



Constitutional Court Ruling on Prenuptial Agreement

The Constitutional Court on 27 October 2016 ruled on a judicial review application of Articles 21 (1) and (3) and 36 (1) of Law No. 5 of 1960 on Basic Provisions on Agrarian Principles ("**Agrarian Law**") and Articles 29 (1), (3) and (4) and 35 (1) of Law No. 1 of 1974 on Marriage ("**Marriage Law**") through ruling No. 69/PUU-XIII/2015.

The court concluded that a prenuptial agreement may be entered into before, at the time of, or after the marriage takes place. The agreement may only be amended or revoked by agreement of both parties and as long as it does not prejudice any third party. A prenuptial agreement is effective as of the marriage having taken place unless determined otherwise under the prenuptial agreement.

As a background, The judicial review petition was submitted by Mrs. Ike Farida, an Indonesian citizen married to a Japanese citizen. The application was filed on the ground of an infringement of her constitutional right to Freehold Title (*Hak Milik*) and/or Right-to-Build Title (*Hak Guna Bangunan/HGB*) over land in Indonesia because she is married to a foreigner. In particular, she referred to Articles 21 (1) and 36 (1)) of the Agrarian Law, which allow Freehold Title and Right-to-Build Title to be held only by Indonesian citizens. Further, under Article 21 (3) of the law, if the holder loses his/her citizenship due to inheritance or as part of joint assets following marriage to a foreigner, he/she has to release the titles he/she holds within one year.

In addition, she also contested the Marriage Law provisions on prenuptial agreements. Under Article 35 (1) of the law, all assets acquired during a marriage become joint assets of the couple. An exception is that joint assets of a mixed-marriage couple (ie an Indonesian and a foreigner) can be separated by a prenuptial agreement between the couple entered into before their marriage (Letter from Directorate General of Human Rights No.HAM2-HA.01.02-10 dated 20 January 2015). However, according to the Marriage Law, a prenuptial agreement may be entered into before or at the time of the marriage, not after. The agreement may not then be amended except by agreement of both parties and as long as it does not prejudice any third party. The agreement goes into effect once the marriage takes place (Article 29 (1), (3) and (4)).

The Government's response was that Article 29 (1) of the Marriage Law provides legal certainty to prevent undesirable situation. For instance, mixed-marriage couples who do not enter into prenuptial agreements before the marriage may not own land under Hak Milik, HGB, or Right to Use (*Hak Guna Usaha/HGU*) title. The prohibition against foreigners owning land and buildings is in line with the spirit of the national land law and prevents illegal land ownership by foreigners. Both the Agrarian Law and the Marriage Law are in accordance with the 1945 Constitution.

In coming into the decision, the court's panel of judges essentially considered Articles 29 (1) and (3) and 29 (4) of the Marriage Law unconstitutional because these provisions restrict the constitutional right of a person to enter into an agreement at any time.

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