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The Juridical Analysis of Land Ownership Rights Purchased Prior to Making a Marriage Agreement (Postnuptial Agreement)

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Abstract. *This research aims toknow and analyzeregarding the juridical analysis of land ownership rights purchased prior to the conclusion of a postnuptial agreement on a marriage, as well asknow and analyze aboutthe role and authority of a Notary in making a marriage agreement deed for land ownership purchased before the marriage.The approach method in this research is normative law (doctrinal). Normative legal research that is more specific discusses legislation or is also called normative juridical. Based on the results of the study concluded: 1)Marriage agreements made while in a marriage bond can be carried out after the decision of the Constitutional Court Number69/PUU-XII/2015, while regarding land purchased before the marriage agreement is made it will remain joint property as stipulated in Article 35 paragraph (1) of the Marriage Law, because marriage agreements made while in a marriage bond only bind to the assets that will be obtained later after the marriage agreement was made. The same goes for theorylegal certainty in the opinion of Gustav Radbruch, in principle has been well fulfilled considering that the marriage agreement is made as a legal means to protect the rights and obligations of the husband and wife when the marriage life takes place, which is made in accordance with the agreement of the parties to be ratified by the employee of the Marriage Registrar or Notary; 2)The role and authority of the Notary in the marriage agreement is based on the addition and change of phrases made by the Constitutional Court to the formulation of Article 29 paragraph (1) of Act No. 1 of 1974 concerning Marriage, which is connected with the phrase ".....after which the contents also apply to third parties as long as a third party is involved" is still maintained by the Constitutional Court, it is found that the Constitutional Court gives new authority to Notaries to ratify marriage agreements with third party binding purposes. In this case it can be said that the role of the Notary is to ratify the existing marriage agreement and not to make marriage agreements. This is due to the change in the phrase "enter into a written agreement" to "submit a written agreement".*

Keywords: Debt; Outstanding; Tax.

1. Introduction

One of the purposes of making a marriage agreement is to hold deviations from the provisions regarding joint assets as stipulated in Article 119 of the Civil Code. The parties are free to determine the legal form they want for the assets that are the object. They may determine that in their marriage there will be absolutely no shared assets (uitsluiting van gemeenschap van goederen) or limited shared assets (beperkte gemeenschap van goederen).

The issue of property in marriage is very important because one of the significant factors in whether or not a happy and prosperous household life lies in property.[1]It is very clear and firm, the law determines that assets acquired during marriage become joint property, thus the nature of the legal norms attached to Article 35 Paragraph (1) of Act No. 1 of 1974 is coercive (*dwingenrecht*) or also called imperative norms.[2]

Article 29 paragraph (1) of the Marriage Law stipulates that a marriage agreement is an agreement made at or before the marriage takes place. Based on these provisions, if there is no marriage agreement, the assets acquired during the marriage become joint property.

A postnuptial agreement is an agreement made between a husband and wife after the marriage has taken place which basically contains the division of assets between the husband and wife, both existing and those that will exist in the future.

The distribution includes what belongs to the husband and wife together, what belongs to each husband or wife, what is the responsibility of the husband and wife, or it can also relate to innate assets, namely property that the prospective husband and wife bring to their home. in marriage in order to be able to distinguish which is the property of the prospective wife and which is the property of the prospective husband. And in the future, both husband and wife can own property for their respective ownership (not joint property/*gono-gini*).

The problem that will be faced by husband and wife when carrying out a postnuptial agreement is regarding the distribution of joint assets in the form of land acquired during the marriage on the basis of buying and selling. When the husband and wife both want the land to become their property, then that's when problems arise.

Constitutional Court Decision Number: 69/PUU-XIII/2015 only regulates when the marriage agreement may be made and is only binding on the parties who make it, namely the husband and wife, while regarding the distribution of joint assets which should belong to the husband or to the wife not regulated in all provisions of laws and regulations. Therefore, according to the authors of the study on postnuptial agreements, it is very interesting to do research.

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[1]Tan Kamello and Syarifah Lisa Andrianti, 2015, Civil Law: Person & Family Law, (USU Press, Medan), p. 67.

[2]Soebekti, R., 2001, Fundamentals of Civil Law, (Intermasa, Jakarta), p. 37.

