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Legal Implications in The Implementation of a Will Without Making an Authentic Deed in The Conception of Legal Certainty

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Abstract. *The legal system in Indonesia is pluralistic in nature, in which it applies as a legal system that has its own characteristics and structure, namely the customary legal system, the Islamic legal system, the western legal system (civil). In this case, inheritance law is also regulated in it. Where in Islam, a "will" is an act of someone giving an object or benefit to another person or institution/legal entity, which is valid after the giver dies, the research method uses a normative legal approach. The specification of legal research that will be used in this writing is descriptive research, the method of data collection in this study through literature studies and documentation studies. Data analysis in a systematic way includes data reduction, data presentation and drawing conclusions. Based on the research results, it can be concluded that the Legal Implications for the Implementation of a Will Without Making an Authentic Deed in the Concept of Legal Certainty, namely the legal certainty of a will without a Notary deed in the KHI with the Civil Code is that it has a written legal basis, is the last statement of the testator after before he died and its implementation after the testator dies, can be revoked and can be cancelled or canceled, has the aim of human welfare so that there is no dispute between the heirs. The difference between a will without a Notary deed in the KHI is a minimum age of 21 years while the Civil Code is a minimum age of 18 years, seen from the recipient of the will in the KHI, namely another person or institution while the Civil Code is an outsider and the heir, seen from its form in the KHI, namely oral or written or before a Notary while the Civil Code is written before a Notary or deposited/stored by a Notary. Legal Protection for Will Recipients Who Make Wills Without Making an Authentic Deed If There is a Dispute Between the Parties, namely the legal consequences of wills without a Notarial deed, making the will vulnerable to lawsuits from interested parties because the evidence is not strong enough and there is no legal*

certainty. According to the KHI and the Civil Code, wills need to be proven authentically, this is intended so that negative things that are not desired by the testator or the will recipient do not occur.

Keywords: *Legal Certainty; Notarial Deed; Will.*

1. Introduction

Indonesia as a country with a majority Muslim population, coupled with diverse tribes, customs, and other beliefs, gives rise to a variety of laws used. Be it customary law, religion or state law. The legal system in Indonesia is pluralistic in nature, in which it applies as a legal system that has its own characteristics and structure, namely the customary legal system, the Islamic legal system, the western legal system (civil). In this case, inheritance law is also regulated in it. Where in Islam, a "will" is an act of a person giving an object or benefit to another person or institution/legal entity, which is valid after the giver dies.

Indonesian law allows property owners to give their property based on their own wishes. This is not in line with the provisions of inheritance distribution in Islam. This can be said to be reasonable, because in principle property owners can freely manage their property according to their wishes. In addition, it is reasonable for a person's last wishes to be considered and respected as far as they can be implemented.[1] Basically, humans were not created to live forever, but humans will die leaving behind property, and those who have the right to inherit are the heirs according to the provisions of the law so that the possibility of disputes between heirs can be avoided. The heir can give part of his property to others with the distribution of inheritance in accordance with justice. In this case, the law needs to regulate it. The act of determining the last message from the giver of inheritance in Islam is known as a will.[2]

A will is one way of transferring assets from one person to another. In the Big Indonesian Dictionary, a will is the last message conveyed by a person who is about to die (usually regarding assets and so on)[3]. In the Compilation of Islamic Law (KHI), a will is a gift of an object from an heir to another person or institution which will take effect after the heir dies.[4] Regarding wills, it is also regulated in the Al-Qur'an, among other things, regulated in Surah Al-Baqarah verse 180, which means:*"It is obligatory upon you, when one of you experiences (signs of) death, if he leaves behind a large amount of wealth, to make a will for his parents and close relatives in a makruf manner, (this is) an obligation upon*

