

Reconstruction of the Law on Legality of Post-Marriage Agreements Based on Justice Values

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DOI: [10.36348/sijlci.2023.v06i05.007](https://doi.org/10.36348/sijlci.2023.v06i05.007)

| Received: 22.04.2023 | Accepted: 28.05.2023 | Published: 31.05.2023

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Abstract

This study aims to analyze and find the current implementation of post-nuptial marriage agreements, to analyze and find the legal standing of marriage agreements made after marriage to third parties (Post-Decision of the Constitutional Court Number. 69/PUU-XIII/2015), to find reconstruction the validity of the marriage agreement after marriage. This research is included in the socio-legal research tradition. Socio-legal research examines the application of legal principles or norms by using legal and social science approaches. Weaknesses in the implementation of the post-nuptial agreement at this time are the weakness in the absence of post-nuptial agreement arrangements, the weakness that there are opportunities for misuse of the situation by the parties in the post-wedding agreement; as well as the weakness in the form of a culture of society that only realizes the importance of the marriage agreement after the marriage takes place. The reconstruction carried out is to add Article 185A of the Civil Code which states that the provisions referred to in Article 155 to Article 185 also apply to marriage agreements made after and in marriage.

Keywords: Reconstruction, Marriage, Agreement, Justice Values.

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INTRODUCTION

Every human being living his daily life is interconnected with one another, one of the bonds arranged by God to live in pairs is through the marriage process. It is natural for two people of different sexes, namely a man and a woman to be attracted to each other to live together (Wirjono, 1981). Marriage is one of the most important institutions in the world that establishes intimate relationships, regulates sexual relations, and encourages commitment between spouses (Mesoumeh, 2015).

Marriage is nothing but an event that contains rights and obligations, which a husband and wife have carried out will have legal consequences, including regarding the rights and obligations of husband and wife during the marriage, their responsibilities towards children, and the consequences for property, assets, both joint assets and individual assets, as well as the legal consequences for third parties. These things are essential to be understood by every prospective husband and wife who will get married to prevent problems later in the marriage (Abdul, 2006).

In Indonesia, the problem of assets in marriage is regulated in the Civil Code and Law Number 1 of 1974 concerning Marriage. Article 119 of the Civil Code states that marriage results in a mix or unification of assets between husband and wife, whereas in the Marriage Law, the issue of assets in marriage is contained in several articles such as Article 35 paragraph (1), Article 36 paragraph (1), and Article 37.

Marriage according to Article 1 of Law Number 1 of 1974 concerning Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the belief in God Almighty. Regarding the marriage agreement regulated in Law Number 1 of 1974 concerning Marriage, it is stated in Article 29 which reads:

1. At the time or before the marriage takes place, both parties, by mutual agreement, can enter into a written agreement that is ratified by the marriage registration officer, 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 decency,

3. The agreement is valid since the marriage took place,
4. As long as the marriage lasts, the agreement cannot be changed unless both parties agree to change and the change does not harm the third party (Darmabrata, 2004).

The marriage agreement is an agreement between the prospective husband or wife, to regulate the consequences of marriage on their assets, which deviate from the unity of assets. The marriage agreement as an agreement regarding the property of the husband and wife is possible to make and hold as long as it does not deviate from the principles or patterns established by law (Subekti, 2004). Protection of individual rights in marital relations according to Indonesian positive law can be enforced by making a marriage agreement. Marriage agreements in Indonesia have been allowed to be made since the enactment of the Civil Code on May 1, 1848 (Hanafi Arief, 2017).

The existence of the Constitutional Court as a guardian of the constitution since the amendment of the 1945 Constitution of the Republic of Indonesia has produced many decisions that have attracted the attention of the public (Si Ngurah Ardhya *et al.*, 2021). The legal force of the Constitutional Court's decision consists of binding legal force, evidentiary legal force, and executorial legal force (Eva Dwinopanti, 2017). The shift in the meaning of the marriage agreement due to the Constitutional Court Decision number. 69/PUU-XIII/2015 which allows the making of a marriage agreement during the marriage period has an impact on relations with third parties, especially if before the marriage agreement was made there was already a relationship between the husband and wife and a third party.

In connection with the Constitutional Court Decision, if the parties do not determine when the marriage agreement will take effect, it will be interpreted that the marriage agreement will take effect from the time the marriage took place. From this, of course, it will give birth to problems due to changes in the legal status of assets in marriage which were previously in a unanimous union to become separated if previously there had been legal actions related to third parties, for example, credit agreements.

