

**Legal Consequences And Notary Responsibilities For The Hawalah
Contract Deed That Does Not Meet The Provisions Of Sharia Law
(Study of Decision Number 1922/Pdt.G./2020/PA.Btm)**

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Abstract

Cessie or what is known as Hawalah in Islamic financial institutions is a debt transfer agreement that is widely used by banks because it is a way to transfer the right to collect to another party and/or a third party to guarantee credit facilities or funds provided by the bank. In making a Deed of Cessie or Hawalah Deed, a Notary must pay attention to the provisions of positive law and Islamic law. This is related to legal certainty regarding the validity of the deed and its harmony with Islamic law. The research method used in this study is the doctrinal research method. The data used in this study are secondary data obtained from document studies and strengthened by case analysis. The purpose of this study is to understand the legal consequences of a Hawalah Deed that does not meet the applicable legal provisions and the notary's responsibility for a Hawalah Deed that is canceled by a religious court. Based on the study's result, a Hawalah Deed that does not meet the provisions of the law can be canceled or null and void by law. A Hawalah Deed that is canceled by the court makes the deed no longer have perfect evidentiary power. The notary who makes the deed can be sued for compensation, costs and interest in the aggrieved party.

I. Introduction

An authentic deed made by a Notary can be used as a guideline by the parties if a problem occurs so that in making an authentic deed the Notary must carry it out by following the applicable legal provisions so that the deed he makes has legal certainty. In making a *Cessie* Deed or *Hawalah* Deed, the Notary must pay attention to the provisions of positive law and Islamic law. This is related to legal certainty regarding the deed's validity and harmony with Islamic law.

The needs of life that are increasing along with the times make people need more funds to meet their needs. These funds are usually used to run business activities to meet the survival of the community. To expand their business, the community needs a lot of funds, so that to obtain these funds the community can borrow from financial institutions by way of credit/financing. There are 2 (two) types of financial institutions in Indonesia, namely bank and non-bank financial institutions. The operational activities of financial institutions are divided into conventional financial institutions and Islamic financial institutions. Islamic financial institutions are financial institutions that run their business based on Islamic law and comply with sharia principles.

Sharia principles are principles of Islamic law in the form of fatwas issued by institutions that have the authority to determine fatwas in the field of sharia used in banking business activities.¹ In providing financing facilities to customers, Islamic financial institutions must comply with these sharia principles. In sharia principles, Islamic financial institutions must avoid usury, gharar (uncertainty), and masyir (gambling) which are prohibited and explained in the Al-Quran and Hadith when providing financing facilities to customers.² In providing financing facilities, financial institutions require collateral as a guarantee that the debtor will return the funds that have been given. Collateral is something that can be measured in money and submitted by the debtor to the creditor so that the creditor feels confident and believes that the debtor will carry out his obligation to pay the funds he has received by the agreement that has been made. This guarantee is needed when the debtor is in default, so that the creditor can carry out the collateral auction process or through *cessie* by what has been agreed in the agreement.

Cessie according to Subekti is the transfer of receivables on behalf of the old creditor by selling the receivables to the new creditor, but the legal relationship of the debt and credit does not end but is transferred to the new creditor.³ The Civil Code does not recognize the term *cessie*, but *cessie* is known as the transfer of receivables. Article 613 of the Civil Code states that the transfer of receivables in the name and other intangible property can be done by making an authentic deed or deed under hand and delegating the rights to the property to another party. *Cessie* deed is valid if the debtor has been notified

¹Undang-Undang Tentang Perbankan Syariah, UU Nomor 21 Tahun 2008, LN Tahun 2008 No. 94, TLN No. 4867, sebagaimana diubah oleh UU Nomor 4 Tahun 2023 Tentang Pengembangan dan Penguatan Sektor Keuangan, LN Tahun 2023 No. 4, TLN No. 6845, selanjutnya disebut UU Perbankan Syariah, Pasal 1 ayat (12).

²Yuli Warnida dan Herlina Yustati, *Lembaga Keuangan Syariah*, (Bengkulu: CV Brimedia Global, 2024), hlm. 1.

