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Practice in Making Notarial Agreements in Unregistered Marriage in Indonesia

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Abstrack: *This article aims to examine the legal force of the marriage agreement deed made by a notary, particular for those who are only married in an unregistered manner. In notary, it is known that there is a Marriage Agreement which is the authority of a notary to prepare an authentic deed in accordance with the provisions of the legislation on the basis of law. Based on the description above, a question arises whether the parties who carry out an unregistered marriage are able to state their wishes in a notarial agreement. What are the possibilities and legal consequences for both the parties and for the notary as a public official who prepares the deed of agreement. The research method uses in this research is normative legal research or normative juridical research with a statutory approach and a case approach. The data used is secondary data, while the analysis method uses qualitative analysis methods. The results of the study indicate that with certain adjustments, a notary is able to prepare a notarial agreement for the parties carrying out an unregistered marriage. The notarial agreement has perfect evidentiary power for the parties as is an authentic deed in general. A notarial agreement with certain adjustments prepared by the parties who entered into an unregistered marriage was prepared with the aim of providing legal protection for the parties.*

Introduction

Marriage comes from the root word marriage, which in the Big Indonesian Dictionary is defined as "forming a family with the opposite gender, " in general marriage can additionally be interpreted as a social bond which is a social cultural institution that aims to formalize intimate and personal relationships between the sexes.

According to Sayuti Talib, marriage is a sacred, strong and solid bond between a pair of humans (male and female) who have the goal of living together legally by forming a lasting family, assisting each other, loving each

other, peacefully, and happily. While the essence of marriage according to Hazairin is sexual relations and he added that there is no marriage if there is no sexual relationship (Hazairin, 1982).

Ibrahim Hosein interprets marriage as a contract that makes intercourse lawful between men and women, while Mahmud Yunus defines marriage as intercourse. Therefore, it can be said that marriage is a sexual relationship (intercourse) (Hosen, 1971).

According to Imam Al Ghazali, several purposes of marriage are:

1. Obtaining legitimate descendants who will carry out descendants, and
2. Developing human races;
3. Fulfilling the instinctive demands of human life;
4. Protecting people from evil and corruption;
5. Forming and managing a household as the first basis of a great society on the basis of love and affection;
6. Growing sincerity in trying to discover a halal livelihood, and increasing a sense of responsibility.

Legally, the definition of marriage is clearly stated in Law Number 1 of 1974 on Marriage which defines marriage as, "the inner and outer bond between a man and a woman as husband and wife based on the One Almighty God that aims to build a happy and eternal family."

Furthermore, in Article 2 paragraph (1) of Law Number 1 of 1974 on Marriage, it is stated "If the marriage is carried out in accordance with the law of the religion and the beliefs he/she holds, therefore the marriage is valid." The provisions in the article above expressly state that the conditions for the validity of a marriage are to be carried out in accordance with the procedures of each religion and belief. However, in Article 2 paragraph (2) of Law Number 1 of 1974 on Marriage it is stated that "Every marriage is recorded based on the applicable applicable laws and regulations." Based on the foregoing, the law clearly provides provisions that marriage is legal if it is carried out according to the provisions of religion and belief and therefore the marriage is registered. The two conditions apply cumulatively, not alternatively (Oky Deviany Burhamzah, 2016).

In society, the provisions that require registration of marriages cause several problems, one of which is how the legal protection for the parties to marriages that have been carried out legally in accordance with the provisions of their religion and beliefs as required by Article 2 paragraph (1), but are not carried out recording as mandated in Article 2 paragraph (2) of Law Number 1 of 1974 on Marriage.

Many are discovered in the lives of Indonesian people, marriages are not recorded. The practice of marriage carried out according to religion and belief and not registered is commonly referred to as Unregistered marriage. There are many reasons why a person does not register his marriage, including for example due to administrative costs of registration, marriages that do not want to be published, the absence of a marriage registrar because they are in remote and geographically difficult areas, and others. This certainly raises several legal problems, one of which is related to how legal

protection is for the parties who carry out Unregistered marriage (Kharisudin Kharisudin, 2013).

In the notarial practice, there is a legal institution known as an agreement. According to Sudikno, an agreement is a legal relationship on the basis of an agreement with legal consequences. Therefore, there is a legal relationship between each legal subject who is entitled to achievements and the others are obliged to carry out their achievements in accordance with the agreement (Sudikno, 2008).

The Legal Dictionary defines an agreement as "an agreement between two or more parties, orally or in writing, and the parties are subject to the agreement they have made together." According to Article 1313 of the Civil Code, "Agreement is the act of a person or more binding himself with one or more other people" (Sudarno, 2007).

