

The Role of Notary in Making the Deed on Inheritance of Land Rights

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Abstract. *This writing aims to determine the process of dividing the inheritance of land rights by a notary and theoretical analysis of the role of a notary in making a deed of inheritance of land rights. The role of a Notary in the transfer of land rights based on inheritance is very large, where every transfer of land rights must be proven by a deed made by and before a Notary so that the deed he makes has binding legal force. The researcher used a legal research method with a normative juridical approach, the research specifications used were descriptive analysis, the data source came from secondary data. Methods of data collection were conducted through interviews, library research, and document studies. This writing was analyzed qualitatively by using the analytical knife of legal certainty theory and Islamic justice theory. The results showed that the process of distributing inheritance rights to land carried out by a Notary, namely the parties (heirs) together faced the Notary in the presence of 2 (two) witnesses. Both parties bring the files that are the formal requirements and the material requirements that have been determined. Theoretical analysis of the role of the notary in making the deed of distribution of inheritance rights to land is carried out with justice, so it is fair not justice. This is similar to Islamic justice theory. Basically the concept of justice in Islam is not "equality" but "comparability".*

Keywords: *Division; Inheritance; Notary; Role.*

1. Introduction

The Republic of Indonesia as a legal state based on Pancasila and the 1945 Constitution of the Republic of Indonesia guarantees certainty, order and legal protection for every citizen. To ensure order and legal protection, authentic

written evidence is needed regarding acts, agreements, stipulations and legal events made before or by an authorized official.¹

Agrarian law is the overall legal norms both written and unwritten that regulate legal relations between legal subjects in the agrarian field. Agrarian law is actually a group of various legal fields, each of which regulates control rights over natural resources, namely land law, water law, mining law, fishery law and control law over energy and elements in outer space.²

Land in the legal sense is the surface of the earth as stated in Act No. 5 of 1960 concerning Agrarian Principles. For human life, land has a very important role because by nature there is forever a direct relationship between humans and land.³ In this case it can be described that the relationship between humans and land is very close because land is the main capital and for the largest part of Indonesia land is the only capital. Therefore, humans have a dependence on land because land existed before humans were born, so humans cannot exist without land.⁴

The transfer of land rights is usually carried out through the process of making a deed signed by the parties interested in the transfer of land rights. And the making of the deed of transfer of land rights must be carried out before a notary / Land Deed Making Officer, so that the deed of transfer of land rights can have evidentiary power both as a deed in the judicial system and a deed that is used as the basis for making a certificate.

The transfer of ownership rights to land is regulated in Article 20 paragraph 2 of the UUPA, namely that property rights can be transferred and transferred to other parties. The definition of the word "switch" is a transfer of rights because the owner of the right has died, his rights automatically become transferred to his heirs. Article 20 paragraph (2) of the UUPA states that land ownership rights can be transferred and can be transferred. The transfer of ownership rights to land can occur due to legal actions and legal events. The transfer of ownership rights to land due to legal actions can occur if the holder of property rights on land intentionally transfers the rights he holds to another party. Meanwhile, the

¹M. Luthfan Hadi Darus, (2017), *Hukum Notariat Dan Tanggungjawab Jabatan Notaris*, Yogyakarta: Uii Press.p.1.

²Sahnan, 2016, *Indonesian Agrarian Law*, Setara Press, Malang, p. 7

³Imam Soetiknjo, 1994, *National Agrarian Politics*, Gajah Mada University Press, Yogyakarta, p. 15

⁴Notonagoro, 1984, *Legal Politics and Agrarian Development in Indonesia*, Bina Aksara, Jakarta, p. 18

transfer of ownership rights to land due to legal events occurs when the holder of property rights to land dies.⁵

Basically the process of transferring one's assets to their heirs called inheritance occurs only because of death, therefore inheritance will only occur if three conditions are met, namely:

- There is someone who died
- There are people who are still living as heirs who will receive an inheritance when the testator dies;
- There are a number of assets left by the heir.

