LEGAL POWER OF TESTAMENT ACT AS AUTHENTIC DEED IN THE INDONESIAN AND MALAYSIAN LAW SYSTEM

Izzah Afkarina
State Islamic University (UIN) Postgraduate KH. Achmad Siddiq Jember, Mataram Street, No. 1 Mangli District, Jember Regency 68136, East Java | zafka.gemini97@gmail.com
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Abstract: The Testament is a letter that contains a person's statement about what they want on assets after they die. In principle, in civil matters in the Indonesian legal system (Civil Law), written evidence is prioritized evidenceor the highest evidence than others. In contrast to Malaysia (Common Law), in the law of proof, it uses a jury system. Legal issues are determined by the judge and the facts are determined by the jury. From the explanation above, the Testament deed doesn't have to do because the heirs are entitled on the inheritance of the property. Based on the description above, it needs to further examine "The Comparison of the Testament Deed Law as an authentic deed of Law in the Legal System in Indonesia and Malaysia". The method that used in this research is Qualitative Method, using Normative Law research. The results showed that (1) The Testament Regulation in the legal system in Indonesia and Malaysia is still pluralism of law; (2) The legal force of the Testament Deed and the legal consequences are both perfect proof in the Court if it fits its the procedures and provisions; (3) The Implementation of Testament Deeds in the legal system of the Indonesian and Malaysia, both can be done in writing, verbally or signal and it is witnessed with two witnesses.

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Abstrak: Surat Wasiat adalah surat yang memuat pernyataan seseorang tentang kehendaknya terhadap harta kekayaan setelah ia meninggal dunia. Sistem hukum Indonesia (*Civil Law*) menyatakan bahwa alat bukti yang berbentuk tulisan itu merupakan alat bukti yang jika dibandingkan dengan alat-alat bukti lainnya. Berbeda dengan Malaysia (*Common Law*), dalam hukum pembuktiannya memakai sistem jury, yakni persoalan-persoalan hukum ditentukan oleh hakim dan persoalan kenyataan atau *feiten (facts)* ditentukan oleh jury. Maka, Akta Wasiat (Testamen Acte) tidak wajib untuk dilaksanakan karena para ahli warislah yang berhak atas peninggalan harta tersebut. Dengan adanya produk hukum yang plural dari kedua sistem hukum tersebut, maka bisa jadi menghilangkan hak-hak dari ahli waris *testamenter* (penerima wasiat). Berdasarkan uraian di atas maka perlu untuk mengkaji lebih lanjut mengenai "Perbandingan Kekuatan Hukum Akta Wasiat sebagai Akta Autentik dalam Sistem Hukum di Negara Indonesia dan Malaysia". Metode penelitian yang digunakan dalam penelitian ini ialah Metode Kualitatif, dengan menggunakan penelitian Hukum Normatif. Hasil analisis menunjukkan bahwa (1) Pengaturan Akta Wasiat dalam sistem hukum di Negara Indonesia dan Malaysia masih terdapat pluralism hukum; (2) Kekuatan hukum Akta Wasiat dan akibat hukumnya sama-sama menjadi pembuktian sempurna di Pengadilan apabila sesuai dengan prosedur dan ketentuan yang ada; (3) Pelaksanaan Akta Wasiat dalam sistem hukum di Negara Indonesia dan Malaysia, sama-sama dapat dilakukan secara tertulis,lisan maupun isyarat dan disaksikan dengan 2 orang saksi.
Kata kunci*:* Wasiat, Akta autentik, Sistem hukum, Indonesia, Malaysia.

Introduction

Inheritance in a particular situation can increase conflict among heirs or testators. Inheritance can even also be the source of slander, division, and even as the potential to cause fights within one's own family. In order to avoid conflicts that could divide their family and descendant, a testament was made as a precautionary measure. According to Zainuddin Ali in his book "Indonesian Islamic Civic Law" a will is the surrender of rights to certain assets from a person to another voluntarily, the implementation of which is suspended until the owner of the property dies. [1]

The process of making a will between the legal system of Indonesia (*Civil Law*) and Malaysia (*Common Law*) is completely different. According to Article 874 of Civil Code,[2] all assets that are left by someone who dies belong to their heirs. According to the law, insofar as he has not made a valid decision regarding this matter, the legal decree intended is a will. A will *(testamen acte)* is a deed containing a person's statement about what he wants to happen after he/she died, which he/she could revoke (Article 875 the Civil

[1] Zainuddin Ali, *Hukum Perdata Islam Indonesia* (Jakarta: Sinar Grafika, 2006), 140.

