

# UNDERSTANDING THE MARRIAGE AGREEMENT POST DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA NUMBER 69/PUU-XIII/2015

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## ABSTRACT

The marriage agreement is made before the marriage takes place and then recorded at the agency authorized to record it. This registration is a publicity requirement so that the marriage agreement is binding on third parties. Even though the Marriage Agreement is made before the wedding, it may be made after the wedding if the husband and wife are concerned enough to ask for a proviso allowing them to make a Marriage Agreement after the wedding. To make a Marriage Agreement then it is recorded at the agency authorized to record it. After the Constitutional Court Decision, Number 69/PUU-XIII/2015 has opened the opportunity that a Marriage Agreement can be made after marriage.

**Keywords:** Marriage Agreement, Marriage Registration, Constitutional Court Decision

## INTRODUCTION

In marital life, the arrangement of marital property does not receive much attention from the husband and wife, and even considers it something that can injure the marital property concerned, if the marital property is regulated legally written in the form of a Marriage Agreement.

Marriage property becomes a problem if they are divorced. This indicates that when people are going through a divorce, they start thinking about and deciding how marital property will be regulated, whereas marital property regulation should be known by those who are getting married, not those who are going through a divorce.

Since the enactment of Law number 1 of 1974 concerning Marriage (UUP), there has been unification in our country <sup>[2]</sup> in the field of Marriage Law, except as long as it is not regulated in the law, the old regulations can be used (Article 66 of Law number 1/1974).(Nomor, 1 C.E.)

The laws and regulations have regulated the making of a Marriage Agreement, which is part of the Marriage Law <sup>[3]</sup>. According to Article

147 of the Civil Code, the marriage agreement must be made before the marriage takes place and the agreement must be made before a notary if it is not made before a notary, then the agreement is void. Based on the substance of Article 147 of the Civil Code above, it is clear that the Marriage Agreement is made before or shortly before the marriage takes place. In other words, the Marriage Agreement cannot be made after the marriage takes place.

The Marriage Agreement in the UUP is regulated at the time of Article 29 paragraph 1 confirms that the agreement is made at or before the marriage takes place. From this sentence, problems arise at or before the marriage. The Marriage Agreement can be made and ratified.

Regarding the Regulation of the Legality of Marriage Agreements in the Compilation of Islamic Law (KHI), KHI does not regulate the mixing of assets in the marriage, both the husband's property and the wife's property will remain the property and fully controlled by each party (Article 86 of the KHI). Although in KHI there is no known mixing of marital assets, the parties can still enter into an agreement that regulates the position of property in marriage, and the agreement in question is a Marriage

Agreement. The Marriage Agreement in KHI is regulated in Chapter VII starting from Article 45 to Article 52.

Article 45 of the KHI states that "The two prospective brides can enter into a Marriage Agreement in the form of:

1. divorce; and
2. Other agreements do not conflict with Islamic law.

Article 47 KHI regulates the mixing of joint assets obtained by husband and wife during marriage, as follows:

First, at or before the marriage is held, the two prospective brides can make a written agreement ratified by the Marriage Registrar regarding the position of property in the marriage.

Second, as long as it does not clash with Islam, the agreement may involve the mixing and separation of their respective assets

Third, in addition to the provisions in paragraphs (1) and (2) above, the terms of the agreement may further specify the respective authorization to enter into mortgage bonds on personal assets and joint assets or business property

The Marriage Agreement, according to the above description of Article 47 of the KHI, includes not only husband and wife assets gained during the marriage but also each party's natural assets. A marriage agreement regarding joint property is an agreement made by the prospective bride and groom in written form and ratified by the Marriage Registrar to unite and or separate the personal assets of each party during the marriage.

In KHI there are arrangements regarding the types or types of Marriage Agreements that can be made by the parties, namely:

- A. Marriage Agreement of mixed personal property, and
- B. Marriage Agreement for the separation of the livelihood assets of each party;

Based on the description of the terms of the Marriage Agreement as specified in the KHI, it

can be deduced that the following requirements apply to the Marriage Agreement's legality under the KHI:

- a. The Marriage Agreement is made before or at the time the marriage takes place;
- b. The Marriage Agreement made must not conflict with Islamic Law;
- c. The Marriage Agreement is made based on the will of the parties;
- d. The Marriage Agreement is made in written form;
- e. The Marriage Registrar ratifies the Marriage Agreement.

Based on the above provisions, the Marriage Agreement can only be made before or shortly before the marriage is carried out.

