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PRIVILEGED WILLS IN MALAYSIA: THE SUSTAINABILITY OF PRIVILEGED WILLS AMONG SOLDIERS, AIRMEN AND SAILORS

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ABSTRACT

Privileged will is the right of soldiers and airmen, and sailors, to dispose of their property during "actual military service", and "at sea", respectively. The sustainability of this right leads to economic prosperity and social justice. The objective of this paper is to examine the sustainability of privileged wills as a model for combating poverty among soldiers, airmen and sailors in Malaysia. Privileged wills appear to be relevant and important as soldiers, airmen and sailors may dispose of their properties during difficulties in obtaining advice and assistance to make a formal will. Despite the benefit, it is found that the legal provisions relating to privileged wills are not applicable to Muslims and native soldiers and sailors, and that there is no clear legal provision to guide Muslims and native soldiers and sailors to make privileged wills. The methodology employed in discussing this paper is a qualitative research using doctrinal and comparative approach to the legal systems. This paper analyses legislations governing privileged wills ranging from the Malaysian

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Wills Act 1959 (Act 346), the Sabah Wills Ordinance (Sabah Cap. 158), Armed Forces Act 1972 (Act 77) and the English Wills Act 1837. The study suggests that the Government of Malaysia should support the idea to extend the provision of law on privileged wills to Muslim and native soldiers and sailors. This is to enable the society to earn and benefit from the property disposed of by soldiers, airmen and sailors.

INTRODUCTION

Being a soldier, an airman or a sailor is the first and most important condition for the right of making a privileged will to be lawful. Everett Paul Griffin *et al.,* points out that the phrase "soldiers' and sailors' wills" applies to oral or unwitnessed will (Everett Paul Griffin *et al*., 1943). The informal wills which soldiers and sailors are permitted to make are frequently called nuncupative wills, but they are not necessarily oral (Thompson, 1936; E.B.M, 1946). In this regard, James Schouler writes that soldiers and members of naval forces have special privilege to dispose of their personal property, their wages, goods and chattels, by mouth provided they are in actual military service and while engaged in expedition (James Schouler, 1915). As a fighting man, they are seen to have legal rights in regard to making their wills provided they are in active service (St Amaud Mercury, Vic.: 1914-1918). As such, it seems to suggest that any military serviceman who serves as soldiers, airmen or in navy have personal special privilege right to make a will by way of privileged wills as they protect the country for public interest.

W. Bowe *et al*, mention that the reasons justified for privileged class of soldiers and mariners are the imminent dangers, diseases, disasters and the possibility of sudden death constantly besetting soldiers and sailors, and the inability of such persons to find the time or the means to make deliberate and written testamentary dispositions of their effects (2 W. Bowe *et al*, Robert J Murphy 11, 1981). Thus, it is fair and just to allow soldiers, airmen and sailors to make privileged wills temporarily during difficult time.

In Malaysia, despite the benefit of having law on privileged wills, it is found that there are problems surrounding the application of law on privileged wills in Malaysia. The problems faced in the practice of privileged wills in Malaysia is mainly on the inapplicability of privileged wills to Muslim soldiers, airmen and sailors in West Malaysia and the

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native in Sabah. Hence, this paper aims to analyse legal provisions relating to privileged wills in Malaysia through the primary sources such as Malaysian Wills Act 1959 (Act 346), the Sabah Wills Ordinance (Sabah Cap. 158), Armed Forces Act 1972 (Act 77) and the English Wills Act 1837. Other secondary sources referred to in this paper include decided cases, books, articles in journals and internet sources. This paper also discusses the sustainability of privileged wills as a model for combating poverty among soldiers, airmen and sailors in Malaysia.

LEGAL PROVISIONS RELATING TO PRIVILEGEDWILLS IN MALAYSIA

In Malaysia, according to section 26(2) of the Wills Act 1959 (Act 346), privileged will means any declaration or disposition, oral or in writing, made by or at the directions of the testator which manifests the intentions of the testator which he desires to be carried or to the guardianship, custody and tuition of a child or to the exercise of a power of appointment.

According to section 26(1) of the same Act, a member of the armed forces of Malaysia being in actual military service, and a mariner or seaman (including a member of the naval forces of Malaysia) being at sea may dispose of his property or of the guardianship, custody and tuition of a child or may exercise a power of appointment exercisable by will by a privileged will. In Malaysia, according to section 26(1) of the Wills Act 1959 (Act 346), privileged will is the right of soldiers, airmen and sailors to dispose of their property or the guardianship, custody and tuition of a child or may exercise a power of appointment. In order for the right to make a privileged will to be lawful, certain conditions are required to be fulfilled; firstly, a member of the armed forces of Malaysia must be in actual military service. Secondly, a mariner or seaman (including a member of the naval forces of Malaysia) must be at sea.

