



Apostille Convention: Notary Profession in Transnational Document Legalization

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Abstract. Issuance of an apostille certificate is a convenience and shortens the bureaucratic path given to the public to legalize documents to be used in digital transnational activities. The problem is that the legalization of documents that are apostille does not cover the truth of the contents of the documents which can lead to weak legal strength of documents as evidence. This study aims to analyze the issuance of an apostille certificate for notary documents that will be used by the public for transnational activities, as well as its impact on notaries as public officials. Method: this research is qualitative legal research with an analytical descriptive design. The results of the study show that there is an impact on the truthfulness of the contents of the apostille documents on their legal strength as evidence and notaries as public officials.

Keywords: Covid-19 · Apostille Certificate · Perfect Evidence

1 Introduction

Every country in the world cannot escape international conventions, especially conventions that provide convenience and protection for citizens in transnational activities, one of which is the Hague series of conventions that regulate civil relations between countries [1]. The ratification of countries on the conventions in question is very necessary, because in its development the relations that have occurred have expanded not only limited to civil relations of an administrative nature, for example marital relations, but so far have expanded to economic relations within the scope of transnational trade [2].

One of them The Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, this convention is better known as the Apostille Convention. This convention makes it easy to shorten the document authentication path that will be used by the public in transnational activities, so that will have an impact on the effectiveness and efficiency of society in transnational activities. Efforts to break the complicated and long bureaucratic chain made it easy for the public during the Covid-19 Pandemic, because the process was carried out online. In addition, this convention also opens space for easier investment and trade activities between world communities on a more private scale [3]. Global economic conditions have recently

experienced severe shocks caused by various factors that have led to various uncertainties. If it is exacerbated by administrative problems, it will have the potential to cause many countries to experience an economic downturn. Therefore, ease of authentication of various documents that support community activities in transnational relations is urgently needed. Specially to facilitate civil law relations between business actors from different countries, to prevent the world from economic stagnation which will have a bad impact on the world community in the end. Such as the food crisis, energy crisis and economic decline and even war [4].

As stipulated in the Apostille Convention, the categories of public documents that can be apostille include documents from institutions or officials who have a relationship with a country's judiciary, administrative documents, notarial deeds and official certificates attached to documents and signed by officials [5]. However, not all of the documents referred to can be strong evidence in court in the event of a dispute. Notary deed, for example, can also be in the form of letters or agreements or deed made privately. Thus, in relation to the contents of the document in question, it may contain things that are inappropriate and may even be fake.

Based on the description above, legal issues in the apostille process, in relation to the issuance of an apostille certificate, have the potential to cause legal problems in the event of a dispute at a later date, because the issuance of an apostille certificate only concerns authentication of signatures, stamps, seals and authority of persons and/or official who signs the document in question from the country of origin [6]. In another sense, the issuance of an apostille certificate is not related to the correctness of the contents of the document in question. Thus, the strength of the Notary document as proof of a perfect letter in the settlement of disputes cannot be realized. This is because private documents, private deed and private agreements cannot be controlled for the truth of their contents by a Notary. Previous research on the ease of legalization and authentication of public documents has been carried out, and some of them have even discussed the renewal of civil relations that occurred related to the documents in question. Even though there has been no research in the last 5 years on legal issues arising from notai deed, the truth of the contents of which is not the focus of the Apsotille Convention, so that the legal force of the said deed is very weak in the process of resolving disputes in transnational activities. Therefore, this research is a continuation of previous research that specifically discusses the responsibility of the notary profession for apostille documents [7]. Another study was conducted by Margaret E. Swain and Colin James Rogerson, regarding the authentication of public documents of cross-border surrogate mothers in 2020 [8]. So, this research aims to analyze the issuance of apostille certificates for notary documents that will be used by the public for transnational activities, as well as the impact on notaries as public officials.

2 Methods

This research is legal research, normative juridical, the type of research is qualitative where legal materials are sourced from secondary data in the form of laws and regulations, articles, journals, books, news, reports, and other related written references

traced through library research) and searches through online databases. The legal material obtained will be analyzed using the interpretation method, the discussion will be designed using an analytical descriptive model.

