

The legality of prenuptial agreement legitimated by notary after constitutional court decree No. 69/PUU-XIII/2015

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Abstract

Spouses can make a prenuptial agreement as they marry or even before marriage process then it will be legitimated by marriage officials. This rule has been changed after Constitutional Court decree no. 69/PUU-XIII/2015 states that the prenuptial agreement can be executed after marriage happens and legitimated by the notary. The kinds of this research was normative research laws with applied law approach. The results explain that in the execution there is no special regulations which issued as follow-up of Constitutional Court decree no. 69/PUU-XIII/2015. However the notary in making the marital deed according to each interpretations to the decree and will be implemented so far with individual interpretations strictly with ethics and notary's norm profession.

Keywords: legality, constitutional, legitimated, decree

1. Introduction

A prenuptial agreement is not populer thing in Indonesia and not a must. Making a prenuptial agreement is considered as materialistic. Eventhough, the government still accomodates it's need. But, the inclusion of prenuptial agreement is government attempt to meet society's need and law development in the future ^[1].

Most people who has been married doesn't care with consequences of the married, when one of them is about property, they think that the marriage is only relationship about two families ^[2], it is mean that the marriage is not only making lifelong family and keeping family's sustainable will need marriage property ^[3].

Law no. 1 year 1974 on Marriage (Marriage Law) stipulates that prenuptial agreement in article 29 whether the agreement is made before and as the marriage happens and made written ^[4]. The spouse can makes the agreement as they marry and even before it then the agreement will be legitimated by marital officials. Those rules has been changed after Constitutional Court decree no. 69/PUU-XIII/2015 stipulates the prenuptial agreement can be executed after the wedding. This is has consequences about different time for making the agreement according to Civil Code, Marriage law, Islamic Law.

A notary is only one official that authoritative to make authentic deed about actions, agreements and statments.

Constitutional Court decree no. 69/PUU-XIII/2015 rules that prenuptial agreement was legitimated by marriage officials, but now also legitimated by both marriage officials and notary. Addition authority to notary in marriage legitimacy rises legal uncertainty in society especially in notary circles to conduct their duties. This is appear because the agreement legitimacy is not only about legitimacy or illegitimacy marriage, and related with registration in marriage deed in order to the third party know about prenuptial agreement. The notary doesn't has authority to marriage registration in the deed because the authority on making marriage deed is marital official's authority as the marriage has been registered.

The problem formulation in the reseach is how do notary's roles in legality of prenuptial agreement deed by the notary after Constitutional Court decree no. 69/PUU-XIII/2015.

2. Research Method

The research was normative law research ^[5]. Types of this research was descriptive research which reseach to obtain complete, detail, clear and systematically descriptions in some aspect researched according to law and judiciary decree as research basis ^[6]. Problem approach done by applied law approach. With judicial case study which is case study approach to certain legal events through judiciary process with its decisions ^[7].

3. Literature Review

3.1 Prenuptial Agreement

An agreement is law action that causes, changes, removes rights or creates law relations and with this way, the agreement causes law effects that is parties objectives ^[8].

¹ Syaifullahi Maslul, Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Ditinjau Dari Pemenuhan Hak-Hak Asasi Manusia Dan Asas-Asas Pembentukan Perjanjian, Jurnal Mahkamah IAIM NU Metro, Vol. 1, No. 2, Desember 2016, 409-424

² Andi Hartanto, Hukum Harta Kekayaan Perkawinan (Marriage Property Law), Laksbang Grafika: Yogyakarta, 2012, hlm. 1

³ Miqat, Patitting, The Rights Of Land In Marriage Agreement Of Miscenegation By Subsequent The Constitutional Court Decision Number 69 / PUU-XIII 2015 Based On The Customary Law Perspective, Jurnal Yustisia Vol. 7 No. 1 January – April 2018

⁴ Agustine, O. V. (2017). Politik Hukum Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Dalam Menciptakan Keharmonisan Perkawinan. Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional, 6(1), 53-67. h. 6.

⁵ Abdulkadir Muhammad. Hukum dan Penelitian Hukum, PT Citra Aditya Bakti, Bandung, 2014, hlm. 120.

⁶ Ibid. hlm. 50

⁷ Ibid. hal. 149

⁸ Herlien Budiono, Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan, Cetakan Keempat, PT Citra Aditya Bakti, Bandung, 2014, hlm. 3.

Individuals rights as contract law, lawsuit and property related private law. In those things, the state's involvement is only as facilitator for parties as well as tool to enforce them conduct the agreement^[9].

