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# HPI INDONESIA'S PERSPECTIVE ON INHERITANCE THROUGH TESTAMENT BY INDONESIAN CITIZENS ABROAD

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**Abstract**
This study discusses the form of HPI protection and the legal consequences of inheritance through testament by Indonesian citizens abroad. This research is a juridical-normative research, using legal, conceptual, and comparative approaches. In this study, it was found that the form of HPI protection against testament making by Indonesian citizens abroad is the existence of Algemeine Bepalingen and the doctrine of experts, which Indonesia itself has not ratified, so it tends to adopt existing principles. This results in no certainty regarding the validity of making testaments by Indonesian citizens abroad. The author's suggestion is to revise the Indonesian Civil Code on several articles related to making testaments. In addition, it is necessary to establish an HPI law as protection in making testaments abroad, as well as the adoption of the concept of granting power of attorney by heirs to their heirs in Indonesia to register the testament with an Indonesian Notary.

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## I. INTRODUCTION

The law of inheritance according to the Civil Code (hereinafter referred to as the Civil Code) is literally divided into 2 (two), namely inheritance according to law (ab intestato) which is interpreted as the existence of a rule or procedure for inheritance regulated by law (Rudya, 2013). While the next is to inherit by will. Inheriting by will is described in Article 875 of the Civil Code (hereinafter referred to as the Civil Code) (Subekti & Tjitrosudibio, 2002). Inheritance by will means recording a person's statement of what he wants after he dies. Based on the prevailing principle, such a statement is out of a party only (eenzijdig) which at any time can be withdrawn by a person who make it (Oemarsalim, 1991).

Basically, the making of a will deed is intended as a form of embodiment of the provisions of Article 164 Herzien Inlandsch Reglement (HIR), Article 284 Rechtreglement voor de Buitengewesten (RBg) and Article 1866 Civil Code which states that evidence by letter or written, evidence by witnesses, evidence of allegations, evidence of confession and evidence of oath . As for these written evidences, there is a class of written evidence that is very valuable in evidentiary efforts, namely deeds. Conceptually, this deed is divided into 3 (three), namely authentic deeds, deeds under hand,

and ordinary letters (Putri, 2016). The division of this deed is based on its importance and validity as evidence. The connection is with the role of notaries in making, signing, and even storing the will deed.

Along with the development of cooperative relations between countries (international traffic), there are significant changes, especially related to the ease for Indonesian citizens (hereinafter referred to as WNI) to be able to travel to other countries. With this convenience, it does not rule out the possibility of legal acts carried out by Indonesian citizens outside the country of Indonesia, such as the occurrence of inheritance processes with wills. S. Gautama (1981) explained an example that there was a process of inheritance by deed of will that occurred in 1971 in Singapore, where two years later the heir died in Jakarta. This case then becomes a question whether Indonesian citizens can make a valid will recognized by Indonesia even though the making is done abroad (Gautama, 1981).

The making of a will should indeed be based on the rule of law at the testator's last residence. The birth of different legal systems in the world, commonly known as the Common Law (Anglo Saxon) and Civil Law (Continental Europe) legal systems, is certainly an obstacle in the implementation of making wills abroad. This has given rise to several views that wills made by Indonesian citizens abroad have no legal force, because there are inappropriate manufacturing procedures, especially in the procedure for making authentic deeds (Indradewi, 2022). There are also some doubts about making wills abroad, where there are differences in formal requirements between countries that have actually been regulated in the Civil Law Convention International (hereinafter referred to as HPI) The Hague on the form of Testament (Gautama, 1981). Moreover, in HPI a principle is known as the Lex Rei Sitae Principle (Lex Site) which means matters concerning immovable objects subject to the law of the place where they are located (Purwadi, 2014).

The 1961 Hague HPI Convention has actually hinted at the creation of testaments outside the countries of the members of the convention, which should be welcomed by its ratification into existing laws and regulations in the country. Not the case with Indonesia, because until now the provisions in the convention have not been ratified in existing laws and regulations. When referring to the provisions in Article 945 of the Civil Code, the use of which must be accompanied by existing jurisprudence. This is because the provisions in the article tend to be rigid and not in accordance with current conditions (Purwadi, 2014). The absence of codification from HPI Indonesia itself makes the theory of legal objectives proposed by Gustav Radburch invalid, which states that existing law aims to achieve Justice, Certainty and Expediency (Erwin, 2012).

