

# The Relevancy of Privileged Wills of Members of Armed Forces: Enhancing the Role of the Armed Forces Council

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**Abstract:** This paper aims to highlight the relevancy of privileged wills and the power of the Armed Forces Council to come up with the relevant policy to enable members of the regular forces of Malaysia to execute privileged wills in Malaysia. Recognising the dangerous global nature of duty faced by members of the armed forces, many countries have granted them the exclusive right of making privileged wills including making a written will with no witnesses or oral will whose contents could be proved by only one witness. The law provides that the members of the armed forces are free to make a will informally on a temporary basis while on actual military service or while being at sea. For this purpose, this paper adopts a qualitative research methodology as it provides a deeper understanding relating to privileged wills in Malaysia. This paper concludes that the law relating to privileged wills is still relevant and important as a way forward in the 21st century. Their position of preparedness in duties for the preservation of life and property makes it necessary for them to be privileged personnel. The Armed Forces Council should exercise its power under the Federal Constitution.

## 1 INTRODUCTION

The statute governing privileged wills in the States of Peninsular Malaysia is the Wills Act 1959. The relevant section applicable for privileged wills is section 26 of the Wills Act 1959.

Section 26. "Privileged wills of soldiers, airmen and sailors.

(1) "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."

Sabah has a different provision of law for making privileged wills. Privileged wills in Sabah is governed by section 137 of the Sabah Wills Ordinance. Section 137 provides:

"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, if he has completed the age of twenty-one years, dispose of his property by a will made in the manner provided in the

following section. Such wills are called privileged wills."

The Armed Forces of Malaysia may be engaged in operations that include war, invasion, riot, insurrection and civil disaster whether actual or apprehended. The members of the Malaysian army, the Royal Malaysian Navy and the Royal Malaysian air force who are in action against armed mutineers, armed rebels, armed rioters and pirates are placed in dangerous situations. They are subject to service law and must obey the lawful command of the superior officer in a prompt and immediate compliance failing which they will be charged for disobedience to standing orders. Due this situation, the Wills Act 1959 provides that soldiers and airmen in actual military service and members of the naval forces while being at sea may execute a will without complying with formalities.

The concept of actual military service has been adopted by Courts in determining whether a will is made in actual military service and whether the will may be admitted to probate. In actual military service and active service" means "in expedition" and involved mobilization. Pilcher J. in the case of *In the Estate of Rippon* [1943] P. 61; [1943] 1 All E. R. 676

decided on the issue as to whether a soldier is “in actual military service” to enable him to make a privileged will under section 11 of the English Wills Act, 1837. The court held that it depends on the facts of the case. As defenders of the government, who defend by sea, they have a right to enjoy the special privilege to make a will (Schouler, 1915). The explanation regarding the exception in favour of soldiers’ will can be seen in many cases (see *In re Limond*; *Limond v. Cunliffe* [1914-15] All ER Rep 214; *In the Estate of Stanley* [1916] P 192; *In the Estate of Robert Myles Heywood* [1916] P 47; *In the Estate of John Wardrop, Deceased* [1917] P 54; *In re Stable Dalrymple v. Campbell* [1918-19] All ER Rep 299 and *In the Estate of Grey* [1922] P 140). The privilege of making a valid soldier’s will is not dependent upon the military position or education of testator (see *May v. May (Note)* [1902] P 103).

Wills executed by privileged personnel are privileged wills and is to be considered by the High Court in the application for probate by the O. 71 r. 15 of the Rules of Court 2012 which reads:

“Wills of persons on military service and seamen.

If it appears to the Registrar that there is *prima facie* evidence that a will is one to which section 26 of the Wills Act 1959 applies the will may be admitted to proof if the Registrar is satisfied that it was signed by the testator or, if unsigned, that it is in the testator’s handwriting.”

