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Nuptial Agreement in Indonesia:

A New Change in Indonesian Marriage Law

Agus Yudha Hernoko (1st Author)
Universitas Airlangga, Faculty of Law
Private Law Department
Surabaya, Indonesia
yudha_fhunair@yahoo.co.id

Faizal Kurniawan (3rd Author)
Universitas Airlangga, Faculty of Law
Private Law Department
Surabaya, Indonesia
faizal@fh.unair.ac.id

Erni Agustin (2nd Author)
Universitas Airlangga, Faculty of Law
Private Law Department
Surabaya, Indonesia
erni@fh.unair.ac.id

Mahendri Putri (4th Author)
Universitas Airlangga, Faculty of Law
Magister of Notarial Law
Surabaya, Indonesia
mahendriputris031311133023@gmail.com

***Abstract*— Recently, there has been a new change in the Indonesian marriage law. The change is especially about the provision on prenuptial agreements in the Article 29 of the Act Number 1 Year 1974 on Marriage, resulting from the decision of Indonesian Constitutional Court's Decision Number 69/PUU-XIII/2015. Before the Constitutional Court's decision, the nuptial agreements must be made before the marriage, so called prenuptial agreement, which may only be changed if it was agreed by the parties and all such changes do not harm the third parties. In October 2015, the Indonesian Constitutional Court made a judicial review on this provision that was conducted related to the provision of Government Regulation Number 103 Year 2015 on Ownership of Dwelling of Residency House By Foreign Persons Domiciled In Indonesia that stipulates that Indonesian citizens who have married with foreign citizens without previously creating prenuptial agreement, will not be able to have rights to the land. Article 3 (1) of the Government Regulation specifies that Indonesian citizen who has married with foreigner can own the rights to the land if it is not a community property that is evidenced by the segregation of assets between husband and wife, which is made by notarial deed. In accordance with the Indonesian Constitutional Court's decision, the Article 29 of the Law Number 1 Year 1974 on Marriage shall be construed differently. Postnuptial agreement is now allowed to be made in Indonesia. This change may not only have positive sides, but also negative sides when the parties create postnuptial agreement in bad faith that may harm the third parties. This paper attempts to elaborate issues regarding nuptial agreements in Indonesia. This paper also compares the characteristics of nuptial agreements in Indonesian law and Dutch law, especially on definition, scope, requirements of validity, time, form, and legal protection for the third party. Secondly, this paper tries to find lessons learned regarding nuptial agreements from Dutch law for Indonesian marriage law reform, particularly regarding nuptial agreements. The analysis will be using statute approach, conceptual approach, and comparative approach.**

Keywords—Indonesian Marriage Law; Nuptial Agreement; Characteristic.

I. INTRODUCTION

Marriage in Indonesia is stipulated in the Act Number 1 Year 1974 on Marriage (hereinafter referred to as the Marriage Act 1974). This act was issued as an attempt of Indonesian government to create a unification of Indonesian marriage law that is rooted from values that match and are close with Indonesia to leave law that had been applied in Dutch colonialism era. One of important aspects on marriage that is stipulated in the Marriage Act 1974 is regarding prenuptial agreement which is on Article 29. This article sets prenuptial agreement in four subsections. The Article 29 (1) states that:"*At the time of or prior to the marriage performance, both parties may by mutual consent conclude a prenuptial agreement in writing, legalized by registrar of marriage, where upon the contents shall also be binding on third parties in so far as third parties are affected*." Then, the prenuptial agreement can only be legalized when it is not contrary to the restrictions set by the law, religion, and morality, as stipulated in the Paragraph 2 of Article 29. This provision reflects the criteria of the scope of prenuptial agreement.[1]

Compared to the previous regulation in *Burgerlijk Wetboek*, Indonesian Civil Code (hereinafter referred to as BW) that was applied in Indonesia based on concordant principle, prenuptial agreement is set in more detail. BW stipulates prenuptial agreement in Article 139 to 185. In Article 135 BW, it is stated explicitly that prenuptial agreement is made in order to deviate from the provision on matrimonial property. This means that prenuptial agreement is meant to stipulate separation of matrimonial property.

