THE CONCEPTUAL FALLACY OF INDONESIAN CONSTITUTIONAL COURT DECISION NO.69/PUU-XIII/2015 ON NUPTIAL AGREEMENT

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ABSTRACT

A prenuptial agreement is an agreement made and signed by a man and a woman before their marriage. The prenuptial agreement will regulate the future assets and liabilities of the couple when they get married. This research aims to discuss the Indonesian Constitutional Court Decision No.69/PUU-XIII/2015, which allowed the married couple to sign a nuptial agreement after their marriage. The research is normative legal research that uses secondary data, which are data available to the public. It consists of primary legal sources, secondary legal sources, and tertiary legal sources. Data were collected using literature research using the google search machine. It is descriptive-analytical research conducted using a qualitative approach. It also used a comparative and historical approach to understand the concept of nuptial agreement. Results showed that the Constitutional Court Decision did not make enough consideration before making the decision. It merely relied on the freedom to own without considering the problems of a nuptial agreement, especially a postnuptial agreement. It failed to explain the consequences of a postnuptial agreement. The discussion proved that the decision conceptually, among others, forget the implication of legal pluralism in Indonesia.

Keywords: Nuptial Agreement, Marital Agreement, Community Property, Separate Property, Legal Pluralism

INTRODUCTION

Part of the Indonesian law and legal system was developed from Dutch law and legal system, combined with local customary law. The division of the population in Dutch Indie (former name of Indonesia during Dutch colonialism, before the independence of the Republic Indonesia) has caused pluralism, among others is the Indonesian private law. It was regulated in Article 163 Indische Staatsregeling (Stbld. 1925-415 jo. 577) effective as of January 1 1926. Those people who belong to European and Asian descendent (especially Chinese descendent) were regulated by the Indonesian Civil Code (ICC), with some modification. The ICC itself was derived by concordance principle from the Old Dutch Civil Law with some adjustment, enforced during Dutch Indie colonialism in Indonesia (Subekti, 1976; Gautama, 1983; Gautama & Hornick, 1983).

ICC consisted of four books. Provision regarding a person, marriage, and family are regulated in Book One. Book Two regulates Property and Inheritance. Meanwhile, provisions concerning Obligation and Contract can be found in Book Three. In 1974, the Republic of Indonesia, through the People Representative Council, issued Law No.1 Year 1974 regarding Marriage (Marriage Law). The Marriage Law replaced the similar provisions previously regulated in Book One of the ICC, as stipulated in Article 66 of Marriage Law. Among several issues that Marriage Law replaced is the regulation on marital property. The Marriage Law was

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then amended in 2019 with Law No.16 Year 2019 regarding Amendment of Law No.1 Year 1974 regarding Marriage (Marriage Law Amendment).

Before the amendment, in 2112, based on an application made in 2010, case number 46/PUU-VIII/2010, Constitutional Court has created a new interpretation on Article 43 paragraph (1) of Marriage Law. Article 43 of Marriage Law regulates the relationship between a child born without a formal marriage of the parents. Before the Constitutional Court decision, the child only has relationships with his/ her mother that give birth to him/ her and his/her mother's family. However, based on science and technology and/or other evidence in the court of law, the child can prove that he/ she can relate with his/ her father and his/ her father's family. Later in 2015, an application to review Article 29 paragraph (1), (3), and (4) Marriage Law was filed under case number 69/PUU-VIII/2015. Based on the application, Constitutional Court has made its decision with a new interpretation of Article 29 paragraph (1), (3), and (4) Marriage Law.

The new interpretation made Article 29 paragraph (1) Marriage Law shall be read: "On-time, before or during the marriage, both parties by mutual consent may enter into a written agreement validated by a marriage registrar or notary, after which the contents shall also apply to third parties, as long as the third parties are involved." Article 29 paragraph (3) Marriage Law must be read as "The agreement takes effect since the marriage took place unless specified otherwise in the marital agreement." Article 29 paragraph (4) Marriage Law shall be read: "During a marriage, the marital agreement about the property or other things, cannot be changed or revoked unless both parties agree and such change or revocation is no detriment to any third party."

The new interpretation of Article 29 paragraph (1), (3), and (4) Marriage Law caused ambiguity in practice. In the late quarter of 2020, the researcher found at least two agreements signed during a marriage became disputes in the court of law. Both the agreements regulated the couple's property during their marriage. The signed marital agreement is then used as legal evidence that the husband/ wife acknowledged all the assets they have and received before and during the marriage only belong to his/ her couple. The marital agreement was used as evidence during the separation. The content of the marriage agreement, which allowed only one party to have all the assets, was then contested in the court of law.

The research aims to discuss and find out the legal consequences of the new interpretation of Article 29 paragraph (1), (3), and (4) of Marriage Law. This research will also discuss whether the verdict with the new interpretation can be justified under the general principle of law.

RESEARCH METHOD

The research is normative legal research. It uses secondary data, mainly consisting of primary legal sources, secondary legal sources, and tertiary legal sources. Data were collected through literature research using the google search machine, with the nuptial agreement, marriage agreement, marital agreement, separation agreement as main keywords.

The analysis is conducted using the qualitative method. The analysis will also use a comparative legal method to compare marriage agreements within several jurisdictions under common law and civil law legal traditions.

To understand the concept and function of the marital contract, the researcher will review the marital agreement enforced in England, the Netherlands, and the United States of America. The comparative understanding will be used for further discussion to answer the aims of the research. For such purposes, historical and teleological interpretation will be used to determine the functional purpose of the marriage agreement before and after the new interpretation was given by the constitutional court verdict.

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For easy reference, in this research, the wording "marital agreement" will be used interchangeably with "nuptial agreement" or "marriage agreement". Likewise, the term "marriage property" will have the same meaning as "marital property".

FINDINGS

Marriage Property and Marital Agreement in England

English law does not recognize a community of property between husband and wife (O'Neill, 1974; Donahue, 1979; Lowe, 2008). It means that either husband or wife has his/ her property he/ she has before, during, and after marriage, assuming that such properties were not used or consumed. The property owned by the husband or wife during marriage is known as separate property. Each husband or wife has the capacity and capability to act before the law and do anything concerning each separate property.

