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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

The 5th International Conference and Call for Paper Faculty of Law 2019 Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

<i>FRONT PAGE</i>	<i>I</i>
<i>Information of The International Seminar</i>	<i>III</i>
<i>Committee Composition</i>	<i>IV</i>
<i>PREFACE</i>	<i>V</i>
Fulfillment Of Teacher Protection Rights <i>Yenny AS, Rini Setiawati</i>	<i>I</i>
Legal Reconstruction Of Laws Regarding Human Rights Through Judicial Re- view To The Constitutional Court <i>Umar Ma'ruf</i>	<i>13</i>
Legal Analysis Of Social Security Transformation And The Reality Of Its Implementation In The Community In Indonesia <i>Siti Ummu Adillah, I Gusti Ayu Ketut Rachmi Handayani ,Adi Sulistiyono</i>	<i>30</i>
Increasing Voluntary Compliance Of Tax Payments In Micro Small And Medium Enterprises (Msmes) Post-Issuance Of Government Regulation Number 23 Of 2018 (Case Study In Semarang City) <i>Amin Purnawan, Akhmad Khisni, Aryani Witasari</i>	<i>41</i>
Legal Analysis Of Racist Exams In Surabaya Papua Dormitory <i>Ma'aruf Akib</i>	<i>50</i>
Reconstruction Of Misdemeanor Settlement Based On Pancasila Value <i>S. Andi Sutrasno</i>	<i>57</i>
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights <i>Adhi Budi Susilo, Indra Yuliawan</i>	<i>63</i>
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice <i>Rahmatsyah</i>	<i>67</i>
Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice <i>Widayati , Winanto</i>	<i>73</i>

Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methodsbased On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Sopyono, Nuridin</i>	82
Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice <i>Carto Nuryanto, Gunarto, Anis Mashdurohatun</i>	91
Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP) <i>muhamad Iqbal al Hakiem,aryani witasari</i>	96
Reconstruction Completion Of The Crime Of Light On Value Pancasila <i>Andi S. Sutrasno</i>	102
Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value <i>Wieke Dewi Suryandari ; Gunarto; Amin Purnawan</i>	108
Reconstruction Of Transport Regulatory On Marine Toll To Support Sea Connectivity Based On Pancasila Justice <i>Hartanto, Gunarto, Anis Mashdurohatun</i>	114
Reconstruction Of Scientific Investigation In Indonesia Based On Justice <i>Teguh Prihmono; Gunarto, Sri Endah Wahyuningsih</i>	120
Legal Construction On Training Ship Management Belongs To Human Resources Development Of Transportation (Bpsdmp) Based On Dignity Justice Value <i>Wahyu Wibisono, Gunarto, Anis Mashdurohatun</i>	126
Protection Of Law Refugees/Asylum Seekers In Indonesia (As A Transit State) No Ratify 1951 Convention Of And The 1967 Protocol <i>Muhammad Djamir</i>	133
Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children) <i>Cucuk Kristiono, Gunarto, Anis Mashdurohatun; Suparji</i>	144
Legal Protection Against Indonesian Workers (Tki) In Abroad <i>Yaya Kareng ,Ong Argo Victoria ,Sri Yulianingsih</i>	149
Recontruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice <i>Moh Djarkasih**</i>	158

Reconstruction Policy Of Sanctions Against Destruction Of Evidence Illegal Fishing Based Small Fishing Welfare Values <i>R. Juli Moertiyono</i>	165
Reconstruction Of Legal Policy Interfaith Marriage In Indonesia <i>Moh. Zeinudin, Dian Novita</i>	179
Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia <i>Nana Ruhyana</i>	186
Legal Protection Against Disability In Getting Work <i>Oktavianto Setyo Nugroho</i>	193
Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice <i>Agus Sugiarto</i>	203
Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws <i>Yanto Irianto</i>	208
Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice <i>Asep Hermawan</i>	220
Reconstruction Of Performance Assessment Of Drinking Water Companies (Pdam) Based On Consumer Protection <i>Bustaman</i>	225
Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt <i>Euislistianti</i>	229
Reconstruction Of Operational System As A Community Economic System Based On Welfare <i>Abbas Ibrahim Idris</i>	234
Reconstruction Of Criminal Responsibility For Actors Prostitutorial Criminal Justice In The Criminal Justice Based On Value <i>Iwan Rasiwan</i>	242
Reconstruction Of Legal Drinking Water Management Company (Pdam) Based On Justice <i>Suharyadi</i>	248