On the other hand, due to the simple stipulation on prenuptial agreement in the Marriage Act 1974, prenuptial agreement is not only interpreted to set regarding matrimonial property, but also other aspects, such as: tasks and obligation of husband and wife. In practice, there have been problems arise in creating prenuptial agreement due to the unclear stipulation in the Article 29. Prenuptial agreement is not only interpreted to set regarding matrimonial property, but also other aspects, such as: tasks and obligation of husband and wife. Again, compared to BW, prenuptial agreement's scope should be regarding the separation of matrimonial property.

Matrimonial property in the Marriage Act 1974 is stipulated in Article 35 that applies different principle compared to BW. The Article 35 embraces separation of matrimonial property. This Act recognizes community property as any assets gained during the marriage and separate property, namely any assets obtained before the marriage or by inheritance or grant. Community property is owned by both spouses, while separate property is owned by each spouse who obtained it.[2]

Every asset obtained by each husband or wife during the marriage are owned by both spouses. Any legal action upon the assets should be done by the consent of both spouses. This is in accordance to the Article 36 (1) of the Marriage Act 1974. In case of transnational marriage, when an Indonesian citizen married with foreign citizen, this provision shall also apply; yet, there is a problem arises when the property is land. Regarding land, there are provisions that must be considered, one of which is a prohibition for foreign nationals to obtain rights of ownership over land. Thus, in practice, transnational marriage couples are not allowed to have right of ownership on land, even though one of them citizens of Indonesia. When Indonesian citizens marry foreigners, according to Article 35 of the Marriage Act 1974, there is a common ownership of property acquired during marriage between husbands and wives, except for gifts and inheritance. This means that when Indonesian citizens who marry foreigners then buy land that has the status of property rights, the right to use or the right to use buildings, there is a joint ownership between the Indonesian citizen and foreign citizens. Meanwhile, the Land Regulation in Indonesia prohibits foreigners from possessing land with ownership status, use rights, and building rights (see Articles 21 and 26, 30, 36 of The Act Number 5 Year 1960 on Basic Agrarian Principle (hereinafter referred to as the Agrarian Act 1960)).

Ike Farida, an Indonesian citizen who married with a Japanese citizen, applied a judicial review against Article 29 of the Marriage Act 1974 to Indonesian Constitutional Court. Then, in the late 2015, Indonesian Constitutional Court considered that the Article 29 paragraph (1), paragraph (3), and paragraph (4) are unconstitutional. This decision has changed the provision in the Article 29 through its Decision Number 69/PUU-XIII/2015. This change was made with regard to land regulation in Indonesia that prohibits foreign citizen to have land ownership based on Nationality Principle. Article 21 (1) *jo.* 26 (2) of the Agrarian Act 1960), stipulate that any foreign citizens are not allowed to have right of ownership over land in Indonesia.

This Indonesian Constitutional Court decision has caused a change in Indonesian marriage law. Previously, the Marriage Act 1974 only set prenuptial agreement. After this decision, nuptial agreement may be created by spouses during the marriage, so-called postnuptial agreement. This change is basically intended to provide This change may arise several issues regarding the procedure to create such agreement, the requirements, and the protection for third parties.

Actually, this kind of provision allowing postnuptial agreement to be made is also recognized in the Netherlands and set in the Dutch Civil Code, Book 1 on Law of Persons and Family Law, Article 1:114 on that a nuptial agreement may be concluded by the prospective spouses before or during their marriage.

This article tries to elaborate the change of nuptial agreement and its implication in Indonesian marriage law and to look at how Dutch marriage law regulates about nuptial agreement to find lessons that can be learnt.

The approach used in this article is statute approach which analyzes the statutory regarding marriage law, especially nuptial agreement in Indonesia. Then the second approach used is conceptual approach that elaborates the concept of nuptial agreement, matrimonial property and other concepts regarding nuptial agreement. After that, comparative approach is used to find best practices in the Dutch law that can be learnt by Indonesia.

