

Legal Consequences of Marriage Agreement that is Made After The Marriage Exists for Husband and Wife Who Have Debts

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Abstract.

Marriage is a physical and mental bond between a man and a woman, hereinafter referred to as husband and wife. In marriage, there are married couples who make a marriage agreement. The Constitutional Court issued Constitutional Court Decision Number 69/PUU-XIII/2015 which states that a marriage agreement can now be made after a marriage has taken place. Debt arising in a marriage is very possible, this can be done by both husband and wife. The result of this research is that liability cannot be asked of the husband and wife if the husband or wife does not first agree to a credit agreement with collateral for joint property. This type of research is normative research that uses a statutory approach and uses primary legal sources and secondary legal materials. The legal material analysis technique used is qualitative analysis, namely discussing the legal material that has been obtained by referring to the existing theoretical basis.

Keywords: Debts and Credits, Marriage and Marriage Agreement.

I. INTRODUCTION

The definition of marriage is contained in Law No. 1 of 1974 concerning Marriage in conjunction with Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage (referred to as the Marriage Law). Marriage is a physical and mental bond between a man and a woman as husband and wife who have the aim of building a lasting and happy family based on God Almighty. Based on Article 1, it can be concluded that the definition of marriage is a bond arising from a man and woman who establish a relationship as husband and wife to live together in order to create a prosperous family. From this article, it can also be seen that the purpose of marriage is to form a happy and eternal family based on God Almighty (Hilman Hadikusuma, 2007: 21)^[1]. Marriages that occur in Indonesia are on average held to build a family. Considering that Indonesia is a culturally diverse country, there is also diversity in marriage. The form of marriage depends on the culture of the married couple. In marriage, there are causes of divorce, namely infidelity, which is one form of violation of marriage that may occur to a married couple. The impact resulting from marriage as a form of legal action is essential. The closest effect is the bond named as the marriage bond. Article 2 of the Marriage Law regulates the legal conditions of marriage. The article states that a valid marriage is a marriage that is carried out based on the laws of each religion or belief and recorded according to the applicable laws and regulations. Indonesians who are Muslims can register their marriages at the Office of Religious Affairs. As for those who adhere to religions other than Islam, registration is carried out at the Civil Registry Office. So that if someone only marries based on religion law, it can be said to be an invalid marriage. In Indonesia, marriage law also regulates property.

There are 2 types of marital property (Article 35 of the Marriage Law), namely inherited property and shared property. Inherited property has the meaning of property that is brought by the husband or wife before the marriage takes place which is obtained from inheritance, grants, gifts, and so on (Hartanto, 2012: 63)^[2]. Meanwhile, shared property is property obtained during the marriage period. This is different from the provisions in the Civil Code, because in the Marriage Law, marital property is not one. So that there are 2 kinds of property, namely inherited property and shared property. The property between a man and a woman in marriage and existing at the time of marriage can be called marital property. If there is no agreement

between husband and wife before marriage regarding the separation of property, then the property owned by the husband and wife obtained during the marriage becomes shared property. Shared property is a word that cannot be separated because it is a unity, so that the property can be enjoyed by husband and wife with equal rights and obligations. If a husband or wife wants to sell or transfer shared property, the consent of one of the parties is required. If a husband/wife does not want their property to become shared property, it becomes a necessity to enter into a marriage agreement. A marriage agreement has the meaning of an agreement between the two parties, namely husband and wife, which is made in a form of writing, which is legalized by the marriage registrar and its contents also apply to third parties as long as the third party is involved. Article 29 of the Marriage Law regulates marriage agreements, which are:

- (1) At the time or before the marriage takes place, the two parties by mutual consent can make a written agreement legalized by a marriage registrar, after which the contents shall also apply to third parties as far as third parties are concerned.
- (2) The agreement cannot be legalized if it violates the boundaries of law, religion and decency.
- (3) The agreement is valid from the time when the marriage is contracted.
- (4) During the marriage the agreement cannot be amended, unless both parties consent to the amendment and the amendment is not detrimental to a third party.