Reconstruction Of Private Criminal System Implementation In The Commitment Values In Indonesia Justice <i>Sumanto</i>	252
Reconstruction Of Justice Law Protection Law Protection <i>Wamyani</i>	260
Criminal Code Draft Law And Development In Indonesia <i>Nany Pujianti Suwigjo</i>	265
Deconstruction of the Principle of Legal Thinking <i>Sriyati</i>	270
Development Of The Law Of Complete Systematic Land Registration (Ptl) And Effect Of Conduct Values of Land Based On Dignify Justice In The District Of Kendal, Central Java <i>Desy Dwi Nurhayati Hartanti</i>	279
Interpretation Teaching Of Human Rights Laws Against Material In Corruption Provisions <i>Burham Pranawa, Hartiwiningsih, Hari Purwadi</i>	293
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice <i>Rahmatsyah</i>	301
Law Due To Delay The Registration Under Fiduciary Guarantee Pmk No 130 / Pmk.010 / 2012 <i>Jaenudin Umar</i>	307
The Effectiveness Of The Handling Of The Criminal Acts Of Light Tend To Be Settled Judicial Custom <i>Supena Diansah</i>	313
Interpretation Human Rights Law Against The Teaching Material In Corruption Criminal Offenses <i>Burham Pranawa, Hartiwiningsih, Hari Purwadi</i>	319
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights <i>Adhi Budi Susilo, Indra Yuliawan</i>	327
Independence Institute Of Justice And Judge In Perspective Judicial Reform Blueprint 2010 - 2035 <i>Ahmad Agus Bahaudin</i>	331

Policies Against Crime Criminal Law Made By Children <i>Achmad Arifulloh</i>	341
Law Enforcement Of Law Number 23 Of 2004 In Preventing Efforts Human Rights Violations In Indonesia <i>Andri Winjaya Laksana , Lathifah Hanim</i>	350
Position Of Agreement On Land Acquisition For Development For Public Interest <i>Djoni Sumardi Gozali</i>	359
The Village Fund As Indonesian Social Welfare Program: The Gap Between Regulatory And Practice (A Study On Penal Perspective) <i>Ifrani*</i>	367
The Finality Of Arbitration: The Pros And Cons Of The Court's Power To Setting Aside Arbitral Awards In Indonesia <i>Yati Nurhayati</i>	376
Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methods Based On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Soponyono, Nuridin</i>	382
Improvement of the Presidential System in Concurrent Elections <i>Endro Wibowo Aji</i>	391
Restorative Justice and Penal Mediation in Resolving Cases of Children Confronting the Law in Indonesia <i>Agustinus Dian Leo Putra</i>	398
Criminological Aspects of Corruption Crime <i>Angga Kusumah</i>	405
Policy Online Single Submission (OSS) System as a Public Service Innovation in the Field of Environmental Licensing <i>Haris Fadillah Harahap</i>	413
The Relevance of Civil Law and Common Law Systems in Regulating Standard Contract Law in Indonesia <i>Iman Fathurrahman</i>	421

