



The Implications of Certifying Documents With an Apostille System on the Duty to Maintain the Confidentiality of Deeds by Notaries

Clive Malvin Bayusuta¹ Putu Ayu Sriasih Wesna²

^{1,2} Faculty of Postgraduate, Warmadewa University, Denpasar, Bali, Indonesia
clive.malvin@gmail.com, ayuwesna@gmail.com

Abstract. The idea of the rule of law in a state emphasizes that state power should be exercised based on and bound by law, thereby safeguarding citizens' rights and preventing abuse of power. A state that upholds the rule of law is one in which protection, order, and certainty are based on justice and the truth. One form of legal protection for citizens is through the issuance of authentic deeds by Notaries, who are responsible for the authenticity and accuracy of these deeds. However, with the introduction While the Apostille Convention, which sought to streamline the process of approving foreign documents, there are difficulties in putting it into practice, particularly for notaries who are required to keep the genuine deeds they draft discreet. This essay will look at the difficulties Notaries have had putting the apostille system into practice and how it affects the idea of publicity when it comes to Notarial deeds and apostille-certified documents.

Keywords: Rule of law state, Apostille, Confidentiality of the authentic deeds, Principle of publicity.

1 Introduction

Indonesia, as a state governed by law, has its foundations in history, legal evolution, and national struggles. As a legal state, Indonesia upholds principles such as democracy, human rights, the separation of powers, and legal protection for all citizens. One of the ways the state ensures legal protection for its citizens is by issuing authentic deeds through public officials. Notaries, as public officials, hold the authority to draft these authentic deeds for any actions, agreements, or decisions that parties wish to formalize. They are also tasked with ensuring the deed's date is certain, safeguarding the original deed, and providing copies, excerpts, and originals, as long as their creation is not delegated or excluded by general regulations [1].

As globalization, mobility, and international exchanges continue to rise, there is an increasing need for individuals and legal entities to authenticate documents for use in foreign nations. Since each country operates under its own sovereignty, it closely examines foreign public documents that are intended for use within its borders, as well as its own public documents that are meant to be used abroad. This creates a significant demand for simplifying and streamlining the document legalization process, as the current process is often perceived as complex and time-consuming.

In response to these challenges, the member states of the International Law Conference convened in The Hague, Netherlands, in 1961, and established the Convention of October 5, 1961, which abolished the need for legalization of foreign public documents. This agreement, commonly known as the “Apostille Convention,” introduced the apostille system. On October 5, 2021, Indonesia officially became a participant in the Apostille Convention by enacting Presidential Regulation Number 2 of 2021, which ratified the convention. This action marked Indonesia’s formal accession to the treaty. However, a legal discrepancy exists between Presidential Regulation Number 2 of 2021 and Article 16, paragraph (1), letter f of Law Number 2 of 2014, which amended Law Number 30 of 2004 on the position of notaries, as well as Article 4, paragraph (2) of Law Number 30 of 2004. As a result, the government will need to comply with the provisions outlined by the Apostille Convention [2].

The following is how the research’s problem was formulated: What effects does this have on the duty of confidentiality of deeds by notaries, for documents that will be used abroad through Apostille? What legal protections exist for notaries regarding the duty to Apostille deeds to be used abroad?

2. Method

This study employs a type of normative legal research, which involves analyzing legal statutes to understand their implementation. Also referred to as doctrinal legal research, this approach focuses on studying legal texts and relevant literature. The primary aim of the research is to examine statutory regulations. In cases where legal provisions are unclear or difficult to interpret, they are thoroughly analyzed to determine their meaning and purpose. Normative legal research primarily deals with studying how positive legal norms are applied and enforced. It is concerned with written norms outlined in statutory regulations, and when these norms are unclear, the regulations themselves are scrutinized until the purpose and intent behind the legal norms become clear. This method highlights the importance of considering moral, ethical, and justice aspects in decision-making and policy formulation [3].

3. Result and Discussion

3.1 Implications Regarding the Duty of Confidentiality of Deeds by Notaries, for Documents to be Used Abroad through Apostille

Regarding Authentic Deeds.

