

Implementation of the Principle of Legal Certainty in the Making of Marriage Agreement Deeds by Notaries

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Abstract. *This study aims to analyze: 1) The implementation of the principle of legal certainty in the making of a marriage agreement deed by a Notary aims to provide legal guarantees for the husband and wife and third parties. This agreement must be made in the form of a notarial deed before the marriage takes place in order to have binding legal force. The Notary's role is to ensure that the agreement is in accordance with the provisions of the law, does not cause ambiguity, and is registered at the Civil Registry Office in order to strengthen legal protection. In addition to guaranteeing the rights and obligations of the couple, the application of the principle of legal certainty also prevents potential disputes and ensures transparency in the management of marital assets. Thus, the existence of a marriage agreement deed contributes to justice, legal security, and order in the marriage legal system in Indonesia. marriage in Indonesia. 2) The legal consequences of the application of the principle of legal certainty in the making of a marriage agreement deed by a Notary are that with the existence of a marriage agreement made in the form of an authentic deed and officially registered, legal certainty regarding ownership and management of assets in the marriage can be guaranteed. The Notary plays an important role in ensuring that the agreement is made in accordance with applicable legal provisions, so that it has binding legal force and can be used as valid evidence in the judicial process. In addition, the application of the principle of legal certainty in a marriage agreement also functions as preventive and repressive legal protection. Preventively, this agreement helps prevent potential disputes regarding property in marriage, while repressively, this agreement provides a strong legal basis for resolving conflicts in court if violations or disputes occur.*

Keywords: *Marriage Agreement Deed; Notary; Principle of Legal Certainty.*

1. Introduction

Humans are social creatures who cannot be separated from the presence of other humans, to fulfill biological needs and continue the human lineage must have a bond between men and women or what is called marriage. Article 1 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, give The definition of marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy family (household) based on the One Almighty God.

Marriage for Muslims is a religious event and therefore the person who carries it out has performed an act of worship.¹ Marriage is a sacred and strong and sturdy agreement to legally live together between a man and a woman to form an eternal family, where husband and wife must support each other, love each other, there is a state of security and peace full of happiness both morally, spiritually and materially based on the Almighty Godhead.²

The marriage agreement is regulated in Chapter V of the Civil Code, Article 139, but after the issuance of Law Number 1 Number 29 of 1974, the marriage agreement in the Civil Code is rarely used, in the Compilation of Islamic Law, the marriage agreement is also regulated in Article 47. Although not stated in the Marriage Law, the intent and purpose of the marriage agreement is intended regarding the management of the husband and wife's marital assets in marriage, so it can be concluded by interpreting the term marriage agreement in the Civil Code in connection with Article 29 of Law Number 1 of 1974 and the marriage agreement according to the Compilation of Islamic Law that was previously in effect.³

Every agreement made by the community will certainly lead to a notary as a means of civil validity in the agreement. This means that the position of a notary is very important in helping to create legal certainty for the community. Notaries are in the realm of preventing legal problems through authentic deeds that they make as the strongest evidence in court. The most important position of the notary profession is in their main task as the maker of authentic deeds. Article 1870 of the Civil Code states that an authentic deed is an absolute and strong proof for the parties who made it. Notaries are authorized by law to

¹Amir Syarifuddin, 2009, *Islamic Marriage Law in Indonesia: Between Fiqh Munakahat and Marriage Law*, Kencana, Jakarta, Cet. 3., p. 41.