[2] Soedharyo Soimin, Kitab Undang-Undang Hukum Perdata (KUHPer) (Jakarta: Sinar Grafika, 1996), 226.

Law).[3] This means that if there is no legal stipulation in the form of a will (testament acte), then all the inheritance of the heir belongs to all the heirs. Whereas if there is a valid will (testament acte), then the will (testament acte) must be carried out by the heirs.

The same thing was explained by J. Satrio, that in Article 874 of the Civil Code it is concluded that an important principle of inheritance law is that the inheritance provisions based on the new law apply if the heir does not/has taken a distorted determination regarding his inheritance, which provision must be started in the form of will (testament acte). In other words, the will of the heirs should be taken precedence.4

In contrast to the majority of Muslims in Malaysia and Indonesia, Islamic Sharia recognizes the existence of testamentary law and inheritance law at the same time. Both must be carried out seriously, because each has a legal basis from the Al-Quran and As-Sunnah. In its implementation, Islamic law also regulates the division of areas for each. When and where will all testament law apply has been regulated in such a way and when and where inheritance law

[3] Soedharyo Soimin, Kitab Undang-Undang Hukum Perdata (KUHPer)…, 226.

[4] J. Satrio, Hukum Waris (Bandung: ALUMNI, 1992), 179.

must be enforced has also been regulated in such a way. So that, there is no overlap between will and inheritance.[5]

The guidance in the Qur'an regarding wills is contained in Qs. Al-Baqarah: 180, 181, 182 & 240 also in Qs. An-Nisa': 7, 11 & 12 and 176. Allah says in QS. al-Baqarah: 180.

Inheritance law includes laws that revealed later, in other words, inheritance law was given a bit later after Allah SWT enacted the law of wills. With the revelation of the inheritance verses, some of the will laws become invalid. In a simpler language, parts of law of wills were reduced and replaced with inheritance laws. In the science of *ushul fiqh* we are familiar with the terms *nasakh* and *mansukh*. Nasakh is an annulment of a *syar'i* legal act with the argument that comes later (deletes) whereas, *mansukh* is a legal proposition of syar'i or *lafadh* which is replaced. As QS. al-Baqarah: 180 is replaced by QS. An-Nisa': (11 & 12)[6]

Allah conveyed a will that obliges Muslims who are converts to complete inheritance for children left by their parents, whether they are male or female.[7] So, it is not correct to say that if there is a will, the inheritance law will

[5] Ahmad Sarwat, "Wasiat Orang Tua Bertentangan dengan Hukum Waris", www.rumahfiqih.com (21Desember 2022)

[6] Sutrisno & M. Noor Harisudin, *Ilmu Ushul Fiqh II* (Surabaya : CV. Salsabila Putra Pratama, 2015), 51.

[7] Departemen Agama RI, *Al Quran dan Tafsirnya* (Semarang: PT. Citra Effhar, 1993), 128-129.

be null and void. The opposite is true, even though there is a will, if this will conflicts with a higher law, namely the law of inheritance, the will becomes invalid.[8]

According to Sayuti Thalib in his book "Inheritance Law in Indonesia" in bilateral inheritance legal line relations regarding wills in Qs. Al-Baqarah: 180 with legal lines regarding wills in Qs. An-Nisa': 11 and 12 then do not remove the validity of the entire contents of Qs. Al-Baqarah: that 180. There may be a change in the law, the law that was "obliged" or "obliged" is now lighter in the form of "permissibility" or "ibahah".[9]

In contrast to the opinion of the Shafi'i patrilineal inheritance teachings which say that with the revelation of the inheritance verse Qs. An-Nisa': 7, 11, 12 and 176 then Qs. Al-Baqarah: 180 it is no longer valid. There is no longer any obligation to bequeath parents and aqrabun, it is not even permissible to bequeath parents and relatives (*aqrabun)*, if they receive a share of the inheritance in an inheritance case. So, according to this teaching Qs. Al-Baqarah: 180 has been destroyed.[10]

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[8] Ahmad Sarwat, "Wasiat Orang Tua Bertentangan dengan Hukum Waris", www.rumahfiqih.com (21Desember 2017)

[9] Sajuti Thalib, Hukum Kewarisan Islam di Indonesia Ed. II, Cet. 6 (Jakarta: Sinar Grafika, 2000), 106

[10] Sajuti Thalib, Hukum Kewarisan…, 107.