A prenuptial agreement is an agreement entered into by husband and wife before they get married, which allows the couple to regulate how their asset and financial resources to be split when the marriage breaks down (Slater & Gordon Lawyers, 2015; MJR Solicitors, 2019; UK Supreme Court, (n.d.)). Meanwhile, a postnuptial agreement is an agreement entered into after marriage dealing with the same issues as a prenuptial agreement (Slater & Gordon Lawyers, 2015; MJR Solicitors, 2019). The definition given by the lawyers was almost identical to the definition from The Law Commission (2011) on Marital Property Agreement, except that it includes "the couple's financial affairs during the marriage." The Law Commission states that the marital property agreement in its report is used interchangeably with a nuptial agreement, including prenuptial, postnuptial, and separation agreements. Based on the perception that a marital property agreement is a nuptial agreement that refers to a separation agreement, it can be said that most of the content that English nuptial agreement is an agreement that deals with the separation of the assets of a married couple whenever their marriage broke down.

History proved that prenuptial agreements (and postnuptial) were void agreements. The marital property agreements were considered against public policy as they were used to determine asset on separation that was prohibited. Further development proved that the nuptial agreement could be accepted, that the agreement shall not suppress the weaker party and ensure that the fairness remains. The nuptial agreement shall fulfill the requirements for valid contracts. However, the court has the jurisdiction to overrule the terms in the nuptial agreement whenever the court feels necessary (The Law Commission, 2011). Independent legal advice is suggested for the couples before a prenuptial or postnuptial agreement was signed. It can be used to avoid the unfairness of the agreement's content (Lowe, 2008). In simple ways, the researcher may conclude that English and commonwealth nations do not need a nuptial agreement unless a party to the marriage would like to give his/ her property to his/ her spouse due to some reasons or conditions. In such a condition, the court must review the nuptial agreement and consider whether the agreement's content is fair to both parties. It includes a nuptial agreement made in an international marriage between an English citizen with a person with non-English citizenship, either belongs to the state or country with community property or not.

Marriage Property and Marital Agreement in the Netherlands

In general, there were four regimes in marital property (United Nations, 2018). They are:

a. "Separation of property, in which all assets and income acquired by husband/ wife before and during the marriage remain as separate property of the acquired spouse;

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b. Partial community property, whereby assets brought into the marriage by any of the husband or wife remain as separate property of the spouse who brought it into the marriage;
c. Full community property, which made all assets and income brought into and acquired during the marriage, becomes the property of both the couple;
d. Deferred full or partial property, where full or partial property rules are applied when the marriage is dissolved; until then, the separation of property applies."

England and Wales are examples of states with a system of separate property. France, Italy, Spain, and Croatia are countries with partial community property systems. Meanwhile, the Netherlands is the country with full community property before it was effectively changed on January 1, 2018. Germany, Sweden, Denmark, Norway, Austria, and Greece are countries with deferred community property (Rešetar, 2008). Under current regulation, Indonesia may belong to the partial community property system.

Dutch marital property system was established when the Old Dutch Civil Code (old DCC) was enacted in 1838 (Flos, 2014). Article 174 old DCC stated that there is community property between husband and wife on the marriage, and it may not be changed in any way even with the approval of the husband and wife. Based on Article 1366 of the old DCC, a married woman has no capacity and capability to act before the law. They are legally incapable and therefore cannot make any agreement, including the agreement to amend the community property. However, a mature woman not engaged in a marriage is legally capable of making a contract. Therefore to arrange the marital property after marriage, she is allowed to make a prenuptial agreement, according to the provisions of a valid contract. The prenuptial agreement also allowed the wife to manage her property as separate property. Under the statutory approach, the old DCC, management of community property and/ or wife's separate property is with the husband since the wife was declared incapable. Article 207 old DCC required that before the marital agreement can bind any third party, it must be registered in General Registration in the court of law where the marriage took place. Without the registration, the marital agreement will only apply between the husband and wife. The privity of contract principle will apply.

In 1957, wives were given the same right as husbands. They could now act before the law, which automatically allowed wives to manage their property without assistance from the husband. However, there was still a strong sentiment that the wife should not manage the community property. Another change made because of the capacity to act for a wife was the possibility to conclude marital property during the marriage (Flos, 2014).

History development in the Dutch proved that marriage agreements made with a total separation of property rarely benefit the wife. On the contrary, there was always a hardship. In 1959, the "New Amsterdam Model" was introduced so that the martial agreement, with total separation, should contain an obligation to divide any acquired gains, including revenue from income, profit, and interest after expenses, to husband and wife equally. If no spouse can prove the ownership of an asset, it must be assumed that it belongs to both spouses in equal parts (Flos, 2014).

Since 1992, the old DCC was replaced by the new Dutch Civil Code (Nieuw Burgerlijk Wetboek) (new DCC). Article 94 new DCC stated that:

(1) "A community property shall exist by operation of law between spouses from the moment of the solemnization of their marriage;
(2) The community property shall comprise, where assets concerned, property assets of spouses present at the commencement of the community or acquired thereafter, as long as the community has not been dissolved, with the exception:
    a. property acquired under a testamentary disposition of testator, or gifts when it was made; it falls outside the community;
    b. pension entitlements to which the Act on the Equalization of Pension Entitlements at a Separation applies, as well as pension rights for surviving relatives (dependants) that relate to such pension entitlements;

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c. Rights for establishing usufruct referred to in Articles 29 and 30 of Book 4, and what is acquired under Article 34 of Book 4.

(3) Assets and debts (liabilities), which are a particular way attached to one of the spouses personally, only fall into the marital community of property as far as such attachment does not oppose to this.

(4) Benefits (fruits) derived from assets that do not belong to the community property do not fall into that community. Whatever collected on a claim that does not belong to community property stays outside that community; the same applies to a claim for compensation that replaces one of the spouse's assets, including a claim regarding a decrease in value of such asset.

