



RESEARCH ARTICLE

THE NOTARY AS TRUSTED THIRD PARTY RELATED TO AUTHENTICITY OF ELECTRONIC
TRANSACTIONS SYSTEM: AN INDONESIAN NOTARY LAW APPROACH

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ABSTRACT

Notary as a trustee of a public trust can also become a trusted third party in ensuring the authenticity of electronic transactions. However, there are still outstanding legal issues namely the reasons for notary to become trusted third party in securing authenticity against electronic transactions and the wordings of notary's other authority electronic transactions certification equated with cyber notary contained in the elucidation of Article 15 paragraph (3) of Amendment of Notary Law (Indonesian Law No. 2 of 2014). This research is a normative legal research, by using statute, historical and conceptual approaches with employs snowball method as its collecting legal data technique and interview as additional data. Furthermore, grammatical and authentic interpretations are used. The study shows that the equality between the wording of electronic transaction certification and cyber notary in the elucidation of Amendment Indonesia Notary Law tends to obscure the notary's meaning as a trusted third party. Therefore, it is necessary to reformulate towards the certification and authenticity of the electronic transaction on such provision so that a notary as a public official can implement its function as a trusted third party in strengthening the electronic transaction to avoid multi-interpretation on the elucidation of such article.

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INTRODUCTION

Communication technology is growing rapidly all around the world as well as in Indonesia. "Borderless world" is often presented to illustrate how rapidly the technology develops. Communication technology plays important role such as connecting people, community groups and corporations all over the world spectacularly fast in time without direct face to face communication (Ni Ketut Supasti Dharmawan et.al, 2015, p.190). The development of global computer network technology has created a new world called cyberspace, a world of computer mediated communication that offers virtual reality. This development brought about major and fundamental changes in the conventional into digital order marked by the establishment of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is one of the first international organizations to discuss the development of information technology and its impact on electronic commerce within the scope of international trade law.

In 1996, UNCITRAL issued Model Law on Electronic Commerce with Guide to Enactment that focuses on Data Message, Electronic Data Interchange (EDI), Originator, Addressee, Intermediary, and Information System. Later on, in 2001, it established so called Model Law on Electronic Signatures instrument with Public Key Infrastructure (PKI) in terms of Electronic Commerce arrangement as the focus. It is undeniable that electronic trading activities may lead to the occurrence of conflict or dispute. In relation to dispute settlement contained in the Dispute Settlement Understanding (DSU) with integrated agreement (Covered Agreement) as the binding power of free trade, a free independent institution as trusted third party is needed in supporting the advancement of information technology. In this case, the free-trusted third party is Notary. Notary with its high incredibility and freedom from being bound towards agreement or deed its made thus has legal legitimacy is expected to guaranty the electronic transactions. Notary as a trusted third party in the digital era of information technology can be referred to as cyber notary. Philosophically, a deed or agreement from historical approach can be interpreted as follow (Edmon Makarim (1), 2011, p. 470): (1) Writing. A deed can be written and the elements contained therein can be read; (2) Sign. A deed as the identity and the symbol of consent in esbalishing such deed; and (3) Original. A deed can be brought and reviewed.

Deed as proof of engagement is interpreted by the *pacta sun servanda* principle. R. Soergondo argues that an authentic deed is a deed created and formalized in law, by or before a public official, authorized to do so, in the place where the deed was made (R. Soergondo, 1991, p.89). Irwan Soerodjo suggests that there are 3 (three) essence elements to meet the formal requirements of an authentic deed, namely (Irwan Soerodjo, 2003, p. 148): (1) in the form prescribed by law; (2) made by and in the presence of a Public Official; (3) made by or in the presence of a Public Official authorized to do so and, in the place, where the deed is made. With the existence of UNCITRAL there is a change in Notary's world on the roles and functions. In UINL congress, held on 19-20 October 2016 in Paris – France, the agenda was “The Notary A Trusted Third Party”. The purpose of UINL is as follow, “in a first section devoted to legal confidence, we will attempt to compile the needs which, according to the various stakeholders, justify recourse to a trusted third party. We will then be able to answers a first question: Why is the notary a trusted third party in legal matters. In a second section, we will examine the extent to which legal certainty strengthens and sustains economic security; this will allow us to re-examine the arguments reasserting that the notary plays a pertinent role in today's economy.”

