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Approval and RegiWstration of Marriage Agreements Created During Marriage in Practice (Constitutional Court Decision No. 69/PUU-XIII/2015)

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Abstract

This journal examines the provisions for making and recording marriage agreements found in Indonesia's three legal instruments, namely Law Number 1 of 1974 concerning Marriage (Marriage Law), which was followed by Constitutional Court Decision Number 69/PUU-XIII /2015 and Civil Registration Number 472.2/5876 regarding Marriage Agreement Reporting. The Constitutional Court's reading of Article 29(1) of the Marriage Law enables a variety of interpretations regarding the ratification and recording of marriage agreements. By doing a literature review and using legal resources that can aid in obtaining the results of the discussion in answering the problem formulation, the research method used will lead to a juridical-normative type of research. The ratification of the marriage agreement during the marriage is investigated, as well as whether the Notary's confirmation is sufficiently binding.

Keywords
authorization; civil registry; marriage agreement; notary, registration

I. Introduction

Humans are social creatures who need interaction between other social beings to survive. Every human being is created to live in pairs and is given the right to a happy and everlasting marriage. This is confirmed in Article 1 of Law Number 1 of 1974 concerning Marriage (hereinafter referred to as UUUP). This UUUP is an effort to unite the diverse legal systems and part of the legal system that regulates family matters in Indonesia. Family life is bound by the existence of relationships between family members (Djamarah in Hendra,Y. et al. 2019). Since the enactment of this UUUP the provisions stipulated in the BW, the Indonesian Christian Marriage Ordinance (Huwelijk Ordonnantie Christen Indonesia 1933 No. 74, Mixed Marriage Regulations (Regeling op gemeng de Huwelijken S.1898 No. 158), and other regulations governing marriage so far have been regulated in UUUP is declared no longer valid.In 2019, UUUP is amended and regulated in Law no. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage (hereinafter referred to as the Amendment to the UUP).

Marriage is considered legally valid if it has complied with Article 2 of the UUP. Based on Article 2 paragraph (2) of the UUP, every marriage that has been carried out according to their respective religions must register the marriage. For couples who are Muslim, their marriage is registered with the Office of Religious Affairs (hereinafter referred to as KUA) while for non-Muslims, their marriage is registered with the Department of Population and Civil Registration (hereinafter referred to as Dispendukcapil). One of the legal consequences that will be discussed in this paper is related to property and property as regulated in Article 35 of the UUUP. In an effort to prevent future conflicts, especially in the matter of property, a husband and wife are

