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- ORGANIZERS
- PUBLISHING INFORMATION

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< PREVIOUS ARTICLE IN VOLUME

NEXT ARTICLE IN VOLUME >

Synchronization of Law Regulations Concerning Notary Authority in Electronic Certification

Authors

Vannesia Imanuella Pandelaki¹, Rasji Rasji¹

¹ Faculty of Law Universitas Tarumanagara, Jakarta, Indonesia

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Synchronization of Law Regulations Concerning Notary Authority in Electronic Certification

Vannesia Imanuella Pandelaki^{1,*} Rasji Rasji¹

¹Faculty of Law, Universitas Tarumanagara, Jakarta, Indonesia

*Corresponding author. Email: vannesiapandelaki@gmail.com

ABSTRACT

The rapid development of technology has an impact on every aspect of life, including notaries. Technology such as electronic media makes distance no longer an obstacle in carrying out legal actions, including conducting transactions. To provide legal certainty in conducting electronic transactions, the government established Law Number 11 of 2008 as amended by Law Number 19 of 2016 concerning Electronic Information and Transactions which regulates Electronic Transaction Certification by Electronic Certification Providers. The formulation in these provisions is not in accordance with the formulation in Article 15 paragraph (3) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary which in its explanation stipulates that a Notary has the authority to certify transactions conducted electronically (cyber. notary). In addition, the Regulation of the Minister of Communication and Information Number 11 of 2018 concerning the Implementation of Electronic Certification stipulates that a Notary is authorized as a registration authority in electronic certification. The purpose of this research is to know the synchronization of laws and regulations regarding the authority of a Notary in Electronic Certification. The research method used is normative legal research, with a legal approach, which is sourced from primary, secondary, and tertiary legal materials. After conducting a study, the results of the study found that there was an inconsistency between the laws and regulations governing the authority of a Notary in Electronic Certification which resulted in not achieving legal certainty in the regulation of Notary authority in Electronic Certification.

Keywords: Legislation, Notary Authority, Electronic Certification

1. INTRODUCTION

1.1. Background

Globalization which is supported by the rapid advancement of technology and information causes changes in human activities in various fields of life. According to Sukarmi, globalization has an impact on lifestyle, where people have switched to using electronics.[1] These changes also lead to the emergence of new legal actions, one of which is electronic transactions.

To provide legal certainty and adapt to the development of technology and information as well as the emergence of new legal acts, on April 21 2008, Indonesia enacted Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter abbreviated as "Law Number 11 of 2008".) as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter abbreviated as "Law Number 19 of 2016").

Electronic utilization is not only applied in trading activities. The government is also demanded by the public to provide practical, easy, and fast public services so that the government also begins to use electronics. The use of electronics by the government aims to achieve good governance.

Through Article 13 of Law Number 11 of 2008, the government mandates the establishment of a Government Regulation that regulates the Implementation of Electronic Certification so that Government Regulation Number 82 of 2012 concerning Electronic System and Transaction Operators (hereinafter abbreviated as PP Number 82 of 2018) is formed as an implementing regulation from Law Number 11 of 2008.

Notaries are also required to be able to play a role in the use of electronics in providing their services as public officials. In Article 15 paragraph (3) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions (hereinafter abbreviated as "Notary Position Law"), stipulates that "in addition to the authority as referred to in paragraph (1) and paragraph (2),

the Notary has other authorities regulated in the laws and regulations."

Furthermore, in the elucidation of Article 15 paragraph (3) of the Law on Notary Positions, it is stated that "the authority stipulated in the legislation includes, among others: the authority to certify transactions conducted electronically (cyber notary), make a pledge deed, and aircraft mortgages."

When viewed from the structure of the language structure, the provisions in the Elucidation of Article 15 paragraph (3) of the Law on Notary Positions use the term certify. The root word of certify is "certification".

According to Emma Nurita, certification is the provision of a written guarantee by a third party to state that a product or service has met certain standards.[2] Indonesian Dictionary defines certification as certification. In terminology, certification can be defined as the process of certifying with the result in the form of a certificate.

