

## The Legal Certainty of Attorney's Special Power for Advocates made by a Notary to Conduct a Session in a Religious Court

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**Abstract.** *This study aims to analyze: The role and authority of a Notary in making a special power of attorney for Advocates who will conduct a trial at the Pekalongan Religious Court. 2) Legal certainty of special power of attorney for advocates made by a notary to conduct a trial at the Pekalongan Religious Court. The approach method used in discussing this problem was a normative juridical approach. Normative juridical is library law research conducted by examining library materials or secondary data. The results of the study: 1) The role and authority of a Notary in making a special power of attorney for Advocates who will conduct a trial at the Pekalongan Religious Court is an attribution obligation carried out based on Article 15 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2014 2004 Regarding the Position of Notary. Attributive authority is an authority that comes from the law. One of these powers is to make a power of attorney. The notary has the authority to make a special power of attorney based on the statements of the witnesses, so that the special power of attorney will have legal force as an authentic deed that is perfect. 2) Legal certainty that a special power of attorney for Advocates made by a Notary to carry out a trial at the Pekalongan Religious Court can be achieved if it meets the requirements in Article 1796 of the Civil Code, which is limited in nature, the legal action can only be carried out by the attorney himself, in addition to the letter must be before a notary. The special power of attorney can be made directly by the parties before a notary, or made by the parties first and then requested for approval by a notary. The legal certainty of a special power of attorney for advocates made by a notary to conduct a trial at the Pekalongan Religious Court is related to the role of a notary in providing legal certainty for his clients. To be able to provide legal certainty, a notary must be guided by the laws and regulations that govern it.*

**Keywords:** Advocate; Attorney; Power; Session.

## 1. Introduction

High public legal awareness can result in the parties complying with applicable legal provisions. On the other hand, if the level of legal awareness is very low, then the degree of compliance with the law is not high.<sup>1</sup>One of the efforts so that these interests are maintained and protected, usually they delegate it to someone else and at the same time submit the case to be resolved before a court session. The person who is authorized is known as an advocate or lawyer. In simple terms, it can be said that the granting of power of attorney is a legal act aimed at and on behalf of the giver of the power of attorney. For one reason or another, the act of giving power of attorney and receiving power of attorney need to be done to resolve one or several specific cases. Act No. 1 of 1974 concerning Marriage lays down fundamentally that national marriages are juridical, namely those carried out according to religious law and recorded according to the applicable legislation.

KHI has fully acknowledged that there is interference from the authorities in every marriage, based on a brief description of the affirmation of the juridical basis mentioned above. This affirmation at the same time releases the dogmatics that have been developed and understood so far that teach marriage as an individual affair or private affair. For those who do not comply, KHI does not hesitate to impose sanctions in the form of an invalid and non-binding marriage penalty.<sup>2</sup>

Regarding the granting of special powers intended to settle a civil case in the Religious Courts, it can be seen in Article 123 paragraph 1 HIR and Article 147 paragraph 1 RBg where the intent of the legislators to stipulate this article is to protect the interests of people whose rights have been violated and to provide fair legal services. The presence of an attorney before the District Court session is highly expected, because in addition to the judge being able to easily find the right law, the guarantee to restore the rights of an attorney can be fulfilled. where according to "*Reglement op de Burgelijke Rechtvordering*" (BRv), both parties in a litigation must always be represented or assisted by a "procureur" who is now commonly called a lawyer, and if one or both parties come without being represented by a "procureur", then they are considered not to have come. According to *Herzien Inlandsh Reglement* (HIR) both parties are intended to appear before the Court themselves, unless both parties wish to be represented by their proxies assisted by an advocate or attorney.

