



## The legal position of a marriage agreement according to the decision of the constitutional court number 69/PUU-XIII/2015

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### Abstract

The marriage agreement has been expressly regulated in Article 29 of the Marriage Law, including regulating the time to make a marriage agreement, which can only be made before or at the time of marriage. In general, the purpose and objective of making a marriage agreement is to regulate the legal consequences of a marriage, namely regarding property so that there is no unity of marital property between husband and wife during marriage. Regarding the time of making a marriage agreement, there has been legal reform since the birth of Constitutional Court decision No. 69/PUU - XIII/2015. With the Constitutional Court's decision on the extension of the period for making a marriage agreement, there have been implications for couples who at the beginning of the marriage there was no agreement in marriage. A marriage agreement can be made at any time even after the marriage has taken place. There is no longer a time limit regarding the making of a marriage agreement. In this case, it is necessary to know about the position of the marriage agreement on the separation of joint property after marriage.

**Keywords:** Marriage agreement, separation of joint property, post-marriage, legal position

### Introduction

Marriage is the inward and outward bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) based on God Almighty. Thus reads the provisions of Article 1 of Law 1 of 1974 concerning Marriage (hereinafter referred to as the UU Perkawinan). More than that, marriage can have legal consequences on their property. So it is not uncommon for prospective brides and grooms before entering into marriage to make a marriage agreement to regulate their property. Normatively, the provisions regarding marriage agreements are expressly regulated in Article 29 of the UU Perkawinan. In general, the purpose and objective of making a marriage agreement is to regulate the legal consequences of a marriage, namely regarding property so that there is no unity of marital property between husband and wife during marriage. A marriage agreement containing a deviation from the unity of property is made by the prospective bride and groom before or at the time of the marriage, with consideration, among others, due to the unbalanced amount of wealth of the prospective bride and groom, for example, one of the prospective bride and groom is wealthy, while the other prospective bride and groom do not have much property. However, in its development, a marriage agreement is not only needed when the prospective bride and groom want to get married, but also when they are already a married couple.

Basically, the marriage agreement has been expressly regulated in Article 29 of the UU Perkawinan, including regulating the time to make a marriage agreement, which can only be made before or at the time of marriage. So that there is no opportunity to make a marriage agreement after the marriage is held. But in practice, many married couples make a marriage agreement after the marriage is held. With various reasons and interests, married couples apply to the court for a stipulation.

Regarding the time of making a marriage agreement, there has been legal reform since the birth of Constitutional Court decision No. 69/PUU - XIII/2015. The marriage agreement is not only interpreted as being made before or during the marriage, it can also be made after the marriage is carried out or during the marital relationship. The Constitutional Court gave a constitutional interpretation to Article 29 of Law No. 1/1974 concerning marriage regarding marriage agreements. The Constitutional Court's decision states that Article 29 paragraph 1 of the UU Perkawinan is declared unconstitutional as long as it is not interpreted as "At the time, before the marriage is held or during the marriage, the two parties by mutual consent can submit a written agreement legalized by a marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved".

Article 29 paragraph 3 of the UU Perkawinan is declared conditionally unconstitutional as long as it is not interpreted as 'the agreement applies from the time the marriage is carried out, unless there are other provisions in the marriage agreement'. Article 29 paragraph 4 of the UU Perkawinan is declared conditionally unconstitutional as long as it is not interpreted as 'During the marriage bond, the marriage agreement can be regarding marital property or other agreements, it cannot be changed or revoked, unless there is consent from the spouse to change or revoke the agreed agreement as long as it does not harm the other parties.

With the Constitutional Court's decision on extending the period for making a marriage agreement, there have been implications for couples who did not have a marriage agreement at the beginning of the marriage. A marital agreement can be made at any time even after the marriage has taken place. There is no longer a time limit on the making of a marriage agreement. Therefore, it is necessary to know about the position of the marriage agreement on the separation of joint property after marriage.

Based on the description above, there is a problem that the author wants to discuss about what is the legal position of the marriage agreement on the separation of joint property carried out after marriage according to the Constitutional Court Decision Number 69/PUU-XIII/2015.