Of course, if the making of a will (testament acte) is based on the Indonesian legal system (Civil Law) inherited from the Netherlands, namely the Civil Code, there will be no problems because the Civil Code itself stipulates that a will must be made before a notary in the form of a letter or entrusted to a notary. The problem is when it concerns the legal system based on KHI and customary law in Indonesia. Article 195 paragraph (1) KHI states that "a will is made orally before two witnesses, or in writing before two witnesses or before a Notary." This article provides an opportunity not to make a written will. Where without a will (testament acte) made before a Notary, it is impossible to know the intent/desires of the will and even though there is a will (testament acte) if it is not made before a Notary then, the deed does not have sufficient evidentiary power in it. Likewise in the Common Law legal system inherited from England or the Islamic legal system (sharia) where in this legal system there is no division of the burden of proof.

Based on this statement, it can be understood that if the will is not made in writing, it could eliminate the rights of the testamentary heir (recipient of the will). Based on the description above, it is necessary to study further regarding "Comparison of the Legal Strength of Wills as Authentic Deeds in the Legal System in Indonesia and Malaysia."

Research Methods

The method used in this research is a qualitative method, using normative law research, where normative law research is also called doctrinal law research. The approach used is the statutory approach, historical approach, comparative approach and conceptual approach).[11]

Discussion

1) Arrangement and Implementation of Testament Acts in Indonesian and Malaysian legal systems

Renno Khrisna Abiyasa in his thesis "Will without a Notary Deed According to Islamic Law and the Civil Code (Bw)" states that the KHI has regulated in such a way regarding the implementation of a will that has fulfilled the pillars and conditions.12 In Chapter V Article 195 KHI states: 1) A will is made orally before two witnesses, or in writing before two witnesses, or before a Notary. 2) Wills are only allowed as much as one-third of the inheritance unless all the heirs agree. 3) Wills to heirs apply if approved by all heirs. 4) Statements of approval in paragraphs (2) and (3) of this article

[11] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2008), 93-95.

[12] Renno Khrisna Abiyasa, *Wasiat Tanpa Akta Notaris Menurut Hukum Islam Dan Kuhperdata (Bw)* (Medan: Program Studi Magister Kenotariatan Fakultas Hukum Universitas Sumatera Utara, Tesis, 2020), 65.

are made orally in the presence of two witnesses or in writing in the presence of two witnesses before a Notary.13 Based on Article 195 KHI, the position of a will without a notarial deed is valid and permissible if the will is carried out in accordance with the provisions of Article 195 KHI and does not violate the rules of the provisions stipulated in Article 195 of the KHI.

> Article 195 KHI is very clear. In the Article 195 paragraph (1) KHI explains that a will can only be carried out or carried out if the will is made orally or in writing in the presence of two witnesses or before a Notary. This means that there is no obligation that a will must be made in writing before a notary whose deed is called an authentic deed. Article 195 paragraph (1) KHI clearly states that a will is made orally in front of two witnesses or in writing in front of two witnesses or before a Notary. There is no burdensome element in making a will which is regulated in the Compilation of Islamic Law. The testator may do so orally or in writing as long as it must be attended by two witnesses or may be before a Notary. In a sense, KHI also stipulates that a will may be made in the presence of a notary and a notary who will make the will deed with the wishes of the testator.

[13] Kompilasi Hukum Islam (KHI) Bab V Pasal 195

Based on article 195 paragraph (2) KHI, a will may not exceed 1/3 of the heir's inheritance unless all the heirs agree. And in Article 195 paragraph (3) it explains that a will to the heirs applies if it is approved by all the heirs. The approval statement must be made orally before two witnesses or in writing before two witnesses or before a Notary. The approval of the heirs is intended to avoid unwanted things from happening. In carrying out a will, it is these procedures that must be carried out in order to comply with the provisions of the applicable regulations.