Prenuptial agreement is an agreement made by spouse before and as marriage happens for handle the consequences that rise up in marriage to their properties^[10]. Prenuptial agreement is an agreement about marital aspect that rise up during the marriage^[11].

Law protection for couple married and third party in dispute when making agreement did after the wedding, it is with making agreement in form of prenuptial agreement that legitimated by notary and registered in Religious Affairs or Civil Registration Office, then if there is deed problems can be evidences written valid and enforced because beside binding those parties, also prevails and has power law binding for third party after prenuptial agreement registered^[12].

3.2 Notary

Notary is public officials that the only one authoritative to make authentic deed about all actions, agreement and statements that required by general rules or by interested party for stipulating in an authentic deed, to ensure date certainty, store the deed and provide grosse, its copy, all things along deed making by general rules that not delegates or excludes for other officials/people.

Provision of article 1 *Instructie voor De Notarissen* in Indonesia stipulates that notary is public officials who must know all statutory provisions, that called and be appointed to make deeds and contracts, in order to provide provisions, legitimacy, statements and ensure the date, store the original or the minuta and issue the grosse, and valid and legitimate copy^[13].

3.3 Legal Certainty Theory

John Austin and Van Kan in normative-dogmatic theory assumed that the law basically is created to legal certainty. General characteristic of legal rule prove that the law doesn't aim to create justice or expedience, except for only to certainty^[14].

Legal certainty consists 2 definitions that are there is general rules that makes the individuals know allowed or forbidden actions and legal security for individuals from government arbitrariness because with general rules can be know anything that be imposed or done by State againts individuals^[15].

⁹ Arie Sudihar, Gusti Ayu Ketut, Pujiyono, Waluyo, Public and Private Law Boundaries, Nexus of Position Within State Owned Corporation in Indonesia Perspective, International Journal of Advanced Science and Technology, Volume 28 Number 20, hlm. 277

¹⁰ Rahmadika Sefra Edlynafitri, "Pemisahan Harta Melalui Perjanjian Kawin dan Akibat Hukumnya Terhadap Pihak Ketiga", Jurnal Lex Privatum, edisi No. 1 Vol. 3, 2015, hlm. 110.

¹¹ Lawrence Li, Be Prepared in Advance: A Case For Allowing Binding Prenuptial Agreement in Hongkong, International Journal of Law, Policy and The Family, Volume 28 Number 3, December 2014, hlm. 340

¹² Nofianti, et.al, Legal Status Of Deed Of Marriage Agreement After Marriage (Study Of Constitutional Court Decision Number 69 / PUU-XIII / 2015, International Journal of Humanities, Religion and Social Science, ISSN : 2548-5725 | Volume 2, Issue 2 2018

¹³ Ibid, 13.

¹⁴ Achmad Ali, Menguak Tabir Hukum, Edisi Kedua, Prenada Media, Jakarta, 2015, hlm 88-99.

¹⁵ Riduan Syahrani, Rangkuman Intisari Ilmu Hukum, Citra Aditya Bakti, Bandung, 2013, hlm 23

4. Discussion

In article 1 of Notary Position Law rules that a notary is the only one who has public authority, other officials haven't. As well if there are other officials who has been involved, then his authority doesn't excess over the authentic deed and has limit over Child Acknowledgement Certificate drafting without marriage^[16], Mortgage Officials Omissions Record^[17], Consignment and Cash Payment Offering Record^[18], Check and Money Orders Complain Certificate^[19]. Civil Registration Certificate, the only deed that is not included in Notary authority. But fully in part of Civil Registration Officials authority, prenuptial agreement doesn't included.

Legalization of prenuptial agreement by Civil Registration Officials and Religious Affairs logically in order to all parties that binding in this agreement to be one unity of all marriage documents. But with the legalization authority by Civil Registration Officials as if the notary to be its subordinate of other institutions. Whereas the notary conducts his duty in autonomous, impartial, independent, that means other parties do not allow to intervene the notary duty.

Evidence basis is information from the parties, observing the proof, listening the parties will, making the information as basis for drafting the prenuptial agreement. The notary give explanation and witness before the general officials what he saw, observed and experienced over other parties did in all deed that made before him^[20]. The notary predicates his decision on freedom of contract^[21] moral principal and law officers ethics.

It must be realized that the decree issued by Constitution has aims to accomplish the problems. Especially the problem for intermarriage. But unfortunately the decree caused new issues for other institutions specially for the notary. Constitutional Court Decree provide opportunity for spouse to make marital agreement both during the wedding or after that, gives new authority for notary legitimacy to prenuptial agreement.

