

## The Authority of A Notary to Legalise Letters Under Hand from The Perspective of Islamic Law and National Law

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### Abstract

*A notary as a professional in the legal field who has the duty and authority to make a Private Letter - a Private Letter that can be used as evidence of a person's property status, rights, and obligations. As a noble official, a notary is required to comply with the provisions contained in the Notary Law. One of the duties of a notary is to legalize, namely the ratification of private letters. Legalization is carried out by a notary to ensure the certainty of the date of the Private Letter in question. The notary is also responsible for the identity, contents of the Private Letter, signature, and date on the letter/ Private Letter . This research is a qualitative legal research. In conclusion, the role of a notary is very important in the agreement of the parties through legalization. The notary is responsible for ensuring the validity of the documents used in the agreement process of the parties , as well as assisting in the process of signing and ratifying the necessary documents. With the role of a notary, the agreement process of the parties can run smoothly and in accordance with applicable regulations.*

## I. Introduction

Notary is a legal profession so that the notary profession is a noble profession (*nobile officium*). Notary is called a noble official because the notary profession is very closely related to humanity. Notary has the authority to legalize one of them Private Letter made by a notary can be a legal basis for the status of property, rights and obligations of a person. Mistakes in the Private Letter made by a notary can cause the revocation of a person's rights or burden a person with an obligation, therefore a notary in carrying out his duties must comply with the various provisions stated in the Notary Law .<sup>1</sup>

Notaries are appointed by the government not for the notary's own interests but for the interests of the community they serve. Notaries as public officials are one of the state organs equipped with legal authority to provide public services to the community, especially in making Authentic Private Letters as perfect evidence regarding legal acts in the civil field. <sup>2</sup>In addition, notaries also have the authority to legalize the agreements of the parties.

So, the agreement is only binding on the parties who make it and should not be related to the Notary, this is as regulated in Article 1338 paragraph (1) of the Civil Code which states that every agreement made legally applies as law for the parties who make it.

Legalization as the ratification of a Private Letter underhand which is read by a Notary and signed by the person appearing before the Notary at that time to guarantee the certainty of the date of the Private Letter in question. Where the persons appearing who include their signatures are known by the Notary or introduced to the Notary. As those assigned to provide ratification (legalization) and register (*Waarmerking*) private letters in the register book, in addition to the Notary, those who have the same authority for that are the Head of the District Court, Mayor, Regent and Head of the *Kewedanan*. <sup>3</sup>In reality, some people are less aware of the importance of a document as evidence so that agreements between the parties are sufficient with a sense of mutual trust and made verbally, especially in communities that are still covered by strong customs, for important events proven by the testimony of several witnesses,

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<sup>1</sup>Anshori, Abdul Ghofur. (2009). Indonesian Notary Institution, Legal and Ethical Perspectives. Yogyakarta: UII Press.

<sup>2</sup>NG Yudara, Notaries and Their Problems (Main Points of Thoughts Regarding the Position and Function of Notaries and Letters Under the Notary's Hand According to the Indonesian Legal System), (Paper presented in the context of the INI Congress in Jakarta), *Renvoi Magazine* Number 10.34.III, Edition 3 March 2006, Page 72. xiii

<sup>3</sup>A. Kohar, *Notary Communicating*, Bandung, Alumni, 1984, p. 36.

usually the witnesses for these events are neighbors, village friends or village employees.

The institution of agreement between parties regulated through the legal system is intended to meet the needs of society. There are at least three purposes for regulating agreement between parties in law. First, to meet the needs of selling agreement between parties, which are regulated in many laws and regulations. Second, to fulfill or implement court decisions or dispute resolution institutions based on laws in order to enforce justice (law enforcement). Third, to meet the needs of the business world in general, producers or owners of personal goods are allowed to sell agreement between parties.<sup>4</sup>

However, in legalizing the agreement of the parties which in the future will have implications or impacts, it often has consequences for the notary, even though the notary only exercises his authority to legalize the agreement of the parties.

Article 1320 of the Civil Code which regulates the requirements for a valid agreement, namely: the agreement of those who bind themselves; the capacity to make an agreement; a certain subject matter; a cause that is not prohibited. This capacity is related to Article 1330 of the Civil Code which states that "incapable of making an agreement" are: Minors; Those who are placed under guardianship; Women who are married.

