The Will with Notary Deed in Efforts to Apply the Principles of Justice from the Perspective of Islamic Law and Civil Law

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Abstract.
A will is a part of human life related to a person's message regarding the gift of the property after death. The existence of problems with wills made orally causes issues in the family. In granting this will, several requirements must be completed so that the wills do not cause problems in the future. The normative juridical research approach, descriptive-analytical research specifications, data collection through secondary data in the form of library research and documentation studies, and qualitative analysis methods. The study results found that the will was made with a notary deed to ensure legal certainty. In applying the principle of justice, it is necessary to limit the granting of wills, from the perspective of the Islamic law that a will is only allowed a maximum of 1/3 of the entire inheritance. Meanwhile, in the perspective of civil law, granting wills must pay attention to the provisions of the Legitieme Portie or the share of property that must be given to the heirs in a straight line to create justice for the heirs.

Keywords: *Will, heir, justice, Islamic law, civil law*

1. INTRODUCTION

Human life in this world does not escape the effort to find wealth to fulfill family life. Wealth is one of the most important parts of humans in achieving happiness. Wealth is one of the most valuable things that humans have. Because of wealth, humans can have whatever they want. Assets can be in the form of movable and immovable objects. There are various ways of obtaining wealth. One way to obtain property is to obtain several assets obtained due to someone's death through a will [1].

Before death, sometimes someone wants to manage his property by making a will. The word will comes from Arabic: Washiyah, which means the last message from the person who died conveyed to others about something that must be done or realized after his death, such as regarding the distribution of inheritance; an order to take care of something or manage the property after someone's death [2]. Dividing inherited property through a will is usually intended to avoid disputes among the heirs in the future. The reason is that the will to divide inheritance in a certain way felt binding by the heirs based on a sense of obligation to respect parents' message [3]. The grantor carries out the granting a will by testament by writing that he will grant someone if the grantor dies [4].

A will is the last message said or written by someone who is about to die regarding property and so on [5]. In Article 171, letter f of the Compilation of Islamic

Law (KHI), a will is the gift of an object from the heir to another person or institution, which will take effect after the testator dies. In Article 875 of the Civil Code (KUHPerdata), a will or testament is a deed containing a person's statement regarding something he wants to happen after he dies and can be revoked by him [6]. Testament in the sense of the letter is a testament in the formal sense. In contrast, testament can also mean what someone wants will happen after he dies, or in short, what is commonly called the final will. Testament in this last sense is a testament in the material sense [7]. However, not everyone knows the rules for making a will and even the importance of making a will with a notary deed to avoid family problems in the future.

Based on this background, the formulation of the problem in this study is 1) Should a will be made with a notary deed in order to fulfill the requirements set out in the legislation? 2) How is the will in applying the principle of justice to the heirs from the perspective of Islamic law and civil law?

The normative juridical research approach is legal research carried out by researching or studying the problem in terms of the rule of law, researching library materials, or secondary data. The specification of this research is descriptive-analytical, which describes the applicable laws and regulations related to legal theories and practice of implementing the law concerning the problems in this research. Methods of collecting data are through secondary data in the form of literature studies and documentation studies, and qualitative data analysis methods.

II. METHODS

The normative juridical research approach, descriptive-analytical research specifications, data collection through secondary data in the form of library research and documentation studies, and qualitative analysis methods.

III. RESULT AND DISCUSSION

1. A Will with Notary Deed

A will or testament is made with a Notary Deed. A notary deed is an authentic deed made by or before a notary according to the form and procedure stipulated in the law. The law in question is Law Number 30 of 2004, which was later amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) regulated in Article 1 point 7. Article 1868 of the Civil Code (KUHPerdata) states that what is meant by an authentic deed is a deed made in the form determined by law by or before a public official who is authorized to do so at the place where the deed was made.

An authentic deed has the power of formal proof that proves that the parties had explained what is written in the deed and has the power of binding proof that proves that between the parties on that date in the deed, the person concerned had appeared before a public official and explained what was written [8].

