

The Binding Power of Marriage Agreement Made Before the Notary After The Marriage Is Carried Out Against The Third Party Related To The Decision Of Constitutional Court Number 069/Puu-Xii/2015

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ABSTRACT

Marriage is meant to have offsprings that aim at preventing human life from becoming extinct. Therefore, every single household built has the purpose of getting a better life. Nevertheless, the desire does not always live up to expectation because there are always disputes, quarrels in married lives that cannot be avoided and may end, culminating in a divorce. Frequent and easy divorces can raise concerns and anxious times for married couples, especially those with solid economic levels. Their worries in disputes over the distribution of assets when a divorce occurs have resulted in the desire to make an agreement to separate their assets, which is called Marriage Agreement. Based on the case above, it becomes a background of this research. The problem above is analyzed by using a statute approach. The collecting technique performed is using a literature study. This research is performed by examining secondary library materials as a primary material to be researched by searching for the regulations and literature related to research questions. The discussion results related to the binding power of marriage agreement made before the notary after the marriage is carried out against the third party, and referring to article 29 paragraph (1) of Marriage Act, the marriage agreement can apply to the third party after recording the marriage agreement in the Civil Registry Office for non-Moeslem or Religious Affairs Office (KUA) for Moeslem. As for the settlement of the marriage agreement made after the marriage is carried out against the third party related to the Decision of the Constitutional Court Number 069/PUU-XIII/2015, the settlement of the problem is carried out by litigation through court procedures based on the provisions of the prevailing laws and regulations, and non-litigation as regulated in Act Number 30 of Concerning Arbitration and Alternative Dispute Settlement.

Keyword: Marriage Agreement, Decision of Constitutional Court, Binding Power

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I. INTRODUCTION

Divorce that often and easily occurs raises concerns for some married couples, especially for couples who both have a solid economic level. Their concern about the dispute over the distribution of assets when a divorce occurs has led to a desire to agree to the separation of assets, which is often called a marriage agreement. A marriage agreement is an agreement (agreement) made by a prospective husband and wife before or when the marriage takes place to regulate the effects of marriage on their assets (Prodjodikoro, 1981).

Both parties implement the marriage agreement with mutual consent in submitting a written agreement ratified by the marriage registrar, whose contents also apply to the third party involved (Saleh, 1982). The marriage agreement as regulated in Article 29 paragraph (1) of the Marriage Law states that a marriage agreement can only be made at or before the marriage takes place.

The development of law related to the regulation of marriage agreements over time underwent several changes influenced by various things, one of which was the Constitutional Court Decision (referred to as the Constitutional Court Decision) Number 069/PUU-XIII/2015. The decision of the Constitutional Court Number 069/PUU-XIII/2015, several differences occur related to the marriage agreement, namely: a) A marriage agreement which previously could only be made before or at the time the marriage took place, can now also be made throughout the marriage; b) The marriage agreement which was initially valid since the marriage took place, can now also take effect from the time it was agreed upon by husband and wife; c) The marriage agreement which was initially only able to be changed by both parties, is now in addition to being amended it can also be revoked by both parties.

The Constitutional Court's decision Number 069/PUU-XIII/2015, about the marriage agreement, is a solution for married couples who have not made a marriage agreement, plan to make a marriage agreement or change the marriage agreement that has been made in the middle of the marriage journey, even revoke the marriage agreement. They are marriage agreements if both parties wish. However, this creates a new dimension both to the legal consequences of marital property, legal certainty for third parties and can lead to problems with ownership of land rights related to husbands and wives of different nationalities. The Constitutional Court's decision Number 069/PUU-XIII/2015 provides an opportunity for a husband or wife to make a marriage agreement during marriage. If the parties do not specify when the marriage agreement comes into force, it will be interpreted that the marriage agreement will come into force as the marriage takes place.

To ensure legal certainty, order, and legal protection, authentic written evidence is needed regarding actions, stipulation agreements, and legal events made before or by authorized officials. One of these is a notary as a public official who carries out his profession in providing legal services to the public. In other words, a notary can be interpreted as a profession that belongs to the category of public officials whose duties and obligations are to provide legal services to the community. Notaries indirectly play a vital role in the realm of civil law, and this is because notaries have a role in making marriage agreements about authentic deeds, which will later be needed in making marriage agreements (Budiono, 2013). However, with the Constitutional Court's Decision Number 069/PUU-XIII/2015, the notary cannot immediately serve the request of a married couple to make a marriage agreement. This is because there are still problems that require clarity and legal certainty in connection with the making of the marriage agreement.