This research aims toknow and analyzeregarding the juridical analysis of land ownership rights purchased prior to the conclusion of a postnuptial agreement on a marriage, as well as forknow and analyze aboutthe role and authority of a Notary in making a marriage agreement deed for land ownership purchased before the marriage.

2. Research Methods

The approach method in this research is normative law (doctrinal). Normative legal research that is more specific discusses legislation or is also called normative juridical. While sThe specification of this research is analytical descriptive, namely a research method whose aim is to provide a systematic, factual and accurate description of the facts and the relationship between the phenomena investigated for later analysis.The data collection method used in this research is to find the necessary data from the actual research object through the steps of collecting primary data, secondary data, and field studies. While the method of data analysis carried out is by usingQualitative analysis is an analysis that is carried out not by using numbers or statistical formulas, but by using words or descriptions of sentences by making judgments based on regulationslegislation, theory or opinion of experts and logic so that logical conclusions can be drawn and are the answer to the problem.

3. Results and Discussion

3.1. Juridical Analysis of Land Ownership Rights Purchased Before Making a Marriage Agreement (Postnuptial Agreement) on Marriage

How important is the land as a living resource, so that there is no group of society in this world does not have certain rules in this land issue, the population is increasing, human thinking is growing and developing, so are the systems, patterns, structures and procedures of humans that determine their attitude towards land.[3] Talking about land parcels with rights can be said to be very synonymous with discussing the rights attached to that land, because there are no more land parcels in areas inhabited by humans that are not related to rights of control and or ownership rights.[4]

Land rights acquired in marriage are of course joint property, moreover the purchase is made jointly by the husband and wife concerned. However, in reality, the holder of the land rights listed on the certificate is the name of the husband or wife, not the names of both, namely the husband and wife. The purchase of land rights is carried out after the marriage between the two, so that the

[3] Hamdalilah, 2016, "Legal Protection for Purchasers with Good Faith in Buying and Selling Land". Lambung Mangkurat Law Journal, (Vol. 1 No. 2), p. 152.
[4] Maria SW Sumardjono and Martin Samosir, 2000, Land Law in Various Aspects. (Bina Media, Medan), p. 48.

property is joint property because there has been a marriage between the two, except when selling and/or buying objects on land is carried out when one of the parties is not in a marriage bond.

Article 1 of Act No. 16 of 2019 concerning Amendments to Act No. 1 of 1974 concerning Marriage, stipulates that marriage is a sacred engagement, an agreement between husband and wife based on Belief in One Supreme God. Marriage is a sacred agreement between a man and a woman to form a happy family. In addition to rights and obligations, property is also very influential because it can cause disputes and loss of harmony. After the marriage takes place, by law the property of the husband and wife will unite, which is what is known as *gono-gini* property. Article 35 paragraph (1) of the Marriage Law stipulates that property acquired during marriage becomes joint property.

To avoid disputes regarding these assets, the prospective husband and wife can draw up a deed of marriage agreement or what is also called a prenuptial agreement. This is regulated in the Marriage Law, specifically in Article 29. With this marriage agreement, there is no mixing of the assets of the husband and wife so that assets and debts become the rights and responsibilities of each individual. The contents of the marriage agreement can be determined from the agreement of the parties whether their assets will be separated entirely or only partially.

The making of a marriage agreement is regulated to be carried out before the marriage is carried out, as stated in article 29 paragraph (1) of the Marriage Law, which reads:

"At the time or before the marriage takes place, both parties, by mutual agreement, can submit a written agreement that is legalized by the marriage registrar, after which the contents also apply to the third party involved."

Currently there is a Constitutional Court decision Number 69/PUU-XIII/2015 as a result of a judicial review conducted on Article 29 of Act No. 1 of 1974, namely regarding marriage agreements. From this decision, the meaning of the marriage agreement has been expanded by the Constitutional Court so that the making of the agreement can adapt to the legal needs of each partner. In its ruling, the Constitutional Court stated that Article 29 paragraph (1) UUP was declared conditionally unconstitutional as long as it was not interpreted "At the time, before it is held or while in the marriage bond both parties with mutual consent can submit a written agreement which is ratified by a marriage registrar or notary, after where the contents also apply to third parties as long as a third party is involved.

