

# Legal Consequences Marriage Agreement Post the Constitutional Court Decision Number 69/PUU-XIII/2015

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**Abstract.** Philosophically PMK (Constitutional Court Decision) Nr. 69/PUU-XIII/2015 based on way of life, awareness, and legal ideals such as the mystical atmosphere and Indonesian Nation according Pancasila and The Constitutional of The Republic of Indonesia Article 28E Paragraph (2). Sociologically, based on legal needs society regarding the leniency when the marriage agreement was made that is the phenomenon of a husband and wife for some reason feels they needed to make a marriage agreement after the wedding day was held. Juridically, the issuance of PMK Nr. 69/PUU-XIII/2015 is not solely on the basis of unconstitutionality, but also on a conflict of norms between Article 29 Paragraph (1) of Act Nr. Year 1974 with general provisions of the ageement in Book III Code of Civil Law. Referring to PMK No.69/PUU-XIII/2015 which was strengthened by Act Nr. 2 Year 2014, Notary has the right to ratified the marriage agreement into an authentic deed so that there is no justifiable reason for the Department of Population and Civil Registration and Office of Religious Affairs rejects the authentic nature of the deed which is validated bay notary.

**Keywords:** Consequence; Legal, Constitutional Court Decision; Marriage Agreement

## 1 Introduction

The existence of the Constitutional Court (hereinafter abbreviated to the Constitutional Court) as the guardian of the constitution since the amendment of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution of the Republic of Indonesia) has resulted in many decision that attracted of the public attention. The Constitutional Court was born intended for the implementation of a stable state government and repairing all happened in the state administration in the past due to the dual interpretation of the Constitution of the Indonesian Republic at that time [1].

The Constitutional Court is a branch of the state in the field of judicial power as a stated in the 1945 Constitutional of the Republic of Indonesia Article 24C Paragraph (1) stated that “The Constitutional Court has the authority to judge at the first and last levels whose decisions are final and binding to examine the act against the Constitution of Indonesian Republic 1945, to decide the dispute of branches state authority whose granted by the Constitution of Indonesian Republic 1945, to decide on the dissolution of political parties and decide on disputes over the results of general elections. The mandate of the Constitution of The Indonesian Republic once again emphasizes that the Constitutional Court is present as a

concrete step to be able to mutually correct performance between state institutions and support the implementation of the check and balances system in Indonesia [2].

If we see the authority attached to the Constitutional Court, it is a tough task for the Court because that is to align requirements of the applicant with the existing constitution in Indonesia. Beyond that, Constitutional Court's decisions have the pros and cons polemics in society. However, there are also decisions that have support of the community because they are deemed in accordance with rights of citizens as stated in the Constitution of The Indonesian Republic 1945. One of the Constitutional Court decisions which is quite famous is that of the Constitutional Court Decisions Number 69/PUU-XIII/2015 (hereinafter abbreviated as PMK Nr. 69/PUU-XIII/2015) for a petition for judicial review of Act Number 5 of 1960 concerning Basic Agrarian Regulations (hereinafter abbreviated as Act Nr. 5 of 1960) and The Act Number 1 of 1974 concerning Marriage (hereinafter abbreviated as Act No. 1 of 1974) has made new arrangements regarding marriage agreements in Article 29 of Act Nr. 1 year 1974. The Constitutional Court decision states that Article 29 Paragraph (1) of Act No. 1 of 1974 is unconstitutional conditional as long as it is not interpreted, "At the time, before taking place or while in the marriage bond, both parties with mutual consent can submit a written agreement that is legalized by a marriage register or notary, after which the contents also apply to third parties as long as the third party is involved [3].