The birth of the Constitutional Court Decision Number 69/PUU-XIII/2015 is of course based on the constitutional rights of Indonesian citizens who are harmed by the provision that a marriage agreement can only be made before the marriage takes place. The decision of the Constitutional Court is intended to accommodate anyone who is already married but does not make a marriage agreement due to ignorance. Thus, of course, the Constitutional Court Decision was born based on considerations of a sense of justice for all Indonesian citizens. However, if this is not immediately

followed up with procedures for making a marriage agreement during the marriage, it will certainly have the potential to harm the constitutional rights of other Indonesian citizens, especially those who become creditors.

Therefore, the interests of third parties involved in the marriage agreement must be protected. Because third parties, especially creditors, are people who have an interest in the state of marital assets in a family. Because collateral for debts depends more or less on the condition and form of the debtor's marital assets. This protection also aims to avoid bad ethics from married couples who make marriage agreements. Because in a marriage that makes a marriage agreement will have other influences on third parties, for example, agreements with creditors, in this case, the third party is faced with 2 or 3 groups of marital assets, and third parties must understand which assets can be accounted for about their receivables.

Based on the explanation above, a study was conducted with the title "Reconstruction of Agricultural Absent Land Ownership Regulations Based on Justice Values". This problem is what the author urges to study further in research with the following issues:

1. What are the weaknesses in the implementation of the post-wedding marriage agreement currently?
2. How is the reconstruction of a marriage agreement based on justice after marriage?

METHOD OF RESEARCH

This study uses a legal research approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivism paradigm, the social reality observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of the:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Legislation relating to the practice of medicine and health.
2. Secondary legal materials are legal materials that explain primary legal materials.

3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Regarding secondary data, the search for general truths will be carried out using deductive logic, especially during the initial analysis (the use of theories), but it is also possible to carry out an analysis using inductive logic for cases of election dispute resolution after the election and vote counting. has been documented in the form of study results, records, and research results. And in this study, the researchers used deductive and inductive analysis so that the data obtained could be processed optimally (Hardiyanti *et al.*, 2022).

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses in Executing the Post-Marriage Agreement Currently

a. Weaknesses in Legal Substance

The absence of regulations related to the management of marriage agreements after the marriage has made marriage agreements seen as the same as agreements in general. This is further complicated by the absence of protection arrangements for third parties in a post-nuptial marriage agreement. Such a complex situation has resulted in the problem of proper legal order in society, which ultimately results in the violation of the Pancasila mandate as a *ratio legis*.

The marriage agreement is made in a notarial deed because an authentic deed is needed to provide certainty of proof of the agreement. An authentic deed is a deed that must be made in a form determined by law, made before an authorized official, and must be made where the official is authorized (Gusti, 2018). As stated in Article 15 of Law Number 30 of 2004 concerning the Position of Notary Jo. Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public which states that a Notary in carrying out his duties has the authority to make authentic deeds for parties who wish, whether it is a marriage agreement deed or other authentic deeds (Faradilla Asyatama *et al.*, 2021).

The Notary Deed will be evidence that has perfect evidentiary power and cannot be denied if unwanted things happen in the future, for example in the case of deciding a divorce case, the assets of each party, or debts.

In connection with the position of Pancasila as *Philosophische Grondslag* by Nawiasky, it is called the

Staatsfundamentalnorm as well as a reconsider or legal ideals, resulting in the consequence that the making of all legal regulations and their implementation must be by all the values contained in each of the Pancasila precepts.

Legal politics is the direction of legal development which is based on the national legal system to achieve state goals or the ideals of the state and nation. The goals of the state which depart from the ideals of the nation's community have been concluded in the five principles of Pancasila. So that in other words the implementation of legal politics is based on the five principles of Pancasila, namely Belief in One Almighty God, Just and Civilized Humanity, Indonesian Unity, Democracy led by wisdom in deliberations/representation, and Social Justice for All Indonesian People (Mahfud, 2006).

Pancasila is the basis and source of all sources for national legal politics. This is because Pancasila and the Preamble to the 1945 Constitution of the Unitary State of the Republic of Indonesia contain various ideals of the Indonesian people which are reconsidered, namely creating a country that is capable of creating social justice based on the moral values of Godhead, humanity, unity through democracy, not cooperation. through Western democracies.

The view of Pancasila as the source of all sources of law is in line with MPRS Decree No. XX/MPRS/1966 jo. MPR Decree Number V/MPR/1973 jo. MPR Decree Number IX/MPR/1978. Then it was reaffirmed by MPR Decree Number III/MPR/2000 and also confirmed by Law Number 10 of 2004 jo. Law Number 12 of 2011 Concerning the Formation of Legislation. MPRS Decree Number XX/MPRS/1966 jo. MPR Decree Number V/MPR/1973 jo. MPR Decree Number IX/MPR/1978 states that:

"Pancasila is the source of all sources of law or sources of Indonesian legal order which in essence is a view of life, awareness and moral ideals which include the inner atmosphere and character of the Indonesian nation."

