

A Legal Study of Electronic Deed on Purchase and Sale Land During the Covid 19 Pandemic

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Abstract

During pandemic time, land sale and purchase transaction activity is still likely conducted; therefore, to replace and to minimize face-to-face mobility among the parties, digital transaction policy should be provided through cyber notary. The objective of paper was to find out the legal framework for the certainty and validity of agreement made by notary in electronic procedure as robust evidence in land sale and purchase transaction during covid-19 pandemic time. This paper employed juridical normative research method with statute approach and conceptual approaches to study electronic deed likely made by notary during covid-19 pandemic time. Electronic land sale and purchase deed made during Covid-19 pandemic time is legitimate based on *lex specialist derogate legi generally* principle, the enactment of health quarantine regulation. Juridical construction to give law protection to cyber notary service, particularly land sale and purchase deed development in Indonesia, can be provided through policy issued by Ministry of Agrarian Affairs and Spatial Planning/National Land Agency through referring to the provisions about Notary (PPAT)'s authority in Notary Position Law, Governmental Administration Law, Archive Law, and Information and Electronic Transaction Law.

Keywords: Covid-19; electronic deed; sale and purchase land; cyber notary.

Abstrak

Pada masa pandemi, aktivitas transaksi jual beli tanah masih mungkin dilakukan. Oleh karena itu, untuk menggantikan dan meminimalkan mobilitas tatap muka di antara para pihak, kebijakan transaksi digital harus diberikan melalui cyber notary. Tujuan penulisan makalah ini adalah untuk mengetahui kerangka hukum kepastian dan keabsahan perjanjian yang dibuat oleh notaris dalam prosedur elektronik sebagai alat bukti yang kuat dalam transaksi jual beli tanah selama masa pandemi covid-19. Tulisan ini menggunakan metode penelitian yuridis normatif dengan pendekatan statuta dan pendekatan konseptual untuk mengkaji akta elektronik yang kemungkinan dibuat oleh notaris pada masa pandemi covid-19. Akta jual beli tanah elektronik yang dibuat pada masa pandemi Covid-19 adalah sah berdasarkan asas *lex specialis derogate legi umumny*, pemberlakuan peraturan karantina kesehatan. Pembinaan yuridis untuk memberikan perlindungan hukum terhadap jasa notaris siber, khususnya perkembangan akta jual beli tanah di Indonesia, dapat diberikan melalui kebijakan yang dikeluarkan oleh Kementerian Agraria dan Tata Ruang/Badan Pertanahan Nasional dengan mengacu pada ketentuan tentang Notaris (PPAT) kewenangannya dalam UU Jabatan Notaris, UU Administrasi Pemerintahan, UU Kearsipan, dan UU Informasi dan Transaksi Elektronik.

Kata kunci: Covid-19; akta elektronik; jual beli tanah; cyber notary.

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Introduction

Government is authorized to hold land registration according to the mandate of Article 19 clause (1) of Agrarian Basic Law (Undang-undang Pokok Agraria/UUPA) Number 5 of 1960. It is intended to ensure law certainty in land affairs sector, because registration is the only authentication and the requirement of legitimate transfer of right.

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The provision underlies the Government's attributive authority to conduct land registration.

The attributive authority is a form of legal assignment on authority to a (governmental) agency or administrative official. Furthermore, Article 6 clause (2) of Government Regulation Number 24 of 1997 about Land Registration, government transfers the authority to notary. It means that the authority of land registration the notary has is acquired in delegation manner (delegative authority). Considering the hierarchy of legislation, it can be seen clearly the plot of understanding on how government (in this case, National Land agency or Badan Pertanahan Nasional/BPN) acquires attributive authority and based on the authority, it delegates the authority to notary (Pejabat Pembuat Akta Tanah/PPAT). For that reason, BPN (the authorizer) can no longer use the authority, unless the revocation has been made by holding tightly on the "*contrarius actus*" principle (Hadjon, 2015).

