JURNAL MAGISTER HUKUM UDAYANA
(UDAYANA MASTER LAW JOURNAL)
Vol. 11 No. 4 Desember 2022
E-ISSN: 2502-3101 P-ISSN: 2302-528x
http: //ojs.unud.ac.id/index.php/jmhu

Authority of a Notary Related to Marriage Agreements

Ida Bagus Kade Wahyu Sudhyatmika[1], I Nyoman Bagiastra[2]

[1]Faculty of Law, Udayana University, E-mail: idabaguswahyu1126@gmail.com
[2]Faculty of Law, Udayana University, E-mail: nyoman_bagiastra@unud.ac.id

Article Info

Received: 9th September 2022
Accepted: 17th December 2022
Published: 20th December 2022

Keywords:
Authority; Notary; Decision of Constitutional Court

Corresponding Author:
Ida Bagus Kade Wahyu Sudhyatmika, E-mail : idabaguswahyu1126@gmail.com

DOI:
10.24843/JMHU.2022.v11.i04.p04.

Abstract

The purpose of this study is to analyze the arrangements related to marriage agreements in Indonesia and examine the authority possessed by notary related to marriage agreements after the Constitutional Court Decision. This paper is a normative legal research method since the focus of the study departs from the vagueness of norms by using several approaches: statute approach, conceptual approach, and analytical approach. The results of the study indicated that arrangements related to marriage agreements are subject to the provisions of the Marriage Law and the Civil Code. Referring to the provisions in Article 29 of the Marriage Law, it is understood that at or before the marriage takes place both parties with mutual consent can enter into a written agreement ratified by the civil registration officer, after the contents also apply to third parties. Furthermore, there has been a change in the authority of the Notary after the Constitutional Court's Decision, however, until now the Notary has not been able to ratify the marriage agreement as referred to in the Constitutional Court's Decision. For that we need a new mechanism that can be regulated in implementing regulations related to the authority of a Notary to ratify a marriage agreement, which the result that the ratification of a marriage agreement made by anNotary can be accessed by the public and can provide legal certainty for the parties involved in the marriage agreement, including third parties and also notaries who ratify.

I. Introduction

Marriage is one of the engagements that occur in human life because of the urge to live together with other humans.[1] This relationship is a sacred bond between man and woman in forming a family or household.[2] Referring to the provisions in Article 1 of Law No. 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law) it is stated that "Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on The One and Only God". Furthermore, marriage is also carried out because of the desire of humans as living beings to have descendants.[3]

The enactment of the Marriage Law is a form of unification of family law in the field of marriage and matters related to marriage, but this unification is still not sufficient to

accommodate the thriving needs of the community. Broadly speaking, the Marriage Law regulates: 1) The basis of marriage; 2) Conditions of marriage; 3) Prevention of marriage; 4) the annulment of the marriage; 5) Marriage agreement; 6) Rights and obligations of husband and wife; 7) Property and its consequences; 8) Dissolution of marriage; 9) the position of the child; 10) Rights and obligations between parents and children; 11) Trusteeship; 12) Proof of the origin of the child; 13) Marriage outside Indonesia and 14) Mixed Marriage.

The existence of a marital bond between a man and a woman results in joint assets between the two.[5] This mixing of assets causes the emergence of joint property, namely the entire property acquired during the marriage period. Along with the development of human life, the mixing of assets in marriage can be avoided by making a marriage agreement that explicitly separates the assets of husband and wife in marriage.[6] A marriage agreement is also known as a prenuptial agreement.[7] This agreement is generally made by the prospective husband or wife authentically before a notary who states that the couple has mutually agreed to separate their respective assets in marriage, both assets obtained before marriage or assets obtained after marriage.

Referring to the provisions in Article 29 paragraph (1) of the Marriage Law, it is determined that "At or before the marriage takes place, both parties with mutual consent may enter into a written agreement ratified by the marriage registrar, after which the contents also apply to third parties as long as the third party is involved. " The construction of the provisions of Article 29 paragraph (1) of the Marriage Law is not only binding on the husband and wife, but is also binding on interested third parties.

This legal condition applies to every Indonesian citizen (WNI), including Indonesian citizens who are married to foreign citizens (WNA) or Indonesian citizens who have married outside Indonesia. Problems arise because the condition of mixed marriages between Indonesian citizens and foreigners has implications for the loss of certain rights owned by Indonesian citizens, such as asset rights, building use rights (HGB) or cultivation rights (HGU).

This problem was then tested before the Constitutional Court of the Republic of Indonesia (hereinafter the Constitutional Court). The application submitted basically focuses on the injustice experienced by Indonesian citizens who marry foreigners. This injustice was finally successfully fought for with the issuance of the Constitutional Court Decision Number: 69/PUU-XIII/2015 (hereinafter the Constitutional Court's

---

[5] Etty Rochaeti, "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam Dan Hukum Positif," *Jurnal Wawasan Yuridika* 28, no. 1 (2015): 650–61.