[1]Oemar Salim, "Basics of Inheritance Law in Indonesia, Rineka Cipta", Jakarta, 2000, p. 23
[2]Ibid.
[3]KBBI," Big Indonesian Dictionary (KBBI), https://.kbbi.web.id/wasiat (August 1, 2016)
[4]Government of the Republic of Indonesia, "Law of the Republic of Indonesia of 1974 Concerning Marriage & Compilation of Islamic Law", Bandung: Citra Umbara, 2015, p. 21

those who are pious."Makruf here means, fair and good. The will does not exceed one third of the total assets of the person who will die. This is in accordance with Article 195 paragraph (2) of the Compilation of Islamic Law, bequests are only permitted up to a third of the inherited assets unless all the heirs agree. In Surah Al-Baqarah verse 240 also mentions a will, which means it says*"And those of you who die and leave wives behind, let them bequeath to their wives that they should be provided for for a year without having to move out. But if they move out, there is no sin on you (guardians or heirs of the deceased) that you should leave them to do what is right for themselves. And Allah is Mighty and Wise."* according to Islamic law, the execution of a will must take precedence over the execution of an inheritance by taking into account its limitations. Basically, making a will is an act of will, namely a person is free to make or not make a will.[5] The definition of a will in the Civil Code (Civil Code) is regulated in Article 874, namely that all the inheritance of a deceased person belongs to his heirs according to the law, as long as no valid determination has been made regarding this matter. Article 875 of the Civil Code states that a will (*testament act*) is a deed containing a person's statement about what he wants to happen after he dies, which can be revoked by him.[6]

The Republic of Indonesia as a country of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia guarantees certainty, order and legal protection for every Indonesian citizen, one form of providing certainty, order and legal protection is by having an authentic written instrument made by or before a Notary. In Article 1 number 1 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary. A Notary is a public official who is authorized to make authentic deeds and has other authorities as referred to in this law or based on other laws. The position of Notary is not placed in the Judicial, Executive or Legislative Institutions. Therefore, Notaries must act honestly, carefully, independently and impartially in carrying out legal acts. A Notarial Deed is an authentic deed made by or before a Notary according to the form and procedures stipulated in the law.

The deed made by a Notary describes authentically all acts, agreements and determinations witnessed by the parties and witnesses. In Article 1 number 7 of Law Number 2 of 2014 concerning the Position of Notary, a deed made before or by a Notary is considered an authentic deed according to the form and procedures stipulated in the Law. Notarial Deeds in Article 1866 and Article 1867 of the Civil Code state that Notarial Deeds are written evidence. Authentic deeds according to Article 1868 of the Civil Code" *is a deed in the*

[5]Akhmad Khisni, Hukum Waris Islam, Semarang, Unissula Press, 2017.
[6]Government of the Republic of Indonesia, Civil Code: Burgerlijk Wetboek, Bandung: Citra Umbar, 2010, p. 21

form determined by law made by or in the presence of public officials who have authority for that purpose in the place where the deed is made".

In carrying out his/her duties, a Notary is obliged to make a list of deeds relating to wills according to the order of the time of making the deeds every month, send a list of deeds relating to wills according to the order of the time of making the deeds every month, send a list of will deeds or a list of nil relating to wills to the Will Registration Center at the Ministry of Government Affairs in the field of law within 5 (five) days in the first week of each following month, and record a report on the date of sending the will list at the end of each month.[7]

Thus, it can be concluded that in making a will deed *(testament act)* Notaries have a very important role. Article 934 of the Civil Code stipulates that every Notary who keeps the testament letters among the original letters, in any form, must notify the interested parties after the testator dies. In accordance with applicable laws, the assistance of a Notary from the beginning to the end of the process of making a will *(testament act)* is very necessary so that it obtains binding legal force. Most Indonesian people are still not very aware of making a will using a Notary deed. In fact, with the description above, it can be seen that a will using a will deed is very important. The position of a will deed needs to be known in the legal regulations based on the Compilation of Islamic Law (KHI) and the Civil Code (KUHPer) in order to guarantee legal interests.

Based on the description of the background of the problem above, the author is interested in conducting research with the title Legal Implications in the Implementation of Wills Without Making an Authentic Deed in the Concept of Legal Certainty.

This study aims to determine and explain wills without a notarial deed from the perspective of the Compilation of Islamic Law and the Civil Code.

