

**THE RIGHTS OF LAND IN MARRIAGE AGREEMENT OF  
MISCENEGATION BY SUBSEQUENT THE CONSTITUTIONAL COURT  
DECISION NUMBER 69 / PUU-XIII 2015 BASED ON THE CUSTOMARY LAW  
PERSPECTIVE**

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**ABSTRACT**

The definition of marriage is provided in Article 1 that: "Marriage is a mental bond between a man and a woman as husband and wife with the aim of forming a happy, eternal, family based on the One Supreme God." The meaning of marriage under the law, Law Number 1 Of 1974 is a marriage has a very close relationship with religion, spirituality, so that marriage not only has the element of birth / body, but the element of spirit / *rokhani* also has a very important role. The legal consequence of a marriage is the position of a woman who becomes a wife and a man becomes a husband, hence the rights and obligations assumed by both after the legal act of marriage. For those who marry most do not think about the effects of marriage, on their wealth, some of them only think that the consequences of marriage are only the union of two families, and the continuity of their marriage in order to be eternal and happy. Marital Laws Article 35 to Article 37 regulate about the field of marriage property for husbands and wives, Affirmation of Article 35 states that marriage property becomes a common property. While the property of each luggage as a gift or inheritance, is under the control of each. Unless otherwise specified in order to serve as joint property, for this other determination the husband and wife are allowed to make "marriage agreement", this marriage agreement contains about marriage property. Likewise to the perpetrators of miscenegations. Indonesian citizens who marry foreign citizens, not knowing that there are legal consequences of such miscenegations, there is a right to be lost as a result of miscenegation. The rights in question relate to the marriage agreement, which if the perpetrator of a miscenegation does not enter into a marriage agreement will impact on land rights , and it is also known under costumary law.

**Keywords:** Marriage, Marriage Agreement, Land Rights

**A. INTRODUCTION**

The definition of marriage is provided in Article 1 that : "Marriage is a mental bond between a man and a woman as a spouse with the aim of forming a happy and everlasting family (household) based on the One Supreme God." The

A. INTRODUCTION

The definition of marriage is provided in Article 1 that : “Marriage is a mental bond between a man and a woman as a spouse with the aim of forming a happy and everlasting family (household) based on the One Supreme God.” The meaning of marriage in accordance with Law Number 1 of 1974 is the marriage has a close relationship with religion, spirituality, so marriage does not only have the birth / physical element, but the element of *bathin / rohani* also has a very important role. (Komariah, 2010 : 39) Married means forming a happy family that aims to get offspring, and is responsible for the rights and duties of husbands and wives and their descendants.

Its already the nature of two different gender to have attraction to each other and desire of living together. Marriage itself is a legal act, which in itself will certainly have legal consequences, namely the existence of rights and duties between the two who establishes the marriage. The consequence of marriage (J. Andi Hartanto, 2012: 1) that raises the rights and obligations that must be fulfilled by husband and wife bound marriage.. The legal consequences is very important because it will affect the whole life of the wife and husband and the children later.

Living alone without socialize is not the nature of human as the best God’s creation to live in pairs, to make a family and have children. This development is called socialize. , God created man as the most perfect being, with the natures in pairs, so that later biases coexist to form a family, and produce offspring. This kind of development is called social life.

Law Number1 of 1974 on marriage is one of the legal source of marriage law based on *Lex Posterior derogate lege priori* that the new requirements that the new provisions set aside the old rules, the basis of all marital provisions in the Civil Code (*KUHPerdata*) have not been effective since the enactment of the Law Number1 Of 1974 on marriage. Law This is univication of marriage rules, and this Law is far more comprehensive about the substance governed by it, whether it be principles or the norms of marriage law and divorce and family life.

Most of married people doesn’t concern about the effect of the marriage itself, one of it is about wealth, they think that marriage is only about connection between two families (Andi Hartanto, 2012:1) meaning behind marriage is not only to establish eternal family, and to maintain the continuity of the family will require the property of the marriage.