In 2015, a judicial review has been submitted to the Constitutional Court regarding the position of Article 29 Paragraph (1), Paragraph (3), and Paragraph (4) of the UUP, and the Constitutional Court Number 69/PUU-XIII/2015. It has stated these articles does not have binding legal force and is contrary to the 1945 Constitution, namely the phrase "at or before the marriage takes place" in Article 29 paragraph (1), the phrase "... since the marriage took place" in Article 29 paragraph (3), and the phrase "as long as the marriage takes place". the marriage takes place" in Article 29 paragraph (4) of Law 1/1974 limits the freedom of 2 (two) individuals to make or when to make an "agreement", thus contradicting Article 28E paragraph (2) of the 1945 Constitution as argued by the Petitioners. Thus, the phrase "at or before the marriage takes place" in Article 29 paragraph (1) and the phrase "during the marriage takes place" in Article 29 paragraph (4) of Law 1/1974 is conditionally contradictory to the 1945 Constitution as long as it is not interpreted, including during in the marriage bond.

Comparison of Article 29 paragraph (1), paragraph (3), and paragraph (4) before and after the Constitutional Court Decisio :

Before the Constitutional Court's Decision	After the Court's Decision
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<p>“(1) At or before the marriage takes place, both parties with mutual consent may submit a written agreement ratified by the marriage registrar, after which the contents shall also apply to the third party involved. ...</p>	<p>(1)At the time, before <i>or during the marriage bond</i>, both parties with mutual consent can submit a written agreement which is legalized by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved ”;</p>
<p>(3) The agreement comes into force from the time the marriage takes place.</p>	<p>(3) " The agreement comes into force from the time the marriage takes place <b>unless otherwise specified in the Marriage Agreement ”; stuck ”;</b></p>
<p>(4) As long as the marriage lasts, the agreement cannot be changed, unless from both parties there is an agreement to change it and the change does not harm a third party.”</p>	<p>(4) " During the marriage, the marriage agreement can be regarding marital property or other agreements, it cannot be changed or revoked, unless from both parties there is an agreement to change or revoke it, and the change or revocation does not harm a third party ”;</p>

**The Constitutional Court in its legal considerations affirmed that:**

The current provisions only regulate marriage agreements made before or at the time the marriage takes place, whereas in reality there is a husband-wife phenomenon who for some reason just feels the need to make a Marriage Agreement while in the marriage bond. So far, following Article 29 of Law 1/1974, such an agreement must be made before the marriage takes place and must be placed in a notary deed. This marriage agreement comes into force between husband and wife from the time the marriage takes place. The content stipulated in the Marriage Agreement depends on the agreement of the parties to the prospective husband and wife, as long as it does not conflict with the law, religion, and decency or decency. As for the form and content of the Marriage Agreement, both parties are given the widest possible freedom or independence (following the law "freedom of contract").

Thus, the Constitutional Court's decision has given birth to new legal norms, namely:

1. A marriage agreement can be made before it is held or during the marriage bond, both parties with mutual consent can submit a written agreement, which is legalized by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved.

2. The agreement comes into force from the time the marriage takes place unless otherwise specified in the relevant Marriage Agreement.

3. As long as the marriage takes place, the marriage agreement can be regarding marital property or other agreements, it cannot be changed or revoked, unless from both parties there is an agreement to change or revoke it, and the change or revocation does not harm a third party.

With the decision of the Constitutional Court, the marriage law in Indonesia has experienced significant developments. The marriage agreement was originally only conducted before or at the time of the marriage, but it can now be carried out during the marriage period and is valid as long as the marriage is retained, and it can also be altered or renewed during the marriage period. This provision does not only apply specifically to the perpetrators of mixed marriages, but all marriages in general, and the decision: (1) is final, (b) binds the parties (the applicant), (c) binds all Indonesian citizens

**PROBLEMS**

1. What is the legal status of the joint property obtained during the marriage for the marriage agreement made based on the decision of the Constitutional Court?

2. What the legal protection is for parties when, if a husband and wife make a marriage agreement with the decision of the Constitutional Court?

## METHODS

This research is normative legal research. The approach used in this research is statutory. The legal materials used are primary legal materials, consisting of statutory regulations, court decisions, official minutes, and official state documents. The technique of collecting legal materials used is through a literature study, a document study, and an archive study. The processing of legal materials is carried out in several stages, namely, inventory, identification, classification, and systemization. Then, the author uses a deductive inference method to conclude the findings of this study.

## RESULTS

### Legal Due To Joint Property Obtained During Marriage For A Marriage Agreement Based On The Constitutional Court Decision Number 69/PUU-XIII/2015

The establishment of marital property happens immediately once the marriage takes place or there is a union of unanimous assets, according to Article 119 of the Civil Code. That is from the time the marriage takes place, according to the law there is the joint property between husband and wife, as long as there are no other provisions in this regard marriage agreement. Joint assets may not be abolished or changed with an agreement between husband and wife as long as the marriage is ongoing. It is implying that what is meant by joint property includes all types of property in the form of inheritance, gifts, and even husband and wife's belongings since the marriage took place.

