CLIENT UPDATE
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REAL ESTATE

Constitutional Court Legalizes Post-Nuptial Agreements but Upholds Discriminatory Provisions of Agrarian Law

1. Introduction

In a landmark decision (the "**Decision**") handed down recently by the full bench of nine justices of the Constitutional Court, the Court amended certain provisions of the Marriage Law[i] so as to recognize the validity of post-nuptial agreements for the first time in Indonesia, while simultaneously upholding a number of provisions of the Agrarian Law[ii] that abrogate the rights of Indonesian citizens in transnational marriages to hold Hak Milik (the Indonesian equivalent of freehold) and other real property rights[iii] that are prohibited to non-Indonesians. The unanimous decision, which was handed down on 27 October 2016, may be regarded as something of a double-edged sword: While it has been warmly welcomed by those in transnational marriages, the Court's views on property rights for non-Indonesians will be seen as retrograde in some quarters (for a detailed discussion of property rights for non-Indonesians, see AHP Client Update *New Regulation Clarifies Rules on Property Ownership by Non-Indonesians but Changes Little,* published on 20 January 2016)

2. Key Issues

Before discussing the facts of this particular case and the Court's reasoning,[iv] it may be instructive to first describe the legal situation pertaining to the real property rights of transnational couples under the Agrarian Law and how the Marriage Law has caused particular problems for such couples in respect of their property rights.

One of the key complaints against the Agrarian Law on the part of transnational couples is that Article 21(3) of the legislation in many cases operates to effectively deprive the Indonesian spouse of their right to acquire Hak Milik land. This is because Article 21(3), among other things, specifically prohibits the acquisition of Hak Milik by non-Indonesians through marriage. This prohibition is further reinforced by Article 26(2). Meanwhile, Article 36 of the Agrarian Law provides that only an Indonesian citizen or corporation may hold Hak Guna Bangunan (Building Right / "**HGB**"), which is a subordinate land right that may be granted over Hak Milik land to a third party by the Hak Milik holder.

In order to understand why Indonesian spouses in transnational marriages end up being deprived of their property rights in this respect, it may be useful to first explain the concept of marital property. Under Article 35 of the Marriage Law, any assets acquired during a marriage (other than by way of bequest or gift) become part of the couple's combined marital property, i.e., the two spouses have equal ownership of the assets. Thus, any Hak Milik or HGB land purchased during the course of the marriage by the Indonesian spouse also becomes part of the marital property, thereby giving the non-Indonesian spouse a share in the Hak Milik or HGB, something that is prohibited by the Agrarian Law, which stipulates that only an Indonesian citizen may hold these titles.

In such cases, the Agrarian Law provides that the Hak Milik must either be converted into Hak Pakai (which is a significantly weaker title) through an application to the National Land Agency ("BPN"), or be assigned within one year to a party that is qualified to hold Hak Milik under the Agrarian Law. If not, the land will be forfeit to the state.

In the case of HGB land, the title must also be assigned within one year to a party that is qualified to hold HGB under the Agrarian Law. If not, the title will be extinguished by operation of law.

Prior to the Decision, the only way that this prohibition could lawfully be circumvented was for the prospective parties to a marriage to enter into a pre-nuptial agreement, whereby they agreed that the

Indonesian spouse's Hak Milik property would be excluded from the marital property. The validity of pre-nups is specifically recognized by Article 29(1) of the Marriage Law, which provides that what is termed a "separation of assets agreement" may be entered into prior to or at the time of solemnization of the marriage, meaning that only pre-nuptial agreements were recognized in Indonesian law before the Decision, while post-nuptial agreements were not recognized.

3. Background to the Decision

The petitioner was one Ms. Ike Farida, who complained to the Constitutional Court that she had been deprived of her constitutional right to hold Hak Milik and HGB land as a result of the operation of Articles 21(1) and (3), and Article 36(1) of the Agrarian Law, and Articles 29(1), (3) and (4) and Article 35(1) of the Marriage Law. Accordingly, the petitioner challenged the constitutionality of both pieces of legislation.

Ms. Farida was an Indonesian citizen married to a Japanese citizen. Unaware of the need to enter into a pre-nuptial agreement in order to ensure her continued right to own Hak Milik and HGB property, she put a deposit down on an apartment that carried HGB title but the purchase and sale agreement was subsequently terminated unilaterally by the developer based on Article 36(1) of the Agrarian Law as her husband was a foreigner. As she had not entered into a pre-nup with her husband, her property and that of her husband had been automatically merged as marital property at the time their marriage had been solemnized, in accordance with Article 35 of the Marriage Law.

The District Court subsequently upheld the termination of the agreement under Article 1320 of the Civil Code, which provides that in order for an agreement to be valid and binding, it must be for a "lawful cause." In this case, the District Court held that the sale and purchase agreement breached Article 36(1) of the Agrarian Law, was therefore not for a "lawful cause," and was thus null and void.