Article 1 of the 1945 Constitution of the Republic of Indonesia clearly establishes that Indonesia is a legal state dedicated to maintaining clarity, order, and the protection of the law based on justice and truth. This concept of a legal state requires the use of clear and indisputable evidence to regulate legal actions within society, particularly regarding the rights and obligations of individuals as legal subjects. In accordance with Article 1868 of the Civil Code (KUHPerdota), authentic deeds are defined as “A deed that, in the form prescribed by law, is made by or in the presence of public officials

authorized for that purpose at the place where the deed is made.” Authentic deeds, by explicitly confirming rights and obligations, not only provide legal certainty but also serve to prevent disputes. As significant written evidence, they play an important role in legal processes. To ensure the efficient creation of authentic deeds, it is essential to have officials who are authorized to draft such documents. Notaries are one such public officials with the power to create authentic deeds, particularly when other public authorities do not have exclusive jurisdiction over legitimate deeds. Legal regulations require that authentic deeds be created to ensure certainty, order, and legal protection[4].

Professor Subekti explained that a deed is a document that is intentionally signed and created with the intention of serving as evidence in case of an incident. According to Article 1870 of the Civil Code, an authentic deed serves as the most reliable form of evidence, as it carries significant evidentiary weight due to its intrinsic nature, eliminating the need for additional proof. For judges, it is considered “mandatory evidence” (*Verplicht Bewijs*). Thus, anyone claiming that an authentic deed is false must prove its falsity. This is why authentic deeds have evidential power in both formal and substantive aspects.

3.2 The Publicizing Principle of Apostille Documents

Documents originating from foreign countries must undergo a legalization process before they can be used within a nation’s legal framework. According to Professor Peter Zablud, a document is considered reliable if it meets the criteria for authenticity and trustworthiness. To ensure these standards are met, a process known as document legalization must be followed. This process essentially involves verifying the document’s authenticity by confirming its legal validity and ensuring it is issued and signed by authorized individuals. In Indonesia, the legalization procedure can be intricate and costly. Due to these challenges, an alternative was introduced through the Convention on Apostille, which provides a simpler and more cost-effective way to validate public documents. The Apostille Convention aims to simplify the legalization of foreign public documents by substituting the complex diplomatic and consular procedures with more straightforward standards [5].

According to the applicable convention, an Apostille document itself is a type of a public record. According to Article 1 Paragraph 2 of the Ministry of Law and Human Rights Regulation of the Republic of Indonesia No. 6 of 2022, a document is defined as any written or printed document that is signed as evidence by an authorized official and/or has an official stamp or seal affixed to it. Thus, any written or printed document, in whatever format, can be regarded as public as long as it bears the signature of an authorized official as proof and is attached with an official stamp, seal, or other marking. To elaborate further, according to Stroud’s Judicial Dictionary, “Public Document. (1) A Public document is one made for the purpose of the public making use of it and one to which the public have access.... (2) The requirement for a public document to be admissible is that it should involve a public inquiry, be a public document, and be created by a public officer. I don’t believe that “PUBLIC” in this context refers to the entire world. For instance, an entry in the records of a manor is

considered ‘public’ in the sense that it pertains to those interested in the manor. Similarly, an entry in a corporate record, dealing with matters relevant to all members of the corporation, would also be deemed ‘public’ in that context. However, it must be a public document and created by a public officer. By ‘public document,’ I understand it to mean a document created for public use and reference. It is intended for situations where there is a judicial or quasi-judicial duty to inquire, such as when a bishop acts under writs from the Crown, which could be considered quasi-judicial. In that role, the bishop is serving the public interest, but the document itself must be created with the intention of being kept public, allowing those concerned to access it in the future.

Based on the aforementioned definitions, according to the researcher’s opinion, as long a document is in the form of: written or printed letters; bears an official stamp, signature, and/or seal; is created by an authorized official; and is accessible to the public. Only then can the document be interpreted as a public document.