### Research methods

This type of research is normative research which also has a similar meaning to doctrinal research, that focuses on reading and studying primary and secondary legal materials. This research uses a statute approach on the basis of examining legal issues to find solutions to legal issues. There is no data in legal research. Therefore, to solve legal issues and at the same time provide appropriate prescriptions, the sources of research are needed. The material of legal research can be divided into two, which are research sources in the form of primary legal materials and secondary legal materials (Marzuki, 2013) <sup>[11]</sup>. Primary legal materials are legal materials that are binding and underline other legal materials. Secondary legal materials are legal materials that are closely related to primary legal materials and help to analyse and understand existing primary legal materials. Secondary legal materials also provide explanation of other primary legal materials, such as books, journals, and articles that review the problems being studied.

The legal material collection technique used in this legal writing is a library research technique on legal materials, both primary and secondary legal materials. This legal material collection technique is carried out by reading, studying, reviewing, and analysing legal materials by adjusting the problems studied by the author. Analysis of legal materials is to be used in solving problems in this study. The legal material that has been processed is then analysed using qualitative analysis, namely the legal material that has been obtained by referring to the existing theoretical basis (Fajar and Achmad, 2010) <sup>[4]</sup>.

### Result and discussion

#### Provisions of Marital Agreement Based on Constitutional Court Decision No.69/PUU-XIII/2015

On October 27, 2016, the Constitutional Court ruled on a judicial review case against the provisions of Article 29 paragraph (1) of the Marriage Law. The Constitutional Court Decision No. 69/PUU-XIII/2015 has changed the provisions regarding marriage agreements. If previously a marriage agreement could only be made before and at the time of marriage, the Constitutional Court stated that a marriage agreement could be made by a married couple after the marriage was held, or during the marriage bond.

The petition for judicial review was filed by Mrs. Ike Farida, an Indonesian citizen who was married to a Japanese man. The marriage itself had been registered at the Religious Affairs Office of Kakasar Subdistrict, East Jakarta City, and had also been registered at the Civil Registry Office of DKI Jakarta. The applicant argued that her constitutional rights had been impaired by the provisions of Article 21(1), (3), and Article 36(1) of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (hereinafter referred to as the Agrarian Law), and Article 29(1), (3), (4), and Article 35(1) of Law No. 1/1974 about Marriage.

The problem experienced by the applicant began when he purchased a flat in Jakarta. After the applicant paid in full, the developer did not hand over the flat to the applicant. The

developer instead canceled the sale and purchase of the flat, and requested an order from the court to return the purchase money to the applicant on consignment. The basis used by the developer to cancel the agreement to sell the flats was the provisions of Article 36 paragraph (1) of the Agrarian Law and Article 35 paragraph (1) of the UU Perkawinan, which basically stipulates that a woman who is married to a foreign national, and does not make a marriage agreement is prohibited from buying land and/or buildings with the status of Building Rights Title (HGB). Because the status of property in marriage becomes joint property.

Given that the applicant and her husband did not make a marriage agreement on property before the marriage took place, the status of the applicant's and her husband's property in marriage became joint property. Whereas the applicant's husband who is a foreign national is prohibited from owning land and/or buildings with HGB status. So that the applicant is also affected by the consequences of this prohibition. The problem is that the applicant and her husband also no longer have the opportunity to make a marriage agreement for the separation of joint assets, because based on the provisions of Article 29 paragraph (1) of the UU Perkawinan, a marriage agreement can only be made before or at the time of marriage. As an Indonesian citizen, the applicant felt that her constitutional rights had been harmed.

The Constitutional Court partially granted the petition, namely the provisions of Article 29 paragraph (1), paragraph (3) and paragraph (4) of the UU Perkawinan. According to the Constitutional Court, the current provisions only regulate marriage agreements made before or at the time of marriage, whereas in reality there is a phenomenon of husband and wife who for certain reasons only feel the need to make a marriage agreement during marriage. So far, in accordance with Article 29 of the UU Perkawinan, such an agreement must be made before the marriage takes place and must be placed in a notarial deed. This marriage agreement comes into effect between husband and wife from the time the marriage takes place. The content regulated in the marriage agreement depends on the agreement of the parties, as long as it does not conflict with the law, religion, and decency or morality.