allowed to make a Marriage Agreement as stated in Article 29 of the UUUP, but the article does not explain the definition of the Marriage Agreement. According to the UUP, a marriage agreement can only be made at or before the marriage takes place with the approval of both parties submitted in a written agreement ratified by the marriage registrar. However, with the Supreme Court Decision No. 69/PUU-XIII/2015 (hereinafter referred to as the Constitutional Court Decision No. 69) expands the provisions in Article 29 of the UUUP and stipulates that a Marriage Agreement can be made before or during the marriage bond. The Marriage Agreement made during this marriage bond is called the "Postnuptial Agreement". Constitutional Court Decision No. 69 was ratified since the petition from Ike Farida to receive constitutional rights as an Indonesian citizen (hereinafter referred to as WNI) after he married a foreign citizen (hereinafter referred to as WNA). Ike Farida with a foreigner married without a prenuptial agreement which resulted in all assets becoming joint property, including land rights owned before marriage. The beginning of this case was in 2012, Ike Farida bought an apartment but after paying in full the apartment was not handed over by the developer. Then the Sale and Purchase Agreement was finally canceled unilaterally by the developer on the grounds that Ike Farida's husband was a foreigner and did not have a previous marriage agreement. Law No. 5 of 1960 concerning the Basic Agrarian Law (hereinafter referred to as UUPA) stipulates that only Indonesian citizens can have property rights, cultivation rights (hereinafter referred to as HGU), and building rights (hereinafter referred to as HGB). Foreigners can only have usufructuary rights and rental rights. The response from the Constitutional Court to Ike Farida's petition still maintains the concept of joint property in marriage which includes property rights and HGB obtained during the marriage. Finally the Constitutional Court Decision No. This 69 provides a way out for couples who have not previously made a marriage agreement regarding the separation of assets. So that Article 29 paragraph (1) is changed to, "At the time, before it takes place or during the marriage bond, both parties with mutual consent can submit a written agreement which is legalized by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved. In this change, the marriage registrar or notary can ratify the Marriage Agreement. After the Constitutional Court Decision No. 69, the Government issued instructions regarding the implementation of the registration of the Marriage Agreement through the Circular Letter of the Directorate General of Population and Civil Registration dated May 19, 2017 No. 472.2/5876/DUKCAPIL (hereinafter referred to as SE Dukcapil) regarding the Recording of Marriage Agreement Reporting. In this Dukcapil SE it states that the Marriage Agreement must be made in the form of a Minutes of Deed and subsequently reported to the Implementing Agency or Technical Implementation Unit (hereinafter referred to as UPT) of the Dispendukcapil. SE Dukcapil and Constitutional Court Decision No. 69 has contradictory content. On the one hand, the Constitutional Court Decision No. 69 states that "…a written agreement ratified by a marriage registrar or notary…", in this case means the Marriage Agreement of the Constitutional Court Decision No. 69, which has been ratified by a Notary in the form of a written agreement is quite binding. However, on the other hand, according to SE Dukcapil, the Marriage Agreement made in the form of a Minutes of Notary Deed still has to be reported again to the Dispendukcapil in order to be binding. From this it can be seen that between the Constitutional Court Decision No. 69 and SE Dukcapil still show differences. Based on the description above, it can be seen that there is a need for clarity in the issue of ratification and registration of the marriage agreement. Therefore, this study will discuss the ratification and registration of MARRIAGE AGREEMENTS MADE DURING MARRIAGE IN PRACTICE.

Formulation of the problem based on the description of the background above, the formulation of the problem to be studied in this study are:

a. What is the impact of the Marriage Agreement made during the marriage?
b. Is a registration and ratification of a marriage agreement by a Notary equivalent to being ratified by the Department of Population and Civil Registration so that the agreement can be binding?

II. Research Method

In conducting this research, the author will lead to the type of juridical-normative research, by conducting a literature study and using legal materials that can assist in obtaining the results of the discussion in answering the problem formulation. The problem approach in this paper uses the statute approach method, namely the approach to a problem by first identifying the provisions of the legislation related to the subject matter studied and the conceptual approach method used to support the statute approach approach in the conceptual approach method is carried out by reviewing the literature as well as the opinions of scholars as an analysis to provide enlightenment on the legal issues to be discussed.

III. Results and Discussion

3.1 Marriage Agreement

Over time, a marriage will legally result in the mixing and pooling of assets unless an agreement is made for the separation of assets by the couple. This is regulated in Article 29 UUUP. This property separation agreement is then set forth in a written agreement made before the authorized official. Meanwhile, according to the applicable law, based on Article 35, it is regulated regarding property in marriage.