(5) The marital community of property encloses, as far as it concerns its liabilities, all debts (liabilities) of each of the spouses, except for debts (liabilities):
   a. regarding assets that do not belong to the marital community of property;
   b. arisen from donations, contractual stipulations (clauses), or conversions made or entered into by one of the spouses as referred to in Article 4:126 paragraph 1 and 2 under (a) and (c).

(6) Where the spouses are in dispute on the point to whom an asset belongs, and neither can prove his entitlement, that asset is considered an asset of the marital community of property. However, this legal presumption does not affect the detriment of the creditors of the spouses."

Any derogation to the marital property can only be made by a nuptial agreement. Article 144 new DCC mentioned that both prospective spouses might make the nuptial agreement before the marriage and by the spouses during their marriage. The nuptial agreement made before the marriage will take effect from the date of the solemnization of the marriage. Meanwhile, the marital agreement made during the marriage will take effect when it is executed unless a later date is specified. It must sign in a notarial deed. The content of the nuptial agreement may not violate the mandatory rules, bonos meres (against good morals**),** and public policy. It shall not provide a spouse more share in liability than his/ her shares in the community property. The nuptial agreement must be registered in Matrimonial Property Register to bind a third party (Warendorf et al., 2013). It means that if it is not registered, the nuptial agreement only binds the husband and wife. Chorus, et al., (1999) explained that marriage settlement must be executed by a prenuptial agreement or a postnuptial agreement. The nuptial agreement usually rules about a total separation of community property and limited community property. However, according to Chorus, et al., (1999), there were tendencies that couples are amending their nuptial agreement to community property due to the tax regulations.

On March 28, 2017, the Senate of the Dutch parliament decided to change the regime from full community property to partial community property. The new regime is enforced since January 1, 2018. It means that as of January 1, 2018, a married couple without any marital agreement will be statutorily having a partial community property. All property, assets, and debts before the marriage will belong to each spouse who brought them to the marriage. Assets acquired by inheritance, gift, pension rights, and survivor's pension are excluded as community property. Meanwhile, all assets obtained during the marriage will become community property. Besides, all assets acquired jointly by the spouse before the marriage while living together became community property (Reinhartz, 2017; Montanus, 2018; Maric, 2018).

Based on the new DCC and further amendment in 2017, it can be said that there is no difference between prenuptial or postnuptial agreements in the Netherlands. Therefore, prospective husbands and wives can make a prenuptial agreement, amend it, subject to any required consent, or make a postnuptial agreement after being married before a public notary. The nuptial agreement, according to Chorus, et al., (1999), will be used as a separation agreement for the spouses. However, to be valid and enforceable, its contents shall not be made against the law, good morality, and public order.

Article 117 paragraph (1) of the new DCC stated that a prenuptial agreement is valid if signed by the persons whose approval is required for the marriage. Therefore, if a Subdistrict Court's authorization is required, it can be attached to the original notarial deed. On making a

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postnuptial agreement, Article 119 new DCC required District Court's authorization. Article 119 of the new DCC stated that:

1. "Spouses who want to make or change a nuptial agreement during their marriage need District Court's authorization. When presenting the petition, a draft of the notarial deed has to be submitted. The petition may be filed without a solicitor.
2. The District Court may only refuse to grant its authorization in full or in part if the creditors of the spouses will be harmed or if one or more provisions of the nuptial agreement conflict with rules of mandatory law, morality, or public order.
3. If the notarial deed is not executed within three months after the moment on which the court order, in which the required authorization is given, has become final and binding. In that case, this authorization is no longer valid."

About the registration of the nuptial agreement, from a practical point of view, it can be said that the registration of the prenuptial and postnuptial agreement with the Matrimonial Property Register is only to bind the third party. From the third party perspective, no registration will make the marriage property community property, even though there is another arrangement between the couples. It follows the fiction theory of legislation. When a law was promulgated, announced, published, or made open to the public, the law is known by, applicable, and enforceable to everybody.

The above explanation clarifies that the requirement to make a postnuptial agreement is harder than a prenuptial agreement. To make a postnuptial agreement, authorization from District Court is a must. The authorization will only be given if the court is satisfied with two conditions. The first is that no creditor will be harmed because of the postnuptial agreement. The second is that the content will not violate mandatory law, good morality, and public order. So there will be prior checking made by the court. However, there is no other content in the new DCC that the pre-checked authorization by the court will automatically make the postnuptial agreement enforceable. At least the prior authorization has provided the condition that the spouse cannot easily change a prenuptial agreement or make a postnuptial agreement at any time during the marriage.

Marriage Property and Marital Agreement in the United States

In the United States, each state has its legal system that regulates marriage property. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are states with a community property regime. While other remaining states, which belong to common law states, are known with the separate property system. In community property states, they are spouses' separate property or community property. There is also a co-own property as a tenant in common or joint tenant or tenants by the entirety (Featherston, 2017).

According to Standler (2003), during the 1800s, common law in the USA did not allow husband and wife to make a legally binding contract. Husband and wife were "one" identity. They cannot make any contract between them. The unity still existed in some states until the 1950s. Until the United States acknowledges the capacity of a married woman to make a valid contract, the court remains to declare postnuptial agreement as void. A married woman cannot make a contract with any third party, except for her separate property.

Brod (1994) stated that many people signed a premarital agreement is with the purpose that the spouse would not receive any property from the divorce by not creating community property. It will make the economically poorer spouse will not get wealthier if not get worse after a divorce. It is purposively made to substitute the state law, which will require sharing property or income at the end of the marriage in some states. Even in the states that derived its law from English common law, to acknowledge the economic partnership between husband and wife, they have enacted statutes that regulate an equitable distribution of property at divorce.