Based on the definition of certification above, it can be concluded that certifying is the act of providing guarantees in the form of certificates. So that the authority to certify transactions conducted electronically can be interpreted as the authority to provide guarantees for transactions carried out electronically where the guarantee is in the form of electronic certificates.

The provisions in Article 15 paragraph (3) of the Notary Position Act are not in line with the provisions in Law Number 11 of 2018. Based on Article 1 number 10 of the Electronic Information and Transactions Law, those authorized to certify transactions conducted electronically are Electronic Certification Operator which is a legal entity. Then, on August 27 2018, the Minister of Communication and Information Technology Regulation Number 11 of 2018 concerning the Implementation of Electronic Certification (hereinafter abbreviated as "PERMENKOMINFO Number 11 of 2018") was issued to provide a reference for people who wish to obtain electronic certificates for their electronic transactions.

In PERMENKOMINFO Number 11 of 2018, Notaries are given authority in Electronic Certification, namely in Article 27 which stipulates that Electronic Certification Operators can carry out inspections themselves, or appoint registration authorities and/or notaries as registration authorities to conduct inspections.

Written arrangements in the Notary Position Act, the Electronic Information and Transaction Law, and PERMENKOMINFO Number 11 of 2018 have different concepts in determining the authority of a Notary in Electronic Certification. Therefore, the author feels the need to write a law in the form of a thesis proposal with the title "SYNCHRONIZATION OF LAW REGULATIONS CONCERNING NOTARY AUTHORITY IN ELECTRONIC CERTIFICATION", the results of which are outlined in this script.

1.2. Problem

Based on the background explanation above, the legal issues in this paper is:

How is the synchronization of laws and regulations regarding the authority of a Notary in electronic certification?

2. ANALYSIS

In the analysis of the first problem, the author will find synchronization or conformity between the laws and regulations governing the authority of Notaries in Electronic Certification, namely between the Notary Position Act and the Electronic Information and Transaction Law, and PERMENKOMINFO Number 11 of 2018. Synchronization aims to see whether a statutory regulation that applies to a particular field is appropriate or not contradictory between one regulation and another in a legal system.

In Law Number 12 of 2011 concerning the Formation of Legislation, a hierarchy of laws and regulations has been established as follows:[2]

1. The 1945 Constitution of the Republic of Indonesia;
2. Decree of the People's Consultative Assembly;
3. Laws/Government Regulations in Lieu of Laws;
4. Government Regulations;
5. Presidential Regulation
6. Provincial Regulations; and
7. Regency/City Regional Regulations.

In addition to the laws and regulations above, there are also regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representatives Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, the Minister, agencies, institutions or commissions of the same level established by the above laws and regulations.

The hierarchy of laws and regulations mentioned above has been arranged based on the levels that indicate the position of each regulation so that the hierarchy cannot be changed. The hierarchy explains that lower-level laws and regulations must not conflict with higher-level laws and regulations in order to have binding legal force.

Based on the hierarchy of laws and regulations, the Law on Notary Positions and the Law on Information and Electronic Transactions are equal regulations so that the synchronization that will be discussed is horizontal synchronization. Meanwhile, the synchronization that will be discussed between the Law on Notary Positions and PERMENKOMINFO Number 11 of 2018 is vertical synchronization because the positions in the hierarchy are not the same. Horizontal synchronization is a harmony of several hierarchical equal rules governing the same field. Whereas vertical synchronization is the compatibility of several rules that are not equal but regulate the same field.[3]

In general, the Electronic Information and Transaction Law is the legal basis that serves as a benchmark for matters relating to Electronic Information and Transactions, including matters relating to Electronic Certification and Electronic Certificates.

Article 1 point 10 of the Electronic Information and Transaction Law has regulated the definition of an Electronic Certification Provider, namely a legal entity that functions as a trustworthy party that provides and audits Electronic Certificates.

Article 1 point 9 of the Electronic Information and Transaction Law has stipulated that what is meant by Electronic Certificate is an electronic certificate containing an Electronic Signature and identity indicating the status of the legal subjects of the parties in an Electronic Transaction issued by the Electronic Certification Operator.