The consequences of the law on property have not felt the consequences, if marriages is harmonious, because essentially marital properties that used together its used also shared together, if there is a violation of the marriage property has not been felt and not disputed by both, because they still feel that the use of property is indeed for both.

In a marriage, especially for the family, essentially husband and wife during the marriage takes place, having the same position, either on the property of each other or the property of the joint, as well as about the federation of life between them.

Civil Code of wealth in marriage that as the essence of mixed wealth of the spouses uniformly, all the wealth of each spouse, whether they bring at the beginning of marriage or what is known as the congenital properties, or which they obtain during the marriage takes place. Mixed into one wealth as a joint possession of the spouses. But on the basis of this matter to the prospective husband and wife are given the opportunity to promise each other before, in other words that a man and a woman who will marry, to put aside the mixing of marital properties is by making a marriage agreement before marriage takes place, this agreement in the Civil Code is called the Marriage Agreement.

The marriage agreement contains a mutual promise that there will be no uniformly mixed wealth, but there will be a limited mix of wealth or there will be no mix of wealth. The impact of the marriage agreement is made or not made fatal to both parties when there is a legal act that becomes a constraint, one of them to miscenegation, in this case the marriage between Indonesian citizen and foreign citizen.

The spouses of miscenegations have an impact on their wealth, especially immovable property. For those who married mostly do not think about the consequences of marriage, on their wealth, some of them only think that the consequences of marriage are only the union of two families, and the continuity of their marriage in order to be eternal and happy. Likewise, to the perpetrators of miscenegations. Indonesian citizens who marry foreign citizens, some do not know that there are legal consequences of such miscenegations, there are rights to be lost as the results of miscenegation. The rights which is meant related to the marriage agreement in which if the perpetrator of a miscenegation does not enter into a marriage agreement on marital property is closely related to Article 21 of the Basic Agrarian Law (*UUPA*):

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Article 21 Paragraph (3) Basic Agrarian Law (*UUPA*) states, "Foreigner who after the entry into force of this Act acquire property right due to inheritance without a will or mixing of property due to marriage, as well as an Indonesian citizens who own property rights and after the entry into force of this Law lose their nationalities shall relinquish that rights within a period of one year of the acquisition of such rights or loss of nationalities. If after such period of time the property rights have been released, the right

shall be void because the law and the land fall into the State, provided that the rights of the other party to which burden them remains.

## **B. PROBLEM STATEMENT**

Based on the background that has been described above, the author draws conclusions to be studied, namely how the Rights of the land on the marriage agreement By Subsequent the Constitutional Court Decision Number 69 / PUU-XIII Of 2015, Perspective of Customary Law.

## **C. RESEARCH METHOD**

This research is a normative legal research, normative legal research (Peter Mahmud Marzuki, 2015) is a legal research that puts the law as a system of norms. The system of norms is about principles, norms, rules of legislation, court decisions, agreements and doctrines (Mukti Fadjar, yulianto achmad, 2015: 34). In normative legal research does not recognize the existence of data, to solve legal issues and simultaneously provide prescriptions of what should be required for legal research resources. Legal research resources can be distinguished into legal research resource in the form of legal materials of primary legal materials and secondary legal materials.

## **D. RESEARH RESULT AND DISCUSSION**

The rights of land in Marriage Agreement of Miscenegation By Subsequent the Constitutional Court 69 / puu-xiii 2015 Perspective of Customary Law.

The current legal basis of marriage in Indonesia is:

- a. Book I of the Civil Code (KUHP), namely Chapter IV to Chapter XI
- b. Law Number 1 Of 1974 on Marriage
- c. Law Number 50 Of 2009 on Religious Courts
- d. Government Regulation Number 9 Of 1975 on Implementation Law Number 1 Of 1974 on Marriage.
- e. Government Regulation Number 45 of 1990 on the amendment and addition of marriage and divorce permits for civil servants.
- f. Presidential Instruction Number 1 of 1991 on the Compilation of Islamic Law in Indonesia.