The issuance of Law Number 2 of 2014 about the Amendment to Law Number 30 of 2004 about Notary Position (Republic of Indonesia's Gazette of 2014 Number 3, Supplement to Republic of Indonesia's Gazette Number 5491) (thereafter called UUJN) is a basic rule for notaries to implement their position. As known, before the enactment of UUJN, notaries implemented their position based on *Reglement op Het Notaris Ambt in Indonesie* (Stbl. 1860: 3) or called Notary Position Regulation (Peraturan Jabatan Notaris/PJN), as amended recently in Gazette of 1945 Number 101. In the enactment of UUJN, PJN and its implementing regulation as mentioned in Article 91 of UUJN is void.

Notary's authorities in Article 15 clause (1) of UUJN include: to prepare authentic deed (deed) concerning all actions, agreements, and stipulations as required by legislation and or wished by those interested to be stated in authentic deed; to ensure the certainty of deed preparing date; to store the deed, to provide grosse, deed copy and excerpt; as long as the preparation of deed is not assigned to or excluded from other officials or others as stipulated by the Law" (Article 15 of Law Number 2 of 2014). In addition to the authorities aforementioned, there are other authorities as mentioned in Article 15 clause (2): a) to legitimize signature and to decide the certain date of underhand letter by enlisting it on specific book, b) archiving the underhand letter by listing it on specific book, c) making copy of original underhand letter in the form of copy containing elaboration as written and represented in the corresponding letter, d) legitimizing the compatibility of copy to original version, e) giving legal education concerning the preparation of deed, f) to prepare the land affairs-related deed, and g) to prepare auction treatise deed (Article 15 of Law Number 2 of 2014).

During covid-19 pandemic, Indonesian government has issued some regulations to support the reduction of transmission risk. The implementation of policy is intended, among others, to conduct social distancing/physical distancing by implementing working activity from home (work from home) or long-distance working activity. Reducing physical contact becomes an option to prevent Covid-19 transmission, so that all works can be done electronically or using electronic (online) communication system. This

condition compels everyone to be adaptive and to transform their work electronically, including the one related to legal service. During pandemic time, land sale and purchase transaction activity is still possible; therefore, to replace and to minimize face-to-face mobility, the parties should be equipped with digital transaction through cyber notary.

The development of technology and electronic system is indeed advantageous. People will do transaction or to enter into an agreement more easily. The parties can accomplish their business transaction with electronic deed only. Indonesia has had Law Number II of 2008 about Information and Electronic Transaction (Undang-undang Informasi dan Transaksi Elektronik/UU ITE) that has been enacted since April 21, 2008. Considering UU ITE, everyone can use electronic signature (e-signature) supported with a Certification Service Provider ("CSP"). Basically, an electronic signature along with its electronic certification system is organized to confirm the identity of legal subject and to protect security and authenticity of electronic information. The essence is the existence of verification and authentication method to identify legal subject and its electronic system accountability and reliability according to its usage objective scope. Meanwhile, notary as a public official based on Law No.30 of 2004 about Notary Position plays important role and function in transaction legality in Indonesia.

Referring to Presidential Decision Number 11 of 2020 about the assignment of Covid-19 Community Health Emergency and Government Regulation Number 21 of 2020 about Large-Scale Social Restriction (Pembatasan Sosial Berskala Besar/PSBB) in the attempt of Covid-19 Management Acceleration, people (community) should obligatorily perform social distancing and physical distancing. In this Covid-19 pandemic time, there should be a transformation of legal service particularly concerning the preparation of land sale and purchase deed by Notary usually conducted in face-to-face or Circular Resolution manner into the online one through teleconference. Formally, legal construction is required to be a reference in accepting the legality of land sale and purchase deed prepared electronically during Covid-19 pandemic time. Thus, this paper on the legality of electronic land sale and purchase deed needs a study on the conceptualization of cyber notary based on Indonesian legal system.

Research Problems

Considering the background above, the problems to be addressed in this study are: *firstly*, is the land sale and purchase deed prepared electronically by notary in Indonesia legitimate during Covid-19 pandemic time? and *secondly*, how is the juridical construction of the legality of land sale and purchase deed prepared electronically before the Notary in Indonesia during Covid-19 pandemic time?

Research Method

This study employed normative legal research type with Statute and Conceptual approaches. The regulation about Notary Position, Health Quarantine, Archive, Govern-

ment Administration, Information and Electronic Transaction and its implementing becomes primary law material source. Furthermore, a deductive juridical analysis was conducted based on syllogism and legal interpretation (hermeneutic) concept. Through the analysis, legal norm, legal principle and or legal argumentation can be found concerning the legality of electronic land sale and purchase agreement and so can be the juridical construction of cyber notary, particularly concerning the service of land sale and purchase deed preparation during covid-19 pandemic time in Indonesia.