²Mohd Idris Ramulya, 1999, *Islamic Marriage Law*, 2nd edition, Sinar Grafika, Jakarta, p. 287

³Didik Misbachul Aziz and Siti Ummu Adillah, *The Role of Notaries in Making Marriage Agreement Deeds After the Constitutional Court Decision Number 69/Puu-XIII/2015 of 2015*, Sultan Agung Scientific Journal, Unissula, Semarang, p.935

create this absolute proof. This implies that the contents stipulated in the authentic deed are basically considered true.⁴

The existence of a Notary is very important in the midst of community life. Notaries play a role in providing assurance of certainty, order, and legal protection to the community regarding the creation of authentic deeds. This authentic deed is very necessary in every aspect of community life.⁵The role of a Notary in providing assistance in providing legal certainty and legal protection for the community is very important. The role of a notary is more preventive or preventive in the future of legal problems by making authentic deeds related to a person's legal status, rights and obligations in law, and so on which function as the most perfect evidence in court, namely in the event of a dispute over rights and obligations.⁶

The position of a notary as an official who makes authentic deeds is stated in Article 2 Paragraph 1 of Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notary, which states that a Notary is a public official who is authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws. Authentic deeds made by or before notaries according to the form and procedures stipulated in the law.⁷

The authority of a notary in making an authentic marriage contract deed can be seen in Article 15 paragraph (1) which states: "A notary has the authority to make an authentic deed regarding all acts, agreements and provisions required by statutory regulations and/or which are desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making or, store the deed, provide a grosse, copy and extract of the deed, all of which as long as the making of the deed is not also assigned or excluded to another official or other person as determined by law."⁸

The making of a marriage agreement deed by a notary aims to avoid future disputes between husband and wife. However, without paying proper attention to the principle of legal certainty, there is a risk that the agreement deed does not reflect the intentions and rights that are actually owned by both parties. This can cause disputes to arise in the future.

⁴Rizki Nurmayanti, Akhmad Khisni, The Role and Responsibilities of Notaries in the Implementation of Deed Making, Jurnal Akta, Vol. 4 No. 4 December 2017, p. 611

⁵Putri AR, 2011, Legal Protection for Notaries (Indicators of Notary's Job Duties that Implicate Criminal Acts), Softmedia, Medan, p.32

⁶Erina Permatasari, Lathifah Hanim, The Role and Responsibility of Notaries in the Implementation of Registration of Limited Liability Companies Through an Online System, Jurnal Akta, Volume 4 Number 3 September 2017, p.401

⁷Nawaaf Abdullah, Munsyarif Abdul Chalim, Position and Authority of Notary in Making Authentic Deeds, Jurnal Akta, Vol. 4 No. 4 December 2017, p.658

⁸Imam Wahyu, The Role of Notaries in Making Authentic Deeds for Marriage Agreements, Journal of Islamic Family Law, Volume 3, Issue 1, p.25

2. Research Methods

This type of research is included in the scope of normative legal research. The approach method in this research is the Legislation approach (statue approach). The type of data in this research is secondary data sourced from primary, secondary and tertiary legal materials. The data collection method uses library techniques (study document). The analysis in this research is prescriptive.

3. Results and Discussion

3.1. Implementation of the Principle of Legal Certainty in the Making of Marriage Agreement Deeds by Notaries

As a country that upholds legal values in the life of society, Indonesia has established various rules regarding marriage. In Indonesia, since the enactment of Law Number 1 of 1974, society has used the law as a guideline in marriage. One of the principles adopted by marriage law in Indonesia is that prospective husband and wife must be mature both physically and mentally in order to be able to carry out marriage.⁹

Marriage can cause various problems, especially in three main aspects, namely the relationship between husband and wife, the relationship between parents and children, and problems related to property. The consequences of a marriage have quite a broad influence including social and legal, starting at the time of marriage, during marriage and after marriage, because in a marriage many things will happen or will be obtained such as property problems, descendants, where if there are no clear provisions, especially the problem of dividing the inheritance of the deceased or those who divorce, including the problem of each person's own property will cause a problem.¹⁰

A marriage agreement can function as a preparation for the household ark, because the contents of the marriage agreement are not only the separation of property between the husband and wife. The contents of the marriage agreement can be things related to how to build a harmonious and prosperous family.¹¹For example, a husband and wife can promise each other that once married, the husband may not practice polygamy or commit domestic violence (KDRT).