According to the custom of giving power of attorney in civil cases made by the power of attorney with the recipient of the power of attorney, it is expressly stated

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<sup>1</sup>Soerjono Sukanto & Mustafa Abdullah. 1982. *Sosiologi Dalam Masyarakat*. Jakarta: Rajawali Pers, p.215

<sup>2</sup>M. Yahya Harahap. 2009. *Kedudukan Kewenangan & Acara Peradilan Agama. UU No. 1 Tahun 1989*. Ed-2. Jakarta: Sinar Grafika, p.39

in the agreement. This is done by remembering that the granting of power of attorney is special in nature to carry out certain cases before the court. However, even though the agreement has been expressly stated, sometimes an event occurs that cannot be avoided by both parties, where the recipient of the power of attorney who should act to represent the interests of the power of attorney turns out to be unable to carry out his will perfectly.

## **2. Research Methods**

This research used normative juridical research methods. The specifications of the research conducted by the author are classified as analytical descriptive research. Methods of data collection using library research techniques. The data source come from secondary data. The method of data analysis was descriptive qualitative analytical.

## **3. Results and Discussion**

### **3.1. The Role and Authority of a Notary in Making a Special Power of Attorney for Advocates who will Conduct a Session at the Pekalongan Religious Court**

The state has provided guarantees for obtaining legal assistance as regulated in the constitution, laws, and implementing regulations. The principle in a state of law demands, among other things, the guarantee of equality for everyone before the law (equality before the law).<sup>3</sup>As stated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads "all citizens have the same position in law and government and are obliged to uphold the law and government without exception".<sup>4</sup>

This is also guaranteed in Act No. 14 of 1970 concerning the Basic Provisions of Judicial Power which have been amended by Act No. 35 of 1999 and the second amendment to Act No. 4 of 2004 and the third amendment to Act No. 48 of 2009 are regulated in Articles 35, 36, and 37, that Everyone involved in a case has the right to obtain legal assistance.<sup>5</sup>Legal aid is meant when the parties give power to someone to represent them. This legal aid can be obtained by hiring an Advocate or Lawyer.

Proceedings in the Religious Courts can be carried out directly or indirectly. Directly, it means that the litigants come to the court themselves to take care of their interests until they are finished. If the proceedings are indirect, then the litigating party can represent the case to the recipient of the power of attorney.

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<sup>3</sup>Moh Hatta. 2008. *Menyongsong Penegakan Hukum Responsif Sistem Peradilan Pidana Terpadu*. Yogyakarta: Galang Press, p. 123.

<sup>4</sup>*Panduan Bantuan Hukum di Indonesia*. 2017. Jakarta: YLBHI, p. 47.

<sup>5</sup>*Ibid*. p. 47

The method taken is by making a power of attorney, in which the power of attorney authorizes the recipient of the power of attorney to take legal action regarding the case faced by the power of attorney.<sup>6</sup>

A power of attorney is a letter of evidence from a legal event called the granting of power of attorney. The limitation of the definition of granting power of attorney can refer to article 1792 Burgerlijk wetboek or known as the Civil Code (KUH Perdata) which reads: "The granting of power of attorney is an agreement by which a person gives power to another person, who accepts it, to carry out a power of attorney on his behalf some business."<sup>7</sup>From these provisions, there are 2 things that must be considered, namely the parties and the affairs to be authorized. First, the parties, consisting of the giver of the power of attorney and the recipient of the power of attorney. second, the affairs to be authorized must be stated explicitly for what purpose the power of attorney is given. The mention aims to anticipate losses that arise as a result of the actions of the recipient of the power of attorney if he acts beyond the authority given to him.

The granting of this power of attorney issues obligations for the recipient of the power of attorney as a full representative (full power). The obligation is in the form of giving authority to the power of attorney to act and on behalf of the power of attorney to third parties. The actions taken by the power of attorney are directly binding on the power of attorney, provided that their actions do not exceed the limits of the authority granted by the power of attorney. In relation to third parties, the power of attorney is a formal party and the power of attorney is a material or principal party.<sup>8</sup>

During the trial at the Pekalongan Religious Court, advocates are required to use a special power of attorney when representing their clients. Article 123 of the HIR states that "If desired, both parties can be assisted or represented by a proxy, who is authorized to do so with a special power of attorney, unless the person giving the power of attorney himself is present. The plaintiff can also give such power of attorney in a letter of request signed by him and entered according to the first paragraph of article 118 of the HIR or if the lawsuit is made orally according to article 120 of the HIR, then in this last case, that must be stated in the notes made in this lawsuit."