Discussion

Legality of Land Sale and Purchase Deed Prepared Electronically by Notary (PPAT) in Indonesia during Covid-19 Pandemic Time

Authentic deed, according to Sutantio and Oeripkartawinata (1997) is so far viewed as having 3 (three) concepts: (i) formal proof (*formele bewijskracht*), because it proves to the parties that they have explained what has been written on the deed, (ii) material proof (*materiele bewijskracht*), as it proves to the parties that the event written on the deed has actually occurred; and (iii) externally binding proof, as its enactment also binds the third parties beyond the parties. Similarly, GHS Lumban Tobing stated that authentic deed has 3 (three) powers of proof: (i) physical proof (*uitwendige bewijskracht*), as it can prove its validity itself; (ii) formal proof (*formele bewijskracht*) as it is ensured for its formal truth by the official as mentioned in the deed, and (iii) material proof (*materiele bewijskracht*), because it contains complete substance/content and is considered as truth (certainty as the true one) to be enacted to everyone or third party.

Article 1868 of Civil Code (Kitab Undang-undang Hukum Perdata/KUHPerdata) mentions that the elements composing an authentic deed should meet the following requirements. 1. The deed should be made in a form specified by the law. The deed should be made by door or before ten *overstaan* (a public official). Considering the requirements of an authentic deed as governed in Article 1868 of KUHPerdata; therefore, connected to the provision of Articles 95-102 of Minister of Agrarian/Chairperson of National Land Agency's Regulation Number 3 of 1997 about the Provision concerning the Implementation of Government Regulation Number 24 of 1997 about Land Registration; therefore, if the formal provision or requirement is violated by the Notary, the authentic deed' perfect power of proof will be degraded into the underhand power of proof, when the court's verdict states the presence of one or more violations done.

Notary deed incompatible to its preparation procedure makes it legal defect. Legal consequence of the juridical-defect notary deed is the degradation of the authentic deed's perfect power of proof into underhand power of proof, when the court's verdict states the presence of one or more violations done (the violation of formal requirement), and notary deed can be voided or void for the sake of law in the case of material requirement deviation. Regarding this, technically, the authenticity of electronic information is determined by the accountability and reliability of the electronic system itself. It is in line with a Computer Security expert, Smith's opinion stating that "Where information is

recorded by mechanical means without the intervention of a human mind, the record made by the machine admissible in evidence, provided of course, it is accepted that the machine is reliable....". Meanwhile, Bajaj & Nag saw that the validity of electronic information keeps building on the principle of secured communication system, including Confidentiality, Integrity, Authorization, Availability, Authenticity, Non-repudiation, and Auditability (CIAANA). Similarly, Stephen Mason considers the Weight of Evidence difference of electronic signature, in which the power of proof will be highly determined by the characteristics of security technology. The more completely the principle (CIAANA) is implemented, the stronger is the value of evidence (proof). Mason also suggested that Cyber-Notary was originally an idea expressed by Association Information Security Committee (1994), based on: (a) (b) (c) (d) Trust when transacting between parties over the internet; the security of the transmission; the integrity of the content of the communication; and the confidence that such transactions will receive legal recognition, so that a binding contract is enforceable (Makarim, 2011).

Furthermore, Lawrence Leff revealed that what is conceived to be "Cyber notary" by ABA is an individual with specialty ability in legal and computer fields. Its function is perceived just like Latin Notary in facilitating an international transaction. In the context of Public Key Infrastructure (PKI), it will bind the private key of the sender to the public key of the receiver under one "umbrella of trust"). Cyber notary will authenticate deed electronically, and even Cyber notary is expected to verify its legal capacity and financial accountability, so that a suggestion is given to stipulate a requirement just like that for an attorney. Meanwhile, Leslie Smith said that the term "electronic notary" was coined by a French delegation in TEDIS legal workshop forum in EDI conference held by European Union in 1989 Brussels. The essence is the presence of a party presenting independent record on an electronic transaction entered into by the parties (Makarim, 2011).