So, it can be concluded that the position of a will without a notarial deed according to KHI is valid. A will can only be carried out if the will is carried out in accordance with what is stated in article 195 of the Compilation of Islamic Law. This means that a will without a notarial deed or an underhanded will made without the knowledge of two witnesses or not made before a notary, the will cannot be implemented in the Religious Courts, and the will is null and void by law.14

In social life there are various kinds of legal rules, such as morals or religion. If each of these rules is different, then the legal definition must be specific so that it can be used to distinguish the law from other

[14] Renno Khrisna Abiyasa, *Wasiat Tanpa Akta Notaris…, 68.*

rules. The law of proving Civil Cases is contained in the HIR (Herziene Indonesische Reglement) which applies in Java and Madura, Article 162 to Article 177; RBg (Rechtsreglement voor de Buitengewesten) valid outside the area of Java and Madura, Article 282 to Article 314; Stb. 1867 No. 29 concerning the strength of proof of private deed; and BW (Burgerlijk Wetboek) or Civil Code Book IV Article 1865 to Article 1945. Based on Article 1886 Dutch BW or 164 HIR and 284 RBG, evidence that is recognized in civil cases consists of: "Written evidence or letter, testimony, allegation -Conjecture, Confession and Oath." Written/written/letter evidence is placed first. This is consistent with the fact that in civil cases, letters/documents/deeds play an important role.

Teguh Samudera also said in his book "The Law of Proof in Civil Procedures", that in principle in civil matters, written evidence is the priority evidence or the foremost evidence when compared to the other evidences. What is meant by means of evidence in written form is evidence by letter.15

Verification in Civil Cases is an attempt to obtain formal truth (formeel waarheid). Formal truth is based on legal formalities so that an authentic deed has perfect

[15] Teguh Samudera, *Hukum Pembuktian dalam Acara Perdata* (Bandung: ALUMNI, 1992), 36.

and binding evidentiary power. Perfect means that the judge does not need other evidence to decide the case other than on the basis of the intended authentic evidence. Meanwhile, binding means the judge is bound by authentic evidence unless it can be proven otherwise.16

Article 1868 of the Civil Code states: "an authentic deed is a deed which, in the form determined by law, is made by or before public officials who have the power to do so at the place where the deed is made. “The Civil Code also makes arrangements regarding wills, where Article 874 of the Civil Code states17 “All assets left by a person who dies belong to his heirs according to the law, insofar as he has not made a valid decision regarding this matter.” The legal decree in question is a will. "A will (testamen acte) is a deed containing a person's statement about what he wants to happen after he dies, which he can revoke" (Article 875 of the Civil Code).18 This means that if there is no legal stipulation in the form of a will

[16] Siti Rokhayah, Pembuktian Dalam Upaya Memenangkan Perkara Perdata, https://www.djkn.kemenkeu.go.id/ diakses pada tanggal 09 April 2022

[17] Soedharyo Soimin, Kitab Undang-Undang Hukum Perdata (KUHPer) (Jakarta: Sinar Grafika, 1996), 226.

[18] Soedharyo Soimin, Kitab Undang-Undang Hukum Perdata (KUHPe), 226.

(testament acte), then all the inheritance of the heir belongs to all the heirs. Meanwhile, if there is a valid will (testament acte), then the will (testament acte) must be carried out by the heirs.

Here the Civil Code or civil law does not clearly regulate verbal wills. However, considering article 931 of the Civil Code which basically states that a will may be made using a olographic deed or written by one's own hand, it can be understood that basically a will can be made orally, as long as this can be proven true. So, verbal inheritance is legal and not against the law. If someone sues, as long as we can prove it and there are witnesses to corroborate the claim, we don't need to worry.

It is different from the enactments in Malaysia, where although the rules or enactments are independent in each country, the contents of the articles in each section are the same. In which the form of the will may be made verbally, in writing, or by gesture. As included in the 4th Execution of 1999 the 1999 Execution of the Muslim Will (Selangor), the 5th Execution of the 2004 Execution of the Moslem Will (Negeri Sembilan) 2004 and the 4th Execution of the 2005 Execution of the Moslem Will (Negeri Melaka) 2005 Part II Execution of the Will of Section 3 wills may be made verbally, in writing, or by gesture. For wills for non-Muslims in

Malaysia it is regulated in the Distribution Act 1958 jo. Amendments Act 1997.