Marital agreements are made by married couples usually when one party has more assets than the other. Marital agreements are also generally made when the spouses bring in a lot of inputs (*aanbrengst*) and if each spouse has a business. This is necessary because if one party collapses, it will not include the other party. In addition, each person must have a sense of responsibility as an individual for debts that existed before marriage (R. Soetjono Prawirohamidjojo, 2006: 58)^[3]. Because the Marriage Law does not regulate in detail what the purpose of the marriage agreement is, the content of the agreement is entirely up to husband and wife. Article 29 paragraph (1) of the Marriage Law explains that: "At the time or before the marriage is held, both parties by mutual consent may submit a written agreement which is legalized by the marriage registrar after which the contents also apply to third parties involved". Before the Marriage Law was created, marriage agreements were dependent on the Civil Code. After the Marriage Law came into existence, Article 66 of the Marriage Law regulates that: "For marriage and everything related to marriage based on this law, with the enactment of this law, the following regulations regulated in the Civil Code (*Burgerlijke Wetboek*), the Indonesian Christian Marriage Regulation (*Huwelijks Ordonantie Christen Indonesiaers*) No. 74 of 1933, the Mixed Marriage Regulation (*Regeling op de gemengde Huwelijken S 1898 No. 158*) and other regulations governing marriage within the scope of this law are declared invalid". In Article 147 of the Civil Code, a marriage agreement must be signed and made with a notarial deed (notarial/authentic), not under hand. This is different to Article 29 paragraph (1) of the Marriage Law which only mentions a written agreement without any confirmation whether it is required by notarial deed or under hand.

Therefore, it can be concluded that in accordance with the above provisions, Indonesian marriage law is flexible in terms of making a marriage agreement. A marriage agreement can be made with a notarial deed, under hand only, or under hand with notary legalization. So that the legal basis used in the marriage agreement is not Article 147 of the Civil Code, but Article 29 paragraph (1) of the Marriage Law. Since the release of the Constitutional Court Decision Number 69/PUU-XIII/2015, the making of a marriage agreement can be carried out after the marriage is held and a notary can notarize the marriage agreement. So far, when referring to Article 29 of the Marriage Law, only the Marriage Registrar can ratify the marriage agreement, so the Constitutional Court gave notaries a new authority to legalize marriage agreements and will be called authentic deeds. Authentic deeds have an important role because they can be used as evidence in court hearings if there is a conflict about each other's assets. Authentic deeds have perfect evidentiary power, so that legal certainty can be achieved for husbands, wives, and third parties (Yunita Prayogo, et al., 2021: 167-168)^[4]. One of the considerations in a marriage agreement is openness in disclosing all details of financial conditions both before and after marriage. In this case, the inherited debt also needs to be disclosed in the amount, so that it can be known what debts each party has, what the potency of the debt is after marriage and who is responsible for repaying the debt. The goal is so that no party feels disadvantaged later.

II. METHODS

This research uses normative research methods or doctrinal legal research. This study is prescriptive research that aims to study legal concepts and all provisions in laws and regulations as well as practices related to the unilateral cancellation of agreements as unlawful acts (Peter Mahmud Marzuki, 2014: 22)^[5]. This research is done by using a statute approach, which is by searching and examining laws and other related regulations, because in this legal research, the author seeks a solution to legal problems based on applicable laws and regulations. This legal research used primary legal materials and secondary legal materials. Primary legal materials consist of laws and regulations, official records, and judges' decisions. Meanwhile, secondary legal materials include books, legal dictionaries, and legal journals (Peter Mahmud Marzuki, 2014: 181)^[6].

Primary legal materials are legal materials in the form of laws and regulations related to the formulation of the problem above. The purpose of using primary legal sources is to find a legal basis related to the problem under research. This legal material includes the Civil Code, Law Number 16 of 2019 Amending Law Number 1 of 1974 concerning Marriage, and Constitutional Court Decision Number 69/PUU-XIII/2015. Meanwhile, secondary legal materials are legal materials that provide explanations and information regarding primary legal materials (Mamudji, 2005: 32)^[7]. This legal material is collected through books, newspapers, scientific journals, theses, dissertations, and internet searches related to marriage agreements. The technique of collecting legal materials in this research uses library research techniques. Then the legal material analysis technique used is qualitative analysis, namely discussing the legal material that has been obtained by referring to the existing theoretical basis (Mukti Fajar and Yulianto Achmad, 2010: 182)^[8].

III. RESULT AND DISCUSSION

1) Legal Protection for Creditors in Marriage Agreement

Marriage Agreement is an agreement made by husband and wife concerning their property during marriage. Previously, it was determined that a marriage agreement could only be made at the time or before the marriage was held, this is regulated in Article 29 paragraph (1) of the Marriage Law. However, after the issuance of the Constitutional Court Decision Number 69/PUU-XIII/2015, there was a change, that is a marriage agreement can be made after or during marriage. Husband and wife can do legal actions against their shared property with the consent of both parties, such as selling, renting and pledging joint property to obtain credit facilities. Credit agreements made by husbands and wives, in practical terms, must always be followed by the consent of both parties, and if an agreement is reached, the husband and wife must sign the credit agreement together. If in the credit agreement one of the parties is not willing to sign or for some reason cannot participate in signing the agreement, then the credit agreement is canceled or rejected by the bank.