[6] Besse Sugiswati, "Konsepsi Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat," *Perspektif* 19, no. 3 (2014): 201–11.

[7] Aliya Sandra Dewi, Dian Fitriana, and Nursolihi Insani, "Perjanjian Perkawinan Sebelum Dan Setelah Dilangsungkannya Perkawinan Di Indonesia," *Pro Bono Jurnal Pengabdian Kepada Masyarakat* 2, no. 02 (2022).

[8] Oly Viana Agustine, "Politik Hukum Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Dalam Menciptakan Keharmonisan Perkawinan," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 1 (2017): 53–67.

Decision). Based on the Constitutional Court's decision, the provisions of Article 29 paragraph (1) of the Marriage Law are contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted: "At the time, before it takes place or during the marriage bond, both parties with mutual consent can submit a written agreement which is legalized by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is involved". The Constitutional Court's decision confirms that a marriage agreement can be made not only before and at the time of the marriage, but also throughout the marriage.[8]

Furthermore, the Constitutional Court's decision also confirms the existence of a Notary in relation to the making of a marriage agreement. It is understood that the notary has a role in making the marriage agreement. The affirmation of the notary's authority in relation to the making of a marriage agreement after the Constitutional Court's decision still causes polemics and multiple interpretations. From a normative juridical perspective, the construction of the Constitutional Court's Decision related to the provisions in Article 29 paragraph (1) still has a vague norm, especially with regard to the authority of a notary.

With these conditions, the question arises regarding how are marriage agreements arranged in Indonesia? Another question that arises is how is the authority of the notary after the Constitutional Court Decision related to the marriage agreement?

Based on the background described above, it is necessary to conduct an in-depth study of legal issues related to the marriage agreement after the Constitutional Court's decision. Furthermore, this study also discusses the authority of a Notary as an implication of the new option raised by the Constitutional Court's Decision, namely by adding the phrase "or notary".

A previous study was conducted by Sita Ulima Ekawati and Burhanudin Harahap in 2019 which discussed about "The Function of Ratification of Marriage Agreements by Notary After the Decision of the Constitutional Court Number 69/PUU-XIII/2015".[9] The focus of the study is the function of ratification by a notary of a marriage agreement agreed upon by the parties. In 2021, Andika Prayoga and Billquis Kamil Arasy studied "The Legal Consequences of a Marriage Agreement made During Marriage After the Constitutional Court Decision No. 69/PUU-XIII/2015".[10] The focus of the study in this research is on the legal consequences of marriage agreements made during the marriage after the Constitutional Court Decision (example the case of Decision Number 1082/Pdt.P/2016/PN.Sby) and the role of the notary in making marriage agreements made after marriage takes place after the Constitutional Court Decision.

Referring to these studies, it appears that there are similarities in terms of topics that examine the Constitutional Court Decision Number 69/PUU-XIII/2015, but the focus of the study is different. This study will focus on examining the arrangements related to marriage agreements in Indonesia. Furthermore, this paper will examine the authority possessed by notary related to marriage agreements after the Constitutional Court Decision. This research will focus on examining the arrangements related to marriage agreements in Indonesia. Furthermore, this paper will examine the authority

possessed by notary related to marriage agreements after the Constitutional Court Decision.

The purpose of this study is to analyze the arrangements related to marriage agreements in Indonesia. This research is also to examine the authority possessed by notary related to marriage agreements after the Constitutional Court Decision.

To fulfill the purpose of this writing, this paper will discuss the substance that is relevant to the focus of the problems systematically. First, it is presented about the concept and marriage agreement arrangements in Indonesia. Second, it will be presented regarding the authority of the notary related to the marriage agreement after the Constitutional Court Decision.

2. Research Methods

This paper is a normative legal research method because the focus of the study departs from the vagueness of norms[11] by using several approaches: statute approach, conceptual approach, and analytical approach. The legal materials used in this study were traced using document study techniques and analyzed using qualitative analysis. Referring to Peter Mahmud Marzuki, normative research is seen as a process that aims to find the rule of law, legal principles, and legal doctrine in an effort to answer legal problems that are currently happening.[12]

3. Results and Discussion

3.1 Arrangement of Marriage Agrrement in Indonesia

Arrangements regarding marriage agreements are regulated in the provisions of Article 29 of the Marriage Law.[13] Referring to the provisions in Article 29 paragraph (1) of the Marriage Law, it is determined that:

> "*At the time or before takes place or while in the marriage bond, both parties with mutual consent may submit a written agreement which is ratified by a marriage registrar or a notary public, after which the contents also apply to third party as long as the third party is involved*."

