

# Indonesian Notary and Vienna Convention on Consular Relations 1963: the Issues and Challenges

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## Abstract

One of the main authorities of notary public is to make or issue authentic notarial deed for anyone or any party who needs it. While in Vienna Convention on Consular Relations 1963 it is stipulated that the consular functions, inter alia, is acting as a notary. This provision universally applies to any country's representative (embassy or consulate) overseas, particularly to its consular department. Meanwhile, Indonesia has ratified the Convention into the Law No. 1 of 1982. However, Indonesian representatives (c.q. consular department of the Embassy or Consulate) so far are not authorized to make authentic notarial deed as performed by notary public in Indonesia. This situation leads to some problems for certain Indonesian citizen or corporate who is residing abroad and need an authentic notarial deed from Indonesian Embassy or Consulate. The Indonesian citizen or corporate overseas who needs an authentic notarial deed, they must go to a notary public in Indonesia, which takes time and costly. This study is conducted based on the observation on some Indonesian representatives overseas, as well as on notary offices of Indonesia. Literatures and scientific studies from Indonesia and overseas, as well as interviews with high-rank officials of the Ministry of Foreign Affairs of Indonesia, and diplomats from Indonesian representatives abroad are also used and conducted to fulfill the objective comprehensiveness of this study. To overcome the problem, therefore, this article provides some suggestions that Indonesian government would authorize Indonesian representative (c.q. consular department of the Embassy or Consulate) abroad to make or issue authentic notarial deed. This is in order to serve any Indonesian citizen or anyone overseas who needs the notarial service from the Indonesian representative abroad as mandated by Vienna Convention on Consular Relations 1963.

## Keywords

Notary, Indonesian Notary, Indonesian Notary Law, Vienna Convention on Consular Relations 1963, Notarial Service.

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## INTRODUCTION

Notarial deed is authentic deed that is "made by" or "made before" a notary according to the form and procedure stipulated by the law. While an authentic deed is a deed made in a form

determined by law by or in the presence of a public official who is authorized to do so at the place where the deed was made. Meanwhile, Tobing and Voors, stated that the notary public is a public official who performs part of government's duties in notary.

Indonesian Notary Law No. 30 of 2004 provides that one of the notary public authority is to make authentic notarial deed. In article 1 (1) it is mentioned that the notary is a public official authorized of making an authentic notarial deed and other authorities in accordance of the law. Article 15 also mentions that one of the main functions of the notary public is to make an authentic notarial deed.

Indonesian Law No. 37 of 1999 on Foreign Relations article 24 (1) mentions : Indonesian representative abroad (i.e. the Indonesian Embassy / Consulate) is obliged to record and make a certificate or deed of birth, marriage, divorce and death of the citizen of the Republic of Indonesia and perform other duties of consular function in the area of its accreditation.

While Ministerial Decree of Minister of Foreign Affairs of the Republic of Indonesia No. SK.06 / A / OT / VI / 2004/01 Year 2004 which is an elaboration of Law No. 37 of 1999, article 18 says: "Diplomatic and Consular Officers carrying out consular functions have the duties of notary, judicial and consular services as well as the protection of Indonesian citizens and Indonesian Corporate in the receiving State".

Of the above regulations, the notary public and consular official both carry out governmental duties in the area of notary. Notary public carrying out their duties in the country (Indonesia). While the consular officer performs the function of notary at the Indonesian Representative abroad.

Meanwhile, Vienna Convention on Consular Relations chapter 1 article 5 (f) states that one of the consular functions is: "acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the Receiving State".

This provision universally applies to any country's representative overseas.

However, in its implementation, so far the consular function of the Indonesian Representative abroad is not fully authorized to make an authentic notarial deed. Therefore, Indonesian citizens / corporate overseas who require the services of authentic notarial deed cannot obtain the service from the Indonesian Representative abroad. To be able to obtain authentic notarial deed, they must go to a notary public in Indonesia. As a result, it causes several problems for certain Indonesian citizen or corporate who is residing abroad and need an authentic notarial deed from Indonesian Embassy or Consulate. The Indonesian citizen or corporate overseas who needs an authentic notarial deed, they must go to a notary public in Indonesia, which takes time and costly.