However, in the case of a debtor who makes a marriage agreement after the credit agreement, of course it has legal consequences, that is, the marriage agreement also binds third parties who have an interest, in this case the creditor. If there is a change in the agreement, it must not disadvantage third parties. Bank creditors as third parties in this case, are obliged to know how the position of the husband and wife's assets in relation to the certainty of the repayment of receivables. Therefore, the marriage agreement has an important role to assume the position of the assets owned by the husband and wife as a shared or separate repayment guarantee. In relation to preventive legal protection in marriage agreements for bank creditors, bank creditors need to pay attention to the validity of the marriage agreement and the form of the marriage agreement made to determine the status of the husband and wife's property. The validity of the marriage agreement can be seen from the elements of the marriage agreement, which are (Kadek Megah Bintaranny, et al., 2020: 40)^[9]:

- a. Made by (candidate) husband and (candidate) wife;
- b. Made in writing in the form of an authentic deed;
- c. Does not violate the elements of decency and public order;
- d. The element cannot be changed but can be changed or canceled as long as it does not disadvantage third parties.

The fourth element of point (d) becomes a dilemma for third parties if there is no good faith from the debtor in informing changes or cancelations. However, based on the Decision of the Constitutional Court Number 69/PUU-XIII/2015, if it is proven that the debtor is disadvantaging the creditor, then the change in the marriage agreement can be canceled or sued to the court, and the agreement is still in full force for the bank creditor. In the case that the debtor defaults, the guarantee from the debtor can be used to pay off the shortfall of payments that should have been paid by the debtor. The bank needs to clearly and correctly ascertain the form of the marriage agreement made by the husband and wife before signing the bank credit agreement.

Meanwhile, in the settlement of non-performing loans based on the time of making the marriage agreement, a marriage agreement made before and after the marriage can be divided (Putri, et al., 2018: 114-115)^[10]:

a. Credit agreements made before marriage are debts that each party is responsible for. So that the debtor is considered to have guaranteed the personal property he or she had before the marriage took place and can be taken by the bank creditor if the debtor defaults without the consent of his spouse.

b. Credit agreements made after marriage but there is no marriage agreement, the bank creditor is obliged to receive a marriage agreement that has been legalized by the marriage registrar and made in the form of a notarial deed in advance to obtain certainty of property guarantees.

c. Credit agreements made after marriage and there is a marriage agreement, there is a separation of property where the debtor can guarantee his personal property which has been included in the list of assets of each party so that when the debtor defaults, the bank creditor can claim the property guarantee without disadvantaging the debtor's spouse's property.

d. Credit agreements made after marriage and there is a marriage agreement with changes or cancelations, then the contents of the changes to the marriage agreement must not contradict the credit agreement with the bank including the material guarantee. If in the future the amendment or cancellation of the marriage agreement proves to be disadvantaging the bank creditor or without having the bank creditor's consent, the bank creditor can sue the amendment or cancellation of the marriage agreement and can still execute the debtor's property guarantee if the debtor defaults.

If in the future a dispute occurs due to the debtor's negligence in legalizing his or her marriage agreement and causing losses to the bank creditor in resolving problem loans, the creditor can request repressive legal protection, which is submitting a lawsuit to the court. However, credit problems themselves can be resolved with 2 (two) strategies, including (Hermansyah, 2014: 75-77)^[11]:

a. Credit rescue, is a step to resolve credit problems through renegotiation between banks as creditors and debtors as borrowers. The rescue step is by rescheduling, reconditioning, and restructuring, according to Bank Indonesia Circular Letter Number 26/4/BPPP.

b. Credit settlement, is a step to resolve non-performing loans through legal institutions if the last attempt to save non-performing loans through restructuring is not effective.