³Subekti, *Hukum Perjanjian*, (Jakarta: Intermasa, 1998), hlm. 71.

of the *cessie* in writing and has been approved and recognized by the debtor.⁴

Cessie in Islamic law is not explained in detail, but *cessie* in Islamic law is known as *hawalah* which is related to debt and credit. *Hawalah* is transferring something from one place to another, which in this study has similarities with *cessie* which is interpreted as a transfer of receivables. *Cessie* or *hawalah* is widely used by financial institutions or banks to transfer receivable rights to other parties or third parties as collateral for financing facilities provided by financial institutions. Based on DSN-MUI Fatwa No. 31/DSN-MUI/VI/2002 concerning Debt Transfer, *hawalah* is a customer debt from a conventional financial institution that is transferred to an Islamic financial institution.

Cessie or *hawalah* based on Islamic law is regulated in DSN-MUI Fatwa No. 12/DSN-MUI/IV/2000 on *Hawalah*, DSN-MUI Fatwa No. 34/DSN-MUI/IX/2002 on *Sharia Import Letter of Credit (L/C)*, and DSN-MUI Fatwa No. 58/DSN-MUI/V/2007 on *Hawalah bil Ujrah*. In *cessie*, the new creditor is required to notify the debtor that there is a transfer of collection rights. If the debtor pays the old creditor because there is no notification of the transfer of receivables to the debtor, the payment is considered valid and valid. *Cessie* only transfers the old creditor's right of collection to the new creditor, but does not eliminate the debtor's obligation to his debt.⁵

Cessie Deed or *Hawalah* Deed as a product of Islamic financial institutions must be made based on the provisions of Islamic law and fulfill sharia principles. Notary based on Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Position (UUJN) is a public official who has the authority to make authentic deeds must comply with applicable regulations related to the actions and wishes of the parties as outlined in the authentic deed. Notary in making sharia deeds in addition to paying attention to the provisions of positive law but also must pay attention to the provisions of Islamic law. Notaries must understand the principles of sharia because it is related to the validity and legal certainty of the deed. In reality, there are still deeds made that do not comply with sharia principles, such as the case in Decision Number 1922/Pdt.G/2020/PA.Btm. The deed was made by not complying with sharia principles. This makes the author interested in further researching the legal consequences of *Hawalah* Deed that does not comply with sharia principles and analyzing the responsibilities of Notary in making *Hawalah* Deed that does not comply with sharia principles based on Batam Religious Court Decision Number 1922/Pdt.G/2020/PA.Btm.

2. Research Method

Research method is a way or procedure in obtaining true knowledge or truth through systematic steps. This form of research uses doctrinal research methods. This research method is a method with an approach based on literature study (*library research*) which includes reading, quoting, and analyzing legal theories and laws and regulations related to this research.⁶ In this research, the data used is secondary data obtained from document

⁴*Kitab Undang-Undang Hukum Perdata [Burgerlijke Wetboek]*, diterjemahkan oleh R. Soebekti dan R. Tjitrosudibio, selanjutnya disebut KUHPerdata, Pasal 631.

⁵Retno Sri Astuti, "Pengalihan Hak Tagih dengan *Cessie*", *djkn.kemenkeu.go.id*, 14 September 2022, tersedia pada <https://www.djkn.kemenkeu.go.id/kpknl-sidoarjo/baca-artikel/15372/Pengalihan-Hak-Tagih-dengan-Cessie.html>, diakses pada tanggal 16 September 2024.

⁶Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: Rineka Cipta, 1983), hlm. 7.

studies consisting of primary legal materials in the form of laws and regulations and secondary legal materials derived from sources that can be used to assist analysis in research problems, from various law books, previous research results and sources from the internet that are relevant to this research study.

The data collection procedure in this research is *library research*, namely data collection by quoting, studying and reading library materials and reviewing laws and regulations related to the subject matter of this research and Batam Religious Court Decision Number 1922/Pdt.G./2020/PA. Btm as the theoretical basis for this research.