The above provision clearly allows a member of the armed forces of Malaysia being in actual military service and a mariner or seaman (including a member of the naval forces of Malaysia) being at sea to make a privileged wills. However, it is to be noted that the Wills Act 1959 (Act 346) is only applicable to the States of West Malaysia only (see section 1(2) of the Wills Act 1959 (Act 346).

For Sabah, section 137 of the State of Sabah Wills Ordinance (Sabah Cap. 158), provides that:

> "Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged or any mariner being at sea, may, if he has completed the age of twenty-one years, dispose of his property by a will made in the

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> manner provided in the following section. Such wills are called privileged wills".

A significant difference between the Wills Act 1959 (Act 346) and the State of Sabah Wills Ordinance (Sabah Cap. 158) is that, the Wills Act 1959 (Act 346) allows soldiers, airmen and sailors who has not attained the age of majority to make privileged wills. However, under the State of Sabah Wills Ordinance (Sabah Cap. 158), only a soldier, an airman and mariner who has completed the age of twenty-one years is allowed to dispose of his property by a privileged wills.

Section 1(2) and (3) of the State of Sabah Wills Ordinance (Sabah Cap. 158) provides:

> (2) "Nothing in this Ordinance shall affect the validity of any will made by any native or Muslim according to native law or custom or Islamic law as the case may be".
> (3) "Nothing in this Ordinance contained shall enable any native to dispose of his property by will in a manner contrary to any law or custom having the force of law applicable to him at the time of his death".

It seems to suggest that the Sabah Wills Ordinance exclude native and Muslim soldiers, airmen and any mariners from making privileged wills. This Ordinance is only applicable to non-Muslims and non-Native.

Further, section 138 of the State of Sabah Wills Ordinance (Sabah Cap. 158) provides rules for executing privileged wills in Sabah. Section 138 (1) of the State of Sabah Wills Ordinance states on how a privileged wills can be made in Sabah. Privileged wills may be in writing, or may be made by word or mouth. Sub-section (2) of the section provides that: "(a) the will may be written wholly by the testator with his own hand. In such case it need not be signed or attested; (b) it may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested; (c) if the instrument purporting to be a will is written wholly, or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will; (d) if it appears on the face of the instrument that execution of it in the manner intended by the testator was not complete, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument; (e) if the soldier, airman or mariner has written instructions for the preparation of his will, but had died before it could be prepared and executed, such instructions shall be considered to constitute his will; (f) if the soldier, airman or mariner has, in the presence of two witnesses, given verbal instruction for the preparation of his will,

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and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence nor read over to him; (g) the soldier, airman or mariner may make a will by word of mouth by declaring his intention before two witnesses present at the same time; (h) a will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will".

Comparatively, the Sabah Wills Ordinance (Sabah Cap. 158) provides rules in executing privileged wills whereas the rules on executing privileged wills are not provided in the Wills Act 1959 (Act 346).

CONDITIONS FOR PRIVILEGED WILLS

Since Julius Ceasar's time, soldiers are seen as excellent and faithful but inexperienced in drawing up their wills. As such, the law permits them to draw up their wills in whatever form they desire and they may exercise a power of appointment exercisable by will by a privileged will. Further, it is written that, in 1914, officers and men at that time serving with the Expeditionary Force on the Continent possessed a privilege with regard to the making of effective wills which was not possessed by any civilian. The person entitled to the privilege is defined by the Wills Act of 1837 as any soldier in actual military service. At this point of time, it is agreed that relaxing the rules of will-making in favour of soldiers at the front, is a wise and just discretion (Wills of soldiers on Active Service, 1914) 34 *Can. L. Times* 1162, 1169-1172).

The essential condition for the exercise of making a privileged will is that soldiers must be "in actual military service" and sailors, mariners or seamen (including a member of the naval forces) must be "at sea". This is derived from the principle of law in many cases.

Actual Military Service

In *Drummond v Parish* [1843] 3 Curt 522. 7 Jur 538, 163 ER 812, Sir Herbert Jenner Fust decided that the words "in actual military service" had the effect of confining the privilege conferred by section 11 of the Wills Act, 1837 to soldiers of all ranks, who were on expedition [1843-60] All ER Rep 100, 1 LTOS 207, 2 Notes of Cases 318.