2) Legal Consequences of the Existence of Debts Before the Marriage Agreement by Husband and Wife

Article 35 and Article 36 of the Marriage Law regulate property in marriage. There are 2 kinds of property in marriage, namely shared property and inherited property. Shared property is property obtained during marriage outside of gifts or inheritance (Abdul Manan, 2006: 108)^[12]. So this property is obtained from their business or on their own business during the marriage period. Meanwhile, inherited property is property obtained by the wife or husband before marriage and its control is in each of them as long as no other terms are determined by the parties. From that explanation, it can be concluded that shared property can be used if there is consent from the marriage partners, unless otherwise agreed. This is regulated in Article 29 of the Marriage Law. Then over time the Constitutional Court issued Constitutional Court Decision Number 69 / PUU-XIII / 2015 which stated that a marriage agreement could be made after a marriage was held. Debts in a marriage are possible, and can be made by either the husband or the wife. According to Prof. Subekti, there are two kinds of marital debts, namely personal debts (prive debts) and debts of unity (gemeenschap debts), namely debts used for joint purposes (Subekti, 1995: 34)^[13]. Subekti also argues that in

the case of personal debt, the husband or wife needs to sue the person who made the debt, and the private object (personal object) must first be confiscated. If the personal property does not exist or exists but is insufficient, then the shared property will also be seized, and conversely.

For joint debts, the *gemeenschap* ("shared") property is the first to be confiscated. If this is insufficient, the personal property of the husband or wife who created the debt will also be confiscated (Julius Martin Saragih, et al., 2017: 2-3)^[14]. In this situation, the repayment of personal debt that can be requested from the shared property is personal debt originating from a debt and credit agreement with the agreement of the spouse. This is a logical thing, because if a husband or wife makes a debt, it will have an impact on the shared property if in the case of repayment the husband or wife is unable to repay it, and it should be noted that actions regarding shared property need to get the agreement of the spouses. Therefore, if the wife is in debt without the approval and consent of the husband, liability cannot be assigned to the husband's property because personal debts cannot be paid from the spouse's personal property, and cannot be paid from shared property because there is no agreement. The regulation on the definition of debt and credit has similarities with the loan and borrowing agreement that is regulated in the Civil Code (KUHPerdata) Article 1754 which explains that loan and borrowing is an agreement by which one party gives the other party a certain amount of goods and is depleted due to use, with the condition that the latter will return the same amount of the same kind of conditions (R. Subekti & R. Tjitrosudibyo, 1992: 451)^[15]. The existence of debt in marriage is not excluded from efforts to fulfill needs. So that if you are unable to pay off the debt, it will certainly be a problem. Assets and debts are related to marriage because married life is always faced with income and expenses, which are often the main problem. A marriage agreement or agreement is an agreement regarding the property of husband and wife during their marriage. The regulations in the Civil Code and the Marriage Law are different. The Civil Code explicitly states that after the marriage takes place, the marriage agreement cannot be changed in any way (Article 149 of the Civil Code).

In contrast to the provisions in the Marriage Law, changes to the marriage agreement during the marriage can be made upon the agreement of both parties, namely the husband and wife, and as long as it does not disadvantage third parties (Article 29 paragraph (4) of the Marriage Law). However, currently the regulations of the Marriage Law are the ones that apply. In the making of a marriage agreement, a married couple can agree on all forms of exceptions to the desired (unanimous) property union, including a complete property separation agreement and a marriage agreement which is a limited mixture of wealth (*beperkte gemeenschap van goederen*), namely the union of profits and losses (*gemeenschap van wins ten verlies*) and the union of results and income (*gemeenschap van vruchten en inkomsten*). The existence of debts in marriage can be classified as a shared responsibility. This is because in a marriage where there are debts, they are debts that are used for mutual purposes and by mutual consent, so that they become mutual risks and responsibilities. However, if the marriage agreement is made after the marriage is held to avoid debt collection by the husband or wife by a third party before the marriage agreement is made, based on Article 29 paragraph (4) of the Marriage Law stipulates that during the marriage the agreement may not be revoked or changed during the marriage unless there is an agreement between the two parties and does not harm third parties. In the situation where the marriage agreement is made by the husband or wife with the aim that the shared assets are separated so as to avoid the obligation to pay debts to third parties, then the marriage agreement can be canceled because it has become a form of effort by the husband or wife to avoid their responsibilities, namely completing debt payments. So that the assets that are separated as a result of making a marriage agreement can be taken as shared assets so that debt payments can be made. Indonesian citizens who make marital agreements are a common thing. The Legal Institution of Marital Agreements that emerged from the western continental legal system has actually been recognized by Indonesian civil law. However, there is still a lack of understanding among the Indonesian people regarding the meaning of a marriage agreement made by a couple after the marriage is conducted.