The provisions as regulated in the Marriage Law have not provided a clear and unequivocal understanding of the marriage agreement, including the contents of the agreement itself. The Marriage Law only provides a limitation that a marriage agreement cannot be ratified if it violates the boundaries of law, religion and morality as stipulated in Article 29 paragraph (2) of the Marriage Law.[14]

---

[9] Sita Ulima Ekawati and Burhanudin Harahap, "Fungsi Pengesahan Perjanjian Perkawinan Oleh Notaris Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015," *Jurnal Repertorium* 6, no. 1 (2019): 14.

[10] Andika Prayoga and Billquis Kamil Arasy, "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Selama Perkawinan Setelah Adanya Putusan Mahkamah Konstitusi No. 69/PUU-XIII/2015," *Indonesian Notary* 3, no. 1 (2021).

The absence of a clear understanding of the marriage agreement rises to various interpretations regarding the content and meaning of the marriage agreement. In general, arrangements related to marriage agreements lead to provisions in the Civil Code (hereinafter the Civil Code).

Referring to R. Subekti, the marriage agreement is interpreted as an agreement regarding the property of husband and wife during their marriage which deviates from the principle or pattern established by law.[15] The construction of the understanding of the marriage agreement provides a fairly narrow scope regarding the contents of the marriage agreement, which is limited to only regulating the assets of husband and wife in marriage. In the process of making a marriage agreement, the prospective husband or wife can state the will of each party to the assets owned during the marriage.[16]

Arrangements related to marriage agreements are also regulated in the Civil Code as regulated in the First Book on People.[17] In general, the requirements for making a marriage agreement must meet the conditions for a valid agreement as stipulated in the provisions of Article 1320 of the Civil Code. Furthermore, in making a marriage agreement, the prospective husband and prospective wife must also pay attention to special requirements which include the individual, the form and content of the marriage agreement.

The conditions regarding the personal self-related to the marriage agreement include the age limit. Referring to the Marriage Law, it is understood that a man who has not reached the age of 19 (nineteen) years and a woman who has not reached 16 (sixteen) years are not allowed to bind themselves in a marriage.

---

[11] I Made Pasek Diantha and M S SH, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Prenada Media, 2016).

[12] ND Mukti Fajar and Y Achmad, *Dualisme Penelitian Hukum: Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2013). h. 90.

[13] Haedah Faradz, "Tujuan Dan Manfaat Perjanjian Perkawinan," *Jurnal Dinamika Hukum* 8, no. 3 (2008): 249–52.

[14] Sriono Sriono, "Perjanjian Kawin Sebagai Bentuk Perlindungan Terhadap Harta Kekayaan Dalam Perkawinan," *Jurnal Ilmiah Advokasi* 4, no. 2 (2016): 69–80.[3]

[15] Hera Alvina Satriawan, "Pengaturan Perjanjian Perkawinan Berdasarkan Peraturan Menteri Agama Nomor 19 Tahun 2018 Tentang Pencatatan Perkawinan," *Unizar Law Review (ULR)* 1, no. 2 (2018): 167–76.

[16] Indira Hastuti, "Perlindungan Hukum Bagi Suami Isteri Dalam Pelaksanaan Perjanjian Perkawinan Menurut Hukum Islam," *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 18, no. 1 (2020): 62–69.

[17] Hanafi Arief, "Implementasi Yuridis Perjanjian Kawin Dalam Sistem Hukum Positif Di Indonesia," *Syariah: Jurnal Hukum Dan Pemikiran* 15, no. 2 (2016).

[18] Nazmina Asrimayasha Nugraha, Sonny Dewi Judiasih, and Elis Nurhayati, "Status Kedewasaan Anak Yang Melakukan Perkawinan Dibawah Umur Dalam Pembuatan Perjanjian Kawin Pada Praktik Kenotariatan Di Indonesia," *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 4, no. 1 (2020): 114–32.

[19] Annisa Istrianty and Erwan Priambada, "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung," *Privat Law* 3, no. 2 (2016): 164410.

In general, a person who is not yet an adult (*minderjaring* or person under age) must be represented by a parent or guardian if they want to take a legal action. However, there are exceptions in the case of marriage agreements. Referring to J. Satrio, a person who is not yet an adult is considered capable of making a marriage agreement on the condition that:[18]

1. Has fulfilled the requirements to marry;
2. Must be made with assistance (bijstand or money or aid given by government to people in need.), or accompanied by a person authorized to give a marriage permit

If one or both of the prospective husband and wife have not reached the age limit for marriage and the parties make an agreement without the help of parents or guardians, then the agreement becomes invalid, even though the marriage is carried out at a later date after fulfilling the requirements for the validity of the marriage.[19] This has an impact on not being able to make a marriage agreement so that the parties can only bind themselves in a marital relationship with a unanimous property union.[20]

Referring to the provisions in Article 147 of the Civil Code, it is determined that the marriage agreement must be made with a notary deed, with the threat of cancellation.[21] These terms are meant for the following purposes:

a. The marriage agreement is stated in the form of an authentic deed in order to have strong evidentiary power;
b. Provide legal certainty regarding the rights and obligations of husband and wife on their property, considering that the marriage agreement has broad consequences. To make a marriage agreement, it takes someone who really masters the law of marital property and can formulate the conditions that are determined carefully. This is related to the provision that the form of marital property must remain throughout the marriage. An error in formulating the conditions in the marriage agreement cannot be corrected during the marriage.