The ideas in this journal article are in line with some previous research. As conducted by Rivaldo Joel Saroinsong, Tommy F. Sumakul, and Harold Anis in 2021 in the Lex Privatum Journal in their article entitled The Legal Power of Making Testaments (Wills) Abroad According to the Civil Code. The journal article discusses the provisions and validity of making Testaments by Indonesian citizens abroad according to the Civil Code. The journal article has similarities in discussing the

provisions and validity of making Testaments by Indonesian citizens abroad based on positive law in Indonesia, namely the Civil Code, while the difference, in the journal article is only based on the Civil Code without paying attention to the provisions of Private International Law which in this case is contained in international agreements. In this case, the author will examine more specifically and in detail, namely the provisions and validity of making Testaments by Indonesian citizens abroad by elaborating the provisions of the Civil Code and also Private International Law whose legal position in international law concerns inheritance which in this case is related to making Testaments.

Furthermore, there is also a research conducted by Afifah Kusumadara in 2022 in the Legal Arena Journal entitled The Use of Foreign Law in Private International Law: Obligations and Their Implementation in Indonesian Courts. The journal article discusses the law on the use of foreign law by courts in Indonesia, as stipulated in HPI Indonesia which is based on various laws and regulations related to HPI, court decisions, and HPI textbooks. The journal article has similarities in discussing the use of foreign law in Indonesia according to HPI, while the difference is that the journal article only discusses in general the concept and law of the use of foreign law by courts in Indonesia based on HPI, while the author in this case will apply the concept and law of the use of foreign law based on HPI in the realm of private law, namely making Testaments. The author will elaborate the provisions of international law in the realm of private law with the provisions of Indonesian positive law in regulating the making of Testaments by Indonesian citizens abroad.

Meanwhile, according to Dinda Rizqiyatul Himmah in 2022 in the Journal of Legal Pulpit in her article entitled Convention on Foreign Court Decisions The Hague 2019: Perspectives on Indonesian Private International Law, she discussed HPI Indonesia's views on legal issues related to the recognition and implementation of foreign court decisions. The journal article has similarities in discussing the provisions stipulated in the 2019 Hague Convention and HPI Indonesia's views on these provisions, while the difference is that the author will later apply the principle of these provisions in making Testaments by Indonesian citizens abroad and regulate them into positive law in Indonesia which is intended as a form of legal protection for Indonesian citizens who havenot inherited through a testament he made abroad.

The high number of Indonesian citizens abroad is illustrated based on E-Protection data and the Indonesian Citizen Care Portal, in 2019, the Ministry of Foreign Affairs (Kemlu) recorded the number of Indonesian citizens abroad as many as 3,011,202 people (Ministry of Foreign Affairs, 2020). Meanwhile, as of 2022, stated through an online Focus Group Discussion reported by Validnews.id (2022), the Ministry of Foreign Affairs stated that although the exact number of Indonesian citizens abroad is not yet known due to the large number of Indonesian citizens in and out of Indonesia, it is certain that the number of Indonesian citizens per 2022 is not far from the number in 2019, and actually tends to increase.

Based on these data, the urgency of a legal vacuum regarding the making of testaments by Indonesian citizens abroad is increasingly apparent. So it is important to immediately make changes to existing legal regulations, as well as the establishment of law-level regulations (lex specialis) as a form of implementation of the Civil Code (lex generalis), considering that the Civil Code is currently unable to overcome legal problems regarding the making of testaments by Indonesian citizens abroad. Based on this background, there is its own urgency, especially regarding the form of protection of private international law against inheritance through testaments made by Indonesian citizens abroad and also about the legal consequences for Indonesian citizens who make testaments abroad, which must be studied comprehensively.

## II. RESEARCH METHODS

The type of research conducted is juridical-normative research, which comes from secondary data sources, and is collected through literature studies, which are then analyzed by qualitative methods (Sugiyono, 2010). This research refers to legal norms and principles contained in laws and regulations or outside the laws and regulations, and also considers research on legal systematics, especially related to the object of research, namely the Testament made by Indonesian citizens abroad. This research is a legal research that uses the Statute Approach method, namely the Civil Code. In addition, this study also uses a conceptual approach, which considers the concept of making testaments by Indonesian citizens abroad based on the existing legal system (civil law and common law), besides that the concept of registering testaments using a power of attorney to heirs to register it with an Indonesian notary (Diantha, 2016), and a comparative approach that is an approach taken to compare the law of a country with the law of another country, namely the law of England and the United States in regulating the role of Notaries and their functions in making testaments.

## III. ANALYSIS AND DISCUSSION

### 3.1. Forms of Private International Law Protection Against Inheritance Through Testament by Indonesian Citizens Abroad

Making a testament (will) is a legal act carried out by individuals in determining the position and ownership of what will happen with the property they own after he passed away. A testament is a person's statement of what he wants after death. There is a principle associated with this testament which in essence is that the statement desired by a person is out of a party only (eenzijdig), at any time it can be withdrawn by him (Oemarsalim, 1991). In fact, related to inheritance is often a problem, both legal and social, so it should have a good arrangement and settlement Regulated comprehensively as codified in an existing order of laws and regulations.