The marriage agreement before the Constitutional Court decision is regulated in Article 29 of Act Nr. 1 Year 1974 which states that a husband and wife cannot enter into a marriage agreement after being in marital status, because the agreement must be made before the marriage or when the marriage takes place and is valid from the time the marriage takes place therefore the agreement cannot be changed during the marriage. According to the Code of Civil Law joint property which is comprehensive is a normal result of a marriage. Meanwhile, the limitation or closure of any comprehensive of joint property can only be carried out with a marriage agreement [3]. The existence of the provisions to the Article 29 of Act Nr. 1 Year 1974 regarding the time of making a marriage agreement that must be made before or when the marriage takes place makes a husband and wife feel that their constitutional rights are limited as regulated in the Constitution of Indonesian Republic 1945. The married couple feels their constitutional rights are limited in terms of the freedom of 2 (two) individuals to do or when to make an agreement, which is contrary to Article 28E paragraph (2) of the Constitution Indonesian Republic 1945 which states that, "Everyone has the right to freedom of belief, to express thoughts and attitudes, in accordance with one's conscience [4].

Article 29 Paragraph (1), paragraph (3) and paragraph (4) Act Nr. 1 Year 1974 is considered contrary to Article 28E paragraph (2) of the Constitutional Indonesian Republic 1945 was the basis of conducted judicial review [4]. The results of the judicial review have an impact on the permission to make a marriage agreement as long as the marital ties. The Constitutional Court in this case added a new norm in the provisions of Article 29 of Act Nr. 1 Year 1974 in which a marriage agreement can be made before the marriage takes place, when the marriage takes place, and during the marriage bond. The inclusion of new norms contained in the Constitutional Court decisions in the future may lead to various responses including the following of Constitutional Court decision in the society [3].

## 2 Method

This research uses normative legal study with rationality will examine the juridical, sociological, and philosophical based on issue of PMK nr. 69/PUU-XIII/2015, and also internalization of the implementation the marriage agreement post PMK Nr. 69/PUU-XIII/2015. The approach of this legal research is with the Statute Approach, Legal Analytic and Conceptual Approach. Collecting data is taking by an inventory, studying, and exploring legal materials related to problems in research through literature and document studies. Data analysis wear descriptive analysis techniques systematically and interpretatively to identify and uncover existing problems [5].

In this study, primary data and secondary data were used. Primary data were collected through observation and interviews. Secondary data is collected through literature / document studies, namely on legal materials that are relevant to the research problem. This research method is carried out in the form of previous studies, textbooks, related news in print media, as well as online data search on the internet. And this method is very useful because it does not interfere with the object of research or the atmosphere of research [6].

This research is descriptive in nature, so the sampling technique used is non-probability sampling, meaning that in this study there is no definite rule on how many samples must be taken in order to represent the population. Data processing and analysis techniques in this study will be carried out qualitatively. All data from the research results were collected both from primary data and secondary data, processed and analyzed by systematically compiling the data. The data that has been compiled are linked between one data and another, then interpreted to understand the meaning of the whole data. The analysis process continues since the search for data in the field and continues until the analysis stage [7] .

## 3 Result and Discussion

### **Juridical, Sociological, and Philosophical Basis The Constitutional Court Decision Number 69/PUU-XIII/2015**

The development of marriage law in Indonesia are not only reflected in the amendment of Act Nr. 1 Year 1974 became Act Nr. 16 Year 2019, but can also be reflected in the existence of the Constitutional Court decisions regarding marriage which can be used as a reference for dealing with a case that is not regulated in law and/or used as guide for other judges to resolves a similar case (jurisprudence). One of the Constitutional Court decisions that have influenced the development of marriage law in Indonesia is PMK Nr. 69/PUU-XIII/2015, which is broadly oriented regarding the timing of the marriage agreement.

If studied more further, the provisions of Article 29 Act Nr. 1 Year 1974 concerning the time when the marriage agreement must be made before and / or when the wedding day takes place has actually limited the constitutional rights of the parties as stipulated in the Constitution of Indonesian Republic 1945. In this case the parties have limitation of their constitutional rights in terms by freedom that is 2 (two) individuals to do or when to make an agreement, this is specifically contrary to Article 28E paragraph (2) of the Constitution of Indonesian Republic 1945 which states, "Everyone has the right to freedom of belief, to express thoughts and attitudes, according to conscience".