The provisions as regulated in Article 147 of the Civil Code also stipulate that a marriage agreement must be made before the marriage takes place.[22] The provisions in the Marriage Law and the Civil Code do not stipulate the time period between the making of a marriage agreement and the time the marriage takes place, but in term of practice the marriage agreement should be made as close as possible to the time the marriage takes place. Furthermore, changes to the contents of the marriage agreement can only be made before marriage. The changes must be made by notarial deed. In the case of a marriage agreement made with the help of parents or guardians, the parents or guardians must be reinstated. If the parents or guardians included do not agree to the changes to be made, then the changes cannot be made.

---

[20] Ahmad Royani, "Perjanjian Kawin Yang Dibuat Setelah Perkawinan Terhadap Pihak Ketiga (Pasca Putusan Mahkmah Konstitusi Nomor 69/PUU-XIII/2015)," *Jurnal Independent* 5, no. 2 (2017): 6–16.

[21] Ane Fany Novitasari, "Tanggungjawab Notaris Atas Isi Perjanjian Perkawinan Setelah Perkawinan" (Brawijaya University, 2016).

[22] royani, "Perjanjian Kawin Yang Dibuat Setelah Perkawinan Terhadap Pihak Ketiga (Pasca Putusan Mahkmah Konstitusi Nomor 69/PUU-XIII/2015)."

The provisions regarding the contents of the marriage agreement are not clearly regulated in the Marriage Law. There are several thoughts related to the content of the marriage agreement with reference to several opinions from experts as follows:[23]

a. Referring to R. Sardjono, it is understood that the contents of a marriage agreement should only include rights related to rights and obligations in the field of property law;
b. Referring to Nurnazly Soetarno, it is understood that a marriage agreement can only promise things related to rights and obligations in the field of property law, and this is true regarding assets that are truly personal assets of the husband and wife concerned, which are brought into the marriage.

Furthermore, the provisions in Article 139 of the Civil Code contain the principle that the prospective husband and wife are free to determine the contents of the marriage agreement they make. However, this freedom is still limited by several prohibitions that must be considered by prospective husbands and wives who will make a marriage agreement. There are several prohibitions regarding the contents of the marriage agreement, namely:

a. The agreement must not conflict with decency or public order (Article 139 of the Civil Code);
b. The agreement must not deviate from the power granted by the Civil Code to the husband as the head of the household, for example, it cannot be promised that the wife will have her own place of residence (Article 140 paragraph (1);
c. In the agreement, husband and wife may not relinquish their right to inherit the inheritance of their children (Article 141);
d. In the agreement it should not be specified that one of the parties will bear a debt greater than its share in the profits (Article 142).
e. In the agreement, it may not generally be referred to the regulations in force in a foreign country (Article 143). What is prohibited is not to include the contents of foreign law in detail article by article, but to refer generally to the foreign law. This prohibition is intended so that there is legal certainty regarding the rights of husband and wife, especially for the interests of third parties who may not control the laws of the designated foreign country;
f. The promise must not be made in general words that their position is regulated by customary law and so on (Article 143 of the Civil Code).

The freedom for the prospective husband and wife in determining the contents of the marriage agreement is closely related to the principle of freedom of contract as regulated in Article 1338 of the Civil Code.[25] Referring to the provisions in Article 1338 of the Civil Code, it is determined that:

---

[23] Istrianty and Priambada, "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung."

> "*All agreements made in accordance with the law apply as law to those who make them. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. Approval must be carried out in good faith.*"

The provision in Article 1338 paragraph (1) which states that "All agreements made in accordance with the law ..." are the implementation of the principle of freedom of contract. The principle of freedom of contract provides freedom for the parties to:[26]

1) Free to contract or not to contract;
2) Free to choose with whom to contract;
3) Free to determine the form of the contract;
4) Free to determine the content of the contract;

The principle of freedom of contract provides space for the parties to determine the contents of the agreement, including determining the matters to be regulated in the marriage agreement as long as it is agreed upon by the parties and does not conflict with the provisions of the applicable laws and regulations. This is in accordance with the provisions in Article 1337 of the Civil Code, which expressly stipulates that:

> "*A cause is prohibited, if the cause is **prohibited by law** or if the cause is contrary to morality or public order*."