Provisions regarding inheritance through testament by Indonesian citizens are generally regulated by the Civil Code. The Civil Code divides the types of testaments into 5 (five), namely

Olographic Deed (Article 932 of the Civil Code), General Will Deed (Article 938 of the Civil Code), Secret Will/Superscriptie Deed (Article 940 of the Civil Code), Codisil Deed (Article 935 of the Civil Code), and Emergency Will Deed (Articles 946 to 952 of the Civil Code). However, of the five types of testaments, there are three of them that require the intervention of a Notary in making them, namely geheim or secret testament, openbaar or unclassified testament, and self-written olographic or testament (Oemarsalim, 2006).

The Civil Code does not specifically regulate the structure and systematics of the contents of each type of testament. However, the preparation of a testament by the Civil Code is recommended to be made before a Notary so that an authentic deed with permanent legal force and valid can be produced if desired to then be used as evidence because it has definite legal force. Even if there is a type of testament made under the hand, it is necessary to authenticate directly by the Notary so that a storage deed can then be made for storage and registration of the testament at the Will Register Center, Ministry of Law and Human Rights (Kemenkumham) (Saroinsong,. Rivaldo, J., Tommy, F. Sumakul,. & Anis, H., 2021).

For this, the making of testaments by Indonesian citizens through positive law in Indonesia is limited and requires the manufacture of testaments carried out by Notaries or at least authenticated by Notaries So that products can be produced in the form of authentic deeds. This of course still creates legal uncertainty for Indonesian citizens who inherit through testament abroad, because when referring to existing law, then it is prohibited and considered contradictory.

When referring to the Civil Code, the making of testaments is detailed in several relevant articles. Article 938 of the Civil Code states that testament is usually made before a Notary Public and witnessed by two witnesses. Furthermore, Article 931 of the Civil Code states that the making of an olographic testament is made in handwriting and signed by the Heir in the presence of two witnesses, where there is a provision that the Testator may withdraw the testament. Unlike the two types of testaments, Article 940 of the Civil Code regulates secret testaments which in the making are attended by four witnesses consisting of two people a witness from the family of the testament maker and two witnesses from the Notary Public. Regarding this secret testament does not have to be handwritten by the maker but must be signed directly by him. Even regarding this testament cannot be withdrawn, so that if in the future it is desired to cancel this secret testament, a general testament must be made (Indradewi, 2022).

Making a testament generally must be done by involving the role of a Notary in it, in addition to obtaining the validity of the testament, the Notary in this case has a role to register The testament goes to the Will Registration Center (hereinafter referred to as PDW), and makes a Certificate of Right to Inherit (hereinafter referred to as SKHM) for the making of wills made abroad by Indonesian citizens to then be carried out in Indonesia (Indradewi, 2022). The authority of the Notary in creating an authentic deed is based on the provisions of Indonesian rules. Although over time, it does not rule

out the possibility that testament will be made by Indonesian citizens outside Indonesia or abroad. It is then also possible to make this testament by the Consulate of the Republic of Indonesia in the country where the testament is made, so that the validity of the testament is recognized by Indonesia (Indradewi, 2022).

Regarding the making of testaments abroad, the heir has actually been regulated in the Hague International conventions which took place in 1961 and 2019. The convention discusses Private International Law (HPI), one of which concerns the making of wills in inheritance. In the regulation of Private International Law regarding the making of this testament, two principles are recognized consisting of the principle of nationality or citizenship and the principle of domicile. According to Basuki (1996), Indonesia itself adheres to the principle of nationality or citizenship, where based on Article 16 Algemeine Bepalingen (hereinafter referred to as AB), this principle focuses on the personnel aspect, which means that a person's nationality is inherent and follows wherever the person goes and is. This then makes if the Indonesian citizen is outside Indonesia, then attached to him Indonesian law applies, including in terms of making testaments (Djoko, 1996).

Making testaments abroad in addition to having to pay attention to the formal and material requirements, must also pay attention to how the legal system applies in the country. Until then the problem is if the country adheres to a different legal system from the one Indonesia uses. The role of Notaries in the Common Law (Anglo Saxon) legal system with Civil Law (Continental Europe) is very different. In terms of terms, Notaries in Countries with Continental European legal systems recognize Notaries or Civil Law Notaries who are Notaries in Latin notary areas, while Notaries in Countries with Anglo Saxon legal systems use the title Notary Public (Mourik, 1992).

In the Continental European legal system, Notaries in carrying out their office act impartially, which is known as the nature of onpartijdigheid – impartiality and independent position (onafhankelijkheid – independency), which is actually a characteristic that only Latin Notaries have. Latin Notary also according to the applicable principle, against his appointment as a Notary, he is then a general official who has the right to make all authentic deeds as long as there is no other law that expressly assigns the task to other people/professions/officials for certain legal acts (Budiono, 2017).