A marriage contract must be made with a notarial deed, or with a written agreement approved by the Marriage Registrar, before the marriage takes place

⁹Trubus Wahyudi, 2022, Legal Review of the Implementation of the Supreme Court Regulation on Guidelines for Marriage Dispensation Courts, Journal of Legal Reform, Volume 9 Number 2, p. 308

¹⁰Sofian Syaiful Rizal, 2019, Legal Power of Notarial Deeds Regarding Marriage Agreements, Voice Justisia: Journal of Law and Justice, Volume 3, Number 1, p.109

¹¹Happy Susanto, 2008, Division of Marital Assets in the Event of Divorce (The Importance of a Marriage Agreement to Anticipate Marital Asset Problems), Visimedia, South Jakarta, p.5

and it comes into effect from the time the marriage takes place. The material regulated in the contract depends on the prospective husband and wife, as long as it does not conflict with the law, statutes, religion, and propriety or morality. This marriage contract applies as a law for those who make it, and also applies to third parties as long as these third parties are involved.

A marriage contract will have legal force if it is made before a notary. A notary has the authority to draft an authentic deed, which is related to the legality of the document and his position as a public official who is authorized to draft the deed. As regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, namely the considerations of point b, it is stated that in order to guarantee legal certainty, order, and legal protection, authentic written evidence is needed regarding the circumstances, events or legal acts carried out through certain positions. This shows that notaries have a legal basis that strengthens their profession.

The principle of legal certainty is one of the fundamental principles in the Indonesian legal system which aims to create order and legal clarity. Implementation of the principle of legal certainty in the making of a marriage agreement deed by a notary, among others:

1. Formal Validity

In order for a marriage agreement to have legal certainty, the marriage agreement deed must be made in written form and meet the formal requirements as stipulated in Article 29 of Law Number 1 of 1974 concerning Marriage (which has been amended by Law Number 16 of 2019). Regarding the making of a marriage agreement, in Article 147 of the Civil Code, the marriage agreement must be made with a notarial deed before the marriage takes place, otherwise it is null and void (*van rechtswege nietig*), this aims to protect the interests of the parties and also third parties, by making the agreement with a notarial deed, the interests of the third party will be protected, and will take effect from the time the marriage takes place, another time for that cannot be determined. This is different from the Marriage Law, in the law there is no explanation that a marriage agreement must be made with a notarial deed, but it is better if the marriage agreement is made with a notarial deed and in Government Regulation Number 9 of 1975 Article 12 letter h, there is a rule that if there is a marriage agreement deed, it must be included in the marriage deed. Meanwhile, in terms of the legal force of a notarial deed, it can be connected with the legal force of an authentic deed because of the relationship with the notary's function, the classification of notarial deeds.

2. Registration of Deeds

Marriage agreements must be registered at the Civil Registry Office in order to have binding force for third parties. This registration aims to provide legal certainty to third parties, for example in cases of property ownership or debts, ensure that the agreement can be enforced in the Indonesian marriage law

system and avoid potential legal conflicts related to property ownership and inheritance rights of husband and wife. Without registration, a marriage agreement is only binding between husband and wife and has no legal force against other parties.

3. Clarity of Agreement Contents

The principle of legal certainty requires that the contents of the marriage agreement be clearly drafted and not open to multiple interpretations. Notaries are required to ensure that the agreement made does not conflict with laws and regulations and avoids uncertainty of interpretation. The contents of the agreement must be drafted in detail so as not to cause ambiguity or misunderstanding in the future.

4. Consistency with the Principles of Marriage Law

One of the principles of legal certainty is that it is not easy for a regulation or agreement to be changed after it has been agreed upon. In the context of a marriage agreement, changes or cancellations can only be made with the agreement of both parties and must go through a valid legal procedure. The agreement must not contain clauses that conflict with applicable legal provisions, such as the prohibition of agreements that aim to illegally limit the rights and obligations of husband and wife. In addition, the agreement must not contain elements of exploitation or harm one of the parties.