3 Results and Discussion

In the Indonesian context, ratification of this convention can be said to be too late, given the active participation of the Indonesian people in carrying out various legal relations in transnational activities. This is very reasonable, one of which is caused by the still weak bureaucratic support in Indonesia, especially related to the readiness to implement e-government. In addition, related to the purpose of issuing apostille certificates based on the Apostille Convention, it is intended that foreign documents that enter the convention participating countries or vice versa, foreign documents that are imported are no longer required to verify the originality of the documents (*acta proban sesse ipsa*). As for documents to be used abroad, it requires a guarantee of document originality through a legalization process. Documents that can be apostalized include public documents including Notary documents made in the territory of a participating country and will be used in other participating countries' territories. Issuance of an apostille certificate does not affect the acceptance of the evidentiary value, including the correctness of the contents of the document in question. The validity of the apostille is not limited by time unless otherwise stipulated in the receiving country. On the other hand, the Indonesian people in general are still familiar with documents made privately, especially with regard to deed of agreement which should have been legalized by a notary official in accordance with the applicable laws and regulations.

3.1 Status of Notary Documents Made Under Hand

The provisions in Article 1338 of the Civil Code are a form of recognition of the principle of freedom of contract in the realm of civil law. According to Prof. The subject word "all" in the article contains an explanation that there is a guarantee by law that the community is given the freedom to make any agreement as long as it is made legally [9]. Meanwhile, the terms of the validity of the agreement can be seen in Article 1320 which includes the agreement of the parties to bind themselves, being competent in conducting an engagement, the existence of certain agreed upon issues (object of the agreement), and things that are not legally prohibited.

Related to the legal provisions that are regulated, all forms of agreements and understandings that occur in community relations can be carried out as long as there is no legal prohibition. However, to give the power of the letter, deed or agreement, legalization by an authorized public official is required. The authorized public official in this case is a Notary Public unless otherwise stipulated by law [10].

A notary as a legal expert (jurist) in a country that adheres to a civil law system such as Indonesia is a public official authorized to make all kinds of authentic deeds in the realm of private law, as long as it is not regulated by law, because a notary is not the only public official who meant [11]. So related to this authority, notaries in the civil law

legal system also have the authority to legalize dates and signatures on letters, deeds and private agreements.

Role Notaries are very much needed in an effort to answer the needs of the community, especially as public officials who are generally authorized to make engagement deeds into authentic deeds based on Article 1 number (1) of Law no. 30 of 2004 concerning the Position of Notary as amended by Law no. 2 of 2014 concerning Amendments to Law no. 30 of 2004 concerning the Position of Notary. Especially related to the community's need for legal certainty and protection for every engagement that occurs [12].

Countries that adhere to the civil law legal system also place written evidence or documentary evidence as evidence in resolving disputes that occur in society. As regulated in Articles 1867 and 1868 of the Civil Code, notary deeds have perfect and coercive evidentiary powers. This legal provision explains that the notarial deed has the status of formal and material evidence and has an executorial nature in certain legal events [11].

For letters, deeds and agreements made privately to be used as documentary evidence or written evidence, they must go through a legalization process by an authorized official. As regulated in Article 1874, Article 1874 (a) and Article 1880 of the Civil Code. Even though there is no legal provision governing the obligation to report letters, deeds or agreements made privately.

Letters, deeds or agreements under the hand as documents of the parties that are made by the parties who bind themselves to the agreement. Therefore, both the format, content, place and before whom the agreement was made and the terms and conditions are not in accordance with the standard set by law. Especially the legal provisions governing standard standards for making authentic deeds. Thus, as a tool that can be used as evidence under the hand, it is meant to only apply and bind the parties and cannot be used as evidence in court in the dispute resolution process. Where one of the parties can deny his signature on the document in question. In another sense, one of the parties can deny his signature on the document in question [12].

So, it is often found that letters, deeds or agreements made privately are used by parties for certain interests, making it difficult to guarantee the correctness of the contents of the letters, deed or agreements privately referred to. The untruth of the contents in question is particularly regarding the date the document was made [10].

Proof through written evidence or documentary evidence in the judicial process which aims to obtain a judge's decision based on truth cannot work as it should, if it relies on documents made underhanded. According to Subekti, concrete proof is the process of convincing the judge about the truth of the arguments or the arguments are the truth that emerges in the dispute resolution process [13]. Meanwhile, according to Sudikno Mertokusumo, proof is a series of events that occurred historically, so juridically, proof is essentially an attempt to reason logically about why these events are considered true [14].