3. Results and Discussion

Concept of Cessie or Akad Hawalah

Cessie according to Subekti is the transfer of receivables on behalf of the old creditor by selling the receivables to the new creditor, but the legal relationship of the debt and credit does not end but is transferred to the new creditor.⁷ The transfer of receivables results in the new creditor replacing the old creditor with all rights and obligations that pass entirely from the old creditor to the new creditor because the agreement made between the creditor and the debtor does not end with the transfer of *cessie* receivables. This applies if the *cessie* is carried out for all the creditor's receivables.⁸ In general, *cessie* is carried out in a fairly short time, but has a quick impact on the funds received by financial institutions, so that the turnover of funds can be done at that time.⁹

The parties involved in *cessie* are:¹⁰

1. The creditor who assigns the receivable is called the *cedent*.
2. The new creditor who receives the transfer of receivables is the *cessionary*.
3. Debtor, i.e., *cessus*.

In Islamic law, *cessie*, known as *hawalah*, has the meaning of *al-hawalah* which linguistically means moving (*al-intiqal*) or turning away from a promise (*hala 'an ak-akd*).¹¹ In terms of *al-hawalah*, according to Syafi'iyah and Hanbaliyah, it is a contract that arises from the transfer of a certain party's debt to another party.¹² According to Zainul Arifin, *hawalah* is an agreement to transfer the debt / debt of one party to another party.

There are three parties in the *hawalah* contract that are the same as the parties in

⁷Subekti, *Hukum Perjanjian*, cet. 17, (Jakarta: Intermasa, 1998), hlm. 71

⁸Alda Alifiatara dan Windaningtyas Suherman, "Akibat Hukum Cessie Tanpa Adanya Pemberitahuan Dan Persetujuan Debitur", *Unes Law Review* 6, No. 4 (2024), hlm 10608.

⁹Gita Permata Aulia dan Endang Sri Kawuryan, "Perlindungan Hukum Terhadap Pembeli Cessie Dalam Melakukan Balik Nama Sertipikat Hak Atas Tanah Dan Bangunan", *Jurnal Transparansi Hukum* 1, No. 1 (2018), hlm. 81.

¹⁰Rachmad Setiawan dan J. Satrio, *Penjelasan Hukum tentang Cessie*, (Jakarta: Nasional Legal Reform Program, 2010), hlm. 1.

¹¹Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, diterjemahkan oleh Abdul Hayyie al-Kattani, dkk, (Jakarta: Gema Insani, 2011), hlm. 84-85.

¹²Imam Mustofa, *Fiqh Mu'amalah Kontemporer*, (Jakarta : Rajawali Pers, 2016), hlm. 233-234.

the *cessie*, only different in naming, namely:¹³

1. The debtor (*muhil or madin*).
2. The party giving the debt (*muhal or da'in*).
3. The party receiving the transfer (*muhal'alaih*).

Cessie is regulated in Article 613 of the Civil Code which reads:

"The assignment of debts in name and other immaterial goods shall be made by means of an authentic or underhand deed conveying the rights in such goods to another person. This assignment has no effect on the debtor before the assignment is notified to him or he agrees in writing or acknowledges it. Delivery of debentures by appointment shall be made by giving them away; delivery of debentures by order shall be made by giving them away with an endorsement thereof."

Based on this article, it can be concluded that *cessie* is the transfer of receivables from the old creditor to the new creditor and must be done in writing with an authentic deed or deed under hand but cannot be done orally. *Cessie* is only valid if it has been notified to the debtor in writing and approved and recognized by the debtor. In principle, in the *cessie* mechanism, the new creditor (*cessionaris*) must notify the transfer of collection rights to the debtor, so that if there is a payment made by the debtor to the old debtor because there is no notification to the debtor, the payment in question is considered valid and valid. In addition, *cessie* does not erase the debtor's obligation to debt and credit, *cessie* is only a transfer of the old creditor's rights to the new creditor.

Based on the aspects of Islamic law, the implementation of this *hawalah* contract is permitted to be carried out. *Hawalah* is basically a *tabarru'* contract which has the aim of helping each other to expect the pleasure of Allah SWT. The legal basis for *hawalah* includes:

1. Qur'an
"And if (the debtor) is in distress, then give him respite until he is able, and giving in charity (some or all of the debt) is better for you, if you know." (Q.S. Al-Baqarah: 280)
2. Hadith
Imam Bukhari and Muslim narrated from Abu Hurairoh, that the Prophet said:
"Delaying the payment of the law by the rich is an act of oppression. If one of you is transferred to a person who is easy to pay debts, then let him transfer (accept the transfer)." (HR. Bukhari dan Muslim)
3. Sunnah
Hiwalah is a contract that is permitted by *Shara'* because it is needed by the community.
"Delaying payment of a debt by a capable person is an injustice. So, if one of you has his debt collection rights transferred to a capable party, accept it." (HR. Bukhari).

