

CONSTITUTIONAL COURT DECISION INFLUENCE ON THE ROLE OF NOTARIES IN LEGALISATION OF MARRIAGE AGREEMENTS AND THIRD PARTIES

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Abstract

The Constitutional Court Decision Number 69/PUU-XIII/2015 has changed the norms. The agreement is valid from the start of the marriage if the husband or wife do not decide when it takes effect. The notary has additional authority to ratify marriage agreements that conflict with Article 16 (1) UUJN. The research uses qualitative research with normative juridical research, collecting data from laws, books, theses, and journals. The results showed that the third parties who make marriage agreements in the form of a notarial deed, ensuring the contents do not conflict with applicable norms and cannot be changed at will by the husband or wife. The notary is expected to request an inventory list of assets acquired in the marriage bond and make a statement that these assets have never been transacted in any way or form.

Keywords: Legal Protection; Witness Instrumentair; Notarial Deed.

Abstrak

Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 telah mengubah norma. Perjanjian tersebut sah sejak awal perkawinan apabila suami atau istri tidak menentukan kapan mulai berlakunya. Notaris memiliki kewenangan tambahan untuk mengesahkan perjanjian perkawinan yang bertentangan dengan Pasal 16 (1) UUJN. Penelitian ini menggunakan penelitian kualitatif dengan pendekatan yuridis normatif, pengumpulan data dari peraturan perundang-undangan, buku, tesis, dan jurnal. Hasil penelitian menunjukkan bahwa pihak ketiga yang membuat perjanjian perkawinan dalam bentuk akta notaris, memastikan isinya tidak bertentangan dengan norma yang berlaku dan tidak dapat diubah sesuka hati oleh suami atau istri. Notaris diharapkan meminta daftar inventaris harta kekayaan yang diperoleh dalam ikatan perkawinan dan membuat surat pernyataan bahwa harta kekayaan tersebut tidak pernah ditransaksikan dengan cara dan dalam bentuk apapun.

Kata Kunci: Perlindungan Hukum; Instrumen Saksi; Akta Notaris.

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INTRODUCTION

Marriage agreements are regulated in Article 29 of the UUP. Article 29 of the UUP regulates that prospective husband and wife can make a marriage agreement with the conditions, the marriage agreement is made at the time or before the marriage takes place, the marriage agreement is made in written form which is then ratified by the Marriage Registry Officer, the content of the marriage agreement itself is free as long as it does not violate the norms, law, religion and morality. The marriage agreement comes into force from the moment the marriage takes place, the agreement cannot be changed except with the consent of both parties, then based on Article 12 letter h PP Number 1 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage the marriage agreement is contained in the marriage certificate.

After the Constitutional Court passed its decision on the judicial review of the UUP and UUPA with registration number 69/PUU-XIII/2015, there were changes to Article 29 of the UUP. Where in the Constitutional Court Decision Article 29 of the UUP was changed to:

"(1) At the time, before the marriage takes place or during the marriage, both parties, by mutual agreement, can submit a written agreement that is ratified by a marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved;

The agreement cannot be ratified if it violates the boundaries of law, religion and morality; The agreement comes into force from the time the marriage takes place, unless specified in the marriage agreement;

"As long as the marriage is in progress, the marriage agreement may concern marital property or other agreements, cannot be changed or revoked, unless both parties agree to change or revoke it, and the change or revocation does not harm a third party."

The court's legal consideration in this decision is that many husbands and wives do not know the importance of making a marriage agreement before carrying out the marriage, and the constitutional court is of the opinion in its legal considerations that the limitation on making a marriage agreement which can only be made before or at the time the marriage takes place is a limitation on the principle of freedom of contract.

So, after the issuance of the Constitutional Court Decision Number 69/PUU-XIII/2015, marriage agreements can not only be made before or during the marriage but can also be made during the marriage period because in Article 29 Paragraph (1) there is the addition of the phrase "during the marriage bond-". Then in paragraph (1) the phrase "written agreement ratified by a marriage registrar or notary" is also added. So that notaries are also given the authority to ratify marriage agreements, which is contrary to the Law on the Position of Notaries (UUJN) in Article 16 paragraph (1) letter f of Law no. 2 of 2014 concerning Amendments to Law no. 30 of 2004 concerning the Position of a Notary, which essentially states that in carrying out his or her position a Notary is obliged to keep confidential everything

regarding the deed he or she makes and all information obtained in order to make the deed in accordance with the oath/promise of office, unless the law determines otherwise.¹

