

# POSTNUPTIAL AGREEMENT: A COMPARISON OF LEGAL SYSTEMS IN INDONESIA AND OTHER COUNTRIES

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## ABSTRACT

*Indonesian society considers marriage as a sacred and important event and therefore it is taboo to do a marriage agreement. The marriage agreement was initially only allowed to be made before or when the marriage took place, but then there was an expansion of the rules that marriage agreement could also be made after the marriage took place. The marriage agreement after marriage takes place greatly affects the existing legal order because it raises concerns for practitioners regarding whether or not there is good faith behind the marriage agreement. In this article we will discuss about Postnuptial Agreement in Indonesia and other countries as a comparative. The obligatory to make a marriage agreement after the marriage takes place; it must be made authentically and emphasized by the notary as the official who makes the marriage agreement deed that the agreement is valid since the signing of the marriage agreement deed.*

**Keywords:** Agreement, Indonesian Law, Marriage Law, Postnuptial, Prenuptial.

## INTRODUCTION

Marriage is an inner bond between a man and a woman as husband and wife aiming to form a happy and long-lasting family based on the belief in the one true God. Marriage is a loyalty between equal individuals. Therefore, an agreement made within the family is legitimate (Croty, 1999). Marriage is regarded as one of the precious moment in adult's life (Prameswari & Agustin, 2018). Marriage is a legal situation considered sacred and a strong bond, hence the ability and the will (desire) from the prospective mate should be aligned in order to obtain legal recognition deemed valid legally (Azizah, 2018).

The age limit for having a marriage as in Article 7 paragraph 1 of Act No. 1 of 1974 (Baxter, 2017) states, the age limit for a marriage is that men are 19 (nineteen) years old and women have reached 16 (sixteen) years old. (Samsul et al., 2020). Furthermore, the implemented regulation of marriage law called the Implementation of Regulation (Peraturan Pelaksanaan/PP) No. 9 of 1975 Article 10, paragraph (2) explains that "marital procedure is done according to the law of each religion and belief". This provision applies to all religions in Indonesia except Islam since it combines the law with the provisions of Compilation of Islamic Law (Kompilasi Hukum Islam/KHI) (Lathifah, 2020).

The provisions in the Marriage Law state that the property acquired during marriage will

become a shared property. Meanwhile, the property acquired prior to marriage will remain the original property of each married couple. Marital property is all property acquired by married couples during the marriage, except: The property gained from winning a prize, the property earned before marriage, the property acquired by the spouse after the agreement of separation of property, and the property that does not included in the property contracted by the spouses (Walker, 2015). The marriage agreement in Indonesia regulates the assets in marriage and the assets of a married couple (Susanti, 2018). A marriage agreement relating to property may include the mixing of personal property (property earned prior to marriage) in the form of separation of individual or joint property (Judiasih, 2015)

This provision illustrates that there are several types of property in marriage. The terms of separation of such property may be exempted by the establishment of a marriage agreement. The marriage agreement is an agreement on the aspects of marriage that arise during the marriage (Lawrence, 2014). By formal law, this marriage agreement is regulated in three laws namely the Criminal Code, Marriage Law and KHI (Abdillah, 2017).

Prenuptial agreements are more popular to young couples, who are seeking to protect their assets and attempting to negotiate the best deal for each of them in case of a possible end to their marital bond. While the rising rates of divorce are understood to be a factor influencing couples to sign prenuptial agreements, the changing attitude towards marriage and the increase in independence of women can also be viewed as responsible for the rising acceptance and use of prenuptial agreements (Ghosh and Pratyusha, 2019).

Prenuptial agreements have also been found to be cost effective, as they totally eliminate the usual lengthy, acrimonious legal battles often associated with financial aspects of divorce. All that the courts now have to do is just to enforce the terms which the parties themselves agreed upon in the absence of undue influence or manifest injustice. Besides it is quite evident that the international trend is now leaning in favor of global enforceable prenuptial agreements, and there is every need for every country to recognize and enforce same in order to avoid unnecessary conflict of laws across borders (Ifemeje, 2016).

The making of marriage agreements is becoming very popular in the modern society. Marriage is an institution that is very individual, but nowadays, married couples want to determine economic requirements in their marriage (Atwood & Bix, 2012). The Black's Law Dictionary states that a prenuptial agreement is a contract entered into prior to marriage, civil union or any other agreement prior to the main agreement by the people intending to marry or contract with each other.

The marriage agreement is made by a person who wants to look after his/her own personal property. This agreement was made prior to marriage (Katz, 2003). The marriage agreement is an agreement made by those who want to determine certain things prior to marriage. The marriage agreement determines the rights of a husband and wife if the marriage is terminated due to death or divorce (Ravdin, 2014). It is generally accepted that a married couple can deviate from rules relating to their rights in the event of a divorce. This can be done by making a marriage agreement (Sanford, 2016).