The term "electronic notary" is relatively new term in commerce and first appears to have been coined by the French delegation to the TEDIS (Trade Electronics Data Interchange System) legal workshop at the European Union's 1989 EDI Conference in Brussels, where the concept of such an activity was introduced. This conference proposed that various industry associations and related peak bodies could act as an "electronic notary" to provide an independent record of electronic transactions between parties, i.e. when company A electronically transmits trade deeds to company B, and vice versa (Smith, 2006). The regulation of cyber notary is a legal breakthrough created to satisfy the need for law within society, particularly for Notary in globalization era, but this cyber notary still has a disadvantage in the terms of interpretation, conceptualization, and opportunity in Deed preparation through cyber notary regulation.

The definitions of electronic notary and cyber notary are basically similar, meaning that the media used in the action is electronic (intangible) media as the substitution for paper (tangible) deed in general. However, an idea of cyber notary, according to the Information Security Committee of the American Bar Association, has more specific scope, i.e. cyber notary is a new legal profession similar to notary public, but it has functions

involving electronic deed. The concept of cyber notary in Indonesia is included for the first time into Law Number 2 of 2014 about the Amendment to Law Number 30 of 2004 about the Position of Notary mentioning the Notary's authorities as mentioned in Article 15 of UUJN of 2014. Article 15 clause (3) of UUJN of 2014 mentions the authorities of notary, one of which is a phrase stating that "... *other authorities governed in legislation*". The explanation about what the phrase "other authorities" means is contained in the explanation of Article 15 clause (3) stating that: "What the phrase "*other authorities governed in legislation*" means is, among others, the authorities of certifying the transaction conducted electronically (cyber notary), of making pledge deed of *wakaf*, and aircraft mortgage". Nevertheless, the Law about Notaries' Position has not contained yet the normative definition of cyber notary. Thus, in this case, *cyber notary* concept can refer to the scholars' definition. Concept of cyber notary, according to Nurita (2012), "can be defined provisionally as a notary implementing its duty and authority based on information technology related to the notary's duty and function, particularly in making deed."

Makarim (2011) argued that cyber notary concept is still controversial in Indonesia. Although technology enables the Notary's role to be played online and remotely, it as if cannot be done legally. Cyber notary regulation, if referring to the scholars' arguments, for example Makarim, has similarity, one of which is the notary's method of using cyberspace media, related to duty and authority in undertaking its position. The concept of cyber notary is neither governed well at definition level nor its implementation regulation or mechanism. To acquire the definition of cyber notary, interpretation method is used. Interpretation or legal interpretation method is used when a concrete event is not adhered to clearly and firmly in legislation (Putri, Cyndiarnis, and Budiono, 2019).

Soeroso (2013) confirmed that in interpreting legislation, grammatical interpretation should be done first, because essentially to understand the legislation text, we should understand first the meaning of words. It is noteworthy that phrase *cyber notary* is in the bracket. In *Kamus Besar Bahasa Indonesia* (Indonesian Big Dictionary) bracket means "punctuation mark (...) flanking additional information or explanation". Grammatically, phrase *cyber notary* put in the bracket is an additional information or explanation to the previous phrase. Thus, in this case, cyber notary in grammatical interpretation perspective can be defined as limited to "the authority of certifying transaction conducted electronically". Viewed from the language structure, the interpretation of cyber notary may refer to the action (notary's authority) or the method of implementing the authority (electronically). If cyber notary referring to grammatical interpretation, the authority of certifying transaction conducted electronically, the authority is obviously limited to one authority only, related to the certification of electronic transaction.

Meanwhile, the word "electronically" cannot be interpreted as a method of implementing authority because in interpreting the word, there is a conjunction "that is", so that electronically is an integral part of phrase "transaction [that is] conducted electronically". In relation to Law Certainty theory, one aspect of which is the presence of

general rule enabling an individual to know what may and may not be done. In this case, to achieve one of legal objectives, law certainty, an interpretation is required on the formulation of cyber notary as mentioned in the Position of Notary Law, to enable the Notary to know whether or not the action (Notary's authorities in cyber notary) may be done and the extent to which the Notary can implement it, and to find out the borders of cyber notary application in the attempt of preparing authentic deed, certification, because there is no regulation and normative definition of certification contained in either Notary Position Law or Information and Electronic Transaction Law. Thus, in interpreting certification in grammatical perspective, the definitions of "certification" from many sources are used. A definition of certification can be found in International Organization for Standardization (thereafter called "ISO"), stating that: "Certification – the provision by an independent body of written assurance (a certificate) that the product, service or system in question meets specific requirements" (Putri, Cyndiarnis, and Budiono, 2019).