	Malaysia	Indonesia
Arrangement	- Enactment 4 of 1999 Enactment of Muslim Wills (Selangor) 1999 - Examination 5 of 2004 Expenditure of Muslim Wills (Negeri Sembilan) 2004 - Examination 4 of 2005 Expenditure of Muslim Wills (State of Melaka) 2005 - Distribution Act 1958 jo. Amendment Act 1997	- KHI - Civil Code
Testament Form	Enactment 4 of 1999 Enactment of Wills of Muslims (Selangor) 1999, Execution of 5 of 2004 Excession of Excession of Moslems (Negeri	- Article 195 Paragraph 1 KHI: "a will is made orally before 2 (two) witnesses or in writing before two witnesses or before a Notary". - Article 931 of the

	Sembilan) 2004 and Execution of 4 of 2005 Execution of Moslem Wills (Negeri Melaka) 2005 Part II Execution of Wills Section 3 wills may be made with spoken, written, or gestured: "A will may be made verbally or in writing and if the person who wants to make the will cannot do so, the will may be made by means of a sign that is understandable".	Civil Code: 1) Olographic Will (Self-written); 2) Secret Testament (Geheim Testament); 3) Open or Public Will.
Testamenter / Wasi	-Inheritance management institutions, such as MAIS (Selangor Islamic Religious Council) - Peguam	- Public Notary - Treasure Hall (BHP), or - made by the heirs on paper and witnessed by the Lurah/Village Head and confirmed by the Camat.

2) The Implementation of inheritance in Indonesia and Malaysia

Inheritance law in Indonesia is still in various forms, each population group is subject to the legal rules that apply to it in accordance with the provisions of Article 163 IS (Indische Staatsregeling) Jo. Article 131 IS (Indische Staatsregeling). These population groups consist of the European Group and those who are equated with them, the Chinese and Non-Chinese Eastern Foreign Group and the last is the Indigenous People Group. Even though based on RI Legislation Law no. 62/1958 & Presidential Decree No. 240/1957 the distribution of population groups in Article 163 IS Jo. Article 131 IS having been removed but we can still see it in Islamic Inheritance Law, Customary Law and the Civil Code (BW). From the explanation above, it also results in differences regarding the meaning and meaning of inheritance law itself for each population group, meaning that there is no uniformity regarding the understanding and meaning of inheritance law as a legal standard

(guideline) and guidelines that apply to the entire territory of the Republic of Indonesia.[19]

For example, as the researcher alluded to earlier, namely regarding differences in the application of wills and inheritance in KHI law and the Civil Code, where in KHI's view the distribution of inheritance takes precedence over wills. In contrast to the Civil Code, which considers a will to come first, because it is the last wish of the testator.

Malaysia is a federal country, which until now has no family law that applies nationally. As a result, applicable family laws vary from state to state. Efforts to standardize Islamic family law laws have been made, but not all states are willing to accept this uniformity effort.[20]

Almost the same as Indonesia, the main guideline in formulating legislation in Malaysia is based on the Shafi'i school of thought. If the Syafi'i school of thought does not contain the issues to be referred to or is not in accordance with the current situation and the public interest, then the views of other schools of thought can be considered.

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[19] Galih Satya Pambudi, "*Kedudukan Hukum Waris Adat terhadap Pluralisme Hukum Waris di Indonesia",* www://justice94.wordpress.com (21Desember 2017)

[20] Abdul Manan, *Reformasi Hukum Islam di Indonesia* (Jakarta:Rajawali Press, Cet. III, 2013), *249*.

The regulations governing 2 people who may be related to the inheritance have been explained in title 14 of BW book I (Articles 1005 to 1022), first, who carries out the testament (executeur testamentair) and second, the administrator of the inheritance (bewindvoerder van eennalatesnchap).

In fact, it is the heirs who have the authority to carry out wills and manage inheritance. However, this property can be managed by a third party if the testator is worried. In connection with this, Burgerlijk Wetboek provides the possibility for the person who leaves the inheritance to appoint a person to carry out the will and/or a caretaker of the inheritance. This person is called the executor of the will, in French he is called the *executor testamentair*.[21] Meanwhile, for the State of Malaysia itself, the executor of the will is carried out by the Inheritance Management Institution and or the Peguam.

