

Horizontal Consistency of the Settings of the Exception in Carrying Out a Notary's Official Pledge

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Article 17 Law no. 8 of 2010 on Prevention and Eradication of Money Laundering Criminal Act (“LPEMLCA”) in conjunction with article 3 letter b. Government Regulations No. 43 of 2015 on Complainant in the Prevention and Eradication of Money Laundering Criminal Act (‘GR No. 43/2015’); it is obligatory for a notary to give reports. Article 4 paragraph (2) Law no. 30 of 2004 on Position of Notary (“LPN”) in conjunction with article 16 paragraph (1) letter f Law No. 2 of 2014 on Changes to the Law of 2004 on Position of Notary (‘L No. 2/2014’), it is stated that a notary must keep everything about a deed. The research uses the normative law research method based on the principle of *lex specialis derogat legi generali*; Article 17 LPEMLCA in conjunction with article 3 letter b. GR No. 43/2015 as the specific law disregards article 4 paragraph (2) in the third paragraph of LPN in conjunction with article 16 paragraph (1) letter f Law No. 2/2014 as the general law. Legal protection for a notary can be found in article 28 in conjunction with article 29 Law PEMLCA.

Keywords: Money Laundering Criminal Act, official pledge, specific and general law

Introduction

On October 22, 2010, Law no. 8 of 2010 on Prevention and Eradication of Money Laundering Criminal Act [“L PEMLCA”] was enacted. The money laundering criminal act is a criminal act done by the doer by

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trying to hide or disguise the origin of the wealth which is the result of criminal acts in such various ways that it is difficult for law enforcers to trace it.

In its development, the money laundering criminal act is becoming very complex, crossing the jurisdictional boundaries, and using more various modes, taking advantages of institutions outside the financial system, which has even penetrated various sectors. In order to anticipate this, the Financial Action Task Force (FATF) on Money Laundering has issued an international standard to become the measurement for each country in preventing it.

Based on Article 2 Law no. 8 of 2010 on Prevention and Eradication of Money Laundering Criminal Act ("L PEMPLCA"); basically determines that results of criminal acts are wealth acquired from: corruption, bribing, narcotics, psychotropic, human resource smuggling, migrant smuggling, at banking, capital market, insurance, customs, tax, human trafficking, arms black trade, terrorism, kidnapping, theft, embezzlement, fraud, counterfeiting money, gambling, prostitution, at taxation field, forestry, living environment, marine and fisheries, or other criminal acts threatened to get imprisonment of 4 (four) years or more, done in the territory of The Unitary State of the Republic of Indonesia or outside the territory of The Unitary State of the Republic of Indonesia and that criminal act is a criminal act according to the Indonesian law. The wealth known or suspected to be used and/or to be used directly or indirectly for terrorism activities, terrorists' organizations, or individual terrorists are considered equal to criminal terrorism acts.

One of the aspects to make the efforts of preventing and eradicating the money laundering criminal act effective is the person who has an obligation to report suspicious financial transactions. The complainant meant in Article 1 number 11 L PEMPLCA is every person who according to L PEMPLCA is required to report to the Center for Financial Transaction Reporting and Analysis ('CFTRA'^{9,10,11,12}). One of the persons who have the obligation to report to CFTRA according to Article 17 L PEMPLCA in conjunction with Article 3 Government Regulations No. 43 of 2015 on Complainant in the Prevention and Eradication of Money Laundering Criminal Act ('GR No. 43/2015') is a notary.

A notary is a public official who is authorized to do an authentic deed and has other authorizations as stated in this law or other laws.^{13,14} As

long as a person has the status of being a notary and is still tied to the oath of office and the law and regulations about the notary profession, he or she will be required to keep the deed contents and any information obtained in carrying out the job. This is often mentioned as a notary's official pledge.

Concerning the official pledge, Article 4 paragraph (2) in the third paragraph of Law No. 30 of 2004 on Position of Notary ('L PN) mentions:

"I swear/promise:

that I will keep everything on the deed contents and the information obtained in carrying out my profession".

This official pledge requires a notary to keep the contents of the deed. Besides, in article 16 paragraph (1) letter f Law No. 2 of 2014 on Changes to the Law of 2004 on Position of Notary ('L No. 2/2014') a similar obligation is also mentioned, which states that:

"In carrying out his job, a notary must: keep everything on the deed he made and all the information obtained to manufacture in accordance with the deed of oath/pledge of office, unless the statute otherwise provides."

This article also requires a notary to keep everything related to the deed he made, including all the information which was obtained in relation to the making of the deed. The purpose is none other than to protect all the people connected with the deed.