Sociologically, Notary in Indonesia is not ready to assume trusted third parties position as expressed by UINL in Paris, France. Ideally, to support the authentication process, the function and role of a trusted third party is required to strengthen the information carried out electronically in which a third party will issue an information statement explaining the originality and guarantee of integrity of any information or electronic document in any process of manufacture, sending and receiving of such electronic information or documents. Although information or electronic document is vulnerable on its security in relation to the changes, but through information and communication security system, its authenticity must go through a process of e-identification and e-authentication system (e-IDAS). Electronic commerce transactions experience many problems due to the absence of a trusted institution that serves evidence of an engagement. This article raises the obscurity of norm in Article 15 paragraph (3) of Law Number 2 of 2014 on the Amendment of Law Number 30 of 2004 on Notary (Amendment of Notary Law). This provision stipulates that in addition to the authority referred to in paragraphs (1) and (2), Notary has other authorities provided for in the Laws and Regulations. The elucidation of this article states that what is meant by “other authorities provided for in the Laws and Regulations”, *inter alia*, the authority to certify electronic transactions (cyber notary), create deed of charitable pledge, and airplane mortgage.

The authority referred to in the elucidation of the article is not clear enough in defining and responding to the service of a notary in filling the development in Indonesia. The paradigm of conventional notary to digital notary or known as notary to business becomes urgent in advancing economy. Therefore, the notary will have full authority in performing its functions and role as Public Official to support public services in electronic business transactions. From the above explanation, there two legal issues raised in this article, namely: (1) the reasons for notary to become trusted third party in securing authenticity against electronic transactions; and (2) legal reformulation in relation for a notary as Public Official to perform its trusted third-party function in electronic commerce

transactions. This research is expected to provide benefits for law development both from the side of Ontology, Epistemology, and Axiology as follow: (1) Ontologically to find new concepts in legal reformulation so that notary as Public Official to perform its trusted third party function in electronic commerce transactions; (2) Epistemologically to understand the notary's background to be a trusted third party in ensuring authenticity of electronic transactions; and (3) Axiology from legal reformulation so that a notary as a Public Official can perform its trusted third party function in electronic commerce transactions. This article is a normative legal research. Legal research method is a systematic way of doing a research. William H. Putman argues that “So what do we mean by research we do not mean experiments which scientists tend to mean by research. The word research means to find things out” (William H. Putman, 2004, p.27). This research employs the following approaches: (1) statute approach to examine aspects of legal arrangements on notary's other authorities i.e. Law Number 11 of 2008 on Electronic Information and Transactions (EIT Law) and Amendment of Notary Law; (2) historical approach to study the development of notary in the world along with the existence of notarial institution in Indonesia up to this current era of technology; and (3) conceptual approach to reveal and examine the concept of notary in relation to electronic system or cyber notary system by using the theories of Deconstruction, Ideal of Law, Development Law, and Cybernetics. As to answer the said legal issues, the primary and secondary legal sources are used. In addition, snowball method (Djam'an Satori, 2010, p.18), a continuous rolling method that refers to legislation and legal books related to cyber notary and electronic transactions, is used as the technique of collecting legal sources. This research also uses interview technique with some relevant interviewees which used as additional data in this normative research. This research uses grammatical interpretation in order to find the meaning of the concerned regulation as well as authentic interpretation.

