

LEGAL CONSEQUENCES OF PRENUPTIAL AGREEMENTS FROM THE PERSPECTIVE OF NATIONAL LAW

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Abstract

This study aims to assess the importance of prenuptial agreements for Indonesian citizens marrying either fellow Indonesian citizens or foreign citizens, as well as to evaluate the legal framework provided by Law no. 1 of 1974 and Decision Number 69 / PUU-XIII / 2015 concerning marriages involving Indonesian citizens and foreign citizens. The research methodology utilized in this study is normative legal research, with data collection primarily based on a literature review. The results of this study highlight the significance of prenuptial agreements for Indonesian citizens, as they can act as a form of protection in the event of unexpected circumstances such as divorce. As per the legal regulations outlined in Law no. 1 of 1974 and Decision Number 69 / PUU-XIII / 2015, prenuptial agreements must be documented in writing and properly authenticated by the Marriage Registrar. It is crucial that the terms of the agreement adhere to legal, religious, and ethical standards.

Keywords: Prenuptial Agreement, Indonesian Citizen, Foreign Citizen, Marriages, Legal Regulations

1. INTRODUCTION

In the present day, a modernized perspective has been embraced in the realm of marriage, with the advent of prenuptial agreements. These agreements are formulated by the soon-to-be-married couple, serving as a documented contract that is established before the wedding takes place. Despite not being universally adopted, the prevalence of prenuptial agreements has risen, indicating a new societal norm. The presence of such agreements provides a sense of assurance to prospective couples, as they are believed to be effective in mitigating potential adversities, including divorce, down the line.

As stipulated in Article 1 of Law Number 1 of 1974 pertaining to Marriage, it is elucidated that marriage constitutes a physical and psychological bond between a man and a woman who unite as husband and wife with the intention of establishing an enduring and blissful family founded on religious principles (Haryanti, 2017). This signifies that marriage is not a frivolous matter or a mere game, but rather a solemn commitment. Once a couple has made the decision to embark on this sacred union, they must be prepared to be mutually devoted. Undoubtedly, this endeavor is arduous, as it entails various challenges and hurdles that couples encounter while striving to build a prosperous and contented family. Common issues that arise within marriages encompass economic, social, and other predicaments. Consequently, this has led to the emergence of marriage agreements.

A marriage agreement according to Soetojo Prawirohamidjojo's explanation is an agreement created by the husband and wife before or during the marriage to control the consequences of marriage on their property (Prawirohamidjojo, 1986). This agreement is known as a prenuptial agreement. Prenuptial agreements made between couples with the same citizenship status as Indonesian citizens can protect the rights of children through

the first marriage if the husband or wife who has been divorced, be it a death or life divorce to remarry. For example, a widower who has children through a previous marriage will marry twice with a woman who is not rich and it happens that the widower is a wealthy person and he also does not create a marriage agreement related to the separation of wealth, so that children from the first marriage will lose. If the unexpected happens, namely divorce, half of the wealth of the rich widower will belong to the wife because the wealth owned by the widower becomes joint wealth, which actually only includes the husband's assets, namely the child's *bapat*, other than if the opposite is applied, the one who wants to marry is the one with the most assets.

The prenuptial agreement's substance is essentially unrestricted, although it must adhere to principles of morality and societal norms (Scherpe, 2012; Scott & Scott, 1998). It is impermissible for this agreement to be established for the purpose of prohibited or deceitful causes (*causa*). Furthermore, it is prohibited to make commitments that contradict the matters arising from the husband's authority as the head of the family, rights derived from parental responsibility, rights derived from legal provisions, and there is no exemption from the obligations on the inheritance of the individual who renounces it.

This study seeks to examine the necessity of implementing prenuptial agreements in accordance with national law and to analyze the legal implications that stem from their execution. Two primary questions are explored: first, the urgency of adopting prenuptial agreements as mandated by national law, and second, the legal consequences that ensue from their implementation. The research aims to provide a comprehensive understanding of the importance of prenuptial agreements and the legal framework surrounding them within the context of national law.

