

# Marriage Agreements Made in the Time of Marriage and Its Legal Consequences on Third Parties and Minangkabau Traditional Law after the Constitutional Court's Decision Number 69/PUU-XIII/2015 Comes Into Force

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## Abstract

*The marriage agreement is regulated in Article 29 of Law Number 1 of 1974 concerning Marriage which essentially states that a marriage agreement must be made with a notarial deed, or with a written agreement ratified by the Marriage Registrar, before the marriage takes place or at the time the marriage takes place and The Marriage Agreement shall come into force since the marriage was held, and cannot be changed, unless from both parties there is an agreement to change and the change does not harm a third party. Based on the Decision of the Constitutional Court Number 69/PUU-XIII/2015, the Court is of the opinion that the implementation of the marriage agreement is not limited to being carried out only at or before the marriage is held, but also during the marriage contract, the marriage agreement can be executed by husband and wife upon mutual agreement.*

## Keywords

marriage agreement; tradition law; Minangkabau



## I. Introduction

Forming a family is done through a process which is known as marriage. The definition of marriage according to Law Number 1 of 1974 concerning Marriage which is stated in Article 1, namely:

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

The article contains two formulations, namely the formulation of the meaning and purpose of marriage. The meaning of marriage is "The inner and outer bond between a man and a woman as husband and wife, while the purpose of marriage is "Forming a happy and eternal family or household based on God Almighty". Meanwhile, marriage according to customary law is a matter of relatives, family affairs, community affairs, personal affairs with each other in very different relationships. So marriage according to customary law is a shared responsibility of customary law communities. In the Minangkabau community, for example, the customary law that applies to the Minangkabau community is Islamic law. So marriage must also be based on Islamic law, but in reality this is not the case. This can be seen in the Minangkabau kinship system which is famous for the matrilineal system.

Marriage is a legal act where the parties who can do it have been determined by law and against it will cause a legal consequence for the parties. Such legal actions will give birth to rights and obligations for husbands and wives who have promised to bind themselves to

each other physically and mentally and therefore will have legal consequences for both parties. A legal marriage according to the law is a legal act, so the consequences for any legal action will have legal consequences not only for both husband and wife but also for the other party with whom one or both parties (husband and wife) are. will enter into legal relations in the future. Thus, marriage is one of the legal actions in society, namely a social event which by law is given consequences.

Marriage is the process by which two people make their relationship public, official, and permanent. It is the joining of two people in a bond that putatively lasts until death, but in practice is increasingly cut short by divorce. Over the course of a relationship that can last as many as seven or eight decades, a lot happens. Personalities change, bodies age, and romantic love waxes and wanes. And no marriage is free of conflict. (Jamaluddin, 2018)

Marriage is an important event in the life of every human being. Marriage that occurs between a man and a woman will have physical and spiritual consequences between them, on the community and also their relationship with the assets obtained between them both before, during and after the marriage takes place. In the literature, marriage has an understanding as an *aqad*, which justifies association and limits both rights and obligations and mutual assistance, between a man and a woman, both of whom are not mahram.

After the enactment of Law Number 1 of 1974 concerning Marriage as a legal unification in the field of marriage which adheres to the principle of separation of assets as regulated in the provisions of Article 35 paragraph (1) it is stated that property acquired during marriage becomes joint property and in paragraph (2) further mentions that the property of each husband and wife, and the property obtained by each as a gift or inheritance is under the control of each as long as it is not determined otherwise. It can be seen that among the provisions regulated by Law Number 1 of 1974 concerning Marriage with the Civil Code there are differences, where in the Civil Code regulates the wealth of husband and wife who are brought into marriage to be mixed into joint assets, namely joint assets between them,

But besides that, there are similarities between these regulations, namely, the two regulations provide an opportunity for husband-wife couples to decide otherwise on assets both obtained before and/or after the marriage takes place, this is a deviation justified by law which is determined in a limited manner. through a marriage contract. The Marriage Agreement or often referred to as a pre-nuptial agreement is known in the Civil Code and Law Number 1 of 1974 concerning Marriage which is an agreement made by a pair of prospective husband and wife before a notary stating that they have agreed to make a separation of their respective assets. -each in their future marriage,

Marriage according to Article 1 of Law number 1 of 1974 concerning marriage marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead. Basically, marriage is nothing but an event that contains rights and obligations, which after being carried out by a husband and wife will cause legal consequences, including the emergence of consequences for themselves, namely the emergence of rights and obligations of husband and wife, consequences on the property of husband and wife and the consequences of marriage. to children as offspring. The legal consequences that we will highlight in this paper are the legal consequences on property arising from marriage, namely the emergence of marital property.