Meanwhile, in countries with an Anglo Saxon legal system that also recognizes Notaries but with a different title, namely Notary Public. Notary Public in England is held by solicitor and barrister, between which there is no limit on the position that approaches the work of Notary. In the UK, the Solicitor himself acts on behalf of clients in court in the first instance, he is also an expert in the fields of inheritance, liability and transfer. Barrister is a legal expert who performs work in higher agencies at the invitation of solicitors. Notary public (provincial) main task is to state the correctness of the signature in the case of money orders (Budiono, 2017). While in the United States, the position of Notary public is held by lawyers (counselor at law and attorney), which to serve as a Notary public does not need to receive certain education and internships. Under Section 130 of the New York

Executive Law, counselors and attorneys will be appointed by the secretary of state for a maximum term of two years who may be reappointed at any time. According to Article 135 of the New York Executive Law, the task of Notary public is essentially to provide and make testimony and information regarding the appointment of oaths or promises in the form of certificates (Budiono, 2017).

International law has actually overshadowed private issues such as inheritance and even specific to the making of testaments (wills) contained in Private International Law (HPI). Indonesia itself regarding civil relations of an international nature is guided by several provisions of articles in HPI, namely Article 16, Article 17, and Article 18 AB. These three articles each sequentially regulate personal status (Article 16 AB), regulate the principle of Lex Rei Sitae or the principle of law applicable to objects (Article 17 AB ) where Matters relating to immovable objects will be subject to the law of the place where they are located, the principle of Lex Domicili, namely rights and obligations upon a natural person shall be governed by the law of the place of which the person resides permanently, and shall govern the principle of Lex Loci Celebrationis, whereby the agreement involving the parties originating from a different province, the law of the place where the agreement is made applies. Against these three articles, it must be obeyed and implemented considering that currently Indonesia does not have its own law regarding HPI, so the three articles adopted directly without being codified into Indonesian positive law (Himmah, 2022).

In this regard, HPI can actually provide legal protection for Indonesian citizens who make testaments abroad. However, when reflecting on the provisions of HPI Indonesia's Choice of Law, the inheritance provision refers to the principle of nationality stipulated in the provisions of Article 16 AB along with existing jurisprudence, which determines that the applicable law in inheritance made abroad is the national law of the heir. In this case, if the Indonesian citizen who inherits even though he does it is outside the State of Indonesia, then what applies is Indonesian national law, including in determining who are the legal heirs of the heir and the legitime portie of each heir (Kusumadara, 2022).

For separate wills, Indonesia currently still uses the principle of locus regit actum which means that to determine the law used in determining the formal legality of the will depending on which State the will is made from. When juxtaposed with existing Indonesian positive law, this is in line with the provisions of Article 945 paragraph (1) of the Civil Code which states that "Indonesian citizens who Being abroad is not allowed to make a will other than by an autectical deed and with due regard to all the formalities that apply in the country where the deed is made ". While Article 1868 of the Civil Code also stipulates that "An authentic deed is a deed made in the form prescribed by law, made by or before the public officer authorized therefor, at the place where the deed was made". So that based on these two provisions, it can be known that if a testament is made by Indonesian citizens

abroad, then the law in that country will be the basis of legality of formil from the testament (Kusumadara, 2022).

Friedrich Carl von Savigny, a famous German jurist expressed his opinion on civil cases, he argued that civil cases should be governed by the laws of the country or region with the closest point of link to the case, even if the law is the law of a foreign country. Savigny then conveyed, the use of the law of a State whose closest point of connection is a form of respect for the various civil law systems in various countries, as well as a form of non-discrimination between national law and foreign law (Savigny, 1869).

This thought then gave birth to the importance of choice of law rules in HPI against the use of foreign law, which aims to provide justice for parties whose civil cases are regulated using State law with the closest link point to it or to the object of the case. Regarding the determination of the use of HPI choice of law rules, which by various countries are usually used to determine which laws have a link point to an international event, it actually has several methods. The method was proposed by Von Savigny and several other scholars even older than Von Savigny, such as Bartolo, from Sassoferrato, Italy, and Paul Vote and Ulrich Huber from the Netherlands (Savigny, 1880).

Savigny put forward his theory about the HPI choice of law rules method, according to him the law of the State that is the place (sitz) or center (schwerpunkt) of a legal event is the one that has the closest link point to the legal event. This of course resulted in the law having to be used to regulate the events in question. As an illustration, in a civil case over an object, it must be decided by the legal provisions where the object is located (sitz), while for civil cases that regulate a person's competence, it will be determined based on the legal provisions of the country where the person is domiciled (sitz), and civil cases related to the contract must be decided based on the legal provisions of the country where the contract must be executed (schwerpunkt) (Basuki, 2020).

