OPEN ACCESS

Scholars International Journal of Law, Crime and Justice

Abbreviated Key Title: Sch Int J Law Crime Justice
ISSN 2616-7956 (Print) | ISSN 2617-3484 (Online)
Scholars Middle East Publishers, Dubai, United Arab Emirates
Journal homepage: https://saudijournals.com

Original Research Article

Legal Reconstruction of Notary Role in the Making of a will without Heir Appointment Based on Justice Value

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DOI: 10.36348/sijlcj.2023.v06i09.005 | **Received:** 15.08.2023 | **Accepted:** 23.09.2023 | **Published:** 28.09.2023

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Abstract

The aim of this research is to analyze and reconstruct the regulations on the role of Notaries in making will deeds without appointing an heir of the will in the midst of a pluralistic inheritance system in Indonesia using a constructivism paradigm, through direct interviews with informants empirically supported with studies literature through theoretical steps. Research Result shows that the weakness started from the kinship system in marriage in Indonesia which is the parental or bilateral kinship system where a child legally inherits from his father's and mother's lineage, the matrilineal system where a child legally inherits from his mother's lineage only, the kinship system patrilineal where a child legally inherits from his father's lineage only. This causes some residents to adhere to other laws such as Islamic inheritance law, and to some, the various customary law. Therefore It is not uncommon for there to be contradictions in inheritance law, especially between inheritance through a will and the inheritance system adopted by the heir. Therefore the legal reconstruction due to the pluralism of inheritance law in Indonesia is in the form where the procedures for making wills for each population group must be added to article 16 number (1) letters i and j of the Notary Position Law. based on the value of justice for both heirs, notaries, and parties related to wills, this should be done through harmonization of the legal system between population groups in Indonesia so as to provide beneficial values for heirs, heirs, and society in general.

Keywords: Legal Reconstruction, Notary Role, Will, Justice Value.

INTRODUCTION

Sometimes, when making a will, whether the will is set out in a general will (openbare testament), a closed will or an olographic will, a the heir does not appoint an executor of the will, even though the heir of the will has a very important task in executing the will. The heir of the will carries out his duties to carry out the will in accordance with the will of the heir when the heir dies. If an executor of the will is not appointed, then the heirs of the heir, who may be more than one person, carry out the will themselves (Febyanti, 2023). Considering that the interests of the heirs are different and often contradictory, making a will without appointing an executor of the will has the potential to cause conflict between the heirs. The position of the heir of the will who is appointed by the heir with the intention that the will is actually executed is regulated in the articles concerning the heir of the will (executeur testamentair) in the Civil Code.

In article 1007 of the Civil Code, it is stated that "*the heir of a will may be given control over all inherited objects, or over a certain part thereof, to an executor of a will.*" In article 1005 of the Civil Code, it is stated that "*a person who inherits is permitted either in a will or in a personal deed as stated in article 935, or in a special notarial deed, to appoint one or several people who will executor the will*". He can also appoint various people, so that if one is unable to be replaced by another. Article 935 of the Civil Code states that a will can be made by means of a private letter, written in its entirety, dated and signed by the heir, so with no other orderly conditions, a person is permitted to make decisions regarding treatment after death, but only for the appointment of executors, the organization of burials, to provide clothing, certain body jewelry and special furniture.

The role and position of the heir of a will in a testament is also mentioned in article 1009 of the Civil Code which states that executors of a will are obliged to order the sealing of the inheritance of the heir, if there is an heir who is not yet an adult or is placed under

guardianship, which at the time on the death of the heir who does not have a guardian or custodian, or if there is an heir who is not present either personally or through his/her representative. Article 1010 of the Civil Code also states that executors of wills are required to make a registration of objects including inherited assets, in the presence of all the heirs residing in the territory of Indonesia or after the heirs have been legally summoned. Article 1011 of the Civil Code also states that executors of wills are tasked with ensuring that if a dispute occurs, they can appear before a judge, to defend the validity of the will.

Testamentary inheritance does not apply to population groups as is applied in the *Indische Staatsregeling*, but *ab intestato* inheritance still differentiates the officials authorized to make inheritance certificates for each population group. For Indonesian citizens from the *Bumiputera* (Indigenous) population group, those who have the authority to make a certificate of inheritance are the Village Head or Head of the sub-district, authorized by the Camat. Non-Chinese foreigners, such as those of Arab and Japanese descent, have the authority to make Inheritance Certificates for them handed over to the Inheritance Hall (Wahyu, 2019).