According to the UUPA, it is not enough to just make a deed but must carry out the process of changing the name to make a certificate, to change the name or company name from the old owner to the recommendation of the Land Deed Official. However, having a deed is sufficient to obtain ownership rights, because the rights have already been transferred, but they do not have legal certainty in the future. Because to guarantee legal certainty, it must be proven by a certificate not by a deed, the deed only functions as a proof of rights. The conditions for the transfer of names are:

- There is an official deed (deed of transfer of rights)
- Proof of payment which is the obligation for the transfer of rights.
- Recommendation or cover letter for change of name from PPAT.

In Indonesia, the term agrarian within the Government Administration is used in the sense of land, both agricultural and non-agricultural land, but Agrarisch Recht or Agrarian Law within the Government Administration is limited to the set of laws and regulations that provide a legal basis for the authorities in carrying out their policies in the land sector, then the legal instrument is part of state administrative law.⁶

The distribution of inheritance using a notarial deed is an alternative method of inheritance distribution in addition to using court institutions which are commonly used by Indonesian people in inheritance distribution. Similar to court decisions, the deed made by a notary is intended to explain the distribution of inheritance to anticipate problems that may arise in the future. Based on positive

⁵ Anita Sofiana, Akhmad Khisni, Akibat Hukum Pengalihan Hak Jual Beli Melalui Akta Pejabat Pembuat Akta Tanah Atas Tanah Warisan Tanpa Persetujuan Salah Satu Ahli Waris Lainnya, *Jurnal Akta*, Vol. 4. No. 1, March 2017: 65-70, Unissula, Semarang

⁶Kurniawan Ghazali, (2013), *Cara Mudah Mengurus Sertifikat Tanah*, Jakarta: Kara Pena. p. 9

Indonesian law, there are several ways to obtain a determination of the distribution of inheritance. The first, as already mentioned, is through a court decision, the second is through a notary through the distribution of the deed of separation and distribution of inheritance. Both have the same legal force so that if a family already has only one or uses only one method, then the legal force is already strong.

Notaries as officials who are authorized by the state to make evidence in the form of authentic deeds, with the enactment of the Population Administration Law Notaries have a very important role in making inheritance certificates, based on this the author will discuss the role of Notaries regarding the making of inheritance distribution deeds for Indonesian citizen perspective Article 106 of Act No. 23 of 2006 as Amended by Act No. 24 of 2013 concerning Population⁷ Administration in the explanation that Certificate of Inheritance is a letter that is used as the basis for the right for the heirs to carry out legal actions on an inheritance left by the heir⁸.

With a certificate of inheritance, the heirs can take legal action on the inheritance of the heir together, both regarding management actions and ownership actions on the inheritance, in this case in the form of assets inherited by the heir in the form of land which if you want to change the name can submit an application to the local Land Office, namely by:⁹

- Registering the transfer of rights (transfer of name) for land that has been registered (certified).
- Apply for new rights (certificates) on unregistered land such as girik land, ex-western land rights, state land.

The division of inheritance in Indonesia is classified into 3 (three), namely:

- For Indonesian citizens, indigenous people certificate of heir made by the heirs witnessed by 2 (two) witnesses and confirmed by the Village/Kelurahan Head and the Camat where the heir resides at the time of death.

⁷ Chuasanga A., Ong Argo Victoria. (2019). *Legal Principles Under Criminal Law in Indonesia and Thailand*, Jurnal Daulat Hukum, Vol 2, No 1 (2019) <http://jurnal.unissula.ac.id/index.php/RH/article/view/4218>

⁸ M. Jefry Maulidi, Analisis Hukum Tentang Peralihan Hak Milik Atas Tanah Dengan Bukti Akta Di Bawah Tangan Sebagai Dasar Pendaftaran Tanah Untuk Pertama Kali (Studi Di Kabupaten Lombok Tengah), *Jurnal IUS*, VolIV No. 3 December 2017 and see Muh Idris, "Implementasi Hukum Waris Dan Pengajarannya Pada Masyarakat Kec. Poleang Tengah Kab. Bombana (Perbandingan Antara Hukum Adat, Hukum Islam Dan Hukum Perdata), *Jurnal Al-'Adl*, Vol. 8 No. 1, January 2015.