Article 5 of the Law on Information and Electronic Transactions stipulates that:

1. Electronic Information and/or Electronic Documents and/or their printouts constitute valid legal evidence.
2. Electronic Information and/or Electronic Documents and/or their printed results as referred to in paragraph (1) is an extension of valid evidence in accordance with the applicable procedural law in Indonesia.
3. Electronic Information and/or Electronic Documents are declared valid if they use Electronic Systems in accordance with the provisions stipulated in this Law.
4. Provisions regarding Electronic Information and/or Electronic Documents as referred to in paragraph (1) do not apply to:
 - a. Letters which according to the law must be made in written form; and
 - b. The letter and its documents which according to the law must be made in the form of a notarial deed or a deed made by the official making the deed.

Article 15 paragraph (3) stipulates that a Notary has other powers. The other powers referred to in Article 15 paragraph (3) are certifying transactions conducted electronically, making waqf pledges, and aircraft mortgages.

In the Law on Notary Positions, the authority of a Notary to certify transactions conducted electronically (cyber notary) is not clearly and explicitly regulated in writing. If interpreted in terms of terminology, to certify comes from the word certification. According to Indonesian Dictionary, certification is certification. Meanwhile, certificate means a written or printed sign or certificate from the authorities that can be used as evidence of an incident. According to Emma Nurita, certification means the provision of a written guarantee by a third party to state that a product has met certain standards. Meanwhile, transactions conducted electronically are legal acts carried out using computers, computer networks, and/or other electronic media, as regulated in Article 1 number 2 of the Law on Information and Electronic Transactions.

Based on the above understanding, the authority to certify transactions conducted electronically can be interpreted as the authority to issue certificates for transactions conducted electronically with the result in the form of electronic certificates.

The definition of a Notary's authority above has the same concept as the authority of an Electronic Certification Provider, as regulated in Article 1 number 10 of the Electronic Information and Transactions Law. However,

legal subjects that can be legally recognized as Electronic Certification Providers according to the Electronic Information and Transaction Law are legal entities.

The Law on Notary Positions is a *lex specialis* for Notaries so that Notaries must comply with the Law on Notary Positions in carrying out their duties as public officials. However, in terms of certification of transactions conducted electronically, the Law on Information and Electronic Transactions is *lex specialis*. Therefore, although Article 15 paragraph (3) of the Notary Position Law has stipulated that the Notary has the authority to certify transactions made electronically (cyber notary), the Notary is still unable to exercise this authority because the provisions in the Notary Position Act do not only contrary to the Electronic Transaction Information Law, but also because there are no laws and regulations that clearly and firmly regulate the authority of the Notary.

Next, the author will discuss the vertical synchronization between the Law on Notary Positions and PERMENKOMINFO Number 11 of 2018. The Minister in running the government has the authority to form laws and regulations, namely ministerial regulations and ministerial decisions. PERMENKOMINFO Number 11 of 2018 is one of the regulations established based on the delegation of several laws and regulations, including Government Regulation Number 82 of 2012 which has been revoked after the enactment of Government Regulation Number 71 of 2019.

In PERMEKOMINFO Number 11 of 2018 further stipulations regarding procedures for granting acknowledgment of Electronic Certification Operators, procedures for having Electronic Certificates, supervision of Electronic Certification Implementation, and operation of the Main Electronic Certification Operator facilities.

Regarding the procedure for having Electronic Certificates, Article 25 of PERMENKOMINFO Number 11 of 2018 stipulates that applicants can apply for the issuance of Electronic Certificates to Electronic Certification Providers, and Electronic Certificate owners can apply for extension of validity period, blocking, and revocation of Electronic Certificates to Providers. Electronic Certification.

Furthermore, Article 27 of PERMENKOMINFO Number 11 of 2018 stipulates that for the application as referred to in Article 25, the Electronic Certification Operator may:

- a. Carry out self-examination;
- b. Appoint a registration authority to carry out inspections; and/or
- c. Appoint a Notary as the registration authority

The provisions in Article 27 of PERMENKOMINFO Number 11 of 2018 provide a place for a Notary as the registration authority. This authority is a mandate given by the Electronic Certification Operator which does not release the responsibility of the Electronic Certification Operator, as has been regulated in Article 29 of PERMENKOMINFO Number 11 of 2018.