Referring to the theory of legal protection by Philipus M. Hadjon, the existence of PMK Nr. 69 / PUU-XIII / 2015 which strengthens with provisions of Article 29 Act Nr. 1 Year 1974

actually reflects the existence of legal protection for dignity, as well as recognition of the human rights as legal subjects based on legal provisions. As for the human rights protected in PMK Nr. 69 / PUU-XIII / 2015 are the rights of Indonesian citizens who are married to foreigners.

After the issuance of PMK Nr. 69 / PUU-XIII / 2015 there is a leniency in the regulation of the marriage agreement where that it can be made after the wedding day and / or during the marriage bond period, this is of course very beneficial for Indonesian citizens who have already married foreigners, especially those who previously did not enter into an agreement marriage. The issuance of PMK No. 69 / PUU-XIII / 2015 are of course based on various foundations, while these are as follows:

Philosophical Basic; in line with the view of life as a nation and state, awareness and ideals of Indonesian law based on Pancasila, marriage is a noble and sacred act oriented towards human rights in terms of forming a family through a legal marriage as guaranteed under the provisions of Article 28B paragraph (1) Constitution of Indonesian Republic 1945. Observing the phrase "at the time or before the marriage took place" in Article 29 paragraph (1), the phrase "since the marriage took place" in Article 29 paragraph (3), and the phrase "while the marriage took place" in Article 29 paragraph (4) Act Nr. 1 Year 1974 then it can be understood that the provisions of Article 29 paragraph (1), paragraph (3), and paragraph (4) Act Nr. 1 Year 1974 contradicts with Constitution of Indonesian Republic 1945 conditionally as long as not interpreted, including during the marriage bond. The contradiction meaning as the limitation of a person's constitutional rights (in this case the husband and / or wife as parties to the marriage bond) as regulated in the Constitution of Indonesian Republic 1945 [8].

Referring to three forms of state obligations and / or responsibilities in the framework of a human rights-basis approach as we described above which are related to the judicial review of Article 29 paragraph (1), paragraph (3), and paragraph (4) of Act Nr. 1 Year 1974 therefore the issuance of PMK Nr. 69 / PUU-XIII / 2015 after the case review for Act Nr. 5 Year 1960 and Act Nr. 1 Year 1974 against the Constitution of Indonesian Republic 1945 proposed by Ike Farida, it can be said that the state through the Constitutional Court has fulfilled its obligations to respect, protect and fulfill the human rights of its citizens. The three forms of obligations and / or responsibilities that have been carried out by the state as referred to above each contain an element of obligation to act, in which the state has taken certain steps to fulfill the fulfillment of rights and obligations in the context of human rights in Indonesia [9].

Sociological Basic; Sociologically, as consideration of the issuance of PMK No. 69 / PUU-XIII / 2015 is from the existence of a legal need in society that is oriented towards the aspects of the marriage agreement. Based on these sociological considerations, it would be appropriate if the adage "ubi societas ibi ius" is interpreted that society cannot be separated from the law. In this case it is also right to say that law have dynamic characteristic that a rule of law will always evolve according to the times and / or changes that occur in society such as in Indonesia. The development of law in Indonesia itself can be observed with the emergence of various new legal provisions such as PMK Nr. 69 / PUU-XIII / 2015 which is oriented towards the implementation of the marriage agreement [4].

Article 29 paragraph (1) Act Nr. 1 Year 1974 stipulates that the marriage agreement is carried out before the wedding day or at the time of the wedding day, although in reality there is a phenomenon of husband and wife who for some reason only feels the need to make a marriage agreement after the wedding day (during the marriage bond period). The reasons that are generally used as the basis for the making of the agreement after the wedding day (during the period of the marriage bond) is the negligence and ignorance that in Act Nr. 1 Year 1974 there are provisions that regulate the marriage agreement made before the wedding day and /

or when the wedding day takes place. Another reason is that there is a risk that may arise from joint property in marriage because the husband and / or wife's work has consequences and responsibilities on personal assets, so that each property acquired can remain as private property [10].

It will become a serious problem when the law for community as stated in a statutory regulation turns out to be contradicting to human rights, where in such conditions it can be said that the law what society needs are not fully accommodated and ignore the human rights that have been regulated in the Constitution of Indonesian Republic 1945.