Unlike Savigny, Bartolo from Sassoferrato gave another opinion on the method of choice of law or determination of link points which is also different from the application of national laws to objects and to people. According to him, the law against property located in a territory or State will apply to the national law of that State, regardless of the citizenship status of the owner. As a result, it means that objects that are outside the owning State, the national law of the country cannot be applied. As for the person who applies the opposite, national law will apply to the status of the person wherever the person is, including when he is abroad (Hatzimihail & Emmanuel, 2020).

Basically, legal protection regarding the making of testaments by Indonesian citizens abroad has been given in full through international conventions that discuss HPI. In this case it illustrates that legal protection for those who make testaments abroad depends only on HPI in the international scope, international jurisprudence, and the doctrine of international legal experts. So that there is still a legal vacuum in Indonesia's positive law in providing protection for Indonesian citizens who inherit by making testaments abroad.

Based on its urgency, plus the provisions and principles of HPI and the doctrine of jurists Savigny and Bartolo which in essence there is a conflict about HPI's choice of law in applying which law is will be applied if there is inheritance through testament by Indonesian citizens abroad, causing uncertainty for the community, especially Indonesian citizens in determining which legal provisions must be adhered to, because there is no definite legal basis for making such overseas testaments. So on that basis, the author gives ideas in the form of changes to several articles in the Civil Code related to making testaments as lex generalis, and the formation of HPI laws Indonesia as a lex specialis that can regulate the terms and conditions regarding the making of testaments by Indonesian citizens abroad. The provisions in HPI and the opinions of legal experts mentioned above can be used as considerations and rationales for the formation and amendment of related laws.

### 3.2. Legal Effects for Indonesian Citizens Who Inherit Through Testament Abroad

Inheritance through testaments is indeed a common thing done by someone who has a certain amount of wealth in a certain place. There is even a chance that against inheritance inherited by testament, the heir appoints someone or several people to be his heirs (Perangin, 2016). However, inheritance through testaments made by Indonesian citizens abroad tends to experience various obstacles, especially if in the future disputes about its provisions are disputed.

In some cases that have occurred, the making of testaments abroad cannot be directly carried out in Indonesia. Based on the case in the Supreme Court Decision Number: 2562 K / Pdt / 2011, the case between Erlina and Ahmad Yuni Nasution, S.H. against Yulia Yusriani Mualim, against the making of testaments in Singapore, the judge of the Medan District Court argued, based on law positive Indonesia, ruled that the will made in Singapore is invalid and the beneficiary of the will has no right to the testator's assets in the Singapura. From research written by Afifah Kusumadara (2022), the case was even brought by the plaintiff to the cassation stage, but still did not produce a verdict that heeded the lawsuit First Plaintiff. Afifah also explained that in this case there was no reason that the judge had failed to establish the content of Singapore's law on the terms of wills and was forced to use lex fori (positive law), because there was no ratification the use of HPI or foreign law in cases of making testaments abroad.

As another example that illustrates that making testaments abroad causes a lot of problems, as in the decision of the Supreme Court Reg No. 148 / PK / Perd / 1982 in the research of Andreas Prasetyo Senoadji (2007). In short, the subject matter of the judgment is the question of the validity of the testament made by the Heir in Singapore, the Heir (Lugito Surya Kusno/Liong Sew Kow) who was married to Wantimah/Wong Tjoe Moi (deceased earlier) and had three children (Leo Bonady, Sariwati Chandra and Pauliana Lukito) as Plaintiffs. In short, after Wantimah died, the heir was then close to the Defendant (Lelly Iskandar) who already had five children (Defendant). The testator then raised the Defendant to be a child by means of a testamentary deed. Thereafter, the testator then

makes a will in Singapore before the solicitor which essentially explains that the Defendant and the co-defendant are entitled to the heir's property both in Singapore and in Indonesia. This then made the plaintiffs (children from their previous marriage) sue and declare that the testament was invalid, because it was made in front of a solicitor whose position was not the same as an Indonesian Notary, and was not registered at the Balai Harta Warisan of the Ministry of Justice of the Republic of Indonesia.

In his ruling, the judge apparently considered that a Notary Public in SingaTemple in the context of making Testaments could be equated with Notary Officials in Indonesia. But unfortunately there is no relevant legal basis used in determining the ruling. The judge only considers, as long as the testament is made in the presence of an official such as a notary, wherever the testament is made, it will remain valid and valid in Indonesia. Furthermore, the judge also gave consideration through Article 945 of the Civil Code, while the article was not clearly regulated regarding the order and usual way of making testaments. Whether not to register with BDW is included in observing the usual order and manner, that then becomes a question.

