

## The Urgency of Electronic Notarization in Indonesia by Seeing the Implementation in Estonia During the Covid-19 Pandemic

Sharon Gracale<sup>1</sup>, Mohamad Fajri Mekka Putra<sup>2</sup>

<sup>1</sup>(Faculty of Law, University of Indonesia, Indonesia)

<sup>2</sup>(Faculty of Law, University of Indonesia, Indonesia)

**ABSTRACT:** This study aims to compare the making of a notary deed during the Covid-19 period in Indonesia and Estonia. Normative juridical law research is the method employed in this research. Analytical descriptive was further also utilized, while the data collection technique used is literature study. The results of the study indicated the importance of making supporting or additional regulations for Law Number 30 of 2004 concerning Notary Positions as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions ("Notary Position Law") in connection with by making an authentic deed which is carried out without physical presence, which facilitates Notaries to carry out their positions in times of emergency such as the current Covid-19. In response to this, Estonia, which is also a Civil Law country, has fulfilled the element of legal expediency by amending the Notaries Act of the Republic of Estonian ("Estonian Notaries Act") which makes it possible to make a notarial deed without a physical presence or to do it virtually.

**KEYWORDS :** *Cyber notary, Electronic Notarization, Estonia, Indonesia, Notary Deed.*

### I. INTRODUCTION

During the COVID-19 pandemic, all Indonesians are asked to implement preventive measures including physical or social distancing, quarantining, and working remotely to reduce the spread especially in the workplace. All work must be done electronically, or using electronic communication systems. This has been done by many legal services, including lawyers/advocates, judiciary, and prosecutors.

Ironically, there is still one legal service provider who is relatively lagging behind or seems slow in responding to emergency situations, namely a Notary as a Public Official who also provides public services. It seems that Indonesian Notaries still seem hesitant to transform themselves in order to be able to provide their services electronically. In fact, the community really needs the alertness and dynamic function and role of Notaries in dealing with this emergency situation to be able to organize their services online.

During the Covid-19 pandemic, the best advice that has been given by the government is that Notaries are expected to be able to open offices but still enforce social distancing and limit the glass in front of the desk. This certainly endangers many parties, not only the notary himself, but also the community. Seeing the fluctuating and increasingly unpredictable increase in Covid-19 cases, it is undoubtedly an urgent matter for the government to make special provisions regarding electronic notaries.

In its development, several countries have implemented cybernotary in their national legal systems, especially in the context of the need to guarantee the authenticity of electronic information, in supporting the implementation of digital signatures. The government policies of each country regarding the position of a notary in making a notary deed during the COVID-19 pandemic are different, therefore it is crucial to know how other countries determine these policies. This activity is carried out with the aim of comparing Indonesia to Estonia so that the responsible government can take the newest policy that is more suitable to be applied, especially in terms of notary positions in making deeds during the Covid-19 pandemic. Estonia is one of the countries that represents the Civil Law (European Justice, 2021) [1] legal tradition which recognizes the existence of a notary as a third party who is trusted to guarantee the legality of a legal act and has implemented an e-notary in its national legal system.

This is proven by the fact that Estonia has made some changes in the Notaries Act which has passed through government quickly. It makes Estonia implement a rule that the making of a deed can be done using a two-way audiovisual communication facility to prevent Covid-19. Therefore, this study becomes a necessity in the context of reforming national law in order to accommodate the dynamics of telematics technology as expected properly. This research investigates how Estonia has responded differently to Covid-19 in respect of the physical presence requirement. This is important to see if there is an opportunity for the implementation of

e-notary in Indonesia in the future. With this research, it is hoped that the Indonesian government can imitate the implementation of Estonia and that notaries can still carry out their work comfortably in the midst of the Covid-19 pandemic situation.

## II. RESEARCH METHODS

This study uses a statutory approach in normative legal research. This approach analyses civil law norms related to notary. The primary data are the Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Position of Notary Profession, Information and Electronic Transactions Law Number 11 of 2008 ("ITE Law"), Government Regulation No. 21 of 2020, and Notaries Act of the Republic of Estonia 2000 ("Estonian Notaries Act"). This study uses secondary sources of legal materials such as books, legal journals, work safety journals, and articles related to electronic notarization. The collected data is then analyzed and studied to find answers to the legal issues in this article.

## III. RESULTS AND DISCUSSIONS

### 3.1 Indonesia's Regulations Toward Notary Positions in Making Notary Deed

The concept of cyber-notary seems to be still under debate in Indonesia and is perceived as a discourse, not yet perceived as a necessity. Although technology allows the role of notaries online and remotely, legally it seems that this cannot be done because the paradigm that underlies the Notary Law is built with conventional mechanisms. Notary Position Law stipulates the obligation to 'appear' between the party making the deed and the notary (Notary Positions Law Number 2 of 2014, 2014) [2]. The 'appearing' is carried out in the context of reading the deed in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for making a private will, and signed at the same time by the appearer, the witness, and a notary.