In line with that, this article discusses why consular officials are not authorized to make an authentic notarial deed, what factors are the constraints, etc. It also discusses how the consular official at the Indonesian representative abroad will be authorized to issue authentic notarial deed to Indonesian citizen and or corporate of Indonesia overseas who needs the service from Indonesian representative abroad. Therefore, they do not have to go to a notary public in Indonesia.

## NOTARY IN INDONESIA

Notary in Indonesia dated back to the 17th century when Oost Indie Compagnie (Dutch East Indies company) entered Indonesia and was using notary services in its activities. It was noted that the first notary who was installed in the Dutch East Indies was Melchior Kerchem on

August 27, 1621 who also served as the Secretary of College van Schepenen (sort of court for private business) in Jacatra which later became Batavia (now Jakarta). He was assigned to be a notary for compiling the acts and agreements from civil society. However, Melchior Kerchem served only for a few months (August 27 to November 12, 1620).

Basically the notary at that time did not have the freedom to carry out his duties as they were employees of Oost Indie Compagnie. In 1632 the Governor General issued a regulation which contain provisions: notaries, secretaries and other officials were prohibited in making a deed of transport, trading, wills and others, if not approved by Governor-General and Raad van Indie. The regulation, however, was not fully complied with by the notary public.

Meanwhile, the number of notaries in the Dutch East Indies continued to grow, but still work around the area of Batavia. In 1650 the number of notaries became 2 persons, increasing in 1654 to 3 persons and in 1751 to 5 persons. After growing to 5, it was decided that 4 notary publics worked in the city of Batavia and another one outside Batavia. Since 1822, the notary in the Dutch East Indies has been regulated only by two decrees that regulated in details i.e the decree of 1625 and 1765. One of the provisions in the regulation is the prohibition of Commissioners from Raad van Justitie (Court Council) in Batavia stipulated in the regulation of 1765, that in inspecting the protocols of the notaries did not conduct further examination of the deed of will and other deeds of the notary. They should also keep the sworn secretaries or employees to assist, but not to do the inspection.

Although in the British government (1795-1821), old regulations in notary remained in effect with no change until the end of British rule in Indonesia in 1822. In 1822 the Dutch East Indies government issued Instruktie voor de notarissen in Indonesie (Instruction for the Notary in Indonesia) Stbl. No. 11, comprising of 34 Articles which are the codification of the previous regulations. In Article 1 it is regulating on the limitation of duties and powers of a notary. This can be seen as the first step in regulating notary as the institution in Indonesia which included: notary is a public official who has to know all the applicable laws, called and appointed to make deed of contract with the intention to give it power and legalization, to set and confirm the date, to save the original deed and or issue the grosse deed. Also, to ensure that the copy is valid and true.

The notary in the colonialism era continued to grow with some regulations issued by the Dutch East Indies government. The last regulation issued by the Dutch East Indies government and then remain in force after Indonesia's independent is the Notaris Reglement (Notary Regulation) Stbld. 1860 No. 3. The regulation imposed by the Dutch East Indies government as of 1 July 1860 and regulated on notary (Notary Reglement) was later translated into Indonesian language and known as the Notary Regulation (Peraturan Jabatan Notaris/PJN). In general, Notary Regulation consists of provisions on governing notary working practices, provision on governing the deed, minuta (the original deed), copy and the records book (repertorium), on controlling for notarial works and their acts, and provision of notary protocols (provision on storage, the transfer original deeds (minutas) and the record books in case the notary public died, deposed or moved).