⁹ Arsyad Harun, (2010), *Tinjauan Yuridis Surat Keterangan Hak Waris bagi Penduduk di Indonesia*, Bandung: Refika Aditama.p. 31

- For Indonesian citizens of Chinese descent, Deed of inheritance rights from a Notary.
- For Indonesian citizens of other Foreign Eastern descent affidavit of inheritance from the Balai Harta Peninggalan
 - written power of attorney from the heirs if the applicant for registration of the transfer of rights is not the heir concerned
 - proof of identity of the heirs.

The role of a Notary in the transfer of land rights based on inheritance is very large, where every transfer of land rights must be proven by a deed made by and before a Notary so that the deed he makes has binding legal force.

Based on the description of the background explaining the urgency of the protection of victims, the authors are interested in studying and researching further by taking the title "Role of the Notary in Making the Deed of Distribution of Inheritance of Land Rights".

Based on the description of the background that has been described, the authors formulate the problem as follows:

- How is the process of dividing the inheritance of land rights by a Notary?
- What is the theoretical analysis of the role of a notary in making a deed of inheritance of land rights?

2. Research Methods

The researcher uses a legal research method with a normative juridical approach, the research specifications used are descriptive analysis, the data source comes from secondary data. Methods of data collection were conducted through interviews, library research, and document studies. This writing is analyzed qualitatively by using the analytical knife of legal certainty theory and Islamic justice theory.

3. Results and Discussion

3.1. The process of distributing inheritance rights to land carried out by a notary

Inheritance law occupies a very important place¹⁰. This is understandable because inheritance problems are experienced by everyone. Every time someone

¹⁰ Wagirin, Jessica, Tinjauan Yuridis Sengketa Hak Waris Tanah Yang Dikuasai Secara Melawan Hukum (Studi Putusan No.09/Pdt.G/2013/PN.Binjai), *Jurnal Ilmu Hukum Prima*, Universitas Prima Indonesia

dies, the question immediately arises "how the inheritance (if any) should be treated. And to whom the property is transferred, and how the transfer / transfer. All this must be regulated in the law of inheritance¹¹.

Inheritance according to civil law is inheritance law in the form of a set of legal provisions that regulate legal consequences generally in the field of property law due to the death of a person, namely the transfer of property left by the dead and the consequences of the exile for the recipients, both in the relationship between them and between them with third parties.¹² When talking about Inheritance or Inheritance Law, in essence it revolves around:¹³

- There are people who die;
- There are treasures left behind; and
- There are heirs.

The steps taken at the time of making the deed of distribution of inheritance rights to land are as follows¹⁴:

- The parties (heirs) together appear before the Notary in the presence of 2 (two) witnesses. Both parties bring the files that are the formal requirements and the material requirements that have been determined.
- The notary checks the files obtained from both parties. PPAT before making the deed checks the certificate files brought by both parties.
- Based on the results of these checks, the Land Deed Making Officer makes a will or Inheritance Certificate in accordance with the wishes of the heirs.
- The will is signed by the heirs and the PPAT (made in two copies).
- The deed of inheritance distribution must be made before the PPAT in the presence of 2 (two) witnesses.

Administrative requirements in terms of inheritance must be completed for orderliness of administrative data at the Village and District Offices. Certificate of Inheritance signed by the heirs with 2 (two) witnesses, as well as the local Lurah

¹¹ Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). *Code of Ethics and Position of Notary in Indonesia*. Sultan Agung Notary Law Review 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

¹²Muh Idris, "Implementasi Hukum Waris Dan Pengajarannya Pada Masyarakat Kec. Poleang Tengah Kab. Bombana (Perbandingan Antara Hukum Adat, Hukum Islam Dan Hukum Perdata), *Jurnal Al-Adl*, Vol. 8 No. 1, January 2015.

¹³J. Satrio, (1992), *Hukum Waris*, Bandung: Alumni, p. 8.

