



The Position of the Marriage Covenant in Positive Law and Islamic Law

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ABSTRACT

This study was to determine and analyze the position and legal consequences of marriage agreements in positive law in Indonesia the method of this study is normative jurisprudence that examines the legal regulations through a literature study which is then analyzed and described in the results of research the results of the study revealed that the agreement made before marriage has a position that the, and Kompilasi Hukum Islam, this marriage agreement is made for the sake of legal protection of the property of each, husband or wife. As a result of the law of the marriage agreement on marital property, the togetherness of marital property is limited in accordance with the marriage agreement, in addition to the existence of legal protection against the ownership of property in marriage for the husband or wife, the marriage agreement must not violate or conflict with public order, morality, law and religion. The marriage contract is valid at the time or since the marriage took place. The agreement in principle should not be changed after the marriage took place.

INTRODUCTION

Marriage occurs because of the impulse from within each human being to live together with other humans. It is the nature of two human beings with different sexes, namely a man and a woman there is a mutual attraction to each other to live together.

Indonesia is a country consisting of various ethnicities, tribes, religions and groups. As one of the largest countries in the world, Indonesia is a complex and plural country. Various communities are here. But Indonesia is known as a country that adheres to the well-known Eastern customs of politeness and high kinship. But with the passage of time and civilization, people's lives are now semikin complex and complicated.

Marriage is a very important event in human life because in it there are elements of the rights and obligations of each party regarding the issue of family life that must be met. In marriage to take care of the worst possible thing that will happen before almost every married couple makes an agreement that we often hear about the marriage agreement.

Marriage that occurs between a man and a woman, will cause physical and mental consequences between them, to the community and also its relationship with the property acquired between them both before and during marriage.

The occurrence of a marriage not only brings consequences on the rights and obligations, the common property of the child's position but also involves inheritance, kinship, kinship and performing

traditional and religious ceremonies. In the view of society, the regulation of marital property differs from one legal system to another. According to Islamic law, the property of spouses is separate. Each spouse has his or her own property.

If they are married, they will have a covenant with God. "The marriage covenant is a covenant of politeness and high kinship which is held by the prospective / prospective husband / wife in arranging (circumstances) property or wealth as a result of their agreement. Thus, the marriage agreement is necessary if the prospective husband and wife at the time of marriage have indeed had property during the marriage is expected to obtain property. The marriage agreement in Indonesia is not very popular, because entering into an agreement on property between the future husband and wife, may be felt by many people is inappropriate, even offensive.

Marriage itself has many consequences in the legal field. The legal consequences can be grouped into 2 (two) groups, namely the first group which is the result of marriage against the person, husband and wife, and the second group is the material consequences of the legal consequences against the wealth of the husband and wife, both existing and existing.

The marriage covenant is an agreement between a prospective husband or wife, to regulate the consequences of marriage on their property, which deviate from the Union of property. The marriage agreement as an agreement on the property of the spouses is possible to be made and held as long as it does not deviate from the principles or patterns established by law.

So far, only a small percentage of Indonesian people who make the agreement before marriage. The notion that after marriage everything merges into one makes every couple feel reluctant to make the agreement.

METHOD

The method of approach used is juridical normative, which is a study that examines the legal regulations relating to the marriage agreement through the study of literature which is then linked to the data and habits that live in the middle of society. This study is descriptive analysis. That is to say that this study is a study that describes, examines and explains and analyzes the applicable laws and regulations regarding how the position of the marriage agreement and its legal consequences.

RESULTS AND DISCUSSION

A. The Position Of The Marriage Covenant In Positive Law

According to Article 147 B. W., a marriage agreement must be drawn up: by a notarial act, at the time before the marriage is entered into.

This is done, except for the validity of the marriage agreement, also: a) to prevent hasty actions, since the consequences of this agreement will be borne for life; b) for the existence of legal certainty.) as the only valid means of proof. D) to prevent the possibility of smuggling under the provisions of Article 149 BW. (after the marriage is concluded, then in any way, the marriage agreement cannot be changed).

However, in Article 29 paragraph 4 of Law No. 1 of 1974 on marriage, the marriage covenant and both parties agree to change it does not harm the third party.

At the time before the marriage took place this condition is held with the intention that after the marriage took place can be known with certainty, about the marriage agreement and the contents of the marriage agreement. The marriage contract is valid for the duration of the marriage and cannot be changed. So long as the marriage takes place only one kind of marital property law applies, except when there is a separation of property or separating tables and beds (*scheiding van tafel en bed*).