Since the Dutch government issued the Notary Reglement / Stbl. 1860 No.3 (which later became the Notary Regulation) and came into force on 1 July 1860, the notarial regulations of notary in Dutch East Indies (later became Indonesia) are set out in several acts such as: Ordonantie 16 September 1931 on Honorarium of notary, Notary Regulation as amended in the State Gazette of the year 1945 Number 101, Government Decree No. 11 of 1949 on Oath / Appointment of Notary and Law No. 33 of 1954 regarding the Notary Representative and Temporary Notary Representative.

Although Indonesia was independent in 1945, some of the old notary regulations of the Dutch East Indies government including the Notary Regulation (PJN) were still in force. The Notary Regulation (PJN) and the subsequent regulations on the notary are still in use as referenced on the notary regulation until the Indonesian government issued a law of Indonesian Notary which is now known as the Law No. 30 of 2004 (Notary Law). Ten years after the entry into force of Notary Law, several articles were amended with the enactment of Law No. 2 of 2014 which has taken place until now.

## INDONESIAN NOTARY AND VIENNA CONVENTION ON CONSULAR RELATIONS 1963

Vienna Convention on Consular Relations 1963 is a long-standing work of the United Nations and the International Law Commission in preparing articles draft as the basis of the Convention. After passing through meetings and discussions, Vienna Convention 1963, was finally accepted and universally agreed as a benchmark in the practice of consular relations on April 22, 1963, signed on April 24, 1963 and stipulated effective as of March 19, 1967. Up to 2016, Vienna Convention on Consular Relations 1963 has been ratified by 179 countries. Indonesia became a contracting state of the Convention on June 4, 1982 and has ratified into Law No. 1 of 1982.

The Vienna Convention on Consular Relations 1963 consists of 5 Chapters and 79 Articles which generally outlines: Chapter 1, Consular Relations In General; Chapter 2, Facilities, Privileges And Immunities Relating To Consular Posts, Career Consular Officers And Other Members Of A Consular Post; Chapter 3, Regime Relating To Honorary Consular Offices and Consular Offices; Chapter 4, General Provisions; and Chapter 5, Final Provisions.

As previously mentioned, notary functions internationally regulated in the Vienna Convention on Consular Relation 1963. In Article 5 (f) of consular functions it is stated that one of consular functions is, *inter alia*, acting as a notary. On this basis, then the consular section of the Embassy and the Consulate General of any country, in one of its functions provides notary service. As for Indonesia, this is stipulated in Law No. 37 of 1999. It is also specifically mentioned in the Ministerial Decree of Minister of Foreign Affairs No.SK.06 / A / OT / VI / 2004/01 Year 2004 Articles 18 and 19.

In Article 19 (b) of Law No. 37 of 1999 on Foreign Relations says that Indonesian Representatives abroad are obliged:

"To provide shelter, protection, and legal assistance to citizens and corporates of Indonesia abroad, in accordance with national and international law".

Subsequently in Article 24 of the same Law mentioned:

"(1) The Indonesian Representatives are obliged to record and make certificate of birth, marriage, divorce and death of the citizen of the Republic of Indonesia and perform other consular duties in the area of its accreditation;

(2) In the case of marriage and divorce, the recording and making of a certificate shall only be granted if the marriage and divorce have been done in accordance with the local law where the representative of the Republic of Indonesia is located and not contrary to the laws of the Republic of Indonesia ".

Article 19 and Article 24 of Law on Foreign Relations, clearly says that the representatives of the Republic of Indonesia abroad is obliged to provide shelter, protection, and legal assistance for citizens and Indonesian corporate abroad. Nevertheless, the articles implicitly implies that the representation of the Republic of Indonesia is empowered to implement legal aid or legal

services (including notary service) for the Indonesian citizen and / or Indonesian corporate overseas which requires kenotarians services.