This provision is different from the Marriage Law no. 1 of 1974 Article 35 paragraph (1), it is stated that what is meant by the joint property is property acquired during the marriage period. This means that assets obtained before the marriage are not referred to as joint property. These two prohibitions, however, can be waived if the partners agree to a marriage agreement before they marry, which allows them to govern and own their property.

The legal consequences on the status of marital property whose marriage agreement is made after marriage on the status of property are inherent (closely related) to the time when the agreement comes into force.

As described above, for a marriage agreement made before or at the time of marriage, following the provisions of Article 29 of the Marriage Law, the marriage agreement takes effect from the time the marriage takes place. Then what about the marriage agreement made during the marriage after the Constitutional Court's decision, does the marriage agreement take effect from the date of the marriage agreement or is it retroactive from the date of marriage?

If you look at the Decision of the Constitutional Court Number 69/PUU-XIII/2015, which states that "The agreement comes into force from the time the marriage takes place unless otherwise stipulated in the Marriage Agreement". As a result, unless the marriage agreement specifies otherwise, the marriage agreement made during the marriage is also effective from the time the marriage is carried out. According to the Constitutional Court, the substance of the article must be interpreted that "The marriage agreement shall come into force from the time the marriage takes place unless otherwise stipulated in the Marriage Agreement." If they are not interpreted as interpreted by the Constitutional Court, then such articles are declared contrary to the 1945 Constitution.

When a marriage agreement is made after the marriage without determining its validity, the legal consequences of the agreement start from the time the marriage takes place, which is followed by the status of the joint property being separated if both parties want it in the agreement, without having to get a court order regarding the separation of assets. Since the content of the agreement made by the parties is an agreement for the separation of assets, which in the principle of freedom of contract the parties are given the freedom to determine the content. If in this case, the parties have determined that the assets that previously had the status of joint property become the property of each party, then it can be legally justified. Either so that such property, which is obtained by husband and wife during the marriage takes place before or after the marriage agreement is made, becomes the property of each husband and wife. Legal

Consequences to Third Parties The decision of the Constitutional Court in this case not only regulates the legal consequences of marriage agreements after marriage on property status but also implicitly regulates legal consequences for third parties. The Constitutional Court's decision stated in his ruling that "At the time, before or during the marriage bond, both parties with mutual consent may submit a written agreement ratified by the marriage registration officer or notary, after the contents also apply to third parties as long as the third party is involved.

#### **Legal Protection Against Third Parties, If The Husband And Wife Makes A Marriage Agreement At The Decision Of The Constitutional Court**

Furthermore, the problem, in this case, is how to find out if there are third parties who are harmed related to the making of a marriage agreement after the Constitutional Court's decision. Since the decision of the Constitutional Court does not regulate this matter. The Marriage Law only stipulates that if the marriage registration officer has ratified the marriage agreement, the marriage agreement can only be binding on third parties. So in this regard, it is very unfair if there is a marriage agreement made as long as the marriage is detrimental to a third party, then the marriage agreement is recorded at the Civil Registry Office or the Office of Religious Affairs.

In this regard, in making a marriage agreement after the Constitutional Court's decision, the Notary, in this case, does not necessarily provide his assistance in making a marriage agreement. Because the Notary must obtain certainty, the marriage agreement made is not detrimental to third parties. For there to be legal certainty, the Notary may ask the party who will make the marriage agreement first, the parties will announce in the national/local daily newspapers that a marriage agreement will be made after the Constitutional Court's decision. Second, Request an inventory list of assets obtained during the marriage bond, which will be included in the deed. Third, the existence or making a statement that the assets have never been transacted in any way and form, for and to anyone.

Marriage agreements made based on the decision of the Constitutional Court must be registered with the competent authority, namely:

1. Letter of the Director-General of Population and Civil Registry of the Ministry of Home Affairs of the Republic of Indonesia Number: 472.2/5876/Dukcapil, dated 19 May 2017, concerning the Recording of Marriage Agreement Reporting (Post-MK Decision)
2. Letter of the Directorate General of Islamic Community Guidance, Ministry of Religion of the Republic of Indonesia Number: B.2674/Dj.Iii/Kw.00/9/2017, May 19, 2017, Concerning the Recording of Marriage Agreements (After the Court's Decision)

#### **CONCLUSIONS AND NEXT STEPS**

That the legal consequences of joint assets obtained during the marriage, which then they make a marriage agreement after the decision of the Constitutional Court, then the property will have the position as separate marital property or property of each from the date agreed upon by them themselves. That the protection of the parties when the result of a marriage agreement that separates assets is made, then there is an obligation from the parties to announce it in advance in the newspaper (facultative) and make an inventory of the assets that will be made into separate assets that will become the property of each other.

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