Historically, prenuptial agreements that attempted to defined or limit economic obligations in the event of divorce were void as against public policy, some people believed such contracts encourage divorce and undermined the policy of treating marriage as permanent, however as divorce became more easily obtained and as state regulation of marriage decrease, prenuptial agreement gained acceptance in every jurisdiction. Many marital and premarital

agreements include choice of law provisions, which are clearly important in light of the significant variation among laws governing marital agreements and marital property rights in different jurisdiction (Estin, 2017). Basically a broken marriage, either because of death, divorce or cancellation, will have legal consequences for the position of the husband and wife, the position of the child and joint assets or assets that exist during the marriage (Aisyah, 2018). In this article, we will discuss about Prenuptial Agreement according to the Decision of the Constitutional Court in Indonesia and Postnuptial Agreement in other countries.

## **RESEARCH METHODOLOGY**

The approach method used by researchers in conducting this research is a normative juridical approach. The normative juridical approach is a legal research approach that is carried out theoretically, by examining library materials or secondary data as the basic material for research and conducting searches guided by books or legal literature, as well as written regulations relating to the problem. discussed in this study (Soekanto and Mamudji, 2001). The normative juridical approach method is intended to analyze in depth the relevant positive legal regulations. This legal research method is a method in a systematic way in conducting a research (Muhammad, 2014). This research was conducted using a library research approach or research that focuses on literature and also field research related to nuptial agreement.

The research specification used in this research uses descriptive analytical method, meaning that the data used is a qualitative approach to primary data and secondary data. Descriptive, namely the presentation of research results with the aim of obtaining a comprehensive but still systematic picture (Muchtar, 2015).

This research was conducted using qualitative normative data analysis methods. This method describes data and facts in the form of sentences that are arranged systematically based on the results of the research followed by drawing conclusions to be used as a reference in answering and solving legal problems that are the object of research.

## **DISCUSSION**

### **Prenuptial Agreement according to the Decision of the Constitutional Court**

A premarital agreement or prenuptial agreement is a contract entered into prior to marriage in order to address the identification, separation, and/or division of property and support in the event of the termination of the marriage by death or failure of the marriage, such as divorce (Racey and Feraro, 2019). Prenuptial Agreement means that the agreement was made before (pre) the marriage took place or it could also be made at the time the marriage took place (during the marriage contract) (Dewi, 2019). Pre-nuptial agreement is able to protect the interests of each party who was often feels unfairly treated in inheritance distribution. Similar to the economy world, they bring a lot of capital into the marriage at the beginning of their marriage, but because their significant other make mistakes in business speculation, their assets are declining even at the end of the marriage they do not gain profit and prosper but they do have debt instead (Tedjosaputro, 2017).

Even without a marriage agreement, a marriage can still be carried out. In other words, a marriage agreement is only an institution that is prepared if there are parties who feel the need to

make an agreement to avoid disputes behind the day, for example regarding the separation between personal property and joint property (Rajamenickam et al., 2019).

Basically the Constitutional Court Decision has changed the norm and arrangement of the marriage agreement contained in Article 29 of the Law on Marriage, so that the substance of Article 29 is changed as follows : Article 29 paragraph (1) of Law No. 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia of 1974 No. 1, Supplement to State Gazette of the Republic of Indonesia No. 3019) is contradictory to the 1945 Constitution of the State of the Republic of Indonesia as long as it is not interpreted as, "at the time, prior to or during the marriage of two parties, based on mutual consent, may file a written agreement authorized by the marriage or notarial registry officer, after which the content also applies to third parties as long as the third party is involved.

The Constitutional Court ruling affirms that the marriage agreement must be made by mutual consent, with a written agreement authorized by the marriage registration officer, before or at the time the marriage takes place, then, the agreement entered into force from the moment the marriage takes place. Such agreements usually contain promises of property acquired during marriage, usually in the form of separation of earned property, each party obtaining what was earned before or during the marriage, including the profits and losses. This marriage agreement applies as a law to those who make it as well as to the third party who has an interest in it.

The making of postnuptial agreement during the marriage period has an effect on changes in the legal status of the assets and debts contained or obtained in marriage which are closely related to third parties. Thus the postnuptial agreement should be made must not harm third parties. However, until now there is no regulations have been made that regulated the procedure for making a postnuptial agreement during the marriage period so that it opens up space for interpretation widely (Prihadini, 2019).

With the Decision of the Constitutional Court No. 69/PUU-XIII/2015 (Ahyani, 2018), the making of a prenuptial agreement relates either on when it is made or may it be amended or revoked, if agreed upon by both parties, applies not only to a mixed marriage pair of Indonesian and foreign citizen, who has applied for No. 69/PUU-XIII/2015, but will also apply to marriage couples between Indonesian citizens. The situation raises irony because the decision is not only intended for mixed marriage spouses, but also widely applicable to the general public. Nowadays anyone can make a prenuptial agreement as long as the marriage is legal. Anyone can make the arrangement for any purpose, especially to protect them. We find it difficult to measure the essence of good faith that should be the basis of the agreement, including the prenuptial agreement. For instance, a married couple who defaulted on a credit agreement with a joint property as the mortgage. Before executed by the third party, they then enter into a marriage agreement stipulating that the property is not a joint property but the property of the husband or wife's. This, of course, will harm third parties, so it can be said that protection against third parties is ignored.