4. Decision

In the Decision, the Court amended the formulations of Article 29(1) and (3) of the Marriage Law so as to permit couples to enter into post-nups for the first time. In doing so, the Court recognized that circumstances frequently change during the course of a marriage, and that financial pressures have the potential to give rise to conflict. The Court also recognized that a post-nup could offer many benefits, such as (i) allowing a spouse to sell his or her own assets or to pledge them as collateral for a loan without the need for the consent of the other spouse; (ii) accommodating the exigencies of running a business; (iii) allowing for individual liability for debts; (iv) protecting the personal assets of each spouse in the event of divorce; and, indeed, (iv) remedying a lack of knowledge of the benefits of a pre-nup at the time of the marriage.

However, the Court primarily based its decision on the principle of freedom of contract, as enshrined in Article 1338 of the Civil Code, which allows parties the freedom to enter into whatever agreements they wish, provided that the requirements prescribed by law are complied with.

As regards the challenge to Article 21(1) and (3), and Article 36(1) of the Agrarian Law, the Court found unequivocally against the Petitioner. In their reasoning, the justices once again displayed their conservative views on economic matters based on a narrow interpretation of Article 33(3) of the Constitution, which stipulates that key economic resources must be controlled by the State and utilized so as to maximize public wellbeing.

Having regard to this provision, the Court made it crystal clear that it believes it essential to avoid real property ownership rights falling into the hands of foreigners and thereby "prevent Indonesian land coming under the control of foreign capital, which could in turn threaten and undermine national sovereignty."

5. Injustice and Confusion

The operation of the relevant provisions of the Agrarian Law and Marriage Law has inflicted serious injustice on many transnational couples, something that was specifically acknowledged by the State in its responses to the Petitioner. It has also given rise to a whole raft of abuses, including would-be purchasers of Hak Milik or HGB property losing their deposits. In addition, prior to the Decision, it had been asserted in some circles that post-nuptial agreements were in fact already legal under Article 186 of the Civil Code. This is despite the fact that Article 186 is clearly intended to address a situation where the

husband (only the husband) is endangering the matrimonial property through irresponsible behaviour, such as profligacy, or poor/negligent financial administration. The full text of Article 186 reads as follows (free translation):

"During the course of the marriage, the wife may apply to the court for a separation of (marital) property, but only in the following circumstances:

1. *If the husband, due to profligate conduct, dissipates the marital assets and property and allows the (financial) security of household to become endangered;*
2. *If due to the bad or chaotic management of the marital property/assets by the husband, the security of the wife's dowry and what she is entitled to under law becomes endangered, or due to the gross negligence of the husband the security of the property becomes endangered.*

Furthermore, the separation of marital assets must be approved by the District Court."

Thus, this particular provision may in no wise be construed as providing a legal basis for asserting the validity of a post-nuptial agreement under normal circumstances. But even more importantly, the Civil Code specifically incorporates a blanket prohibition on post-nups in Article 119, which reads as follows: "*During the course of the marriage, the marital assets may not be separated based upon an agreement between the husband and wife*".

6. AHP Commentary

While in family law matters the Constitutional Court has shown itself on occasion to be willing to break the mould (as in this case), in the economic sphere it has been solidly conservative and has consistently reflected the nationalistic and protectionist tendencies that continue to be quite pronounced in virtually all sectors of Indonesian society. This has led to a raft of decisions striking down liberalizing economic legislation in recent years, such as the Court's decisions on the 2002 Electricity Law, 2004 Water Resources Law and the legislation establishing the former upstream oil and gas regulator BP Migas. Most of these decisions were based primarily on Article 33(3) of the Constitution, as discussed in section 4 above.

In upholding the provisions of the Agrarian Law prohibiting the ownership of Hak Milik and HGB by non-Indonesians, the Court is staying true to its track record on economic issues. In this regard, we should also say that it is faithfully reflecting Indonesia's general fixation with national sovereignty in all areas of the economy and, in doing so, is undoubtedly representing the majority opinion in the country at the present time.

From the Government's perspective, the Court's view on property rights for non-Indonesians will be of particular interest given its stated desire to elevate the substance of Hak Pakai so as to place it on a par with HGB, thus making Hak Pakai more attractive to non-Indonesians and thereby, hopefully, helping to reinvigorate the property market and attract greater FDI inflows. However, given the Court's comments on the "need to keep Indonesian land for Indonesians," it is clear that the Government will need to tread carefully in expanding Hak Pakai if it wants to avoid facing legal challenges down the road.

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i. *Undang-undang No. 1/1974 tentang Perkawinan.*
ii. *Undang-undang No. 5/1960 tentang Peraturan Dasar Pokok-Pokok Agraria.*
iii. *"Real property rights" refers to rights that are related principally to the ownership or control of land and buildings.*
iv. *Case No. 69/PUU-XIII/2015*

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ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community ("**AEC**") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.

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