According to Soetojo Prawirohamidjojo, a marriage agreement is an agreement made by a prospective husband and wife before or at the time the marriage takes place to regulate the consequences of marriage on their assets. In addition, Subekti stated that a marriage agreement is an agreement regarding the property of husband and wife during their marriage that deviates from the principle or pattern established by law. Wirjono Prodjodikoro also added that a marriage agreement is defined as a legal relationship regarding assets between two parties, in which one party promises or is deemed to have promised to do something, while the other party has the right to demand the implementation of the agreement. As regulated in Article 29 paragraph (1) of the UUP, it is stated that the marriage agreement is made at the time, or before marriage, so if the marriage agreement is not made before the marriage, then all the assets of the two parties, namely husband and wife, become one unit of property. The statement was valid before the Constitutional Court Decision No. 69 dated 27 October 2016. After the enactment of the Constitutional Court Decision No. 69 dated 27 October 2016 then the marriage agreement is not interpreted only as an agreement made at the time of, or before the marriage, but can also be made after the marriage takes place. So that the provisions of Article 29 paragraph (1) of the UUP in conjunction with the Constitutional Court's Decision No. 69 amended, the provisions of which are as follows: "At the time, before it takes place or during the marriage bond, both parties with mutual consent can enter into a written agreement which is legalized by the marriage registrar or notary.

In the UUP there are no conditions in a certain form for the validity of a marriage agreement, as the specified condition is that the making of the marriage agreement must be in writing so that the marriage agreement can be made in the form under the hand or in the form of a notarial deed. If the marriage agreement is made with an underhand deed, it is very weak in terms of proof before the Court when compared to a marriage agreement in the form of a notarial deed as perfect evidence. If the marriage agreement is made under the hand, then the parties can ratify the marriage registrar or before a notary and be ratified or recorded by the marriage registrar.

Based on article 149 BW, the marriage agreement is valid as long as the marriage lasts and cannot be changed. So, during the marriage, only one kind of marriage agreement applies, except in the event of separation of assets or separation of table and bed (scheiding van tafel en bed). As long as the marriage has not been carried out, the parties can still change the contents of the marriage agreement. However, these changes must still be made before a notary based on article 148 paragraph 1 BW. The contents of the Marriage Agreement depend on the agreement of the parties. Article 139 BW stipulates that in a marriage agreement, both prospective husband and wife can deviate from the rules that have been stipulated in assets, provided that the deviation must not conflict with decency and public order.

a. The agreement made does not conflict with the principle of public order and article 1335 BW which stipulates that the agreement made for false and prohibited causes has no legal force. This is the same as the prohibition to marry more than one wife or the prohibition to ask for a divorce. Although these two things are not explicitly regulated in the BW, they are not allowed to be included in the marriage agreement.
b. No promises are made that deviate from:
    1. Rights that arise from the husband's power as head of marriage Article 140 paragraph (1), for example the husband's right to determine the place of residence or to manage joint assets (Article 124 BW)
    2. Rights that arise from parental authority, for example the right to manage children's assets and make decisions regarding education or child care (the content of parental powers is determined in Article 298 and so on);
    3. The rights determined by law for the longest-living bride, for example, are guardians and are authorized to appoint a guardian with a testament.
c. No agreement was made containing the relinquishment of the rights to the inheritance of the people who inherited it, because this has been regulated in Article 1063 BW concerning the prohibition on relinquishing inheritance rights from people who are still living. In addition, there are other provisions, namely Article 1334 paragraph (2) BW which prohibits the release of inheritance that has not been disclosed, even with the agreement of the person concerned.
d. There is no agreement that one of the parties will bear a debt that is greater than its share in the assets.
e. Prospective husband and wife are not allowed to make an agreement in general words that the law of their marital property will be regulated by the laws of a foreign country, or by customary laws, books of law or local regulations that apply in Indonesia. This provision is made for legal certainty. So what is allowed is if the contents of the foreign country law or customary law are formulated in as much detail as possible or as clearly as possible.

3.2 Important interpretation in the Constitutional Court Decision Number 69 of 2015

The important thing in the Constitutional Court Decision Number 69 of 2015 which is in the spotlight is regarding the changes made to Article 29 of the Marriage Law.

Article 29 paragraph (1) A marriage agreement is made at the time or before the marriage takes place, both parties with mutual consent can enter into a written agreement ratified by the marriage registrar, after which the contents also apply to third parties as long as the third party is involved.