Article 123 of the HIR states that a special power of attorney can only be given in the form of a valid letter. The word letter in civil law can be likened to a deed. This special power of attorney can be made in various forms of deed. The authentic form of the special power of attorney has the following form:

- A special power of attorney made before a notary in the presence of the principal or proxy and the recipient of the power of attorney. However, the special power

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<sup>6</sup>Ronnie Rahmani. op.cit. p.1

<sup>7</sup>R. Subekti & R. Tjitrosudibio. 2008. *Kitab Undang- Undang Hukum Perdata*. Jakarta: Pradnya Paramita, p.457.

<sup>8</sup>Yahya Harahap. 2005. *Hukum Acara Perdata*. Jakarta: Sinar Grafika, p. 2

of attorney actually has a free form (*vrijk vorm*), it does not have to be in the form of a notarial deed.

- A special power of attorney made before the court clerk in accordance with the relative authority. Then the deed made in front of the clerk must be legalized by the head of the court so that the deed is valid to become an authentic deed.<sup>9</sup>

As is known, Notaries also play a role in making power of attorney for someone who wants to represent an advocate or lawyer before the court. In addition to authentic deeds, Notaries are also assigned to register and ratify letters or deeds made privately. Notaries also provide legal advice and explanations regarding the laws and regulations to the parties concerned. The essence of the task of a Notary as a public official is to regulate in writing and authentically the legal relationship between parties who benefit and consensus request the services of a notary which is basically the same as the task of a judge who provides justice between the disputing parties.

The main task of a notary is to make an authentic deed, whether determined by laws and regulations or by the wishes of certain people and legal entities that require it.<sup>10</sup>As for the word authentic, according to Article 1870 of the Civil Code, namely giving to the parties who make it a perfect proof. The location of the importance of a notary, that a notary is given the authority to make a deed containing the formal truth in accordance with what the parties have notified the notary, so that it can be used as a means of proof in a legal dispute that is used to remind events that have occurred so that it can be used for proof purposes.<sup>11</sup>In the sense that what is stated in the authentic deed is basically considered true as long as there is no evidence to the contrary.

Notaries are given the authority to make an authentic deed, then the Notary concerned is obliged to fulfill all the requirements that have been determined by the laws and regulations, so that the deed made meets the requirements as an authentic deed. In carrying out his duties, a Notary has responsibility for his position and has the obligation to be responsible to his client and is responsible for all his actions. According to Sudarsono, the responsibilities are:<sup>12</sup>: "Responsibility is the obligation of a person to carry out properly what has been required of him. Responsibility is borne by individuals who are able to act morally. The object of responsibility is truly human action that departs from the part of humans who act through free will.

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<sup>9</sup>I Made Mulyawan Subawa. Fungsi Notaris Dalam Menjamin Keabsahan Surat Kuasa Khusus Gugatan Pengadilan Yang Dibubuhi Dengan Cap Jempol Sebagai Pengganti Tanda Tangan. *Tesis Hukum*. Universitas Udayana. Denpasar. 2013. p.9

<sup>10</sup>Supriadi. 2006. *Etika & Tanggung Jawab Profesi Hukum di Indonesia*. Jakarta: Sinar Grafika, p. 37

<sup>11</sup>Valentine Phebe Mowoka. 2014. "Pelaksanaan Tanggung Jawab Notaris Terhadap Akta Yang Dibuatnya". *Jurnal Lex et Societatis*. Edition No.4 Vol. II, p.62