As for the elaboration of the provisions of the Law on Foreign Relations, the Ministerial Decree of the Minister of Foreign Affairs of Indonesia No. SK.06 / A / OT / VI / 2004/01 Year 2004 Article 18 says:

"Diplomatic and Consular Officers carrying out consular functions have the duties of notary service, judicial and consular services as well as the protection of Indonesian citizens and Indonesian Corporate in the receiving State".

In Article 19 (g) it is also mentioned that Diplomatic and Consular officers as referred to in Article 18 shall carry out functions;

"Implementation of the notary and civil registrar comprises the legalization of national document to be used in the receiving State and vice versa, recording marriages and issuing the Certificate of Marriage, registration of divorce, issuance of birth certificate, the validity of certificate of adoption, certificate of death, and the presentation of court documents to the respective parties ".

Therefore, as mentioned in articles 18 and 19 above, the consular service and in particular notary service of the Indonesian Representative should be in line with the notary function specified in Law No. 30 of 2004 (Notary Law) and the Vienna Convention on Consular Relations 1963, i.e. to give full authority over the issuance of authentic notarial deed to Indonesian citizen and corporate overseas.

## **IMPLEMENTATION OF NOTARY FUNCTIONS AT INDONESIAN REPRESENTATIVE ABROAD**

The implementation of Indonesian notary function abroad is stipulated in the Ministerial Decree of Minister of Foreign Affairs No. SK.06 / A / OT / VI / 2004/01 Year 2004. Article 18 states that the consular function has a duty of notary service. On the other hand, the Vienna Convention on Consular Relations 1963 Chapter 1 of Article 5 (f) says that one the consular functions is acting as notary. This means that the stipulation of "acting as notary" applies universally to any country's representative (Embassy or Consulate) overseas. The provision set forth in the Ministerial Decree of the Minister of Foreign Affairs No. SK.06 / A / OT / VI / 2004/01 Year 2004 article 18, certainly refers to what is set out in Vienna Convention 1963 in providing notary service to Indonesian citizen or Indonesian corporate abroad. As far as the notary service is concerned, it refers to Notary Law No. 30 of 2004 as well.

Article 5 (f) Vienna Convention on Consular Relations 1963 which has been ratified by Law No. 1 of 1982, says that one of consular functions:

"Acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the Receiving State;

The words "acting as notary ..." above, expressly says that one of consular functions is to act as notary in a sense that such action does not contravene the laws and regulations of the receiving State.

It has been said earlier that the Diplomatic and Consular officers carrying out consular functions have the duty of notary service, judiciary and consular services as well as the protection of Indonesian citizen and corporate in the receiving state. In the notary service, the deeds commonly served by the consular function at the Indonesian Representative abroad are:

1. Marriage Deed: is a proof of the truth issued by a competent office which describes the marriage between two persons as husband and wife;
2. Birth Certificate: is a proof of a true birth certificate issued by a competent official which describes the name, place, date and year of the child's birth and the name of the child's parents of the lawful marriage;
3. The Death Certificate: is a proof of evidence issued by a competent authority stating the evidence of a person's death;
4. Divorce Certificate: is a proof of the truth certificate issued by a competent officer which explains the divorce of a two person's marriage.

The consular services provided in relating with the deed are: a. providing assistance in translation and authentication; b. Make a statement of the truth from the relevant acts; c. Amendment in respective document as a result of changes of the deed.

Other duties of the consular function relating to the notary service is legalization. It is known that legalization is to make lawful; to authorize or justify by legal sanction. In this case, it is the act of official authentication on a document by Indonesian authorities and / or notary office. Public document which are usually legalized by the consular functions of Indonesian representative overseas are:

- a. Birth certificate;
- b. The death certificate;
- c. Statement / notarial deed;
- d. Marriage permit Certificate;
- e. Degree / diploma;
- f. Ship Certificate;
- g. Driving License;
- h. Medical certificate;
- i. Power of Attorney;
- j. Certificate of Good Behavior;
- k. Certificate of Origin;
- l. User certificate;
- m. Business contracts between Indonesian companies and local foreign companies;
- n. Other documents that require legalization of the Indonesian Representatives.