Adult age according to Article 330 of the Civil Code A person who has reached the age of 21 years or has been married before reaching that age is considered an adult. Furthermore, Article 7 paragraph (1) of Law Number 1 of 1974 states that marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years.

In the perspective of Islamic law, the Qur'an Surah Al Baqarah 282 Notary is the registrar of all the interests of the parties in the deed, witnesses in the deed. The sentence "and witness it with two men" contains the provision that in carrying out the contract/transaction it is attended by 2 (two) male witnesses or 1 (one) male witness and 2 (two) female witnesses, which is in line with the principle of unus testis nullus testis (one witness is not witness).

A notary is a public official whose function is to guarantee the authenticity of his/her writings (Underhand Letters). Notaries are appointed by the state authorities and are given trust and recognition in providing services for the benefit of the community. Only people who are known for their honesty and have knowledge and ability in the legal field are permitted to hold the position of notary. Therefore, the holder of the position of notary must maintain the dignity of his/her position by avoiding violations of the rules and not making professional mistakes that can cause harm to others.<sup>5</sup>

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<sup>4</sup>Purnama Tioria Sianturi, Legal Protection for Buyers of Immovable Collateral Through Agreement of the Parties, Mandar Madju, Bandung, 2008, p. 1.

<sup>5</sup>Tamrin, Husni.(2001). Making of Private Land Deeds by a Notary. Yogyakarta: LaksBang

Article 1 number 1 of the Republic of Indonesia Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) "A notary is a public official who is authorized to make authentic Private Letters and has other authorities as referred to in this Law or based on other laws".

The obligations of a notary are regulated in UUJN Article 16 paragraph (1). In carrying out his/her position, a notary is obliged to:

- a. act in a trustworthy, honest, fair, independent, impartial manner and protect the interests of the parties involved in legal actions;
- b. make a Private Letter in the form of a Private Letter Minute and store it as part of the Notary Protocol;
- c. affix letters and documents as well as the face's fingerprints to the Letter Under Hand Minutes;
- d. issue a Grosse Private Letter, a Copy of a Private Letter, or an Excerpt of a Private Letter based on the Minutes of the Private Letter;
- e. provide services in accordance with the provisions of this Law, unless there is a reason to refuse them;
- f. keep confidential everything regarding the Private Letter that he/she has made and all information obtained for the purpose of making the Private Letter in accordance with the oath/promise of office, unless the law determines otherwise;
- g. binding the Letters Under Hand which he made within 1 (one) month into a book containing no more than 50 (fifty) Letters Under Hand, and if the number of Letters Under Hand cannot be contained in one book, the Letters Under Hand can be bound into more than one book, and record the number of Minutes of Letters Under Hand, the month and the year they were written on the cover of each book;
- h. make a list of underhand letters of protest against non-payment or non-receipt of valuable letters;
- i. make a list of Private Letters relating to wills in order of when the Private Letters are made each month;
- j. send a list of Private Letters as referred to in letter i or a nil list relating to wills to the center for registering wills at the ministry that handles government affairs in the legal sector within 5 (five) days in the first week of each following month;
- k. record in the repertory the date of sending the list of wills at the end of each month;
- l. has a seal or stamp containing the state symbol of the Republic of Indonesia and in the space surrounding it is written the name, position and place of the relevant position;
- m. read the Underhand Letter in front of the person appearing in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for making a Underhand Letter of a will underhand, and signed at that time by the person appearing, witnesses and Notary; and
- n. accepting internships for prospective Notaries.