To prove the party entitled to the inheritance left by someone who has died (heir) requires a certificate of heirs, as evidence which forms the basis for the division of inheritance, both over who is entitled and/or how

[21] Riansyah Towidjojo, *Kedudukan Pelaksana Wasiat atau Testament menurut Kitab Undang-undang KuhPerdata,* (Lex Crimen Vol. VI/No. 5/Jul/2017), 29.

many shares are entitled to be owned by heirs either by Legitieme Portie and/or by will. In the practice of making inheritance certificates carried out by different officials, which are based on population groups, there are three officials authorized to make inheritance certificates, namely Notaries, Probate Court (BHP), or made by the heirs on paper witnessed by Lurah/Village Head and strengthened by the Camat.[22]

The making of the inheritance certificate is based on the provisions of Article 111 paragraph (1) letter c of the Regulation of the 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 which contains:

... - for native Indonesian citizens: a certificate of inheritance made by the heirs witnessed by 2 (two) witnesses and confirmed by the Head of the Village/Kelurahan and Camat where the heir lives at the time of death; - for Indonesian citizens of Chinese descent: a certificate of inheritance rights from a Notary, - for

[22] Fardatul Laili, *Analisis Pembuatan Surat Keterangan Waris Yang Didasarkan Pada Penggolongan Penduduk (Berdasarkan Undang-Undang Nomor 40 Tahun 2008 Tentang Penghapusan Diskriminasi Ras Dan Etnis),* (Program Studi Magister Kenotariatan, Pascasarjana Fakultas Hukum Universitas Brawijaya, Tesis, 2015), 2.

other Indonesian citizens of Eastern Foreign descent: a certificate of inheritance from the Probate Court.[23]

In connection with proving the certainty of a person's legal rights and obligations in public life, one of which is carried out by a Notary. The notary plays an important role in helping create legal certainty and protection for the community, is more preventive in nature or prevents legal problems from occurring by issuing authentic deeds made before him related to legal status, rights and obligations of a person in law and so on, which functions as evidence the most perfect in court in the event of a dispute over rights and related obligations.24

With the promulgation of several laws and regulations and Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination in particular, in fact there may no longer be any distinction/categorization of the population based on race and ethnicity, the same is true with regard to making inheritance certificates as a tool evidence, because it is contrary to the philosophy of the state, namely

[23] Pasal 111 ayat (1) huruf c Peraturan Menteri Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 tentang Ketentuan pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah

[24] Sjaifurrachman & Adjie, *Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta*, 5&7.

Pancasila, especially the Three Precepts of the Unity of Indonesia, the Constitution of the Republic of Indonesia and the laws under it. Likewise, regarding the executor of the will where if indeed the notary is a public official who has the authority to make an authentic deed25 With the promulgation of several laws and regulations and Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination in particular, in fact there may no longer be any distinction/categorization of the population based on race and ethnicity, the same is true with regard to making inheritance certificates as a tool evidence, because it is contrary to the philosophy of the state, namely Pancasila, especially the Three Precepts of the Unity of Indonesia, the Constitution of the Republic of Indonesia and the laws under it. Likewise, regarding the executor of the will where if indeed the notary is a public official who has the authority to make an authentic deed:

> *"The notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in an authentic deed, guarantee the certainty of the date of making the deed, save the deed, provide grosse, copies and quotations of the deed , all of that as long as the making of the Deed*

[25] Pasal 1 ayat (1) dan Pasal 15 Undang-Undang Republik Indonesia Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris (UUJN)

is not also assigned or excluded to other officials or other people determined by law."[26]

Fardatul Laili also stated that it would be inappropriate if the inheritance certificate as evidence in civil law was witnessed/know, justified and signed by a state administration body or official (BHP/Lurah/Village Head/Camat) who are subject to administrative law.27

Regarding "Wasi" in Malaysia, it is appointed so that it can protect rights and obligations through inheritance management institutions, such as the MAIS (Selangor Islamic Religious Council) and Peguam. The role of the wasi is to ensure that all matters written in the will are carried out properly. In addition, the wasi also has the following tasks: (1) tracking wills, (2) making requests for grants, (3) making a list of assets, (4) completing obligations, (5) dividing assets according to the will, and (6) make a report.[28] There are 4 main institutions in Malaysia that have assigned their respective fields of power in controlling the distribution of

[26] Pasal 15 ayat 1 Undang-undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-undang Nomor 30 Tahun 2004 tentang Jabatan Notaris

[27] Fardatul Laili, *Analisis Pembuatan Surat Keterangan Waris Yang …*, 22.