Meanwhile, a notarial agreement can be understood as an agreement made by the parties based on an agreement made before a notary as a public official. Notaries in accordance with the provisions of the legislation based on the law are authorized to make authentic deeds. A notarial agreement has its own privilege, which lies in the strength of its legal evidence that is perfect. Therefore, notarial agreements are usually made by the parties with the intention of obtaining legal protection for all matters agreed upon by the parties (Djumadi, 2004).

Based on the description above, an academic question arises whether the parties performing a Unregistered marriage can state their wishes in a notarial agreement. What the legal possibilities and consequences are for both the parties and for the notary as a public official who makes the deed of agreement.

The research method the author uses in this research is normative legal research or normative juridical research. As for the approach, the author uses a statutory approach and a case approach. The typology of research used to answer the main problems in this study uses prescriptive research with the type of data used in this normative legal research sourced from secondary data, namely those obtained from library materials. Since this research is in the form of normative juridical research, this research uses secondary data types, particularly data obtained from library research. After all data is obtained, therefore the next step is to analyze with qualitative analysis methods. This analysis method is carried out for this study used secondary data types that produced descriptive analytical data in order to produce a general picture of the material being discussed in this study.

Research Methods

The research method used in this research is normative legal research or normative juridical research. As for the approach, the author uses a statutory approach and a case approach. The typology of research used to answer the main problems in this study uses prescriptive research with the type of data used in this normative legal research sourced from secondary data, particularly those obtained from literature materials (Soekanto, Soerjono dan Sri Mamudji, 2003). Due to the form of this research is

normative juridical, this research uses secondary data, particularly data obtained from library research. Following all data is obtained, the next step is to analyze with qualitative analysis methods. This analysis method was conducted for this study used secondary data types which produced descriptive analytical data, thus producing a general description of the material being discussed in this study (Gulo, 2002).

Discussion and Result

Notary Authority in Making Notary Agreements Against the Parties Conducting Unregistered marriage

Society in their lives must carry out different activities that often involve more than one party, this certainly will cause several different wills from one another, therefore there needs to be an agreement between the parties involved to carry out an action, referred to as Agreement. In practice, the agreements used by the community in daily life are divided into two, particularly private agreements and notarial agreements as regulated in the Civil Code (hereinafter referred to as KUHper) article 1867 as follows:

"Evidence in writing is carried out with authentic deed or by private deed." [Article 1867 BW]

It is clear that the agreement can be written in 2 (two) forms, particularly an authentic deed and a private deed that can be used as a tool in evidence. Although it has the same function as evidence in written form, however, there is a difference between an authentic deed and a private deed in its application.

The authentic deed explained in Article 1868 of the Criminal Code as follows:

> "An authentic deed is a deed made before an authorized public official at the place where the deed was made and in accordance with the provisions of the law." (Article 1868 BW)

Based on the description of the article, an authentic deed is a deed whose form is determined by law and made by an authorized public official, one of which is a notary. Furthermore, this is additionally stated in Article 1 Number 7 of the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN) as follows:

"Notary Deed, hereinafter referred to as Deed, is an authentic deed made by or before a Notary according to the form and procedure stipulated in this Law." (Article 1 (7) UUJN)

Thus, it can be understood that to the extent that the making of certain authentic deeds is not reserved for other public officials, therefore the authentic deed becomes the authority of a notary who in this case is a public official who is authorized to make an authentic deed. As emphasized in Article 1 point 1 Notary Position Act (UUJN) as follows:

> "As a public official, a notary is authorized to make authentic deeds and other authorities which are further regulated in this law." (Article 1 No 1 UUJN)

While authority is defined as a legal act of the office holder which is regulated and given to him based on the applicable laws and regulations to regulate the position in question. According to Administrative Law, authority can be obtained by way of attribution, delegation and mandate (Adjie, 2008). In addition to the authority to make an authentic deed, a Notary additionally has several authorities with reference to the Article 15 of UUJN as follows:

1. As a public official who is authorized to make an authentic deed
2. To ratify the signature and determine the certainty of the date of the private deed by registering it in a special book, which provision is a form of legalization of the private deed which is made by the individual or by the parties himself on paper with sufficient stamp duty and registered in a special book provided by a notary.
3. Recording private deeds by registering in a special book
4. Making copies and original private deeds in the form of a copy containing the description as written and depicted in the letter concerned
5. Validate the compatibility of the photocopy with the original letter;
6. Conducting legal counseling in connection with the making of the deed,
7. Creating a deed regarding to land
8. Creating the auction minutes deed
9. Certified digital transactions (cyber notary)
10. Creating a deed of waqf pledge
11. Creating an airplane mortgage

In addition to the authority of a notary as mentioned above, there are other powers of a notary, one of which refers to Article 147 of the Civil Code as follows:

> "The marriage agreement must be made before the marriage takes place with a notarial deed. If it is made other than by a notarial deed, therefore, the marriage agreement is considered null and void. The new marriage agreement is effective after the time the marriage takes place, and cannot be determined at another time for that."