On 27 October 2016 the Constitutional Court (MK) through its decision Number 69/PUU-XIII/2015 gave a constitutional interpretation of Article 29 paragraphs (1), (3), and (4) of Law Number 1 of 1974 concerning Marriage at the request of Mrs. . Ike Farida, whose core message stated that as long as it is not interpreted that a marriage agreement can be

carried out "during the marriage bond", then such an article according to the Court does not have binding legal force (conditionally unconstitutional). The Constitutional Court (MK) partially approved the judicial review of Law Number 5 of 1960 concerning the Basic Regulations on Agrarian Principles (UUPA) and Law Number 1 of 1974 concerning Marriage (Law on Marriage). The applicant in the a quo case is an individual who has a marital relationship with a foreign national. In that decision, The Court only granted the judicial review of Article 29 paragraph (1), paragraph (3) and paragraph (4) of the Marriage Law. Meanwhile, the application for review of Article 21 paragraph (1), paragraph (3), Article 36 paragraph (1) of the UUPA and Article 35 paragraph (1) of the Marriage Law was rejected. In summary, the applicant's application is related to the rights of Indonesian citizens who are married to people who have foreign citizenship who have married but do not have a marriage agreement regarding separation to be able to have Property Rights and Building Use Rights on land.

The Constitutional Court provides a constitutional interpretation of Article 29 paragraphs (1), (3), and (4) of Law Number 1 of 1974 concerning Marriage regarding the marriage agreement. The Constitutional Court has expanded the meaning of a marriage agreement, which is made according to the legal needs of each spouse. In its injunction, the Constitutional Court stated that Article 29 paragraph (1) of the Marriage Law was declared conditionally unconstitutional as long as it was not interpreted "At the time, before it takes place or during the marriage bond, both parties with mutual consent may submit a written agreement which is legalized by the marriage registrar or notary, after where the contents also apply to third parties as long as the third party is involved.

Article 29 paragraph (3) of the Marriage Law is declared conditionally unconstitutional as long as it is not interpreted as 'The agreement comes into force from the time the marriage takes place, unless otherwise stipulated in the Marriage Agreement'. Whereas Article 29 paragraph (4) of the Marriage Law is declared conditionally unconstitutional as long as it is not interpreted "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 the third party.

In his application, the applicant examines Article 21 paragraph (1) and paragraph (3), Article 36 paragraph (1) of the UUPA regarding the requirements for ownership of Property Rights and HGB which may only be owned by Indonesian citizens and Article 29 paragraph (1), paragraph (3) and paragraph (4) and Article 35 paragraph (1) of the Marriage Law related to marriage agreements and joint property. The problem that arises as a result of the a quo provisions is that every Indonesian citizen who marries a foreigner cannot own a house with HM or HGB status because it is against the rules of the Marriage Agreement and Joint Assets. The applicant argues that any Indonesian citizen who marries a foreigner as long as they do not have a property separation agreement cannot own a house with Hak Milik or HGB status.

Furthermore, on such a request, the Constitutional Court is of the opinion that in its legal considerations it states that: Strictly speaking, the existing provisions only regulate marriage agreements made before or at the time the marriage takes place, whereas in reality there is a husband-wife phenomenon which for certain reasons has just felt the need to make a marriage agreement during the marriage bond. So far, in accordance with Article 29 of Law Number 1 of 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.

The phrase "at or before the marriage takes place" in Article 29 paragraph (1), the phrase "... since the marriage takes place" in Article 29 paragraph (3), and the phrase "during the marriage takes place" in Article 29 paragraph (4) of the Law Number 1 of 1974 limits the freedom of 2 (two) individuals to make or when to enter into an "agreement", thus contradicting Article 28 E paragraph (2) of the 1945 Constitution as argued by the applicant.

Thus, the phrase "at or before the marriage takes place" in Article 29 paragraph (4) of Law Number 1 of 1974 is conditionally contradictory to the 1945 Constitution as long as it is not interpreted, including during the marriage bond.

The conditions of society are increasingly democratic and critical, the contents of marriage agreements have also developed, which are no longer included only matters of separation of assets and receivables, but also matters of sharing family costs, settlement of disputes in the household, the habit of collecting rare items that are classified as expensive, regulating the profession. Each prospective husband and wife during the marriage, up to the clause on domestic violence (KDRT). These can now be included as part of the marriage agreement.