<sup>12</sup>Sudarsono. 2012. *Kamus Hukum*. Jakarta: Rineka Cipta, p. 84

In general, that this special power of attorney is made in the form of an authentic deed, it must refer to a notarial deed or notarial deed. Namely, according to Article 1 paragraph (7) of the Notary Position Act: "an authentic deed made by or before a Notary according to the procedures stipulated in the Notary Position Act." So that the standard of the authentic deed will be based on the standards of the Law on Notary Positions. Regarding how to make a special power of attorney, of course there is a role for a notary in making the deed.<sup>13</sup>

Notaries get authority from law or attributively. Attribution is the granting of government authority by legislators to government organs, in other words attributive authority is outlined or derived from the division of state power by the Constitution. Attributive authority is an authority that comes from the law.<sup>14</sup>One of these powers is to make a special power of attorney.

The role and authority of a notary in making a special power of attorney for advocates who will conduct a trial at the Pekalongan Religious Court based on Article 15 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary. Article 15 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary, states:

- Notaries are authorized to make authentic Deeds regarding all actions, agreements, and stipulations required by laws and regulations and/or desired by interested parties to be stated in authentic Deeds, guarantee certainty of the date of making the Deed, save the Deed, provide grosse, copies and quotations of the Deed, all of this as long as the making of the Deed is not assigned or excluded to other officials or other people stipulated by law.
- In addition to the authority as referred to in paragraph (1), a Notary is also authorized to:
  - Validate the signature and determine the certainty of the date of the letter under the hand by registering it in a special book;
  - Book letters under the hand by registering in a special book;
  - Make a copy of the original underhand letter in the form of a copy containing the description as written and described in the letter concerned;
  - Validating the compatibility of the photocopy with the original letter;
  - Provide legal counseling in connection with the making of the deed;
  - Make a deed related to land; or
  - Make a Minutes of Auction Deed.
- In addition to the authority as referred to in paragraph (1) and paragraph (2), a Notary has other powers as regulated in the laws and regulations.

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<sup>13</sup>Muhammad Fajar Sidiq. Op.cit. p.49

<sup>14</sup>Mokhammad Dafirul Fajar Rahman. Kewenangan. Kewajiban Notaris & Calon Notaris dalam Membuat Akta Otentik. *Jurnal Hukum*. Universitas Brawijaya. Malang., p.10

Other powers of a notary are regulated in the provisions of Article 51 of the UUJN, namely:

- Keeping the letters under the hand by registering in a special book (waarmerking);
- Make a copy of the original letter under the hand in the form of a copy containing the description as written and described in the letter concerned;
- Validating the compatibility of the photocopy with the original letter (legalized);
- Provide legal counseling in connection with the making of the deed;
- Make a deed related to land; 6) Make a deed of minutes of auction;
- Fix typographical errors and/or typos contained in the signed minutes of deed, by making an official report and providing notes about it in the original minutes of deed stating the date and number of the rectification report, and a copy of which is sent to the parties.

Based on the theory of authority, the role and authority of a notary in making a special power of attorney for advocates who will conduct a trial at the Pekalongan Religious Court is an attributive authority. Attributive or attribution is the granting of government authority by legislators to government organs, in other words, attributive authority is outlined or derived from the division of State power by the Constitution. Attributive authority is an authority that comes from the law as regulated in Article 15 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary.