[28] Tentang Wasiat Dan Akta Wasiat Malaysia Yang Anda Perlu Tahu https://www.propertyguru.com.my/ diakses pada tanggal 19 April 2022

assets if there is no will, namely the High Court (Civil), Chair of the Land and Excavation Director (JKPTG), Amanah Raya Berhad, and the Sharia Court.

3) Testament Act and the Law Impacts in Indonesia and Malaysia

a. The legal power of testament in the Civil Code

The legal power of wills in the Civil Code can be said to be quite strong, because in making a will itself, Article 875 of the Civil Code orders to make it in the form of a deed, although in this case, the Civil Law does not require whether the will must be made in private or in an authentic deed. However, in practice a will is generally made in the form of an authentic deed.

In this case, the juridical facts of the strength of authentic deed proof are perfect (volledig bewijskracht) and binding (bindende bewijskracht). Thus, the truth of the contents and statements contained therein: 1) Complete and binding on the parties regarding what is stated in the deed; 2) Perfect and binding on the judge so that the judge must make

it a perfect and sufficient factual basis to make a decision on the settlement of the disputed case.[29]

Juridical Facts according to KBBI[30], Facts are (circumstances, events) which are reality; something that really exists or happens. Meanwhile, Juridical is according to law; legally. So, a juridical fact is something that has been guaranteed to be true and legally proven to exist.

b. The Power of Testament Law in the KHI (Compilation of Islamic Law)

In contrast to the Civil Code, there are 2 ways or processes for making a will in KHI. We can find this in Article 195 (1), which states that: "*A will is made orally in the presence of two witnesses, or in writing before two witnesses, or before a notary.*"

In this case, KHI, especially Article 195 (1), must have a single meaning, not have a double meaning (vage norms) or there should be no blurring of the norms thereof. So that in this case a legal certainty will be created in the KHI which is the main guideline for Indonesian society in general.

[29] M. Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2004), 545-546.

[30] www.KBBI.web.id (diakses tanggal 4 Juni 2018)

Even though, in this case, in Article 1 Number 9 of Law No. 30 of 2014 concerning government administration has made a regulation regarding discretion, which according to researchers is capable of creating good governance. However, in this case, it is not uncommon for the use of discretion by public officials under the pretext of being in the public interest and legal certainty, instead of sacrificing the rights of the community, both individually and privately, as well as groups and civil legal entities. Discretion is a decision and/or action determined and/or carried out by government officials to address concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete and/or there is government stagnation.[31] Stagnation is a state of being stopped (not moving, not active, not running).[32]

To anticipate this, the KHI as a legal provision in the Instruction of the President of the Republic of Indonesia Number 15 of 1991 Jo. Decree of the Minister of Religion of the Republic of Indonesia No. 154 of 1991, must provide legal certainty. Because in essence, legal

[31] Sekretariat Negara RI, Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan

[32] www.KBBI.web.id (diakses tanggal 4 Juni 2018)

regulations will be obeyed by citizens if they are in harmony with various other norms that apply in society.

c. The Power of Testament Law in the Customary Law

The main sources of legal discovery are statutory regulations, international treaties, then customary law, jurisprudence, then doctrine. So, there is a hierarchy in the source of law or it can be said that there are levels. Therefore, if there is a conflict between two sources, then the highest source of law will paralyze the lower source of law.

In the teaching of legal discovery, laws are prioritized or take precedence over other sources of law. If you want to look for the law, the meaning of a word, then look for it first in an authentic law and in written form, which guarantees legal certainty more. The law is an important and main law. However, it should be remembered that statutes and law are not synonymous.