In a very modern era like now, a marriage agreement is one of the things that is quite busy being discussed, now couples have started to consider making it. Many people began to question whether the actual marriage agreement was actually. A marriage agreement, or often called a pre-nuptial agreement, is an agreement made by a prospective husband or wife authentically before a notary stating that they have mutually agreed and agreed to make a separation of their respective assets in their future marriage by making and signing the agreement. If they handle this agreement, then all of their property, whether it is in the form of property that they brought before they got married, or the income they get after they get married later is the right and remains the property of each of them. Likewise, the debts of each party will remain the responsibility of the party who has the debt. Based on the provisions of civil law, each prospective husband or prospective wife has enormous freedom to determine the consequences of their marriage, especially regarding their property. Each prospective husband or wife can determine whether all of their property will be mixed or only part of it will be mixed and some will be separated, or there is no mixture of property at all, so that each has his own property.

In terms of making a marriage agreement, there are conditions in its implementation that must be considered for the validity of the marriage agreement. These conditions are regulated, among others, that the marriage agreement must be made in written form, and made before the marriage takes place, and is valid since the marriage is held. The agreement is attached to the marriage certificate and is an inseparable part of the marriage certificate, and the marriage agreement is made by mutual consent or will, made in writing, ratified by civil registry officials, and may not conflict with law, religion and decency. The regulations regarding the making of this marriage agreement are also regulated in the Law, namely in Law Number 1 of 1974 concerning Marriage, the marriage agreement is regulated in Article 29 which determines:

1. At or before the marriage takes place, the two parties with mutual consent can enter into a written agreement which is legalized by the marriage registrar, after which the contents also apply to third parties as long as the third party is involved.
2. The agreement cannot be ratified if it violates the boundaries of law, religion and morality.

3. The agreement is valid since the marriage took place.
4. As long as the marriage lasts, the agreement cannot be changed, unless from both parties there is an agreement to change and the change does not harm a third party.

In the first paragraph of Article 29 above it is clearly stated that the marriage agreement must be carried out at or before the marriage takes place, the same thing is also regulated in Article 147 of the Civil Code, namely where it is stated that the marriage agreement must be made with a notarial deed and must be made before the marriage takes place.

Previously in Indonesia, marriage agreements were not well known, because entering into an agreement regarding property between a prospective husband and a prospective wife, it may be felt by many people to be inappropriate. Indonesia's eastern culture also makes our society feel reluctant to talk about property issues, especially before marriage. This is one of the reasons why marriage agreements are not commonly made by prospective married couples, but times continue to develop, so does the human mindset. Humans now tend to be more critical and careful, high economic competition makes each individual try to protect his property more carefully and in various ways that are considered possible. Women in the past were not as active as today, where the number of female and male workers is almost the same, so it is common at this time that both husband and wife both work and generate income. This has become one of the triggers for today's society to feel that a marriage agreement is something that needs to be considered, and because it cannot be denied that nowadays material culture has become part of their lifestyle, which then affects their attitude of thinking to weigh the advantages and disadvantages materially in the future. when entering marriage.

It is common to know that when something develops and begins to be widely used, problems will arise about it in the future. For marriage agreements made before marriage at this time it may no longer be a strange thing, notaries are used to making such agreements, but one of the interesting things is when problems arise regarding marriage agreements made after marriage. Haven't both the Civil Code and Law Number 1 of 1974 clearly stated that the agreement must be made before marriage? This is an interesting matter to discuss, because in fact there are several requests to the Head of the District Court to ask for the ratification of the marriage agreement made after the marriage.

Formally, a marriage agreement is an agreement made by a prospective husband or wife to regulate the consequences of their marriage on their assets. A legal marriage according to law will have the following legal consequences: 1) The emergence of the relationship between husband and wife; 2) The emergence of property in marriage; 3) The emergence of a relationship between parents and children

The purpose and purpose of the prospective husband and wife making marriage promises is to regulate the legal consequences of marriage, namely regarding assets so that there is no unanimous union of marital assets between husband and wife during marriage. Marriage agreements containing deviations from unanimous unions are usually made by prospective husbands and wives whose total wealth is very unequal - the prospective husband is very rich, while the prospective wife does not have any or vice versa.