Furthermore, the making of a marriage agreement must also be in line with the provisions in Article 1320 of the Civil Code regarding the conditions for the validity of the agreement. In the provisions of Article 1320 of the Civil Code, it is determined that for the validity of an agreement, 4 (four) conditions are required, namely:[27]

1) agree on those who bind themselves;
2) the ability to make an engagement;
3) a certain matter;
4) a lawful cause.

In the formulation of the article, the first two conditions are subjective requirements and the last two conditions are objective conditions. If the subjective conditions are not met, then an agreement can be canceled as stipulated in 1446 and 1450 of the Civil Code, while if the objective conditions are not met, the agreement is null and void. An agreement can be canceled means that one of the parties bound in the agreement can request the cancellation of the agreement and the agreement remains binding on both parties in the agreement as long as it is not canceled by the judge.[28]

The provisions in Article 1320 of the Civil Code specify the word "agree" or "consensuality" as one of the conditions for the validity of an agreement. Consensuality as specified in Article 1320 of the Civil Code comes from the word "consensus" which

[24] Arief, "Implementasi Yuridis Perjanjian Kawin Dalam Sistem Hukum Positif Di Indonesia."
[25] Lisa Wage Nurdiyanawati and Siti Hamidah, "Batasan Perjanjian Perkawinan Yang Tidak Melanggar Hukum, Agama, Dan Kesusilaan," *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 4, no. 1 (2019): 101–8.

means agreement, namely the achievement of a conformity of will between one party and another which is indicated by the words "agree", "okay" or so on.[296]

Based on the explanation above, it can be understood that the arrangements related to marriage agreements are subject to the provisions of the Marriage Law and the Civil Code. Referring to the provisions in Article 29 of the Marriage Law, it is understood that at or before the marriage takes place both parties with mutual consent can enter into a written agreement ratified by the civil registration officer, after the contents also apply to third parties. The agreement cannot be ratified if it violates the boundaries of law, religion and morality. This is in line with the provisions stipulated in the Civil Code, especially in Article 147 of the Civil Code it is determined that the marriage agreement must be made with a notarial deed.

3.2 Authority of the Notary After the Constitutional Court's Decision Related to the Marriage Agreement

On 27 October 2016, the Constitutional Court issued Decision Number 69/PUU-XIII/2015 which essentially regulates the marriage agreement contained in the provisions of Article 29 of the Marriage Law.[30] The Constitutional Court's decision is considered to have changed and added to the norms of the initial concept of a marriage agreement as regulated in the provisions of Article 29 of the Marriage Law.[31] Some of these changes include:

1. Prior to the decision of the Constitutional Court, a marriage agreement can only be made before or at the time the marriage is held, after the decision of the Constitutional Court the marriage agreement can be made before, at the time the marriage is held or during the period of the marriage bond;
2. Prior to the Constitutional Court Decision, the ratification of the marriage agreement is carried out by the marriage registration officer, after the Constitutional Court Decision, the ratification is carried out by the marriage registration officer or notary;
3. Prior to the decision of the Constitutional Court, the marriage agreement shall enter into force after the marriage is held, after the decision of the Constitutional Court, the marriage agreement shall enter into force after the marriage or as long as otherwise specified in the marriage agreement;
4. Prior to the Constitutional Court's decision, the marriage agreement can only be changed with the consent of both parties as long as the change does not harm a third party, after the Constitutional Court's decision, the marriage agreement can be changed or revoked with the consent of both parties as long as the change and revocation do not harm a third party.

[29] Dhira Utara Umar, "Penerapan Asas Konsensualisme Dalam Perjanjian Jual Beli Menurut Perspektif Hukum Perdata," *Lex Privatum* 8, no. 1 (2020).

[30] Faradilla Asyatama and Fully Handayani Ridwan, "Analisis Perjanjian Perkawinan Menurut Undang-Undang Perkawinan Di Indonesia," *Ajudikasi: Jurnal Ilmu Hukum* 5, no. 2 (2021): 109–22.

[31] Nur Shofa Ulfiyati, "Perlindungan Harta Kekayaan Dalam Pengaturan Perjanjian Perkawinan Di Indonesia," *ASASI: Journal of Islamic Family Law* 2, no. 1 (2021): 43–65.

One of the points of change in the norms of the marriage agreement after the Constitutional Court's decision is related to the ratification of the marriage agreement.[32] In the Constitutional Court's decision, there is an alternative ratification of the marriage agreement, namely ratification through a notary.
Notary as public officials who are authorized to make authentic deeds in carrying out their duties and positions are subject to the provisions of Law Number 30 of 2004 concerning Notary Positions (hereinafter UUJN) which is amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 2014 concerning the Position of Notary (hereinafter Law Number 2 of 2014). Referring to the provisions of Article 1 point 1 UUJN it is determined that:[33]

> "*Notary is a public official who is authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws*."