The classic reason that becomes a problem in the process of making a deed is the norm of having to be physically present in making a deed and not being able to do it as stated in Notary Position Law. In addition, the ITE Law also excludes notary deeds in the context of electronic documents as legal evidence, so that it has the potential to cause legal problems for notaries, whether civil, administrative or maybe even criminal (Law Number 11 of 2008, 2008) [3].

It is feared that if it is not done physically, it will have legal consequences for the Notary, including: (i) the status of the authentic deed will be reduced to a private deed, as a result (ii) there will be a lawsuit against a notary by its service users in the future; (iii) there is no guarantee of security for electronic systems and electronic documents that are prone to being altered and have the potential to leak so as to violate confidentiality, (iv) refusal by the parties may occur, and (iii) the possibility of not receiving these documents by the relevant agencies, as well as (iv) the potential for dismissal sanctions that must be faced by the Notary for not carrying out legal compliance (Makarim, 2011) [4].

However, of course, with the regulations of physical distancing due to the Covid-19 pandemic, the implementation of Article 16 paragraph (1) letter m is hampered. In this article, the article very clearly regulates the provisions for physical presence and there are no multiple interpretations that occur. Therefore, the government in this article only imposes restrictions on activities, not prohibits the public from carrying out activities. This means that Article 16 paragraph (1) letter m still provides the possibility for notaries and the public to carry out by complying with the health protocols set by the government.

By looking at this provision, the government is actually indirectly forcing notaries to apply the practice of "presence from home", which is certainly very possible for notaries to apply (Budianto, 2020) [5]. If it is said the presence "from" the house and not the presence "at" the house, then his presence should be interpreted as the presence of work. Especially if the presence is remote but with the condition of the Notary being in his office and the server is in his office. So here it can be considered that the appearers who are "invited" and "summoned" by the notary to the server, are counted as being present in his office.

Indeed Notary Positions Law does not recognize audio-visual. However, laws can be softened in the public interest, especially in abnormal conditions that make normal laws unenforceable. The government should enact a new legal rule that may deviate from the provisions of the applicable laws and regulations. Under normal circumstances, Notaries do not have the opportunity to use audio visuals, unless the Notary Positions Law is revised. But in an emergency these rules can be deviated, but with a temporary nature.

### 3.2 Regulations in Estonia

In Estonia, the Notaries Act has amended through government quickly. The amendment proposal was submitted several times, and on April 2nd, 2022 amended Notarial Regulations was amended again, due to the emergency situation caused by the coronavirus (Estonian Notarization Act of 2001, 2001) [6]. In order for normal life disrupted by the emergency situation to proceed as smoothly as possible, the Minister of Justice established a possibility to use remote authentication elsewhere. Thus, as of the beginning of April, notarial transactions can be made in case the party is at home, in the office or elsewhere, in Estonia or abroad.

Prior to launching the e-notary system, physical presence at a local notary's office was required to trade or transfer company shares, buy or sell real estate, attest credentials, or carry out other notarial acts. This made it inconvenient for residents to manage their affairs and carry out business transactions from different cities. But with the e-notary service now rolled out to its total capacity, you can carry out all but one type of transaction from anywhere you are in the world.

These changes mean, that avoiding contact, the notary has the possibility to authenticate almost all the transactions if the party at the same time stays e.g. at home (Estonian Notarization Act of 2001, 2001) [7]. As the remote authentication is a possibility, not an obligation, it is always possible to book an appointment at the notary's office to carry out the notarial transaction. In case several persons are required to participate in the transaction, they shall decide whether they all go to the notary's office or make the transaction remotely. However, it is not possible to make a notarial transaction if one of the parties is at home and the other one is at notary's office.

Therefore, on February 2020, just weeks before the pandemic broke out, the Estonian Chamber of Notaries launched the e-notary service as a pilot project that enables the remote authentication of notarial acts to be carried out anywhere – the first state service of its kind in Europe. The novel service had been in the pipeline for over 5 years but came to life at the most crucial time.

### 3.2.1 Notary Authentication

The possibility of not needing to see notaries face-to-face or not going to their office just became an option with remote authentication. But before that, notaries in Estonia already had a standard e-notary system that was being used internally by the notaries and notary offices to prepare contracts, schedule calendars, sign documents, create document templates, access registers, send out documents and data to the registries, and issue apostilles. It was just that the existing e-notary service was not available for the public's use.