With the issuance of the Constitutional Court decision Number 69/PUU-XIII/2015, a marriage agreement can be made before marriage, at the time the marriage takes place, or while in a marriage bond. Previously, it could only be made before and at the time the marriage took place, in accordance with the regulations in Article 29 paragraph (1) of the Marriage Law. This has of course been considered by the legislators concerned with its legal consequences, namely to protect the interests of third parties or who are usually creditors. If the marriage agreement is made after the marriage, it is feared that there will be a risk that the creditor will be harmed as a result of unpaid debts. The legal consequences of making a post-nuptial marriage agreement involve the parties, property, and third parties.

A valid marriage agreement is in accordance with the legal requirements of an agreement in accordance with Article 1320 of the Civil Code, namely there is an agreement of the parties, the skills of the parties, regarding a certain matter, and a lawful cause.[5]In this case, the parties have agreed to make a marriage agreement, the parties have been able to act because they have reached the age of maturity (have entered into a marriage), an agreement made regarding a certain matter, namely the separation of assets or regarding other matters agreed upon, as well as an agreement made it does not conflict with statutory regulations and does not conflict with public order or decency.

A marriage agreement is also valid if it is made before a Notary so that it has the power of proof and is registered at the Office of Religious Affairs or the Office of Civil Registry marriages can be made before, during, and during the marriage takes place with a notarial deed and reported to the Implementing Agency or the Implementing Agency's Technical Implementation Unit ("UPT"). Regarding the reporting of the marriage agreement, the Civil Registration Officer at the Implementing Agency or UPT Implementing Agency makes notes in the margins on the certificate register and extracts from the marriage certificate.

After the agreement applies to the parties, there are consequences for existing assets and of course based on the type of separation of assets made. If the contents of the agreement regulate the complete separation of assets, then the assets of the husband and wife do not mix at all, or if it concerns joint profits and losses, then the assets acquired after the marriage are joint assets including debts, and if it concerns joint results and income, only assets are shared, only obtained after and during the marriage become joint property, but the losses suffered are only the responsibility of the managing party, causing losses.

[5]Oting Supartini and Anis Mashdurohatun, 2016, Legal Consequences of the Credit Agreement Deed Made by a Notary with Guaranteed Mortgage Rights, Legal Certainty and Fairness of the Parties,http://jurnal.unissula.ac.id/index.php/PH/article/view/1443/1116, Journal of Legal Reform, Volume III No. 2 May - August 2016, p. 207.

Regarding the status of the land purchased before the marriage agreement was made, legally it is a joint property as referred to in Article 35 paragraph (1) of the Marriage Law. However, with the decision of the Constitutional Court Number 69/PUU-XIII/2015, the husband and wife who made the marriage agreement can determine based on a mutual agreement whether the land purchased prior to the agreement will remain joint property or divided into the rights of one of the parties.

Implementation related to the separation of assets as a result of making a marriage agreement after marriage has not been clearly regulated. First, whether the joint property is immediately separated and the share of each husband and wife is determined; or Second, it is considered that the assets acquired prior to the making of the marriage agreement remain joint property and there is a separation of assets after the conclusion of the marriage agreement.

According to the author, regarding the decision of the Constitutional Court Number 69/PUU-XIII/2015 which stated "The agreement comes into effect from the time the marriage takes place, unless otherwise specified in the Marriage Agreement" is only an affirmation of the validity period of the agreement. Meanwhile, regarding the status of the land that was purchased before the agreement was made, it remains the authority of the husband and wife who made the agreement to determine it based on the agreement. The Constitutional Court Decision Number 69/PUU-XIII/2015 only changes the substance of the provisions of Article 29 of the Marriage Law,which originally could only be done before or when the marriage took place, is now experiencing an expansion of meaning by allowing a marriage agreement while in a marriage bond. While the provisions regarding assets acquired while in a marriage bond are shared assets as stipulated in Article 35 paragraph (1) of the Marriage Law there is no change. Thus, the land that was purchased before the marriage agreement was made is still the joint property of the husband and wife. The marriage agreement made while in the marriage bond only binds to the assets that will be obtained later.In principle, the marriage agreement can be about other things that are not limited to matters of property. Even the decision of the Constitutional Court Number69/PUU-XIII/2015there is a new authority granted to a Notary to ratify a marriage agreement.The application of the law as described by the author above is very necessary in order to provide legal certainty to every married couple who will make a marriage agreement while in a marriage bond.