The case illustrates that there is still a legal vacuum governing the making of testaments by Indonesian citizens abroad, both from terms, conditions, to procedures that are considered valid. The lack of codification regarding inheritance law in Indonesia is also a problem, which until now is still regulated by the Civil Code which is classified as very ancient and becomes less relevant to the law in Indonesia today. The Convention on HPI has not yet ratified it into the existing hukum system. Some provisions of the convention have indeed begun to be adopted in Indonesia through the court system in civil cases based on international laws, but have not been carried out on the making of testaments abroad . This is certainly illustrated in the judge's decision in the judgment which is only based on his beliefs.

Testaments made by Indonesian citizens abroad are indeed considered valid and can be recognized by Indonesian positive law, as long as the testament is made by not violating the norms of Indonesian positive law. The testament will then apply and be binding for the Indonesian citizen who made it and also for the heirs as contained in the testament. After the testament is made, the parties must carry it out in accordance with Indonesian law. However, if we reflect on some existing cases, there are still uncertainties in the procedures and provisions in making it itself. As a result, many parties are actually entitled to become heirs, but unfortunately cannot defend because Indonesia itself does not have definite guidelines in making testaments abroad.

Making testaments over time undergoes adjustments, especially regarding where and who has the right to make them. According to research conducted by Saroinsong, Sumakul, & Anis (2021), as long as there is a Consulate of the Republic of Indonesia or similar officials authorized to replace the position of Notary in Indonesia, then in whatever country the testament is made is not a problem (Saroinsong, Sumakul, & Anis, 2021), but this opinion actually causes problems, because the

provision has not been recognized in Indonesia's positive law, So that raises many other opinions about it.

The problem that often arises from making testaments by Indonesian citizens in other countries is about the formal and material procedures which are not necessarily the same as the formal and material procedures based on Indonesian positive law. However, it will be even more complicated if it turns out that the formal and material procedures are contrary to the formal and material procedures as regulated through Indonesia's positive law. Moreover, if the Indonesian citizen has a lot of assets abroad, then he still has to make a testament at a Notary or similar official who is authorized in the place where the property is located in accordance with the applicable law there.

The role of Notaries in the testament making stage plays the most important role. The testament registered at PDW is part of the initiation of the Ministry of Law and Human Rights program under the Directorate General of General Legal Administration (Dirjen AHU). The Director General of AHU provides services for notaries both online and offline regarding the testament registration process until the testament is successfully registered and recorded in the PDW system. This procedure is to make it easier if in the future the heirs of the deceased who register the testament want to know whether the deceased concerned during his life has made a testament or not (Dhiyo & Wiryawan, 2021).

As mentioned earlier, in the process of making testaments, it is necessary to fulfill formal and material elements as regulated in the Civil Code. Based on the positive law governing the procedures and requirements for making testaments in Indonesia, testament registration in PDW is a must, which if not done is considered invalid and never existed. Testament registration at PDW is a formal requirement, so that in certain circumstances such as if a testament is made outside Indonesia, if the formal requirements are not met, the material or essential requirements must be met (Dhiyo & Wiryawan, 2021).

Dealing with the formal and material requirements in the series of procedures and provisions for making testaments, which based on the rules in force to date depend on the position and role of the Notary Officer in making them. The next thought is the difference in the role of notaries previously mentioned, that there are differences in the role of notaries in the State with the Anglo Saxon legal system with Latin notaries who is in a country with a contental European legal system. In essence, the different roles and duties of Notaries in each country with different legal systems will affect the strength of the deed they make. As explained earlier, the role of notaries in countries that adopt the Anglo Saxon legal system is not like that of Latin notaries, especially in fulfilling the material elements of making testaments. This certainly results in the validity of the testament made whether it can be recognized and considered legally enforceable or not. In this case, if reflecting on Indonesia's positive law which is contained in the Civil Code, it has not fulfilled its formal and material elements,

making it difficult to apply positive legal protection for Indonesian citizens who make testaments outside Indonesia.

The testament or will should indeed be stated in the form of a deed, this is in line with the provisions contained in article 921 of the Civil Code. Until now, Indonesia still relies on Notary officials in making and certifying an authentic deed. So this then becomes a separate question about what the consequences will be if the testament is made outside Indonesia, where there is not necessarily a Notary or similar official in certifying and registering the testament with the PDW. So in this case, according to the author, a comprehensive procedure and conditions are needed to be regulated through laws and regulations, where later the testament is made and written by himself or written by a notary-like official in the State in which the testator made it, using a power of attorney to the heir concerned who resides in Indonesia for then he has the power to register the testament to a notary in Indonesia so that the formal requirements rather than making the testament by Indonesian citizens abroad can be fulfilled.