In addition to the perspective of deed (deed) preparation, the concept of cyber notary can be reviewed from the Notary protocol storage. Indah Kusuma Dewi (2015) stated that the opportunity of organizing Notary protocol storage in the form of electronic can be implemented very possibly, recalling that the notary has applied electronic application as governed in: a) Republic of Indonesia Minister of Law and Human Rights' Regulation Number 4 of 2014 about the Procedure of Applying for the Legalization of Legal Entity and Approval of Bylaw Amendment and the Notification of Bylaw Amendment and the Change of Limited Incorporation's Data; b) Minister of Law and Human Rights' Regulation Number 5 of 2014 about Legalization of Foundation Legal Entity; and c) Republic of Indonesia Minister of Law and Human Rights' Regulation Number 6 of 2014 about the Legalization of Association Legal Entity.

Furthermore, it is explained that the transfer of data storage electronically can function as back up rather than as copy with binding legal power. Thus, normatively the opportunity of preparing deed of the result of Stakeholder General Meeting by UU PT (Limited Incorporation Law) and Notary Protocol Storage in electronic form has actually given an opportunity of preparing deed by utilizing technology development, but the problem of cyber notary concept is contained in the Notary's obligation of preparing deed, as mentioned in Article 16 clause (1) letter m stating that Notary should obligatorily "read the Deed before the appearers attended by at least 2 (two) witnesses, or 4 (four) special witnesses for underhand testament Deed, and signed at that time before appearers, witnesses, and notary". The article in its explanation section furthermore informs that Notary should be present physically and sign the Deed before the appearers and witnesses. It is the word "physically" that leads to the concept of cyber notary or the preparation of deed by utilizing technology development. Notary's Obligation and authority encounter conflict of norm, so it is impossible to implement the deed preparation remotely and practically, with the imposition of the obligation of being present physically later. The obligation actually removes the essential element of cyber notary concept. If the notary does not implement its obligation as intended in Article 16 clause (1) letter m, the Notarial

deed's power of proof will be degraded into underhand deed only. It is in line with the provision of Article 16 clause (9) stating that: "if one of requirements as intended in clause (1) letter m and clause (7) is not met, the corresponding Deed has the power of proof as underhand deed only". Thus, if not implemented, the Notary's obligation can lead to a civil sanction imposed to the notary. This sanction can be reimbursement, compensation, and interest that the Notary will assume as a result of the appearers' demand if the corresponding deed has the power of proof as underhand deed only or if the deed is void for the sake of law' (Adjie, 2017). Considering the appearers, it can be seen clearly that the Law about the Position of Notary, despite presenting the concept of cyber notary in Notary's authority, has not provided yet an opportunity of applying the cyber notary concept in Indonesia yet.

The always controversial problem in electronic service to notary is the norm of imperative physical presence in preparing the deed because it should be conducted using paper-based method as mentioned in the Law No. 30/2004 t about the Position of Notary recently revised with the Law No.2/2014. In addition, Article 5 clause (4) of Information and Electronic Transaction Law also excludes the notarial deed in the context of electronic deed as legitimate evidence, thereby potentially becoming legal problem to notaries, either civilly, administratively, or criminally. Meanwhile, the public highly needs the responsive and dynamic function and role of notaries in dealing with this emergency situation to organize its service online.

The imperative of physical presence that cannot be performed in electronic service can worryingly result in some legal consequences to Notaries: (i) the status of authentic deed will degraded into underhand deed, thereby leading to (ii) the lawsuit against notary filed by their service users in the following days; (iii) no security guarantee for electronic system and electronic deed vulnerable to the changes and potentially leaking, thereby breaking the confidentiality, (iv) denial by the parties, and (iii) possible declination against the deed by related institution, thereby (iv) potentially leading to the sanction of discharge the notaries should face because of their incompliance with the law.