However, even though the provision of law about privileged wills is clearly mentioned in the Wills Act 1959 and Sabah Wills Ordinance, there is no specific reference relating to privileged wills in the Armed Forces Act 1972 leading to difficulties for the Armed Forces Council to issue orders and policies relating to privileged wills. Hence, this paper aims to highlight the relevance of privileged wills to a special group of personnel that is; soldiers, airmen and members of the naval forces of Malaysia.

## 2 MATERIALS & METHODOLOGY

For the purpose of the research, this paper employs a qualitative method of research and uses the doctrinal case study approach. The doctrinal analysis includes an analysis of reported cases, journal articles and statutes. In addition, in order to obtain information and opinions, questionnaires were distributed to members of the armed forces of Malaysia. Thus, this paper consists of statistics in the form of tables and charts for easy understanding.

## 3 RESULTS & DISCUSSION

### 3.1 Privileged Personnel and the Law in Peninsular Malaysia, Sabah and Sarawak

The statute governing privileged wills in West Malaysia is the Wills Act 1959, and the relevant section applicable for privileged wills is section 26 of the Wills Act 1959. Section 26 of the Wills Act 1959 provides that 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 the guardianship, custody and tuition of a child or may exercise a power of appointment exercisable by will by a privileged will. As such, soldiers, airmen, mariners or seamen (including members of the naval forces of Malaysia) are privileged personnel. Section 26 of the Wills Act 1959 led to the exception in favour of soldiers’, airmen’ and members of the naval forces’ wills. They may execute will without complying with formalities. Subsection 26 (3) of the Wills Act 1959 provides that a privileged will means any declaration or disposition, oral or in writing, made by or at the directions of the testator. The High Court in the application for probate will require the original copy of a will executed by the testator who is either a soldier or airman in actual military service or a member of the naval forces while being at sea.

Section 137 of the Sabah Wills Ordinance allows a soldier, an airman and any mariner being at sea to make a privileged will in Sabah. However, for soldiers, their entitlement to make a privileged will is subjected to if they are in an expedition or engaged in actual war. As for airmen, their right to make a privileged will is subjected to, if they are so employed or engaged. The provision provides that mariners are entitled to make privileged wills if they are being at sea.

There is no such Enactment or Ordinance for Sarawak, providing for privileged wills. As such, the courts shall apply English common law and rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949. It is under section 3(1) of the Civil Law Act 1956. However, the said common law, rules of equity and statutes of general application should be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit, and subject to such qualifications as local circumstances render necessary.

### 3.2 The Relevancy of Privileged Wills in Malaysia

From 5th February 2017 until 30th June 2017, the researchers distributed questionnaires to 176 members of the armed forces of Malaysia. They were asked about the importance of making a will “in actual military service” and while “being at sea”. They were also asked on the point of whether the law on privileged wills should be preserved to enable them to make a will “during actual military service” and while “being at sea”. For the purpose of this study, among 176 of them, 41 of the respondents are soldiers, 70 of them are airmen, and 65 of them are members of the naval forces of Malaysia.

Table 1 and Figure 1 below represent the views of soldiers, airmen and members of the naval forces (the respondents) regarding whether the making of a will is important for them when they are “in actual military service” or “being at sea”.

Table 1: Views of soldiers, airmen and members of the naval forces on making a will.

Response	Result	Percentage
Strongly agree	67	38
Agree	100	57
Disagree	2	1
Strongly disagree	4	2
Not sure	3	2
Total	176	100

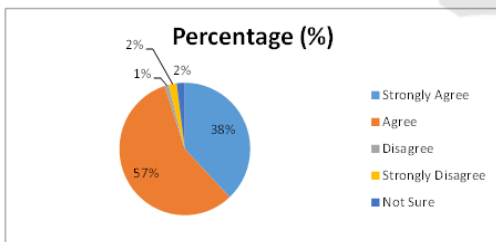


Figure 1: Views of soldiers, airmen and members of the naval forces on making a will.