¹³Abdul Ghofur Anshori, *Perbankan Syariah di Indonesia*, (Yogyakarta: Gadjah Mada University Press, 2009), hlm. 153.

4. *Ijma Ulama*

The scholars agreed (*ijma*) on the permissibility of *hawalah* or *hiwalah* contracts. *Hawalah* is permissible for debts that are not in the form of goods or objects, because *hawalah* is a transfer of debt, so it must be for debts or financial obligations.

5. Fatwa DSN-MUI

As a basis for the *hawalah* contract, the National Shari'ah Council-Majelis Ulama Indonesia has issued the following:

- a. Fatwa DSN-MUI No. 12/DSN-MUI/IV/2000 concerning *Hawalah*.
- b. Fatwa DSN-MUI No. 34/DSN-MUI/IX/2002 concerning Sharia Import *Letter of Credit* (L/C).
- c. Fatwa DSN-MUI No. 58/DSN-MUI/V/2007 on *Hawalah bil Ujrah*

Sayyid Sabiq (in Fiqh Sunnah), Idris Ahmad (in Fiqh al-Shafi'iyah), and Abdul Aziz (in Encyclopedia of Islamic Law) state that in practice, *hawalah* contracts can be divided into two groups, namely based on the type of transfer of the contract object and the pillars of *hawalah*.¹⁴

1. Based on the type of transfer of the contract object, *hawalah* is divided into 2 (two), namely:¹⁵

a. *Hawalah Dayn*

Hawalah dayn is the transfer of debt to another person who has a debt to him. In another sense, *hawalah dayn* is the transfer of the obligation to pay debt (transfer of debt / obligation).

b. *Hawalah Haqq*

Hawalah haqq is the transfer of the right to claim debt or transfer of receivables to another party in the form of money not goods. In another sense, in *hawalah haqq* the one who acts as *muhil* is the debt applicant and he transfers his rights to another debt giver, while the person who owes does not change or change.

2. Based on the pillars *hawalah* is divided into 2 (two), namely:¹⁶

1. *Hawalah Muqayyadah* (transfer of debt that is bound), a conditional transfer is a transfer in exchange for payment of the debt of *muhil* (first party) to *muhal* (second party).

b. *Hawalah Muthlaqah* (absolute transfer of debt)

Hawalah muthlaqah or absolute transfer is the transfer of debt that is not emphasized as compensation for the payment of debt *muhil* (first party) to *muhal* (second party).

A contract can become a valid contract if it fulfills the elements of the pillars and

¹⁴Prudential Syariah, "Hawalah: Pengertian, Jenis, Dasar Hukum, dan Contohnya," shariaknowledgecentre.id, 12 Juli 2023, <https://www.shariaknowledgecentre.id/id/news/Hawalah-adalah/>, diakses pada 16 November 2024.

¹⁵Sunarto Zulkifli, *Panduan Praktik Perbankan Syari'ah*, (Jakarta: Zikrul Hakim, 2007), hlm. 30.

¹⁶Ascarya, *Akad dan Produk Bank Syariah*, (Jakarta: Rajawali Pers, 2006), hlm. 26

conditions of the contract. The pillars of *hawalah* are *muhil* (the person who owes and at the same time owes), *muhal* or *muhtal* (the person who owes to *muhil*), *muhal 'alaih* (the person who owes to *muhil* and is obliged to pay the debt to *muhtal*), *muhal bih* (*muhil*'s debt to *muhtal*), and *sighat* (ijab-qabul).¹⁷ There are five conditions for *hawalah*, which are as follows.¹⁸

- a. *Muhil* (the one who owes the debt to *muhtal*/the one who transfers the debt) and *muhtal* (the one who has a debt to *muhil*/the one who receives the transfer of debt) are both willing to the transfer of debt.
- b. The debt that exists between the *muhil* and *the muhal alaihi* (the person whose debt is owed to the *muhil*/person whose debt is transferred to the *muhtal*) has become a permanent debt. So, the *hawalah* contract if it does not arise from a person who does not have a debt
- c. It can be used as an *'iwad* (means of exchange) according to sharee'ah.
- d. The debts owed to the *muhil* and *muhal alaihi* are known in quantity, nature and type.
- e. The debts owed by *muhil* and *muhal 'alaih* must be the same. If it is not the same *hawalah* is not valid.