Pancasila is a manifestation as a source of value is to make it as the basic values become the source for the compilation of legal norms in Indonesia. From the basic value it made Pancasila as the basic norm for the preparation of legal norms in Indonesia. The state of Indonesia has a national law which is

a unity of the Indonesian legal system that originated in Pancasila as the basic norm of the State. The position of Pancasila is as the *grundnorm* (basic norm) or *staatsfundamental-norm* of fundamental norms of the State in the level of legal norms of Indonesia. (Kaharuddin, 2015; 52).

The law on marriage which is born, can not be separated from the values of Pancasila which is the National legal basic source, as the National legal source, Pancasila is the source of the establishment of legislation in the State of Indonesia. The values contained in the basic values of Pancasila are the value of God, the value of Humanity, the value of Unity, the Value of Democracy, the value of justice. And in the formation of Marriage Act Number 1 of 1974, is the implementation of the five values in Pancasila (Kaharuddin, 2015: 52)

The definition of marriage is set forth in Article 1 that: "Marriage is a mental bond between a man and a woman as a spouse with the aim of forming a happy and everlasting family (household) based on the One Supreme God."

The meaning of marriage according to the Law Number 1 of 1974 is that marriage has a very close relationship with religion, spirituality, so that marriage not only has the element of birth / body, but the element of spirit / *rokhani* also have a very important role (Komariah 2010: 39) Married means forming a happy family that aims to gain offspring, and be responsible for the rights and obligations as husband and wife and their descendants.

Since marriage is a legal event, for that matter, there must be a provision when the marriage is considered legal. The provision is clearly stated in the Marriage Law Number 1 of 1974, Article 2 (1) marriage is legal if it is done according to the law of their respective religions and beliefs, Article 2 (2) Each marriage is recorded according to the applicable laws and regulations. Under these provisions it is certain that the concept of religion is the most important thing in marriage, this is because that marriage is legal, if the marriage is also legal according to their respective religions. The sacred nature of the institution of marriage has become an undeniable feature, so it is natural that the marriage law has a very strong religious nuance (Moch Isnaeni, 2014: 40)

The Marriage Institution results in the legal status of every citizen who makes a marriage. Formally a person occupies a position as husband, wife, legal child, or heir, all of which are union in the Marriage Institute and create legal consequences for every citizen. Everything is packed in religious notions (Moch Isnaeni, 2014, p.40)

In Law Number 1 / 1974, there are several principles of marriage, they form the basis of the provisions of the Marriage Law and the Regulations of

its implementation. These principles include free consent, family participation, complicated divorce, strictly limited polygamy, maturity of bride and groom, respect for women's degrees, marriage registration, marriage according to religious law, prohibition and cancellation of marriages, and entering into a marriage agreement. (Abdulkadir Muhammad, 2010: 76)

The legal consequence of a marriage is the position of a woman who becomes a wife and a man becomes a husband, hence the rights and obligations assumed by both after the legal act of marriage. Marriage Law Article 35 to Article 37 regulates the field of marriage property for husbands and wives, Affirmation of Article 35 states that marriage property becomes a common property. While the property of each luggage as a gift or inheritance, is under their respective mastery. Unless otherwise specified in order to serve as joint property, for this other determination the husband and wife are allowed to make "marriage agreement", this marriage agreement contains about marriage property.

Article 29 (1) of Law Number 1 Of 1974 husband and wife who entered into Marriage Agreement were made in writing, and authorized by the Employee of the Marriage Registerer at the time or before the marriage takes place, the Marriage Agreement should be established without violating the limits of law, religion and morality, throughout the marriage, the treaty can not be changed unless the husband and wife agree to change it, but not harm a third party.

In the Civil Code, there are several Articles which affirm the Marriage Agreement, namely Articles 119, 139, 147, 149. Article 119 of the Civil Code :

"  
From the moment of execution of the marriage, it shall arise by law joint marital property between the spouses to the extent that no other stipulations have been made in the pre-nuptial agreement. Rules regarding community property cannot be revoked or amended by mutual agreement between the spouses for the duration of the marriage."