A Public Official is someone who is appointed and dismissed by the government and is given the authority and obligation to serve the public in certain matters because a notary participates in exercising a power that is based on the authority (*gezag*) of the government.<sup>6</sup>

The notary profession in Indonesia is greatly influenced by the civil law system tradition. In this tradition, the notary profession is a public official who is delegated the authority to make Private Letters

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<sup>6</sup>Alam, Wawan Tunggu. (2004). *Understanding the Legal Profession*. Bandung: Popular Millenium

- Private Letters whose contents have the power of formal evidence and are enforceable. This type of notary is called a functional notary (notariat fonctionnel). Professional notaries (notariat professionnel) in the common law system tradition, their Private Letters - Private Letters do not have the power as mentioned even though this professional organization is regulated by the government.<sup>7</sup>

In accordance with the provisions of Article 1868 of the Civil Code, it is stated that a Private Letter in the form determined by the Law, made by or before authorized public officials for that purpose at the place where the Private Letter is made and regarding the credit binding process itself, the bank will need the services of a notary as a public official who has the authority in the process of making a Private Letter of banking credit agreement including the imposition of collateral which will later involve the debtor and creditor. "<sup>8</sup>In the UUJN "notaries are also expected to be able to guarantee the truth of the contents stated in the credit agreement so that its truth does not need to be doubted again. The notary as a public official himself is one of the parties who has the authority to make an authentic Private Letter regarding an act, agreement and determination to become certainty and legal protection for the parties. "The <sup>9</sup>presence of a notary in the binding of credit and the imposition of collateral in the collateral can be said to be the creation of authentic written evidence which aims to guarantee legal certainty for the parties, namely the debtor and creditor.<sup>10</sup>

According to Subekti, an obligation is "a legal relationship in the field of property law between two or more people or two parties, where one party has the right to demand something from the other party, and the other party is obliged to fulfill that demand". <sup>11</sup>In this creditor-debtor relationship, in general, the debtor is not only obliged to fulfill the performance (schuld), but must also have a guarantee (haftung) based on Article 1131 and Article 1132 of the Civil Code.<sup>12</sup>

According to the provisions stipulated in Article 1319 of the Civil Code, the agreement to hand over collateral as a debt settlement, also known as Collateral Taken Over (hereinafter referred to as AYDA), is an innominate agreement which in banking practice in the field can be found by several notaries who make agreements regarding AYDA which aims to authorize the bank represented by one of its

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<sup>7</sup>Sidharta. (2006). *Morality of the Legal Profession, An Offering of a Framework for Thinking*. Bandung:Refika

<sup>8</sup>Sasauw, Christin. 2015, "Legal Review of the Binding Power of a Letter Under the Hand of a Notary." *Lex Privatum* 3, No. 1

<sup>9</sup>Risida Diani and Azwar Agus, *Legal Analysis of Cooperation Agreements Between Notaries and Banks Reviewed from Law Number 2 of 2014 Concerning Notary Positions and Notary Code of Ethics*, Tri Pantang, Vol. 5, No.2: (2019), 45

<sup>10</sup>R. Subekti, R. Tjitrosudibio, *Civil Code*, (Jakarta: PT Pradnya Paramita,) (2009): 475.

<sup>11</sup>Djaja S Meliala, *Development of Civil Law on Objects and Contract Law*, Nuansa Aulia Publisher, Bandung, 2019, p. 55

<sup>12</sup>Ibid. p. 55

directors to sell the collateral object which has previously been attached with a mortgage right through the power of attorney granted by the debtor, thus enabling the directors representing the bank as a third party to sell the collateral object in order to pay off the debtor's credit.<sup>13</sup>

## 2. Research Method

This research is a qualitative legal research. Because this research is intended to analyze the principles, rules and legal doctrines that are described. Normative legal research places norms as the object of research, both norms in the form of legal dogma, and legal norms that originate from a law.<sup>14</sup>

## 3. Results and Discussion

The duties and authorities of a Notary are closely related to agreements, acts and also provisions that give rise to rights and obligations between the parties, namely providing guarantees or evidence of the acts, agreements, and also provisions so that the parties involved in them have legal certainty. The position of Notary is held or its presence is required by legal regulations with the intention of helping and serving the community who need authentic written evidence regarding circumstances, events or legal acts.<sup>15</sup>

Notary as an official who is authorized to make an authentic Private Letter based on the law. The basis of the notary's authority as a public official is based on the law, the state grants authority to carry out state administrative functions. This is the basis, the notary becomes a position of trust because it is believed to have a neutral attitude in making an authentic Private Letter. Everything is written and determined (constatir) by the notary as an official is true, he is a powerful document maker in the legal process. The formal requirements of an authentic Private Letter are: determined by law, including a Private Letter made by or before an authorized public official for that purpose, and the place where the Private Letter was made . A Private Letter is a writing that is deliberately made and signed to be used as evidence if an event occurs <sup>16</sup>.