Making testaments by Indonesian citizens outside Indonesia is still experiencing pros and cons to its validity. Indonesia's positive law is famous for its flexibility, but regarding this testament is still regulated in the ancient Dutch heritage code. The lack of regulation of testaments and their procedures and requirements in laws and / or similar legal systems makes inheritance with testaments tend to be rigid and inflexible. Also regarding the regulation of testaments by Indonesian citizens abroad itself which should have been regulated and umbrellaed by Private International Law (HPI), but in fact Indonesia has not ratified it into law.

Making testaments by Indonesian citizens abroad actually requires legal certainty which is not only an umbrella but can also be a guideline for parties who want to make testaments abroad. Too many questions arise as a result of unclear regulations and guidelines for the implementation of testament making by Indonesian citizens abroad. Especially regarding the registration of the testament to PDW by an Indonesian Notary, so that it is possible to make a power of attorney to the heirs or related parties to register the testament with an Indonesian Notary.

Moreover, until now Indonesia has not codified the laws derived from international conventions. Civil relations, which are actually private domains, are an important thing that must also be regulated in a regulation at the level of law. This is a form of preventive effort in protecting one's private rights, not only at the national scope but at the international scope. Because, although legal is considered valid and binding for the parties, but when reflecting on the Civil Code Article 945, which in making it must be accompanied by existing jurisprudence (Purwadi, 2014). New problems will then arise, will the law in Indonesia regarding the manufacture of this testament will always depend on existing jurisprudence, while various cases regarding the manufacture of Testaments are increasingly diverse along with the development of times and technology.

Too long the legal umbrella regarding civil cases owned by Indonesia has now become an urgency in itself. People increasingly need a legal umbrella to get certainty about the legal actions they will undergo, so it is not enough if Indonesia until now does not have an umbrella law related to HPI and depends only on existing jurisprudence. The lack of codification of international legal regulations into existing positive law results in a legal vacuum governing the exact procedure for making testaments by Indonesian citizens abroad.

This then gave birth to the author's thought that the provisions concerning formal and material procedures should indeed be regulated and codified into Indonesian laws and regulations, apart from making changes to the Indonesian Civil Code by adjusting the international private law system, especially regarding testaments, as well Law-level arrangements are needed to regulate Indonesian private international law, which regulates the provisions (adoption of the private international law system in the form of other international principles and provisions) as well as the procedure for making and registering testaments through a power of attorney authorized by the Heir to his Heirs. This is of course to provide legal certainty and protection for Indonesian citizens who inherit with testaments abroad, which is based on Private International Law.

## IV. CONCLUSION

Based on the discussion that has been done, the author concludes that Private International Law has actually provided protection to individuals and parties who want to make a testament when they are outside their country. As for specifically, HPI provides protection for testament making by Indonesian citizens abroad in the form of legal regulations contained in Algemeine Bepalingen (AB) precisely in Articles 16 AB, 17 AB, and 18 AB, which from these three articles gave birth to several HPI principles including, the Lex Rei Sitae Principle (Lex Site), Lex Domicili Principle, and Lex Loci Contractus Principle. In addition, based on the HPI Convention, several experts such as Savigny and Bartolo emerged who contributed ideas on making testaments abroad. However, in Indonesia itself it turns out that there is still a legal vacuum regarding this matter, so the author suggests a revision or renewal of the Civil Code, especially in the articles which deals with the manufacture of testaments. In addition, it is also necessary to establish an HPI law as a form of implementation of the principle of lex specialis derogate lex generalis, which functions to regulate in detail the making of testaments in overseas.

As for the absence of positive Indonesian law which specifically becomes a legal umbrella in the process of inheritance through testament by Indonesian citizens abroad, the result is the absence of legal certainty regarding the validity of the testament he made. This also resulted in some parties being disadvantaged and difficult in fighting for their rights over the existence of the testament made abroad, because its validity is still in doubt by several parties. Thus, in addition to the need for revision of several articles in the Civil Code concerning the making of testaments, and the

establishment of the Indonesian HPI law as a lex specialis, it is also necessary adoption of the principle of making a power of attorney by the testator to his heirs in Indonesia to then register the will abroad with a Notary, so that itcan be comply with the provisions of the validity of the will stipulated in the Civil Code, which is regulated in the Indonesian HPI law.

## BIBLIOGRAPHY


### 1. Book

Ali, A. (2008). Menguak Tabir Hukum. Jakarta: Ghalia Indonesia.

Basuki, Z.D., dkk. (2020). Materi Pokok Hukum Perdata Internasional. Modul 1, Jakarta: Universitas Terbuka.

Diantha, I.M.P. (2016). Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum. Jakarta: Kencana.

Erwin, M. (2012). Filsafat Hukum. Jakarta: Raja Grafindo.

Oemarsalim. (1991). Dasar-Dasar Hukum Waris Di Indonesia. Jakarta: Rineka Cipta.