The *hawalah* agreement will end if one of the following occurs.¹⁹

- a. One of the parties to the contract may cancel the *hawalah* contract before it has taken effect. With the cancellation of the contract, the second party is again entitled to demand payment of the debt from the first party.
- b. The third party has paid off the transferred debt to the second party.
- c. The second party grants or hands over the property that is the debt in the *hawalah* contract to the third party.
- d. The second party releases the third party from its obligation to pay the transferred debt.
- e. The second party dies, while the third party is an heir who inherits the second party's property. In this case, of course, the debt burden of the third party is considered in the distribution of inheritance.

Legal Consequences of Deed of Hawalah Deed Made by Not Complying with The Provisions of Sharia Law

The transfer of debt from the old creditor to the new creditor must be done by an authentic deed of transfer of rights or through a notarial deed in the presence of a local notary official. Underhand transfer through a written agreement or written consent from the debtor to the old creditor to the new creditor along with the approval of clauses that have been read and understood as described in Article 613 of the Civil Code. Transfer of receivables (*cessie*) to a third party according to the Civil Code as known is a way of

¹⁷Dewan Syariah Nasional, Fatwa No. 12/DSN-MUI/IV/2000, Majelis Ulama Indonesia (2000), hlm. 2.

¹⁸Abdul Majid Toyyibi, "Implementasi *Hawalah* pada Pembiayaan Bermasalah Studi Kasus Koperasi Jasa Keuangan Syariah Usaha Gabungan Terpadu Bmt Sidogiri Kep Omben Tahun Buku 2018," *Profit: Jurnal Kajian Ekonomi dan Perbankan* 3 No. 2, (2019), hlm 47.

¹⁹Abdul Rahman Ghazaly, Ghufon Ihsan, dan Sapiudin Shidiq, *Fiqh Muamalat*, ed.1, cet. 1 (Jakarta: Kencana, 2010), hlm. 258.

transferring receivables or bills, and rights arising from an agreement in the form of an authentic or underhand deed can be transferred to another party, so that the transfer of rights from contracts or receivables or what is often referred to as *cessie*. This is regulated and justified by the Civil Code and regulated in Article 613 of the Civil Code, however, against rights arising from an unlawful act by another person, it is impossible to be transferred because it is contrary to public order.

The validity of a transfer of receivables (*cessie*) must also be in accordance with the provisions of its legal basis, namely Article 613 of the Civil Code and the *cessie* agreement must be made by fulfilling the subjective and objective requirements as referred to in Article 1320 of the Civil Code. The transfer of receivables (*cessie*) may be carried out repeatedly if it must fulfill these provisions. The validity of a transfer of receivables can affect the transfer of the mortgage rights that are collateral for the receivables. Receivables secured by mortgage rights are transferred due to *cessie*, so the mortgage rights are also transferred by law to the new creditor. The transfer of the mortgage right to the new creditor cannot take effect if the mortgage right is not registered at the land office. Receivables on behalf of are receivables whose payment is made to the party whose name is written in the receivable letter, but with the notification of the transfer of receivables on behalf of the debtor, the debtor is bound to pay to the new creditor and not to the old creditor.²⁰

Cessie or *hawalah* made based on sharia financing must also fulfill the pillars and conditions of the *Hawalah* contract in Islamic law as previously explained, one of which is *muhil* (the person who owes to *muhtal* / the person who transfers the debt) and *muhtal* (the person who has a debt to *muhil* / the person who receives the transfer of debt) are both willing to transfer the debt.