Then changes were made by the Constitutional Court with regard to the implementation of the making of a marriage agreement, namely the marriage agreement was made at the time, before it took place or during the marriage bond, both parties with mutual consent can submit a written agreement which is legalized by the marriage registrar or notary, after which the contents also apply. against third parties as long as the third party is involved.

Then Article 29 paragraph (4) in the Marriage Law states that as long as the marriage lasts, the agreement cannot be changed unless from both parties there is an agreement to change and the change does not harm a third party.

The Constitutional Court interprets that as long as the marriage takes place, the marriage agreement can be regarding marital property or other agreements, it cannot be changed or revoked, unless from both parties there is an agreement to change or revoke and the change or revocation does not harm a third party. There are 3 important points that are studied in this paper, namely the marriage agreement that can be implemented during the marriage, the addition of the phrase "or notary" and the marriage agreement can be changed or revoked according to the agreement of the parties as long as it does not harm third parties.

3.3 What is the impact of the Marriage Agreement made during the marriage? Can it be changed during the Marriage Agreement?

The marriage agreement that is held during the marriage is considered valid and binding on the husband and wife. If it is related to the interpretation by the Constitutional Court regarding the validity period of a marriage agreement starting from when. This relates to the application of the retroactive principle in the marriage agreement.

When the marriage agreement takes effect in Article 29 paragraph (3) of the Marriage Law there is the phrase "...comes into effect since the marriage is held, unless specified in the marriage agreement" then for a marriage agreement made before or at the time of the marriage, the marriage agreement comes into force as of marriage and for a marriage agreement made while in the marriage bond, the parties (husband and wife) may determine the time when the marriage agreement comes into force and if this is not determined, then by law the marriage agreement will take effect from the time the marriage takes place. Thus, the date of making the marriage agreement with the date of marriage is different so that the validity of the marriage agreement can be retroactive. Even though the agreement made by the parties is legally valid as a law (pacta sunt servanda). The law should not be applied retroactively (non-retroactive). This retroactive marriage agreement is a deviation from the non-retroactive principle. The time when the agreement takes effect is when the agreement is made.

In making a marriage agreement while in the marriage bond, the marriage agreement can be determined to be effective from the time the marriage is legalized or the husband and wife agree to choose a date between the date of marriage and the date of making the marriage agreement. Thus, the date of making the marriage agreement with the date of marriage is different so that the marriage agreement is retroactive.

Article 1338 of the Civil Code which states that all agreements made are legally binding as law for those who make them (pacta sunt servanda). The law should not be applied retroactively (non-retroactive). This is a deviation from the principle of non-retroactivity. The time when the agreement takes effect is when the agreement is made. Marriage agreements made while in the marriage bond can cause problems in the future.

The legal impact of a marriage agreement is not only binding between husband and wife, a marriage agreement can also bind third parties. There are conditions that must be met so that the marriage agreement can be declared valid against a third party, namely the marriage agreement is made before a notary and registered with the Population and Civil Registry Office. This is done to uphold the principle of publicity. With the new provisions after the decision of the Constitutional Court Number 69/PUU-XIII/2015 concerning marriage agreements, namely the entry into force of a marriage agreement made while in a marriage bond, three options can apply, namely, first, a marriage agreement can be valid from the date the marriage is legalized. Second, the marriage agreement can take effect from the date the marriage agreement is made and third, The marriage agreement can be valid between the date the marriage is legalized and the date the marriage agreement is made. Problems that can arise if the marriage agreement is present after an agreement with a third party.

So, the assets obtained before the marriage agreement is made will become joint property. Marriage agreements made during marriage are regulated in the Constitutional Court Decision which states that "...a written agreement ratified by a marriage registrar or notary ...", in this case the marriage agreement can be ratified by a marriage registrar or notary in the form of a notarial deed.