However, in the society, it remains discovered that the marriage agreement is made with a private deed (private agreement).
What is meant by a private deed is that an agreement/deed can be made by the parties without having to be made before or by an authorized public official.

This is clearly stated in Article 1874 of the Civil Code which states that:
"which are classified as private writing are letters, lists, private signed deeds, household affairs letters and other writings made without the intermediary of public officials.".

Meanwhile, if it is viewed related to the binding strength of a private deed, it is the same as an authentic deed, in addition to the agreement being made legally and of course not contradicting the law, therefore, in this case Article 1338 of the Civil Code, the agreement becomes law for those who make it. , meaning that the agreement can be canceled, unless desired by the

parties or based on reasons permitted by law (Subekti, 1987). According to Subekti regarding the strength of evidence of private deed, in his book entitled Principles of Civil Law, every deed made without the intermediary of a public official is classified as a private deed, the strength of which is the same as an authentic deed. (argumentum per analogy/analogy) provided that the party signing the agreement does not deny his signature, which means he does not deny the truth of what is written in the agreement letter. Meanwhile, if there is a party who denies his signature in the agreement letter, therefore, it becomes mandatory for the party submitting the agreement to prove the truth of the signing of the contents of the agreement (Enik Isnaini, 2014).

In this case the notary is present as an intermediary, therefore, the deed under the hand can have the power of evidence as in terms of UUJN Article 15 paragraph 2 letters a and b, therefore, private deed is divided into two, particularly the private deed that had been waarmeking and the private deed that is legalized, further regulated in UUJN as follows:

a) Ratify the signature and determine the certainty of the date of the letter under the hand by registering it in a special book.
b) Record a provate deed by registering in a special book (waarmeken)

Not only notaries, but all certain officials who are given the authority and duty to record the deed. In this case, for example, the prospective husband and wife make a private marriage agreement, therefore, they carry the deed to a notary to be legalized, the strength of the evidence becomes strong like an authentic deed. Article 10 paragraph (2) of the Decree of the Minister of Religion of the Republic of Indonesia Number 477 of 2004 on Marriage Registration states "Marriage agreement on paper with sufficient stamp duty, in 4 copies. The first sheet is for the husband, the second for the wife, the third for the Penghulu and the fourth for the court as stipulated regulated by laws and regulations" (Ramulyo, 1999).

Legal Consequences of Agreements Made Before a Notary by Parties Conducting Unregistered marriage

In recent times, we have viewed a rapid increase in the number of marriages in Indonesia. Marriage itself is a bond between a man and a woman with the aim of fostering life and forming an eternal and eternal family, which is recognized as valid by law. On the basis of this description, it can be concluded that the elements of marriage are as follows: (Manan, 2006).

a). In order to be valid, marriage must be carried out in accordance with applicable laws and regulations
b). Article 27 of the Civil Code states that marriage is based on monogamy, therefore bigamy and polygamy contradict what is regulated by the Civil Code
c). In principle, marriage must last forever.

In addition, marriage itself according to Law Number 1 of 1974, is formulated in Article 1 as follows:

"Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of building a happy and eternal household (family) based on the God Almighty."

The provision of the article that in a marriage creates an inner and outer bond for husband and wife in carrying out domestic life therefore, they become a sakinah, mawaddah and warahmah family.

Furthermore, mutual subjects who bind themselves in marriage create a legal relationship which is further defined by the Civil Code as marriage. The agreement between the two parties is the basis of the marital relationship and is binding. The approval as referred to above is not the same as the agreement referred to in Book III,
the difference lies in the form and content.

Later in a marriage, it is known that a marriage agreement is an agreement made by a pair of lovers either when the marriage is about to take place or after the marriage takes place, which contains agreements in carrying out the marriage that will be obeyed for both. The Civil Code does not provide a specific definition of a marriage agreement, however, legal experts provide an understanding of a marriage agreement, including:

1. According to Wirjono Prodjodikoro, a marriage agreement is a legal consideration of assets between two parties (husband and wife), the first party promises or is deemed to have promised to do certain matters, while the second party has the right to demand the implementation of the promise from the first party (Wirjono Prodjodikoro, 1974)
2. R. Soetojo Prawirohamidjojo defines a marriage agreement as an agreement made before or when the marriage is held by a prospective husband and wife with the intention of regulating their assets after the marriage takes place. (R. Soetojo Prawirohamidjojo, 1988)

From the understanding of the marriage agreement above, it can be concluded that the marriage agreement is an agreement between two people as prospective husband and wife, and has the same elements, particularly the agreement and property elements in the marriage agreement. Therefore, the marriage agreement can be interpreted as a noble agreement between the groom and the bride as husband and wife, and the object agreed here is the merger or separation of the personal assets of the prospective husband and wife. Today, the purpose of the marriage agreement is not only related to the issue of property, but additionally the length of support for how much care the couple cares about (Siti Aminah, 2014).