Basically, the form of a Notarial deed containing acts and matters satirized by the Notary, generally must follow the provisions of the applicable laws and regulations, both those regulated in the Civil Code and the Notary Office Law. However, in the practice of deeds made by and before a Notary, problems often arise, sometimes the deed made by a Notary is not in accordance with the information of the parties or it is also often found that the deed made before a Notary is legally defective due to the negligence of the Notary himself at the time of making the deed. Consequently, the deed made before the Notary loses its authenticity, so that it becomes a deed under the hand or even the deed is declared null and void.

The effect of a nullity in principle can be canceled, null and void or non-existent, which results in the legal act becoming invalid or the legal act has no legal effect, or the absence of something essential or principal in the agreement. Based on this theory and the case that occurred, it can be concluded that, if a Notary Deed is declared null and void by the court because the deed contains material errors in the form of unlawful acts, the deed does not have material evidentiary strength even though outwardly and formally it is in accordance with the provisions determined by law. The cancellation of a Notarial deed by the court has a direct impact on the validity and evidentiary power of the deed, namely the Notarial deed as an authentic deed with perfect evidentiary power turns into

²⁰Suharnoko dan Endah Hartati, *Dokrin Subrogasi, Novasi, dan Cessie (Dalam Kitab Undang-Undang Perdata, Nieuw Nederlands Burgerlijk Wetboek, Code Civil Prancis dan Common Law*, (Jakarta : Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hlm. 102-103.

a deed under the hand and the Notarial deed becomes null and void. For deeds that are declared null and void, the contents and agreements of the deed become null and void and not binding for the parties.

Based on Decision Number 1922/Pdt.G./2020/PA. Btm, it is known that there was a transfer of *cessie* receivables from PT BTN Tbk as Defendant I to T as Defendant II without the knowledge and consent of Plaintiff HG as Debtor. HG and PT BTN Tbk have bound themselves in a *Murabahah* Sale and Purchase Agreement for the object of home ownership. Then Defendant I transferred the Plaintiff's receivables to another party, namely Defendant II without the knowledge of the Plaintiff and without going through sharia mechanisms. As a result of the transfer of the receivables without the knowledge of the Plaintiff by Defendant I to Defendant II, it caused material and moral losses to the plaintiff. Therefore, the Plaintiff filed a lawsuit at the Batam Religious Court and requested the Panel of Judges to grant the Plaintiff's claim in its entirety. That based on the case, the Panel of Judges decided that the *Murabahah* contract is a sharia contract so that the debt transfer agreement (*cessie*) in the case must also use the provisions of Islamic law by referring to the provisions of Fatwa DSN-MUI Number 31/DSN-MUI/VI/2002. The Panel of Judges stated that Defendant I and Defendant II had committed an unlawful act (PMH) against Islamic banking law and declared null and void the *Hawalah* Deed made by Defendant I and Defendant II before the Notary.

The consideration of the Panel of Judges was in accordance with statutory provisions. The transfer of debt carried out by Defendant I and Defendant II is contrary to the transfer of debt regulated in the provisions of Fatwa DSN-MUI Number 31/DSN-MUI/VI/2002. The philosophical basis for the transfer of money in Fatwa DSN Number 31/DSN-MUI/VI/2002, dated 15 Rabiul Akhir 1423 H / June 26, 2002 which reads: "That one of the forms of financial services that the community needs is to help the community to transfer ongoing non-sharia transactions into transactions that are in accordance with sharia." Based on the definition of debt transfer according to MUI Fatwa 31/DSN-MUI/VI/2002, dated June 22, 2002/15 Rabi'ul Akhir 1423 H, which reads: "The transfer of customer debt from a conventional bank/financial institution to a shari'ah bank/financial institution."

Thus, the transfer of debt in Islamic banking must be a transfer of debt from a conventional bank to an Islamic bank to avoid usury. In this case, the transfer of debt made by Defendant I and Defendant II was the opposite, namely from an Islamic bank to a conventional individual, thus contradicting the norms of Islamic banking law. The legal consequences of a *Hawalah* contract deed made without fulfilling sharia provisions can result in the deed being canceled and invalid because it does not fulfill one of the pillars in DSN Fatwa NUMBER: 12/DSN- MUI/IV/2000 concerning *Hawalah* which causes this contract to be canceled and forbidden to continue. A *Hawalah* deed that is declared null and void has an impact on the validity and evidentiary power of the deed and the deed becomes null and void. A deed that is null and void means that the contents of the deed agreement are not binding on the parties, so that the debt owner or debtor still has an obligation to pay his debt to the old creditor.