RESULT AND ANALYSIS

Notary as A Trusted Third Party in Supporting the Authentication System of Electronic Transactions: In Indonesian language, in *Bahasa, autentik* (or in English is called as authentic) means: (1) *Dapat dipercaya* (trustworthy); (2) *Asli, tulen* (original, genuine); (3) *Sah* (Legitimate) (W.J.S Poerwadarminta, 1986, p.34). Authentic is the absorption language that has been confirmed into standard Indonesian language. Based on the Amendment of Notary Law, Notary is neither placed in the executive, legislative, nor judicative institution. Notary is expected to have a neutral position. Consequently, notary is not placed in any of the said three state bodies. With such neutral position notary is expected to provide legal counsel for and upon legal action performed by notary at the request of his client. In the case of performing legal action for his client, the notary shall not side with his client since the duty of the notary is to prevent the occurrence of the problem. Along with the rapid development of electronic transaction, the duties and functions of notary as Public official certainly cannot be separated from such technological progress. In relation to its duties and functions, Article 15 paragraph (3) of the Amendment of Notary Law stipulates that in addition to authorities referred to in paragraphs (1) and (2), notary has other authorities provided for in Laws and Regulations. As for what is meant by “the other authorities” contained in such Article, the elucidation of such Article

already provides the scope. The other authorities in Article 15 paragraphs (3) of the said Law refer to the authorities to certify electronic transactions (cyber notary), to create deed of charitable pledge and airplane mortgage. This provision aims to facilitate the parties who live far apart, so that with the cyber notary, distance is not a problem anymore. Cyber Notary is intended to facilitate or accelerate the performance of the duties and authorities of a notary in creating authentic deeds of all action or agreement or decision required by Laws and Regulations or what is desired by interested parties to be stated in an authentic deed. Cyber Notary itself is a concept that utilizes technological advances for the notary to create authentic deeds in cyberspace as well as to perform their daily duties. For example: the electronic signing of a deed and General Meeting of Shareholders by using teleconference (Emma Nurita, 2012, p. 53); online fiduciary system stipulated in the Circular Letter of the Director General of General Law Administration of the Department of Justice and Human Rights of the Republic of Indonesia Number AHU-06.OT.03.01 dated March 5, 2013 on the Implementation of the Administration System of Electronic Fiduciary Guaranty Registration; online testament as regulated in Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 60 of 2016 on the Testament Reporting Procedures and Issuance of Electronic Testament Certificate Request; Legal Entity Administration System as regulated in the Decree of Minister of Justice and Human Rights of the Republic of Indonesia number M-01.HT.01.01 Year 2000 on the Legal Entity Administration System Enforcement at the Directorate General of General Law of Ministry of Justice and Human Rights of the Republic of Indonesia; exchange of public documents for international trade in document legalization system - in the Private International context, the term *Apostille* means to provide space for simplification of the authenticity of public documents across the State through a single document, and in its development also held electronically (*e-Apostille*) (Edmon Makarim (2), 2015, p.514).

In order to facilitate international trade interoperability, UNCITRAL encourages its international application in line with the electronic *apostilles* model meanwhile for domestic application with electronic notary or cyber notary. Interoperability system in notarial deed is needed by considering the identity of the parties to support the validity of an agreement in the deed by at least looking at some necessary policies, namely: (1) policy on registering; (2) policy on the use of credentials; (3) policy on interoperability; (4) policy on information security and communication; (5) policy on privacy and personal data protection; and (6) policy on user empowerment and awareness (Edmon Makarim (3), 2015, p. 242). Basically, there are two important issues in an electronic transaction in terms of digital identity, namely: (1) ensuring the identity of the parties, and (2) ensuring the security and authenticity of the communicated message. Notary is the only public official who is authorized to create an authentic deed of all acts, treaties and decisions required by Laws and Regulations or desired by the interested party to be declared in an authentic deed, to guaranty the date certainty, to preserve its deed, to grant *grosse*, copy and excerpt of the deed, all of them to the extent that the deed creation is not also assigned to other official or other person stipulated by the Laws. It is understood that Article 1 and Article 15 of the Amendment of Notary Law already affirmed that the main task of notary is creating authentic deed. Such authentic deed will then serve as perfect evidence for the parties in concern.