Table 2 and Figure 2 below represent the views of the respondents regarding the law on privileged wills should be preserved to enable them to make a will “during actual military service” and while “being at sea”.

Table 2: Views of soldiers, airmen and members of the naval forces on privileged wills.

Response	Result	Percentage
Strongly agree	67	38
Agree	103	58
Disagree	1	1
Strongly disagree	4	2
Not sure	1	1
Total	176	100

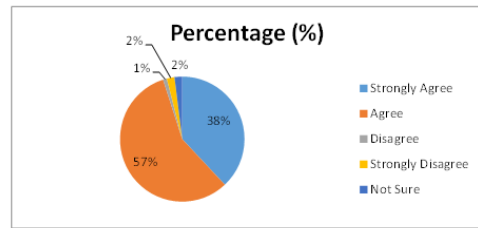


Figure 2: Views of soldiers, airmen and members of the naval forces on privileged wills.

There is an indicator that making a will is important for soldiers, airmen and members of the naval forces of Malaysia when they are “in actual military service” or “being at sea”. Also, there is an indicator that the members of the armed forces of Malaysia agreed that the law on privileged wills should be preserved. It is identified, supported and verified from the views of members of the armed forces of Malaysia.

### 3.3 Legal Analysis on the Relevancy of Privileged Wills in Malaysia

It has been observed that due to the dangerous global nature of duty faced by members of the armed forces, many countries have granted them the special right of making privileged wills including making a written will with no witnesses or oral will whose contents could be proved by only one witness. Privileged wills are relevant and important as soldiers, airmen and sailors (including members of the naval forces of Malaysia) may dispose of their properties during difficulties in obtaining advice and assistance to make a formal will (Faridah Hussain et al., 2016). A few authors mention that privilege is granted by almost all governments to military service personnel who are ready to serve the country at the first sign of conflict that often arises without prior warning (Beyer et al., 2003).

In the Malaysian context, though not in a state of war, it has been its practice to contribute soldiers to

peacekeeping forces under the auspices of the United Nations. Hence, the validity of a will made by members of the armed forces in actual military service or while being at sea is essential. In the application for probate, the High Court will determine whether the will may be admitted to probate. In such cases, evidence from the military department will be essential to support the application for probate in privileged will's cases.

Section 2 of the Armed Forces Act 1972 (Act 77) provides that "Armed Forces Council" means the council established under Article 137 of the Federal Constitution. Nevertheless, the provision of law about privileged wills is not provided in the Armed Forces Act 1972. This situation has caused difficulties to the Armed Forces Council to issue orders or policies relating to the execution of privileged wills. As such, it is practical and necessary that the Armed Forces Act 1972 should enumerate privileged wills as a matter on which the Council can make orders. This is in line with Article 137 of the Federal Constitution which gives responsibility to the Council for the command, discipline, administration of and all other matters relating to the armed forces.

The proposed amendment to the Armed Forces Act 1972 will allow the Council to come up with the relevant policy and guideline relating to privileged wills. It follows that legal offices from the war department may advise the members of the armed forces, in actual military service or being at sea, on their privileged rights.

#### 4 CONCLUSIONS

The law allows the members of the armed forces to execute a will informally on a temporary basis while on actual military service or while being at sea. Their position of preparedness in duties for the preservation of life and property makes it necessary for them to be privileged personnel. As such, relaxing the rules of will-making in favour of these privileged personnel is allowed if these personnel comply with the conditions provided by section 26 of the Wills Act 1959 and section 137 of the Sabah Wills Ordinance.

With the proposed amendment to the Armed Forces Act 1972, it would allow the Armed Forces Council to draft policies and orders relating to privileged wills for members of armed forces. As these members are serving their countries or the United Nations, their welfare, as well as that of their families, should be taken care of. If the will is made informal, the evidence from the war office or the relevant war department may be necessary. The

Armed Forces Council is to assist and should come out with the policy on this issue. This should be the attitude going into the era of the 21st century.

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