Notary's Responsibility in Making a *Hawalah* Deed that Does Not Meet the Provisions of Sharia Law

Based on Article 1 of the UUJN, Notary has the definition as the only public official who has the authority to make laws unless otherwise provided by law.²¹ The definition of Notary in Article 1 *Staatsblad* 1860 Number 3 concerning Notaries states that Notary is the only public official who has the authority to make authentic deeds related to all agreements that must be stated in an authentic deed.²²

Regarding the cancellation of Notarial deeds, Article 84 of the UUJN states that if the Notary violates the provisions as referred to in Article 16 paragraph (1) letters i, k, Article 41, Article 44, Article 48, Article 49, Article 50, Article 51, Article 52. Then the deed only has evidentiary power as a deed under the hand. As stipulated in Article 15 paragraph (1) of the UUJN, in his position Notary is authorized to make an authentic deed about an event, agreement, and provision in accordance with the legislation at the will of the parties who have an interest to be stated in an authentic deed.²³ In making a deed in sharia financing, the notary must pay attention to the legal requirements of the agreement in the Civil Code, the provisions of the UUJN, and the provisions of the Islamic Banking Law, but there are no provisions governing the form and clauses of sharia deeds to date, so that sharia deeds are made in the form of authentic deeds that have been regulated in the Civil Code and UUJN.

An agreement deed that does not meet the validity requirements of the agreement can be canceled or null and void. Agreements that do not meet the objective requirements, then the agreement can be canceled. Can be canceled means that a request for cancellation can be submitted to the court by proving that the subjective requirements are not met. Making an Islamic bank deed must comply with the rules relating to the procedure for making notarial deeds and sharia principles. A contract is considered not to violate sharia principles if it does not violate the provisions of Article 2 of the Islamic Banking Law.²⁴ If the contract does not fulfill and is contrary to sharia principles, the contract becomes null and void as stated in Article 28 number 3 KHES which states that a null contract is a contract that lacks the pillars and conditions. Related to that, if the deed or contract made by a notary is not based on sharia principles, the deed is null and void.

Regarding case number 1922/Pdt.G./2020/PA. Btm, the *Hawalah* Deed made by the Notary was declared null and invalid by the panel of judges because the deed was made not in accordance with the provisions of Islamic law, namely related to the transfer of debt carried out in Islamic banking must be the transfer of debt from conventional banks to Islamic banks, while the *Hawalah* Deed made by Defendant I and Defendant II made by the Notary was the opposite. As a public official, a Notary must be responsible

²¹Salim, *Teknik Pembuatan Suatu Akta (Konsep Teoritis, Kewenangan Notaris, Bentuk dan Minuta Akta*, (Jakarta: PT. Raja Grafindo Persada, 2015), hlm. 33.

²²G. H. S. Lumban Tobing, *Peraturan Jabatan Notaris*, (Erlangga: Jakarta, 1991), hlm. 1.

²³*Undang-Undang Tentang Jabatan Notaris*. UU Nomor 30 Tahun 2004. LN Tahun 2004 No. 117. TLN No. 4432. Sebagaimana diubah oleh UU Nomor 2 Tahun 2014 Tentang Jabatan Notaris. LN Tahun 2014 No.3. TLN No. 5491, selanjutnya disebut UUJN, Pasal 15 ayat (1).

²⁴Lilies Pratiwipuspa, *Keabsahan Akta Akad Bank Syariah yang Dibuat oleh Notaris yang Tidak Bersertifikat Lembaga Keuangan Syariah*, (Surabaya: Universitas Airlangga, 2010), hlm. 46.

for all actions taken. Such responsibility includes the formal truth and materially against omissions or errors in the contents of the deed he made. The responsibility of the Notary relating to material truth in civil terms is based on Article 1365 of the Civil Code on juridical construction regarding the presence or absence of elements of illegal acts against the deed. Criminal liability of Notary relating to material truth is not regulated in the UUJN, but can be imposed if the Notary commits criminal acts that violate the law. Therefore, notaries are responsible for their duties and positions both administratively, civilly and criminally.