In the Estate of Spark [1941] 2 All ER 782, Hodson J pointed on the meaning of *inops concilii*. In this case he mentioned that there were phrases in some of the old cases which laid emphasis on the reason for the soldier's privilege being given, the reason being that a soldier *in expedition* or in actual military service, was usually *inops consilii*. He

pointed out in this case that if a soldier is *inops consilii*, he had no opportunity of drawing up a will with the necessary formalities. He also has no opportunity of obtaining legal advice. As such, he was privileged by virtue of Wills Act 1837, s 11.

Similarly, in *Re Wingham (deceased): Andrews and Another v Wingham* [1948] 2 All ER 908, Cohen LJ mentioned that the privilege conferred by section 11 of the Wills Act, 1837 did not extend to regular soldiers of every description at all times, but only to soldiers who were "in expedition". He mentioned that the courts had not given a narrow meaning to the words "in expedition" but had taken a broad view of the circumstances to justify treating a soldier as being in expedition, and had had regard to the conditions of warfare from time to time prevalent.

In this same appeal case, Denning LJ. rid the Roman test (The test of "can the soldier be considered as having been regarded as in expedition?" should no longer be applied) and decided that the proper test must be simple and certain to enable every soldier to apply it without difficulty in the situation in which he found himself. The rule was that a soldier "in actual military service" was privileged to make a will without any formalities. As such, applying the test above, it was held that the testator was in "actual military service". In this appeal case, Lord Denning LJ. in his judgment criticized the decision of Sir Herbert Jenner Fust in the case of *Drummond v Parish* (1843) (3 Curt, 531); 1 LTOS 207). He mentioned that this was the case which had given rise to all the trouble, for in it Sir Herbert Jenner Fust fell into an error by deciding that General Drummond was not in "actual military service" when he made a will in peace-time while serving in Woolwich Barracks.

In the case of *In the Goods of Hiscock* [1900-03] All ER Rep 63, for a man to be "in actual military service", it is necessary, first, that there should exist a state of war; and secondly, that the man should be for that purpose in some place where otherwise he would not have been. As soon as he had done something under those orders, actual military service might be said to have commenced. This is the test laid down by Sir Francis Jeune.

The above principle was further supported by the case of *Kitchen, Re Kitchen v Allman* (1919) 35 TLR 612 where it was decided that what constituted actual military service was when the country was at war. As such, a soldier who has been ordered to hold himself in readiness for service overseas can make a valid soldier's will under section 11 of the Wills Act 1837. These cases prove that privileged wills is important to enable soldiers, airmen and members of naval forces to dispose of their properties in just, expeditious and economical manners even during difficult time.

In attempting to give a clear view as to when a soldier may be said to be in actual military service, Lord Merrivale P, in the case of *Re Booth; Booth v Booth* [1926] All ER Rep 594 (also reported [1926] P 118; 95 LJP 64; 135 LT 229; 42 TLR 454), considered if mobilization was the test. In this case, Col. Booth was mobilized. He and his regiment were in course of making ready under orders to go on board a troopship for the purpose of reaching the scene of operations. It was held that he was in actual military service within the meaning of the phrase in the Wills Act as he personally was involved actively in the military operations which were then in progress. In this case, the plaintiff received a letter (which enclosed what she described as his will) from her husband while she was in England, and he was serving with the 46th Regiment (2nd Battalion of the Duke of Cornwall's Light Infantry). In this letter, he wrote to this effect: "I am just off to Egypt with the regiment and send my will, with fond of love. Will write when I get to Egypt." Enclosed with the letter was a document which termed, "I leave everything to my wife. I hope she will have regard to my sister Mary". That was signed by the testator and witnessed by a pay-sergeant, who was the paymaster of his regiment at that time in his office.

The case of *Re Stable Dalrymple v Campbell* [1918-19] All ER 299 illustrates the best way in making privileged wills. In this case, the deceased, while under orders to leave for France, said to the plaintiff, in the presence of an independent witness: "If I stop a bullet everything of mine will be yours." The Probate, Divorce and Admiralty Division's Court held that the words used by the deceased were deliberately intended to give expression to his wishes as to what should be done with his property in the event of his death and constituted a valid soldier's will. Horridge J. pronounced for probate of the oral declaration as a will.

