



Notary Responsibility on Electronically Stored Client Data: Challenges and Developments

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Abstract

The purpose of this research to analyze the use of cloud computing in notary profession. This research used an empirical research. This research is done in Makassar at the Regional Office of Law and Human Rights of Makassar, the Regional Notary Supervisory Council of the Makassar and Notaries in Makassar. The source of data that is used is a primary and secondary data. The data collected through interviews, questionnaires, and literature study. The data analysis used in this research is descriptive-qualitative. According to the result of this research it is known the used of cloud computing on the notary profession is not right to do so. This because in principle, notaries work is based on the act of notary public, that explaining the deed is the original deed which is then stored as one of the notary protocols and the original of the deed that is scanned, cannot be an evidence. Notaries who are negligent in keeping the minimum deed using cloud computing will result in civil liability, namely actions against the law, administrative responsibility in the form of written warning sanctions and even disrespectful dismissal and responsibility in the code of ethics in the form of warning to disrespectful dismissal from the association.

Keywords: *Cloud Computing; Cyber Notary; Personal Data Protection*

Introduction

Indonesia is a state based on rule of law. Is it stated on the Article 1 Paragraph (3) of The Constitution of Republic of Indonesia 1945 “The State of Indonesia shall be a state based on rule of law”. This constitutional affirmation means that all aspects of life in society, state, and government must always based on law.

Indonesia as a state that based on rule of law is guaranteeing the legal certainty, order, and protection of every citizen. The existence of authentic written evidence is one of the forms on providing the legal actions, agreement, stipulations and legal incident that made by the authorized officials which in this case by a notary.

The technology and information in this digital era are developing rapidly and it is important to the society. The use of technology has been expanded so that it has entering almost all aspect of life.¹ Notary is demanded to know how to used the cyber notary concept in order to creating a fast, precise, and efficient services, so it is able to accelerate the economy growth.²

The irony is that the cyber notary concept in Indonesia is still debatable. Even though the technology has allowed the role of online and remote notaries, but on the legal side this kind of act is still cannot be conducted.³ Although the cyber notary has been appeared since 1995, this is hampered by the absence of a related legal basis. But, since the promulgation of The Law No. 11 of 2008 concerning on Electronic Information and Transaction as well as in Law No. 2 of 2014 concerning on Amendments of the Law No. 30 of 2004 concerning of Notary Position on the Article 15 Paragraph 3, where in the principle the other authority is an authority in certifying transaction that is carried out electronically (cyber notary), making waqf pledge deeds and aircraft mortgages, so that the discourse on cyber notary will roll back.⁴

Cyber notary used the technology advances for the notary in running their activities every day, such as digitalize document, signing the deed electronically, and other such activities.⁵ Cyber notary provide an opportunity for authority in terms of electronic document storage in the form of electronic document. This electronic document storage could use cloud computing that giving many advantages, apart from reducing the operational budget also can reduce the lost of the original deed cause by flood, eaten by insect or rat, and fire disaster.⁶ The implementation of the cyber notary concept should meet four requirements, as proposed by the American Bar Association Information Security Committee:⁷

1. Trust when transacting between parties over the communication;
2. The security of the transmission;
3. The integrity of the content of the communication;
4. The confidence that such transaction will receive legal recognition, so the binding contract is enforceable.

Various advantage on the usage of the cloud computing in notary profession, is also giving a negative impact in the usage where it is easier for the criminal to carry their action which is increasingly worrying the public especially in electronic document storage which result in the abuse that occurs in cyber spaces which is known as the cyber crime or in the other literature known as computer crime.⁸ Generally, computer crime or cyber crime is an attempt to entering and/or using the computer facilities or computer network without permission and by violating the law with or without causing changes and or a damage on the computer facilities that are entered or used.⁹

The lack of understanding or negligence of these matters causes the notary to held accountable for his mistake so that the party who suffer has juridical reasons to demand reimbursement of expenses,

¹ Nurita, R. A. E., (2012). *Cyber notary Pemahaman Awal Dalam Konsep Pemikiran*. PT. Refika Aditama. Bandung. p. 91

² Setiadewi, K., & Wijaya, I M. H. (2020). Legalitas Akta Notaris Berbasis *Cyber notary* Sebagai Akta Otentik. *Jurnal Komunikasi Hukum*. 6 (1). 126-134. p. 128.