3.3 Legal Protection for Notaries in Certification of Apostille Document

Authority and Responsibilities of Notaries as Public Officials

Notaries play a crucial role in social, national, and state life by contributing to the community’s protection and legal certainty. Notaries are tasked with anticipating potential future difficulties as early as possible, either by advising their clients or by creating authentic deeds. The scope of authority, duties, and prohibitions for notaries can be seen in The following is how Law No. 30 of 2004 Jo. Law No. 2 of 2014 describes their jurisdiction in Article 15:

If the authority to create such deeds is not delegated or excluded to other officials or individuals as prescribed by law, notaries have the responsibility to create authentic deeds for all actions, agreements, and decisions required by law or desired by the involved parties to be recorded in an authentic deed. This ensures the certainty of the deed’s creation date, guarantees its preservation, and allows for the provision of copies, excerpts, and extracts of the deed.[6] Moreover, notaries are authorized to: a. verify the authenticity of signatures and confirm the date of private letters by registering them in a designated book; b. record private letters in a special book; c. make copies of private letters in the form of excerpts that accurately reflect the content of the original letter; d. authenticate photocopies by comparing them to the original documents; e. offer legal advice on the creation of deeds; f. prepare deeds related to land matters; or g. create minutes of an auction.

(3) Beyond the powers specified in paragraphs (1) and (2), notaries also have supplementary authority, which is governed by legal limitations. These regulations regarding the notary’s powers are crucial to ensuring legal clarity, order, and protection in relation to authentic written documents.

Law No. 30 of 2004 Jo. Law No. 2 of 2014 states in Article 16 that notary functions are controlled in addition to the authorities:

“(1) In carrying out their responsibilities, notaries must: a. act with honesty, diligence, independence, impartiality, and protect the interests of the parties involved in legal transactions; b. draft deeds in the form of Deed Minutes and store them as part of the

Notary's Protocol; c. issue Grosse Deeds, Copies, or Extracts of Deeds based on the Deed Minutes; d. provide services in accordance with the provisions of this law, except when there is a legitimate reason to refuse; e. keep the details of the deeds they prepare and any related information confidential, as sworn under oath, unless required by law to disclose; f. bind the deeds they create into a single book within a month, containing no more than fifty deeds; if this limit is exceeded, they may bind them into multiple books, each marked with the Deed Minutes number, month, and year on the cover; g. maintain a record of protested deeds for unpaid or undelivered negotiable instruments; h. keep an organized list of deeds related to wills in chronological order every month; i. j. submit the list of protested deeds or the empty list regarding wills to the Central Will Registry within five days after the first week of the following month and record the submission date at the month's end; k. have a stamp or seal bearing the emblem of the Republic of Indonesia, along with their name, title, and location; l. read the deed aloud in the presence of the presenter, with at least two witnesses, and have it signed by the presenter, witnesses, and notary at that time; m. accept trainees as Notary candidates (2) Keeping the Deed Minutes as mentioned in point b of paragraph (1) is not required if the Notary issues the deed in its original form. (3) Original deeds referred to in point (2) include deeds such as: a. payment deeds for rent, interest, or pensions; b. cash payment offers; c. protest deeds for unpaid or undelivered negotiable instruments; d. power of attorney deeds; e. ownership certificate deeds; or f. other deeds under legal provisions. (4) Original deeds mentioned in point (2) can be made in multiple copies, signed simultaneously, in the same form and content, with the phrase "valid as one and each valid for all" written on each deed. (5) (6) (7) (8) (9) Original deeds involving a power of attorney with no specified recipient can only be made in one copy. The form and size of the stamp or seal mentioned in point (1) letter K are specified by the Ministerial Regulation. Reading the deed mentioned in point (1) letter l is not mandatory if the presenter requests the deed not be read, stating that they have read, understood, and agreed to its contents, provided this is noted at the end of the deed and each page of the Deed Minutes is initialed by the presenter, witnesses, and notary. If the conditions of point (1) letter l and point (7) are not fulfilled, the deed only holds evidentiary power as a private deed. The provisions in point (8) do not apply to the creation of will deeds. Due to clear regulations regarding the authority and duties of Notaries through the legislation, When performing their duties, notaries must always abide by these principles and make every effort to refrain from breaking or misusing them. New rules and regulations must frequently be carefully considered by notaries since they may conflict with their responsibilities and power. This is evident in the following: Article 2 (3) letter c, Jo. Minister of Law and Human Rights Regulation Number 6 of 2022 concerning the legalization service of apostille on public documents According to Article 1 Paragraph 2, papers issued by notaries are public records in the form of written or printed letters that are fastened with an official stamp and/or seal and/or signed as proof by authorized officials. However, taking public papers literally means that the general public has access to them, which could lead to legal ambiguities. While notaries are required to maintain the confidentiality of the contents of deeds, legalization service for public documents in Indonesia, stipulates that notarial documents must be accessible to the public to ensure services are provided in accordance with legal requirements. [7].