2. Research Methods

The method used in this research is normative juridical. Normative juridical research is research conducted by examining library materials (secondary data), which are related to legal issues and applicable norms in accordance with the thesis.[8]. Normative legal research includes:[9]

a. Legal research using secondary data sources;

b. Emphasis on speculative, theoretical and analytical steps

normative, qualitative;

[7]Habib Adjie, Thematic Interpretation of Indonesian Notary Law Based on Law Number 2 of 2014 Concerning Amendments to Law Number 30 of 2004 Concerning the Position of Notary, Bandung, Refika Aditama, 2015, p. 33
[8]Ediwarman, Monograph on Legal Research Methodology, Medan, Sofimedia, 2015, p. 45
[9]Ibid.

c. Using the legal dogmatic method which is based on the arguments

logical argument.

This legal research is a legal research that is carried out with the aim of finding the principles or doctrines of positive law that apply. This type of research is commonly referred to as*dogmatic study*or known as*doctrinal research.*[10]

After all the data has been collected completely, the data is analyzed using qualitative data analysis techniques, namely data collection using laws, theories and legal principles. The use of qualitative data analysis is intended to measure and test data, theories, doctrines, without using mathematical formulas or statistical formulas but using logical reasoning. With this data analysis method, it is expected to obtain a clear picture so that it can answer existing problems.

3. Results and Discussion

3.1. Legal Implications of the Execution of a Will Without Making an Authentic Deed in the Concept of Legal Certainty

Wills or also called testaments are regulated in the second book of the Civil Code (KUHPerdata). Wills or testaments are a problem that is often encountered in the lives of society in general. This is because people's livelihoods are inseparable from the desire to fulfill their needs or satisfaction in life, and specifically through wills people want to fulfill their wishes in the form of statements about their wealth in the future or in the future.

A will is made with the aim that the heirs cannot know whether the inheritance left by the testator will be inherited by his heirs or will be inherited by another party who is not his heir at all until the time the will is read.[11]This incident often causes problems between the heirs and those who are not heirs, however, according to the will, the person who is not the heir receives the inheritance. Of course, there will be parties who feel disadvantaged and submit objections/cancellations regarding the truth of the contents of the will made by the testator.

The existence of this will (testament), then often avoids disputes among the heirs in terms of the division of inheritance, because the heirs respect the will or last wishes of the testator. However, in order for the division of inheritance practically and fairly to be implemented, the law limits the testament, the restrictions must not be contrary to the law.

3.2. Legal Protection for Will Recipients Who Execute a Will Without Making an Authentic Deed If a Dispute Occurs Between the Parties

[10]Bambang Sugono, Metodologi Penelitian Hukum, Jakarta : Raja Grafindo, 1996.
[11]Effendi. Inheritance Law, Grafindo Persada, Jakarta, 2016. P. 21.

In terms of language, the word protection in English is called protection. The term protection according to the Big Indonesian Dictionary can be equated with the term protection, which means the process or act of protecting. The definition of protection is a place of shelter, something (an act and so on) protecting. In the KBBI, protection means the way, process, and act of protecting. While law is a regulation made by the government or which data applies to everyone in society (country). In general, protection means protecting something from dangerous things, something can be an interest or an object or goods. In addition, protection also contains the meaning of protection given by someone to a weaker person. Thus, legal protection can be interpreted as all efforts by the government to ensure legal certainty to provide protection to its citizens so that their rights as citizens are not violated, and those who violate them can be subject to sanctions according to applicable regulations.

Legal protection means an act, in terms of protecting, for example providing protection to the weak. The definition of law is a collection of regulations containing commands and prohibitions that regulate the order of society and therefore society must obey them.[12]

Philipus M. Hadjon stated that legal protection for the people is related to the formulation in Dutch literature, rechtsbescherming van de burgers tegen de overhead and in English is known as legal protection of the individual in relation to act of administrative authorities. In the formulation of legal protection for the people, it is deliberately not included against the government or against government actions, for the following reasons:[13]

a. The term people already contains the meaning as the opposite of the term "government". The term people essentially means the governed (geregeerde), thus the term people contains a more specific meaning compared to terms in foreign languages, such as volks, people, peuple.

b. The inclusion of “against the government” or against government actions can give the impression that there is a confrontation between the people as the governed and the government as the governing. Such a view is certainly contrary to the philosophy of life of our country, which views the people and the government as partners in the effort to realize the ideals of national life.