A notary who does not do the job in accordance with article 4 paragraph (2) in the third paragraph of LPN in conjunction with article 16 paragraph (1) letter f Law No. 2/2014, based on article 85 LPN, can get such sanctions as oral warning, written warning, layoffs, honorable discharge, or dishonorable discharge. Besides the sanctions in the LPN, article 322 paragraph (1) Criminal Code also arranges, in general, the pledge that must be kept because of the profession. Article 322 paragraph (1) Criminal Code says:

"Any person who with deliberate intent reveals a secret that by any reason of either his present or earlier office or profession is obliged to keep secret shall be punished with a maximum imprisonment of nine months or a maximum fine of nine thousand rupiahs."

The sanction is given definitely to make the obligations to keep the deed information, and the official pledge stated by a notary obeyed as well as possible.

When analyzing further the regulations about the revelation of a secret, it is seen that there is opposition or inconsistency of the official pledge, particularly for notaries. On the one hand, based on article 4 paragraph (2) third paragraph of LPN in conjunction with article 16 paragraph (1) letter f L No. 2/2014, a notary must keep everything about the deed that he made and all the information obtained to make a deed in accordance with the official pledge/oath. On the other hand, based on Article 17 LPEML in conjunction with article 3 Government Regulations No. 43 of 2015 on Complainant in the Prevention and Eradication of Money Laundering Criminal Act ('GR No. 43/2015'); a notary is one of the complainants who must give reports to CFTRA. Thus, it means that a notary is given the obligation by the law to open and give information obtained in doing a deed.

In order to give legal certainty of the inconsistency, it is necessary to analyze which regulation should be applied for the enactment or non-enactment of the official pledge. Besides, what is also necessary is the legal protection given to a notary when he gives a report.

Literature Review

In this part there will be some elaboration on the theories functioning as the "analysis knives" which are intended to "dissect" the problems, especially those related to the horizontal inconsistency among regulations. In connection with this, the theories that will serve as "analysis knives" are the theory about legislation and the theory of legal protection.

First, the theory of legislation. Legislation theory, in particular, is a theory that talks about the process of arranging the regulations. In legislation theory, there are some foundations or principles of the legislation of the regulations that if 1 (one) legislation is in conflict with other legislation. The relationship between principles, norms, and regulations can also be seen that if there is a conflict of the regulations, this will be overcome by applying the principle as meta-rules.

Samuel Meira Brasil Jr. states that in law argumentation theory, there is a difference between rule and principle.² Conflict of rules is overcome by the principle as meta-rules such as *lex superior* (based on the general hierarchy of law system structure), *lex posterior* (based on the priority of the rule that is applied later), *lex specialis* (berdasarkan spesifikasi aturan), and exceptions. Because a principle is metanorm/rule, then a norm/rule cannot oppose a principle, and if this happens,

a norm or a rule or an agreement that has been made (a contract) will be repealed.³ B. S. K. Bhandary, K. P. Sharmila, N. S. Kumari, V. S. Bhat, and G. Sanjeev⁵, The principles of legislation cover:

1. *Lex specialis derogat legi generali.* *Lex specialis* originating from Latin words, meaning law governing a specific subject matter. *Lex specialis derogat legi generali* means special rules derogate from general ones or special law repeals general law.
2. *Lex posterior derogat legi priori.* The principle of *Lex posterior derogat legi priori* means that a later law repeals an earlier law.
3. *Lex posterior generalis non-derogat priori specialis* means a later, general law does not repeal an earlier, specialized law.
4. *Lex superior derogat legi inferiori* means a law higher in the hierarchy repeals the lower one.⁴
5. Non-retroactive. The non-retroactive principle means that legislation is not retroactive.

Second, the theory of legal protection. Maria Theresia Geme understands legal protection as follows:

“In relation to the country’s action to do something (enacting the country’s law exclusively) with the intention of giving assurance of a person’s or a group of people’s rights.”⁵

Methodology

The method used in this research is normative juridical, a study that deduction initiates an analysis of the clauses in the legislation governing the above problems. Juridical legal research means that the research refers to the study of existing literature or of secondary data used, while normative research means the legal research aims to gain knowledge about the relationship between the normative regulations with other regulations and application in practice. In normative legal research at first, the secondary data are examined and then it will proceed to Cosmos primary data in the field or on the practice.⁶

Results and Discussion

Article 17 LPEML in conjunction with article 3 letter b. GR No. 43/2015 states that one of the professions determined to be a complainant and decided to have an obligation to give reports to CFTRA if there are suspicious financial transactions is a notary. On the other side, based on article 4 paragraph (2) in the third paragraph of LPN in conjunction with article 16 paragraph (1) letter f L No. 2/2014 it has also been de-

terminated that basically notaries are obliged to keep everything on the deed he made and all the information obtained to manufacture in accordance with the deed of oath/pledge of office. In this condition, the inconsistency is obvious, which does not give any legal certainty, let alone assurance for notaries in carrying out their duty that what they are doing is lawfully right.