Principle of Notary Professionalism

While performing their responsibilities, notaries must consistently adhere to their professional ethics, as outlined in the Notary Code of Ethics, and demonstrate professionalism rooted in integrity, in accordance with legal standards. The Notary Code of Ethics specifies what is deemed acceptable and unacceptable behavior, as well as the consequences for violations. The creation of valid legal documents relies on individuals who are both morally and ethically responsible. Notaries are expected to act with autonomy, fairness, diligence, honesty, and reliability, ensuring the protection of the interests of all parties involved in legal transactions. A notary's independence must be aligned with the principle of legality to ensure they remain free from external pressures in their work. As a professional, a notary must adhere to the rules set by their specific professional organization. Additionally, the Notary/Professional Code of Ethics serves as a vital tool for social regulation, establishing standards for members of the profession and supporting the perspectives of senior members on established ethical principles, thereby preventing government or societal oversight through various regulatory bodies[8].

This principle of professionalism refers to the expected behavioural standards of a notary in performing their duties, where these guidelines are founded on the notary's authority and responsibilities in addition to their code of ethics. The power to produce genuine deeds and the duty to preserve the confidentiality of the contents of deeds are two of a notary public's most significant responsibilities. In line with their sworn duties or pledges, and except when stipulated by law, a notary is required to perform their responsibilities with honesty, care, independence, and impartiality, while safeguarding the interests of those involved in legal transactions. Additionally, they are obligated to maintain the confidentiality of all information related to the deeds, including any details gathered for their preparation.

The Right of the Notary to Refuse to Keep Document Confidentiality

The concept of the "Right to Refuse" refers to an individual's entitlement to decline or not follow orders or regulations issued by authorized individuals or entities with the power to impose such directives. A notary is a legally authorized public figure who is empowered to testify in court and enjoys legal protection. This right to refuse, also known as the "Right to Refuse," is a form of legal safeguard provided by the law. The law allows certain positions the right to refuse, commonly referred to as the right to reject or the right to seek an exemption from giving testimony. This refusal extends to all aspects of the documents they produce, not just the written content. The right to refuse is rooted in the notary's duty to uphold confidentiality regarding information obtained from their clients. This right is often invoked in situations where an individual believes that complying with an order would compromise their moral principles, ethics, or values.

According to Article 4, paragraph (1) of the Notary Position Law, a Notary is required to take an oath in accordance with their religion before the Minister or another authorized official to carry out their duties. The Notary Oath, as stated in paragraph (2),

declares: “I swear/pledge to remain loyal and obedient to the Republic of Indonesia, Pancasila, and the 1945 Constitution of the Republic of Indonesia, the Notary Position Law, and all other relevant laws and regulations. I vow to perform my duties with integrity, honesty, diligence, independence, and impartiality. I will uphold my conduct, behavior, and fulfill my responsibilities in accordance with the professional code of ethics, maintaining honor and dignity in my role as a notary. I will keep confidential all details of the deeds and information obtained while performing my duties. I affirm that I have never and will never offer or promise anything to anyone to secure my appointment to this position, either directly or indirectly, under any name or pretext.”

As outlined in the oath of office, a Notary is legally required to maintain confidentiality regarding all matters related to the deeds they prepare and any information gathered in connection with the creation of such deeds, as specified in Article 16, paragraph (1), letter e. The explanation of this article emphasizes that the primary aim of preserving confidentiality concerning the deed and related documents is to protect the interests of all parties involved. Consequently, under these provisions, a Notary may only disclose the contents of a deed to third parties who are not directly involved if required by law. It is governed by Article 170 paragraph (1) of the Criminal Procedure Code (KUHAP), Article 1909 paragraph (2) of the Civil Code (KUHPerdata), and Article 322 paragraph (1) of the Criminal Procedure Law, Civil Law, and Criminal Law.

the Criminal Code (KUHP) respectively, which state:

Article 170 paragraph (1) KUHAP:

“Individuals who are required to maintain confidentiality due to their profession, honor, rank, or role, have the right to be excused from the duty of testifying as witnesses about information entrusted to them.”