³ Makarim, E. (2011). Modernisasi Hukum Notaris Masa Depan: Kajian Hukum Terhadap Kemungkinan *Cyber notary* di Indonesia. *Jurnal Hukum dan Pembangunan*. 41 (3). 468-499. p. 468.

⁴ Rossalina, Z., Bakri, M., Andrijani, I., (2016). Keabsahan Akta Notaris Yang Menggunakan *Cyber notary* Sebagai Akta Otentik. *Jurnal Hukum*. 1-25. p. 3.

⁵ Devita, I., (2020). *Cyber notary*. From <https://irmadevita.com/2010/cyber-notary/#>.

⁶ Rositawati, D., Utama, I M.A., Dewi Kasih, D. P., (2017). Penyimpanan Protokol Notaris Secara Elektronik Dalam Kaitannya *Cyber notary*. *Acta Comitas* . (2). 172-182. Hal. 173.

⁷ Harris, F. & Helena, L., (2017). *Notaris Indonesia*. PT Lintas Cetak Djaja. Jakarta. Hal. 205.

⁸ Maskun. (2013). *Kejahatan Siber (CYBER CRIME)*. Kencana. Jakarta. Hal. 47.

⁹ Mansur, D. M. A., & Gultom, E., (2009). *Cyber Law Aspek Hukum Teknologi Informasi*. PT Refika Aditama. Bandung. Hal. 7.

compensation, and interest to the notary.¹⁰ Not to mention, the problem with the regulation today still cannot elaborate the concept of cyber notary even though it is allowed with the Law No. 2 of 2014 concerning of Amendments of Law No. 30 of 2004 concerning of Notary Position on the Article 15 Paragraph 3.¹¹ Therefore, this research will discuss about the responsibility of the notary that is negligent in storing the client data electronically relating to cyber notary.

Methods

This type of research used the empirical research in the form of a method that using empirical legal case study in form of community legal behavior. The source of data in empirical legal research is not based on positive law, but the result of observation at the research location. The approach that used in this legal research is statute approach, it is need to examining further about the legal basis by examining the laws and regulation related to the legal issue that is handled and the conceptual approach which departs from the views and doctrines that develop in the law. Source of data of this research is primary data which is the laws and regulation that is relevant and related to this research, secondary data about the explanation of the primary data such as the bill, law journal, the result of research, or the expert opinion and tertiary data about explanation of primary and secondary legal material, such as dictionary (legal dictionary), encyclopedia. The data then collected through interviews and the distribution of questionnaire to the South Sulawesi Regional Notary Supervisory Council at the Office of the Ministry of Law and Human Rights of South Sulawesi and notaries in Makassar and also library research that is obtained from books, laws and regulation, internet, and other type of documents. The analysis of the legal material that is used by the author is descriptive-qualitative, mean the legal material both primary and secondary will be identified and used on analyze the problem that is related to this research.

Result and Discussion

The Legal Basis for Protection of the Private Client Data That Stored Electronically in Indonesia

The first regulation in Indonesia about privacy has been started when the Criminal Code is legalized by the government of Dutch-East Indies. Several things that is known about privacy in Criminal Code is regulated in Article 167 (1), Article 335 (1), Article 431 and Chapter XXVIII.¹²

Other that those regulation, there also several regulations that is giving a protection on the rights of privacy, especially in the communication field such as the Law No. 36 of 1999 concerning of Telecommunication, the Law No. 30 of 2002 concerning of Corruption Eradication Commission (KPK), the Law No. 11 of 2008 concerning of Information and Electronic Transaction, the Law No. 19 of 2016 concerning of Amendments of the Law No. 11 of 2008 concerning of Information and Electronic Transaction, the Law No. 14 of 2008 concerning of Public Information Disclosure, and the Law No. 35 of 2009 Concerning of Drugs. In the level of constitution, Article 28 G Paragraph (1) giving protection to the rights of the privacy for the society.¹³

Further regulations regarding the protection of internet user personal data are contained in the Information and Electronic Transaction Law. This regulation does not contain a specific regulation on

¹⁰ Anshori, A. G., (2009). *Lembaga Kenotariatan Indonesia Perspektif Hukum dan Etika*. UII Press Yogyakarta. Yogyakarta. Hal. 46.

¹¹ Alwajdi, M. F., (2020). Urgensi Pengaturan *Cyber Notary* Dalam Mendukung Kemudahan Berusaha Di Indonesia. *Rechts Vinding*. 9 (2). 257-274. Hal. 260.