Based on these considerations, the Constitutional Court is of the opinion that the phrase "at or before the solemnization of marriage" in Article 29 paragraph (1), the phrase ". Since the solemnization of marriage" in Article 29 paragraph (3), and the phrase "during the marriage" in Article 29 paragraph (4) of the UU Perkawinan limit the freedom of two individuals to make or when to make an agreement, thus contradicting Article 28E paragraph (2) of the 1945 Constitution. Thus, the phrase "at or before the time of marriage" in Article 29 paragraph (1), and the phrase "during the marriage" in Article 29 paragraph (4) of the UU Perkawinan are conditionally contrary to the 1945 Constitution insofar as they are not interpreted to include during the marriage bond.

Based on these legal considerations, the Constitutional Court gave the following decision

1. Article 29 paragraph (1) of the UU Perkawinan is contrary to the 1945 Constitution insofar as it is not interpreted as "At the time of, or prior to, or during a marriage, both parties by mutual consent may propose a written agreement to be legalized by a marriage registrar or notary public, after which the contents shall

- also apply to third parties to the extent that third parties are involved."
2. Article 29 paragraph (3) of the UU Perkawinan is contrary to the 1945 Constitution insofar as it is not interpreted as "The agreement shall come into force at the time of marriage, unless otherwise specified in the marriage agreement."
  3. Article 29(4) of the UU Perkawinan is contrary to the 1945 Constitution insofar as it is not interpreted to mean "During the marriage, a marital agreement, whether concerning marital property or any other agreement, may not be amended or revoked, unless both parties agree to amend or revoke, and such amendment or revocation shall not prejudice third parties."

### **The Legal Position of Marital Agreements Against Separation of Joint Property Implemented After Marriage According to the Constitutional Court Decision Number 69 / PUU-XIII / 2015**

Basically, the change in the provisions of the marriage agreement before and after the decision of the Constitutional Court No. 69/PUU-XIII/2015 dated October 27, 2016 is only at the time of making the marriage agreement. If previously the marriage agreement could only be made by the bride and groom before and at the time of the marriage, then now the marriage agreement can not only be made by the bride and groom before or at the time of the marriage, but can also be made by the husband and wife after the marriage is held, or during the marriage bond.

Prior to the decision of the Constitutional Court No. 69/PUU- XIII/2015, the legal position of a marriage agreement made by a married couple after the marriage takes place is bound by the provisions of Article 29 of the Marriage Law, which is invalid and not binding, unless it is based on a court decision requested by the married couple before making a marriage agreement. So that without a court decision, the marriage agreement made during the marriage bond is invalid and not binding. However, after the decision of the Constitutional Court No. 69/PUU-XIII/2015, the position of a marriage agreement made by a married couple during the marriage bond is valid and binding, both to the two parties, and to third parties as long as the third party is involved.

However, the phrase ". after which the contents shall also apply to third parties to the extent that third parties are involved," in relation to marital agreements made during the marriage, is ambiguous. Especially if the marriage has been going on for a long time, and the couple has made various agreements with third parties.

The creation of a marriage agreement as in the law must be done before the marriage takes place and / or can be made in the form of an authentic deed in front of a notary, the authentic deed is very important because it can be used as evidence in a court trial if there is a dispute about the assets of each of them (husband and wife). If there is no marriage agreement made before the marriage is carried out, all the assets of the husband and wife will be mixed. This marriage agreement has been determined in the laws and regulations as long as it does not violate the morals and tranquility prevailing in society. Constitutional Court Statement No.69/PUU-XIII/2015.

The regulation of marriage agreements is still guided by Law Number 1 Year 1874 concerning Marriage and the

Civil Code coupled with the Constitutional Court Decision Number 69/PUU-XIII/2015 as long as it does not conflict with the limits of religious law and morality and positive law in Indonesia. Constitutional Court Decision Number 69/PUU-XIII/2015 only provides a view regarding the timing of the implementation of a marriage agreement which is not limited to the time before the marriage takes place, but can be carried out during the marriage bond.