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Whenever the separation is caused by death, they have adopted elective share status, except for Georgia. They also have a dower statute to protect the surviving spouse. In addition, Brod (1994) also mentioned that premarital agreement might sharpen inequality in the distribution of wealth for women. It is because most premarital agreements were generally made to disadvantage women. Most states have statutes that regulate (Standler, 2003):

a. "Legal obligation to support their children;
b. Legal obligation to support each other during the marriage;
c. The distribution of assets at divorce;
d. Legal obligation to the greater income spouse to support the ex-spouse with approximately the same standard as during the marriage with an 'alimony' payment."

So, traditionally, even though prenuptial agreements were signed, the prenuptial agreements were not enforceable because the court found that it is against public policy. From another perspective, it may be seen to encourage divorce. Before the 1970s, the court would refuse to enforce a prenuptial agreement. During the 1970s to 1980s where divorce became epidemic in the USA, the court started to enforce a prenuptial agreement. Several courts begin to note that prenuptial agreement may, on the other hand, encourage marriage. It provided the freedom for the prospective couple to regulate their marriage instead of leaving it to the state. By enforcing a prenuptial agreement, the court will encourage the next prospective couple to marry (Standler 2003). However, to be valid and enforceable, the prenuptial agreement must be proven to be voluntarily signed by both prospective husbands and wives. Any party was not well informed of the property and financial conditions of the other party and/ or did not have adequate legal consultation before signing the prenuptial agreement can be used to nullify the prenuptial agreement (Abrams & Willick, 2016).

Concerning premarital agreement, a Uniform Premarital Act (UPAA) was completed in 1983 and adopted in many states in the USA. It defines "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." The premarital agreement must be made in writing and signed by both parties, and it is enforceable without consideration (Abrams & Willick, 2016). According to UPAA, "After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration."

The UPAA was enacted to ensure that a valid premarital agreement signed in one state would be honored by the courts of another state where a couple might get a divorce. Concerning the enforceability, UPAA stated that:

"A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

a. That party did not execute the agreement voluntarily; or
b. The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
   (1) Was not provided with a fair and reasonable disclosure of the property or financial obligations of the other party;
   (2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
   (3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party."

According to Brod (1994), the acknowledgment and enforceability of a prenuptial agreement must consider that it shall not violate public policy, which may be different from one state to another state in the United States. The prenuptial agreement must be signed voluntarily and with sufficient knowledge of the content of the contract. Both represent procedural fairness and substantive fairness in the prenuptial agreement to be enforceable. Each state may have a different standard to determine substantive fairness to protect the spouse's interest. It would not leave the dependent spouse not to be financially supported. The court, on many occasions, would

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not let the weaker spouse prove the imbalance in the prenuptial agreement (Brod, 1994). Some tests were used by the court to scrutinize the validity of a prenuptial agreement. In general, they are (Standler, 2003):

a. "absence of fraud/ deceit;
b. voluntariness;
c. full disclosure of assets and income before marriage;
d. fairness or reasonableness;
e. and in some circumstances, the understanding of the terms as represented by advice or opinion of an attorney."

Based on Williams (2008), the freedom given by UPAA was never realized in practice. Instead, postnuptial agreements were signed as a straightforward concept. It determined the rights and obligations of the couple upon divorce. In a postnuptial agreement, the wife and husband can tailor their rights without speculative forecasting like a prenuptial agreement. It is suitable for practical purposes compared to a prenuptial agreement. The statement is similar to Browne & Fister (2012). According to Browne & Fister (2012), a postnuptial agreement could be more helpful in saving marriages in many cases, in view that it will provide more realistic terms to be incorporated in the marital contract. Willick (2009) stated that in a postnuptial agreement, each spouse has a greater fiduciary duty to the other.

A postnuptial agreement is a private agreement that needs no registration. It differs from other kinds of marital agreements. There were three kinds of agreement that the spouse may sign during their marriage. There were settlement agreements, which will be incorporated in the divorce decree; the reconciliation agreement, which restates the financial relationship of the spouse to start an "anew" marriage; and the postnuptial, which were signed during a marriage but before filing a divorce (Williams 2008). A separation agreement does not have the same restriction as a postnuptial agreement (Abrams & Willick, 2016). A postnuptial agreement may look like a prenuptial agreement on managing the spouse's financial situation to make it predictable (Williams, 2008).

In 2012, the UPAA was revised to become the "Uniform Premarital and Marital Agreements Act" (UPMAA). The UPMAA was adopted in 2016 (Abrams & Willick, 2016). So far, 28 states and the District of Columbia have adopted the UPAA and/ or the UPMAA. They are Arkansas, Arizona, Colorado, California, Connecticut, Delaware, Hawaii, Florida, Illinois, Idaho, Iowa, Indiana, Maine, Montana, Kansas, Nevada, New Jersey, Nebraska, New Mexico, North Dakota, North Carolina, Oregon, Rhode Island, South Dakota, Texas, Virginia, Utah, and Wisconsin. The adopted rules need not be the same. Each country has its variances to the UPAA/ UPMAA, which may be different from other states. The premarital agreement still exists in the other 22 states even they do not adopt UPAA/ UPMAA. UPMAA defines:

a. "Premarital agreement means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement."
b. "Marital agreement means an agreement between spouses who intend to remain married which affirms, modifies or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement."

Based on the definition above, it is clear that UPMAA treats premarital agreements and (post)marital agreements the same. Therefore, it is purposively drafted to provide the same treatment with premarital agreement when the divorced couple enforces the (post)marital agreements.

UPMAA does not apply to an agreement that requires court approval to become effective. It does not apply to an agreement signed by the couple when a proceeding for marital dissolution or court-decreed separation is anticipated or pending. According to UPMAA:

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"A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:
(a) The party's consent to the agreement was involuntary or the result of duress;
(b) The party did not have access to independent legal representation under subsection (2) of this section;
(c) Unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (3) of this section or an explanation in a plain language of the marital rights or obligations being modified or waived by the agreement; or
(d) Before signing the agreement, the party did not receive adequate financial disclosure under subsection (4) of this section."