As Allan Farnsworth's argument on perfect evidence in the United State, "The word contract is used in different senses in American Law. Sometimes it is used, as it is used in common speech, simply to refer to a writing containing terms on which the parties have agreed" (E. Allan Farnsworth, 1999, p.1). Authentic deed which is created by the notary can be used as written evidence. Such authenticity can be achieved through the fulfilment some requirements. For example, the reading of the deed in ensuring the parties in concern understand the contents of deed as desired by the parties. In addition, authentic deed according to Article 1868 of the Indonesia Civil Code is "deed in a form prescribed by Law, made by or in the presence of the ruling public officials for it in the place where the deed was made." Authentic deed has three kinds of evidentiary power, namely: (1) external evidentiary power (*Uitwendige Bewijskracht*). It is the power of the deed itself to prove itself as an authentic deed (*acta publica probant sese ipsa*), which if visible from the outside as an authentic deed therefore in accordance with the rule of law which determines the requirements for authentic deed then the deed is valid as an authentic deed. The evidentiary value of notarial deed from the external aspect should be seen as it is (Habib Adjie, 2010, p. 18). The external evidentiary power does not apply to the private deed; (2) formal evidentiary power (Formal *Bewijskracht*). With this formal evidentiary power, the authentic deed proves that the said official has declared it in writing as stated in the deed and the truth of what is described by the official in the deed is as has been done and witnessed in performing its position (G.H.S Lumban Tobing, 1999, p. 54). In other words, that deed provides certainty that the content of the deed is truly done or explained by parties before the notary; (3) Material evidentiary power (*Meteriele Bewijskracht*). It is certainty on the content of a deed that what is mentioned in the deed is a valid evidence against the parties creating the deed or those who are entitled as well as applicable for the public, unless there is proved otherwise (Habid Adjie, *Op. Cit.*, p.57). In this rapid development of communication and information technology era that happens globally, notary as the trusted third parties has become part of Indonesian people's daily life. Furthermore, electronic transactions have also become part of Indonesian people's everyday life both through the conventional communication channels and global communication channels that based on computer system connected in global network (internet). In their day-to-day work of creating deeds, nowadays, notaries have also used computer systems in their offices to create their authentic deeds. It is just that the paradigm of the authenticity of the deed seen only from the final result, that is the check result of the deed he made which is the deed is signed and sealed by the notary and not in its basic form of data in the computer.

Legal Reformulation of Notary's Position as A Trusted Third Party in Electronic Commerce Transactions: In general, the development of technology has brought benefit to Notary as public official. Those benefits include online company registration (legal entities), the use of email for data transmission from the clients and other matters related to the utilization of information technology. Furthermore, EIT Law governs matters on electronic transaction with the support of Electronic Certificate, Electronic Signature, and Electronic System. With Electronic Certificate and Electronic Signature, the parties who mutually transact can be authenticated in terms of the clarity of the signatories and the status of any signed document or electronic information in a whole.

The parties who enter into electronic transactions would want the security and legal certainty of the agreement they create. Electronic document as lawful means of proof has already accommodated under EIT Law. However, this lawful means of proof does not apply to all matters. Article 5 paragraph (4) of EIT Law has determined the limitation on such lawful means of proof. It basically governs that the provision concerning electronic information and/or electronic records as intended by paragraph (1) to have lawful means of proof shall not apply to: (a) certificates which by Law must be made in writing form; (b) certificates together with their papers which by law must be made in notarial deed or deed made by land conveyancers. Thus, the existence of this article, the authority of notary to legitimate certain title in relation to electronic transaction is closed. Meanwhile, in the present time the possibility of a notary to be requested by its client to be involved in an agreement which is the product of electronic transaction is relatively large. This is a challenge for the notary in response to globalization and development of information technology. Hence, along the development of the technology, the duties of Notary actually are also to be developed. For example, are the roles of notary in implementing its authority as Certification Authority and in issuing electronic certificate through Certification Authority. Electronic Certificate through Electronic Certification Authority in the EIT Law is very irrelevant due to the existence of the above explained Article 5 paragraph (4).