This addition to notary authority can create legal uncertainty in society, especially among notaries in carrying out their duties and positions. This is because the Notary does not have the authority to record the marriage agreement in the marriage certificate, because the authority to make the marriage certificate is the authority of the marriage registration officer where the marriage is registered.²

Apart from the Constitutional Court's decision, marriage agreements can be made during the marriage period as explained previously, in Article 29 (3) it is regulated that "the agreement comes into force from the time the marriage takes place, unless specified in the marriage agreement" so that for married couples who have just made marriage agreement after marriage and does not regulate the period when their agreement comes into force, then the relevant agreement must by law be seen as coming into force from the time the marriage takes place. So that such an agreement applies retroactively.³

This of course could potentially harm third parties who have an agreement with the husband and wife before the marriage agreement is made if the husband and wife make the marriage agreement in bad faith to avoid their obligations to the third party.

Based on the background above, the problem formulation is as follows: What is the juridical analysis of the role of notaries in ratifying marriage agreements after the Constitutional Court Decision Number 69/PUU-XIII/2015?, What is the juridical analysis of third party protection in marriage agreements made during marriage?

METHOD

The research carried out by the author is qualitative research with a normative juridical or doctrinal approach. Doctrinal research is research that provides a systematic explanation of the rules governing a particular legal category, analyzes the relationship between laws, and also analyzes difficulties and predicts legal development in the future.⁴ Doctrinal research is also often referred to as library research or normative juridical research. Library research is library-based research.⁵ This research was carried out based on legal norms, regulations, books, written works, media letters and others.⁶ In writing normative legal research, there are generally 5 (five) approaches, namely the statutory approach, the conceptual approach, the historical approach, the case approach and the comparative approach.

¹Ekawati and Harahap, Function of Ratifying Marriage Agreements by Notaries After Constitutional Court Decision Number 69/PUU-XIII/2015, 2016, Faculty of Law, Sebelas Maret State University, Surakarta, p. 55

²Prasetyawan, The Role of Notaries Regarding the Ratification of Marriage Agreements After the Decision of the Constitutional Court Number 69/PUU-XIII/2015, 2018, *Justicia Journal of Law*, Faculty of Law, Muhammadiyah University, Surabaya, p. 91

³Yuvens, Critical Analysis of Marriage Agreements in Constitutional Court Decision Number 69/PUU-XIII/2015, 2017, *Constitutional Journal*, Vol. 14, No. 1, p. 81

⁴Marzuki, *Legal Research*, 2011, Kencana Prenada, p. 32

⁵Soekanto and Mamudji, *Normative Legal Research*, 2003, PT. Raja Grafindo Persada, p. 13

⁶Arikunto, *Research Procedures A Practical Approach*, 2000, Rineka, p. 234

RESULT AND DISCUSSION

1. *Juridical Analysis of the Role of Notaries in Ratifying Marriage Agreements Based on Constitutional Court Decision Number 69/PUU-XIII/2015*

After the Constitutional Court Decision Number 69/PUU- "By mutual agreement, both parties can submit a written agreement that is ratified by a Marriage Registration Officer or notary, after which the contents also apply to third parties as long as the third party is involved."

After the amendment to Article 29 Paragraph (1) of the UUP, a marriage agreement which initially could only be made before or during the marriage can now also be made during the marriage. Apart from that, the Constitutional Court granted new authority which was not previously regulated in the Notary Position Law, namely ratifying marriage agreements submitted by husband and wife.

Validation according to the Big Indonesian Dictionary (KBBI) comes from the word legitimate. Ratification means the process, method, act of validating. Another meaning of validation is recognition based on law⁷. In Article 29 Paragraph (1) of the Marriage Law, ratification is carried out to fulfill the principle of publicity of a marriage agreement so that it can not only bind both parties, namely husband and wife, but can also bind third parties in the agreement. This principle of publicity is fulfilled by recording the marriage agreement in the marriage certificate in accordance with Article 12 letter h PP Number 1 of 1975 by the Marriage Registration Office. A notary does not have the authority to record a marriage agreement in a marriage certificate, because the authority to make a marriage certificate is the authority of the marriage registration officer where the marriage is registered. Then Article 16 paragraph (1) letter f of the Law on the Position of Notaries also regulates that a Notary is obliged to "keep confidential everything regarding the deed he or she makes and all information obtained in order to make the deed in accordance with the oath/promise of office, unless the law determines otherwise." Article 54 paragraph (1) of the Law on the Position of Notaries states "A notary can only give, show or inform the contents of a deed, a gross copy of a deed or an excerpt of a deed to a person who has a direct interest in the deed, an heir or a person who has acquired rights, unless otherwise specified." by statutory regulations".