Seeing this condition, in order that legal certainty is fulfilled, which later will give assurance and legal protection to the bearers of the profession who are bound to the official pledge but obliged to do reporting; it is necessary to determine what action should be taken by the profession bearers: reporting a suspicious financial transaction for the reason of subjecting to and obeying the legislation or not reporting because of keeping the official pledge. In order to decide this, it is necessary to do a juridical analysis of the condition which is fit to be suspected that there is a suspicious financial transaction, which legislation to be 'won' and which legislation to be disregarded. The juridical analysis to determine this will be done by looking at the purpose or reason for the articles to be determined in a law, particularly those which set the official pledge, protected interests, understanding the general and specific condition in a financial transaction, and later the principle will be used if there is a horizontal conflict related to the legislation.

The legislation is certainly made and determined with one particular purpose which is connected with the protection of a certain interest. LPN in conjunction with Law Number 2/2014 which arranges a notary's position in which there are specific articles arranging an official pledge is made and determined for the purpose of protecting every side's interests connected with the deed and not protecting public and society's interests.

On the other hand, the purpose of making and determining LPEML in conjunction with GR No. 43/2015 is not only for the parties involved in a financial transaction contained in a deed, but also for the wider-scoped purpose, namely for the sake of the society, nation, and country. In short, 'public interest' is defined as: the importance of the nation, country, and society which the government must realize and use maximally for the people's welfare.

In the global scope, the money laundering criminal act is considered more and more complex, crossing the juridical boundaries with more various modes; and regional and international cooperation is even required in handling this through bilateral or multilateral forums. This

is seen in the fifth paragraph of the general explanation of L PEML which says:

“...To anticipate this, Financial Action Task Force (FATF) on Money Laundering has issued an international standard which becomes the measurement for every country in preventing and eradicating money laundering criminal act and terrorism criminal act, which is known as Revised 40 Recommendations and 9 Special Recommendations (Revised 40 +9) FATF, which is on widening the reporting parties that cover jewel and jewelry/gold and motor vehicles. In preventing and eradicating money laundering criminal act, it is necessary to have regional and international cooperation through bilateral or multilateral forums so that the intensity of criminal acts resulting in or involving wealth in a great amount can be minimized.”

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Based on the fifth paragraph of the general explanation of L PEML, it is more clearly seen that the public interests meant is not only on the jurisdiction of a country but even wider across the country's jurisdiction.

In the condition where it is suspected that a suspicious financial transaction, the condition is no longer a general condition, but a specific one. What is meant by the specific condition is the condition where there is a suspicious financial transaction, in which the wealth used is suspected to come from crime. In this specific condition, a notary, based on Article 17 L PEML in conjunction with Article 3 letter b. GR No. 43/2015 is obliged to give reports to CFTRA. In other words, the suspicion of a financial transaction in which the wealth used is suspected to be the result of a criminal act is a specific condition.

In the analysis related to the general law (*legi generali*) and the specific law (*lex specialis*), it is found out that article 4 paragraph (2) in the third paragraph of L PN in conjunction with article 16 paragraph (1) letter f UU No. 2/2014 is a general law (*legi generali*). The reason is that in principle in a normal condition or general condition, the profession bearers who are bound to the official pledge must do the obligation. In the specific condition in relation to the suspicious financial transaction as the wealth used in the transaction comes from a criminal act, has been arranged in Article 17 L PEML in conjunction with article 3 letter b. GR No. 43/2015 as a specific law (*lex specialis*).

Samuel Meira Brasil³ Jr. as elaborated in Literature Review basically states that (Conflict of rules) is overcome by a principle of me-

ta-rules, such as by the principle as meta-rules such as *lex superior* (based on the general hierarchy of law system structure), *lex posterior* (based on the priority of the rule that is applied later), *lex specialis* (berdasarkan spesifikasi aturan), and exceptions. Because a principle is metanorm/rule, then a norm/rule cannot oppose a principle, and if this happens, a norm or a rule or an agreement that has been made (a contract) will be repealed.⁷

Consequently, in regard to the inconsistency of the arrangement of the official pledge as elaborated above can be overcome by the principle of *lex specialis derogat legi generali*, which means special rules derogate from general ones or special law repeals the general law, meaning that the specific law is applicable despite its opposition with the general law. The priority given in specific law can be considered right considering that the specific legislation is applied in certain conditions which may not exist if based on the general condition

Based on the legislation, in the perspective of the prevention and eradication of money laundering, LPEML has given legally to the parties that are obliged to give reports but are bound to the regulation concerning the official pledge. Article 29 LPEML states that:

“Unless there is an abuse of authority, a complainant, official and staff cannot be sued, both in a civil and criminal way, for the obligation of giving reports according to the law.”