The term marriage agreement in legal norms in Indonesia is regulated in Chapter Seven, Part One, Article 139 to Article 154 of the Civil Code, in further developments in 1974 Act No. 1 of 1974 concerning Marriage was born which was amended by Law -Invite No. 16 of 2019, which also regulates marriage

agreements in Chapter V Article 29. This Marriage Law is the first law that regulates marriages that are "based on Islamic law".

The position of the marriage agreement, is the process of making a marriage agreement that is important for both parties, with the provisions that the agreement must be legally registered and recorded through the Notary's office so that the agreement deed can be used properly, and has legal force to provide protection and legal justice in obtaining joint assets against the marriage, therefore it is necessary to make a marriage agreement as outlined in a Notary Deed.

Regarding the form of the marriage agreement based on the provisions of Article 29 paragraph (1) of the Marriage Law Jo. Decision of the Constitutional Court Number 69/PUU-XIII/2015, the marriage agreement is made in the form of a written agreement ratified by a Marriage Registrar or Notary. The written form of the marriage agreement can be stated that it can be made in a private deed or an authentic deed. Authentic deed, namely a deed in the form determined by law, made by or before public officials who have power for that at the place where the deed was made (Article 1868 of the Civil Code). Notary and Marriage Registrar are public officials authorized to make authentic marriage agreement deeds.

If the marriage agreement is studied from the theory of legal certainty in the opinion of Gustav Radbruch who argues that legal certainty is a product of law or more specifically from legislation, then if one of the parties does not carry out the marriage agreement and harms the other party, claims can be made against the party that gave rise to the loss to the Court, both claims regarding the implementation of the agreement and claims for compensation. Making a marriage agreement deed cannot be separated from the authority and responsibility of the notary himself. To obtain legal certainty and validity, an agreement made by the parties should be made in the form of an authentic deed.

The notary has the authority to make a marriage agreement deed as mandated by law. In Article 15 paragraph (1) of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary, which states that a Notary has the authority to make authentic deeds regarding all actions, agreements and provisions required by laws and regulations and which are desired by those concerned to be stated in an authentic deed.

Legal certainty guarantees a person to carry out behavior in accordance with applicable legal provisions, otherwise without legal certainty, a person does not have standard provisions in carrying out behavior. Legal certainty refers to the implementation of the order of life which in its implementation is clear, orderly,

consistent and consistent and does not affect subjective conditions in people's lives.[6]

An agreement is defined as a legal relationship regarding property and wealth between two parties, in which one party promises or is assumed to promise to do something or not to do something, while the other party has the right to demand the implementation of that promise. A fixed marriage agreement must be made based on the general conditions that apply for the validity of an agreement. An agreement to be able to fulfill the legal requirements of an agreement as stipulated in Article 1320 of the Civil Code, in which the contents of the agreement are made based on the agreement of the parties.

The content regulated in the Marriage Agreement depends on the parties of the prospective husband and wife, as long as it does not conflict with the law, religion and decency or decency. The form and content of the marriage agreement, as is the case with agreements in general, is given to both parties the widest possible freedom or independence as long as it does not conflict with the law, decency or does not violate public order.

As we know, land acquired by a husband and wife after the marriage takes place is also joint property, so that the ownership is also joint ownership. With reference to Article 35 paragraph (1) of the Marriage Law, assets in the form of land acquired or purchased during the marriage are joint assets, unless otherwise determined by the spouses concerned. In the jurisprudence of the Religious Courts, joint property is property acquired during marriage in relation to marriage law, whether the receipt is through the intermediary of the wife or through the intermediary of the husband. This property is obtained as a result of the works of husband and wife in relation to marriage.[7]

Community order is closely related to certainty in law, because order is the essence of certainty itself. Order causes people to live with certainty because they can carry out the activities needed in social life.