Article 139 of the Civil Code stipulates that "With promises of marriage, the prospective husband and wife have the right to make deviations from the provisions concerning the unity of property, provided that: 1) Do not violate decency; 2) Does not violate public order; 3) heed the regulations or not violate the applicable legal provisions". In order to separate assets or mix profit and loss or mix income, a person who wants to marry can enter into a marriage agreement (*huwelijkse voorwaarden*). Such an agreement according to Article 147 of the Civil Code must be made before the marriage takes place and must be placed in a notary deed.

If the registration of the agreement at the Registrar's Office of the District Court has not been carried out and has not been recorded in the Civil Registry Marriage Deed, then third parties may consider the husband and wife to be married in a unanimous union of marital assets (Article 119 of the Civil Code). Developments that occur in today's society, there are many problems that may be faced by husbands or wives, especially carrying out marital life, so the marriage agreement can be used as a solution to protect their respective assets.

Based on the above background, it is important to study further the legal implications of the Constitutional Court's Decision which affects the legal system of marriage agreements which have been regulated in Law Number 1 of 1974 concerning Marriage, where after the Constitutional Court's Decision there has been a significant change to Article 29 paragraph (1), (3), and (4) which according to the Court must be interpreted can also be carried out when the marriage bond has taken place if there is mutual agreement between husband and wife, this will have implications for the making of the Marriage Agreement Deed while in the marriage bond by the notary and the legal consequences of the marriage agreement on the status of assets that have become joint assets and against third parties, This is the author's attention so it is interesting to explore and study.

## **II. Research Methods**

This study belongs to empirical legal research. The subject of the study was conceptualizing law as actual behavior as an unwritten social phenomenon experienced by every individual in social life setting. The data source of empirical legal research is based on positive law and applicable customary law and then combined with observations in research sites.

## **III. Result and Discussion**

On 27 October 2016 the Constitutional Court (MK) through its decision Number 69/PUU-XIII/2015 gave a constitutional interpretation of Article 29 paragraphs (1), (3), and (4) of Law Number 1 of 1974 concerning Marriage on the request of Mrs. Ike Farida, whose core message stated that as long as it is not interpreted that a marriage agreement can be held "as long as it is in the marriage bond", then such an article according to the Court does not have binding legal force (conditionally unconstitutional).

This means that based on the Constitutional Court's decision on Article 29 paragraphs (1), (3), and (4) the Court applies an extensive interpretation so as to result in the formulation of norms in Article 29 paragraphs (1), (3), and (4) on the implementation of the marriage agreement. Now it is not limited to only being carried out at or before the marriage takes place, but also during the marriage bond, the marriage agreement can be carried out by husband and wife with mutual consent. Thus, in this case the Constitutional Court puts forward the application of progressive law to meet the legal needs of phenomena that occur in society against the risks that may arise from joint property in marriage, both because of the work of husband and wife which have consequences and responsibilities to property. Personal.

The provisions regarding the making of a marriage agreement as regulated in Law Number 1 of 1974 concerning Marriage do not regulate the making of a marriage agreement after the marriage takes place. The provisions in Article 29 of the Law which in essence only regulates marriage agreements that can be made at or before the marriage takes place, but in the phenomenon of its development in society (practice) it can be found that marriage agreements are made at the time the marriage bond takes place which for certain reasons the

husband and wife have just made a marriage agreement, while this can be justified by law on the basis that such an agreement must be preceded by submitting an application to the competent court in order to obtain a determination from the judge.

Furthermore, after obtaining the court's determination, the parties (husband and wife) can then make a marriage agreement deed after marriage before a notary. Because based on Article 15 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary, it is stated that a Notary has the authority to make authentic deeds regarding all actions, agreements, and provisions required by laws and regulations. and/or what is desired by the interested party to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, providing grosse, copies and excerpts of the deed, all of this as long as the making of the deeds is not assigned or excluded to other officials or other people. determined by law.

Therefore, if it is linked between the article (authority of the Notary) and the marriage agreement after marriage which has previously received a determination from the court, it can be interpreted that even though such an agreement is carried out at the time of the marriage, it does not reduce the essence of the marriage. From the authority of the Notary as a public official in making the marriage agreement deed. Then the deed of agreement that has been made before the Notary is registered with the agency authorized by the legislation to register it, namely the Population and Civil Registration Service or the Office of Religious Affairs (KUA) according to the legal subject.