II. RESULTS

A. Characterictics of Nuptial Agreement in Indonesia after the Constitutional Court Decision Number 69/PUU-XIII/2015

Nuptial agreement is categorized as domestic contract which is different with commercial contract. Though, basic requirements to create a contract also apply here. This nuptial agreement is regarding the domestic interests of the spouses that also may cause legal consequences for the third party. Looking at the stipulation in the Marriage Act 1974, as mentioned before, this act has different principle of matrimonial property compared with the BW. From the provisions, it is understandable that in principle, the matrimonial property is separate, meaning that the property of each party that is gained before the marriage is basically the property of the husband or wife in private and under the supervision of each husband or wife that even has the full right (*beschikkingbevoegd*) to do legal acts concerning the property. Regarding the juridical consequences of a nuptial agreement under the Marriage Act 1974, there are two implications, that are the separation of joint property or the union of congenital property of husband and wife.

The nuptial agreement is set forth in Chapter V and is placed in only 1 (one) article, namely Article 29 of the Marriage Act 1974 consisting of 4 (four) verses, that states:

(1) at the time before the marriage takes place, the two parties to mutual consent may enter into a written agreement authorized by the Registrar, after which the content also applies to the third parties as long as the third party is involved;

(2) the agreement cannot be ratified when it violates the boundaries of law, religion and morals;

(3) the agreement is valid since the marriage takes place;

(4) during the marriage, the agreement is irrevocably, unless on both sides there is an agreement to amend and the change is not to harm a third party

From the stipulation, we can find that the clause of a nuptial agreement may not violate the law, morality, and religion which may result in the nullification of the agreement. Agreements that violate these norms may be terminated by third parties, even by unrelated ones.

In principle, the substance of the nuptial agreement is only regarding the marriage property. Since, even though husbands

or wives do not strictly regulate matters beyond the property of marriage, religious norms, propriety, customs and laws also bind the parties that make it. However, the third party is only bound by the nuptial agreement made by the husband and the wife limited to about the property. Other matters beyond the arrangement of marriage property, the third party is not bound by any consequences it may cause. A third party may also file a cancellation of the nuptial agreement, against any content or any part of the clause that harms a third party.

Based on the Article 29, the nuptial agreement may be changed during the marriage under conditions on the basis of agreement between husband and wife and shall not harm a third party. If the change of nuptial agreement is detrimental to a third party then the third party is not bound by the amendment of the nuptial agreement. This shows that the law provides legal protection for the third party.

Then, the timing to create this nuptial agreement in the Marriage Act 1974 is explicitly determined before or at the time of marriage. This nuptial agreement is valid since marriage takes place, as well as against a third party.

As explained above that the Constitutional Court Decision Number 69/PUU-XIII/2015 has resulted in the changes on the Article 29 of the Marriage Law. Firstly, about the time to create the agreement. Previously, the prenuptial agreement shall be made at the time before the marriage. The previous stipulation on Article 29 paragraph (1) which stated "…since the marriage" and paragraph (3) which stated "…during the marriage", imply the limitation of the freedom of the parities to determine the timing to create the agreement. This limitation is considered against the Constitution 1945 of Republic of Indonesia. The Constitutional Court considered that there may be needs to have postnuptial agreement to be made during the marriage.[3]

Based on the Constitutional Court, the nuptial agreement may be authorized by the registrar or the notary. Regarding this, there is no further stipulation on the authorization by the notary. This results in questions about further procedure that shall be conducted by the public notary.

The issuance of the decision of the Constitutional Court Number 69 / PUU-XIII / 2015 March 21, 2016 is related to the request of an Indonesian citizen who did a transnational marriage, which married without making marriage agreement. Then, the couple intended to buy a home/ flats, but because of the land law regulation that apply in Indonesia, which put the nationality principle as the priority, they are not allowed to have land ownership in Indonesia. This decision is applicable and legally binding. The legal consequences of the Constitutional Court Decision above creates a state new law (*declaratoir constitutif*).

If we look at the Decision of the Constitutional Court Number 69 / PUU-XIII / 2015 that mentions that "The agreement came into effect since the marriage takes place, unless otherwise provided in the Nuptial Agreement ". Then it is clear that the nuptial marriage agreements made throughout the marriage also applicable since the marriage is conducted, unless specified otherwise in the nuptial agreement. marriage in question.