Gustav Radbruch put forward 4 (four) fundamental things related to the meaning of legal certainty, namely:[8]

1) *The law is positive, meaning that positive law is legislation.*
2) *The law is based on facts, meaning it is based on reality.*

[6]Nur Agus Susanto, 2014, Axiological Dimensions of the "ST" Case Decision Study of Judicial Review Decision Number 97/PK/Pid.SUS/2012, Judicial Journal, (Vol. 7 No. 3, Judicial Commission of the Republic of Indonesia, Jakarta), p. 219.
[7] Abdul Manan, 2006, Various Problems of Islamic Civil Law in Indonesia. (Kencana, Jakarta), p. 108.
[8]Ibid., p. 59.

3) *Facts must be formulated in a clear way so as to avoid misunderstandings in meaning, besides being easy to implement.*
4) *Positive law should not be easily changed.*

Gustav Radbruch's opinion is based on his view that legal certainty is certainty about the law itself. Legal certainty is a product of law or more specifically of legislation. Based on this opinion, according to Gustav Radbruch, positive law that regulates human interests in society must always be obeyed even though positive law is unfair.

Based on the theory of legal certainty put forward by Gustav Radbruch mentioned above, that with the Constitutional Court Decision Number 69/PUU-XIII/2015 which has expanded the meaning of the marriage agreement so that the marriage agreement is no longer interpreted only as an agreement made before marriage (prenuptial agreement), but It can also be made during the marriage bond (postnuptial agreement). In the process of forming and implementing it, the marriage agreement made during the marriage period is in practice different from the marriage agreement made before the marriage period. The marriage agreement made during marriage based on the decision of the Constitutional Court Number 69/PUU-XIII/2015, in making the agreement must be based on the principles of the agreement so that no other party feels disadvantaged by the existence of the agreement.

Decision of the Constitutional Court Number 69/PUU-XIII/2015 explains that Article 29 paragraph (1) of the Marriage Law "At the time, before it takes place or in a marriage bond both parties with mutual consent can submit a written agreement which is ratified by a marriage registrar or notary, after which the contents also apply to third parties as long as the third party is concerned. With this decision, the marriage agreement can be made at the time, before or when the marriage has taken place, which can be determined by the parties to the marriage agreement made by the couple concerned. In this case the official authorized to certify is a marriage registrar or notary. So that when the marriage agreement is recorded, then the marriage agreement is also binding for the third party concerned. Thus, there is legal certainty regarding when the marriage agreement can be made by the couple who are married. Meanwhile, regarding the validity period of the marriage agreement made during the marriage period, it becomes a separate problem. This is because, based on the decision of the Constitutional Court Number 69/PUU-XIII/2015, that Article 29 paragraph (3) of the Marriage Law "The agreement comes into force from the time the marriage takes place unless otherwise specified in the marriage agreement". The validity period of the agreement is not regulated explicitly and clearly, it can take effect from the date the marriage agreement is ratified, or it can take effect before or

after the agreement is legalized according to the agreement of the parties in the marriage agreement made.

When referring to the theory of legal certainty put forwardGustav Radbruch that law is positive, law is based on facts, and facts must be formulated in a clear way so as to avoid mistakes in meaning, it can be concluded thatThe decision of the Constitutional Court Number 69/PUU-XIII/2015 has not provided legal certainty because it does not clearly and clearly state the time when the marriage agreement is valid so that in practice there has been a mistake in its meaning. Likewise with regard to land that has been purchased before the marriage agreement was made, it is uncertain whether it will remain joint property or will become the property of one of the married couples who make the marriage agreement, because the status of the land that has been purchased before the marriage agreement is made depends on the validity period of the marriage agreement.

3.2. The Role and Authority of a Notary in Making a Deed of Marriage Agreement on Land Ownership Purchased Before Marriage

The making of a marriage agreement is generally based on the will of the parties, however, Articles 139 to 143 of the Indonesian Civil Code regulate provisions that may not be included in a marriage agreement, including:

1) Marriage agreements may not conflict with decency and public order;
2) The marriage agreement may not interfere with the rights delegated to the husband in his position as the head of the household;
3) The marriage agreement may not interfere with the rights that have been granted by law to the husband or wife or the longest living partner;
4) The marriage agreement may not waive its legal obligations regarding the hereditary inheritance and cannot regulate the hereditary inheritance;
5) The marriage agreement may not stipulate that one person must be responsible for a larger share of the joint property debt than the other;
6) The parties may not promise that their marital bond will be governed by foreign laws and customs that were once in force in Indonesia and its colonies.