The legalization functions performed by consular officials and notary public in Indonesia, is basically similar. Both essentially legalizing the signature verification (authenticating), set the date of the informal deed and register in a special notary book (waarmerking or registration) and confirmation that the copy matches of the original letter.

## THE ISSUES AND CHALLENGES

Previously it was discussed that a notary public acquired the authority directly from the government. As a public official, notary public performs part of the government's authority, especially in the area of notary service. And so, is the consular officers, as Indonesian representative abroad is a formal institution representing the government of Indonesia.

The duties and powers of the notary itself are reflected in Article 15 of Law No. 30 of 2004 mentioning; First, the notary has the authority to make an authentic deed, agreements, and resolutions required by law and or which are required by respective parties to be stated in the

deed, to certify the date of the deed, to keep deed, to make and keep grosses deed, to keep the original copies of deeds, all of which were not assigned or exempted to another official or other person prescribed by law. Second, notaries have the power: a. to authenticate or legalize the signature and set the certain date of the informal deed by registering in a specific book; b. To register informal deed by registering in a special book; c. To make a copy of the original informal deed containing the description as written and depicted in the deed; d. To authenticate or legalize that the duplicate matches with the original deed; e. To provide legal counsel regarding the making of the deed; f. to make deed related with land-property; g. To make an auction minutes. Third, other than the powers referred to in paragraph (1) and paragraph (2), notaries have other powers governed by the laws and regulations. "

On the other hand, with regard to the legalization, Indonesian Representatives abroad serve legalization of public document to be used in Indonesia or to any document required by Indonesian citizen or corporate abroad. Document issued by local institution abroad, before being legalized by consular official at an Indonesian Representative, must first be legalized by the local Ministry of Foreign Affairs. The legalization made by the Indonesian Representative is only a valid confirmation that the signature of official of local Ministry of Foreign Affairs, whose signature specimen is previously sent to the respective Indonesian representative. Indonesian Representative is absolutely not responsible for the content of the document. Nevertheless, consular function of the Indonesian Representative also performs authority in issuing some deeds, such as: birth certificate (deed), marriage certificate (deed), death certificate (deed).

To some extent, it would seemingly appear that the implementation of notarial service at the Indonesian representative abroad has been exercised by the consular function accordingly. However, when it is examined deeply there are some issues that still need to be improved or reformed in connection with the authority of consular function at the Indonesia representative abroad. Particularly, in enhancing notary service to Indonesian citizen or corporate abroad who needs the authentic notarial deed. This is in a sense that the Indonesian representative abroad is the only overseas Indonesian government institution that has the power to represent formally either in conjunction with the government of the receiving state or other country's representative. Or, with regard to the consular function, in providing notarial service to Indonesian citizen and corporate overseas.

The problem happens when a citizen and / or a corporate of Indonesia overseas needs an authentic notarial deed. He or she has to go far to a notary public in Indonesia only to obtain a notarial deed. It is certainly not only takes time but also costly e.g. for the cost of travel, etc. Not to mention the other risks that certain Indonesian citizen must face in the country where they are residing. Which, due to some reasons, the person probably cannot return to the country where he and his family live because of their immigration status. In this matter, until now the consular officials at the Indonesian representative abroad are not fully authorized to make or issue authentic notarial deed as performed by a notary public in Indonesia. This is not only ineffective but also impractical either to an Indonesian citizen or to an Indonesian corporate.

With regard to legalization of public document of an Indonesian citizen or corporate overseas to a notary public in Indonesia, Sudargo Gautama, among others, states that it is not practical because it takes time and costly. " The things mentioned by Sudargo Gautama concerning inefficiency and impracticality are certainly no need to happen if consular official at the Indonesian representatives abroad are also fully authorized to make authentic notarial deed or legalization deed. It is considered that the authority of the consular official acting as a notary is

indeed stipulated not only in Vienna Convention on Consular Relations of 1963 but also (already ratified) in Law No. 1 of 1982. It should, therefore, a citizen or a corporate of Indonesia overseas who needs an authentic notarial deed may directly obtain the service from Indonesian representative abroad, without having to go to a notary public in Indonesia.