Since the existence of a postnuptial agreement is related to the conditions of the spouse during marriage, it can be found that under certain circumstances whereby one of the spouses would sign a postnuptial agreement, due to saving the marriage, that will release certain rights provided by the law (Ulfers, 2015; Bruno, 2012; Abrams & Willick, 2016; Browne & Fister, 2012). Many authors agree that the enforcement test to a prenuptial agreement must be used to determine whether a postnuptial agreement can be enforced (Ulfers, 2015; Bruno, 2012; Abrams & Willick, 2016; Browne & Fister, 2012; Willick, 2009). Louisiana, which does not adopt UPMAA, has article 2329 regarding exclusion or modification of matrimonial regime. The article stated:

"Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.
Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.
During the first year after moving into and acquiring domicile in this state, spouses may enter into a matrimonial agreement without court approval."

The article has proven that making a postnuptial agreement or any amendment of a prenuptial agreement during a marriage is not as simple as making a prenuptial agreement. There is court intervention to guarantee that by making a postnuptial agreement (including amending prenuptial agreement), the spouse will not suffer in the future, especially when they get divorced.

From the discussion above, it can be said that prenuptial agreement and postnuptial agreement have different roots and causes. However, almost similar things must be scrutinized before a prenuptial or postnuptial agreement can be declared enforceable. There would be legal and financial protection to guarantee the wealth of the husband and/or wife, the family, including the (future) children, and any third party after the separation. At least it will not injure any of them. The scrutinization starts from prospective husband and wife conditions before they signed the prenuptial agreement or matters that happened to the couple before they signed the postnuptial agreement. Free will, disclosure, understanding, and legal assistance are among the things that need attention, besides the financial conditions of the (prospective) couple. Even UPAA/ UPMAA opens an opportunity for husband or wife to challenge the prenuptial agreement and postnuptial agreement.

ANALYSIS

Marriage Law in Indonesia and the Status of Indonesian Civil Code (ICC) under Indonesian Legislation and the Application of ICC for Marriage in Indonesia

Before Indonesian independence, the Indonesian population was divided into there groups. They are (Gautama and Hornick 1983, Safioedin 1994):

a. Europeans, and others origins from Europeans;
b. Foreign Orientals;

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c. Indonesian Natives.

In order to regulate Europeans that lived in Indonesia, the laws and regulations that were applicable and enforceable during the time in the Netherlands were copied (with some adjustment) and promulgated in Dutch Indie (Indonesia before independence). Among others was the ICC. So the content of the ICC was almost similar to the old DCC.

The ICC was first formally applied to the Europeans. However, under certain circumstances, ICC was also used as private law for foreign orientals and Indonesian natives under Article 11 of Algemene Bepalinen van Wetgeving voor Indonesie of 1947 (AB). AB is the general law on rules and regulations applicable for the Dutch Indie population. It created an institution that made ICC applicable to others than Europeans. The institution was known as submission. There were voluntary submissions and involuntary submissions. Voluntary submission can take form in total submission, partial submission, ad-hoc submission, and presumed submission (veronderstelde onderwerping) (Gautama & Hornick, 1983; Safioedin, 1994).

Article II of Transitional Provision of the 1945 Constitution stated that "All existing state bodies and regulations are still in force, as long as new ones have not been established according to this Constitution." Further, Article 1 of Government Regulation No.2 Year 1945 confirmed that "All existing State Agencies and Regulations exist at the independence of the Republic of Indonesia on August 17, 1945, before the making of the new one according to the Constitution, still valid as long as it does not contradict the Constitution." It made ICC still exists and valid until today, even though there were several attempts to treat ICC only as "a set of the norm", not as legislation.

In family law, ICC was used by the European group and was not applicable for native Indonesian unless there was a voluntary or presumed submission. For foreign orientals, some provisions of the family law in ICC were applicable, and some were not (Prawirohamidjojo & Pohan, 2020; Subekti & Tjitrosudibio, 1992). It showed that before independence, marriage law in Indonesia is not unified in one regulation. ICC was applicable for Europeans and part of foreign oriental. For the others, adat law and Islamic law applied. Thus, each group of the population may have their marriage law.

One aspect of the marriage law is marital property. Different marriage laws resulted in a different conception of marital property. Article 119 ICC stated that "From the moment the marriage took place, it shall arise by law community property between the spouses to the extent that no other provisions have been made in a prenuptial agreement. The community property, during the marriage, shall not be negated or amended with the agreement between husband and wife." It means that according to ICC, upon marriage, there is community property between husband and wife. The spouse might deviate from the community property only if they made a prenuptial agreement.

Concerning the prenuptial agreement, Article 139 ICC stated that "The prospective husband and wife by making marital agreement may deviate from the rules regarding community property, provided that it does not contravene with good morality or public order and the following provisions." Article 157 ICC stated further:" The prenuptial agreement must be made in notarial deed before marriage, and shall be void if it is not made accordingly. The contract shall be in force at the time of marriage, and no other time can be set for it." Further, article 148 ICC regulated that "Changes in this matter, which were initially allowed to occur before the marriage took place, could not be made other than by deed, in the same form as the previous agreement deed. After all, no change is valid if made without the presence and consent of the parties to the prenuptial agreement." Article 149 ICC added that "After the marriage takes place, the prenuptial agreement must not be altered in any way." According to ICC, the prenuptial agreement may regulate on:

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1. The community property in respect of profit and loss and gains and income;
2. Gifts between the two prospective spouses;
3. Gifts granted to the prospective spouses or the children of such marriage.

They are prohibited from making a nuptial agreement that the content:

1. Release their legal rights given by law to them on the inheritance of their offspring, nor can they regulate the inheritance (Article 141 ICC);
2. Make one's liability is greater than its portion in the benefit of the community property (Article 142 ICC);
3. Stipulate that their marriage shall be governed by foreign laws, by customs, laws, law books, or local customs, which were previously enforced in the Royal Kingdom of the Netherlands (Article 143 ICC).

From the content of the ICC, there was no absolute separation of marital property between husband and wife. There was only limited community property. The limited community property is in profit and loss or gains and income during the marriage between husband and wife.