A Notary in carrying out his position is obliged to make a list of deeds related to wills according to the order in which the deeds are made every month, send a list of wills or a list of nil deeds relating to wills to the Center for List of Wills at the Ministry of Law and Human Rights through AHU Online within 5 (five) days in the first week of each following month, and record it in the repertoire of the date of sending the will at the end of each month. If the Notary from the 1st to the 5th forgets not to report his will list, then the system will automatically have zero will report status.

The rule of will law can be found in Article 195 paragraph (1) of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI), 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 the Civil Code (KUHPerdata), a formal will must be made in writing before a Notary or deposited/kept by a Notary. From the two laws, it can be interpreted that a will is made before a notary. According to Yahya Harahap [9], the emergence of the will lies in the written and unwritten will before a notary. This means that the will, according to the Civil Code, is stated in the form of a notary deed, while according to the KHI, it can also be in oral or written form.

Wills made orally often cause problems in the family. For example, Decision Number 721 K/Ag/2015 regarding an inheritance claim case which began with an oral will by Vincentius Papilaya bin Yos Papilaya (indeed/heir) before he died in the presence of his brothers who stated that Vincentius Papilaya (the testator/heir) would not give any inheritance to his children from his first wife (Antonius Papilaya bin Vincencius Papilaya) and Fransisca Papilaya binti Vincentius Papilaya. The testator (heir) also left a statement letter, which handed over the property in the form of land and the building that stood on it, as explained in the SHM Number 11901/8 Ilir Ukur Number 18/8 Ilir/2011 to Sumarni binti Sirat (the second wife of Vincentius Papilaya, has no children). This led to a case from the first level to the cassation, which was finally decided at the Cassation level that the only heir of the late Vincentius Papilaya bin Yos Papilaya was his wife, Sumarni binti Sirat—determined that Sumarni binti Sirat would receive ½ (half) of the joint property (gono-gini). Determine that ½ (half) part of the joint property (gono-gini) of the late Vincentius Papilaya is part of the heirs and is an inheritance. It was determined that Sumarni binti Sirat got 2/3 of the inheritance (inheritance) of the late Vincentius Papilaya. Meanwhile, his first wife's children, Antonius Papilaya bin Vincencius Papilaya and Fransisca Papilaya binti Vincentius Papilaya are entitled to 1/3 of the inheritance (inheritance) of the late Vincencius Papilaya.

Another example is Decision Number 218 K/Ag/2016 regarding an inheritance lawsuit which began with a verbal will from the testator/heir to his stepson, which eventually led to a lawsuit between families. From the two examples of verbal wills, it can be seen that verbal wills are prone to causing problems. Therefore, making a will with a notary deed will further guarantee legal certainty.

A Notary Deed is an authentic deed made to prove it in the event of a dispute in the future. Legally, an authentic deed has two functions: state the existence of a legal

act and prove it. The power of proof of an authentic deed is regulated in Article 165 HIR, Articles 1870-1871 of the Civil Code. It can be argued that the power of proof of a notary deed is perfect evidence because an authentic deed has all the powers of proof, both external, formal, and material. Because legally, a will with a notary deed will provide legal certainty compared to a will without a notary deed or an underhand will which does not provide legal certainty because it can be cancelled unilaterally.

A will is the last message conveyed by a person who will die, usually regarding his wealth and others. Article 171, letter f of the Compilation of Islamic Law (KHI) states that the enactment of a will is the gift of an object from an heir to another person or institution after the heir dies. Meanwhile, Article 875 of the Civil Code states that 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.

The KHI and the Civil Code both have a written legal basis. Basically, in the two legal systems, namely the KHI and the Civil Code, a will is a gift that is dependent on the event of the death of the person who wills, whether the gift is with or without the consent of the person who will be given or who will receive the will. Also equally mentioned that the will can be revoked and can be cancelled. The revocation of wills according to KHI is regulated in Article 199, among others.