In Malaysia, the term "actual military service" can be seen in section 26(1) of the Wills Act 1959 (Act 346). This provision does not contain the term "active service". However, under section 3(1) of the Armed Forces Act 1972 (Act 77), the term "on active service" is provided. In this Act, the expression "on active service" in relation to force, means that it is engaged in operations against an enemy, or is in a country or territory outside the Federation for the preservation of life or property or is on military occupation of a foreign country, and in relation to a person, means that he is serving in or with such a force which is on active service. Soldiers in Malaysia may include the Regular Forces and Volunteer Forces of Malaysia and any other forces which may be declared by the Yang di-Pertuan Agong from time to time to be Armed Forces, superior officer or serviceman, volunteers, commanding officer, officer, provost officer, regular forces, and service chief and air force (see section 2 of the Armed Forces Act 1972 (Act 77).

Being at Sea

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In Malaysia, the term "being at sea" can be seen in section 26(1) of the Wills Act 1959 (Act 346). Under this section it is clearly stated that a mariner or seaman (including a member of the naval forces of Malaysia) being at sea, may dispose of his property or of the guardianship, custody and tuition of a child or may exercise a power of appointment exercisable by will by a privileged will. The privileged will of a seaman at sea was illustrated in *In the Estate of Wilson*; *Wilson v Coleclough* [1952] 1 All ER 852. In this case, the deceased was a chief officer employed in the marine department of a petroleum company. On 11 January 1946, he went on leave in England, and on 25 April he received instructions to join a ship on 30 April. On 27 April he made a nuncupative will by saying in the presence of witness: "If anything happen to me, I want everything to go to my mother". It was held that the deceased made the will in contemplation of the voyage on 30 April and, therefore, he was a "seaman at sea" within the meaning of s 11 of the Wills Act, 1837, and the will could be admitted to probate.

The privileged will of a mariner being at sea was illustrated in the case of *In Re Godfrey (Deceased)* [1944] NZLR 476. In this case, a marine engineer, who was drowned at sea when his ship was torpedoed, wrote from his ship in the Suez Canal on August 19, 1941, a letter containing the passage "About the Insurance of mine…the money I save is all yours anyway…". Northcroft J. held that the writer was "a mariner being at sea", and that, therefore, the letter was a testamentary disposition, and the letters of administration with the will annexed was granted to his widow.

In *Re Rapley's Estate, Rapley v Rapley* [1983] 3 All ER 248, the court held that, section 11 of the 1837 Act exempted any mariner or seaman at sea from the formal requirements imposed by the Act for the valid execution of a will because those who were at sea were without legal assistance and also faced a greater risk of death. However, in this case, the court held that the document made by the deceased was not a valid testamentary disposition because he had not, by the time he executed the document, received instructions to join a ship. In *Re Hamilton deceased* [1982] NI 197, Kelly J. pointed out that "mariner or seaman" includes sailors of a merchant ship. In *In the Goods of Alfred John Wilson, Decd. Wilson v Coleclough* [1952] P. 92, the court held that the declaration made by a chief officer in a merchant ship, in contemplation of sailing in a particular ship which he had been ordered to join on a specific voyage for which he was then preparing, was a nuncupative will. The court granted letters of administration to the plaintiff of the estate of the deceased with the contents of the nuncupative will annexed as the plaintiff had satisfied the court that the deceased was a "seaman at sea" when he made his nuncupative will.

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PRIVILEGED WILL AS A MODEL FOR COMBATING POVERTY AMONG SOLDIERS, AIRMEN AND SAILORS IN MALAYSIA

Section 26 of the Wills Act 1959 (Act 346) allows any soldier being in actual military service, or any sailor (including a mariner, seaman and member of the naval forces) being at sea, to dispose of his property by way of privileged will. From the above discussion, privileged will appears to be relevant and important as soldiers, airmen and sailors may dispose of their properties during difficulties in obtaining advice and assistance to make a formal will.

By allowing the privileged testator to make a privileged will, the privileged testator may dispose of his properties to the beneficiaries or to the poor and needy without complying with formalities in making a formal will. The beneficiaries, the poor and needy would get benefit from the properties of the privileged testator. This would lead to economic prosperity and social justice. With regard to the importance of combating poverty, Hunud Abia Kadouf *et al*, mention that Malaysia has been combating poverty since the era of Tun Abdul Razak in the 1960s. Not only poverty is seen as a factor that may lead to political disturbance (Hunud Abia Kadouf *et al*, 2015), it may reduce the quality of life. Therefore, this paper contends that privileged will appears to be relevant and important and is a model for combating poverty.