This includes starting an open and honest marriage, an opportunity to express their will to each other, including financial matters. Every day the standard of living of the community is increasing, therefore not a few couples include the issue of interests and talents into the marriage agreement. For example, therefore they are allowed to continue their hobbies such as collecting expensive trinkets, preserving certain animals, performing adventure sports and others.

Therefore, couples can remind each other and balance each other, in order to create family financial stability. Generally, a marriage agreement is made for the following reasons:

1. If the assets of one party are greater than the other.
2. Each party carries considerable input (*aanbrengst*)
3. Both parties have their own business.
4. The debts before the marriage will be borne by each party.

Regarding the arrangement of the marriage agreement, we can refer to the Civil Code with the Marriage Law as follows:

1. Marriage Agreement in the Civil Code in Article 119 paragraph (1) of the Civil Code it is stated that since the occurrence of marriage, the mixing of husband and wife's assets begins to apply, only regarding that with the agreement there are no other provisions. Generally, a marriage agreement is made if the total assets of one party is greater than the other. Article 154 of the Civil Code states that in essence a marriage agreement becomes void if there is no marriage. Furthermore, if the understanding of the marriage agreement is related to the doctrines and articles governing the marriage agreement, then there are several elements of the marriage agreement, particularly: (Edi Gunawan, 2013)

   Made before the marriage by prospective husband and wife Article 147 of the Civil Code states that in order to avoid the cancellation of the marriage agreement, every marriage agreement must be made with a notary deed before the marriage takes place. In certain circumstances due to logical reasons, the marriage agreement is made by the parties whose contents involve their assets as a result of the marriage. It becomes essential, in this case the marriage agreement will subsequently become a law for the husband and wife pair. In a marriage agreement, it is possible to enter a third party. With a note as long as the interests of the parties are protected. Technically, the prospective husband and wife who desire to make a marriage agreement must make it before a notary before the marriage takes place.

   Made in written form. It is mandatory for the marriage agreement to be made in writing. According to Subekti, the strength of evidence of a private deed is perfect as with an authentic deed, the condition is that the parties acknowledge signing the private deed. (Article 1875 of the Civil Code).

   Elements of decency and public order

   As for the elements of decency and public order as regulated in Article 139 of the Civil Code, it is stated that the contents of the marriage agreement may not violate the boundaries of law, religion and decency. It should be noted that Article 29 paragraph (2) of the Law on a similar matter is additionally regulated in this way.

   Elements can not be changed

It is stated that after the marriage takes place, in any way the marriage agreement may not be changed.

a. Elements of the marriage agreement take effect from the time the marriage takes place.

Furthermore, regarding the form of marriage agreements, there are several forms of marriage agreements that can be implemented by the parties as stipulated in Article 147 of the Civil Code as follows:

> "The marriage agreement must be made in the form of a notarial deed before the marriage takes place, and becomes invalid if it is made that way, and the agreement officially takes effect when the marriage takes place, it cannot be determined at another time."

From this article, several elements that must be fulfilled in the marriage agreement are depicted, including:

1. The marriage agreement is obligatory to make a notarial deed (authentic deed/notary deed) therefore it has strong evidentiary power;
2. Marriage agreements may only be made at or before the marriage takes place;
3. Depict what are the rights and obligations of husband and wife on their property and other matters that are to be agreed upon in order to provide legal certainty, considering that the marriage agreement has a great influence in carrying out their marriage.

Therefore, if these elements are not fulfilled cumulatively, it can cause the cancellation of a marriage agreement that has been made previously. Therefore, in making a marriage agreement, it takes someone who is an expert in the law of marital property who in this case is given the authority to a notary to make a marriage agreement. In connection with the above provisions, the form of marital property must remain for the duration of the marriage. If there is an error in the preparation of the marriage agreement, it cannot be done in the future (Zeni Lutfiyah, 2015).