This is in accordance with the provisions of Article 29 paragraph (1) of the Marriage Law, the marriage agreement is ratified by the Marriage Registrar. According to Alwesius, "ratified" in the sentence of the provisions of Article 29 paragraph (1) of the Marriage Law does not mean that if the marriage agreement is not ratified by the Marriage Registrar, then the marriage agreement is invalid. According to him, "ratified" in the sentence means that the marriage agreement must be "recorded", and if the marriage agreement is not recorded then the marriage agreement is not binding on third parties.

However, after the issuance of the decision of the Constitutional Court Number 69/PUU-XIII/2015 dated March 21, 2016, there was a change related to the making of a marriage agreement, the decision was at the request of an Indonesian citizen who entered into a mixed marriage, who entered into a marriage without making a marriage agreement. Over time, the couple also intends to buy a house/flat, but because of the regulations that apply in the context of national land law, namely the provisions of the UUPA, the principle of nationality is adopted, which means that only Indonesian citizens can have land rights in Indonesia.

Furthermore, on such a request, the Constitutional Court is of the opinion that in its legal considerations it states that: Strictly speaking, the existing provisions only regulate marriage agreements made before or at the time the marriage takes place, whereas in reality there is a husband-wife phenomenon which for certain reasons has just felt the need to make a marriage agreement during the marriage bond. So far, in accordance with Article 29 of Law Number 1 of 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,

The phrase "at or before the marriage takes place" in Article 29 paragraph (1), the phrase "since the marriage takes place" in Article 29 paragraph (3), and the phrase "during the marriage takes place" in Article 29 paragraph (4) of the Law Law Number 1 of 1974 limits the freedom of 2 (two) individuals to make or when to enter into an "agreement", thus

contradicting Article 28 E paragraph (2) of the 1945 Constitution as argued by the applicant. Thus, the phrase "at or before the marriage takes place" in Article 29 paragraph (4) of Law Number 1 of 1974 is conditionally contradictory to the 1945 Constitution as long as it is not interpreted, including during the marriage bond.

Such a decision of the Constitutional Court will have permanent and binding legal force since after being pronounced before a trial, it is open to the public, which means that the decision of the Constitutional Court immediately acquires permanent and binding legal force after being pronounced and no other legal remedies can be taken (final and binding). The legal consequences of the above Constitutional Court Decision which grants the Petitioner's petition are null and void and do not have binding legal force against a legal norm requested by the Petitioner, therefore in this case Article 29 paragraphs (1), (3), and (4) of the Law Law Number 1 of 1974 concerning Marriage based on the Constitutional Court's ruling above is conditionally unconstitutional, so that such a decision creates a new legal situation (*deklaratoir constitutif*) which in this case the Constitutional Court as referred to by Hans Kelsen as a negative-legislator,

The legal force of the Constitutional Court Decision consists of binding legal force, evidentiary legal force, and executive legal force. The binding legal force on the Constitutional Court Decision does not only bind the litigants (*interpartes*), but also binds and/or is intended for all citizens, state institutions/officials and legal entities within the territory of the Republic of Indonesia (*erga omnes*). Therefore, based on this explanation, the Constitutional Court's decision is also binding on the Notary as having the authority (official) in making the marriage agreement deed and the Population and Civil Registration Service or the Office of Religious Affairs (KUA) as the official who has the authority to register the marriage agreement deed.

The phenomenon that occurs in the community is one of the considerations of the Constitutional Court to declare such articles as conditionally unconstitutional as the legal considerations of the Constitutional Court described above, this is solely carried out by the Constitutional Court in order to provide legal certainty and justice guaranteed by the Constitutional Court. the 1945 Constitution for the community for their constitutional rights in making an agreement (the principle of freedom of contract) in this case a marriage agreement, therefore the Constitutional Court through one of its authorities regulated in Article 24 C paragraph (1) of the 1945 Constitution is to examine the Act against the Constitution 1945 issued a progressive decision to accommodate legal needs in society.

#### **IV. Conclusion**

Based on the discussion that has been described previously, the marriage agreement is regulated in Article 29 of Law Number 1 of 1974 concerning Marriage which essentially states that a marriage agreement must be made with a notarial deed, or with a written agreement ratified by the Marriage Registrar, before the marriage takes place or at the time the marriage takes place and The Marriage Agreement shall come into force since the marriage was held, and cannot be changed, unless from both parties there is an agreement to change and the change does not harm a third party. Based on the Decision of the Constitutional Court Number 69/PUU-XIII/2015, the Court is of the opinion that the implementation of the marriage agreement is not limited to being carried out only at or before the marriage is held, but also during the marriage contract, the marriage agreement can be executed by husband and wife upon mutual agreement.



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