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<sup>13</sup>Sushanti, Trahutami, Retno, Emilia, Legal Analysis of Debt Cases That Result in the Position of the Bank (Creditor) as the Holder of Mortgage Rights. University of Indonesia, July 2008, p. 11

<sup>14</sup>Soerjono Soekanto and Sri Mamudji, 1995, *Normative Legal Research* , Jakarta: Rajawali Press, page 70.

<sup>15</sup>Habib Adjie, Civil and Administrative Sanctions Against Notaries as Public Officials, (Bandung: PT. Refika Aditama), 2008, p. 32.

<sup>16</sup>Dewi Ratnasari. (2021). Legal Analysis of the Notarial Sale and Purchase Agreement (PPJB) of

Regarding legalization, it is regulated in Article 1874 of the Civil Code which states that: "As private writings, private letters signed privately, letters, registers, household letters and other writings made without the intermediary of a public official are considered private writings."

What is meant by legalization and *Waarmerking* here is:<sup>17</sup>

1. Legalization is the ratification of letters made privately in which all parties who made the letter come before a notary, and the notary reads and explains the contents of the letter, then the letter is dated and signed by the parties and finally legalized by the notary.
2. *Waarmerking* is a registration by affixing a stamp and then registering it in the registration book provided for that purpose. Regarding legalization, it is regulated in Article 15 paragraph 2 letter a of Law No. 2 of 2014 concerning the Position of Notary which regulates legalization, which reads: "Notaries are authorized to validate signatures and determine the certainty of the date of private letters by registering them in a special book";

For private letters that are legalized by a notary, the notary is responsible for 4 (four) things:<sup>18</sup>

- a. Identity, Notaries are obliged to examine the identity of the parties who will sign the letter/*Underhand Letter* underhand (KTP, Passport, Driving License), or introduced by others. Examining whether they are competent to carry out legal acts
- b. Contents of the Private Letter The notary is obliged to read the contents of the Private Letter to the parties and ask whether the contents of the Private Letter are what the parties want.
- c. Signature "are the authorized parties who signed the letter/*Underhand Letter*"
- d. Date After that they must sign before a notary and date the private letter which is then recorded in the register book that has been provided for that purpose."

The rights and obligations arising from the contract are fulfilled by both the debtor and creditor parties. However, in practice, sometimes the debtor does not comply with his obligations and this is called default. The word default comes from Dutch which means poor performance. In addition, the word default is often paired with the word negligent or absent, broken promise, or violated the agreement, if the debtor does or does something that should not be done.<sup>19</sup>

A debtor's default (negligence or negligence) can be of four types:

- a. Not doing what he promised to do;
- b. Carrying out what he promised, but not as promised;

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<sup>17</sup>Ida Rosida Suryana, *All About the Notary Position*, Padjajaran University, Bandung, 1999, p. 19.

<sup>18</sup>HM Imron, *Legalization Must Be Equipped with Witnesses*, Renvoi Number 10/34 April 2006, page

<sup>19</sup>I Ketut Oka Setiawan, *Contract Law* (Jakarta: Sinar Grafika, 2016) p. 19

- c. Do what you have to do but it's too late;
- d. Doing something that according to the agreement you are not allowed to do.<sup>20</sup>

Default can be in the form of: First, not doing what he promised to do. Second, doing what he promised, but not as it should be. Third, doing what he promised but late. Fourth, doing something that according to the agreement should not be done. <sup>21</sup>Ultimately, the court's decision regarding default can be in the form of execution of the collateral object of the losing party in the decision.