Makarim (2011) argued that historically, the intention of the exclusion mentioned in Article 5 clause (4) letter (a) and (b) of UU ITE is that the spirit is not absolute in nature because it should be in line with technological dynamic developing and referring to sectoral law as its *lex specialis*. Referring to the UNCITRAL Model Law on e-Commerce (1996), the provision of exclusion is no longer included. In addition to the controversy concerning the interpretation on the article of exclusion, in fact the article of exclusion does not mean a prohibition to the Notaries from doing their work electronically or the prohibition from using electronic system for the notaries. So, according to its *lex-specialis*, it reverts to the UU-JN itself; if the notaries make legal breakthrough bravely, the enactment of the exclusion is no longer absolute in nature.

Referring to the guidelines of legislation in Law Number 12 of 2011 as amended with the Law Number 15 of 2019 about the Legislation, it is noteworthy that the word "must" meaning that the notary should be present physically and sign the Deed before the

appearers and witness is contained in the explanation of Article 16 clause (1) letter (m) of UUJN rather in the body of it. The explanation section should not add new norm other than the norm existing in the body of Law. Therefore, the norm “must” should be not-absolute from the beginning, but it is just confirmatory in nature, thereby it should not have any legal consequence to the notarial deed made electronically.

The decision of emergency condition in coping with Covid-19 epidemic through the issuance of Presidential Decree (Keppres) Number 11 of 2020 derives from the Article 10 clause (1) of Health Quarantine Law Number 6 of 2018 authorizing the government to stipulate it. So, although the existence of Keppres is intended to implement the mandate of Law, for the bigger legal interest it should override the succinct norm because it is put into the explanation of UUJN. For the sake of bigger public interest, the norm of imperative in the obligation mentioned in Article 16 clause (1) letter (m) should be overridden in emergency condition. In emergency condition, physical encounter is instead considered in contradiction with the bigger and primary public interest, and thereby should not exert any effect on the organization of its service electronically.

The requirement of physical presence electronically is no longer absolute in nature in emergency condition, considering the authority of Health Quarantine Law, thus viewed from legal perspective based on *lex specialis derogate legi generali* principle, the land sale and purchase deed made electronically is legitimate.

A Juridical Construction of the Legality of Electronic Sale and Purchase Deed Made Before Notary in Indonesia during Covid-19 Pandemic Time

Some skepticism keeps existing apparently concerning the rule of how the preparation of transaction deed electronically can be equivalent or meet the requirements of important elements of an authentic deed, including: (i) the physical presence of parties before the notary to ensure that the corresponding ones are the actual ones, (ii) reading to know that the corresponding ones indeed have legal capacity and understand their action, and (iii) the presence of witnesses to prevent the corresponding ones from declining their presence in the transaction.

In such situation, the cryptography application can be used to be the symbol of parties' authorization and consent. However, there are still some other rules, requiring the presence of the parties along with the witnesses to see the image of their signature on the screen along with the image of notary's seal that should appear in the end of transaction activity *prosesueel*. The assumption that physical presence is very desirable to an authentic deed preparation still becomes a challenge to the adaptation of either preexisting or developing ICT for the future. Technically, “physical presence” can be performed electronically possibly. Considering the development of mobile telecommunication (3G) today, everyone can do video conference call, and implant their signature onto SIM card or corresponding headset, and it can be seen the real fact where the corresponding one is through satellite facilities with GPS or map utilities provided. Furthermore, in relation to the principle of caution that should always accompany the standard work of notary, in

addition to accredited or certified system infrastructure, the standard competency is also required for the notaries who want to organize their service electronically in order to prevent its misapplication and to anticipate certain problem if there is an indication that the system does not run duly. It is noteworthy that US and France, as the developed countries particularly in preparing electronic deed, in fact also require all parties to be present before them and to prepare the deed electronically and live in the notary office. Basically, they have not had given yet the space for preparing deed remotely. The author assumes that it is because instead e-ID has not been organized well in France, so that it cannot be ensured that the Legal Subjects are present electronically with physical presence directly. If the appearance of an individual appearing in video-teleconference has been compatible to the photograph contained in personal data ID as included in its authentic data source (e-ID resources) that can be accessed online by Notary, it is difficult to say that there is a space for declining the validity of data. Therefore, the presence of remote transaction deeded electronically will occur very possibly in the future.