The principle on the enactment of one kind of marital property law is held by the legislator:

1. Article 197 B. W. when wealth is taken away, it is as if it had never been "taken away". The term "togetherness" (*gemeenschap*) *dalam pasal 197 B. W.* the meaning is that each togetherness, either the togetherness of wealth in a round, or the togetherness of limited wealth. If a marriage contract is not made, then there will be another Mutual Wealth, and if a marriage agreement is made, then the marriage agreement is valid again.
2. Article 248 B. W. which contains the provision that if there is peace (*verzoening*) between husband and wife after separating the table and bed, then the legal situation of "separation" is restored, in the sense, as if there had never been any separation. In Section 197 B. W. used the term "togetherness". (*gemeenschap*) which means: every togetherness, both the togetherness of wealth in a round or limited togetherness of wealth. If the marriage contract is not made, then there will be

another mutual property, and if the marriage is valid again.

3. Article 232A B. W. (S. 1923-31 jo. S. 1928-546): the above principle also applies in the event of remarriage (reparatie huwelijk, Article 33 B. W.), after the marriage broke up due to divorce. As long as the marriage has not taken place, the marriage agreement can still be changed. According to the provisions of Article 148 paragraph 1 B. W. its change must be made by a notarized certificate. The change is considered valid if it is agreed by those who were previously parties (partij). Pasal 148 ayat 2 B. W. mention: not only those who give permission for the agreement, but also those who give gifts to the future husband and wife.

If the "help" is not obtained, then the marriage agreement cannot be changed. In general, marriage agreements that have been made can be nullified. A husband and wife can marry without a marriage agreement and with the status of mutual marital property unanimously (algehele gemeenschap van goederen).

The parties who must provide the assistance required by the prospective husband and wife are those who must give permission to marry. However, they were able to make it difficult for the future husband and wife with j alan withdrawing his marriage license.

If those who give gifts (Schenking) refuse to provide assistance to change the marriage agreement, then by releasing the schenking, the future husband and wife can still marry by making another marriage agreement or marrying with the joint marital property unanimously.

Fill Out The Marriage Agreement. Principles defined in B. W. the husband and wife are free to decide what they want in the marriage contract. Article 139 B.W. determining that in the marriage agreement, both prospective spouses can deviate from the provisions stipulated in the togetherness of property, provided that the deviations are not contrary to public decency and order (openbare order).

Such provisions are also contained in Article 23 A.B. generally applicable to any agreement, thus the provisions of Article 139 B. W. the above is no longer needed because it is considered too much.

The principle of freedom of contract of both parties in determining the content of the marriage agreement is limited by the following provisions:

1. The agreement concluded does not contradict Article 23 A.B. above and Article 1335 B. W. which determines that agreements made for false and forbidden causes have no legal force. This is the same as the prohibition to marry more than one wife or the prohibition to ask for a divorce. Although both are not expressly set out in B. W., but not allowed to be contained in the marriage agreement. For example, the right of the husband to determine the place of residence or to take care of.
2. Not made promises that deviate from :a) the rights arising from the power of the husband as the head of the marriage (Article 140 paragraph 1 of the Civil Code),. For example, the right of the husband to determine the place of residence or to take care of joint property (Article 124 B. W.).b) rights arising from parental authority (ouder-lijke macht), e.g. the right to take care of the property of the child N A k d a n m e n g a m b i l k e p u t u s a n - k e p u t U s a n m e n g e n a i education or care for children (the content of parental. The rights prescribed by law for the longest-living bride (langstlevende echtgenoot) for example, to be a guardian and to be authorized to appoint a wali by testament (2) a), b), c) are set out in Article 140 B. W).
3. There are no covenants against the inheritors. It is (Article 141 B.W.) perceived excessive (overbodig), therefore article 1063 B. W. has also set the prohibition to release the right to inherit from the living.
4. It is not made an agreement that one of the parties will assume a greater debt, from its share in activa.

Some legal scholars argue, that in this case, the passive should be divided according to the balance of activa. Pitlo argued that the agreement should be considered non-existent, because it contradicts the law. So the provisions on the togetherness of marital property apply, meaning that each husband and wife will bear half of the share.

Prospective spouses may not enter into an agreement (beding) with General words (in algemene bewoordingen) that the law of their marital property will be governed by the laws of foreign countries, or by customs, laws, statutes or local regulations in force in Indonesia. This provision is held for legal certainty. So, what is allowed is if the content of the legislation of a foreign country or

customary law is formulated in as much detail or as clearly as possible.