Article 139 of the Civil Code states :

"The prospective spouses, may, pursuant to a prenuptial agreement deviate from the rules stipulated in relation to legal community property, provided that they do not contravene proper morals or public order and that they comply with the following provisions. "

Article 147 Of the Civil Code states :

"On the threat of nullity, any marriage agreement must be drawn up by notarial deed before the agreement takes place. Agreement becomes effective upon the execution of the marriage and such time period may not be altered. "

Article 149 Of the Civil Code states :

Following the execution of the marriage, no changes whatsoever may be made to the prenuptial agreement.

Conclusions drawn about the marriage agreement pursuant to that described in the Articles of the Civil Code and Law Number 1 / 1974, that the marriage agreement is a written agreement made by the prospective spouse before or during the marriage took place in order to regulate the consequences of marriage related to property wealth. (Tan Kamello, Syarif Lisa Andriati, 2011: 61).

Understanding the marriage agreement (*huwelijkse voorwaarden*) according to Hamaker namely "... any agreement between the prospective spouse husband and wife related to the legal marriage to be performed, no matter what the contents of the agreement (Herlien Budiono, 2013: 3).

The scope of the marriage agreement does not specify what the agreement is about, for example about property. It is concluded that the treaty is immense, due to the absence of restrictions, it may concern various matters, except that the agreement does not include ta'lik talak (Damanhuri 2012: 7).

After the Constitutional Court Decision Number 69 / puu-xiii In 2015 the marriage agreement originally made before marriage or at the time of marriage takes place, then the marriage agreement may be made long after throughout the marriage takes place.

The impact of Constitutional Court Verdict, Decision of Constitutional Court Number 69 / PUU-XIII of 2015 is more perceived by the marriage agreement perpetrators of Miscenegation, Miscenegation is set forth in Article 57 The meaning of miscenegation in this Law is the marriage between two persons in Indonesia that are subject to different laws because of the differences in citizenship and one of the party has Indonesian citizenship.

For those who married mostly do not think about the consequences of marriage, on their wealth, some of them only think that the consequences of marriage are only the union of two families, and the continuity of their marriage in order to be eternal and happy. Likewise, to the perpetrators of miscenegations. Indonesian citizens who marry foreign citizens, some do not know that there are legal consequences of such miscenegations, there are rights to be lost as the results of miscenegation.

The rights which is meant related to the marriage agreement in which if the perpetrator of a miscenegation does not enter into a marriage agreement on marital property is closely related to Article 21 of the Basic Agrarian Law (*UUPA*).

Article 21 Paragraph (3) of the Basic Agrarian Law states

“Foreigner who after the entry into force of this Act acquire property right due to inheritance without a will or mixing of property due to marriage, as well as an Indonesian citizens who own property rights and after the entry into force of this Law lose their nationalities shall relinquish that rights within a period of one Of of the acquisition of such rights or loss of nationalities. If after such period of time the property rights have been released, the right shall be void because the law and the land fall into the State, provided that the rights of the other party to which burden them remains.”

Spouses of miscenegations who do not know the existence of a rule stating that marriage can lead to loss of rights to the ownership of an object of the land, then with the decision of this Constitutional Court, the right of land rights can be guaranteed its ownership. The existence of a separation agreement of property against all properties under the marriage thus remains a private property, and shall not lose its right of ownership.

Customary Law is an unwritten law and held a place in the legal system in Indonesia, which recognized two forms of law, through written law and unwritten law. Both forms of this law are equally binding in the context of each, because both contain sanctions. unwritten law binding on the whole community, while Customary Law binding on customary communities. (nurul miqat , 2017, Journal of law , Policy, and Globalization : 2)

In the National Law we recognize the existence of ulayat land from customary law community, the Basic Agrarian Law of 1960 which is commonly referred to as BAL (*UUPA*) provides clear protection to the rights of indigenous and tribal peoples. The enactment of BAL (*UUPA*) which entered into force on September 24<sup>th</sup>, 1960 has caused fundamental changes in agrarian law in Indonesia, especially in law land. This change is a fundamental change, either in the structure of the law or the concept of its content. Prior to the coming into force of the BAL (*UUPA*) in Indonesia, Dutch law and customary law were enacted, following the enactment of the BAL so that the legal dualism of the land was no longer valid and there had been a legal unification of land.