Then regarding the making of a marriage agreement made during the marriage it is not clear how many times the agreement can be made. Thus, this can trigger the occurrence of multiple interpretations in society. In the Marriage Law and in the Constitutional Court Decision 69 of 2015, it does not regulate the number of times the Marriage Agreement is allowed to be made. In terms of the number of making this is a legal vacuum that must be regulated immediately because with this decision it can be misused by parties who do not have good faith.

3.4 Is a registration and ratification of a marriage agreement by a Notary equivalent to being ratified by the Department of Population and Civil Registration so that the agreement can be binding?

As regulated in Article 29 paragraph 1 of the Marriage Law which was amended in the Constitutional Court Decision No. 69 of 2015 states that, "...a written agreement ratified by a marriage registrar or notary ...". Based on the contents of the amendment, Article 29 paragraph (1) provides an interpretation where the ratification of a marriage agreement can be carried out other than by a marriage registrar or in this case by a civil servant dispenduk or it can also be carried out by a notary. Therefore, the Constitutional Court assigns additional duties to notaries, namely to ratify and bind marriage agreements. The problem that occurs here is regarding the binding power to third parties in a marriage agreement ratified by a notary.

In Article 12 letter h PP 9/1975 stipulates that the marriage agreement must be recorded in the marriage certificate and according to Article 2 PP 9/1975, the Notary does not have the authority to record the marriage agreement into the marriage certificate, because the authority over recording the marriage agreement into the marriage certificate. Marriage certificates are the authority of the Office of Religious Affairs (KUA) for those

who carry out their marriages according to Islam and the Civil Registration Office for those who carry out marriages other than Islam.

The marriage agreement cannot bind third parties, because it is not legally valid (has not been registered and ratified by KUA / Capil). Things related to the binding of third parties can occur in business life such as buying and selling houses. If the marriage agreement is not clear, the developer and the notary who made the AJB will not enter into a sale and purchase agreement, because one of the important things in AJB is the marriage agreement.

The marriage agreement submitted by both parties (husband and wife) made in a notarial deed is not directly legally binding on third parties because it requires action related to the principle of publication. The principle of publication is the obligation to disclose information so that the public (general public) can find out the information. However, the principle of publication is contrary to the principle of confidentiality used by a Notary in carrying out his duties and authorities as regulated in Article 16 paragraph (1) letter f of Law 2/2014 which states that a Notary is obliged to "confidentially everything regarding the deed he made and all information obtained in order to making a deed in accordance with the oath/promise of office, unless the law stipulates otherwise" and Article 54 paragraph (1) of Law 2/2014 states "Notaries can only provide, show or notify the contents of the deed, grosse deed, copy of the deed or excerpt of the deed to people who have a direct interest in the deed, heirs or people who have rights, unless otherwise stipulated by laws and regulations. Based on these provisions, if in the ratification of the marriage agreement, the Notary then registers it in the repertoire as well as the recording of other Notary deeds, so that it cannot be said to be a publication principle in which the agreement is binding on third parties, because the repertoire cannot be accessed by the general public and can only be accessed by the general public. can be accessed by parties with direct interest in the deed, heirs or people who have rights.

In connection with the above, the clause contained in the Supreme Court Decision Number 69 of 2015 which states that, "... a written agreement ratified by a marriage registrar or notary ..." cannot be implemented. The word "or" in the clause gives an alternative meaning that the agreement can be ratified by one of the parties, namely the marriage registrar or notary. So in reality, a Notary is only authorized to make a marriage agreement, but then related to the ratification of a marriage agreement, the authority lies with the Office of Religious Affairs for those who carry out their marriages according to Islam and the Civil Registry Office for those who carry out marriages other than Islam. If the marriage agreement is declared invalid by the Office of Religious Affairs or the Office of Civil Registration,