The inconsistency of the norm is contradictory to Article 1868 of the Indonesian Civil which regulates that an authentic deed is one which has been drawn up in a legal format, by or before public officials who are authorized to do so at the location where this takes place. Furthermore, if it is connected to Article 1 number (1) of the Amendment of Notary Law, it is understood that notary is a public official who is authorized to create an authentic deed and other authorities as referred to in this Law or under other Laws. Therefore, according to these articles, it can be seen that authentic deed basically has conclusive authentication power. In relation to certifying a transaction, it is important to understand the often-used terms. Electronic certificate means a certificate in electronic nature that bears an Electronic Signature and identity, demonstrating a status of a legal subject of parties to an Electronic Transaction issued by Electronic Certification Authority (Article 1 number 9 of EIT Law). Meanwhile Electronic Certification Authority means a legal entity that acts as a reliable party, issues and audits Electronic Certificates (Article 1 number 10 of EIT Law). Trust is the core value to run business. With this trust, responsibility arises. In relation to responsibility towards the possibility of null and void effect to the authentic deed he drawn up and the *fautes personnelles* theory (Khairandy, Ridwan, 2001, p.365), notary shall be individually or personally responsible to such deed. The urgency of trustworthiness in electronic transactions specifically in electronic commerce is carried by the notary. According to the Amendment of Notary Law, notary has an important role and function in the legality of transaction in Indonesia. Moreover, notary is also understood as the trusted third party. Notary has 2 basic needs necessary to help them him to have all the qualities of a trusted third party. Those basic needs are as follow: (1) By their activities and professional training: a qualified professional, which consisted of three points namely: a. the notary's reliability stems above all of his personal, moral and human qualities; b. specific education and training; and c. duty of discretion; and (2) By

their status: a regulated status means as a professional, notary shall have position that is regulated under Laws and Regulations. As quoted in UNICTRAL, "...be noted that the UNL Code states that a notary always acts in the general interest...". This can be interpreted as in order to make notary as a trusted third party, there are seven criteria need to be met as follow: a. the obligation to carry insurance; b. controls and disciplinary measures; c. conflict of interest rules and prohibitions on drafting documents; d. obligations relating to data retention and transmission; e. contract enforceability: authentic instruments for greater legal force; f. duty to draw up instruments to provide a legal public service; and g. an identical scale of offensive guaranteeing equal treatment. Therefore, notary as the one who drawn up authentic deed deserves to serve role as a trusted third party especially in electronic commerce transaction. The role of notary is intertwined with the certification of electronic commerce transactions. The certifying process comes from certify which means: (1) a. to confirm formally as true, accurate, or genuine, b. to guarantee as meeting a standard: butter that was certified Grade A. See Synonyms at approve; (2) to acknowledge in writing on the face of (a check) that the signature of the maker is genuine and that there are sufficient funds on deposit for its payment; (3) to issue a license or certificate to; (4) to declare to be in need of psychiatric treatment or confinement; (5) archaic to inform positively; assure. To testify: certify to the facts. In addition, Black Law Dictionary also defines the term certify. Certify means: (1) to authenticate or verify in writing; (2) to attest as being true or as meeting certain criteria; (3) (of a court) to issue an order allowing a class of litigants to maintain a class action; to create (a class) for purposes of a class action (Henry Campbell Black, 1991, p.259).

As previously discussed, the notary's authority to certify electronic transaction can be found in Article 15 paragraph (3) of Amendment of Notary Law through the wordings of "other than authorities provided for in paragraph (1) and (2), Notary has other authorities as regulated under Laws and Regulations". According to its elucidation, it is noted that other authorities referred to such article includes "*sertifikasi transaksi elektronik*" (cyber notary) or in English translated as electronic transactions certification (cyber notary). In line to that, such existence of this provision and its elucidation give rise to multiple interpretations on notary's authority, which is not in line with legal certainty principle. The question is on the authority on electronic transactions certification equated to (cyber notary). To what extent notary can perform certification in electronic transaction? Whether notary performs certification in electronic transaction? The basic question, how the certification mechanism is? Whether certification in this provision means verifying document, validating document or performing certificate for such document? Differing views on the meaning of certification lead to context problem. This context problem is the absorption of a foreign language directly embodied into a part of the Law. It is argued that grammatical interpretation on the context of certifying electronic transaction (cyber notary) is incompatible with the juridical basis. This is because according to Article 1 number 1 of Amendment of Notary Law, notary is public official who is authorised to create authentic deed. Paul Klienman argues that to be authentic, one must be in harmony with his freedom. In existentialism, the notion of authenticity means really coming to terms with oneself, and then living accordingly. One must be able to be with his identity while letting his background and