Actually, notary appreciate to Constitutional attempts. Because of the decree allows house and land ownership for spouse specially intermarriage can be meet. Even so with spouse doesn't make prenuptial agreement yet during the wedding and need to make agreement can be fulfil.

But in implementation so much found issues for notary which imposed by the decree. Each notary has different interpretations againts the Constitutional Court No. 9/PUU-XIII/2015. Guideline that used by the notary to interpret the decree was profession ethics

While every notary has different guideline as decision basis as long it doesn't contradict with norm and gives harm to other parties.

Even so, most notary has same restless to respond legalization policy of prenuptial agreement by Civil Registration Office and Religion Department. In a verdict in article 29 verse 1 UUP, Constitutional Court states that constitutional is conditional as long as it is interpreted as

¹⁶ Pasal 281 KUH Perdata

¹⁷ Pasal 1227 KUH Perdata

¹⁸ Pasal 1405 dan Pasal 1406 KUH Perdata

¹⁹ Pasal 143 dan Pasal 218 KUH Dagang

²⁰ G.H.S Lumban Tobing, Peraturan Jabatan Notaris, Erlangga, Jakarta, 1980, hal. 52.

²¹ Pasal 1338 ayat (1) KUHPerdata yang menyatakan: "Semua perjanjian yang dibuat secara sah berlaku sebagai undang-undang bagi mereka yang membuatnya.

"At the time, before taking place or while in the marriage bond, both parties with mutual consent may submit a written agreement which is legalized by a marriage registrar or a notary public, after which the contents also apply to third parties as long as the third party is involved".

Notaries can interpret automatically the prenuptial agreement deed as binding on a third party and authentic as long as it meets formal and material requirements. Legalization by Civil Registration Office as well as the Religious Affairs is optional and fulfills administrative requirements only. However, the emergence Letter of the Director General of Dukcapil Number: 472.2 / 5876 / Dukcapil dated 19 May 2017 concerning Recording of Prenuptial Agreement and Letter of Director General of Islamic Binmas Number: B.2674 / DJ.III / KW.00 / 9/2017 dated September 28, 2017 concerning Recording of Prenuptial Agreements gives rise to a different interpretation. The prenuptial agreement deed is presumed not binding on a third party and has no legal force before being legalized by Civil Registration Office for non-Muslims and Religious Affairs for Muslims.

Whereas in article 1868 of the Civil Code it is explained that the legality of an agreement deed if it is made by or before public official, is attended by witnesses, and signed by the parties concerned ^[22]. According to the notary, the prenuptial agreement deed should also directly bind a third party, and be legally / authentic as long as it is in accordance with the prevailing rules, norms and ethics. The Civil Registration Office and the Religious Affairs only register, not legalize. Government interpretation which then issued a legal product in the form of a circular letter actually placed the notary as a sub-ordinate of government institutions, in this case the Civil Registration Office and Religious Affairs. Basically, the interpretation of the 1945 Constitution, which is the mother of all regulations, can only be done once, which is binding ^[23]. Since the beginning of the discourse on the formation of the Constitutional Court in Indonesia until now, the decisions is final and binding. The final decision means that the Constitutional Court decision is the first resort as well as the last resort for justice seekers ^[24]. This means that both the Notary, Dispendukcapil, and KUA, in relation to the Constitutional Court decision Number 69 / PUU-XIII / 2015 should not overlap.

The reality becomes different, and differences in interpretations of several institutions, especially for decisions with this type of conditional constitution, will continue to be a polemic until a new instrument of the Constitutional Court, the judicial order instrument, has the power to forcefully order to implement the Constitutional Court decision and to ensure the harmonization of laws and regulations both vertically and horizontally ^[25]. This fact strengthens Maruarar Siahaan's argument, which states that the Constitutional Court decisions very often makes it confront with other branches of state power, the executive,

legislative, or other institutions. This is indeed a natural thing considering that the follow-up of most Constitutional Court decisions requires other legal instruments, which is the domain of other institutions ^[26].

The effort to realize harmonization is certainly not an easy job because it is a process of harmonization between laws and regulations as an integral part or sub system of the legal system in order to achieve legal objectives ^[27]. However, it is a necessity that stakeholders must think about so that the purpose of issuing a decision by the Constitutional Court can be maximally implemented and is able to fulfill the rights of the people in general.