Apart from being an Indonesian citizen, a foreign citizen can make a will or testament before a Notary as a Public Official in Indonesia as long as the object of the will is in Indonesia, as mandated in Article 16 of the Law on the Position of Notary Number 30 of 2004 in conjunction with Law Number 2 of 2004. 2014 regarding the position of Notary. Based on the law ex article 4 of the Staatsblad of 1924/559, foreign nationals can make a will in Indonesia, but the will is limited to being made in the form of a public testament (*openbaar testament*) before a notary in the presence of 2 (two) witnesses. Making a will by a foreigner should not only look at the legal aspects that apply in Indonesia but should also look at aspects of international private law and the country of origin of the heir making the testament. The appointment of one or more executors in a testament for foreigners, even though it is not required in the law, is very important, considering that the implementation of the testament involves heirs who may not be Indonesian citizens, so it is appropriate to appoint executors from the country of origin of the will.

Based on this problem, the author then formulate several problem discussed in this article, namely:

1. What are the weaknesses in the regulation regarding Notary Role in the Making of a will without an Heir Appointment in Indonesia currently?
2. How is the Legal Reconstruction of Notary Role in the Making of a will without an Heir Appointment Based on the Value of Justice?

METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach).* The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010):

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses in the Regulation Regarding Notary Role in the Making of a will without an Heir Appointment in Indonesia Currently

Both in customary inheritance law, Islamic inheritance law and inheritance law according to the Civil Code, there is a testamentary inheritance or more commonly known as a will (Muzakir, 2022). The will, which is the final will of the deceased, often cannot be carried out because of a lawsuit from the heirs. In many cases, wills cannot be carried out in accordance with the heir's last will because the will is canceled by the court. From various cases in the Religious Courts and District Courts as judex factie, as well as at the appeal and cassation level, the will was canceled because it violated the legitieme portie (absolute part) of the heirs ab

intestato (statutory provisions) in a straight line and the heir did not appoint executor of the will (executeur testamentair) to carry out his will but leave the implementation of the will to the heirs who receive the object of the will (Lediana, 2023).

The weakness in terms of the legal structure of inheritance in Indonesia is that with the existence of a population classification based on *Indische Staatsregeling* 163 concerning population classification, this has implications for recording inheritance certificates for each population group. For European population groups and those that are equated with them, they are subject to the Civil Code, the institution for recording inheritance is submitted to a Notary. As for the group of natives who are subject to the customary law of their inheritance registration institution or those who issue inheritance certificates for them are customary elders, village heads/lurah. For people who are classified as citizens of East Foreign-Chinese descent, the institution for registering inheritance or making a Certificate of Inheritance for them is a Notary. For non-Chinese foreign eastern residents, such as citizens of Japanese and Arab descent, the institution that makes inheritance certificates for them is the Heritage Treasure Hall.

Even though Law Number 23 of 2006 concerning as amended in Law Number 24 of 2013 concerning population administration seeks to abolish this population classification, the system of inheritance for each of these population groups has not changed. When making a will without appointing an executor, the notary needs to be careful to confirm the statement of the will of the heir so that the will does not conflict with statutory regulations or customary law regulations regarding inheritance to avoid lawsuits for canceling the will in the future.

Inheritance through a will in Islamic law is like inheritance in customary law, which can be done orally or in writing before 2 witnesses or before a Notary (Article 195 Compilation of Islamic Law). In contrast to the terminology of wills in the Civil Code which regulates the form of wills only in written form, wills in customary law and Islamic law do not have to be put in written form but can be in oral form, as long as there are witnesses who know and witness the heir making the will the object of inheritance to the heirs while the heir is still alive. Wills are often made when the heir feels that his death is near, is seriously ill or is old. In many cases, the will is usually made by people who do not have children in their marriage. Likewise, if the heir has children outside the legal marriage or has children from the second and subsequent marriages. The purpose and objective of this testamentary grant is to avoid inheritance disputes in the future among the heirs fighting over the inheritance of the bequest. In many cases that have been brought before the courts at the Supreme Court, inheritance disputes arise because of claims from heirs because they feel they have received injustice because of the division of assets mandated in an oral will that was mandated by the heir during his lifetime. Inheritance according to the Civil Code also regulates the heir of the will (*Execucuteuer Testamentair*) and his duties from 1007 to 1022 of the Civil Code. In customary inheritance, the heir of this will is known as the interpreter, while in Islamic inheritance, the heir of this will is known as the heir of the distribution of inheritance as contained in article 187 of the Compilation of Islamic Law.