Juridical Basic; The marriage agreement has been regulated in Article 29 of Act Nr. 1 Year 1974. However, with the existence of sociological symptoms that arise in society regarding the timing of the implementation of the marriage agreement, after a material review is towards Act Nr. 5 Year 1960 and Act Nr. 1 Year 1974 against the Constitution of Indonesian Republic 1945 produced PMK Nr. 69 / PUU-XIII / 2015. If learned more into juridical aspects, the issuance of PMK Nr. 69 / PUU-XIII / 2015 is not solely based on unconstitutionality, but is also based on a conflict of norms, peculiarly between the provisions of Article 29 paragraph (1) of Act Nr. 1 Year 1974 with the general provisions of the agreement in Book III Code of Civil Law.

A marriage agreement wasn't based on the provisions of Article 29 paragraph (1) of Act Nr. 1 Year 1974 is considered invalid. Although the marriage agreement is specifically stipulated in Article 29 of Act Nr. 1 Year 1974, however, regarding the mechanism for implementing the marriage agreement is not clearly regulated in it. Such conditions have a consequence that the mechanism for implementing the marriage agreement still refers to the general provisions of the agreement as specified in Book III Code of Civil Law, especially regarding the validity of the agreement in the provisions of Article 1320 Code of Civil Law , regarding a prohibited cause in Article 1337, as well as the principle of legal certainty (pacta sunt servanda) in Article 1338 paragraph (1) Code of Civil Law[11].

Article 29 paragraph (1) Act Nr. 1 Year 1974 actually has been injured the principle of consensuality in Article 1320 paragraph (1) Code of Civil Law which bases the mutual agreement between the parties. In entering into an agreement the parties must be in a state of freedom to express their will. This is reaffirmed based on the principle of freedom of contract as stipulated in Article 1338 paragraph (1) Code of Civil Law. The principle of freedom of contract also means that everyone is free to make and / or not make agreements. If the provisions of the principle of freedom of contract are linked to the marriage agreement in Article 29 paragraph (1) Act Nr.1 Year 1974 this means that there is no obligation for the parties who are going to marriage to enter into and / or not enter into a marriage agreement, either before marriage, on the day of marriage, or after the day of marriage (within the period of the marriage bond). In this case it is clear that the marriage agreement in Article 29 paragraph (1) Act Nr.1 Year 1974 has overridden the principle freedom of contract as stated in Article 1338 paragraph (1) Code of Civil Law because there are restrictions on free will to determine the timing of the agreement.

#### **Internalization of Marriage Agreement Post-Constitutional Court Decision Number 69 / PUU-XIII / 2015**

PMK Nr. 69 / PUU-XIII / 2015 states that Article 29 paragraph (1), paragraph (3) and paragraph (4) Act Nr. 1 Year 1974 is conditional unconstitutional so that the Constitutional Court provides a constitutional interpretation of the paragraphs in Article 29 as intended. At PMK Nr. 69 / PUU-XIII / 2015, the Constitutional Court stated that Article 29 paragraph (1) of Act Nr.1 / 1974 is conditional as long as it is not interpreted, legalized by a marriage

registrar or notary public, after which the contents also apply to third parties as long as the third party is involved ". This means that now a husband and wife can make a marriage agreement regarding the separation their assets during marriage attached without having to go through a court order. If in the marriage agreement the parties have determined that the property that was previously joint property becomes the personal property of each party, then the property acquired by the husband and wife during the marriage either before or after the marriage agreement was made will become the property of each of them. This can minimize the risk of joint assets in marriage because the husband and / or wife's work has consequences and responsibilities on personal assets. So if after the marriage agreement was made while in the marriage bond, something happens that causes one of the parties to bear compensation up to his personal property, then the other party will not include of losing [10].