¹² Anggara, et al., (2015). *Menyeimbangkan Hak: Tantangan Perlindungan Privasi dan Menjamin Akses Keterbukaan Informasi dan Data di Indonesia*. Institute for Criminal Justice Reform. Jakarta. Hal. 7.

¹³ *Ibid.* hal. 7

personal data protection. Even though, implicitly this law created a new understanding on the protection of the existence of electronic data or information, both in public and private. The elaboration of personal electronic data is further explained by the Information and Electronic Transaction Law and Government Regulations concerning the Operation of Electronic Systems and Transactions.¹⁴

As for protection for unauthorized acts, protection by the electronic system administrators, and protection from illegal interventions access. One of them are on the Article 26 of Information and Electronic Transaction Law, that require every personal data in electronic media should gain an authorization from the owner. So, if there was a violation happened from the act, it can be sued by the loss that occurred. In the explanation of the article, it is stated in utilization of information and technology, personal data protection is one of the rights of privacy. Furthermore, according to this provision, personal right includes (i) the right to enjoying a private life and free from all kinds of disturbances; (ii) the right to be able communicate with others without the meta-spying act; and (iii) the right to monitor access to personal life information and personal data.¹⁵

Moreover, in the provision of Article 43 Paragraph (2) it is also stated the essence of personal data protection of the citizen, even in the criminal proceeding. It is said in that provision, in every investigation in the field of technology information and electronic transaction should be done with due regard to the protection of privacy, confidentiality, smoothness of public services, data integrity in accordance with the provisions of laws and regulations. Relating to the form of the protection, Information and Electronic Transaction Law opening a way to filed a lawsuit for the loss of the personal data violation. This also confirmed on the Article 38 that explain every parties that feel aggrieved by the operation of the Information Technology system can file a lawsuit. Relating to the wiretapping practice as it is regulated in Article 31, violation is regulated in Article 47. In those articles it is emphasized that the maximum penalty is ten years and a maximum fine of eight hundred million rupiah (Rp. 800,000,000.00).¹⁶

Although it has been generally regulated in the Information and Electronical Transaction Law and several other regulations, Indonesia is need to immediately make a special regulation regarding on the protection of personal data. One of the reasons is to increasing the economy value on the international business relation. If Indonesia already has a strict and adequate regulations, developed countries will no longer hesitate to conduct a business relation with the Indonesia people through cyberspaces, because in this business relationship there will be an automatic transfer of data, where regulation in developed countries confirm that transfer of data can only be done with equally strong privacy protections.¹⁷

The regulation that is intended as the mechanism on personal data protection in the framework of right of privacy fulfillment can be seen from several form of regulation that is made by a number of parties, including international organization, such as European Union, OECD, and APEC. Various kind of personal data protection on several state in the world also made a various kind of the regulations.¹⁸

The region that is considered as the most advanced in providing a protection of personal data is the European Union which already has Convention 108, Data Protection Directive, Directive 97/66/EC (Directive on Privacy and Telecommunication) and Directive 20002/58/EC (Directive on Privacy and Electronic Communication) that is the legal basis of all the personal data protection in order to the right of the privacy that is recognized under Article 8 ECHR and Article 7 of European Charter. Regarding to the realization of personal data protection, it is then guaranteed by five basic principle that must be fulfilled by all parties:

¹⁴ Latumahina, R. E., (2014). Aspek Hukum Perlindungan Data Pribadi di Dunia Maya. *Gema Aktualita*. 3 (2). 14-25. Hal. 17.

¹⁵ Djafar, W., et al. (2016). *Perlindungan Data Pribadi di Indonesia Usulan Pelembagaan Kebijakan dari Perspektif Hak Asasi Manusia*. Lembaga Studi dan Advokasi Masyarakat. Hal. 40

¹⁶ *ibid*

¹⁷ Latumahina, R. E., *Op. Cit.* Hal. 23.

¹⁸ Djafar, W., *Op. Cit.* Hal. 8.