¹⁴ M. Jefry Maulidi, Analisis Hukum Tentang Peralihan Hak Milik Atas Tanah Dengan Bukti Akta Di Bawah Tangan Sebagai Dasar Pendaftaran Tanah Untuk Pertama Kali (Studi Di Kabupaten Lombok Tengah), *Jurnal IUS*, VolV No. 3 December 2017

and Camat. The following are the formal and material requirements for making an authentic deed of inheritance of land rights¹⁵:

1. Formal Terms

Inheritance is regulated in Book II of the Civil Code concerning objects, but the Civil Code does not have a separate definition of inheritance. Article 830 of the Civil Code explains that inheritance only takes place due to death. Basically the process of transferring one's assets to their heirs occurs because of death, therefore inheritance will only occur if three conditions are met, namely:

- There is someone who died
- There are people who are still alive as heirs who will receive an inheritance when the testator dies
- There are a number of treasures left by the heirs

After the fulfillment of the above conditions, the heirs are given leeway by law to further determine their attitude towards an inheritance, the heirs are given the right to think for four months after which they must state their position. Based on Article 1024 of the Civil Code as long as the heir exercises his right to think in order to determine his attitude, he cannot be forced to fulfill his obligations as heirs until that period ends for four months. After the period stipulated by the law expires, an heir can choose between three possibilities, namely:

- Receive full inheritance

By accepting the inheritance in full, either secretly or expressly, it means that the heirs are fully responsible for all obligations attached to their inheritance. The heirs must bear all kinds of debts of the testator. Full acceptance of inheritance which is carried out firmly, namely through an authentic deed or an underhand deed, while full acceptance which is carried out secretly is usually carried out by taking certain actions that illustrate the full acceptance.

- Receive an inheritance but with the proviso that he will not be obliged to pay the debts of the heir that exceeds his share in the inheritance, or is referred to as receiving beneficiary inheritance

As a result of receiving beneficiary inheritance, all inheritance is separated from the personal assets of the heirs, the heirs do not need to bear the payment of the heirs' debts with their own wealth because the settlement of the heirs' debts

¹⁵ Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. *JURNAL AKTA*: Vol. 5, No. 4, 1017-1026. Retrieved from <http://jurnal.unissula.ac.id/index.php/akta/article/view/4135>

is only made from the existing inheritance, there is no mixing of assets between the wealth of the heirs with the inheritance and if the debts of the heirs have been fully paid off and there is still a remnant left, then the remainder is part of the heirs.

- Refusing inheritance

An heir who refuses to inherit is considered to have never become an heir, because if he dies earlier than the heir, he cannot be replaced by his surviving children. Refusing an inheritance must be done with a statement to the clerk of the district court of the jurisdiction where the inheritance is open.

Inheritance law system according to the Civil Code has different characteristics from other inheritance law systems, namely it requires that the inheritance of an heir as soon as possible be divided among those who are entitled to the property. Even if you want to leave it in an undivided state, it must first go through the approval of the heirs.

2. Material Terms

The initial step of the process is that the heirs bring the original certificate of ownership on behalf of the testator along with all the requirements before the Land Deed Maker Officer to submit the following application:¹⁶

- Down Inheritance

Certificate of Inheritance is one of the requirements. The definition of an inheritance certificate is a letter issued by an authorized government official or agency, or made by all heirs themselves which is then justified and confirmed by the Village Head or Lurah and Camat, which is used as strong evidence about the existence of a transfer of rights to an inheritance. inheritance from the heir to the heirs.¹⁷

Administrative requirements must be completed for orderliness of administrative data at the Village and District Offices. Certificate of Inheritance signed by the heirs with 2 (two) witnesses, as well as the local Lurah and Camat.

¹⁶Interview with, Dr. Taufan Fajar Riyanto, SH, M.Kn at the Office of the Notary/PPAT Dr. Taufan Fajar Riyanto, SH, M.Kn on November 10, 2020

¹⁷I.Gede Purwaka. (1999). *Keterangan Hak Waris yang dibuat oleh Notaris Berdasarkan Ketentuan KUH Perdata*. Jakarta: UI Press, p. 25

The final result of the inheritance process is that the certificate of land rights which was originally in the name of the deceased (deceased) becomes in the name of the heirs in accordance with the agreement.

- Solution

Splitting means that one parcel of land that has been registered is divided into several parts, each of which is a new plot unit with the same legal status as the original plot of land.

The division cannot be done in part but must be done in full, which means that the land parcel that has been registered is divided into several parts, each of which is a new plot unit with the same legal status as the original plot of land.