So a notary cannot immediately ratify a marriage agreement as intended in Constitutional Court Decision Number 69/PUU-XIII/2015. Based on interviews conducted by the author, in ratifying a marriage agreement the notary plays the role of the authorized party in ratifying the marriage agreement in the form of a notarial deed as regulated in 15 Paragraph (1).

Article 15 paragraph (1) of the Law on the Position of Notaries states that notaries have the authority to make authentic deeds, as long as the making of such deeds is not assigned or excluded to officials or other people. Giving authority to officials or other agencies, such as the Civil Registry Office, does not mean giving the Civil Registry Office qualifications as public officials but only carrying out functions as public officials when making deeds as determined by legal regulations and their position remains in their position as before as government employees. In Article 15 paragraph (2) letter a of the Law on the Position of Notaries, the Notary, in his/her position, has the authority to certify signatures and determine the exact date of documents under his/her hand, by registering them in a special book. This provision is a legalization of private deeds, which are made by individuals, or

⁷Suharso and Retnoningsih, Big Indonesian Dictionary, 2009, CV. Widya, p. 5

by parties, on paper with sufficient stamps, by way of registration in a special book, provided by a Notary. The point of this legalization is that the parties make a letter, take it to a notary, then sign it in front of the notary, then record it in the legalization book. The date of signing before a Notary, as the date of legal action, which gives rise to rights and obligations between the parties (Ekawati & Harahap,⁸

Although a notary can ratify a marriage agreement, a marriage agreement ratified by a notary cannot necessarily bind third parties. However, the marriage agreement must first be registered with the KUA or Civil Registry Office so that the marriage agreement can be recorded on the marriage certificate or marriage book to fulfill the principle of publication of the marriage agreement. Based on the Letter Regarding the Recording of Marriage Agreement Reporting Number 472.2/6876/DUKCAPIL by the Directorate General of Population and Civil Registration, a notarial deed is a requirement that must be fulfilled to record a marriage agreement so that the marriage agreement can bind third parties.

2. *Juridical Analysis of Third Party Protection in Marriage Agreements Made During Marriage*

Once more, Malaysia profits from a variety of businesses participating in commercial endeavors. The nation's prevalent Common Law system acknowledges several types of business entities, including: Sole Proprietorship, a firm owned by a single person where all authority and decision-making related to the firm's operations rest with the proprietor. Partnership, also referred to as a coalition, is a firm founded or owned by two or more individuals known as "partners". This kind of business entity is generally more appropriate for professional companies. Similar to Sole Proprietorship, only Malaysian nationals can register such partnerships. Limited Liability Partnership (LLP) merges characteristics of a partnership with those of a Private Limited Company. This type resembles traditional partnerships but also reaps advantages similar to a Private Limited Company. Private Limited Company/Sendirian Berhad (Sdn Bhd) is a distinct legal entity from its proprietors, allowing it to participate in contracts, transactions, tax payments, property sales, as well as legal actions autonomously. Sdn Bhd is comparable to a Limited Liability Company in Indonesia.

A marriage agreement basically provides benefits for husband and wife, including third parties, including:⁹

- a. A marriage agreement is made to legally protect the assets of each party (husband/wife). This means that a marriage agreement can function as a legal medium to resolve household problems that are forced to end, either due to divorce or death. With a marriage agreement, it will be clear what is mutually exclusive property (which needs to be divided equally), and which is each other's personal property (which does not need to be divided).
- b. Marriage agreements are also useful for securing family assets and economic conditions. If one day there is confiscation of all family assets because the business goes bankrupt, with a marriage agreement, the family's economic partners will be safe. When they want to make a marriage agreement, prospective couples usually consider that marriage does not only form a household, but there are other aspects that must be included in the points of the agreement. The aim is none other than to maintain their interests.