Unlike the case with making a will according to the Civil Code, a will in which a will in the Civil Code must be put in writing, wills in Islamic law and customary law allow the will to be pronounced verbally in the presence of at least two people witness. The position of an oral testament is very weak in civil law institutions, because according to the evidentiary law hierarchy in civil procedural law, verbal statements in the form of confessions and oaths occupy the last place in terms of the strength of proof. The law of proof in civil cases is contained in *Herziene Indonesische Reglement* (HIR) which applies to the Java and Madura regions and is contained in articles 162 to 177, while for areas outside Java and Madura it is contained in the *Regulation voor de Buitengewesten (*RBg) articles 282 to 314, *Staatsblaad* (STB) 1867 number 29 and *Burgerlijk Wetboek* (BW) or Book of the Civil Code book IV articles 1865 to article 1945. The hierarchy of evidentiary powers is based on article 1866 of the Civil Code or article 164 of the Civil Procedure Code (HIR), hierarchy of evidence. The hierarchy of evidence in proving civil cases is: (1) Written Evidence can be in the form of deeds, letters or private writings, (2) Witnesses, (3) Allegations, (4) Confessions, (5) Oaths.

In customary law, wills are verbally acknowledged for their validity, but for reasons based on mutual trust, the heirs and customary elders do not appoint the heir of the will or the person appointed to carry out the will or weling, but hand over the distribution of inheritance based on the said will to the heirs (Wahyu, 2018). This has the potential to cause disputes when there are heirs who feel abused by their inheritance rights, because in inheritance law, both customary inheritance law, Islamic law and western civil inheritance law, every heir in straight line descent has an absolute share that must be obtained in different portions. differ according to the rules of inheritance law adopted. When read in the directory of civil court cases in the realm of the Religious Courts and in the District Court regarding inheritance cases on the basis of wills, lawsuits revolve around claims of heirs due to violations of the absolute part or the implementation of wills that are not in accordance with the sense of justice for the heirs who filed the lawsuit (Toebagus, 2022).

2. Legal Reconstruction of Notary Role in the Making of a will without an Heir Appointment Based on the Value of Justice

Regulations regarding the necessity of having a will executor in a testamentary deed in Indonesia have not been specifically regulated in inheritance law, either in the compilation of Islamic law or customary law regulations. Even though the civil law book includes executors of wills and administrators of inherited assets in Chapter XIV (14) articles 1005 to article 1022, there is no requirement to appoint one or more executors of wills.

If the heir has descendants and then makes a will that harms the inheritance rights of his descendants, this has the potential to cause disputes in the future. This is because each heir is in a straight line (their descendants/children have inheritance rights which cannot be distorted even by a will).

From these incidents, the urgency of reconstructing regulations on the role of notaries in making will deeds with the appointment of will executors needs to be carried out so that justice is based on values. This is because the heir of the will has the function of ensuring that the heir's will can be implemented and if there is a dispute the heir of the will can appear before a judge (court) to maintain the validity of the will (Akrawy, 2023).

That in the law that regulates the position of Notary, namely Law Number 2 of 2014 as an amendment to Law Number 30 of 2004, Compilation of Islamic Law, as well as the Civil Code, there is no regulation of the role of a Notary in making will deeds. appointment of executors of the will so that the Notary and the heirs according to statutory provisions (ab intestato) and the provisions of customary inheritance law regulations have not achieved the values of justice.

For Notaries, the value of justice here is defined as legal protection for Notaries in carrying out their office, while for heirs who feel that their inheritance has been violated, it is defined as a balance between the rights they have acquired and the obligations that must be fulfilled for the benefit of the heir or the heir after reconstruction is carried out. Quoting from the concept and theory of progressive law from Satjipto Rahardjo, in Alfared (2023) that "*The law must serve human interests, and not humans who must serve themselves to the law*", this research produces a legal reconstruction which is made with the aim that the law as intended can have sufficient evidentiary power. strong, so the will must be stated in written form and stated in the form of an authentic deed in the presence of at least two witnesses. For population groups that are subject to Islamic inheritance law, the will is a maximum of one third (1/3) of the total inheritance objects. Wills for population groups that are subject to inheritance law according to the Civil Code, wills must not violate the absolute share of the heirs (Legiteieme Portie) heirs in a straight line. For heirs who are subject to customary law, the will must not differentiate between the positions of female or male heirs by taking into account the applicable customary rules.

Article 1005 to Article 1022 of the Civil Code, the position of the heir of the will or executor testamenter is very important because he is tasked with supervising that the letter or testamentary deed is actually executed according to the will of the heir and he represents the heir to appear before the judge/court. in the event of a dispute in order to maintain the validity of the will.