- Shared Rights

The Deed of Sharing of Joint Rights is a deed made by the Land Deed Making Official to prove the agreement between the holders of the joint rights regarding the distribution of the joint rights. Meanwhile, regarding the understanding of the distribution of joint rights itself, it is a legal act carried out by the holders of joint rights, on the land so that it becomes the right of each holder of the joint rights based on the Deed of Distribution of Joint Rights.

The end result of the process of sharing joint rights is ownership of land rights in accordance with the mutual agreement of the heirs.

3.2. Theoretical Analysis of the Role of Notaries in Making the Deed of Distribution of Inheritance of Land Rights

Based on the letter from the Ministry of Home Affairs, Directorate General of Agrarian Affairs, Directorate of Land Registration (Kadaster), dated December 20, 1969, number Dpt/12/63/12/69 concerning Certificate of Inheritance and Proof of Citizenship and Article 111 paragraph (1) letter c Regulation of the State Minister of Agrarian Affairs / Head of the National Land Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, currently there are 3 (three) forms of (formal) proof of inheritance and also 3 (three) institutions that can provide evidence as an heir adapted to the group or ethnicity of the population or Indonesian citizens.

The classification of the population based on ethnicity and the laws that apply to each population group is a legacy of the Dutch colonial government in Indonesia, which until now is still considered a sacred law that cannot be changed by

anyone, even the government or the state. In fact, in the context of legal reform and building a dignified and civilized nation, we must abandon such rules immediately, because they are no longer in accordance with our independent nation.

Important things that need to be considered by a Notary in making a Certificate of Inheritance are: First, the last place of residence of the testator needs to be noted and mentioned in the inheritance statement. The place where the heir dies is not the determining factor in inheritance matters. If someone dies in Jakarta or in Singapore, where he travels or receives treatment, but the person who dies resides in the city of Yogyakarta, then in the city of Yogyakarta his inheritance is "open". With the determination that an inheritance is open in Indonesia, for example, then the Indonesian Civil Law will apply which regulates and controls the legal consequences of that inheritance.

Furthermore, if after it is proven by the existence of a death certificate, a Notary can ask for information from the Central Office for the List of Wills, whether the testator has left a will or not. Furthermore, the Center for the List of Wills will provide written information regarding the presence or absence of a will from the testator. If there is an office, it will only state the last will, the name and place of domicile of the Notary who made it, the serial number of the repertoire, the date and number of the deed. The contents of the deed were not notified because it was not known by the agency. The statement from the Center for the List of Wills must be checked carefully, first whether the spelling of the name of the testator is in accordance with what is stated in the death certificate. Second, whether the old name is included in it (related to the name change regulation implemented between 1966-1968, it is possible that someone made a will at that time). After the copy of the will is obtained, it must be noted whether the will contains the revocation of all wills that have been made by the testator or not.

As we know, the usual way to carry out the distribution of inheritance is to carry out the final will in a will. Then it is checked whether the distribution according to the contents of the will violates the law or not. Especially the absolute part of the legitimaries. If this is the case, then repairs will be made at the request of the legitimaries (that is, by incoring or reducing). On the other hand, if no one demands, the distribution will be carried out according to the contents of the will. Therefore, it is important for a Notary in making a Certificate of Inheritance to check whether there is a will or not at the Central Testament Register Service which was formerly known as the Central Testamenten Register.

After it is known whether there is a will or not, the thing that needs to be done by a Notary is to check the facts carefully on all letters, such as ID cards of the heirs, Family Cards, Marriage Certificates, Birth Certificates, and match with what is explained by witnesses (usually two witnesses who are close to the heir's

family, close relatives or blood relatives are not prohibited from being a witness and that is better). If you do not have a close family or a neighbor who is closely related to the testator, you can be submitted as a supporting witness. The statements of the witnesses are also not only used to match the existing documents, but also about things that cannot be seen from the existing documents.