Meanwhile Article 1 paragraph (3) MPR Decree No. III/MPR/2000 states clearly that "the source of national basic law is Indonesia." Furthermore, in Article 2 of Law Number 10 of 2004 Jo. Law Number 12 of 2011 jo. Law Number 15 of 2019 Concerning the Formation of Legislation states that "*Pancasila is the source of all sources of law*".

The non-regulation of agreements related to post-nuptial marriage agreements in the Flats Law has resulted in disharmony between formal Gesetz, Staats grund Gesetz, and staats fundamental norms. So the policy of the marriage law agreement is far from the justice of Pancasila. Regarding the justice of Pancasila, Romli is of the view that law must be implemented with

a good bureaucratic system, and the formation of the law itself must be by the values, norms, culture, character, environment, and people's outlook on life. Romli expressly wants legal arrangements that are adapted to the ideology of the Indonesian nation which has been embodied in Pancasila.

Lon L. Fuller stated that to recognize the law as a system, it must be examined whether it fulfills the following eight principles or principles of legality:

- 1) The legal system must contain regulations meaning that it cannot contain merely ad hoc decisions.
- 2) The regulations that have been made must be announced.
- 3) Rules cannot be retroactive.
- 4) The rules are arranged in an understandable formulation.
- 5) A system cannot contain rules that contradict each other.
- 6) Regulations should not contain demands beyond what can be done.
- 7) Rules cannot be changed often.
- 8) There must be a match between the promulgated regulations and their daily implementation (Lon L. Fuller, 1971).

Based on Fuller's explanation above, it is seen that the non-regulation of post-nuptial marriage agreements in national legal policies has resulted in deviations from points d and h. Namely "the regulations are arranged in an understandable formula", and "There must be a match between the regulations promulgated and their daily implementation." has become a kind of standard (paradigm) social, even though it contains contradictions.

b. Weaknesses in the Legal Structure

The existence of problems in aspects of legislation in the form of unclear regulation regarding provisions related to post-wedding marriage agreements has resulted in many misuses of circumstances by one of the parties making a post-wedding marriage agreement. This is very likely to happen considering that one of the parties during the marriage bond until the end of the marriage is in a weak position, for example, a wife who depends on her husband for life.

The term abuse of circumstances in Indonesian law is the equivalent of the terms *misbruik van omstandigheden* and *undue influence*. The doctrine of *undue influence* is seen from the consequences of the imbalance on the giving of agreement from the affected party, while *unconscionability* is seen from the behavior of the strong party in trying to force or take advantage of transactions against weak people, whether it is by *propriety* (Algra *et al.*, 1983).

The formation of the teaching about the abuse of circumstances was due to the absence (at that time)

of the *Burgerlijk Wetboek* (Netherlands) provisions governing this matter. If a judge finds a situation that is contrary to custom, a judge's decision is often found which cancels the agreement in whole or in part (Henry, 1991). It turned out that the judge's considerations were not based on one of the reasons for canceling the agreement, namely defects in the classical will (article 1321 of the Indonesian Civil Code).

The principle of freedom of contract should be interpreted not only in terms of the form of the agreement but also in the freedom to determine the content. This means that there is the widest possible freedom through equal opportunities for each party to agree on anything, as long as it does not conflict with laws and regulations, propriety, and public order. The essence of freedom of contract should be how individuals develop themselves both in private life and social life as part of human rights that must be respected.

This meaning eventually raises questions about the existence of standard agreements such as marriage agreements because there are still those who agree with the existence of these agreements, but there are also scholars who reject this type of agreement. The question is whether an agreement can apply and someone is said to be bound by the agreement only because he has signed the agreement, so he must be deemed to know, and want and therefore be responsible for the contents of the agreement even though he did not have the opportunity to negotiate or not.

Thus even though an agreement is said to be valid by fulfilling Article 1320 of the Civil Code, namely that there has been an agreement or agreement of the parties regarding the main points of the agreement, fulfilling the skills of the parties, the existence of a certain matter and fulfilling a lawful reason, Realizing justice requires the active role of both parties. As Asser-Rutten said that "The principle of freedom of contract is not written in many words in the law but all of our civil laws are based on it".

When talking about law, of course, we will be confronted with what is known as '*das seine* and '*das sollen*'. This is also the case when talking about how the post-nuptial agreement takes place in the field. If in advance it has been discussed in such a way how the law regulates the provisions of the post-nuptial marriage agreement in such a way as to achieve the goals and assumptions about the impact of that arrangement, then we will see what happened in reality.

c. Weaknesses of Legal Culture

This weakness that often occurs is the weakness in the form of forgetfulness and ignorance of the applicants about the provisions of the marriage agreement, the existence of employment risks to the joint property, the existence of the desire to still have

property rights on the land, and the existence of the income of each of the applicants. The Civil Code and the Marriage Law itself are laws because they contain legal rules to protect human interests.