Article 28 of PERMENKOMINFO Number 11 of 2018 stipulates that the examination as referred to in Article 27 is in the form of verifying the correctness of identity and checking the completeness of documents. Furthermore,

Article 30 stipulates that if the examination conducted by a Notary is declared to meet the requirements, the Notary shall forward the application to the Electronic Certification Operator to issue an Electronic Certificate. In PERMENKOMINFO Number 11 of 2018 there are no provisions governing the meaning of registration authority. Identity verification for applications to have Electronic Certificates is classified into 2 (two) levels, as regulated in Article 33 of PERMENKOMINFO Number 11 of 2018, namely:

1. Level 3 for face-to-face identity verification, using the applicant's identity card in accordance with the requirements in Article 32 paragraph (1) which is compared with the database of the ministry authorized to administer population administration nationally; and
2. Level 4 for identity verification using electronic means by utilizing population administration data that meets 2 (two) authentication factors including:
 - a. What you have, namely identity documents owned by prospective Electronic Certificate Owners, namely electronic identity cards; and
 - b. What you are, namely biometric data, among others in the form of fingerprints belonging to the prospective Electronic Certificate Owner.

In the Law on Notary Positions, Notaries are also required to check the identity of the appearer before making an authentic deed or ratification of an underhand letter. If the identity and documents provided by the appearer are judged to be true and do not conflict with the laws and regulations, the Notary will perform his/her duties, namely making a deed in accordance with the wishes of the parties and following the applicable legal provisions. Similar to identity checks carried out by a Notary as the registration authority, if the Notary as the registration authority states that the identity and documents submitted by the Applicant are appropriate and meet the requirements, the Electronic Certificate requested will be made and given by the Electronic Certification Provider.

Problems arise when the examination carried out by a Notary as the registration authority in PERMENKOMINFO Number 11 of 2018 is in the form of identity verification using electronic means. Identity verification using electronic means has not yet been regulated in the Law on Notary Positions. Identity checks by a Notary must be carried out face-to-face to ensure the correctness of the identity and related documents. Identity check through face-to-face is the application of the precautionary principle by a Notary in carrying out his duties.

In Article 10 of the Regulation of the Minister of Law and Human Rights Number 9 of 2017 concerning the Application of Principles Regarding Service Users for Notaries, it stipulates that the Notary must meet directly with the Service User to ensure the truth of the identity of the Service User.

Based on the description above, it can be seen that there is a discrepancy between the provisions of the Law on Notary

Positions and the provisions of the Information and Electronic Transactions Law, and PERMENKOMINFO Number 11 of 2018. This is clearly contrary to the fifth principle of legality according to Fuller, namely regulations in a legal system must not conflict with each other.[4] The non-synchronization of laws and regulations in a legal system has implications for not achieving the goal of the rule of law, namely legal certainty.

3. CONCLUSION

The provisions in Article 15 paragraph (3) of the Notary Position Act which in its explanation states that the Notary has the authority to certify electronic transactions (cyber notary) not in accordance with the provisions in Article 1 number 10 of the Law on Information and Electronic Transactions which stipulates that Electronic Certification Providers which is a legal entity authorized to issue and audit Electronic Certificates. PERMENKOMINFO Number 11 of 2018 which gives authority to Notaries as registration authorities to verify identity using electronic means is also not in accordance with the laws and regulations related to Notary Positions which do not allow Notaries to conduct identity checks using electronic means but face to face. The non-compliance in the laws and regulations regarding the authority of a Notary in Electronic Certification is a juridical obstacle for a Notary to provide his services in Electronic Certification, and causes legal certainty to be not achieved in setting the Notary's authority in Electronic Certification.

ACKNOWLEDGMENT

Our profuse gratitude to the staff, lecturers, and colleagues at Universitas Tarumanagara whose support in the research and writing of this paper has been immeasurable.

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Judul : Synchronization of Law Regulations Concerning Notary Authority in Electronic Certification
Nama Media : Prosiding 3rd Tarumanagara International Conference on the Applications of Social Sciences and Humanities (TICASH 2021)
Penerbit : Atlantis Press
Volume/Tahun : 655/3/2021/21 April 2022
URL Repository : <https://www.atlantis-press.com/proceedings/ticash-21/125973243>

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