1. The principle of valid data processing;
2. The principle of special objectives and limitation
3. The principle of data quality
4. The principle of honest data processing; and
5. The principle of accountability.¹⁹

OECD as a forum for the countries that commit to developing democracy and market economy, providing a regulation for countries to compare policy practices, seek answers to common problems, identifying best practices and coordinate with all international and domestic policies. One of the roles of OECD in giving a guarantee on personal data protection is with making an OECD guideline that is based on eight main principles such as:

1. Collection Limitation Principle
2. Data Quality Principle
3. Purpose Specification Principle
4. Use Limitation Principle
5. Security Safeguards Principle
6. Openness Principle
7. Individual Participation Principles
8. Accountability Principle²⁰

The flow of information is vital for doing a business in the era of economy globalization. On 2004 APEC has made a breakthrough with the APEC Privacy Framework. It is a little bit different with the legal instrument that OECD have, APEC Privacy Framework have nine main principle, such as:

1. preventing harm;
2. notice;
3. collection limitations;
4. choice;
5. uses of personal information;
6. integrity of personal information;
7. security safeguards;
8. access and correction;
9. accountability.²¹

Responsibility of a Notary Who is Negligent in Electronic Storing the Client Data Electronically Relating to Cyber Notary

Notary as a general official (*openbaar ambtenaar*) can be held a responsibility for their actions relating to their work. The scope of responsibilities of notary includes the truth of his deeds. About the responsibility as general official relating to the truth, Nico differentiate it into four points:²²

1. The responsibility of the notary in a civil manner regarding on the truth of the deed that he/she made;
2. The responsibility of the notary in criminal manner regarding on the truth of the deed that he/she made;
3. The responsibility of the notary based on the Notary Position Regulation regarding the truth of the deed that he/she made;
4. The responsibility of the notary in carrying out his/her job duties based on the code of ethics.

¹⁹ *Ibid.*

²⁰ *Ibid.* Hal. 9.

²¹ *Ibid.* Hal. 10

²² Nico quoted on Anshori, A. G., *Op.Cit.* Hal. 34

According to the interview with Notary Supervision Board of South Sulawesi that a notary is responsible if the notary did not carry out its obligation as it is stated on Article 16 Paragraph (6) that is keep everything secret that is relating to the deed and other documents is to protect the related parties. As in this case, a notary supposed to protecting themselves from hacking toward the original deed that is stored electronically with cloud computing. Those responsibilities such as:

1. *Responsibility on a civil basis*

The juridical construction used in civil liability for the truth of the deed made by a notary is the construction of an illegal act. This juridical construction regarding on unlawful act does not have a very wide scope so that is possible to reach any action as long as it is detrimental to other parties and the loss has causality with any such act.²³ The form of legal responsibility that appear caused by unlawful act according to the civil law is:²⁴

- a) Liability with an element of error (intentionally or negligently) as it is in Article 1365 of the civil code.
- b) Liability with an element of error, especially of negligence as it is on Article 1366 of civil code.
- c) Absolute liability (without error) in a very limited sense in Article 1367 of civil code.

A notary on civil lawsuit, is often used as a defendant or co-defendant or even the main defendant by another party, who feels that the legal action stated in the deed is categorized as an act or legal act of a notary or notary with other parties who are also mentioned in the deed.²⁵ In the Notary Position Law, it is strictly regulated about notary responsibility in Article 84 of the Notary Position Law which:

Violation by a Notary against the provisions referred in Article 16 Paragraph (1) letter i, Article 16 Paragraph (1) letter k, Article 41, Article 44, Article 48, Article 49, Article 50, Article 51, or Article 52 which resulting in a deed only have the power of evidence as an privately made deed signed before or the deed to be null and void can be a reason for the party who suffering a loss to demand reimbursement of expenses, compensation, and interest from a notary.

The provision regarding on general compensation are regulated in civil code on the chapter four of the third book, starting from Article 1234 Code of Civil Law. Apart from general compensation, the civil code also regulating about special compensation, which is a compensation toward the loss that arise from several obligations. The form of compensation toward the unlawful act that is known in law is:²⁶

1. Nominal Indemnity

If the serious unlawful act, example the unlawful act that contain intentional element, but doesn't cause real harm to the victim, then the victim can be given a certain amount of money according to the sense of justice without calculating the actual amount of the loss

If there is a serious illegal act, such as an act against the law that contains an intentional element, but does not cause real harm to the victim, then the victim can be given a certain amount of money according to the sense of justice without calculating the actual amount of the loss.

2. Compensatory Damage

The compensation is a compensate that is a payment for the amount that the victim actually has suffered from an unlawful act.

3. Punitive Damage

Punitive compensation is a compensate in large amount of compensation in excess of the actual amount of the loss.

²³ *Ibid.* Hal. 35.