ICC regulated two kinds of prenuptial agreements with limited separation: community profit and loss and community of fruits and income. However, practice proved that there is the third kind of prenuptial agreement. The third kind of prenuptial agreement is the total separation of community property. Even there was no specific research of the model of the prenuptial agreement, practice showed that most of the prenuptial agreement is total separation. This kind of prenuptial agreement does not require a list of separate property, likewise a community profit and loss and community of fruits and income model of a prenuptial agreement.

With respect to the management of the community property, Article 124 ICC stated that:

> "Only a husband is authorized to manage the marital property. He may dispose of, sell, and encumber it without any intervention by the wife, except in the event stipulated in the third paragraph of article 140. A husband may not grant the property to individuals unless he does so to afford the status to his children of the marriage. He cannot give ownership of a specific movable asset if he intends to continue to use it."

However, Article 168 ICC allowed "prospective spouses, pursuant to the prenuptial conditions, to grant one another or one party to the other, anything which they consider appropriate, without reducing the deduction of said grant to the extent that the gift would be detrimental to those entitled to a portion according to law." In general, according to article 1678 ICC, grand between married spouses is prohibited. However, it is not applied to the gift of movable tangible property, which is not expensive subject to the gifter's financial status.

The regulations mentioned above showed from the ICC perspective, the husband cannot make a contract with his wife because they are one "person". By making a prenuptial agreement that separated the community property, the wife can contract with the husband. However, a gift between spouses is prohibited even with separate property. The gift may only be granted if the gift is for a small amount and movable and tangible property. The conditions are mostly the same as in the Netherlands during the old Dutch Civil Code enforcement.

Prior to the independence, the prenuptial agreement regulations in ICC apply to European and Chinese foreign oriental. Interestingly, the prenuptial agreement made before the public notary was opened for voluntary submission by other groups in society. It means that any group of people in the Dutch Indie can make a prenuptial agreement in practice.

After independence and before the effectiveness of the Marriage Law on January 1, 1975, although there was no more grouping of people, Indonesian citizens still do not have unity in marriage regulations. The conditions remain the same. Indonesian citizen that was a descendant of European or Chinese people, the ICC applied. For Indonesian muslim, Islamic law applied. Others, some adat law may be applicable. Disputes arising out of the marriage property were settled through the civil court of law for those subject to ICC or adat law and religious court of law for Indonesian muslim. The marriage agreement was made in a notarial deed, and any dispute concerning the marriage agreement was settled by the civil court using ICC. According to the General Elucidation of the Marriage Law, the applicable marriage law at that time was:

a. For Indonesian natives muslim, Islamic law applies;
b. For Indonesian natives non-muslim, adat law applies;

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c. For Indonesian natives with christianist religion, Huwelijksordonnantie Christen Indonesia (S.1933 No.74) applies;
d. For Chinese foreigners and Indonesian citizen Chinese descent, ICC applies with some adjustment;
e. For East Far Foreigner non-Chinese and their descendants in Indonesia, adat law applies;
f. For European and their descendants, ICC applies.

The Marriage Law was made for the purpose to unify the existing applicable laws. It was promulgated on January 2, 1974, and become effective as of October 1, 1975, when the Government Regulation No.9 Year 1975 regarding the Implementation of Law No.1 Year 1974 regarding Marriage. Based on article 66 of the Marriage Law, "all provisions stipulated in the Indonesian Civil Code (Burgelijk Wetboek), Christian Indonesian Marriage Ordinance (Huwelijk Ordanantie Christen Indonesia S.1933 No.74), Mixed Marriage Regulations (Regeling op gemeng de Huwelijken S.1898 No.158), and other regulations governing marriage, as far as it has been regulated in the Marriage Law is declared invalid." The article opens for interpretation that it may mean that for matters that were not regulated in the Marriage Law, the provisions of the law mentioned in article 66 remain valid.

The Marriage Law sees marriage as a legal matter and from the religious point of view. Therefore, marriage is only valid if it is conducted following the couple's religion. Then the valid marriage will be registered at the Department of Population and Civil Registration in each city or regency (Kabupaten) where the marriage took place. For muslims citizens, the registration of the marriage is conducted at the District Office of Religious Affairs (Kantor Urusan Agama kecamatan).

Based on article 35 paragraph (1) Marriage Law, property acquired by the spouse during the marriage become community property. Meanwhile, in article 35 paragraph (2) Marriage Law, each husband or wife properties brought to the marriage and acquired as a gift or inheritance become separate property of the husband or wife unless the husband and wife regulate differently. Elucidation of article 35 Marriage Law stated that the (distribution of) community property should be settled according to the law applicable to the spouse if the marriage is terminated. Article 35 of the Marriage Law clarifies that there will be only partial community property, which is different from ICC. However, the elucidation indicates that there is no unification in law on the separation of property. The phrase "the law applicable to the spouse" shall be interpreted as the law applicable for the marriage. Based on article 2 paragraph (1) Marriage Law, it must be read as the law applicable to the couple's religion that validates the marriage.

The Compilation of Islamic Law (CIL) acknowledges community property as well as separate property. The property brought by the wife or husband to the marriage or obtained by the wife or husband through grant or legacy remained the separate property of wife or husband. The prospective wife and husband can deviate from it by making a prenuptial agreement. Each husband and wife is entitled to half of the community property upon divorce (Abdurrahman 2018).

Regarding the marital agreement, Article 29 Marriage Law, before the Constitutional Court decision, only acknowledged the prenuptial agreement. It must be validated and registered by the officer that registers the marriage. It cannot be validated if it violates law, religion, and good morality. After that, the content of the prenuptial agreement binds third parties. It shall be in force upon marriage and cannot be amended unless the wife and husband agree to do so and it is not detrimental to any third party. The elucidation of Article 29 Marriage Law explains that the term "prenuptial agreement" in article 29 does not include "tak'lik – talak." Tak'lik – talak is a kind of agreement used and acknowledged in Islamic law that provides the right to the husband to "talak" the wife upon the occurrence of one or more certain events. Talak means breaking the marriage bond between husband and wife according to Islamic law.