Legal Politics In Erading Money Launching Criminal Actions In Indonesia <i>Abdul Haris</i>	427
The Legal Politics Of The State Defense Industry In Indonesia <i>Ade Christian Manapa</i>	433
Political Directions For Land Law On Land Property Rights For The People <i>Aga Wigana</i>	438
Political Form Of Pre-Justice Law In Law Enforcement In Indonesia <i>Apromico</i>	443
Inner Legal Political Strategy Prevention Of Radicalism In Indonesia <i>Beno</i>	448
The Government's Efforts Through Legal Politics In Hajj Management <i>Dhanar Dhono Vernandhie</i>	453
Political Law Of Regional Autonomy As The Management Of Local Government <i>Eka Damayanti</i>	458
Responsibility Of Corporate Crimes In Criminal Actions Of Narcotics <i>Himawan Aji Angga</i>	464
Juridical Review of The Existence of Notary Prohibitions on The Office of The Curator <i>Nurchahyo Pratomo Widodo</i>	469
The Legal Strength of Covernote and Notary Responsibility for The Making of a Covernote as a Legal Product Not Regulated by Notary Laws <i>Arif Bahtiar Jefry</i>	474
Role of Notary / PPAT in Making Authentic Assets Towards False Document Description <i>Kanzu Khirzul Yaman</i>	479
Legal Review of Personal Warranties Made Against The Notary of Lending <i>Nur Chamid</i>	484

Harmonization in Regulation of Heritage Certificate by Notary in Sociolegal Perspective <i>Desi Wulan Anggraini</i>	488
Legal Protection of The Wife's Property in Marriage by Making a Marriage Agreement Made in a Notary Provision <i>Nur Ismi Hanifah</i>	492
Legal Due To The Implementation Of Absolute Authorization In The Sale And Purchase Agreement Before The Development Of Sale And Purchases <i>Bayun Kismantoro</i>	496
Political Laws Notary Honor Assembly <i>Muhammad Wildan Mahindra</i>	500
Role of Notary in The Making of Deal of Sale and Buy Agreements to Support National Development <i>Ika Yulia Ningrum</i>	506
Legal Due to The Implementation of Public Business Credits with Guarantee of The Rights of Liability Made in Notary <i>Riska Fauziana</i>	511
Implementation of Credit Agreement Through Notary Notary And Its Legal Due When Performance Occurs <i>Iqbal Rino Akta Pratama</i>	515
Implementation of Court Determination on The Sell and Purchase Process Towards Officials of Land Associates who are Herities Under The Age <i>Zaenal Arifin</i>	519
Authority of The Notary Regional Supervisory Assembly to Issue a Client's Document Return Order <i>Adi Candra Saputra</i>	524
Implementation of Management and Environment of Damaged Land <i>Agil Aladdin</i>	528

Legal Protection of The Wife's Property in Marriage by Making a Marriage Agreement Made in a Notary Provision

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Abstract

The problems in this research are: 1) How legal protection of the wife's property in the marriage agreement? 2) what are the constraints in implementing the marriage agreement made before a notary before and after the Marriage Law is enacted? 3) what is the authority and responsibility of the notary in making marriage agreement deeds?

The approach method used in this research is a juridical empirical approach. The specifications of this research are descriptive analytical, data sources are primary and secondary data, data collection methods use literature study, data analysis methods with qualitative analysis.

Results of the research: 1) legal protection of assets in a marriage marriage agreement can only be done when a marriage is taking place. In accordance with Article 1338 of the Civil Code and the Marriage Law in Article 29, the contents of the agreement must be carried out in good faith by taking into account the provisions of law, religion, moral norms and public order. 2) Constraints in implementing the marriage agreement in the absence of good faith from the parties. The solution is that the notary should ensure that the deed he has drawn up has been registered at the authorized office so that it does not harm the parties. 3) The authority and responsibility of a notary is limited to the content of the agreement which has fulfilled the legal requirements of the agreement based on Article 1320 of the Civil Code, so he cannot be prosecuted in court.

Keywords: Legal Protection, Wife's property in marriage, Notary

A. INTRODUCTION

Indonesia is a country consisting of various ethnicities, ethnicities, religions and groups. As one of the largest countries in the world, Indonesia is a complex and plural country. Various communities are here. In the institution of marriage, our society has always known the mixing of marital assets. The bride and groom never make a fuss about each other's assets. Asas trust each other and understands the couple is the basis for the union of marital assets.