Referring to the provisions of Article 15 of Law Number 2 of 2014 concerning the authority of a Notary. In the provisions of Article 15 paragraph (1) of Law Number 2 of 2014 it is determined that:[34]

> "*The notary has the authority to make an authentic deed regarding all actions, agreements and stipulations required by laws and regulations and/or desired by the interested parties to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, storing the deed, providing grosse (first copy and authentic deed), copies and quotations of the deed, all of which is as long as the making of the deed is not assigned or excluded to other officials or other people stipulated by law.*"

Referring to these provisions, it can be understood that the notary as a public official is authorized to make an authentic deed, as long as the making of the deed is not assigned or excluded to other officials or people. The notary is authorized to make an authentic deed as long as it is desired by the parties and in accordance with the provisions of the applicable laws and regulations.

The authority possessed by a notary is able to provide legal certainty and legal protection for the community. This is seen as an effort to prevent or prevent the possibility of problems related to legal issues in the future. The existence of an authentic deed can be used as the most perfect evidence before the Court.[35]

The addition of the phrase "or notary" after the phrase "... legalized by the marriage registration officer" in the Constitutional Court's Decision is a new thing related to the ratification of marriage agreements, although in practice marriage agreements are often made in the form of a notary deed as regulated in the provisions of Article 147 of the Civil Code, but based on the provisions in Article 29 paragraph (1) of the Marriage

---

[32] Respati Nadia Putri, Sonny Dewi Judiasih, and Nanda Anisa Lubis, "Perlindungan Hukum Terhadap Kreditor Dan Upaya Notaris Membuat Perjanjian Perkawinan Setelah Perkawinan," *Veritas et Justitia* 5, no. 2 (2019): 464–91.

[33] Kadek Setiadewi and I Made Hendra Wijaya, "Legalitas Akta Notaris Berbasis Cyber Notary Sebagai Akta Otentik," *Jurnal Komunikasi Hukum (JKH)* 6, no. 1 (2020): 126–34.

[34] Ibid.

[35] I Ketut Tjukup et al., "Akta Notaris (Akta Otentik) Sebagai Alat Bukti Dalam Peristiwa Hukum Perdata," *Acta Comitas* 2 (2016): 180–88.

Law, this requirement is no longer binding. Furthermore, the Constitutional Court's decision also changed the phrase "to enter into a written agreement" which was previously specified in Article 29 paragraph (1) of the Marriage Law to "submit a written agreement".

Referring to the addition and change of phrases in the Constitutional Court's Decision on the construction of the formulation of Article 29 paragraph (1) of the Marriage Law, especially if it is associated with the phrase "... after which the contents also apply to third parties as long as the third party is involved" which is maintained by the Constitutional Court, it can be understood that the Constitutional Court gives new authority to notary to ratify marriage agreements with the aim of binding third parties. This change is interpreted as a new authority for the Notary to ratify an existing marriage agreement and not to make a marriage agreement.

This is based on the change in the phrase "to conduct a written agreement" which was changed to "submit a written agreement". Referring to the Big Indonesian Dictionary (hereinafter KBBI) there is a difference in meaning between "to hold" and "to propose". Etymologically, the word "to conduct" means to make, create or cause something that does not exist to exist, while "to propose" means to express, bring forward or display something that already exists.

Referring to the changes in the Constitutional Court's Decision, it is understood that there are 2 (two) roles of the notary after the Constitutional Court's Decision. The two roles include:[36]

1. The notary has a role as the authorized party in ratifying the marriage agreement as a written agreement in the sense that the notary is authorized to make a marriage agreement into a notarial deed if the parties want it as stipulated in the authority of the notary in Article 15 paragraph (1) of Law Number 2 of 2014;
2. Notary have a role as the authorized party to ratify existing marriage agreements with the aim that the agreement is also binding on third parties.

Furthermore, the new authority granted by the Constitutional Court's Decision on the position of a Notary has not been regulated in the UUJN. This gives rise to multiple interpretations in the implementation of these changes. Referring to the Constitutional Court's decision, it is understood that now the Notary has a new authority, namely to ratify the marriage agreement proposed by both parties, namely husband and wife. Marriage agreements made in the form of a Notary Deed do not necessarily legally bind third parties, but only validly apply to the parties who make them, this is because binding third parties requires actions related to the principle of publication. The principle of publication is understood as an obligation to disclose information so that the information is known to the general public.

---

[36] Fhauzi Prasetyawan, "Peran Notaris Terkait Pengesahan Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015," *Justitia Jurnal Hukum* 2, no. 1 (2018).