The revocation of a will can be done expressly or secretly, regulated in Article 993 and Article 995 of the Civil Code. Meanwhile, KHI regulates the revocation of wills in Article 199: A will can revoke his will as long as the prospective will beneficiary has not stated his approval, and the revocation of a will can be done verbally in the presence of two witnesses or writing witnessed by two witnesses or based on a notary deed.

The loss of the will because the item donated by the will is completely destroyed while the testator (heir) is still alive or the recipient of the testament grant refuses the testamentary grant, regulated in Article 999-1001 of the Civil Code [10]. Meanwhile, Article 197 of the KHI regulates the cancellation of the will because the candidate who receives the will is punished based on a judge's decision which has permanent legal force; the beneficiary is not aware of the existence of a will until he dies; the beneficiary refuses to accept the will; the willed item is destroyed [11].

The laws and regulations have regulated this will in such a way as to ensure legal certainty. In essence, the will in the KHI and the Civil Code both have the same goal, namely for the benefit of humans so that there are no quarrels between heirs. A notary deed carries out the making of a will. The aim is to create legal certainty because a will statement is documented in the form of a deed made by a state official following the laws and regulations so that the evidentiary value is strong.

2. The Application of the Principle of Justice in the Granting of Wills from the Perspective of Islamic Law and Civil Law

Applying the principle of justice in every human activity is expected to be carried out because justice is one of the fundamental values of human life and is a

classic problem that has never been completely solved. The lack of conformity in interpreting justice encourages people to formulate and define it according to their respective backgrounds of knowledge and experience. Justice is defined as a constant and continuous distribution to provide everyone's rights [12].

The distribution of property or transfer of property is one of the efforts to transfer one's property rights to another through a testamentary grant. The will grants coexist with inheritance law, which both are rooted in the transfer of property rights after the property owner dies [13]. The property owner is given the authority to give up his property rights to whom he wants, for example, through a testamentary grant. Implementing the will itself must take precedence over the distribution of inheritance [14].

The application of the principle of justice in granting a will can be seen in the Qur'an, Surah al-Baqarah (2) verse 180, which means: It is obligatory on you when death is about to pick up one of you if he leaves a lot of property, a will is for both parents and close relatives in a good way, (as) an obligation for those who are pious [15]. This means that the will does not exceed one-third of the entire property of the person who wills.

Some scholars believe that a will (to parents and relatives) which was initially obligatory until now the obligation is still permanent and can be enforced so that the giving of a will is mandatory to walidain (mothers and fathers) and aqrabin (relatives) who get a share (acceptance) inheritance, can be applied and implemented. At the same time, others believe that the provisions of the mandatory will cannot be applied and implemented because the legal provisions regarding the will in verse have been canceled, both by the Qur'an and al-Hadith [16]. This can be understood textually and separately from other verses and Hadith so that it can mean: (1) the testator may leave property to the family absolutely whether the family is Muslim or not; (2) the testator may bequeath property to the family, both the family who gets the inheritance and the family who does not get the inheritance; and (3) the testator may bequeath property to the family with an unlimited number of wills [17].

The first understanding does not impact other families' fair or unfair perception because it makes all families entitled to inheritance. This provision positively impacts the realization of the principle of justice in the family if there are religious members other than Islam because the verse does not discriminate between religions in the family, Islam or not. On the other hand, differences in creed do not make the relationship in the family divided. The second and third understandings above can cause jealousy and feelings of injustice, namely if the will is given to the family who gets the inheritance, thus allowing the beneficiary to get two parts—the will and the inheritance—while other families only get one share, namely inheritance, even though the property is the right of the owner.

As for granting a will without a limit on the amount, it is not a problem if the number of wills is small and the assets that are not in the will are still considerable, for example, less than 1/3 of the assets. However, when the will exceeds 1/3 or the entire

property, this is an injustice because it will break down family relations. Of course, this does not follow Islamic guidance, which teaches its people to connect and perpetuate kinship ties and prohibits breaking them.