### **Postnuptial Agreement in other Countries**

Similar in intent to a prenuptial agreement, a postnuptial agreement is entered into after the marriage has taken place, not before. Unlike a separation agreement, which is entered into in contemplation of divorce, a postnuptial agreement is entered into in contemplation of an ongoing marriage. Common reasons people enter postnuptial agreements include insufficient time to

finalize a prenuptial agreement before marriage, modification of a prenuptial agreement, a significant change in net worth, or the presence of marital difficulties and an ensuing reconciliation (Ulfer, 2015).

In the Netherlands, as stipulated in The Civil Code of the Netherlands, marriage agreement can be made during the marriage. This can be seen in Article 114 stating that:

#### **Article 114 NBW**

Marriage contracts may be made both by the prospective spouses prior to entry into their marriage and by the spouses during their marriage.

#### **Article 115 (1) NBW**

In order to be valid, marriage contracts must be entered into by notarial instrument. In America, Although some of Americans do not believe in marriage, a study has found that the majority of international students who lives in America maintain that marriage is important to them and that gendered cultural pressures developed in their home countries, religious affiliation, and the importance of parental input remain key influences on their marital aspirations (Assel **Kuzembayeva, 2020**). In America premarital agreements started on shaky turf, due to the idea that premarital agreements would encourage divorce and destroy the sanctity of marriage. Marital agreements for the death of one spouse was both widely accepted and never challenged, because these agreements were thought to pre- serve the trust of marriage (Andrew & Gann, 2016).

In the United States' legal system, a postnuptial agreement is the same as a prenuptial agreement, which can describe the things that the parties want when they are divorced or at the end of marriage. In the United States, generally, almost all states have a prenuptial agreement, but only a few states already have the concept of a postnuptial agreement.

In U.S. there is Uniform Premarital Agreement Act (UPAA) which was approved in the National Conference of Commissioners of Uniform State Laws, and is now adopted by half of its states. Similar to contract, prenups are agreements between the parties, and there lies enforcement of duty to fulfill such obligations and in case of breach of such duty, it leads to liability (Matisa, 2016).

Prenuptial agreements positions in United States of America are quite stable. Prenuptial agreements are enforceable in all fifty states of the United States, although the nature of such agreement and procedural requirements prescribed for them varies from state to state. The National Conference of Commissioners on Uniform State Laws prepared the Uniform Premarital Agreement Act (UPAA) in 1983 which has been adopted by 26 states the District of Columbia till now. The other states either have their own statutes or impose general procedural requirements on prenuptial agreements. In spite of varying provisions for such agreements between the states, some common prerequisites exist across states which are to be fulfilled to make legally binding prenuptial agreements. These basic requirements are that there should be full and fair disclosure of assets of both parties, and the agreement must be accomplished voluntarily, must not be unconscionable, should be entered into with access to independent legal consultation, should be executed well before the wedding, and should not be against public policy.

The Position of Prenuptial Agreements in Selected Common Law Jurisdiction (Rajamenickam, 2019). The England Courts have generally held that premarital agreement is unenforceable on the basis of public policy. England enacted the Matrimonial Causes Act 1973 which was intended to govern matrimonial proceedings, maintenance agreements, and divorce. Prenups are said to violate Section 25 (1) of the Act which provides for the powers of the court. Further prenups are deemed to be void as it restricts the right for an order from the court in relation to financial arrangements as provided under Section 34 (1) of the Act. In Ireland, Prenuptial agreement is unenforceable in Ireland for the reasons of public policy. The Constitution of Ireland exhibits how the country esteems families. The Constitution provides fundamental rights, including the family. This can be seen in Article 41 of the Constitution. The state ensures the families especially establishment of marriage and only grants a divorce in circumstances where there is no way of compromise and as recommended by the law. In Australia, an amendment to the Family Law Act on December 2000 formed binding financial agreements which can be agreements entered into before, amid and after marriage. Before that time, prenups were not enforceable. The intention of the amendment is to enable individuals to enter into agreements which were contractually binding upon them and which defeated the jurisdiction of the family courts over any financial related question. The reformation of the law to enable couples to enter binding prenups was a progressive step. To be binding, there must be consent and also the terms that are agreed upon. In Malaysia, Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) governs marriage and divorce in Malaysia. The Act accommodates the importation of English principles. There is a misconception that a prenuptial agreement is not enforceable in Malaysia. However, the courts may consider prenuptial agreements when determining the distribution of matrimonial assets, so long as the agreement is not contrary to anything in the LRA 1976.

## CONCLUSION

The marriage agreement contained in the current Indonesian legal norm elucidates that a marriage agreement may be made before, at the time or during the marriage. This is similar to that contained in the legal provisions in the Netherlands and some States in the United States where marriage agreements may be made after the marriage takes place. The difference lies in the making of the marriage agreement, in which in Indonesia, the marriage agreement made after the marriage takes place shall not be made by notarial deed, whereas in both the Netherlands and the United States, it is required that the marriage agreement be made by notarial deed since the absence of notary will make the agreement null and void.

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