Several opinions regarding proof as described above show how important the process of proof is in resolving disputes. Especially related to the implications of letters, deeds and private agreements on the process of proving dispute resolution in the realm of private law.

Moreover, if the dispute requires proof of the correctness of documents used in transnational or cross- country relations. Therefore, the process of legalizing letters, deeds and private agreements has the potential to cause serious legal and moral consequences for a Notary. Especially when it is associated with the impact of disputes which can result in investment delays and their impact on the national economy and relations between countries.

3.2 Apostille: The Power of Documents in Dispute Resolution

After going through a long deliberation about the urgency of accession to the Apostille Convention, then through PP No. 2 of 2021 the government finally acceded to the Apostille Convention. Even so, there are still many legal issues that have not been properly harmonized. One of them is about which institution or ministry has the right and holds the authority as the competent authority. This is because the issuance is related to the existence of Non-Tax State Revenue (PNBP).

Legalization of documents in relation to the role and duties of a Notary essentially consists of documents containing the identities of the parties who have signed them with a statement that the document has been signed by an officer or authority who has been authorized to do so [12] or in another sense legalization can also be interpreted as validating the signature and date of the private deed which contains information stating that the Notary as a public official has witnessed the signing of the deed on the date stated in the deed.

Legalization according to the Apostille Convention is a formality for diplomatic and consular officials of the country of origin to certify the authenticity of the signature with the authority to sign the document, including if there is an identity seal or stamp affixed to the document. The effective and efficient application of the Apostille Convention has broken the long process of legalization and replaced it with a single formality.

On the one hand, the issuance of apostille certificates on Notary documents is very effective and efficient in terms of time and cost. However, it becomes ineffective because there are still gaps in legal issues that have the potential to arise if a dispute occurs in transnational relations. The occurrence of disputes in transnational relations is not only a potential but a natural thing that occurs in business relations. Therefore, in addition to the need for a more effective and efficient document legalization and/or authentication process, it is also necessary to stipulate standard standards through laws and regulations regarding the correctness of document contents and the strength of document evidence which is intended as one of the prerequisites for legalization to be processed for the issuance of apostille.

Based on the description above, bearing in mind that the issuance of an apostille does not cover the truth of the contents of the document, a more in-depth legal analysis is needed to close the gaps in letters, deeds or private agreements as an integral part of the Notary document. Because this loophole can be used temporarily by individuals to bind themselves with private agreements that are not required to be registered with a notary. Then the document is legalized or authenticated through the issuance of an apostille certificate.

A part from the potential losses that will arise, it will affect the parties themselves. Because of the weak strength of proof of letters, deeds or private agreements in the

dispute resolution process. However, the nature of the issuance of an apostille is oriented towards establishing relations with the international world, particularly in the investment sector which can boost economic growth which of course will have a major impact on improving people's welfare.

So in addition to the need for legislation that can accommodate the issuance of a postille certificate that is more effective and efficient through the digitalization process. Furthermore, the regulations needed are regulations that can close the gap in the apostille of Notary documents whose contents cannot be accounted for. At least notary documents in the form of private letters, whether deed or agreement, cannot be categorized as documents that can be apostille, as stipulated in the Apostille Convention that the authority to determine the authenticity of documents, in the sense that the destination country has the authority to determine that the documents have been falsified or altered, including if the said document is made through an illegal process [6].

Even though it seems simple, Indonesia's accession to the Apostille Convention is a gamble on legal sovereignty and an urgency for harmonization of laws and regulations related to technology, public information disclosure, the role of notaries in transnational business and investment relations and orderly administration in a state administration system that protects the entire Indonesian nation through legal certainty. Legal certainty can only be realized if all parties always try their best to maintain legal order and administrative order.

Issuance of an apostille certificate which does not affect the truth of the contents and the correctness of the process of making a document, will have implications for legal protection and legal certainty for people who have transnational business activities. In the event of a dispute, even if the destination country does not adhere to the civil law legal system which prioritizes written evidence. The parties cannot submit documents under their possession to fight for the truth through the process of proving before a judge.

4 Conclusion

Renewal of the notary document authentication system through the issuance of certificates on notary documents needs to be accompanied by the existence of rules regarding legal protection for notaries related to the correctness of the contents of documents that are misused. In addition, private letters and/or deeds used as transnational business documents require separate arrangements in order to have legal certainty and legal force as a perfect means of proof in transnational dispute resolution.

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