In comparison, it could be noted that the implementation of consular functions at the Italian embassy in Washington DC, which also applies Civil Law system as Indonesia, includes:

- a. Power of Attorney : A document authorizing one to act on behalf of another person to take the necessary action to achieve a particular purpose (e.g. selling, buying, managing, donating, receiving donations, establishing or closing a company, requesting a wedding ban, etc.);
- b. Will and Testament: One of the activities of the notary functions is preparing a document of Last Will and Testament to Italian citizen who lives overseas. The Will and Testament, in Indonesia, is an authentic notarial deed which is a statement of a person made before a notary public witnessed by to persons;
- c. Public Act: Legal acts for which the law foresees a public act. It means a lawful act where the law, in anticipating at any time, requires a public act.
- d. Certificate of Authentication: The Certificate of Authentication is made by the consular official who is also performed by a notary as kind of legalization.

Consular function which includes notarial service provided by the Italian embassy above, shows that the issuance of authentic notarial deed is one of its consular function. According to Black's Law Dictionary, public act is also a public law. And so in making the Will and Testament deed. Therefore, the consular function of a notary in making of authentic notarial deed as referred to in Article 5 of the Vienna Convention on Consular Relations 1963 is practically performed by the Italian embassy in Washington DC. In contrary, although in Article 5 (f) of the Vienna Convention 1963 it is already stipulated and has also been ratified by the Government of Indonesia in Law No. 1 of 1982, in reality the Indonesian representative abroad ( cq. consular official) is not authorized to make authentic notarial deed.

## CONCLUSION

Under Indonesian Law of Notary No. 30 of 2004, one of the main functions of notary public is to make authentic notarial deed. Meanwhile, according to Vienna Convention on Consular Relations 1963, one of consular functions is acting as a notary. Therefore, the Indonesian representative's abroad (cq consular function) supposedly have the authority to make authentic notarial deed for Indonesian citizens or corporate residing overseas. Likewise, it should also apply for the need of foreigner or foreign corporations who have business with Indonesian corporate or for any of their needs in Indonesia. In reality, so far Indonesian representatives abroad are not authorized to make the authentic notarial deed. The deed which has been performed by Indonesian representative abroad so far is only limited on the issuance of birth certificate, marriage deed and death certificate. Birth certificate, marriage deed and the death certificate are basically not a notarial deed, but rather a civil registrar certificate.

Therefore, for the purpose of Indonesian citizen and corporate need overseas, the representative of Indonesia abroad cq. Consular function should immediately be authorized to make the authentic notarial deed as performed by notary public in Indonesia. It is not only to facilitate the need of Indonesian citizens and corporate residing overseas. But also, no less importantly, is to serve foreign individual or foreign corporate who needs the Indonesian notarial service abroad

for their business dealing with their Indonesian corporate partner or for the purpose of investing in Indonesia.

Indonesian Representative is the only Indonesian government institution abroad that has the authority to represent the Government of Indonesia both formally in relation with the government of the receiving country or other country's representative. Its duties, inter alia, is to give notary service for Indonesian citizen and corporate abroad. In order to enhance its function, it is imperative that Indonesian representatives shall be authorized to issue authentic notarial deed. This can be done, among others, by amendment of the Notary Law No. 30 of 2004 or Law of Foreign Relations No. 37 of 1999. If the revisions or amendments of the two laws through the parliament will require a long period of time, instead a relatively faster method can be taken. For instance, i.e. to create a Joint Ministerial Decree of the Minister of Foreign Affairs and the Minister of Law and Human Rights of Indonesia.

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