2. RESEARCH METHODS

The study employs normative legal research, utilizing statutory and conceptual approaches as the selected method for addressing the research issues (Ibrahim, 2007). To address the trimmed-down problems, legal materials are gathered through library research, encompassing both primary and secondary legal sources. The collection process involves recording, quoting, summarizing, and reviewing various documents such as laws, newspapers, magazines, and other relevant articles pertaining to the research subject. Subsequently, the legal materials are presented descriptively, either in written form or orally through informants connected to the issues at hand, leading to conclusive findings.

3. RESULTS AND DISCUSSION

3.1. The Urgency of Prenuptial Agreement Implementation According to National Law Perspective

A Prenuptial Agreement is a legal document that is established by a Notary, an authorized official, between couples who are planning to get married (Febriansyah et al., 2021; Hartono, 2020). This agreement serves as a means to assist Indonesian citizens who are marrying foreigners in retaining ownership of their property and land in Indonesia. In addition to safeguarding property rights, this agreement also proves beneficial for individuals who wish to hold shares in Indonesian companies, as one of the requirements is that all parties involved must be Indonesian citizens. Without a prenuptial agreement,

Indonesian citizens who marry foreigners are unable to apply for credit or loans from banks, as banks typically require this legal document as a prerequisite for such financial transactions.

The prenuptial agreement deed should be drafted and executed prior to the wedding day (Tait, 2021). It is essential for the document to be prepared by a qualified Notary and subsequently authenticated by the same individual. While some individuals argue that the prenuptial agreement should also be legalized by the nearest District Court, it is important to note that the prenup created by a legally authorized Notary holds significant weight. This is due to the fact that Notaries are appointed by the Government and entrusted with the responsibility of carrying out public service functions in the realm of law. Notaries possess the legal authority to create a deed that possesses specific and substantial evidentiary value. All provisions and determinations within the prenuptial agreement are valid and enforceable. Notaries play a crucial role in generating robust legal documents within the framework of the legal process.

The basis for making this Prenuptial Agreement is the Civil Code Article 147:

"A marriage contract must be created using a notarial deed before the marriage takes place, and will be void if it is not properly made. The agreement shall come into force at the time of the marriage, no other time shall be stipulated for it".

Court authorization is required if there is a third party included in the agreement. This is in accordance with Article 152 of the Civil Code:

"The provisions contained in the marriage contract, which are incompatible with the common property under the law, in part and in full, shall not be enforceable for third parties before the day of registration of such provisions in the public registry, which shall be executed in the registry of the District Court, in whose jurisdiction the marriage was performed or the registry where the marriage certificate was registered, if the marriage was performed abroad".

The Civil Code is a provision that contains interests and rights between individuals in society, enacted in January 1848. Since Marriage Law Number 1 of 1974 was enacted, so that the validation of the Prenup is not re-enacted, so that the validation, registration or recording of the prenup is not carried out again in the Registrar of the District Court, but is carried out in the KUA for Muslim couples and in the Civil Registry for Non-Muslims by being registered in the deed or marriage book.

Marriage Law Number 1 of 1974 CHAPTER V Article 29 explains that:

"At or before the time of marriage, two parties may, by mutual consent, enter into a written agreement which is authorized by the Marriage Registrar, after the contents have been given effect to third parties concerned".

The agreement cannot be ratified if it deviates from the limits of law, decency or religion. The agreement comes into effect at the time of the marriage. At the time of the marriage, the agreement cannot be changed, other than if there is an agreement between the two parties to change it and the change does not disadvantage a third party.