According to Sudikno Mertokusumo, there are three types of decision implementation (execution), namely:<sup>22</sup>

1. Execution of a decision that sentences the losing party to pay a certain amount of money. In this execution, the required achievement is to pay a certain amount of money. This execution is regulated in Article 196 HIR or Article 206 Rbg.
2. Execution of a decision that punishes a person for committing an act. This execution is regulated in Article 225 HIR or Article 259 Rbg. The community cannot be forced to fulfill the achievement in the form of an action, but the winning party can ask the judge to assess the interests that will be obtained with money.
3. Real Execution is the implementation of a Judge's decision ordering the vacating of fixed assets. In the event that a person sentenced by the Judge to vacate fixed assets does not want to comply with the order, the Judge will order by letter to the bailiff that with the assistance of the Court Clerk and if necessary with the assistance of the state authorities, the person sentenced and his family will vacate the assets.
4. Execution of Mortgage Rights can be carried out in 3 (three) ways, namely:
5. The right of the first Mortgage Holder to sell the Mortgage Rights under his own authority.<sup>23</sup>

The legal responsibility of a party who has committed a breach of contract is a punishment or sanction in the form of:

1. Paying losses suffered by creditors (compensation);
2. Cancellation of agreement;

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<sup>20</sup>Subekti, Law of Contracts (Jakarta: Intermasa, 1991), p. 45.

<sup>21</sup>R. Subekti, 1970, Contract Law, Second Edition, Pembantu Masa, Jakarta, p. 50.

<sup>22</sup>Sudikno Mertokusuko, Indonesian Civil Procedure Law, Yogyakarta, Liberty, 1988. Page 201.

<sup>23</sup>J. Satrio, Collateral Law, Property Collateral Rights, Mortgage Rights, Bandung, PT. Citra Aditya Bakti, 1998, Page 271.

3. Risk transfer. The object promised as the object of the agreement becomes the responsibility of the debtor from the time the obligation is not fulfilled;
4. Pay court costs, if the case is brought before a judge.<sup>24</sup>
5. The debtor is obliged to pay compensation, after being declared negligent he still does not fulfill the performance". (Article 1243 of the Civil Code). "Compensation consists of costs, losses, and interest" (Articles 1244 to 1246 of the Civil Code).

The legal consequences of a party that has committed a breach of contract are that the agreement can be canceled. In principle, an agreement that has been made can be canceled if the agreement in its implementation will harm certain parties. <sup>25</sup>An agreement can be canceled because there is a violation of the subjective requirements of the validity of an agreement.

## CONCLUSION

Notaries have the authority to legalize documents. agreement of the parties but various implications that arise later should be the responsibility of the parties not the responsibility of the notary , in terms of legalization. Legalization as a process of ratifying a document by a notary so that it is legally valid. In the context of an agreement of the parties , legalization is carried out to ensure that the documents used in the agreement process of the parties are valid and in accordance with applicable regulations.

The role of a notary in the agreement of the parties through legalization is as the party responsible for checking the validity of the documents that will be used in the agreement process of the parties . The notary will check whether the document is valid and in accordance with applicable regulations, and ensure that all necessary requirements have been met.

## 4. Conclusion

There is a need to regulate the time for mediation of industrial relations disputes, which was previously regulated for thirty days by Law. Number 2 of 2004 concerning Completion Dispute Industrial Relations and Regulation of the Minister of Manpower and Transmigration of the Republic of Indonesia Number 17 of 2014 Concerning the Appointment and Dismissal of Industrial Relations Mediators and Mediation Work Procedures, to 50 days for the period of mediation of industrial relations disputes.

An industrial relations mediator who does not provide written recommendations to the parties experiencing an industrial relations dispute, following the failure of industrial relations

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<sup>24</sup>Subekti, 1996, Principles of Civil Law, Intermasa, Jakarta, p.147

<sup>25</sup>Kartini Muljadi and Gunawan Widjaja, 2003, The Contract Born from an Agreement, Rajawali Press,

dispute mediation within a period of ten days after the first mediation as mandated by the Law. Number 2 of 2004 concerning Completion Dispute Industrial Relations and Regulation of the Minister of Manpower and Transmigration of the Republic of Indonesia Number 17 of 2014 Concerning the Appointment and Dismissal of Industrial Relations Mediators and Mediation Work Procedures, can be subject to administrative sanctions in the form of disciplinary sanctions in accordance with the laws and regulations applicable to state civil servants as regulated in Article 116 of Law Number 2 of 2004 concerning Completion Dispute Industrial Relations .

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