B. According To Law No. 1 Of 1974 On Marriage

The marriage agreement in practice is not in demand by future husbands and future wives, because this agreement is considered too materialistic and does not correspond to our Eastern customs. In addition, the marriage agreement is not yet a popular legal institution in Indonesia, but in order to accommodate the needs of some members of the community and future legal developments, Law No. 1 of 1974 on marriage provides provisions regarding it in it.

Regarding the arrangement of marriage agreements, Law No. 1 of 1974 on marriage regulates it in Article 29 which consists of 4 paragraphs. The contents of Article 29 paragraph 1, namely :“ at the time or before the marriage takes place, the two parties by mutual agreement may enter into a written agreement certified by the employee Registrar of marriage, after which the contents also apply to third parties as long as the third party is involved”.

Article 29 paragraph 1 above does not explicitly say that the agreement in question is a marriage agreement. In the article it is only mentioned that the two parties by mutual agreement may enter into a written agreement authorized by the Registrar of marriages, but because Article 29 is placed in Chapter V of the marriage agreement, it is concluded that the written agreement referred to in Article 29 paragraph 1 of Law No. 1 of 1974 on marriage is a marriage agreement. The agreement referred to in this article does not include taklik-talak.

Furthermore, in Article 29 paragraph 1 of Law No. 1 of 1974 on marriage, also states that :“.... both parties by mutual agreement may enter into a written agreement....” , because the one who will enter into marriage is the prospective husband and wife, then what is meant by both parties in the provisions of Article 29 paragraph 1 is that the two prospective husbands and wives who will marry are.

Marriage agreement according to Law No. 1 of 1974. Understanding marriage agreement in Law No. 1 of 1974, regulated in Chapter V, Article 29, namely :

1. At the time of or before the marriage is entered into, both parties by mutual agreement may enter into a written

agreement notarized by an employee of the Registrar of marriages, after which the contents shall also apply to third parties, insofar as third parties are involved.

2. The covenant cannot be ratified if it violates the boundaries of law, religion and morality.
3. The agreement comes into force from the moment the marriage is concluded.
4. During the marriage, the agreement cannot be changed, unless both parties agree to change and the change does not harm the third party.

Prospective husband and wife, before the marriage took place by mutual agreement can enter into a marriage agreement (Huwelijkvoorwarden), which include :

1. The marriage agreement is made in writing.
2. The written marriage agreement is endorsed by The Marriage Registrar.
3. Since the ratification by The Marriage Registry officer, the contents of the terms of the agreement become valid to the husband and wife and also to third parties, as long as the contents of the contents of the provisions concerning third parties.
4. The marriage agreement comes into force from the date of the wedding day.

The marriage agreement cannot be changed during the marriage, if such changes are made unilaterally. Unilateral changes are not allowed, but if the changes are of Mutual will or bilaterally the changes can be made.

The marriage covenant cannot be ratified if the content of the provisions of the agreement violates the boundaries of religious law and morality.

In Article 29 paragraph (1) of Law No.1 Tahun1974, which reads “at the time or before the marriage takes place, both parties by mutual agreement may enter into a written agreement, certified by the Registrar of marriages, after which the contents shall also apply to third parties insofar as third parties are involved.”According To M. Yahya Harahap, that the purpose of the marriage agreement according to law No.1 of 1974 is the separation from the mixing of joint property (husband and wife) before the marriage is carried out by agreement of both parties, or is the storage

of the provisions of the law on joint property in marriage.

Making an agreement made before the wedding is allowed as long as it does not contradict the law, religion and morality, moral values and Customs. This has been regulated in accordance with Article 29 of Law No. 1 of 1974 on marriage. In making a marriage agreement, it is necessary to consider several aspects : openness; willingness; objective official; notary.

CONCLUSION

The position of the marriage agreement in positive law is regulated in BW/ KUHPPerdata, Law No. 1 of 1974 on marriage and compilation of Islamic law, this marriage agreement is made for the sake of legal protection of the property of each, husband or wife. The essence of the marriage agreement is an agreement between the future spouses who are getting married to separate the ownership of property and debts and debts, and an agreement on a number of other important matters. Based on Article 66 of Law No. 1 of 1974 on marriage, which contains: "for marriage and everything related to marriage based on this law, with the entry into force of this law the provisions stipulated in the Civil Code (Burgerlijk Wetboek), the Indonesian Christian Marriage Ordinance (Huwelijks Ordinantie Christen Indonesiers S. 1993 number 74), mixed marriage regulations (Regeling op degemengde Huwelijken S. 1898 No. 158), and other regulations governing marriage to the extent provided for in this Act, shall be declared void".

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