Regulations that require the appointment of executors of the will in the testamentary deed made before a notary are urgently needed. The heir of the will must come from the same population group as the heir, have good character, and have knowledge of the inheritance laws adopted by the heir and determined by the heir before the will is made (Garwan, 2021). Therefore, Law Number 2 of 2014 concerning the Position of Notaries, especially the one that regulates wills in Article 16 number 1 letters (I), (j), and (k), needs to be reconstructed by adding paragraphs that regulate the procedures for making Deeds of Wills for each population group in Indonesia. For population groups that are subject to Islamic inheritance law, the will is a maximum of one-third of the total inheritance and must not be detrimental to the heirs. For residents who are subject to Western inheritance law (according to the Civil Code), the will must not violate the absolute heirs in a straight line. In particular, residents who are subject to customary inheritance law need to sort out the assets that are the object of the will so that high inheritance and customary property do not become objects of the will and cause harm to the heirs. Article 16 number 1 letter (i), (j), and (k) of the Law on the Position of Notaries-Changes should be added with paragraphs that require an executor of a will to be appointed through a special notarial deed, meaning that the deed does not contain anything other than the appointment of an executor of the will. The appointment of executors of wills who come from the same population group as the heirs is expected to be able to minimize testament disputes so as to be able to provide a sense and values of justice for Notaries who make wills, and heirs.

CONCLUSION

1. There is often a conflict between ab-intestato inheritance and testamentary inheritance (will). This especially happens when the heir has no descendants, or the testamentary heir has no descendants or the heir gives the object of the will excessively to a person or institution thereby violating the rights of other heirs. The pluralism of inheritance law in Indonesia is due to the division of the population and the kinship system due to marriage which causes the existence of a parental or bilateral kinship

system, a Patrilineal kinship system, and a Matrilineal kinship system, thus causing pluralism in legal substance, legal structure and legal culture in Inheritance Law in Indonesia. Notaries often become co-defendants when heirs feel that their inheritance rights have been violated by the will, even though a will is classified as a Partij deed made based on a statement or will of the heir and can be revoked by the heir himself. In this case, the notary only plays the role of producing the strongest and most complete evidence in civil procedural law Article 164 HIR (Civil Procedure Code) and Article 1866 (Civil Procedure Code) concerning the sequence of evidence in civil cases. that an authentic deed has perfect legal force because it provides evidence for the parties or heirs regarding what is contained therein.

2. Unification of inheritance law in Indonesia cannot be carried out because of the classification of the population and the diversity of kinship systems in Indonesia. In order for a will to have strong evidentiary power, it must be stated in written form and expressed in the form of an authentic deed in the presence of at least two witnesses. For population groups that are subject to Islamic inheritance law, the will is a maximum of one-third (1/3) of the total inheritance objects. Wills for the population groups that are subject to inheritance law according to the Civil Code, wills must not violate the absolute share of the heirs (Legiteieme Portie) heirs in a straight line. For heirs who are subject to customary law, the will must not differentiate between the positions of female or male heirs by taking into account the applicable customary rules. Article 1005 to Article 1022 of the Civil Code, the position of the heir of the will, or the heirs is very important because he is tasked with supervising that the letter or testamentary deed is actually executed according to the will of the heir and he represents the heir to appear before the judge/court. in the event of a dispute in order to maintain the validity of the will. Regulations that require the appointment of executors of the will in the testamentary deed made before a notary are urgently needed. The heir of the will must come from the same population group as the heir, have good character, and have knowledge of the inheritance laws adopted by the heir and determined by the heir before the will is made. Therefore, Law Number 2 of 2014 concerning the Position of Notaries, especially the one that regulates wills in article 16 number (1) letters (i), (j), and (k), needs to be reconstructed by adding paragraphs that regulate the procedures for making Deeds of Wills for each population group in Indonesia. . That for population groups that are subject to Islamic inheritance law, the will is a maximum of one third of the total inheritance and must not be detrimental to the heirs. For residents who are subject to western inheritance law (according to the Civil Code), the will must not violate the absolute heirs in a straight line. In particular, residents who are subject to customary inheritance law need to sort out the assets that are the object of the will so that high inheritance and customary property do not become objects of the will and cause harm to the heirs. Article 16 number 1 letter (i), (j), and (k) of the Law on the Position of Notaries-Changes should be added with paragraphs that require an executor of a will to be appointed through a special notarial deed, meaning that the deed does not contain anything other than the appointment of an executor of the will. The appointment of a will executor who comes from the same population group as the heir is expected to be able to minimize will disputes so as to provide a sense and values of justice for the notary who makes the will deed, and heirs.

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