Creating a Prenuptial Agreement before a marriage is not a negative thing. But for couples of fellow Indonesian citizens who are still a lot of bother because they are considered not trusting each other. In fact, this is quite helpful for the future if there are things that are not expected, for example divorce. The existence of the Prenup, so that it will be easier and clearer and does not have to be involved in problems, especially joint property or other problems, because there are already clear and legally enforceable opportunities (Istrianty & Priambada, 2016).

Mixed couples consisting of foreigners and Indonesian citizens benefit from the fact that the Indonesian state recognizes only one nationality. According to Indonesian law, even if they retain their Indonesian citizenship or have not undergone a change in citizenship, they are deemed to have forfeited their Indonesian citizenship and are treated on par with Indonesian citizens. Consequently, their ability to own property or land in Indonesia is restricted, as stated in the Basic Agrarian Law (UUPA) 1960 (Mahendra & Yustiawan, 2023). This provision aligns with Article 21 point 3 of the UUPA:

“Foreign individuals who, subsequent to the implementation of this legislation, obtain ownership of assets through inheritance without the utilization of wills or acquire mixed property as a result of marriage, along with Indonesian citizens who possess property rights or forfeit their citizenship following the enactment of this Law, are required to surrender these rights within a period of one year from the moment they acquire said rights or lose their citizenship. In the event that the relinquishment of these rights occurs after the expiration of this timeframe, the rights are automatically terminated by legal means or the land reverts back to the State. It is important to note that the rights of the opposing party, against whom the encumbrance is imposed, shall remain valid and enforceable.”.

As a follow-up to the protection and development for foreign nationals in Indonesia, on December 22, 2015, Government Regulation (PP) No. 103/2015 related to the ownership of residential houses by foreigners who have a domicile in Indonesia was signed. The regulation states:

“Foreigners can have a house for residence or occupancy with the Right of Use,”

Based on the old Citizenship Law, there were 2 forms of mixed marriages and their problems, namely:

- a. Foreigner Man marries Indonesian Woman
Based on Article 8 of Law No. 62 of 1958, an Indonesian woman who marries a foreigner may lose her citizenship if she provides information to that effect within one year, and if she loses her citizenship, she is then stateless. If the foreign husband wants to obtain Indonesian citizenship, he must comply with the requirements set for ordinary Indonesian citizens. Because it is difficult to obtain a residence permit in Indonesia for foreign men while the Indonesian wife cannot leave Indonesia for several reasons, many couples live separately because they are forced to.
- b. Foreign Women who marry Indonesian Men
Indonesia adheres to the principle of single citizenship, so based on article 7 of Law Number 62 of 1958 if a foreign woman marries an Indonesian man, she can obtain Indonesian citizenship but at the same time she must also lose her original

citizenship. The application to become an Indonesian citizen must also be made within 1 year after the marriage, if this period is missed, so the application to become an Indonesian citizen must be in accordance with the conditions imposed on ordinary foreigners to be able to live in Indonesia. A foreign woman can obtain sponsorship from her husband or obtain a residence permit, which must be renewed annually or requires time and money. If the husband dies, she will lose her sponsor and her presence in Indonesia will be unclear, so every time she executes an agreement to leave the country, she needs a reentry permit, the application of which must be agreed upon by the sponsor. If the husband dies, the property inherited by the husband must be immediately transferred within 1 year (Article 21 of Law No. 5 of 1960), and another problem is that a foreign woman cannot work other than using a company sponsor. If the husband is sponsored, he can only work as a volunteer. So as the mother or wife of an Indonesian citizen, this woman loses the right to contribute to the family income (Rubyasih, 2016).

Based on the problems related to the old Citizenship Law, the principle of the new Citizenship Law has changed the old Law, for example stated in Article 19 point (1) of Law No. 12 of 2006 which states that foreigners who are legally married to Indonesian citizens can obtain Indonesian citizenship by giving a statement as a citizen in front of an authorized official. The statement as contained in paragraph (1) can be carried out if the person concerned has resided in the territory of the Republic of Indonesia for the shortest five consecutive years or the shortest 10 consecutive years, in addition to the acquisition of citizenship that gives the effect of having dual citizenship (Article 19 point (2)).