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The CIL allowed the making of a prenuptial agreement. It can be made before or at the time the marriage takes place. It may regulate tak'lik – talak and other things that do not violate Islamic law. It must be validated by the officer who registers the marriage (marriage registrant) at the District Office of Religious Affairs. If the marital agreement regulates the property of the marriage, it can take partial separation, total separation, or total community property. It will bind the couple and third parties upon marriage. It can be revoked upon mutual consent of husband and wife and must be registered with the office of marriage registrant. It binds the couple upon the registration but will only bind third parties upon publication in a local newspaper.

Analysis of the Content of the Constitutional Court Decision Case No.69/PUU-XIII/2015

The case started with an application from a woman who married a foreigner without a prenuptial agreement. According to the case, the application for judicial review was submitted, because she cannot own an apartment because her husband is a foreigner. Indonesian Agrarian Law (Law No.5 Year 1960 regarding Basic Rules of Agrarian Principles) determines that foreigners cannot hold the right of land in Indonesia except in the form of Right to Use (Hak Pakai). It also applies to a married couple without total separation of property, with one of them being a foreigner (mixed marriage).

The submission was made to review the content of the Agrarian Law on land ownership and the Marriage Law on the community property upon marriage and the prenuptial agreement. The Constitutional Court dismissed the request for judicial review on the land ownership that only Indonesian citizens can own land. Mix marriage couples cannot hold the land ownership title. In principle, no changes on interpretation were made to the Agrarian Law. Concerning the judicial review of article 35 paragraph (1) Marriage Law, the Constitutional Court dismissed the request due to the new interpretation of Article 29 paragraph (1) Marriage Law.

Based on the legal consideration of the court, it was stated that the content of Article 29 paragraph (1), (3), and (4) limited the rights of "two people" from making a contract that violating Article 28E paragraph (2) the fourth amendments of the Indonesian Constitution 1945 (the 1945 Constitution). Article 28E paragraph (2) of the fourth amendments of the Indonesian Constitution 1945 stated that "Everyone has the freedom to believe in beliefs, to express thoughts and attitudes, according to his conscience." The consideration also noted that the couple "may not know" that there is a provision in the Marriage Law that a marital agreement must be made before marriage. Besides, there is a possibility that husband and wife may think that they need to make a marital agreement during the marriage.

From the facts given above, based on the content of the Constitutional Court decision No. 69/PUU-XIII/2015, it can be said that the decision was lacking legal consideration and arguments. There was not enough discussion to justify the new interpretation of article 29 paragraphs (1), (3), and (4) Marriage Law. The decision only provides four pages of consideration with almost no legal discussions to jump to the conclusion that article 29 paragraph (1), (3), and (4) Marriage Law must be given a new interpretation.

First, the consideration "the couple may not know that a marital agreement must be made before marriage" that reasoned making marital agreement during the marriage cannot be justified at all. The Court never discussed the legal concept of legislation, that is, the legal fiction principle. Based on article 87 of Law No.12 Year 2011 regarding The Making of Legislations (Legislation Law), all legislation shall come into force and bind the citizens when published according to article 81 of the Legislation of Law. Publication of laws, it must be made in State Gazette. Therefore, the woman who submitted the judicial review shall not challenge that she did not know Agrarian Law does not allow mixed marriage couples to own land ownership and the Marriage Law only allowed prenuptial agreement. The Agrarian Law was existed and has been

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enforced since 1960, and the Marriage law has been implemented since 1975. Ever since the publication of the laws, all Indonesian citizens have to know the laws that they may need to seek legal advice, in this case, before the marriage took place. In addition, the "ignorance" of the law may not be used to say that the original article 29 paragraph (1) Marriage Law violates Article 28E paragraph (2) the 1945 Constitution.

The second thing to bear in mind is that article 37 Marriage Law stated that upon divorce, separation of marital property should be regulated based on the couple's law. It means that even article 35 Marriage Law said that upon marriage, there would be community property for property acquired during the marriage and separate property for property obtained before marriage and property acquired by way of gift or inheritance. It means under current legislation, ICC will still apply for the non-muslim couple, and CIL applies for muslim couples. It does not include adat law that may still be applicable in a certain community. Legal pluralism cannot be separated from marriage regulations.

It may look like the Marriage Law itself is ambiguous and can be said to be contradictory by content. It is supposed to unify the differences in marriage regulation, but on the other side, it still refers to the different laws applicable to the couple. However, article 37 Marriage Law would like to tell us that the term "separate property" may be defined differently in each different law. ICC differentiates between immovable property and movable property. Immovable property shall be known by its registration. However, ICC only acknowledges separate movable property if there were a clear and definite list of the movable property, including property obtained through gift and inheritance. According to Article 165 ICC, the listed movable property must be attached to the prenuptial agreement to become separate property. Accordingly, article 1977 paragraph (1) ICC that stated "whoever possesses a movable property, except interest and receivable not payable to the bearer, will be constituted as the owner" is not applicable for husband-wife relation. Husband and wife are considered one legal subject unless there is a prenuptial agreement with a total separation of community property. Even the movable property is in the wife's hand; unless it was made clear in the list, the property belongs to community property and is subject to half division upon divorce. According to Article 1467 ICC and Article 1678 ICC, sale purchase and give between husband and wife, even with separate property, were not allowed. It is due to the protection of the third party. Article 1131 ICC that stated all property of a debtor, either movable or immovable, either currently exist or will be obtained in future shall become the security for all his liabilities shall apply. It is the philosophy why Article 149 ICC stated that no prenuptial agreement might not be amended in any way after the marriage. Amending a prenuptial agreement will be seen as a gift from husband to wife or wife to husband, which will somehow harm the creditors. It is also the reason why the two kinds of prenuptial agreements in ICC were hardly found in practice.