Marriage according to Islamic law is called nikah, which is one of the main principles of life in a civilized and perfect society, because according to Islam marriage is not only a very noble way to regulate household life and descent, but also as one of the paths leading to it. the door of

introduction between one people and the other.¹

The marriage agreement is made either in written form or deed, either under hand or in the form of an authentic deed made by an authorized official or notary.

With regard to authentic deeds and the authority of notaries as public officials who are authorized to make authentic deeds, it can be further seen in Law Number 2 of 2014 concerning the Position of Notary Public, namely the preamble point b states that to guarantee legal certainty, order and legal protection, evidence is needed. in writing which is authentic about conditions, events or legal actions carried out through certain positions. Thus, obtaining a marriage agreement with a deed made under hand can create legal uncertainty, because the

¹. Sayuti Thalib, *Hukum Keluarga Indonesia*, UI Press, Jakarta, 1974, p. 47.

community (third party) is not aware of the marriage agreement, and the power of proof is still not strong, because it is debatable, whereas if it is admitted it only has perfect proving power for the parties.²

Furthermore, when the marriage agreement has been made, it must be registered at the Office of the Clerk of the District Court where the marriage takes place in its jurisdiction. The objective is to fulfill the principle of publicity. The formulation of the problem under study is:

1. How Legal Protection of Wife's Assets in Marriage Agreements Made Before a Notary Public Before and After the Enactment of Law Number 1 Year 1974?
2. What are the obstacles to the implementation of marriage agreements made before a notary public before and after the enactment of Law Number 1 of 1974 and what are the solutions?
3. What are the powers and responsibilities of a notary in the making of the Marriage Agreement Deed made before and after the enactment of Law Number 1 of 1974?

B. DISCUSSION

1. Legal Protection of Wife's Assets in Marriage Agreements Made Before a Notary Public Before and After the Enactment of Law Number 1 Year 1974.

Agreements are usually made for the sake of legal protection of each other's assets, husband or wife, although the law does not regulate the purpose of the marriage agreement and what can be agreed upon, everything is left to both parties.³

The marriage agreement that is made aims to provide legal protection, namely as a law for parties with good faith intentions. If a conflict between the parties occurs, it can be used as a reference and one of the bases for each partner in carrying out, and providing

limits on rights. and obligations between them.

As a result of marriage on the husband and wife's property according to the Civil Code is mixed assets in Article 119 of the Civil Code, assets acquired during marriage become joint assets including all marital assets, namely: assets that existed at the time of the marriage, assets acquired during the marriage. The purpose of making this marriage agreement is to deviate from the provisions concerning joint assets as stipulated in Article 119 of the Civil Code, the parties are free to determine the form of law they want on the assets that are their objects. They may decide,

Article 1338 of the KUHPerata states that all agreements that are legally made are valid as law for those who make them. Such agreements cannot be withdrawn other than by agreeing both parties, or for reasons that are declared sufficient by law. , agreements must be executed in good faith.

In this article, it can be concluded that the most important meaning of the marriage agreement must be carried out in good faith and compliance. If there is a violation or deviation that the parties do not want, then the violation of the agreement can be used as an excuse to demand divorce to the Religious Court.

2. Constraints to the Implementation of Marriage Agreements Made Before a Notary Public Before and After the Enactment of Law Number 1 Year 1974.

From the author's interview with the KUA Mr. Muhammad Muhlis, the Civil Registry and Notary Office in Kendari, the main obstacle in implementing the marriage agreement is that if there is a divorce there will be no report to them.