Generally, if the idea of Cyber notary or E-notary can be implemented in Indonesia, the power of proof of information and electronic transaction often perceived as having weak value of proof so far will have stronger position because it can be understood just like the authentic deed. It can improve the public's confidence and feeling of secure with electronic transaction. Although the notaries' opportunity of playing electronic role seems to be unseen in the Law of Notary, there is another legislation giving the opportunity (e.g. Government Regulation (Peraturan Pemerintah/PP) mandated by UU ITE to give the Notaries an opportunity of supporting the electronic certification service),¹⁴; therefore it is actually still very relevant to the provision of Article 15 clause (2) point (a) and clause (3) of Law of Notary giving another authority to the Notaries as long as it is corresponding to the legislation. It can be seen clearly that the opportunity of empowering the role of notaries in electronic transaction is still opened widely and desirable to the public. Nevertheless, some problems (challenges) are still encountered related to the legal principle that should be studied more in-depth, concerning the requirement of physical presence in preparing and signing the deed (deed), limiting the notaries' jurisdiction, infrastructural preparedness, and standard technical competency needed. As a public official assuming the public mandate, notaries should develop a tight procedure (Makarim, 2011).

Formally, electronic system should operate feasibly and be enlisted in Ministry of Communication and Informatics. It refers to the related legislations including UU No. 11/2008 revised recently with UU No. 19/2006 (UU ITE), UU No. 25/2009 (Public Service Law), UU No. 43/2009 (Archive Law), UU No. 30/2004 (Governmental Administrative Law) and UU No. 7/2014 (Trading Law). Regardless the strengths and the weaknesses of legislation formulation, it has been at least sufficient to be the foundation of electronic transaction legality as a lawful deed, along with the legal framework working in an electronic transaction. Furthermore, for the sake of mutual interest in emergency

situation, the important point is all components of nation's awareness and contribution to keep doing the job electronically, thereby can help rotate the economic wheel.

Makarim (2011) mentioned that it should be observed in the body of UU-JN not mentioning that what the words "written" means is the mechanism of putting the ink onto paper media. The word "paper" is mentioned once only in the explanation of Article 15 clause (2) letter (a). It can be perceived that it applies to the context of legalizing signature only or deciding the certain date of underhand letter by listing it in special book. The explanation section states that This provision is the legalization of underhand deed (deed) made independently by an individual or parties on paper with sufficient stamp by means of registering it in the special book provided by Notaries. So, the paper media in this context is the deed carried by the appearers. Thus, as long as the norms of obligation can be met functionally (functional equivalent approach) by the electronic system used, through the presence of electronic deed coming from accountable electronic application system, the preparation of electronic deed should not be in contradiction with UU-JN. Thus, the Notaries can make their deeds (deeds) originally in electronic and/or then printed form, thereby not removing its deed minutes and protocol. Similarly, the finger print stamp can be used because the requirement of finger print stamp can be met by using finger print scanner adhering to electronic deed (<https://www.hukumonline.com/berita/baca/lt5e968bo8889e7/layanan-notaris-secara-elektronik-dalam-kedaruratan-kesehatan-masyarakat-oleh--edmon-makarim>).

The uncertainty about when this Covid-19 pandemic emergency will end requires the government's firm measure to deal with the polemic related to the cyber notary implementation, particularly in land transaction. Article 1875 of KUHPerdara (Civil Code) states that underhand deed (deed) not denied by the parties has the power of proof just like the authentic deed does. Thus, in worst condition in which the notarial deed prepared electronically will be assumed to be underhand deed, it will not be a legal problem as long as the parties do not deny it, and the corresponding Governmental Institution can accept it well.