Based on the above, the function of the two supporting witnesses is to strengthen documents or statements from the heirs. Therefore, the supporting witnesses who were submitted gave the true information. And in order for the supporting witness to provide true information, the notary must include at the end of the body of the deed, the statement of the supporting witness having known and confirmed the contents of the deed, if necessary they are willing to take an oath before the competent authority to further ensure the honesty of the witnesses. The witness's obligation to take an oath is regulated in Article 1911 of the Civil Code: "Each witness is required, according to his religion, to swear or promise that he will explain what is true"¹⁸.

The role of the Notary in making a certificate of inheritance is carried out with justice, so it is fair, not justice.¹⁹ This is similar to Islamic justice theory. Basically the concept of justice in Islam is not "equality" but "comparability". It is fair if it is comparable to what he gets with what he does, not the same as what other people get. This is in accordance with Rawls's opinion that everyone has the same right to be rich, not the right to have the same wealth.²⁰ Therefore, according to the author of Rawls's theory of justice, which is quite popular today, reflects a little on Islamic concepts, considering that today Islamic sharia systems are starting to be implemented in the west, such as the sharia system which is being implemented by foreign banks. However, it seems less relevant if we confuse John Rawls' theory of justice with the concept of justice in Islam. As we all know that theories are something that deserves to be debated, because they develop through improvisation from generation to generation, from age to age²¹. Meanwhile, the concept of justice in Islam is something real, absolutely derived

¹⁸ Umi Setyawati, Antonius Iwan Murdianto, & Amin Purnawan, Akta Penegasan Keterangan Waris Sebagai Pengganti Surat Keterangan Waris dalam Pengurusan Balik Nama Waris di Kantor Pertanahan Kota Semarang, Akta Penegasan Keterangan Waris Sebagai Pengganti Surat Keterangan Waris Dalam Pengurusan Balik Nama Waris di Kantor Pertanahan Kota Semarang, *Jurnal Akta*, Vol. 5 No. 1 January 2018

¹⁹ Interview with, Dr. Taufan Fajar Riyanto, SH, M.Kn at the Office of the Notary/PPAT Dr. Taufan Fajar Riyanto, SH, M.Kn on November 10, 2020

²⁰ Ahmad Ali, Loc. cit.

²¹ Patricia Kacabiru, Analisis Yuridis Penguasaan Tanah Dengan Melawan Hukum Oleh Seorang Yang Mengaku Sebagai Ahli, *Tesis Hukum*, Universitas Sumatera Utara, Medan and see Syarief Husien & Akhmad Khisni, Hukum Waris Islam di Indonesia (Studi Perkembangan Hukum Kewarisan Dalam Kompilasi Hukum Islam & Praktek di Pengadilan Agama), *Jurnal Akta*, Vol 5 No 1 March 2018

from the Qur'an, and cannot be debated or compared again because it applies to all ages.

4. Conclusion

The process of dividing the inheritance of land rights carried out by a Notary, namely the parties (heirs) jointly appear before the Notary in the presence of 2 (two) witnesses. Both parties bring the files that are the formal requirements and the material requirements that have been determined. The notary checks the files obtained from both parties. PPAT before making the deed checks the certificate files brought by both parties. Based on the results of these checks, the Land Deed Making Officer makes a will or Inheritance Certificate in accordance with the wishes of the heirs. The will is signed by the heirs and the PPAT (made in two copies). The deed of inheritance distribution must be made before the PPAT in the presence of 2 (two) witnesses. Theoretical analysis of the role of the notary in making the deed of distribution of inheritance rights to land is carried out with justice, so it is fair not justice. This is similar to Islamic justice theory. Basically the concept of justice in Islam is not "equality" but "comparability". In the distribution of inheritance is fair, not fair. This is because in the distribution of inheritance, the less fortunate heirs can inherit more than their share. Accuracy and completeness of knowledge regarding inheritance law should be properly controlled by a Notary so that there are no mistakes in making the deed considering that inheritance is one of the conflictual laws considering that its contents in the form of property and assets in this materialistic era play an important role for human survival in the future. Therefore, before it is too late, the Notary must carefully prepare all things and know the inheritance law that applies in Indonesia. It is expected that the Notary in making the certificate of inheritance is adjusted to the evidence and conditions in carrying out the inheritance and then uses his conscience as a Notary so that in the distribution process there are no disputes in the future.

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