### **3.2. Legal Certainty Special Power of Attorney for Advocates made by a Notary to Conduct a Session at the Pekalongan Religious Court**

One of the reasons for breaking up a marriage in Islam is divorce. Divorce can occur because of talak or based on a divorce suit. If the divorce occurs because of talak, it is certain that the person who filed the divorce is the man or the husband, while if the divorce is based on a divorce suit, the woman or the wife is the one filing.<sup>15</sup> Divorce can only be carried out before a court hearing, after the court has tried and failed to reconcile between the two. This is in accordance with the provisions of Article 39 paragraph (1) of Act No. 1 of 1974 concerning Marriage: "Divorce can only be carried out before a Court Session after the Court in question has tried and failed to reconcile the two parties." The Compilation of Islamic Law also regulates the same issue, namely in article 115. The judge needs to know the reasons put forward by the applicant to divorce his wife. If the judge considers that the reasons submitted are sufficient, the judge will give permission to impose divorce on a wife. According to the rules, divorce must not be done outside the court, divorce

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<sup>15</sup>Muhammad Fajar Sidiq. Legal Standing Kuasa Istimewa Untuk Mewakili Mengucapkan Ikrar Talak Dalam Perkara Cerai Talak. *Jurnal Hukum*. Volume 3 Nomor 1, 2019. p.1

must be pronounced in front of the Religious Court. Community life in public services is closely related to the need to obtain legal certainty. In this regard, the philosophical foundation for the establishment of the UUJN is the realization of guarantees of legal certainty, order and legal protection. The realization of these three things is based on truth and justice through the deed he made. Notaries must be able to provide legal certainty to the public who use notary services.<sup>16</sup>

Legal certainty pointing to the implementation of a clear, permanent, consistent and consequent law, the implementation of which cannot be influenced by subjective circumstances. The indicator of the existence of legal certainty in a country itself is the existence of clear legislation and the legislation is well implemented by judges and other legal officers.<sup>17</sup>

Based on the theory of legal certainty, the legal certainty of a special power of attorney for an advocate made by a notary can be achieved if the preparation of the special power of attorney fulfills the requirements in the legislation, because the legislation contains legal facts that are clear and not easy to change. Legal certainty of a special power of attorney for advocates made by a notary to conduct a trial at the Pekalongan Religious Court can be achieved if it meets the requirements in Article 1796 of the Civil Code, namely:

- It is limited, meaning that the legal action can only be carried out by the attorney himself. There is no substitution of power in this special power. Therefore, the special actions taken are only limited to transferring the objects belonging to the authorizer, to making peace with third parties and to taking an oath.
- Made based on an authentic deed to an authorized official, namely a Notary.

The special power of attorney, besides being made directly before a notary by the parties, can also be made first and then brought to a notary for ratification by a notary. The authority to ratify by a notary exercised on a special power of attorney made under the hand will be able to provide legal certainty to the parties, as long as the ratification or legalization is in accordance with the provisions of the legislation. The legal certainty of a special power of attorney for advocates made by a notary to conduct a trial at the Pekalongan Religious Court is related to the role of a notary in providing legal certainty for his clients. To be able to provide legal certainty, a notary must be guided by the laws and regulations that govern it.

A deed is a letter affixed with a signature, which contains events that form the basis of a right or an engagement, the purpose of which is intentionally made as evidence. So to be considered a deed, the letter must be signed. The requirement to sign a letter so that it can be called a deed is indicated in Article 1869 of the Civil Code. If the deed is made by an incompetent or incompetent person or the deed is defective, then it is not an authentic deed but has the power to be written under

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<sup>16</sup> Made Mulyawan Subawa. Op.cit. p.2

<sup>17</sup> Abdul Rachmad Budiono. 2005. *Pengantar Ilmu Hukum*. Malang: Bayumedia Publishing. p.22



the hand if it is signed by the parties. The function of the signature here is to characterize or to individualize a deed.<sup>18</sup>

The guarantee of legal certainty of a letter or deed lies in its function. The most important function of the deed is as evidence and the strength of proof of the deed can be distinguished as follows:<sup>19</sup>

- The power of outward proof is the power of proof that is based on the state of birth that appears at birth.
- The power of formal proof is related to the question of whether or not a statement exists.
- The strength of material evidence is related to the answer to the question whether or not the contents of the statement in the deed are true.