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Then, what is the position of other legal sources besides statutory legal sources? According to Prima Jayatri in his article "Tagged with Legal Principles as Unwritten Law Playing an Important Role in the

judiciary", citing the opinion of J.A. Pontier, these doctrines can only become a source of law if they can be returned (linked, grounded) to one of the formal legal sources mentioned above, legal principles as unwritten law play an important role in the judiciary. Therefore, legal principles can play an important role if these principles underlie statutory provisions.[33]

Regarding the making of a will in Customary Law itself, it should use a written method. Given the national law in the civil field what is sought is formal truth. And in particular, in Indonesia itself this formal truth cannot be separated from the Fourth Book of the Civil Code which regulates evidence and expiration, the updated Indonesian Regulation, Staatsblad 1941, Number 44 (RIB) and in the Buiten Gawesten Regulation (RBG) or the Overseas Regional Regulation (RDS). Proof in the fourth book of the Civil Code is a material aspect of civil procedural law, while proof in RIB and RDS regulates formal aspects of civil procedural law.[34]

In Islamic Law there are also theories that influence it, including: 1) Theory of Receptie In

[33] Prima Jayatri, "Tagged With Asas Hukum sebagai Hukum Tidak Tertulis Memainkan Peranan Penting dalam peradilan" www.logikahukum.wordpress.com (diakses tanggal 05 Juni 2018)

[34] O.s. Hiariej, *Teori dan Hukum Pembuktian*, 81.

Complexu, namely where Islamic law fully applies to its adherents or Muslims); 2) Receptie Theory, namely where Islamic law can be applied if it is in accordance with customary law); 3) Theory of Receptie Exit, namely Islamic law is a law that is independent and free from the influence of other laws; 4) Theory of Receptie a Contario, namely customary law only applies if it does not conflict with religious law that is embraced by the community).

When these four theories are linked to the discussion of "comparison of the legal power of wills as authentic deeds in the legal systems in Indonesia and Malaysia", the result can be obtained that Islamic law does not definitively regulate the obligation to make a will in the form of a deed. However, according to Syatibi, the purpose of Islamic law itself was quoted by Muh. Zaenuddin in his writing "Maqashid Sharia: Functions and how to find out"[35] is to achieve benefit (Maqashidus Syariah/Al Mukhasidu Al Khamsah)

[35] Muh Zaenuddin, "Maqashid Syariah: Fungsi dan cara mengetahuinya", www.kompasiana.com (05 Juli 2018)

namely by protecting the soul, mind, religion, property and saving (reconciling/pacifying) the family.[36]

As in Indonesia, the best standard of information is information based on primary sources or valid sources of origin. For example, if the statement is in the form of a document, then the best document is the document of origin, while for direct testimony as well, the best statement is a direct statement by a witness who is present to provide testimony regarding a case in court.[37]

Conclusion

Arrangements for wills in the legal system in Indonesia are: First, in the Civil Code it is regulated in chapter XIII Article 874-1022 concerning wills. Second, in KHI, arrangements regarding wills in the Compilation of Islamic Law are contained in chapter V Articles 194-209. Third, customary law of inheritance is integrated into customary law which lives in many ethnic groups with patrilineal, matrilineal and bilateral kinship.

[36] Mohd. Idris Ramulyo, *Asas-Asas Hukum Islam Sejarah Timbulnya dan Berkembangnya Kedudukan Hukum Islam dan Sistem Hukum di Indonesia* (Jakarta: Sinar Grafika, 2004), 7.

[37] Faiz Adnan, *Isu Pembuktian di Mahkamah Syariah* https://peguamsyariefas.com.my/ diakses pada 19 April 2022

In the implementation of wills in the legal system in Indonesia there is no plurality of laws, where among the three laws, they are equally carried out after the maker of the will dies. It's just that the Civil Code recommends that the will be drawn up in a deed, especially an authentic deed. This is different from the KHI and Customary Law which state that there is no obligation to make a will in writing, as long as the parties can prove the existence of a will.

The legal consequences of the three legal systems are, first, if carried out based on the Civil Code itself, the will has perfect evidentiary power (volledig bewijskracht) and binding (bindende bewijskracht). Second, if it is carried out according to KHI then there are 2 possibilities that can happen to it. Where if it is carried out in writing before a Notary, it will obtain perfect (volledig bewijskracht) and binding (bindende bewijskracht) evidentiary power. Meanwhile, if it is carried out orally, as long as the heirs agree to the existence of the will, they will get a legal provision in it. Third, Customary Law is not much different from a will in KHI, in Customary Law it also states that if the will is approved by all heirs, then the will becomes a legal stipulation, and must be implemented.

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