history play a part in his decision-making process. Making choices should be based on one's values, so that there is a responsibility that comes with the decision-making process. If one does not live within a balance of his freedom, he is inauthentic. It is in the inauthentic experience that people allow ideas like determinism, believing choices are meaningless and acting as one should be persuade their choice making (Paul Klienman, 2013). In relation to that, the background behind the inauguration of a Notary is the oath based on *Pancasila*. That is understood as there is a responsibility that comes with the process of decision making. Paul Klienman's opinion of authentic concept is almost the same as the concept of notary in creating authentic deed. Black's Law Dictionary mentions that authentication (Henry Campbell Black, *Op. Cit.*, h.151): (1) broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being (authentication of the handwriting); (2) specific, the assent to or adoption of a writing as one's own. The concept of authentication, although continually used by the courts without apparent difficulty, seems almost to defy precise definition. Some writers have construed the term very broadly, as does wig more when he states that 'when a claim or offer involves impliedly or expressly any element of personal connection with a corporeal object, that connection must be made to appear...' So, defined 'authentication' is not only a necessary preliminary to the introduction of most writings in evidence, but also to the introduction of various other sorts of tangibles. If it is still unwavering, it creates a contextual problem that will render one regulation to conflict with another thus electronic transactions system becomes inconsistent with the ideal of law theory.

The ideal of law can be understood as a construction of the mind which is a necessity to direct the law on the ideals that society desires. Moreover, law is as an indispensable system for Indonesia as a developing country (Lili Rasjidi and Ida Bagus Wyasa Putra, 2003, p. 5). Gustav Radbruch argues that ideal of law serves as a regulative and constructive benchmark. Without ideal of law then legal products will lose its meaning (Esmi Warassih, 2005, p.43). Therefore, from the above explanation, reformulation towards the wordings of Article 15 paragraph (3) of Amendment of Notary Law is needed. The "other authorities" in certifying electronic transaction shall be mentioned within the article itself and not in its elucidation. Certifying is not meant to provide certificate, but to strengthen the electronic transaction in order to avoid any future multi interpretations towards the elucidation of Article 15 paragraph (3). The proposed wordings (in *Bahasa*) are, "*Kewenangan notaris sebagai pihak ketiga terpercaya dalam menguatkan transaksi yang dilakukan secara elektronik*" or if it is translated in English, "notary's authority as a trusted third party in strengthening electronic transactions". Notary as trusted a third party in electronic transaction is one form of transaction that is non-face and non-sign (without face to face and without signature). This transaction is paperless (without written document), borderless (no geographical boundaries) and the parties who make transactions do not need to meet face to face. In this case, transactions are expressed as method of communication and storage of information that use an alternative medium beyond the things written in the paper (information or documents written on paper). The relationship of cyber notary in providing legal certainty and legal fair for the parties in creating an agreement and so that the contract is legitimate according to Article 1320 Indonesian Civil Code.

The mechanism in verifying electronic transaction, which is also part of this reformulation includes the following: (1) notary's authority in identifying the appearers; (2) validity of electronic signature; and (3) electronic data storage by notary.

Conclusion

Philosophically, notary both in the common law and civil law system as well as juridically as stated in Amendment of Indonesian Notary Law, notary as a trustee of public trust can also become a trusted third party in ensuring authenticity of electronic transactions. However, the elucidation of Article 15 paragraph (3) Amendment of Notary Law stipulates notary's other authorities by mentioning the wordings of electronic transactions certification which equated to cyber notary tends to obscure the notary's meaning as a trusted third party. Therefore, the government is suggested to reformulate it by defining the phrase "other authorities" that specifically relates to certifying electronic transaction as means to strengthen the electronic transaction within the article itself and not in its elucidation to avoid multi interpretations. In addition, government is also urged to provide infrastructure and human resources by providing license to notary as Sub CA (Certification Authority) hence electronic document as the agreement of parties in concern with electronic signatures therein can have the same lawful means of proof as the authentic deed.

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