Article 1909 paragraph (2) KUHPerdata:

“Anyone who, due to their role, occupation, or responsibility, is legally obligated to maintain confidentiality, but only regarding the matters entrusted to them in that capacity.”

Under criminal procedure law, an individual can be designated as an expert witness, provided they possess relevant knowledge and expertise on the matter. In the event that a notary violates their confidentiality duties, they may face criminal penalties as outlined in Article 322 of the Criminal Code, which stipulates, “Anyone who knowingly discloses confidential information that they are bound to keep due to their position or profession, whether current or former, will be subject to imprisonment for up to 9 months or a fine of up to Rp. 600.”

Generally, a Notary has the authority to refuse or exercise their “Right to Refuse” in order to protect the confidentiality of the documents they notarize, based on the relevant legal provisions. However, this right may be overridden under specific circumstances, provided that the law permits it. This is in line with Article 66, Paragraph 1, Letters A and B of The Notary Position Law, which outlines the conditions. [9]:

To support the judicial process, Investigators, Prosecutors, or Judges, with the approval of the Notary Honorary Board, are authorized to: a. Make copies of the Deed’s Minuta and/or any documents attached to the Deed’s Minuta or the Notary’s Protocol in storage, and b. Call the Notary to testify regarding the deeds created or the Notary’s Protocol in storage.

Additionally, the right to refuse can be overridden by the Anti-Corruption Law and the Tax Court Law. In this context, a Notary cannot face criminal charges under Article 322 of the Criminal Code for violating their confidentiality duty, nor any penalties related to such breaches. This is because Article 50 of the Criminal Code stipulates: “Anyone who acts to comply with legal provisions shall not be punished.” This provision justifies the actions of the Notary, excusing criminal acts of disclosing confidential information entrusted by parties to the Notary due to valid reasons. [10].

4. Conclusion

1. According to Indonesian legal provisions, a notary’s duty to maintain the confidentiality of deeds remains in effect, even when the document is intended for international use and receives an Apostille. This is because an Apostille serves only as a process of legalization, enhancing the document’s validity for foreign use, but it does not alter the obligation of confidentiality. The notary is still bound, unless stated otherwise by law, to protect the confidentiality of all information related to the deeds they prepare, as well as any information gathered during the deed’s creation. This obligation is in accordance with their oath of office, the Notary’s code of ethics, and Article 16(1)(e) of Law No. 30 of 2004, as amended by Law No. 2 of 2014. Although documents issued by a notary are considered public documents under the Indonesian Minister of Law and Human Rights Regulation No. 6 of 2022 on apostille legalization of public documents, the researcher argues that the term “public document” refers to documents that are publicly accessible, particularly notarial documents. This is because, as stipulated in Article 16(1)(e) of Law No. 30 of 2004, as amended by Law No. 2 of 2014, and the principles outlined in the Notary’s code of ethics, every deed executed by a notary and all information gathered for its creation must remain confidential and not be disclosed to the public.
2. Regarding Notaries’ legal protection regarding the obligation to Apostille deeds to be used abroad, Notaries must be careful in submitting documents and deeds intended for Apostille. This is because Apostille documents are considered public documents, which the general public has access to. However, in accordance with their oath or vow of office, Notaries still have a duty to maintain confidentiality regarding all matters pertaining to the deeds they make and any information collected for the preparation of deeds, except there are later legal regulations that override or provide legal protection for Notaries. Until now, there are no further or specific regulations that can override the Notaries’ obligation to maintain confidentiality regarding all issues pertaining to the deeds they make and the data gathered in accordance with their oath or office pledge. Therefore, the protection for Notaries is limited to the extent of the authority and obligations of Notaries as already regulated in the legal framework. For Notaries who wish to apply for Apostille, it is advised not to include documents or deeds that are confidential, especially if such documents or deeds would harm the parties mentioned in them if the data were accessible to the public

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