Then after the decision of the Constitutional Court Number 69/PUU- XIII/2015 regarding the marriage agreement Article 29 Paragraph (1) of the Marriage Law there is also the addition of the phrase "...a written agreement ratified by a marriage registrar or notary". The phrase "ratified by a marriage registrar or notary" contains ambiguity in the ratification of the marriage agreement, who is authorized to ratify the marriage agreement. Thus, Article 29 Paragraph (1) of the Marriage Law can be called a vague norm. In its current application, a Notary is authorized to make a marriage agreement. Agreements cannot be made under the hands. Article 29 Paragraph (1) does not state that a marriage agreement must be made at a Notary. The article only states "a written agreement and ratified by a notary", Meanwhile, based on the circular letter of the Directorate General of Population and Civil Registration May 19, 2017 addressed to the Population and Civil Registration Offices of districts/cities throughout Indonesia with letter number 472.2/5876/DUKCAPIL regarding the procedure for recording marriage agreement

reporting, it is clearly regulated that marriage registrar employees (Department of Population and Civil Registration) and Civil Registry) is in charge of recording reports of the existence of a marriage agreement. Recording of reporting includes when there is a new agreement made, if there is a change, and if there is a revocation of the marriage agreement. Implementation of recording of marriage agreement reporting by giving marginal notes on the register of marriage certificates and certificates of marriage. The circular letter also attaches the requirements that must be met in the process of recording the reporting of the marriage agreement. according to the author, The marriage agreement should only be legalized at the Population and Civil Registry Office, the Notary only makes a marriage agreement. Based on the decision of the Constitutional Court Number 69/PUU-XIII/2015 concerning marriage agreements, marriage agreements made at a Notary are allowed not to be registered with the Population and Civil Registry Office. As a result of the marriage agreement not being recorded in the Population and Civil Registry Office, the marriage agreement only binds husband and wife, cannot bind third parties. This has the potential to cause legal disputes in the future. As a result of the marriage agreement not being recorded in the Population and Civil Registry Office, the marriage agreement only binds husband and wife, cannot bind third parties. This has the potential to cause legal disputes in the future. As a result of the marriage agreement not being recorded in the Population and Civil Registry Office, the marriage agreement only binds husband and wife, cannot bind third parties. This has the potential to cause legal disputes in the future.

Regarding the place of recording and reporting of marriage agreements after the decision of the Constitutional Court Number 69/PUU-XIII/2015 concerning marriage agreements, marriage agreements can be registered and reported at the Population and Civil Registry Office in any district, no longer having to be in the domicile district of one husband and wife. . With the entry into force of the marriage agreement, it may be registered at the Population and Civil Registry Office anywhere, so this is a legal reform that makes it easier for people to carry out legal actions.

Marriage agreement (postnuptial agreement) after the decision of the Constitutional Court

a. The marriage agreement is made by a notary. After the marriage agreement is made before a notary, the registration of a non-Muslim marriage agreement can be done at the Population and Civil Registry Office in any district, not necessarily at the Population and Civil Registry Office of the domicile of one husband and wife. If the property regulated in the marriage agreement binds a third party, then the marriage agreement must be in the Population and Civil Registry Office. If it is not registered, the marriage agreement only binds husband and wife.
b. The marriage agreement can take effect from:
    1. the date the marriage took place;
    2. The date between the date of marriage and the date of the marriage agreement;
    3. The date when the marriage agreement was made by a Notary.

IV. Conclusion

1. With the decision of the Constitutional Court No. 69, the regulations regarding marriage agreements regulated in the old UUUP that marriage agreements are not limited to at or before marriage but marriage agreements can also be made after the marriage takes place. So that husband and wife do not need to apply to the District Court to get a Court Determination.
2. A registration and ratification of a marriage agreement by a Notary is not equivalent to a marriage agreement legalized by the Department of Population and Civil Registration. Notaries are authorized by law to make a marriage agreement based on Article 29. However, regarding the ratification of the marriage agreement, so that the agreement can be used in Indonesia and has permanent legal force, the authority lies with the Office of Religious Affairs. So that if it does not get ratification, the agreement cannot bind a third party, but only the two parties in the agreement.

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