5. Conclusion

Provisions regarding the prenuptial agreement deed drafting, which previously could only be done before or during the marriage, change to before, or during marriage, can also be made after marriage. In addition, in drafting of prenuptial agreement deed, which was previously only approved by Civil Registration Office and Religious Affairs, can now also be legitimated by a Notary.

However, in its implementation with the status of a notary as a professional institution and public official outside the government, there is no special regulation issued as a follow-up to the Constitutional Court Decree Number 69 / PUU-XIII / 2015. However, every Notary Public in making a prenuptial agreement is carried out in accordance with their respective interpretations of the decision, and is implemented as far as each individual's interpretation by adhering to the ethics and norms of the Notary profession.

References

1. Abdulkadir Muhammad. *Hukum dan Penelitian Hukum*, PT Citra Aditya Bakti, Bandung, 2014.
2. Achmad Ali. *Menguak Tabir Hukum*, Prenada Media, Jakarta, 2015.
3. Andi Hartanto. *Hukum Harta Kekayaan Perkawinan (Marriage Property Law)*, Laksbang Grafika: Yogyakarta, 2012.
4. Bambang Sutyoso. *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama, PT. Citra Aditya Bakti, Bandung, 2006.
5. GHS Lumban Tobing. *Peraturan Jabatan Notaris*, Erlangga, Jakarta, 1980.
6. Herlien Budiono. *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan*, Cetakan Keempat, PT Citra Aditya Bakti, Bandung, 2014.
7. Maruarar Siahaan. *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama, Jakarta: Konstitusi Press, 2005.
8. Setio Sapto Nugroho. *Harmonisasi Pembentukan Peraturan Perundang-Undangan*, Dokumentasi Dan Informasi Hukum, Bagian Hukum, Biro Hukum Dan Humas: Jakarta, 2009.
9. Riduan Syahrani. *Rangkuman Intisari Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2013.
10. Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia*:

²² Penjelasan pada pasal 1868 KUHPerdara

²³ Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia: Buku VI, Kekuasaan Kehakiman*, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2010, hlm. 472

²⁴ Bambang Sutyoso, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama, PT. Citra Aditya Bakti, Bandung, 2006, hlm. 160

²⁵ Mohammad Mahrus, *Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru*, *Jurnal Konstitusi*, Volume 12, Nomor 3, September 2015.

²⁶ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama, (Jakarta: Konstitusi Press, 2005), hlm. 357

²⁷ Setio Sapto Nugroho, *Harmonisasi Pembentukan Peraturan Perundang-Undangan*, (Dokumentasi Dan Informasi Hukum, Bagian Hukum, Biro Hukum Dan Humas: Jakarta, 2009), h. 4

- Buku VI, Kekuasaan Kehakiman, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2010.
11. Augustine OV. Politik Hukum Perjanjian kawin Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Dalam Menciptakan Keharmonisan Perkawinan. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 2017.
 12. Arie Sudihar. Gusti Ayu Ketut, Pujiyono, Waluyo, Public and Private Law Boundaries, Nexus of Position Within State Owned Corporation in Indonesia Perspective, *International Journal of Advanced Science and Technology*, 2019, 28(2).
 13. Lawrence Li. Be Prepared in Advance: A Case For Allowing Binding Prenuptial Agreementd in Hongkong, *International Journal of Law, Policy and The Family*, 2014, 28(3)
 14. Miqat, Patitting, the Rights of Land in Marriage Agreement of Miscenegation by Subsequent The Constitutional Court Decision Number 69 / PUU-XIII 2015 Based On The Customary Law Perspective, *Jurnal Yustisia*, 2018, 7(1).
 15. Mohammad Mahrus, Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru, *Jurnal Konstitusi*, 2015, 12(3).
 16. Nofianti, et al. Legal Status Of Deed Of Marriage Agreement After Marriage (Study Of Constitutional Court Decision Number 69 / PUU-XIII /), *International Journal of Humanities, Religion and Social Science*, ISSN: 2548-5725 |, 2015, 2(2).
 17. Rahmadika Sefra Edlynafitri. "Pemisahan Harta Melalui Perjanjian Kawin dan Akibat Hukumnya Terhadap Pihak Ketiga", *Jurnal Lex Privatum*, edisi No. 1, 2015, (3).
 18. Syaifullahi Maslul, Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/Ditinjau Dari Pemenuhan Hak-Hak Asasi Manusia Dan Asas-Asas Pembentukan Perjanjian, *Jurnal Mahkamah IAIM NU Metro*. 2016; 1(2):409-424.