What many people know is that a marriage agreement is made before or at the time of marriage. The reasons that can be the basis for making a marriage agreement after a marriage in more detail are:

a. There is negligence or unknowing that there is a regulation in the Marriage Law which stipulates that a marriage agreement can be made before the marriage is held.

b. There were possible risks arising from the existence of shared assets. The applicants were concerned that the applicant's jobs had consequences and responsibilities for their personal property, so that each of the assets they had received could still become the personal property of the applicants.

c. There is an individual behavior. Individual behavior comes as a result of the environment and human civilization that is increasingly liberated and imitates western life, which ultimately affects married couples and makes a marriage agreement.

d. There is a desire to have a certificate of ownership of land. The UUPA and its implementing regulations state that only Indonesian citizens can hold certificates with property rights to land and that if the person concerned after obtaining a certificate of property rights marries a foreign citizen then within one year after the marriage he or she must release the property right to the land to another entitled legal subject.

A marriage agreement made after the marriage is held in order to regulate the cause and effect of marital property after the marriage has taken place, where there are several assets that are not the same, either larger or smaller, on one side, namely the wife or husband. So that basically the marriage agreement after marriage is always related to the issue of property in marriage.

IV. CONCLUSION

1. Preventive legal protection for bank creditors in a marriage agreement is that the marriage agreement must be made in the form of a notarial deed and legalized by a marriage registrar employee. If in the future there is a conflict due to the debtor's negligence in validating the marriage agreement and causing losses to the bank creditor or there is bad faith in changing or revoking the marriage agreement, the bank creditor can request repressive legal protection, namely filing a lawsuit in court.

2. If the husband or wife does not first agree to a credit agreement with the guarantee of shared property, then liability cannot be asked from the husband and wife. The marriage agreement after the Constitutional Court Decision Number 69/PUU-XIII/2015 does not provide legal certainty for third parties because there are concerns if the husband and wife have bad intentions when making the marriage agreement. So in order to achieve legal certainty for third parties who act as credit facility providers, the husband and wife are required to register the marriage agreement so that the principle of publicity is fulfilled.

REFERENCES

- [1] Bintaranny, Kadek Megah., I Nyoman Putu Budiarta., I Wayan Arthanaya. (2020). Perlindungan Hukum Bagi Kreditur Bank Pada Perjanjian Kawin dalam Perkawinan Campuran. *Jurnal Interpretasi Hukum*, 1(1), 37-43.
- [2] Fajar, Mukti dan Yulianto Achmad. (2010). *Dualisme Penelitian Normatif & Empiris*. Yogyakarta: Pustaka Pelajar.
- [3] Hadikusuma, Hilman. (2007). *Hukum Perkawinan Indonesia: Menurut Perundangan, Hukum Adat dan Hukum Agama*. Bandung: Mandar Maju.
- [4] Hartanto, J. Andy. (2012). *Hukum Harta Kekayaan Perkawinan (Menurut Burgerlijk Wetboek dan Undang-Undang Perkawinan)*. Yogyakarta: Laksbang Grafika.
- [5] Hermansyah. (2014). *Hukum Perbankan Nasional Indonesia*. Jakarta: Kencana Prenada Media Group.
- [6] Manan, Abdul. (2006). *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Prenada Media Group.
- [7] Mamudji, Sri. *et al.*, (2005). *Metode Penelitian dan Penulisan Hukum*. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia.
- [8] Marzuki, Peter Mahmud. (2014). *Penelitian Hukum (Edisi Revisi)*. Jakarta: Kencana Prenada Media Group.
- [9] Prawiroadmiyojo, R. Soetojo. (2006). *Pluralisme Dalam Perundang-undangan Perkawinan di Indonesia*. Surabaya: Airlangga University Press.
- [10] Prayogo, Yunita., Efi Yulistyowati., Agus Saiful Abib. (2021). Implikasi Perjanjian Perkawinan Sebelum dan Sesudah Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 Terkait Harta Benda pada Perkawinan Campuran. *Semarang Law Review (SLR)*, 2(2), 164-175.
- [11] Putri, P. Y., Djatmika, P., & Puspitawati, D. (2018). Implikasi Yuridis Perjanjian Perkawinan yang Dibuat Selama Dalam Ikatan Perkawinan Terhadap Utang Bersama Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015. *Legality*, 26(1), 95-117.

- [12] Saragih, Julius Martin., Yunanto., & Herni Widanarti. (2017). Pertanggungjawaban Hutang-Hutang Persatuan Setelah Putusnya Perkawinan. *Diponegoro Law Journal*, 6(1), 1-14. <https://doi.org/10.14710/dlj.2017.15676> .
- [13] Subekti, R., R. Tjitrosudibyo. (1992). *Kitab Undang-Undang Hukum Perdata*. Jakarta: Pradya Paramita.
- [14] Subekti, R. (1995). *Aneka Perjanjian*. Bandung: Intermasa.