Remote authentication (Estonian Notarization Act of 2001, 2001) [8] enables notarial acts to be performed by means of a video conference between the notary and the customer (Chamber, 2020) [9]. Such authentication is equivalent to a physical authentication at the notary's office. Not all notaries allow remote authentication, as it is not a requisite, but an option. It is up to the notary to decide if a specific transaction can be carried out by using remote authentication.

This meant that Estonians no longer had to visit the notary office each time they needed the services of the local notaries. Although, before this time, 99% of Estonian public services had been digitized for years, the complexities, sensitivity, and risks associated with notarial acts excluded them from this narrative. Notarial services just had to be done in person at local notary offices.

There are no limits to the type of notarial services that can be done remotely. People can do everything remotely except marriage or divorce. For that, Estonians just have to see the notary face-to-face in the same room. But anything else, the clients can just be at their home or wherever else they are and do all that needs to be done. The types of deeds including but not limited to: (1) carrying out transactions with shares of a private limited company, (2) authenticating powers of attorney, (4) applications related to succession, (5) deletion and transfer of real rights, (6) commercial pledges (Chamber, 2020) [10].

### 3.2.2 Data Privacy and Protection Assured

Data privacy and protection remains a recurrent issue and burning topic within the tech sphere. With the sensitivity of the data and information exchanged between notaries and their clients, data security and privacy were group members or team members significant for the Chamber of Notaries. Nobody should see or hear what the notaries and clients are talking about. This is why The Estonian Chamber of Notaries developed the platform and server. They are not using third-party services, so all communication, including video and audio transmission, is going through their server (Rigi, 2020) [11]. The digital ID and signing system is also a platform they did not develop themselves. But since this belongs to the state, all state agencies can make use of it.

They are minimizing the occurrence of potential breaches by hosting their own system and using their own video conference platform. They used an open-source code that Andmevara modified for them, but the server is hosted on the Ministry of Justice's server (Blessing, 2021) [12]. So, to use the e-notary service, every client connects to the server in the Ministry of Justice – no other connection is made. As of yet, they do not know of vulnerabilities related to the e-service. And since they are not relying on third-party platforms, they would continue our remote notarial authentications even when Zoom, Skype, Facebook, or some other platform is down.

## 3.3 The improvements of the Platform

The e-notary service has improved in diverse ways since the initial pilot was first launched. This is partially due to the impact of the pandemic and the way it has disrupted technological innovations. Three years ago, notaries did not know what people wanted from the video conference, but since COVID-19 hit, notaries

have gotten to see how the likes of Zoom and Skype have improved, and they have incorporated similar improvements into our system. Then they added a chatbox, zooming/pausing/recording features, and other helpful functionalities. Right now, they get feedback from the users, listen to the feedback and discuss that internally. It is a public service, so usability and security are important to them. And of course, our reputation needs to be kept intact as well. This is why notaries always strive to improve the service.

The biggest upgrade to the e-notary system went live at the beginning of September this year. This upgrade gives room for a hybrid notarial transaction, whereby some of the clients are on seat in-person with the notary while others are connected remotely. Before now, they could only carry out notarial acts offline. Every member of a group or team had to be at the notary office in person with the others. Now people can have a big hybrid transaction.

#### IV. CONCLUSION

Based on the description and analysis above, the author conclude that in Indonesia, the Law on Notary Positions does not yet recognize virtual meetings but requires the making of a notary deed by means of the parties dealing directly with the notary; while Estonia has previously implemented a rule that the making of a deed can be done using a two-way audiovisual communication facility for the prevention of COVID-19.

In connection with the condition of the COVID-19 pandemic, there is a need for urgency to add changes to the Law on Notary Positions, one of which is regarding the expansion of the meaning of "confronting". With advances in technology, the phrase "appear" can be interpreted as a Notary can deal virtually through a unique application made by the Government to read and sign the deed before the parties, in which the application is designed with technological advances, namely being able to find out when the deed was read, and the time the deed was signed and can find out the location of the deed signing.

Thus, Indonesia needs to have supporting regulations on the Notary Position Law, which accommodates notaries to carry out their positions in times of emergency such as the current COVID-19 condition. The changes and policy in Estonia can be determined as inspirations so that Indonesia can be developed in terms of notary position in making deeds during the COVID-19 pandemic. Its policy certainly cannot be directly implemented in Indonesia, however it can to be adjusted to other regulations and other aspects that Indonesia has.

Although the measures can be a difficult process, E-notary may speed up the modernization of the role of the notary and the witness in making last wills, adjusting these roles to the standards of the 21st century. Solutions introducing audio-video technology as an alternative for physical presence are more favorable than the conventional systems. Introducing remote authentication and remote witnessing leaves intact the existing deeds types of the particular jurisdiction as they are, while at the same time preserving legal certainty by anchoring these possibilities in legislation. Moreover, introducing audio-video technology in making notarial deeds seems a logical step forward in Indonesia, given the possibilities at hand.

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