The application of the principle of publication is contrary to the principle of confidentiality which is implemented by a notary in carrying out his duties and positions as regulated in the provisions of Article 16 paragraph (1) and Article 54 paragraph (1) of Law Number 2 of 2014.[37] Referring to the provisions in Article 16 paragraph (1) letter f of Law Number 2 of 2014 it is determined that a notary is obliged to "keep everything confidential regarding the deed he/she made and all information obtained for making the deed in accordance with the oath / promise of office, unless the law provides otherwise." Furthermore, Article 54 paragraph (1) of Law Number 2 of 2014 stipulates that "Notary can only provide the contents of the deed, *grosse* deed (first copy and authentic deed), a copy of the deed or an excerpt of the deed to people who have a direct interest in the deed, heirs, or people who have rights, unless otherwise provided for by statutory regulations".

Moving on from these provisions, if in the ratification of the marriage agreement, the notary then records it in the repertoire like other Notary Deeds, then this cannot be said to be the implementation of the publication principle. This is because the agreement is binding on third parties, while the repertoire cannot be accessed by the general public. The repertoire can only be accessed by parties who have a direct interest in the deed, heirs or people who have rights. This is certainly different from the recording into the marriage certificate carried out by the marriage registration officer, which can be accessed by the general public.

Based on the explanation above, it can be understood that there has been a change in the authority of the notary after the Constitutional Court Decision, however, until now the Notary has not been able to ratify the marriage agreement as referred to in the Constitutional Court Decision. For that we need a new mechanism that can be regulated in implementing regulations related to the authority of a notary to ratify a marriage agreement, so that the ratification of a marriage agreement made by a notary can be accessed by the public and can provide legal certainty for the parties involved in the marriage agreement, including third parties and also notary who ratify. Prior to the implementation of these implementing regulations, the ratification of the agreement with the aim of binding third parties was still carried out by the marriage registration officer. Thus, the notary continues to carry out its role as the party that ratifies the marriage agreement as a written agreement (making the marriage agreement into the Notary Deed) if desired by the parties.

4. Conclusion

Based on the explanation above, it can be understood that the arrangements related to the marriage agreement are subject to the provisions in the Marriage Law and the Civil Code. Referring to the provisions in Article 29 of the Marriage Law, it is understood that at or before the marriage takes place both parties with mutual consent can enter into a written agreement ratified by the civil registration officer, after the contents also apply to third parties as long as the third party. The agreement cannot be ratified if it violates the boundaries of law, religion and morality. This is in line with the provisions stipulated in the Civil Code, especially in Article 147 of the Civil Code it is stipulated that the marriage agreement must be made with a notarial deed. Furthermore, there has been a change in the authority of the Notary after the Constitutional Court's Decision, however, until now the Notary has not been able to ratify the marriage

agreement as referred to in the Constitutional Court's Decision. For that we need a new mechanism that can be regulated in implementing regulations related to the authority of a Notary to ratify a marriage agreement, so that the ratification of a marriage agreement made by a Notary can be accessed by the public and can provide legal certainty for the parties involved in the marriage agreement. including third parties and also notaries who ratify. Prior to the implementation of these implementing regulations, the ratification of the agreement with the aim of binding third parties was still carried out by the marriage registration officer. Thus, the Notary continues to carry out its role as the party that ratifies the marriage agreement as a written agreement (making the marriage agreement into the Notary Deed) if desired by the parties.

Reference

Agustine, Oly Viana. "Politik Hukum Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Dalam Menciptakan Keharmonisan Perkawinan." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 1 (2017): 53–67.

Arief, Hanafi. "Implementasi Yuridis Perjanjian Kawin Dalam Sistem Hukum Positif Di Indonesia." *Syariah: Jurnal Hukum Dan Pemikiran* 15, no. 2 (2016).

Asyatama, Faradilla, and Fully Handayani Ridwan. "Analisis Perjanjian Perkawinan Menurut Undang-Undang Perkawinan Di Indonesia." *Ajudikasi: Jurnal Ilmu Hukum* 5, no. 2 (2021): 109–22.

Dewi, Aliya Sandra, Dian Fitriana, and Nursolihi Insani. "Perjanjian Perkawinan Sebelum Dan Setelah Dilangsungkannya Perkawinan Di Indonesia." *Pro Bono Jurnal Pengabdian Kepada Masyarakat* 2, no. 02 (2022).

Diantha, I Made Pasek, and M S SH. *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*. Jakarta: Prenada Media, 2016.

Ekawati, Sita Ulima, and Burhanudin Harahap. "Fungsi Pengesahan Perjanjian Perkawinan Oleh Notaris Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015." *Jurnal Repertorium* 6, no. 1 (2019): 14.

Faradz, Haedah. "Tujuan Dan Manfaat Perjanjian Perkawinan." *Jurnal Dinamika Hukum* 8, no. 3 (2008): 249–52.