⁸Ekawati and Harahap, Function of Ratifying Marriage Agreements by Notaries After Constitutional Court Decision Number 69/PUU-XIII/2015, 2016, Faculty of Law, Sebelas Maret State University, Surakarta, p. 10

⁹Susanto, Gono Gni's Division of Assets When Divorce Occurs, 2008, PT. Transmedia Library, p. 81

c. Marriage agreements are also very beneficial for the interests of women. With the existence of a marriage agreement, the rights and justice of women (wives) can be protected. The marriage agreement can be used as a guideline so that the husband does not monopolize his wife's mutual assets and personal assets. Apart from that, from the perspective of women's empowerment, this agreement can be a tool to protect women from all possible occurrences of domestic violence. Marriage agreements are also the same as agreements in general, they must meet the requirements for the validity of the agreement. An agreement that is legally made is valid as law for the parties who make it in accordance with the principle of the binding force of an agreement in general as stated in Article 1338 paragraph (1) of the Civil Code.

Unfortunately, these good benefits may be misused by married couples to avoid obligations to third parties. The third party here is the party who is bound by the marriage agreement because there is an interest in rights related to the husband and wife's assets. This is different from before the Constitutional Court Decision Number 69/PUU-XIII/2015 where in Article 29 Paragraph (1) of the UUP it was regulated that a marriage agreement was made in written form, and could only be made before or at the time of the marriage which was then ratified by the Registrar's Officer. If the marriage certificate is issued, the third party will immediately know about the existence of the marriage agreement if they are to make an agreement with the husband and/or wife and there will be no new agreement in the future. After the Constitutional Court Decision Number 69/PUU-XIII/2015 where it is regulated in Article 29 Paragraph (1) that a marriage agreement can be made during the marriage, as well as Article 29 Paragraph (3) where it is regulated that the agreement comes into effect from the time the marriage takes place, if husband and wife do not determine other than that. So, this can be interpreted to mean that if a husband and wife do not specify in their marriage agreement when the agreement comes into effect, then the agreement comes into effect when their marriage begins.

For example, if the married couple Mr. Ridho and Mrs. Tessa got married in 2015 and decided not to make a marriage agreement, but then as time went by in 2020 the husband and wife felt that they needed a marriage agreement in their marriage and became aware of the Constitutional Court Decision. which allows the making of a marriage agreement within a marriage bond. Then Mr. Ridho and Mrs. Tessa met with a notary to make a marriage agreement, but they did not specify that the marriage agreement came into effect at the time the marriage agreement was made, therefore their marriage agreement was retroactive and began at the time the marriage took place.

Making a marriage within a marriage bond will have an impact on the legal status of joint property obtained during the marriage as stated in Article 35 Paragraph (1) of the Marriage Law where it is stated that "Property acquired during the marriage becomes joint property. Therefore, if the marriage agreement is retroactive, then there has been a mixing of assets (joint assets) in the period before the marriage agreement was made. So, if Mr. Ridho and Mrs. Tessa had a loan in 2017 and have jointly enjoyed the proceeds of the loan, if at this time the loan starts to have problems and most likely cannot be paid or repaid.

This can have an impact if the husband is unable to pay off his debt to a third party, the third party cannot bill his wife because the husband or wife will take refuge behind the contents of the marriage agreement and the existence of the marriage agreement, and vice versa. Even though previously the loan had been enjoyed jointly. This of course can be very detrimental to third parties. This third party outside the husband and wife does not mean that the third party is also mentioned in the agreement, but

rather that the third party is the party bound by the marriage agreement because the third party has an interest in the rights of the marital assets.

Thus, marriage agreements made during the marriage must be made carefully to avoid the possibility of bad faith by both husband and wife. This is especially intended for notaries, although the notary's authority in making deeds is only limited to writing down the marriage agreement in the form of a deed, as well as ensuring that the contents of the agreement meet the formal requirements, namely in accordance with Article 120 of the Civil Code, but as a notary he is given the authority to When making a marriage agreement deed, the notary must be concerned about the contents of the marriage agreement, which the notary must be able to review so that there are no things that are detrimental to third parties.