Customary law which is an unwritten law product controls the law of land before the coming into force of BAL (*UUPA*). In customary law itself also



recognizes the right of land rights, the relationship of life between human beings that are orderly arrangement and related to each other on the one hand and land on the other side of the land where they dwell, the land that feeds them, the land where they are buried, and the land becomes the place of the ancestors, such a thing is rooted in the nature of their thoughts. (Surojo Wignjodipuro, 1973, 237) In customary law is known the term of federation rights and individual rights. *Beschikkingrech of ulayat right*, the right of the federation has a certain right to the land, and implements that right both to the insiders and outsiders. Based on the entry into force of the right to the insiders, the federation shall be entitled to enjoy the land, because the federation is as a whole which means all federation of communion together as a whole, implements the right of federation, reaps the rewards of the land and all the plants and animals that live upon it, entry into force of the outsiders means that an outsider who is not a community of federation in principle can not enjoy / work on much less owns the rights to land in the territory of the federation. Only with the consent of the federation after paying the stake, income money (Aceh), outsiders of the federation can have the opportunity to participate in using the land in the territory of the federation (Bushar Muhammad, 2013: 104).

The right is also affirmed in the Basic Agrarian Law that the right to own land rights in the Territory of Indonesia is only Indonesian citizen. So an Indonesian citizens who excecute miscenegations, their rights to own the land in Indonesia will be lost. Except by making a marriage agreement on the property brought into the marriage then the property remains under their respective control.

## **E. CLOSING**

### **1. Conclusion**

The definition of marriage is provided in BAL (*UUPA*) Article 1 that: "Marriage is a mental bond between a man and a woman as a spouse with the aim of forming a happy and everlasting family (household) based on the One Supreme God." The rule concerning the making of the marriage agreement is the agreement made before the marriage takes place or at the time of marriage is held, but the Decision of the Constitutional Court Number 69 / PUU-XIII Of 2015 has established a change concerning the making of a marriage agreement that is a marriage agreement originally made before marriage or at the time of marriage, then the marriage agreement may be made after a marriage takes place.

Indonesian citizens who execute a marriage with foreign citizens, are known as miscenegations. There are legal consequences of miscenegation. there is a right that will be lost as a result of miscenegation if a miscenegation perpetrators do not enter into a marriage agreement on marital property is closely related to Article 21 of the Basic Agrarian Law (BAL/UUPA). Miscenegation perpetrators who make marriage agreements on the separation of property entered into marriage, then the property will remain under the control of each party. In customary law the term of The Right of federation and The Right of individual means, the federation has a certain right to the land, and implements that right both to the insiders and outsiders. Based on the entry into force of the right to insiders, the federation shall be entitled to enjoy the land, because the federation is as a whole which means all federation of communion together as a whole, implements the right of federation, reaps the rewards of the land and all the plants and animals that live upon it, entry into force of the outsiders means that an outsider who is not a community of federation in principle can not enjoy much less has the right to land in the territory of the fellowship.

## 2. Suggestion

The perpetrators of miscenegations should be given the freedom in making marriage agreements against the property to be brought into marriage, The negligence of the perpetrators of the miscenegations by not making the marriage agreements before the marriages took place can already be overcome by Decision of the Constitutional Court Number 69 / PUU-XIII / 2015, so that do not happen mixing of properties of their own properties, it is advisable to make a marriage agreement. Since the provisions of the Law on Land in Indonesia do not give space for land ownership rights to foreign citizens and customary law which is the source of our land law have also provided an illustration that foreigners are not allowed to enjoy the right to land.

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