In CHAPTER V Article 29 of the Marriage Law specifically additionally explains the marriage agreement as follows:

1. With the agreement of the parties at or before the marriage, a written agreement can be made which is legalized by the marriage registrar, the contents of which additionally apply to third parties as long as the third party is involved.
2. If it turns out that the contents of the agreement violate the boundaries of law, religion and morality, therefore, it cannot be ratified.
3. From the time the marriage takes place, the agreement shall come into force.
4. The agreement cannot be changed during the marriage, unless the parties agree to change it. And it is important that these changes do not cause harm to third parties.

The agreement itself is an act to bind itself by one or more business actors with other business actors using any name, whether written or not.

Agreement is one source of engagement. Thus, from an agreement, an engagement gives rise to rights and obligations in the agreement for the parties. As already mentioned in Article 1313 *Burgerlijk wetboek* or better known as the Civil Code (KUHPer):
"An agreement is an act in which one or more people bind themselves to one or more other people."

As formulated above, Article 1313 of the Civil Code affirms that an agreement causes a person's engagement with another person, while in full an agreement is defined as an act by which one or more people bind themselves to one or more other people. This means that an agreement has legal consequences for the parties, namely the obligation of one party to the party who is entitled to the fulfillment of that obligation (which is his right). Therefore, in other words, there will always be two parties to an agreement, where the parties are equally obliged to meet each other's achievements (Thriwaty Arsal, 2012).

Article 1338 of the Criminal Code, the principle of freedom of contract, which means that the parties are free to make or not make an agreement, determine the content and form of the agreement as follows: *"By being legally made, all agreements act as law for the parties who sign."*

Although this is regulated, freedom of contract is not certainly interpreted as freedom without limits. However, it is carried out either through statutory regulations or court decisions. (Ahmad Sobari, 2013) The principle of freedom of contract is a principle related to the form and content of the agreement as stated in Article 1338 paragraph (1) of the Civil Code. The meaning of this principle (freedom of contract) is that everyone is free to determine with whom he will make a contract, select the form and content of the agreement and is free to make a choice of law (choice of law). This principle shows that there is a need for a bargaining position between the parties involved. (Moh. Amin, 2015).

One matter that needs to be underlined here is that the legal terms of the agreement regulated by the Criminal Code must not be violated by the principle of freedom of contract. The conditions for the validity of the agreement are regulated in Article 1320 – Article 1337 of the Criminal Code, particularly: (Syahmin, 2006)

1. Agreement of the parties.
   Agreement here is defined as the freedom of the parties to equate their will regarding the main matters set forth in the agreement. This means that the free (voluntary) will to bind themselves must be owned by the parties. Free here means free from error, coercion, and deception. based on article 1321 of the Criminal Code, the agreement becomes invalid, if the agreement occurs because of elements of error, coercion, or fraud. As for the form, the agreement can be made in writing or secretly orally.
2. Ability of the parties.

Article 1329 of the Criminal Code states that, each person is capable of making agreements, unless he is classified otherwise according to the law.

3. On a certain matter
   The purpose of a certain matter is that the object of the agreement must be of a clear type. According to article 1333 of the Criminal Code, the object of the agreement must be clear on the subject and type of goods. Article 1332 of the Criminal Code regulates that what can be used as objects of the agreement are goods of value (able to be traded).
4. Halal cause.
   The purpose of the lawful cause here is that the object of the agreement does not conflict with the law, decency, or public order. This is regulated in article 1337 of the Civil Code.
   From the brief description of point 4 above, it is clear that an agreement must not conflict with the law.

In this case, a marriage agreement that comes from a unregistered marriage is contrary to Article 29 of the Marriage Law on "Both parties with mutual consent can make a written agreement during or before the marriage which is legalized by the marriage registrar which the marriage agreement is not legalized. by the marriage registration officer because it is only held in a religious marriage or customary marriage." In this case, a marriage agreement cannot only be subject to the principle of freedom of contract, however, it is still required to comply with the conditions for the validity of the marriage in order to fulfill the conditions for the validity of an agreement in this case. a clause regarding a lawful cause so as to create a Marriage Agreement that is in line with the regulations in Indonesia.

Conclusion

Based on the implemented research, the following conclusions can be drawn. With certain adjustments, the Notary can make a notarial agreement for the parties who carry out an Unregistered marriage. The notarial agreement has perfect evidentiary power for the parties as an authentic deed in general. A notarial agreement with certain adjustments made by the parties who enter into a serial marriage is made with the aim of providing legal protection for the parties. Although it is possible to make a notarial agreement in a unregistered marriage, a legal and registered marriage still has stronger legal force in providing legal protection to the parties. Notary agreements with certain adjustments must still be subject to and follow the provisions of the applicable laws and regulations.

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