In line with the unconstitutionality of Article 29 paragraph (1) Act Nr. 1 Year 1974 based on PMK Nr. 69 / PUU-XIII / 2015, Article 29 paragraph (3) of Act Nr. 1 Year 1974 is also declared conditionally unconstitutional as long as it is not interpreted as "The agreement enter into force since the marriage takes place, unless otherwise stipulated in the Marriage Agreement". This means that for a marriage agreement made before the marriage takes place and / or is made at the time of the marriage, as well as those made during the marriage bond, the parties can determine the time it takes effect. In the event that the parties do not determine a time to take effect, then for the sake of law the marriage agreement shall come into effect from the time the marriage took place.

Article 29 paragraph (4) Act Nr.1 Year 1974 also include from a conditional unconstitutional statement as long as it is not interpreted. approval to change or revoke, and the change or revocation is not detrimental to the third party ". By declaring the conditional unconstitutional to Article 29 paragraph (1), (3), and (4) Act Nr. 1 Year 1974, it can be understood that there is an extended meaning the content of the marriage agreement where the marriage agreement not only regulates marital assets but also regarding other agreements outside of marital property. In addition, the current marriage agreement can not only be changed, but can also be revoked based on the agreement of both parties and does not make any loss of the third party [11].

The consequence of the parties in making a marriage agreement is that both parties will be bound by each other to carry out their rights and obligations in accordance with every single terms which determined in the agreement. In the parties make a marriage agreement based on an agreement, this means they are concerned do not want the rules that have been provided by the government so they arrange them according to their wishes. Even though the Constitutional Court provides an opportunity for an agreement to be made during the marriage bond, the content of the marriage agreement is limited in relation to ownership of land and buildings in Indonesia so that husbands or wives who have foreign nationals still cannot have property rights or HGB or HGU for any reason (Brata 2018: 10 ). On the other hand, Indonesian citizens who are married to foreigners are given protection by allowing a marriage agreement to be made during the marriage bond for a partner who has not made a previous agreement, so that Indonesian citizens can still get their constitutional rights over ownership of land and buildings in Indonesia [1].

Referring to Act Number 2 Year 2014 concerning Amendments to Act Number 30 Year 2004 concerning the Position of Notary (hereinafter abbreviated to Act Nr. 30 Year 2004), notaries are authorized to make authentic deeds regarding all actions, agreements and stipulations required by a general regulations or by interested parties want it to be stated in an authentic deed, guarantee the certainty of the date, keep the deed and provide the grosse, copy and excerpt, all as long as the deed is made by a general regulation it is not assigned or

excluded to other officials or persons (Adji 2008 : 20). Against the resistance faced by notaries as previously described, with due regard to Act Nr. 30 Year 2004 and refers to PMK Nr. 69 / PUU-XIII / 2015, the notary legally has the right to ratify the marriage agreement into an authentic deed so that there is no reason from the population and Civil Registration Service and KUA that can be justified in rejecting the authentic character of the marriage agreement deed which is legalized by a notary..

#### 4 Conclusion

The philosophy of PMK Nr. 69/PUU-XIII/2015 based on a view of life, awareness, and legal ideals which include the mystical atmosphere and the philosophy of the Indonesian Nation grounded by Pancasila and the Constitution of the Indonesian Republic 1945, peculiarly Article 28E paragraph (2) which is unfully integrated to provisions of Article 29 paragraph (1) Act Nr. 1 Year 1974. Juridically, the issuance of PMK Nr. 69/PUU-XIII/2015 neither solely the basis of unconstitutionality, but also based on the existence of conflict norms between Article 29 paragraph (1) Act Nr. 1 Year 1974 with the general provisions of the agreement in Book III of Code Civil Law. Article 29 paragraph (1) Act Nr. 1 Year 1974 has been limits the free will of parties to enter into agreement so that there is a deviation from the principle of freedom of contract and the principle of consensualism which states that the agreement applies immediately at the time agreement was made of. With reference to PMK Nr. 69/PUU-XIII/2015 which was strengthened by Act Nr. 30 Year 2004 in fact that notaries legally have the right to ratify the marriage agreement into an authentic deed so that is no justifiable reason for the Population and Civil Registration Service and Religious Affairs Office to rejecting the authentic deed of the marriage agreement which already ratified by the notary.

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