The arrangement of the will in the Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) and the Civil Code (KUHPerdata) contains several differences, including:

1) The testator. In Article 194 paragraph (1) of the KHI, the testator must be at least 21 (twenty-one) years old, have good sense, be made without any coercion, and testify part of his property to another person or an institution. Meanwhile, Article 897 of the Civil Code states that minors who have not reached the full age of 18 (eighteen) years are not allowed to make a will.
2) Beneficiary. Article 171 letter f KHI explains that the party who receives the will is another person or institution that will take effect after the testator dies. Meanwhile, Article 874, Article 882, and Article 883 of the Civil Code state that those entitled to a will are the heirs and other people (deemed worthy of a will).
3) Form of Will. Article 195 of the KHI states that a will can be made orally in the presence of two witnesses or in writing, which is carried out in the presence of two witnesses or before a notary. In KHI, there is no obligation to make a written will, and it is not required to use Notary intervention depending on the testator's choice. Meanwhile, Article 931 of the Civil Code, concerning the form of a will, states that a will can only be made, by an olographic deed or handwritten, by a general deed, or by a secret deed or a closed deed. Formally, from several provisions of the Civil Code mentioned above, a will must be made in writing before a notary or deposited/kept by a notary.
4) Restriction of Will. Article 195 paragraph (2) of the KHI states that a will is only allowed as much as one-third of the inheritance unless all heirs agree. Scholars who allow more than 1/3 of the will if the heirs agree to it put forward two conditions. First, approval is given after the testator's death because the right of ownership of the beneficiary only takes effect after the testator dies. Second, the beneficiary of the will at the time of delivery has had the skills (*ahliyah*) not to be hindered because of *safih*, forgetting, or being under the *curatele* [18]. The majority of opinions state that the will at most is 1/3 of the inheritance of the dead. Meanwhile, according to the Civil Code, everyone has the freedom to regulate what will happen to their assets after death. It is better to protect the heirs in a state of abundance than to leave them in poverty. Everyone who will bequeath part of his property should prioritize the interests of the heirs. Then the Civil Code stipulates

the limit on the number of wills to a maximum of 1/2 (half) property if the testator has a legitimate child, 1/3 (one third) if he has two legitimate children, and 1/4 (quarter), if they have three legitimate children, including in this definition, are their descended children as a substitute for children in their respective descending lines (Article 914 of the Civil Code) and a maximum of 1/2 (half) if the testator only leaves heirs straight up, as well as children out of wedlock who are recognized as legitimate (Article 915-916 of the Civil Code), unless there is no upward line of the family, the will is not limited (Article 917 of the Civil Code).

In Islamic law, the issue of wills must be distinguished from the issue of inheritance. When parents order something while they are still alive, it indicates that a will can be given to family or non-family, while inheritance is only given to the family. The granting of the will is limited to a maximum of 1/3 of the inheritance because Islamic law aims to realize benefits in family relationships so that problems do not occur in the future. Another reason is that the limitation of the will implies the application of the principle of justice in the granting of a will. Likewise, in civil law, it is also regulated regarding the limitation of wills that the making of will grants must pay attention to the provisions of the Legitieme Portie or the share of property that must be given to the heirs in a straight line, as regulated in Article 913 BW [19].

In the Civil Code, there are different types of wills based on their contents, namely:

a. A will that contains an *erfstelling* or a will for the appointment of an heir as regulated in article 954 of the Civil Code, which states that: a will by which the person is making a will can give to a person or more than one person, wholly or partly of his assets, for example, one-half or one-third when he dies. According to this article, people who get assets are heirs under the general title.
b. A will contains a grant (will grant) or a legacy regulated in Article 957 of the Civil Code, namely a special will in a testament. This will gives goods to one or more persons in the form of movable or immovable property, goods of a specific type, and usufructuary rights of all or part of the inheritance. A person who gets a will like this is called a will under a special title.