Constitutional Court Decision No. 69/PUU-XIII/2015 expands the meaning of a marital agreement so that it no longer means only an agreement made before the marriage takes place but can be made after the marriage takes place. Although the Constitutional Court Decision was petitioned by Indonesian citizens married to foreigners, the decision also applies to couples married to fellow Indonesian citizens. The agreement after the marriage must still be made in front of a notary or authorized party.

There are several elements contained in Article 29 paragraphs (1), (3) and (4) of the UU Perkawinan after the Constitutional Court Decision, namely

#### **Agreement Made During the Marriage Period**

After the MK decision, the making of a marriage agreement can be done at any time before the marriage is held, at the time of the marriage and during the marriage / after the marriage is held. Even though the husband and wife have been married for many years or are still in the marriage period and intend to make a marital agreement for the separation of joint assets, the husband and wife are allowed to make and make a marriage agreement.

#### **Mutual Consent**

Mutual consent is the most important thing in making an agreement. marriage agreements that are carried out in a family manner may only be made by husband and wife, as referred to in Article 29 paragraph (1) of Law No. 1 of 1974 jo. If in the future the husband or wife wants to make changes and revoke the marriage agreement that they have previously agreed upon, it must be agreed upon jointly or must be with the consent of the spouse between husband and wife so that the agreement can be changed and canceled.

#### **Made in Writing**

Marriage agreements must be made in writing in order to provide legal certainty and become a guide for husband and wife if problems occur in the future so that they are officially recorded. This aims to protect the assets that have been agreed upon in a marriage agreement so that no party is harmed.

#### **Notarized by a marriage registrar or notary**

Although the marriage agreement on the separation of joint property has been made in writing, if the marriage agreement is not recorded, then the agreement is not valid according to the law. The agreement cannot be legalized if the contents of the agreement violate the boundaries of religion, law, and decency, as well as the conditions for the validity of an agreement. In the case of a marriage that is recorded at the KUA for those who are Muslim, the agreement is recorded and registered at the KUA. Meanwhile, for those who are non-Muslims or marriages conducted abroad, the agreement is recorded at the local Civil Registration Office. Especially for marriages conducted abroad, only marriages that have been reported or

recorded at the capil can record the marriage agreement. Without the evidence that reports the marriage of Indonesian citizens abroad provided by the Population and Civil Registration Office, the agreement cannot be registered or reported. In addition, the marriage agreement can also be legalized by a notary. This applies not only to the creation of a marriage agreement, the first time, but also applies to changes and revocation of the agreement.

### Applicable to Interested Third Parties

Although the marital agreement on the separation of joint property is the result of an agreement between the two parties (husband and wife), the agreement must not harm other parties (third parties) who have an interest in the agreement.

Moreover, joint property that has previously been attached in an agreement with a third party is then separated into joint property in a marriage agreement. This needs to be taken seriously and more carefully so that the joint property that wants to be separated through a marriage agreement does not harm the other parties concerned (third parties).

The reason for the marriage agreement after the marriage regarding the separation of joint property is due to the ignorance of the husband and wife that there are legal provisions governing the marriage agreement before the contract is carried out. Then another reason is the impact that may arise from joint property. there is concern that there will be consequences for the joint property of husband and wife in marriage, because the work of husband and wife has risks and responsibilities for their own property, so that the property obtained can remain private property.

Marital agreement After a marriage is held to regulate the causes and consequences of marital property after marriage, if there is an unequal property in one particular party. The post-marriage Marital Agreement is basically always related to the issue of wealth in marriage.

The making of a marriage agreement on the separation of joint property after the marriage takes place provides space for couples who previously did not have a marriage agreement, when after entering into marriage, there are certain things that are deemed necessary and necessary to make a marriage agreement while in a marriage bond. The content outlined in the marriage agreement is free depending on the agreement of the couple, as long as it does not conflict with the law, religion, or decency. Both parties are given freedom as intended in the principle of freedom of contract.

### Conclusion

The legal position of a marriage agreement made by a married couple after the marriage takes place is bound by the provisions of Article 29 of the UU Perkawinan, which is invalid and not binding, unless based on a court decision. However, after the decision of the Constitutional Court No. 69/PUU-XIII/2015 dated October 27, 2016, the position of a marriage agreement made by a married couple during the marriage bond is valid and binding, both to the two parties, and to third parties as long as the third party is involved.

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