II. METHOD

Concerning this research, the specifications used are descriptive-analytical, namely, making systematic, factual, and actual descriptions of the facts, conditions, situations, or problems to be analyzed (Soekanto and Mamuji, 2003). This research will discuss the implementation of marriage agreements made after the marriage takes place against third parties and then analyze the juridical problems that arise from these facts related to the principles in the legislation. In this study, the author will describe the facts and existing data clearly, systematically, in detail, and thoroughly.

The type of research used in this study consisted of normative juridical research, which was carried out through library research. A literature study was conducted to obtain secondary data that are considered relevant to be used as material in compiling a thesis using the basic library research materials consisting of Primary Legal Materials, Secondary Legal Materials, and Tertiary/Supporting Legal Materials. Legal research recognizes several approaches used to examine each problem. The type of approach used in this research is the statute approach. This statutory approach is an approach using legislation and regulations (Marzuki, 2005).

The approach and data collection procedure used by the researcher in this study was carried out by library research, namely by researching various literature relevant to the problem of this thesis such as books, papers, articles, and news obtained by the author from the internet with the aim of to seek or obtain theories or materials related to the title of the article, namely the issue of the marriage agreement.

The author's data analysis method in this thesis research is carried out in a qualitative and prescriptive juridical way regarding whether or not, according to the law, the facts or legal events from the research results. In addition, the data obtained through field research and library research are compiled systematically and then analyzed qualitatively to achieve clarity on the problems to be discussed. The data is then analyzed interpretatively using the theory and positive law that has been outlined. Then inductively concluded to answer the existing problems.

III. RESULTS AND DISCUSSION

The Power of Binding a Marriage Agreement Made before a Notary for Third Parties after the Marriage Takes Place

Constitutional Court Decision Number 069/PUU-XIII/2015 conditionally granted the request of Mrs. Ike Farida, an Indonesian citizen who married a Japanese citizen. The Constitutional Court gives a constitutional interpretation of Article 29 paragraph (1), paragraph (3), and paragraph (4) of the Marriage Law. Mrs. Ike Farida's request, the core of which states that as long as it is not interpreted that a marriage agreement can be carried out "as long as it is in the marriage bond," then Article 29 paragraph (1) of the Marriage Law according to the Constitutional Court does not have binding force (conditional unconstitutional).

Based on the Constitutional Court Decision Number 069/PUU-XIII/2015, the provisions of Article 29 paragraphs (1), (3), and (4) of the Marriage Law are further interpreted as follows:

Article 29 paragraph (1):

"At the time, before 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."

Article 29 paragraph (3):

"The agreement comes into force from the time the marriage takes place unless otherwise stipulated in the marriage agreement."

Article 29 paragraph (4) "

"During the marriage, the marriage agreement can be regarding marital property or other agreements that 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."

Thus, the making of a marriage agreement can be adjusted to the needs of each partner. This means that a marriage agreement can be made at any time, namely before marriage according to the law of each religion and belief, before the ratification of marriage, or during the marriage bond.

The new interpretation of the Constitutional Court Decision Number 069/PUU-XIII/2015 is added regarding the role of the notary, where previously the notary also had a role in doing the marriage agreement deed before the Constitutional Court Decision Number 069/PUU-XIII/2015, based on Article 147 of the Civil Code, which states that on the threat of cancellation, every marriage agreement must be made with a notarial deed before the marriage takes place. The agreement comes into force from when the marriage takes place; other times, it may not be stipulated. However, after the Constitutional Court's Decision Number 069/PUU-XIII/2015, it was reaffirmed that notaries have an essential role in terms of marriage agreements. Notaries are officials authorized to make marriage agreements as stated in the Constitutional Court Decision Number 069/PUU-XIII/2015. So based on these provisions, a notary has two roles: 1) Make a Marriage Agreement in the form of an Authentic Deed. This role is the authority of a notary as regulated in Article 15 paragraph (1) of the UUJN, which is to do an authentic deed regarding all actions, agreements required by legislation, or desired by the interested parties to be stated in an authentic deed; 2) To ratify the marriage agreement made by the appearers under their hands and signed by the appearers. This role is the authority of a notary as regulated in Article 15 paragraph (2) letter an of the UUJN, namely to ratify the signature and determine the certainty of the date of the letter under the hand by registering it in a particular book (Judiasih, 2017).