This article gives a guarantee that if there is a complainant, official, and employee who give reports, they cannot be sued, in a civil or criminal way. Therefore, it can be comprehensible that the sanction which threatens a person who does the obligation of giving reports cannot be applied to him.

As a result, it can be certain that Article 322 paragraph (1) Criminal Code including the sanction which states:

“Any person who with deliberate intent reveals a secret that by any reason of either his present or earlier office or profession is obliged to keep secret shall be punished with a maximum imprisonment of nine months or a maximum fine of nine thousand rupiahs.”

is not applicable for profession bearers who do the obligation of giving reports and in a certain condition deliberately reveals a secret which they must keep because of the position.

In regard to the profession bearers that are given the obligation to give reports, in the perspective of a notary's position as one of the com-

plainants who are also obliged to report, they get legal protection as stated in Article 16 paragraph (1) letter f L No. 2/2014:

“In carrying out his job, a notary must: keep everything on the deed he made and all the information obtained to manufacture in accordance with the deed of oath/pledge of office, unless the statute otherwise provides.”

*Carrying Out
a Notary's
Official Pledge*

This article does oblige a notary to keep everything related to the deed he made, including all the information obtained in connection with the making of the deed. The purpose is none other than protecting all parties' interests which are related to the deed. However, at the end of the sentence, there is the clause "unless the statute otherwise provides". Based on the clause "unless the statute otherwise provides", it can be understood that if there is another law arranging the official pledge, but different from the material stated in article 16 paragraph (1) letter f Law No. 2/2014, which gives an obligation to carry out an official pledge, then the obligation to carry out the official pledge in the condition determined in the other law is not applicable. Moreover, what is meant by the sentence 'unless the statute otherwise provides' is the obligation to give reports that gois determined by Article 17 L PEML in conjunction with article 3 Government Regulation Number 43 of 2015 on the Complainant of the Prevention and Eradication of Money Laundering Criminal Act ('GR No. 43/2015').

Furthermore, article 28 L PEML states that the obligation of giving reports by the complainant is excluded from the regulation of keeping the official pledge that should be kept by the complainant. This article also gives legal protection to profession bearers who are obliged to give reports but also bound to their official pledge.

Conclusion

1. In the condition where there is a suspicious financial transaction, based on the principle of *lex specialis derogat legi generali*, Article 17 LPEML in conjunction with article 3 letter, GR No. 43/2015 as specific disregarding article 4 paragraph (2) the third paragraph of LPN in conjunction with article 16 paragraph (1) letter f Law No. 2/2014 general law.
2. Article 29 LPEML has given legal protection to complainants who report a suspicious financial transaction to CFTRA. In addition, based on the sentence "unless the statute otherwise provides", it can be understood that if there is another regulation which ar-

ranges an official pledge, but different from the material in article 16 paragraph (1) letter f Law No. 2/2014 which gives the obligation to do an official pledge, the obligation to keep a secret in the conditions determined in another law is repealed. Article 28 LPEML also firmly gives legal protection to the profession bearers who are bound to their official pledge but obliged to give reports.

Notes

- 1 Based on Article 1 number 2 Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Criminal Act, it is said that Center for Financial Transaction Reporting and Analysis which is later referred to as CFTRA is an independent institution formed to prevent and eradicate money laundering criminal act.
- 2 The definition of 'Notary' is contained in article 1 number 1 L PS No. 2/2014.
- 3 Samuel Meira Brasil Jr (2001), 'Rules and Principles in Legal Reasoning: A Study of Vagueness and Collins in Artificial Intelligence and Law,' Information & Communications Technology Law 10(1) <http://lp3madilindonesia.blogspot.co.id/2011/01/divinisi-penelitian-metode-dasar.html>
- 4 A'an Efendi, Freddy Poernomo, IG. NG Indra S. Ranuh, *Teori Hukum*, Jakarta: Sinar Grafika, 2016, pp. 167-168.
- 5 *Ibid.*, pp. 168.
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