Legal protection according to Philipus M. Hadjon, who has his own statement, states that:

"a subjective condition that states the presence of a necessity in a number of legal subjects to immediately obtain a number of resources for the continued existence of legal subjects to be guaranteed and protected by law so that their

[12]Siti Hidayatul Hidayah, Legal Protection in the Republic of Indonesia,: Pukad Hlmi, Surabaya 2004, p. 6

[13]Philipus M. Hadjon, Legal Protection for the Indonesian People, A Study of Its Principles, Handling by the Courts in the General Court Environment and the Formation of State Administrative Courts, Bina Ilmu, Surabaya 1985), pp. 1-2

power is organized in the process of making political and economic decisions, especially the distribution of resources, both in individual and structural devices."

Based on the explanation above, as in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia, which reads "The State of Indonesia is a state of law", then from the sound of the article, it is meant that every state administrator in all fields must not conflict with the legal regulations in force in the State of Indonesia. This is emphasized by Article 28D paragraph 1 of the 1945 Constitution of the Republic of Indonesia, which states that "everyone has the right to recognition, guarantee, protection and certainty of fair law and equal treatment before the law".

Legal protection is the protection of dignity and honor, as well as recognition of human rights owned by legal subjects based on legal provisions from arbitrariness or as a collection of regulations or rules that will be able to protect one thing from another. Legal protection is a narrowing of the meaning of protection, in this case only protection by law.

The protection provided by law is also related to the existence of rights and obligations, in this case owned by humans as legal subjects in their interactions with other humans and their environment. As legal subjects, humans have the rights and obligations to carry out legal actions.

The definition of protection in legal science is a form of service that must be carried out by law enforcement officers or security officers to provide a sense of security, both physically and mentally, to victims of sanctions from threats, disturbances, terror, and violence from any party given at the stage of investigation, prosecution and or examination in court. Legal rules are not only for short-term interests, but must be based on long-term interests. Community empowerment is a concept of economic development that explains social values.

Legal protection must actually provide legal protection to all parties in accordance with their legal status because everyone has the same position before the law, every law enforcement officer is clearly obliged to enforce the law and with the functioning of the rule of law, then indirectly the law will also provide protection for every legal relationship or all aspects of community life that are regulated by the law itself, namely legal protection can mean protection given to the law so that it is not interpreted differently and is not injured by law enforcement officers and can also mean protection given by law against something.

4. Conclusion

Based on the research conducted by the author regarding the Legal Implications in the Implementation of a Will Without Making an Authentic Deed in the Concept of Legal Certainty, the author has the following conclusions: 1. Legal

Implications for the Implementation of a Will Without Making an Authentic Deed in the Concept of Legal Certainty, namely the legal certainty of a will without a Notary deed in the KHI with the Civil Code is that it has a written legal basis, is the last statement of the testator after before he died and its implementation after the testator dies, can be revoked and can be cancelled or canceled, has the aim of human welfare so that there is no dispute between the heirs. The difference between a will without a Notary deed in the KHI is a minimum age of 21 years while the Civil Code is a minimum age of 18 years, seen from the recipient of the will in the KHI, namely another person or institution while the Civil Code is an outsider and the heir, seen from its form in the KHI, namely oral or written or before a Notary while the Civil Code is written before a Notary or deposited/stored by a Notary. 2. Legal Protection for Will Recipients Who Make Wills Without Making an Authentic Deed If There is a Dispute Between the Parties, namely the legal consequences of wills without a Notarial deed, making the will vulnerable to lawsuits from interested parties because the evidence is not strong enough and there is no legal certainty. According to the KHI and the Civil Code, wills need to be proven authentically, this is intended so that negative things that are not desired by the testator or the will recipient do not occur.

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