Oemarsalim. (2006). Dasar-Dasar Hukum Waris Di Indonesia. Jakarta: Rineka Cipta.

Perangin, E. (2016). Hukum Waris. Jakarta: PT Raja Grafindo Persada.

Purwadi, A. (2014). Dasar-Dasar Hukum Perdata Internasional. Surabaya: Pusat Pengkajian Hukum dan Pembangunan (PPHP) Fakultas Hukum Universitas Wijaya Kusuma Surabaya.

Rudya, C. (Tanpa Tahun). Kamus Hukum. Yogyakarta: Pustaka Mahardika.

Subekti, R., & Tjitrosudibio, R. (2002). Kitab Undang-Undang Hukum Perdata. Jakarta: Pradnya Paramita.

Sugiyono. (2010). Metode Penelitian Kualitatif dan R&D. Bandung: Alfabeta.

### 2. Journal

Dhiyo, A.A.D.A., & Wiryawan, I.W. (2021). Peran Dan Tanggung Jawab Notaris Dalam Memperoleh Surat Keterangan Wasiat Terkait Permohonan Oleh Ahli Waris. Acta Comitas Jurnal Hukum Kenotariatan, 6(1), Bali: Universitas Udayana.

Djoko, B.Z. (1996). Teori-Teori Umum Hukum Perdata Internasional Yang Dapat Mengesampingkan Berlakunya Hukum Asing Dengan Memberlakukan Hukum Nasional Sang Hakim. Jurnal Hukum dan Pembangunan, 26(3), Jakarta: Universitas Indonesia.

Gautama, S. (1981). Testamen Yang Dibuat Warga Negara Indonesia Di Luar Negeri, Jurnal Hukum & Pembangunan, 562

Hatzimihail, & Emmanuel, N. (2007). Bartolus and the Conflict of Laws. Revue Hellenique de Droit International, 60(1), 33–34.

Himmah, D.R. (2022). Konvensi Putusan Pengadilan Asing Den Haag 2019: Perspektif Hukum Perdata Internasional Indonesia. Jurnal Mimbar Hukum, 34(2), 624.

Indradewi, A.A. (2022), Akibat Hukum Terhadap Ahli Waris Berkewarganegaraan Asing Atas Pembuatan Wasiat Oleh Pewaris Warga Negara Indonesia Di Luar Negeri. Jurnal Privat Law, 10(1), 26.

Indradewi, A.A. (2022). Akibat Hukum Terhadap Ahli Waris Berkewarganegaraan Asing Atas Pembuatan Wasiat Oleh Pewaris Warga Negara Indonesia Di Luar Negeri. Jurnal Privat Law, 10 (1), 28.

Kusumadara, A. (2022), Pemakaian Hukum Asing Dalam Hukum Perdata Internasional: Kewajiban Dan Pelaksanaannya Di Pengadilan Indonesia. Jurnal Arena Hukum, 15(3), 449.

Putri, A.Z., (2016). Pembatalan Akta Hibah Wasiat Sebagai Akta Otentik Dalam Proses Pemeriksaan Perkara Perdata (Studi Kasus Pengadilan Negeri Jakarta Selatan Nomor : 53/Pdt.G/2012/PN.Jkt.Sel.). Jurnal Verstek, 4(3), 213.

Salamba, P. (2017). Tinjauan Hukum Mengenai Pembagian Harta Warisan Menurut KUHPerdata. Lex Administratum, 5(6). Sulawesi: Universitas Sam Ratulangi.

Saroinsong, R.J., Sumakul, T.F., dan Harold, A. Kekuatan Hukum Pembuatan Testamen (Wasiat) Di Luar Negeri Menurut Kitab Undang-Undang Hukum Perdata. Jurnal Lex Privatum, 9(2), 180-181.

Saroinsong,. Rivaldo, J., Tommy, F., Sumakul,. & Anis, H. (2021). Kekuatan Hukum Pembuatan Testament (Wasiat) Di Luar Negeri Menurut Kitab Undang-Undang Hukum Perdata. Lex Privatum, 9(2), Sulawesi: Universitas Sam Ratulangi.

Savigny, F.C.V. (1880). Private International law, and the Retrospective Operation of Statutes; a Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time. Translated, With Notes, by William Guthrie, 2nd ed., revised, (Edinburgh: T. & T. Clark, 1880), The University of Toronto Law Journal, 64(1), 432–516.

Savigny, F.C.V. Private International Law. (2014). A Treatise on The Conflicts of Laws, and the Limits of Their Operation in Respect to Place and Time. Translated, With Notes, by William Guthrie, (Edinburgh: T. & T. Clark, 1869), pp. 25 – 33; Sagi Peari, "Savigny's Theory of Choice-Of-Law as A Principle of 'Voluntary Submission'", The University of Toronto Law Journal, 64(1), 117.