Creating the postnuptial agreement during the marriage without determination its validity then cause the nuptial agreement binds since the marriage takes place. The nuptial agreement made causes the separation of the community property or the unite the separate property. Here, the principle of freedom of contract applies and the parties are granted the freedom to determine the substance of the agreement. When, the nuptial agreement is made during the marriage, but it binds since the marriage starts, then it may be detrimental to the third parties, i.e. creditor.

B. Nuptial Agreements in Dutch Civil Law

Compared with the development of Dutch law, as stipulated in the Title 1.8 Marriage Contracts, Section 1.8.1 on Nuptial Agreements in general, Article 114 states that: "Conclusion of a nuptial agreement before or during the marriage A nuptial agreement may be concluded by the prospective spouses before their marriage (prenuptial agreement) or during their marriage (postnuptial agreement)." Nuptial contracts may be made both by the prospective spouses prior to entry into their marriage and by the spouses during their marriage. Marital conditions mean an agreement between spouses, which governs the right to marital property (property and income). Marriage terms are agreed if the spouses want to deviate from the legal power system of the community of goods. The legal community of goods is created by law (automatically) when entering into marriage.

A nuptial agreement, in accordance with Dutch law, must be entered into by means of notarial deed under penalty of nullity. An authorization to represent one of the partied in entering into a nuptial agreement must be granted in writing and must include the provisions to be drawn up in the nuptial agreement.[4] The postnuptial agreement has caused an issue about the protection of third parties. In accordance with the Article 1:116 Dutch Civil Law, provisions in a prenuptial agreement can only be invoked against third parties who were unaware of their existence if those provisions have been registered in the public Marital Property Register, kept at the Registry of the District Court in whose district the marriage was contracted or, if the marriage has been contracted outside the Netherlands, at the Registry of the District Court of The Hague. The organisation and method of consultation of the Marital Property Register shall be regulated by Order in Council.

By Order in Council it is possible to regulate, in derogation from paragraph 1, that the register shall be kept elsewhere than at the Registry of the District Court. It is possible as well to regulate by Order in Council that the presentation of data which are to be registered in the register can take place only in a manner as defined in that Order in Council.

Furthermore, as stated in Article 1:120 of the Dutch Civil Law, a nuptial agreement made or changed during the marriage (postnuptial agreement), takes effect from the day following the one on which the notarial deed has been executed, unless it is indicated a later time for this purpose. The provisions in such a postnuptial agreement can only be invoked against third persons who were uninformed of their existence, if those provisions have been registered in the public Marital Property Register for a period of at least fourteen days. Regarding the substance of the nuptial agreement, the spouses may derogate from the stipulation on marital community property, provided that the derogating provisions are not contrary to the rules of mandatory law, morality or public order. The parties may not determine that in their relationship, one of them is accountable for a greater portion of the debts than his share in the assets of the community of property. Parties cannot deviate from rights derived from having authority over children (parental responsibility), nor from rights granted by law to a surviving spouse.

III. CONCLUSION

In Indonesian marriage law, the stipulation on nuptial agreement has changed due to the Constitutional Court Decision Number 69 / PUU-XIII / 2015. Previously, postnuptial agreement is not allowed in accordance with the Marriage Act 1974, then it is now possible to create postnuptial agreement even though it is not made by spouses of transnational marriage. This result in legal consequences, that separation of matrimonial property may be conducted after the marriage; thus, this may not be detrimental to the third parties if the postnuptial agreement is created in the absence of good faith. The good faith of the parties in postnuptial agreement must take precedence. Further stipulation on the implementation of the provisions on nuptial agreement, especially, postnuptial agreement, is needed to provide clearer regulation. This is important to provide legal protection to the spouses and also the third persons.

REFERENCES

[1] The Act Number 1 Year 1974 on Marriage (State Gazette No. 1, No. 3019).

[2] Government Regulation Number 9 Year 1975 on the Implementation of The Act Number 1 Year 1974 on Marriage (State Gazette No. 1, No. 3019)

[3] Constitutional Court Decision Number 69 / PUU-XIII / 2015, March 21, 2016 http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/69_PUU-XIII_2015.pdf. Accessed 1 November 2017.

[4] DutchCivilLaw, http://www.dutchcivillaw.com/civilcodebook01.htm Accessed 1 November 2017.