Notary is a part of Governmental Administration in which based on the Governmental Administration Law, the Public Service Law, and the Archive Law, electronic information has been accepted as evidence and the electronic decision making is possible. It is in line with Makarim (2011) explaining that in juridical framework, according to Article 1 number (1), Notary is a public official authorized to prepare authentic deed and to do some other activities as mentioned in this law or other laws. Furthermore, the explanation of Article 15 clause (3) of UU-JN also states that one of other authorities governed in the legislation is Notary's participation in certifying electronic transaction (Cyber notary). The word "certifying" actually means that the Notary can provide reliability service supporting the authenticity system of an electronic transaction. It can be confronted with the provision about the Organization of Electronic System and Electronic Transaction (PP 82/2012 as amended with PP 71/2019) deriving from UU-ITE. In addition, as the public official constituting the part of Governmental Administration,

Notary is also authorized to legalize or to validate the deed decided by governmental administration that can also be in electronic form corresponding to Article (1) of Governmental Administration Law. Considering this, it can be said systemically that Notary belongs to governmental administration. If Governmental Administration Law has enabled the implementation of governmental administration electronically, automatically the Notary should also be able to use electronic system in organizing its service electronically. It can be done through either electronic system developed by Government or the third party's electronic system enlisted in the organization of electronic system. It is desirable absolutely at least to legalize the Deed the original form of which is in electronic version.

Juridical construction can be provided to the legality of land sale and purchase deed service electronically in this pandemic time through the issuance of policy by Ministry of Agrarian Affairs and Spatial Planning/National Land Agency recognizing that the electronic deed is legitimate without arguing the imperative of presence. The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency itself has issued 4 (four) online service types since late 2019: Electronic Mortgage Right, *Roya* (the deletion of security expense of a land right that is the object of mortgage right), Certificate Checking, and Added-value Zone (ZNT), electronic sale and purchase deed acceptance should be added based on the higher regulation, i.e. Governmental Administration Law, Public Service Law, and Archive Law. The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency can follow other ministries that have provided service policy in this Pandemic Time, just like the organization of justice process electronically by Supreme Court through e-court implementation, in addition to Supreme Court's Circular No.1 of 2020 legalizing the organization of court session through teleconference facilities during Covid-19 transmission prevention period. Then, Attorney General also publishes Attorney General's Instruction No.5 of 2020, for all of those attempts to reveal the collective awareness of the need for the organization of governmental administration to keep doing public service online.

Conclusion

The electronic land sale and purchase deed made before Notaries during covid-19 pandemic time is legitimate by referring to the *lex specialis derogate legi generali* principle putting the Health Quarantine Law to be the foundation of cyber notary service authority. The juridical construction of cyber notary lawful deed as the service during covid-19 pandemic time can be provided through the policy issued by Ministry of Agrarian Affairs and Spatial Planning/National Land Agency.

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References

- Adjie, Habib. (2017). *Sanksi Perdata dan Administratif Terhadap Notaris sebagai Pejabat Publik*. Bandung: Refika Aditama.
- Dewi, Indah Kusuma. (2015). Kajian tentang Penyimpanan Protokol Notaris. *Thesis*. Yogyakarta: Fakultas Hukum Universitas Gadjah Mada.
- Hadjon, Philipus M. (2015). *Pengantar Hukum Administrasi Indonesia*. Yogyakarta: Gadjah Mada University Press.
- Makarim, Edmon. (2011). Modernisasi Hukum Notaris Masa Depan: Kajian Hukum terhadap Kemungkinan Cybernotary di Indonesia Edmon Makarim. *Jurnal Hukum dan Pembangunan*. 42(3). 467-499. DOI: <http://dx.doi.org/10.21143/jhp.vol41.no3.287>.
- Nurita, R. A. Emma. (2012). *Cyber Notary (Pemahaman Awal dengan Konsep Pemikiran)*. Bandung: Refika Aditama.
- Putri, Cahyaning. Cyndiarnis. and Budiono, Abdul Rachmad. (2019). Konseptualisasi dan Peluang Cyber Notary dalam Hukum. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 4(1). 29-36. DOI: <http://dx.doi.org/10.17977/umo19v4i1p29-36>.
- Smith, Leslie. (2006). The Role of the Notary in Secure Electronic Commerce, Information Security Institute Faculty of Information Technology. *Thesis*. Queensland University of Technology. https://eprints.qut.edu.au/16407/1/Leslie_Smith_Thesis.pdf
- Soeroso. (2013). *Pengantar Ilmu Hukum*. Jakarta: Sinar Grafika.
- Sutantio, Retnowulan. and Oeripkartawinata, Iskandar. (1997). *Hukum Acara Perdata dalam Teori dan Praktek*. Bandung: Mandar Maju.