A notary carries out this role following the provisions in Article 16 paragraph (1) letter an of the UUJN, where it is stated that a notary must act in a trustworthy, honest, thorough, independent, impartial, and safeguard the interests of the parties involved in legal actions. In addition, notaries, while carrying out their duties, must prioritize the principle of prudence. Notaries need to take preventive legal protection steps in doing a deed to protect themselves and the parties in the deed (Manuaba, 2018).

In addition to protecting the notary from being involved in disputes that arise in the future, this opinion is also helpful so that the interests of third parties are protected. The matters referred to need to be considered by the notary about his duties and positions as well as his authority, which will be described as follows: 1) Request an inventory list of assets obtained during the marriage bond which will be included in the deed; 2) There is a statement that these assets have never been transacted in any way and form, for and to anyone (Adjie, 2016).

Several things must be considered and done to protect third parties in making marriage agreements made during the marriage bond, namely: 1) Making a marriage agreement before a notary becomes essential to ensure certainty, order, and legal protection; 2) The marriage agreement is made in good faith by the parties, especially their relationship with third parties because only the husband and wife will know if they have a credit agreement with a third party that is not known by the notary who will make a marriage agreement during the marriage of the husband and wife; 3) Marriage agreements must be registered with the marriage registrar so that legal protection for third parties is fulfilled and to fulfill the principle of publicity, as regulated in Article 29 paragraph (1) of the Marriage Law.

In the Decision of the Constitutional Court Number 069/PUU-XIII/2015, it is stated that the marriage agreement shall come into force from the time the marriage takes place unless otherwise specified in the marriage agreement in which the phrase can be interpreted that the making of a marriage agreement while in the marriage bond can be made and applies retroactively, except otherwise specified in the marriage agreement.

Thus, if a notary makes a marriage agreement while in a marriage bond, he is required to notify that the marriage agreement in a marriage bond only takes effect after the signing of the deed and only binds the third party after it has been ratified at the Department of Population and Civil Registration or Religious Affairs office. If the marriage agreement was never registered at the Department of Population and Civil Registration or Religious Affairs office when the marriage took place, then the marriage agreement was never ratified. With this understanding, a third party cannot accept the transfer of rights from one party (husband or wife only) because the marriage agreement only applies to husband and wife internally regarding managing each other's assets during the marriage. However, if husband and wife make a marriage agreement, it is legalized by a marriage registrar or notary, then it is also binding on third parties. In other words, the description above has reflected the application of the theory of legal certainty. Because as we know, the theory of legal certainty requires efforts to

regulate law in legislation made by authorized and authoritative parties to ensure legal certainty. In addition, the presence of the Constitutional Court Decision Number 069/PUU-XIII/2015 provides a new dynamic in the world of marriage law in Indonesia. The Constitutional Court's decision Number, 069/PUU-XIII/2015 as written law, is expected that in its implementation, it will provide legal certainty and is essential as an elaboration of the principle of legality, which is one of the characteristics of the rule of law.

Legal certainty as one of the objectives of the law, of course, must be balanced with other legal objectives, including justice and expediency. Vice versa, justice, and benefit must always be in balance with certainty. Legal certainty has an essential role in law enforcement. Law enforcement in question is an effort to make the law function, operate, and manifest concretely (Ginting, 2015).

Meanwhile, if referring to the theory of justice according to Aristotle, it is said that justice is appropriate in human action (Asikin, 2015). Feasibility is defined as the middle point between the two outer ends, which are too much and too little. The two outer ends involve 2 (two) people or objects. If the 2 (two) people have the same thing in a predetermined size, then each person must get the same object or result. So that the Constitutional Court's decision has fulfilled a sense of justice, where previously the husband or wife bought movable objects during the marriage and the marriage was a mixed marriage (marriage between Indonesian citizens and foreigners) which was held without making a separate property agreement, then this is not allowed. However, after the Constitutional Court's decision, this provision is no longer valid because husband and wife can make a marriage agreement to separate property while in the marriage bond. The presence of the Constitutional Court Decision Number 069/PUU-XIII/2015 provides a new dynamic in the world of marriage law in Indonesia when referring to the theory of justice in its implementation.