Despite the benefit of having legal provisions on privileged wills in Malaysia, it is found that the law on privileged wills suffers from problems such as the legal provisions do not apply to Muslim and native soldiers, airmen and sailors (mariners or seamen, including members of the naval forces of Malaysia). There is no clear provision of law to guide Muslim and native soldiers, airmen and sailors (mariners or seamen, including members of the naval forces of Malaysia) to make privileged wills. Even though Muslim and native soldiers, airmen and members of the naval forces of Malaysia are soldiers covered by the Armed Forces Act 1972 (Act 77), they are not privileged as the Wills Act 1959 (Act 346) and the Sabah Wills Ordinance (Sabah Cap. 158) seem to exclude them from making privileged wills.

Thus, this may hurt their rights to make privileged wills. This paper suggests that the Government of Malaysia should support the idea to extend the provision of law on privileged wills to Muslims according to conditions prescribed by *shari'ah*, and to the natives. This is to enable the society to earn and benefit from the property disposed of by Muslim and native soldiers, airmen and sailors. By allowing them to execute privileged wills when they are in actual military service or at sea, the economy of the beneficiary, the poor and needy may be increased. They can earn and

benefit from the property disposed of by privileged wills. The community can pool various funds to broaden ownership.

Having acknowledged that privileged wills law is good to benefit the soldiers, airmen and sailors, Patricia Critchley however writes that the continued existence of privileged wills does not appear to be desirable. She gives the reason that the average modern soldier in barracks in England, or a sailor on extended shore leave, has no difficulty in obtaining the advice, materials and assistance needed to make a formal will (Patricia Critchley, 1999). Similarly, A.L.G. Goodhart argues that privileged will is no longer relevant as the military authorities also put efforts in giving advice free of charge (A.L.G. Goodhart, 1949; G. Cole, 1982; Patricia Critchley, 1999).

Nevertheless, T. Weiss mentions that despite the apparent opportunity to make a formal will, the lack of psychological energy and attention when a soldier is in rigorous preparatory training means that it is unreasonable to expect completion of testamentary formalities. Therefore, he suggests that it is important for morale to allow members of the armed forces, who are acutely aware of the risk of their death, to make privileged wills by relaxing the testamentary formalities (T. Weiss, 1947).

Case law seems to suggest that privileged wills are not limited to soldiers of little education (See *May v. May* [1902] P. 103, n) Soldiers, airmen and members of naval forces may make a privileged wills provided they are in actual military service (See *Re Wingham*, *Andrew v. Wingham* [1949] P. 187; [1948] 2 All ER. 908. The flexibility in making a privileged will is significant as soldiers' wills are good despite defects in number of witnesses or testamentary formalities (See Justinian's Institutes. *Translation: Institutes II*. Translated with an Introduction by Peter Birks and Grant McLeod. With the Latin text of Paul Krueger, 1987).

CONCLUSION

The applicability of privileged will in Malaysia to soldiers, airmen and sailors is pursuant to section 26 of the Wills Act 1959 (Act 346) and the Sabah Wills Ordinance (Sabah Cap. 158). It does not matter whether the soldiers have high or low level of education, or they are able to consult someone for making a will, as long as they are on campaign or in combat, they face death. As such, they are qualified to make a privileged will provided they satisfy the requirement of "in actual military service". Similarly, it does not matter whether the sailors have high or low level of education, or they are able to consult someone for making a will, as long as they are at sea, they face death. As such, they too are qualified to make a privileged will provided they satisfy the requirement of "being at sea".

"Therefore, the provision of privileged wills must be preserved in Malaysia.

The clear issue is, even though the Wills Act 1959 (Act 346) and the Sabah Wills Ordinance (Sabah Cap. 158) give freedom to soldiers, airmen and sailors to make privileged wills, however, at the same time there is no clear legal provision on how Muslim and native soldiers may make privileged wills when they are in "actual military service" and how Muslim and native sailors (mariners or seamen, including members of the naval forces of Malaysia) may make privileged will when they are "at sea". The study suggests that, the sustainability of privileged wills among soldiers, airmen and sailors is important. The Government of Malaysia should not only maintain the provision of law on privileged wills but should also support the idea to extend the provision of law on privileged wills to Muslims according to conditions prescribed by *shari'ah*, and to the natives. This is to enable the society to earn and benefit from the property disposed of by soldiers, airmen and sailors in Malaysia so that economic prosperity and social justice could be sustained.

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