In order to be clearer about the obstacles and solutions for making marriage agreements made before a notary public both before and after the enactment of Law No. 1 of 1974 and its problems the authors present in the table below:

². Wahyono Darmabrata, *Tinjauan Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan*

³. http://www.duniaibu.org/html/agreement_pra_nikah.html, Dunia-ibu.org online journal, "Prenuptial Agreement

Table of Constraints and Solutions

No.	Obstacles	Solution
1	The marriage agreement is a law for the parties, this is in accordance with Article 1338 of the Civil Code. Furthermore, in the Marriage Law in Article 29 the contents of the agreement must be carried out in good faith by observing the provisions of law, religion, moral norms and public order.	Notary public should ensure that the deed he has drawn up has been registered at the authorized office so that the deed he makes is ensured as an authentic deed so as not to harm the parties. If not, the deed is made only as an underhand agreement deed
2	The problem is the absence of goodwill from the parties and the exclusion of rights and obligations in the marriage agreement. This can lead to disputes that lead to divorce so that they can be used as an excuse for canceling the marriage or demanding divorce and compensation to the Court	The elements of good faith for the parties in making the agreement need to be explicitly stated in the contents of the agreement including the rights and obligations of the parties.
3	The authority and responsibility of the notary in drawing up the deed he makes is limited to the content of the agreement which has met the legal requirements of the agreement based on Article 1320 of the Civil Code, so he cannot be prosecuted in court. Conversely, if the agreement does not meet the validity requirements, the deed made by a notary may be canceled by a judge.	Notary as a noble and dignified profession, should also be able to formulate laws related to marriage agreements. For this reason, before making a marriage agreement deed, the notary must be sure and trust the identity of the parties as well as the object / property being promised must be clear.

3. Authorities and Responsibilities of Notaries in Preparing Agreement Deeds Made Before and After the Enactment of Law Number 1 Year 1974.

At this time the marriage agreement can be made in writing, both notary and under hand. If the marriage agreement is made notary, it must be a notary who makes it, while the parties can make an underhand marriage agreement without involving a notary.

Article 1 paragraph 1 (one) of the UUJN states that a notary is a public official who has the authority to make authentic deeds and other powers as referred to in this law.

Furthermore, Article 1870 of the Civil Code states that an authentic certificate provides that between the parties and their heirs or people who get rights from them is perfect evidence of what is contained in it.

Another notary's authority is stated in Article 15 paragraph 2 letter a, namely

ratifying the signature and determining the date of the letter under signature by registering in a special book. An example is a marriage agreement deed that is drawn up under hand and then the deed is legalized by a notary.

C. CLOSING

1. Conclusion

- Legal protection of assets in a marriage agreement can only be done when the marriage is underway. Where the marriage agreement is a law for the parties, this is in accordance with Article 1338 of the Civil Code. The agreement must be made in good faith by taking into account the provisions of law, religion, moral norms and public order. If one of the parties does not carry out the marriage agreement and harms the other party, then the court will ask for compensation to the party

who feels aggrieved, both for the implementation of the agreement and compensation.

- Constraints in the implementation of the marriage agreement in the absence of good faith from the parties and the exclusion of rights and obligations in the marriage agreement. This can lead to disputes that lead to divorce so that they can be used as an excuse to cancel the marriage or demand divorce and compensation to the Court. The solution is that the notary should ensure that the deed he has drawn up has been registered at the authorized office so that the deed he makes is ensured as an authentic deed so as not to harm the parties.
- The authority and responsibility of a notary in drawing up a deed that he makes is limited to the content of the agreement which has met the legal

conditions of the agreement based on Article 1320 of the Civil Code, so he cannot be prosecuted in court. On the other hand, if the agreement does not meet the validity requirements, the deed made by a notary can be canceled by a judge. The cancellation decided by the judge on the notary deed can be in the form of (1) null and void; or (2) can be canceled.

2. Suggestion

- The marriage agreement basically adheres to the principle of freedom of the parties, so it is best to include a choice of law clause in the settlement of property disputes in marriage.
- Notary public should ensure that the deed he has drawn up has been registered at the authorized office so that the deed he makes is ensured as an authentic deed so as not to harm the parties.

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