Based on the explanation of Article 19 of Law No. 12 of 2006, it can be concluded that if a foreigner who marries an Indonesian citizen who wants to obtain Indonesian citizenship, so that the foreigner can become an Indonesian citizen if he gives a statement in front of an authorized official. Foreigners who have been legalized as Indonesian citizens based on existing provisions, so that the legal status of foreigners who become Indonesian citizens is equivalent to Indonesian citizens, meaning the obligations and rights contained in Indonesian national law for citizens. This new provision has resolved a problem that has often arisen regarding the legal system through which a husband and wife become citizens after a mixed marriage has taken place.

3.2. Legal Consequences of Premarital Agreement Based on National Law Perspective

The emergence of Law No. 1/1974 on Marriage, which came into effect for all Indonesian citizens on January 02, 1974, was mostly in accordance with the demands of Indonesian citizens. This demand had been informed during the first Indonesian Women's Congress of other opportunities, such as the hope of improving the position of women in marriage. The desired improvement for the "Indigenous Indonesian" group who adhere to the Muslim religion is contained in written law. The marriage law of indigenous Indonesians whose religion is Islam is contained in the fiqh book, based on the Indonesian legal system cannot be included in the category of written law, because it is not contained in the PP.

A marriage agreement is an agreement created by 2 prospective spouses when or before the implementation of marriage, in order to regulate the consequences of marriage related to property (Leeds, 2012). The legal effect of a marriage agreement is that the

parties are bound when they are in a marriage relationship. Article 29 of Law No. 1 of 1974 related to marriage explains:

- a. Before or during the marriage, two parties to a common goal can execute a written agreement that is approved by the Marriage Registrar after the content is enforced or by a third party;
- b. The agreement cannot be ratified if it deviates from the limits of law, decency or religion;
- c. The agreement is enforceable at the time of the marriage;
- d. The contract cannot be changed at the time of the marriage, except if the parties agree to change it and the change does not disadvantage a third party.

The contents of the Marriage Agreement can be divided into three, namely:

- a. Marital Agreement using the Union of Earnings and Income (Article 164 of the Civil Code);
- b. Marriage Agreement using the Union of Profit and Loss (Article 155 of the Civil Code);
- c. Marital Agreement-Provision on all assets together (completely separate assets).

The Marriage Agreement must be registered in a designated institution in order to fulfill the element of publicity. The importance of this registration is to provide strong legal protection to the party who made it, as well as so that the third parties involved understand and comply with the agreement. For example, there is a sale and purchase by husband and wife, the existence of this marriage agreement so that the agreement can be binding on the legal action to be carried out.

If the marriage agreement is not registered, so this agreement is only binding or enforced on the party who made it (husband and wife). This is as stated in Article 1313 of the Civil Code, that an agreement is an act in which 1 or more individuals bind themselves to 1 or more other individuals and in Article 1340 of the Civil Code, namely an agreement that is only enforced between the parties who make it.

The registration of a marriage contract for a husband and wife whose religion is Islam is carried out at the local KUA or in the KUA where the marriage is registered. Registration and registration for husband and wife whose religion is non-Islamic is carried out at the civil registry office. Marriage agreements generally that have been created cannot be changed at the time of marriage, other than if the two parties agree to change it and the change does not cause harm to the third party, as stated in Article 29 paragraph (4) of Law No. 1 of 1974 related to Marriage, namely:

"When a marriage is entered into, the agreement cannot be changed, other than if the two parties agree to change it or if the change does not cause harm to a third party."

Based on the Civil Code or Law No. 1/1974 on Marriage, it does not explain the rules related to the creation of a marriage agreement after the marriage has taken place. The provisions of the law only regulate marriage agreements that are created before or during marriage. Article 29 of Law No. 1 of 1974 relating to Marriage, explains:

"During or before the marriage, two parties to a mutual agreement can submit a written agreement that is authorized by the marriage registration officer, after the contents are enforced on the third party concerned."