Administratively, the Notary can be sanctioned in the form of a written warning. Parties who feel aggrieved in this case can submit this case to the Notary Supervisory Panel so that it can be followed up. The Notary Supervisory Council can impose strict sanctions if the Notary is proven to have violated the UUJN and other laws and regulations. The sanctions are regulated in Article 16 paragraph (11) of the UUJN, namely that the Notary can be warned in writing, temporarily dismissed, honorably dismissed, and dishonorably dismissed. In Article 16 paragraph (12), in addition to being subject to sanctions, a Notary who violates the provisions of Article 16 paragraph (1) letter (j) may also be sued for reimbursement of costs, compensation, and interest in the party who suffered the loss.

Civilly, the responsibility of a Notary refers to the explanation of the UUJN. According to the UUJN, the Notary's responsibility is only limited to the formality of the authentic deed, not the material of the authentic deed. This shows that the Notary must always be neutral by not favoring anyone. Material truth can be the responsibility of the Notary if there is a mistake in the deed in the future. Therefore, it can be concluded that a Notary can be held accountable for the formality of a deed for material truth according to UUJN. In Article 16 paragraph (12), in addition to being subject to sanctions, Notaries who violate the provisions of Article 16 paragraph (1) letter (j) may also be prosecuted for reimbursement of costs, compensation, and interest in the party who suffers the loss.²⁵ The prosecution of costs, compensation, and interest to the Notary is carried out by filing a lawsuit by the injured party to the Religious Court.

Criminally, a Notary can be held liable if there is a legal action from the Notary towards the formal aspects of the deed, which is done intentionally that the deed made by or before the Notary is used as a basis for committing a criminal offense. Although not regulated in the UUJN, this criminal provision remains the responsibility of the Notary who commits the criminal act. Criminal cases involving notarial deeds will be examined against notaries, if they have violated articles namely Article 55, Article 56, Article 263 paragraphs (1) and (2), Article 264, and 266 of the Criminal Code. Parties who feel aggrieved by the actions of the Notary can file a complaint to the police by accompanying evidence. The complaint is based on Article 1 paragraph (25) of the Criminal Procedure Code, which basically states that a complaint is a notification accompanied by a request by an interested party to follow up on someone who has committed a criminal offense that has harmed him.²⁶ If it is proven that there is a criminal element in it, then the investigation will continue and the court authorized to try is the District Court.

²⁵UUJN, Pasal 16 ayat (1) huruf (j).

²⁶*Kitab Undang-Undang Hukum Acara Pidana*, selanjutnya disebut KUHAP, Pasal 1 ayat (25).

In the case of decision number 1922/Pdt.G/2020/PA.Btm, the Plaintiff did not make any claims against the Notary who made the *Hawalah* Deed, so the Notary was not responsible for the deed he made and was not given administrative, civil or criminal sanctions. If a Notarial deed is canceled by a judge's decision in court, then if it causes losses to the interested parties, the Notary can be sued to provide compensation, as long as it occurs due to the fault of the Notary. If the annulment of the Notarial deed by the court does not harm the interested parties, the Notary cannot be sued to provide compensation even if he loses his good name. If the Plaintiff or other parties who feel aggrieved by the deed can file a lawsuit to the Religious Court, submit to the police and report to the Notary Supervisory Council, so that the Notary can be held accountable for his actions administratively, civilly, and criminally.

4. Conclusion

The conclusions of this study are as follows:

- a. The legal consequences of a Hawalah Deed that is made by not fulfilling the provisions of sharia law are declared null and invalid. If the contract does not meet sharia principles, then the pillars and conditions are not fulfilled, so the deed is null and void. Parties who feel aggrieved can file a lawsuit to the Religious Court. A deed declared null and invalid by the Court results in the deed no longer having perfect evidentiary power and only has the power of proof under the hand,
- b. Notaries are responsible for the deeds they make in accordance with the provisions of the UUJN including to ensure the fulfillment of sharia principles in making sharia deeds. Notaries can be held liable for deeds that are declared void by the court because they do not fulfill the provisions of sharia law. The aggrieved party can file a claim to the Religious Court, report to the police and report to the Notary Supervisory Council. Notaries are responsible for the deeds they make administratively, civilly, and criminally.

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