Ideally, judges in making decisions must reflect the theory of legal certainty, the theory of justice and the theory of utility.¹² According to Gustav Radbruch, the theory of justice, the theory of legal certainty, and the theory of utility are three important terms in the courtrooms, but in essence their meanings are not necessarily agreed upon. The word justice becomes an analogous theme, so that the terms procedural justice, legal justice, commutative justice, distributive justice, vindicative justice, creative justice, substantive justice, and so on are presented. In this context, justice and legal certainty are not opposites but rather side by side.¹³

Legal certainty guarantees that a person behaves in accordance with applicable legal provisions, conversely, without legal certainty, a person does not have standard provisions in carrying out behavior. Legal certainty refers to the implementation of a way of life that is clear, orderly, consistent and

¹²Elisabeth Nurhaini Butarbutar, 2011, Freedom of Civil Judges in Legal Discovery and Antinomy in Its Application, *Mimbar Hukum Journal*, Volume 23 Number 1, Faculty of Law. Gadjah Mada University (UGM), Yogyakarta, p. 62.

¹³Sidharta, 2010, Reform and State Responsibility, *Judicial Commission Anthology, Judges' Decisions: Between Justice, Legal Certainty, and Benefit*, Judicial Commission of the Republic of Indonesia, Jakarta, p.3.

consequential in its implementation and does not affect subjective conditions in the life of society.¹⁴

Legal certainty is one of the fundamental principles in the legal system that guarantees clarity, order, and justice in the application of legal rules. Gustav Radbruch, a leading legal philosopher, put forward four (four) basic things related to the meaning of legal certainty, namely:¹⁵

1. The law is positive, meaning that positive law is legislation.
2. The law is based on facts, meaning it is based on reality.
3. Facts must be formulated in a clear manner so as to avoid errors in interpretation, as well as being easy to implement.
4. Positive law cannot be easily changed.

Analysis of Gustav Radbruch's legal certainty theory shows that the principle of legal certainty in the making of a marriage agreement deed by a notary is very important to guarantee the validity, enforceability, and implementation of the agreement. By adhering to the principles of positive law, based on facts, clearly drafted, and having legal stability, a marriage agreement deed can provide optimal legal protection for the couple who make it. Notaries as authorized public officials have a key role in ensuring the implementation of these principles, so that the community can benefit from a marriage agreement with strong and reliable legal certainty. Notaries have a primary role in ensuring that the marriage agreement deed is made in accordance with applicable legal provisions, as well as ensuring that the agreement is registered so that it has binding legal force. Therefore, optimizing the role of notaries and increasing public legal awareness are important factors in implementing the principle of legal certainty in marriage agreements.

Legal certainty will be related to the legal protection of the parties, with the provision of services to the community in which there are human interests and is a demand that must be protected and fulfilled by humans themselves, so if one party does not carry out the marriage agreement and harms the other party, then compensation is requested from the party who feels disadvantaged to the Court, both demands regarding the implementation of the agreement and demands for compensation. The making of a marriage agreement deed is also inseparable from the authority and responsibility of the notary himself. To obtain legal certainty and validity, legality and legal protection, an agreement made by the parties should be made in the form of an authentic deed.¹⁶

¹⁴Febrina Andarina Zaharnika, 2022, Legal Consequences of Marriage Agreements (Huwelijkse Voorwaarden) on Assets in Connection with the Principle of Legal Certainty, Codification Journal, Volume 4 Number 1, p.57

¹⁵Gustav Radbruch, 1961, Einfuehrung In Die Rechtswissenschaft, Koehler Verlag, Stuttgart, p.36

¹⁶Febrina Andarina Zaharnika, 2019, Legality of Notarial Deed No. 12 Concerning Joint Property, Codification Journal, Kuantan Singingi Islamic University (UNIKS), Volume 1 Number 1, p. 41.