Upon closer examination, it becomes evident that there are notable distinctions between the regulations outlined in the Civil Code and those stipulated in Law Number 1 of 1974 pertaining to Marriage. The Civil Code explicitly specifies that a marriage agreement must be established prior to the marriage ceremony, and it must be formalized through a Notary Deed and subsequently legalized by the Marriage Registrar. Conversely, under Law No. 1 of 1974, a marriage agreement can be formulated either before or during the marriage, and it is required to be documented in written form, irrespective of the involvement of a Notary Deed (Budiono, 2011). The elucidation of the term "written and agreements or notarial private deeds" necessitating validation through the Civil Registry Office for non-Muslim individuals or the KUA for Muslim individuals is not adequately expounded in Law Number 1 of 1974 concerning Marriage.

Apart from the existing dissimilarities, these three provisions also have similarities, both the rules in the Civil Code, Law Number 1 of 1974 related to Marriage. The first equation, namely the three rules regulate that the parties who create a marriage agreement, the contents do not contradict the general order, law, decency, or religion that each party believes in.

The second similarity is that the preparation of the marriage agreement must be created based on the agreement of the two parties, it is not allowed that only one party wants it. This agreement through two parties is an important thing to consider, because through the wishes of the parties it can result in an agreement between them, which they are also obliged to obey the rules created in it. If the agreement is not created based on the agreement of two parties, then it can be canceled.

Since the enactment of Law No. 1/1974 relating to Marriage, so that there has been unification in the field of Marriage Law, the origin of which has not been or is not contained in the law, so that the old rules can be used (Article 66 of Law No. 1/1974) (Adjie, 2009). To the extent that this is in line with Article 29 of Law No. 1 of 1974, such an agreement must be executed prior to the marriage or must be contained in a Notarial deed. This marriage agreement is enforced between husband and wife since the marriage is carried out. The contents contained in the marriage agreement depend on the agreement of the prospective husband and wife, as long as it does not contradict the law, religion, compliance, decency, as for the content and form of the marriage agreement, the two parties are given the widest possible freedom (based on the law of "freedom of contract") (Faradz, 2008).

4. CONCLUSION

The urgency of implementing a prenuptial agreement between Indonesian citizens and Indonesian citizens is to help in the future if there are things that are not desired, for example divorce. The existence of the Prenup, so that it will be clear and easy and does not have to be involved in problems, especially joint property and other problems, because there is a clear agreement or has legal force. Meanwhile, for mixed couples of foreigners and Indonesian citizens, it helps to have land and property in Indonesia, the status cannot be used as property rights. The actual prenuptial agreement is to provide protection to the

two parties after the implementation of the marriage, so that each party to the agreement is difficult to make deviations.

The Marriage Agreement has a legal consequence of establishing a bond between the parties involved in a marital relationship. Prenuptial agreements, in accordance with Law Number 1 of 1974 and Decision No. 69/PUU-XIII/2015, are formulated for both Indonesian citizens and foreigners either prior to or during the marriage ceremony. These agreements are documented in writing and authorized by the Marriage Registrar. It is important to note that the contents of the marriage agreement must not contradict religious principles, moral standards, or legal regulations.

A prenuptial agreement must be drafted in written form and subsequently signed by the involved parties, who are then obligated to adhere to the terms outlined in the agreement. This ensures legal certainty. In the event that one of the parties breaches the agreement, the written document can serve as concrete evidence in court, leaving no room for denial by the defaulting party. It is crucial for the community to exercise increased vigilance in creating prenuptial agreements as a precautionary measure against undesirable circumstances. The community is expected to honor their commitments in accordance with the mutually agreed-upon terms stated in the agreement. Failure to do so can result in detrimental consequences for the other party involved.

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