CIL keeps silent on the content of the acknowledgment and enforcement of the separate property of husband and wife. It means that it is open for scrutinizing by the court, subject to the ability of the party to prove it. CIL stated that any disputes concerning the community property must be settled in the religious court. But no information about disputes in a prenuptial agreement. However, dispute or implementation over the tak'lik - talak agreement is under the jurisdiction of the religious court.

The term "prenuptial agreement", except for tak'lik - talak, was inherited by ICC. According to ICC, the making of the contract itself was determined to be in the form of a notarial deed. However, the "notarial deed" statement cannot be found in the original Article 29 Marriage Law. It only stated that the prenuptial agreement must be made in writing and validated by the marriage registrar. However, until today, the marital contract is made by and before a public notary. Since practices found that a prenuptial agreement was made before a public notary, disputes over the prenuptial agreement were settled in civil court. It shows that

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Indonesian citizen still follows the concept of "voluntary submission". It may raise an issue on the applicable law in challenging the validity and enforceability of the prenuptial agreement, especially for muslims.

In its explanation to the verdict of case No.69/PUU-XIII/2015, the Constitutional Court stated that the purpose of having a marital agreement is to:

a. Separate the property of husband and wife so that there will be no community property. Therefore, if they separate, each couple's property is protected, and there will be no dispute over the community property.
b. Upon each debt, whoever makes it during the marriage, will be responsible for each own debts.
c. If one party wants to sell his/ her property, he/ she must not ask for the other's permission.
d. The same applies to a credit facility proposed by any of the party, that he/ she need not ask for permission in case he/ she need to provide security over the property registered under his/ her name.

Damanhuri (2012) mentioned several reasons why the prospective husband and wife would enter into a prenuptial agreement. First is that there is a significant difference in the social status of the prospective husband and wife. Therefore, this prenuptial agreement was purposively made to keep the status of the poorer couple as it is. Second is the other way around that the prospective couple has almost the same wealth. Therefore, the prenuptial agreement was made so that the failure or bankruptcy of the husband/ wife will not affect the other. The third is that a wealthy family does not want their precious property to be shared or changed its ownership. Forth is because the marriage will become a mixed marriage that is subject to different laws. The same reasons were mentioned by Prawirohamidjojo (2003)

The explanation of the Constitutional Court did not consider other views than a business point of view. Damanhuri (2012); Prawirohamidjojo (2003) stated that there could be a cultural reason that higher-status families in a society do not want to mix their property with the poorer ones. It could also be for the history and heritage reason that a particular family property should not be transferred in whatever way to others other than their descendent.

Indonesian citizenship is known for its pluralism since Dutch Indie, even though the making of the marital agreement is derived from ICC. However, ICC made a marital agreement favoring the poorer, with those two kinds of prenuptial agreements. Even though the total separation made and signed in practice, considering the reason mentioned by Damanhuri (2012); Prqwirohamidjojo (2003), the signing of the prenuptial agreement is made in full consciousness and understanding of the prospective husband and wife family, that there is something that must be protected. Indonesian natives in Dutch Indie signed marital agreement is considered as a matter of legal submission.

The third point is that Constitutional Court forgot that marriage for almost all Indonesian citizens is "sacred." To marry someone means to marry the family. So there would never be a prenuptial agreement if the family disapproves. If there is a need for a prenuptial agreement, the content must be discussed between the family of prospective couples. Once the prenuptial agreement is signed, it may not be amended. If there is a requirement to amend the prenuptial agreement, something must have happened to the couples or the families. In principle, no postnuptial agreement is required.

Suppose the marital agreement was to be seen as a partnership agreement without considering the religious and moral value of the marriage. In that case, a postnuptial agreement must be reviewed, discussed, analyzed, and considered by the court before signing. The new DCC and Louisiana law on the marital agreement was an example of regulations that keep protecting husband or wife in marriage from the misconduct of his or her couple. It also protects the interest of any relevant third party from bad misconducts of the couples.

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As can be seen from the Constitutional Verdict No.69/PUU-XIII/2015, there was no:

a. Consideration on the effect of legal pluralism in Indonesian society as well as the legal and cultural approach;
b. Philosophical, legal, and conceptual reference, argument and discussion as to whether the prohibition of making the postnuptial agreement violates human rights as stipulated in Article 28E paragraph (2) the 1945 Constitution;
c. Ethical and moral consideration as to whether religions in society never encourage or even refuse to make a postnuptial agreement, and that is not in violation of the rights acknowledged in the community where the 1945 Constitution is enforced;
d. historical, sociological, and cultural behavior analysis that postnuptial agreement was uncommon and such a thing for was never contested, questioned, challenged, and considered to be a violation of human rights;
e. Comparative approach and research as to how the acceptance and enforcement of the postnuptial agreement in civil law countries, especially di the Netherlands;
f. Evidence of the urgency of such matters is already in public opinion to violate human rights.

In addition, the verdict violated Law No.8 Year 2011 regarding the Amendment of Law No.24 Year 2003 regarding Constitutional Court (Constitutional Court Law) enforceable during the year when the case No.69/PUU-XIII/2015 was filed and decided. According to Article 57 paragraph 2a of the Constitutional Court Law, the Constitutional Court shall not make a verdict that contained a new formulation of norms that was declared violating the 1945 Constitution. The statement of new interpretation in the judgment that Article 29 paragraph (1), (3), and (4) Marriage Law "shall be read as follows" has made new norms to the Marriage Law.

CONCLUSION

From the above discussion, it can be concluded that Constitutional Verdict No.69/PUU-XIII/2015 has no conceptual background neither philosophical reasoning nor legal argument that supports it. Furthermore, the Constitutional Court verdict violated its law (the Constitutional Court Law) that it might not make any decision that provides new norms. Among others is that the Constitutional Court forgot that the Indonesian community remained pluralist even the Marriage Law tried to unify it. The Constitutional Court also forgot that it was not the court of law allowed to make norms through the stare decicis doctrine. Under Indonesian law, only the legislative can make norms by making the law based on Law No.12 Year 2011 regarding Formation of Legislations as amended by Law No.15 Year 2019.

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