Apart from that, the notary who is given the authority to make marriage agreements has stated an oath of office, namely; Carry out your position with trust, honesty, thoroughness, independence and impartiality, "carefully" that is, be careful and precise in preparing the editorial deed so as not to harm the parties. Therefore, a marriage agreement made with a notarial deed is an effort so that the marriage agreement made at the time the marriage takes place does not harm the parties concerned. This is because the notary prioritizes the principle of caution carefully.

As the spearhead of making a marriage agreement, a notary can take anticipatory steps to protect third parties, namely:

- 1) Ask the husband and wife to make a detailed statement regarding the list of assets and their status, for example whether they are being used as collateral by a third party.
- 2) A statement is made by the parties explaining to release the notary from all legal consequences due to the making of this Marriage Agreement.
- 3) Check the status of assets (especially certificates) that are the object of the marriage agreement to see whether they are guaranteed to a third party.
- 4) Obtaining approval from the third party involved, for example in the event that the assets that are the object of the marriage agreement are collateral for bank credit.

Meanwhile, according to Habib Adjie in his journal entitled Marriage Agreements After the Constitutional Court Decision, what the notary needs to pay attention to is so that the marriage agreement does not harm third parties, namely (Adjie 2017:58)¹⁰:

- a) Request an inventory list of assets acquired during the marriage which will be included in the deed.
- b) There is a statement that these assets have never been transacted in any way or form, for and to anyone.

Although the Constitutional Court's decision stipulates that the parties can determine at any time, in order to protect the interests of third parties regarding the "enactment/entry into force" of the marriage agreement contained in the marriage agreement deed, it is "better" and "recommended to the parties" to be regulated by the legal provisions that " marriage agreement made during the marriage, the separation of marital assets with the marriage agreement deed comes into force and lasts from the date the marriage agreement deed is made and signed, while "the status, position, legal condition and condition of the marriage assets before the marriage agreement deed is made which are related and related to all agreements/engagements and agreements with third parties that have been made before the marriage agreement is made, remain as the original legal status, position, circumstances and conditions as before

¹⁰Adjie, Marriage Agreement Post Constitutional Court Decision, 2017, Notary, p. 72

the marriage agreement occurred and was made, and the marriage agreement made by the husband and wife. does not apply retroactively. So, the notary can provide legal opinions to the parties so that the agreement contains the following clauses:

"All legal acts carried out before the deed of this marriage agreement and its legal consequences remain valid and binding for both parties as before the signing of this deed of marriage agreement and therefore the parties remain bound and subject to every provision that has been made with a third party up to the legal action is officially declared complete"

And/or contains the clause "That as of the day and date this deed is signed between the first party (husband) and the second party (wife) there will be no unity of property, both movable and immovable, unity of profits and losses, unity of debts and receivables or unity of material or unity of results. and income, while regarding the unity of assets, both movable and immovable, the unity of profits and losses, the unity of debts and receivables or the unity of material goods as well as the unity of results and income that existed before this agreement was signed remain united between the first party (husband) and the second party (wife). "

The above matters need to be taken into account, both by the husband and wife and by the notary, so that the marriage agreement made at the time the marriage takes place can avoid problems that may arise in the future due to a lawsuit from a third party who is harmed as a result of its making. the marriage agreement.

After signing the marriage agreement before a notary, recording the marriage agreement in the marriage registration by the civil registry or KUA in the marriage certificate or marriage book is also protection for third parties because because the principle of publication in the marriage agreement is fulfilled, third parties can know about the existence of the marriage agreement.

CONCLUSION

Based on the description of the research results above, it can be concluded that: The role of the Notary in Ratifying Marriage Agreements Post Constitutional Court Decision Number 69/PUU-XIII/2015 is as the party with the authority to ratify marriage agreements in the sense of making marriage agreements into notarial deeds as explained in Article 15 Paragraph (1) UUJN which then becomes a requirement in recording the marriage agreement by the Marriage Registry Officer on the marriage certificate or marriage book with the aim that the marriage agreement is also binding on third parties.

The protection of third parties in marriage agreements after the Constitutional Court Decision is that in making a marriage agreement made with a notarial deed, the notary guarantees that the marriage agreement does not conflict with applicable norms, the property agreed upon is not property that is still tied to a third party and cannot be changed at will by the husband or wife, because the contents of the minutes of the notarial deed are the same as the copy that each of them keeps as well as the recording of the marriage agreement by the Civil Registry Officer or KUA on the marriage certificate or marriage book so that third parties are aware of the existence of the marriage agreement.

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