3.2. Legal Consequences of the Application of the Principle of Legal Certainty in the Making of a Marriage Agreement Deed by a Notary

A marriage agreement is an important agreement made with the aim of separating marital property between husband and wife, thereby preventing problems arising regarding marital property between husband and wife.¹⁷ Separation of assets in marriage is a concept that aims to provide clarity regarding the ownership and management of assets of each spouse. This has different legal implications before and after the marriage takes place. Before marriage, the couple can make a marriage agreement that clearly regulates the separation of assets. This is done to ensure that any assets owned before and after the marriage remain the personal property of each spouse. Article 29 paragraph (1) of Law No. 1 of 1974 on Marriage states that a marriage agreement must be made before or at the time the marriage takes place and be ratified by a notary in order to have binding legal force.

The main objectives of separating assets before marriage include:

- a. Maintaining the financial independence of each party in the marriage.
- b. Protect personal assets from possible lawsuits or debts that may arise during the marriage.
- c. Provide legal certainty to third parties, such as creditors or financial institutions, regarding each partner's responsibility for financial assets and liabilities.

A premarital agreement made before marriage also protects couples from the joint property system as regulated in Article 119 of the Civil Code, which states that in marriage, legally the property of the husband and wife becomes one entity unless there is another agreement.¹⁸

Previously, Article 29 of the Marriage Law stated that a marriage agreement can only be made before or during the marriage. However, through Constitutional Court Decision No. 69/PUU-XIII/2015, married couples are now allowed to make or change a marriage agreement after the marriage has taken place. Agreements made after marriage must still meet formal requirements, namely being made in the form of a notarial deed and registered with the Civil Registry Office or the Office of Religious Affairs, so that they have binding legal force against third parties.

The legal consequences of applying the principle of legal certainty in the making of a marriage agreement deed by a notary are:

¹⁷Fitria Anas, 2023, Principles of Legal Certainty of the Ratification of Marriage Agreements by Notaries After the Decision of the Constitutional Court of the Republic of Indonesia Number 69/PUU/XIII/2015, Unnes Law Review, Volume 6, Number 2, p. 6235

¹⁸Ahmad Sainul, 2018, The Concept of Marriage Agreement in Indonesia, El-Qanuny Journal, Volume 4 Number 1, p. 67

1. A marriage agreement deed made by a notary has binding legal force for both the husband and wife and third parties. This is in line with Article 1338 of the Civil Code, which states that every agreement made legally applies as a law for the parties who make it. With its status as an authentic deed, this agreement cannot be denied and must be carried out in accordance with the agreement that has been made.

2. The validity of the marriage agreement is strengthened because it is supported by Article 29 of Law No. 1 of 1974 concerning Marriage, which stipulates that the marriage agreement must be made before or at the time of the marriage. This agreement must also be registered at the Civil Registry Office or the Religious Affairs Office so that it can be enforced against third parties. Without registration, the agreement only binds the husband and wife and cannot be used as a legal basis for other parties such as creditors or financial institutions.

Based on Article 29 paragraph (1) it can be interpreted that only marriage registration officers can validate marriage agreements. However, after the Decision of the Constitutional Court of the Republic of Indonesia Number 69/PUU/XIII/2015, there was an additional authority, namely that notaries have the authority to validate marriage agreements so that the marriage agreement can bind third parties.¹⁹This decision is in line with the principle of freedom of contract as regulated in Article 1338 paragraph (1) of the Civil Code. The main principle underlying it is that every individual has the right to freely determine the marriage agreement for the duration of the marriage bond, in accordance with the interests of each party.²⁰

The binding legal force of the Decision of the Constitutional Court of the Republic of Indonesia Number 69/PUU/XII/2015 applies not only to the parties to the case, but also to all citizens, state institutions, state officials, and legal entities throughout the territory of the Republic of Indonesia. As a result, the Decision of the Constitutional Court Number 69/PUU/XII/2015 binds notaries, the Population and Civil Registration Service, and the Office of Religious Affairs (KUA) as officials authorized to validate marriage agreements.²¹

3. One of the main functions of a marriage agreement is to prevent legal disputes related to property. Based on Article 119 and Article 126 of the Civil Code, a joint property system applies in marriage, unless otherwise specified in the marriage agreement. With this agreement, a husband and wife can