Settlement of Problems against Marriage Agreements Made After the Marriage Takes Place for Third Parties Related to the Constitutional Court Decision Number 069/PUU-XIII/2015

A problem or dispute, the resolution of which can be carried out in court (litigation), usually also known as a civil case trial process as determined based on civil procedural law, where it can be seen that the final stage of litigation dispute resolution is in the form of a judge's decision which is the final result of the settlement to the problems faced by the parties. Settlement of disputes through non-litigation, we are already familiar with alternative dispute resolution (from now on referred to as ADR), which is described in Article 1 number (10) of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (from now on referred to as APS), it is stated that Arbitration and APS are institutions for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely the settlement of disputes outside the court using Arbitration, Mediation Negotiation, Conciliation, or Expert Assessment.

Apart from the dispute resolution method as mentioned above, which is based on Law Number 30 of 1999 concerning Arbitration and APS, in the Indonesian legal system, this matter has been regulated in Law Number 48 of 2009 concerning Judicial Power as stated in Article 58 and Article 60, which determines the settlement of disputes through mediation. The final result of a series of out-of-court dispute resolution processes concerning the provisions stipulated in Article 6 paragraph 7 of Law Number 30 of 1999 concerning Arbitration and APS, which if successful will result in an agreement or peace between the parties. The problems that occurred were related to the marriage agreement based on the Constitutional Court's Decision Number 069/PUU-XIII/2015, where this problem began when Mrs. Ike Farida, an Indonesian citizen, married a foreigner.

Then she and her husband had problems when they bought a flat in the Jakarta area. However, after being paid in full, the developer never handed over the flat, and even in the end, the apartment purchase agreement was canceled unilaterally by the developer because the applicant's husband is a foreigner and the applicant does not have a marriage agreement.

The developer states that following the provisions in Article 36 paragraph (1) of the LoGA and Article 35 paragraph (1) of the Marriage Law, a woman who is married to a foreigner is prohibited from buying land and buildings with HGB or in other words, cannot have HakMilik and HGB. on immovable objects. Therefore, the developer decided not to carry out PPJB or AJB with the applicant because this violates Article 36 paragraph (1) of the BAL. So that the applicant feels that his constitutional rights as a citizen have been violated or taken away, based on this reason, the applicant, namely Mrs. Ike Farida, applied to the Constitutional Court, which in essence, was the review of the constitutionality of legal norms. Finally, on 27 October 2016, the Constitutional Court partially granted Mrs. Ike Farida's application as the applicant relating to the review of Article 29 paragraph (1), paragraph (3), and paragraph (4) by issuing the Constitutional Court Decision Number 069/PUU-XIII/2015, and reject the applicant's application for other than and the rest.

Suppose you look at the Constitutional Court's Decision Number 069/PUU-XIII/2015. In that case, this opens up new opportunities for married couples to make a marriage agreement during the marriage bond or after the marriage takes place, there may be parties who are harmed, especially if the husband or wife wants to marry

take advantage of existing opportunities, primarily if the manufacture is based on bad intentions or intentions by one of the parties to fulfill their interests.

Legal remedies that can be taken to resolve the issue can be done through a litigation mechanism, where it is done by demanding cancellation by filing a lawsuit against the law on the agreement through the Head of the local District Court with the party being sued (defendant) based on the provisions of Article 1365 of the Civil Code: "Every act that violates the law, which brings harm to another person, obliges the person who because of his fault published the loss, compensates for the loss."

Referring to the description above, then with efforts to resolve problems through litigation mechanisms, this is done by filing a lawsuit to the court, which will ultimately result in a decision on the problem at hand. So the decision reflects the application of the theory of legal certainty.

IV. CONCLUSION

The power to bind a marriage agreement made before a notary for a third party after the marriage takes place, it can be concluded that referring to the Constitutional Court Decision Number 069/PUU-XIII/2015, concerning Article 29 paragraph (1) of the Marriage Law, the new marriage agreement can be valid against third parties after the ratification of the marriage agreement at DISDUKCAPIL for non-Muslims or KUA for Muslims. If the marriage registrar does not ratify the marriage agreement, then by itself, the marriage agreement does not have binding force against third parties. Settlement of problems with marriage agreements made after the marriage for third parties is associated with the Constitutional Court Decision Number 069/PUU-XIII/2015. It can be concluded that if there are problems with the marriage agreement that harm the third party, then the resolution of the problem is carried out by litigation through court procedures—based on the provisions of the prevailing laws and regulations and non-litigation such as arbitration, negotiation, mediation, conciliation, and expert judgment as stipulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

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