²⁴ Daus, L, H., (2017). *Hukum Notariat dan Tanggungjawab Jabatan Notaris*. UII Press Yogyakarta. Yogyakarta. Hal. 64.

²⁵ *Ibid.*, hal. 66.

²⁶ *Ibid.*, hal. 69.

2. *Administrative Responsibility*

In addition to the civil sanction imposed on notaries who violate the law, administrative sanction may also impose against the notaries.²⁷ Based on the administrative sanction for notaries that make a mistake, it can be seen in the Article 5 of The Notary Position Law, there are 5 types of administrative sanctions:

1. Verbal Warning;
2. Written Warning;
3. Temporary Suspend;
4. Dismissal with Respect;
5. Disrespectful Dismissal.

In Article 85 of The Notary Position Law, the verbal warning is placed first in imposing sanction, it is a warning for notary and supervisory board that are not fulfilled, and will be followed up with a written warning sanction.²⁸ If this such sanction is not obeyed by the notary, then it can be followed with the next sanction.²⁹ The sanction against notaries in the form of temporary suspend are a period of waiting for the implementation of government coercive sanctions. This sanction is intended to prevent the notary from holding its position for a while before the sanction in the form of respectful or dishonorable discharge is imposed on the notary. This temporary dismissal in the form of restoration to the notary to carry out his duties again or followed up with next the sanction. The implementation of article above has to see the weight of the violation made by the notary, it means the sanction is gradual³⁰

3. *Responsibility in the Code of Ethics*

Notary is a profession that is related to the individual, profession organization, general community and country. The act of notary will be related with those elements therefore a wrong act by notary can be harmful to the profession organization, community and country. The relation of notary and community and country is regulated in the Notary Position Law and other regulations. While the relation between notary as profession and notary organization is regulated in the code of ethics.

The violation related to the code of ethics of notary is an act that is done by the member of the association of the Indonesia Notary or the people who hold and carry out the notary position that violate the provisions of the code of ethics and/or organizational discipline.³¹ Imposing sanction against notary as a form of effort to enforce the notary code of ethics for violating the code of ethics is defined as a punishment that is intended as a mean, effort, and mean to enforcing notary obedience and discipline. Sanction in notary code of ethics is regulated in Article 6 that stated the sanction that sanction imposed on member who violate the code of ethics can be in form of verbal warning, *schorsing* (temporary dismissal) from the association membership, *onzzetting* (dismissal) from association membership and dishonorable dismissal from association membership.³²

²⁷ Sjaifurrachman, & Adjie, H. (2011). *Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta*, CV Mandar Maju, Bandung. Hal. 198.

²⁸ *Ibid.* Hal. 205.

²⁹ *Ibid.*

³⁰ *Ibid.* Hal. 207

³¹ Anshori, A, G., *Op.Cit.* Hal. 49.

³² *Ibid.*

Conclusion

From above, the following conclusion can be drawn:

- a. There is various regulation that Indonesia have related to privacy, but until now Indonesia did not have a special regulation about personal data protection. This problem only regulated on Article 26 of Information and Electronic Transaction Law and other articles. The main reason on the need for this specific regulation to increase the economic value of Indonesia in international business relation which in the business relation there will be automatically transfer of data, where in developed country it is emphasize that the transfer data could only done to the country that have the same strong privacy protection, especially it has a very positive impact on the notary profession as a general official who provide services in making legal products in conducting business in Indonesia.
- b. The responsibility of notary that negligent in storing the client data electronically relating to the cyber notary in form of:
 1. Responsibility on a civil basis
The regulation of general compensation is regulated in Code of Civil Law on chapter four of the third book, from Article 1234 Code of Civil Law. The form of compensation on unlawful act known by the law are:
 - Nominal Indemnity
 - Compensatory Damage
 - Punitive Damage
 2. Administrative Responsibility
According to the administrative sanction for notary that have violate the law can be seen in Article 85 of the Notary Position Law, it is emphasize five type of administrative sanction:
 - Verbal Warning;
 - Written Warning;
 - Temporary Suspend;
 - Dismissal with Respect;
 - Disrespectful Dismissal.
 3. Code of ethics Responsibility
The sanction in the code of ethics of notary is regulated on Article 6 that stated the sanction that imposed to the members that violate the code of ethics can be in form of verbal warning, *schorsing* (temporary dismissal) from the association membership, *onzetting* (dismissal) from association membership and dishonorable dismissal from association membership.

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