¹⁹Febrina Andarina Zaharnik, 2022, Legal Consequences of Marriage Agreements (Huwddlijkse Voorwaarden)," *Journal of Codification*, Volume 4 Number 1, p. 55

²⁰Oly Viana Agustinee, 2017, Legal Politics of Marriage Agreements after Constitutional Court Decision Number 69/PUU-XIII/2015 in Creating Marital Harmony, *Rechtsvinding Journal*, Volume 6 Number 1, p.61

²¹Firman Floranta Adonara, 2020, The Authority of Notaries to Validate Marriage Agreements as a Constitutional Mandate, *Journal of Notary Science*, Volume 1 Number 2, p. 64.

determine their own property ownership rules, thus avoiding conflict in the event of divorce or death of one of the partners. If there is no agreement, all property acquired during the marriage is considered joint property and can be a source of legal conflict.

4. Marriage agreements also provide protection for third parties, especially in terms of debts. According to Article 29 of the Marriage Law, if the agreement regulates the separation of assets, then the personal assets of one spouse cannot be used to pay off the debts of the other spouse without consent. This provides legal certainty for creditors and other parties who have an interest in the economic relationship of a husband and wife.

5. The principle of legal certainty in a marriage agreement also emphasizes that an agreement that has been agreed upon cannot be changed unilaterally. Article 29 of the Marriage Law and Constitutional Court Decision No. 69/PUU-XIII/2015 emphasizes that any changes must be mutually agreed upon and made in the form of a notarial deed. In addition, changes must be re-registered at the Civil Registry Office or the Religious Affairs Office in order to maintain legal force against third parties. If one party tries to change the contents of the agreement unilaterally, then the action is not legally valid and can be the basis for a lawsuit in court.

6. In the realm of legal evidence, a marriage agreement deed has the power as a valid evidence. Based on Article 1870 of the Civil Code, a notarial deed has perfect evidentiary power in the legal process. If a dispute or dispute occurs, this deed can be used as valid evidence showing that the agreement was made legally and has been agreed to by both parties. However, if a marriage agreement is made without meeting the legal requirements, then the agreement can be considered invalid or not legally binding.

Overall, the application of the principle of legal certainty in the making of a marriage agreement deed by a notary provides protection for the husband and wife and related third parties. The notary acts as a public official who guarantees the legal validity of the agreement, so that the agreement has binding legal force, provides legal protection for the rights and obligations of the couple, and can be used as valid evidence in the judicial process. However, if legal procedures are not met, the agreement can lose its legal force and create uncertainty for the couple and other parties involved.

Legal certainty guarantees that a person behaves in accordance with applicable legal provisions, conversely, without legal certainty, a person does not have standard provisions in carrying out behavior. Legal certainty refers to the implementation of a way of life that is clear, orderly, consistent and

consequential in its implementation and does not affect subjective conditions in the life of society.²²

4. Conclusion

The implementation of the principle of legal certainty in the making of a marriage agreement deed by a Notary aims to provide legal certainty for the husband and wife and third parties. The agreement must be made in the form of a notarial deed before marriage in order to be valid and binding. The Notary ensures that the agreement is in accordance with the law, is not ambiguous, and is registered at the Civil Registry Office to strengthen legal protection. This helps regulate the rights and obligations of the couple, prevent legal conflicts, and create justice and order in marriage law. The legal consequences of the application of the principle of legal certainty are the guarantee of ownership and management of assets in marriage through a valid and binding authentic deed. The Notary ensures that the agreement is in accordance with the provisions of the law, so that it can be used as evidence in court. This agreement functions as preventive legal protection to prevent disputes and repressive as a basis for resolving conflicts if violations occur.

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²²Nur Agus Susanto, 2014, Axiological Dimension of the Decision in the “ST” Case, Review Decision Study Number 97/ PK/ Pid.SUS/ 2012, Judicial Journal, Volume 7 Number 3, Judicial Commission of the Republic of Indonesia, Jakarta, p.219.

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