Hastuti, Indira. "Perlindungan Hukum Bagi Suami Isteri Dalam Pelaksanaan Perjanjian Perkawinan Menurut Hukum Islam." *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 18, no. 1 (2020): 62–69.

Istrianty, Annisa, and Erwan Priambada. "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung." *Privat Law* 3, no. 2 (2016): 164410.

Mukti Fajar, ND, and Y Achmad. *Dualisme Penelitian Hukum: Normatif & Empiris*. Yogyakarta: Pustaka Pelajar, 2013.

Novitasari, Ane Fany. "Tanggungjawab Notaris Atas Isi Perjanjian Perkawinan Setelah Perkawinan." Brawijaya University, 2016.

Nugraha, Nazmina Asrimayasha, Sonny Dewi Judiasih, and Elis Nurhayati. "Status Kedewasaan Anak Yang Melakukan Perkawinan Dibawah Umur Dalam Pembuatan Perjanjian Kawin Pada Praktik Kenotariatan Di Indonesia." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 4, no. 1 (2020): 114–32.

Nurdiyanawati, Lisa Wage, and Siti Hamidah. "Batasan Perjanjian Perkawinan Yang Tidak Melanggar Hukum, Agama, Dan Kesusilaan." *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 4, no. 1 (2019): 101–8.

Prasetyawan, Fhauzi. "Peran Notaris Terkait Pengesahan Perjanjian Perkawinan Pasca

Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015." *Justitia Jurnal Hukum* 2, no. 1 (2018).

Prayoga, Andika, and Billquis Kamil Arasy. "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Selama Perkawinan Setelah Adanya Putusan Mahkamah Konstitusi No. 69/PUU-XIII/2015." *Indonesian Notary* 3, no. 1 (2021).

Putri, Respati Nadia, Sonny Dewi Judiasih, and Nanda Anisa Lubis. "Perlindungan Hukum Terhadap Kreditor Dan Upaya Notaris Membuat Perjanjian Perkawinan Setelah Perkawinan." *Veritas et Justitia* 5, no. 2 (2019): 464–91.

Rochaeti, Etty. "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam Dan Hukum Positif." *Jurnal Wawasan Yuridika* 28, no. 1 (2015): 650–61.

Royani, Ahmad. "Perjanjian Kawin Yang Dibuat Setelah Perkawinan Terhadap Pihak Ketiga (Pasca Putusan Mahkmah Konstitusi Nomor 69/PUU-XIII/2015)." *Jurnal Independent* 5, no. 2 (2017): 6–16.

Satriawan, Hera Alvina. "Pengaturan Perjanjian Perkawinan Berdasarkan Peraturan Menteri Agama Nomor 19 Tahun 2018 Tentang Pencatatan Perkawinan." *Unizar Law Review (ULR)* 1, no. 2 (2018): 167–76.

Setiadewi, Kadek, and I Made Hendra Wijaya. "Legalitas Akta Notaris Berbasis Cyber Notary Sebagai Akta Otentik." *Jurnal Komunikasi Hukum (JKH)* 6, no. 1 (2020): 126–34.

Sriono, Sriono. "Perjanjian Kawin Sebagai Bentuk Perlindungan Terhadap Harta Kekayaan Dalam Perkawinan." *Jurnal Ilmiah Advokasi* 4, no. 2 (2016): 69–80.

Sugiswati, Besse. "Konsepsi Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat." *Perspektif* 19, no. 3 (2014): 201–11.

Tjukup, I Ketut, I Wayan Bela Siki Layang, A Martana Nyoman, I Ketut Markeling, Nyoman Satyayudha Dananjaya, IPRA Putra, and P A R Tribuana. "Akta Notaris (Akta Otentik) Sebagai Alat Bukti Dalam Peristiwa Hukum Perdata." *Acta Comitas* 2 (2016): 180–88.

Ulfiyati, Nur Shofa. "Perlindungan Harta Kekayaan Dalam Pengaturan Perjanjian Perkawinan Di Indonesia." *ASASI: Journal of Islamic Family Law* 2, no. 1 (2021): 43–65.

Umar, Dhira Utara. "Penerapan Asas Konsensualisme Dalam Perjanjian Jual Beli Menurut Perspektif Hukum Perdata." *Lex Privatum* 8, no. 1 (2020).

Wicaksono, Dimas Bagus. "Perlindungan Hukum Terhadap Konsumen Go-Jek (Layanan Transportasi Dengan Aplikasi Online) Dalam Perjanjian Aplikasi Go-Jek Berdasarkan Pasal 1320 KUHPerdata." *Justitia Jurnal Hukum* 1, no. 2 (2017).

Law and Regulations

the 1945 Constitution of the Republic of Indonesia
the Civil Code
Law No. 1 of 1974 concerning Marriage
the Constitutional Court Decision Number: 69/PUU-XIII/2015