From the petition of the applicants, it is known that the applicants are concerned about the risk that their work will pose a risk to their joint property in marriage because the work of the applicants has consequences and responsibilities extending to personal assets so that each of the assets obtained can remain the property of the individual applicant. In particular, applicants who serve as directors or directors of a Limited Liability Company, where their respective positions have a risk to joint assets in the marriage because the consequences and responsibilities of their work extend to personal assets so that each of the assets obtained remains to become the private property of the applicant.

If we review this from Law Number 40 of 2007 concerning Limited Liability Companies in Article 97 paragraph (3) which reads: "Each member of the Board of Directors is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2)", then it is clear that there is an occupational risk that requires the Board of Directors to compensate for the loss of the limited liability company up to personal assets if the Board of Directors or Directors are guilty or negligent in carrying out their positions in making decisions or legal actions that are detrimental to the company. So that the husband and wife, in this case, the applicants who have not made a marriage agreement, finally make a marriage agreement to protect the assets of each husband and wife by submitting a request for a marriage agreement from the District Court.

An example of a case is that there is a desire to own this land because one of the applicants is not an Indonesian citizen, namely Petitioner II (Kavita Uttam) in Decision Number : 207/Pdt/P/2005/ PN.Jkt.Tmr and Petitioner I (Dubagunta Ramesh) in Determination Number: 459/Pdt/P/2007/PN.Jkt.Tmr,

The judge's considerations in deciding the application for establishing a marriage agreement after marriage are based on the decision of the District Court, it can be seen that in the contents of an agreement, there is a principle of freedom of contract that can be used to promise anything and about what legal actions are necessary for husband and wife when the marriage takes place with the good faith of both parties regarding the contents of the agreed terms while still referring to the applicable laws and regulations.

The existence of the District Court's stipulation becomes a guideline and legal basis for both husband and wife parties to administer and regulate their marital

assets because a court stipulation is a judicial product, which contains rules or legal regulations that bind the parties concerned. This was taken because the District Court as a legal institution is upheld, where its legal products must be obeyed by anyone involved in it.

2. Justice-Based Reconstruction of Marriage Agreements After Marriage

In its development, interpreting the law as a set of regulations governing society will only mean if it is supported by a clear and firm sanction system so that justice is upheld. The justice referred to is vindictive justice, not absolute justice which imposes a sentence based on legal procedures and clear and basic reasons, in the sense that it is not based on feelings of solidarity, compromise, and or other reasons that are far from a sense of justice. This is by the spirit animating in article 28D of the 1945 Constitution.

The process of achieving a sense of justice is a chain that cannot be separated, at least from the making of laws and regulations, the occurrence of cases or legal events, to the verbal processing of police and prosecution of prosecutors, or lawsuits in civil cases, and then ending with a judge's verdict. obtain permanent legal force so that the quality of the process guarantees the quality of the culmination point of the results or benefits of a set of laws and regulations that are made. Thus it is very possible to uphold the rule of law in our country. Harold J. Laksi quoted by Sabian said "*that citizens are obliged to comply with certain laws only if the law satisfies their sense of justice*" (Sabian, 2007).

To realize the various types above, it is necessary to carry out a reconstruction of the Civil Code and the Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The reconstruction carried out is to add Article 185A of the Civil Code which states that "*on the basis of the agreement of the parties the provisions referred to in Articles 155 to Article 185 of the Civil Code also apply to marriage agreements made after and/or in marriage*".

Then the next reconstruction is to add paragraph (5) to Article 29 of the Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which states that "*with the agreement of the parties, the marriage agreement as meant in paragraph (1) can also be made after the marriage bond occurs. In addition to this reconstruction, the next reconstruction is to make rules regarding procedures for making marriage agreements after marriage and legal protection for third parties who make agreements on joint property objects that change their ownership after the divorce*".

CONCLUSION

Based on the discussion of the problems above, it can be concluded that:

1. Weaknesses in the implementation of the post-nuptial agreement at this time are the weakness in the absence of post-nuptial agreement arrangements, the weakness that there are opportunities for misuse of the situation by the parties in the post-wedding agreement; as well as the weakness in the form of a culture of the society that only realizes the importance of the marriage agreement after the marriage takes place
2. The reconstruction carried out is to add Article 185A of the Civil Code which states that the provisions referred to in Article 155 to Article 185 of the Civil Code also apply to marriage agreements made after and/or in marriage. Then the next reconstruction is by adding paragraph (5) to Article 29 of the Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which states that "with the agreement of the parties, the marriage agreement as meant in paragraph (1) can also be made after the marriage bond occurs. In addition to this reconstruction, the next reconstruction is to make rules regarding procedures for making marriage agreements after marriage and legal protection for third parties who make agreements on joint property objects that change their ownership after the divorce.

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