The forms of wills found in society, in general, can be classified into three, namely:

a. A general will (*openbaar testament*) is a will or testament made by a Notary and attended by two witnesses. As for the method, a person who will make a will directly comes to the Notary's office to express his will verbally, and the Notary makes a will deed according to the testator's will (heir). This is following article 938 and article 939 BW. After the heir *zakelijk* informs the

final will, the Notary, in the presence of witnesses, reads it whether the written will is correct or not. Thus mute people cannot make general wills, and deaf people can make general wills. The will is signed by the testator (heir), notary, and witnesses. If the testator (heir) cannot sign the deed, the Notary will write explaining that the testator (heir) cannot sign the deed at the end of the deed. The will then will be kept by the Notary.

b. *Olographic* will, namely a will written and signed by the testator (heir) also signed by witnesses. This will is deposited with the Notary to be kept by the Notary. The Notary prepares and signs the deed of receipt of the deposit of the will, which is called the deed of *van bewargeving* and is signed by the testator (heir) and the existing witnesses. The will made by the testator (heir) can be submitted to a notary in a closed or open state. If the testator (heir) submits it to the Notary in an open form, the Notary can read out the will in the presence of witnesses for signature and then keep the Notary.
c. The testator (heir) wrote a will in the form of a secret, or the *geheim* testament was written by the testator (heir), and its submission to a notary requires at least four witnesses. The will is submitted to the Notary in a closed-form. The will is included in the envelope to be kept by the Notary. This will cannot be considered an authentic deed [20].

The majority of the four madhhab scholars state that a will is not an obligation on everyone. Will laws vary according to circumstances. A will becomes mandatory if there is a concern that the heirs will be negligent if they are not given a will. For example, not giving deposits, paying debts, paying zakat or hajj. A will is a sunnah if it is intended for the good of the family, the poor, and the pious. A will becomes haram if it harms the heirs. For example, giving all assets to others or using assets for immoral purposes. A will is considered makruh if the person who makes the will has little wealth, while the testator has many heirs. Likewise, a will is made permissible for the wicked if it is known to be used in wickedness and corruption [21].

The arrangement of the will has the aim of not causing problems in the future after the testator (heir) dies. The granting of a will must be based on deliberation and consensus and attended by witnesses. According to Islamic and civil law, a will must also meet subjective and objective criteria as regulated in statutory regulations. The granting of a will must meet subjective criteria, which relate to the parties' requirements, both testator and testator, and meet objective criteria relating to the property to be willed.

IV. CONCLUSION

A will must be made with a notarial deed to fulfill the requirements contained in the legislation and have perfect evidentiary power. A Notary Deed is an authentic Deed

(Article 1 point 7 of Law Number 30 of 2004, which was later amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions (UUJN), which was made to prove if in the future there is a dispute. Authentic deeds have two functions: state the existence of a legal act and prove. The power of proof of an Authentic Deed is regulated in Article 165 HIR, Articles 1870-1871 of the Civil Code, so it can be argued that the power of proof of a Notary deed is perfect evidence because an authentic deed has all the powers of proof, both external, formal, and material. Although Article 195 paragraph (1) of the KHI allows a will to be made orally in front of two witnesses, it also mentions that a will is made before a notary. Making a will with a notary deed will provide legal certainty because the statement of the will is documented in the form of a deed made by a state official so that the proof value becomes strong.

The granting of wills in applying the principle of justice to heirs from the perspective of Islamic law can be seen in Article 195 paragraph (2) of the KHI, which states that the granting of wills is limited to a maximum of 1/3 of the entire inheritance. The third restriction is because Islamic law aims to create good relations in the family so that granting a will does not cause problems in the future. Another reason is that the limitation of the will implies the application of the principle of justice for all heirs. Likewise, in civil law, it is also regulated regarding the limitation of wills, that the making of will grants must pay attention to the provisions of the *Legitieme Portie* or the share of property that must be given to the heirs in a straight line, as regulated in Article 913 of the Civil Code. The limitation is also intended to apply the principle of justice for the testator's heirs.

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