The notary world recognizes the terms *waarmeking* and legalization. If the deed under the hand has been signed before appearing before a notary then it is referred to as *Waarmeking* however, if the deed under the hand is signed before a notary then it is referred to as legalization. Of course the legal consequences of the two actions are different. *Waarmeking*, an act to explain that the Notary has seen the deed under the hand on that day. So that the date listed by the notary is the date when the deed under the hand was seen by the notary.<sup>20</sup> Legalization is an act to ratify a deed under the hand that has not been signed and the execution of the signatures of the parties is carried out before a Notary. Of course, before signing the deed under the hand, the contents of the agreement will be explained by a notary. Regarding the procedure, it has been regulated in Article 1874 a *Burgerlijk Wetboek*.

The authority of a Notary to legalize a deed is subject to the provisions of Article 15 paragraph (2) letter a of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary, which reads "To ratify the signature and determine the certainty of the date of the letter. under the hand by registering in a special book. In the explanation it is written as follows: "This provision is the legalization of private deeds made by individuals or by parties on paper with sufficient stamp duty by way of registration in a special book provided by a Notary."

The legalized deed has a definite signature and a definite date of the deed. Certainty of signature because the parties directly appear before the notary himself according to his identity document and not someone else who appears. The certainty of the date means that it is at the time of the meeting that the day

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<sup>18</sup>Sudikno Mertokusumo. 1993. *Hukum Acara Perdata Indonesia*. Edisi Keempat. Yogyakarta: Liberty. p.121.

<sup>19</sup>Teguh Samudera. 1992. *Hukum Pembuktian dalam Acara Perdata*. Bandung: Alumni, p.47-48.

<sup>20</sup>Kiagus Yusrizal. Tinjauan Hukum Terhadap Pembuktian Akta di Bawah Tangan Dhubungkan dengan Kewenangan Notaris dalam Pasal 15 ayat (2) UU NOmor 30 Tahun 2004 tentang Jabatan Notaris. *Tesis Hukum*. Universitas Diponegoro. Semarang. 2008.p. 112

and date are included. Does not include the date at the request of the parties. The certainty of this date is very important to determine when the deed was made. If it is associated with a special power of attorney to pronounce divorce, then the making of the special power of attorney must be dated after the decision of the Religious Courts which allows the divorce pledge to be pronounced.

If viewed from the point of view of its legal power for proof, then of course legalization is stronger than *waarmerking*, because with legalization a notary knows for sure when the special power of attorney is approved by both parties in other words when the letter is affixed with a thumbprint or signed by a notary directly witnessed it. In addition to being witnessed, the Notary also explains to the party appearing on the contents and intent of the power of attorney. Legislation that is legally flawed results in the cancellation of the previous judge's decision, this is what needs to be a concern so that people who need the services of a notary can get legal certainty.<sup>21</sup>

#### **4. Conclusion**

The role and authority of a Notary in making a special power of attorney for Advocates who will conduct a trial at the Pekalongan Religious Court is the attribution authority which is carried out based on Article 15 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary. Attributive authority is an authority that comes from the law. Legal certainty of a special power of attorney for advocates made by a Notary to conduct a trial at the Pekalongan Religious Court can be achieved if it meets the requirements in Article 1796 of the Civil Code, which is limited, meaning that legal actions can only be carried out by the attorney himself, in addition to a letter or deed must be made based on an authentic deed to an authorized official, namely a notary. The special power of attorney can be made directly by the parties in front of a notary, or made by the parties first and then requested for approval by a notary. The legal certainty of a special power of attorney for advocates made by a notary to conduct a trial at the Pekalongan Religious Court is related to the role of a notary in providing legal certainty for his clients.

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<sup>21</sup>Hadi Nuskah Alhaqi. Ashoya Ratam. Widodo Suryandono. Otentisitas Suatu Akta Notaris Tanpa Adanya Dokumen Pendukung Akta. *Jurnal Hukum*. Universitas Indonesia. p.2

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