The marriage agreement is made in a notarial deed because an authentic deed is needed to provide certainty of proof of the agreement. An authentic deed is a deed that must be made in a form determined by law, made in the presence of an authorized official, and must be made in the place where the official is authorized.[9]As stated in Article 15 of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary Public which states that

[9]Gusti Muhammad Faruq Abdul Hakim Sutikno, "The Legal Power of Registration of Marriage Agreements for the Parties", Journal of Private Law, (Vol. VI No. 2 July-December 2018), p. 222.

a Notary in carrying out his duties has the authority to make authentic deeds for parties who wish, whether it is a deed of marriage agreement, or other authentic deeds.

The role of a Notary in making a marriage agreement is very necessary because it regulates many things, especially regarding assets. The authority of a Notary in making a deed is limited to the contents of the agreement which has fulfilled the legal requirements of the agreement based on Article 1320 of the Civil Code which states the conditions for a valid agreement, namely the existence of an agreement from the parties, the parties must be proficient in making an agreement, there is a certain thing, and a lawful reason.

The Notary Deed will be evidence that has perfect evidentiary power and cannot be denied if unwanted things happen in the future, for example in the case of deciding a divorce case, the assets of each party, or debts.

After making the marriage agreement by a Notary in the form of a Marriage Agreement Deed, a copy of the deed needs to be recorded and ratified by the Marriage Registrar and the power to bind the marriage agreement will be binding after the Marriage Registrar makes notes in the margins on the register of deeds and quotes the marriage certificate or issues a Certificate for marriage agreements made in Indonesia and registration of marriages in other countries.[10]

Act No. 1 of 1974 which has been amended by Act No. 16 of 2019, in Article 29 states that a marriage agreement is made at or before the marriage takes place with the mutual consent of both parties to enter into a written agreement which is legalized by the Marriage Registrar, after where the contents also apply to third parties as long as a third party is involved. Based on the words of the article, the Marriage Law states that the power to bind a marriage agreement is after it has been registered and ratified by the Marriage Registrar. Therefore, there is a difference between the Marriage Law and the Civil Code which according to the provisions of Article 152 of the Civil Code states that the binding force of a marriage agreement is before it is recorded in a general register at the clerk's office at the District Court where in the jurisdiction the marriage takes place. Of these two provisions, which are currently in effect based on the principle of lex specialis derogate legi generalis, the provisions in the Civil Code regarding the binding force of a marriage agreement are set aside by the Marriage Law, as well as the principle of lex posterior derogate legi priori, namely the principle of legal interpretation that the latest law overrides existing laws. old, then the provisions apply the latest provisions.

[10]Directorate General of Population and Civil Registration. Circular Letter Number 472.2/5876/Dukcapil concerning Recording of Reporting of Marriage Agreements, (19 May 2017).

One of the decisions of the Constitutional Court regarding marriage agreements, namely decision Number 69/PUU-XIII/2015 dated 27 October 2016, has become a new provision for marriage agreements. The Constitutional Court Decision Number 69/PUU-XIII/2015 was issued with the aim of regulating the time for making a marriage agreement.

The Civil Code and the Marriage Law only regulate the making of agreements at the time or before the marriage takes place, while these provisions are amended and perfected after the issuance of the Decision of the Constitutional Court of the Republic of Indonesia Number 69/PUU-XIII/2015 which states that the meaning of Article 29 paragraph (1) The Marriage Law, that is, at the time before it is held or while in the marriage bond, both parties, by mutual agreement, can submit a written agreement that is ratified by a marriage registrar or Notary, after which the contents also apply to third parties as long as the third party is involved.

Article 29 paragraph (4) of the Marriage Law states that as long as the marriage lasts, the marriage agreement can be related to marital assets or other agreements, it cannot be changed or revoked, unless both parties have an agreement to change or revoke, and the change or revocation does not harm third parties. .

The provisions regarding the time for making a marriage agreement have changed since the Constitutional Court decision No. 69/PUU/XII/2015 on March 21 2006. In addition to expanding the meaning regarding the time for making a marriage agreement, the Constitutional Court decision No. 69/PUU/XII/2015 also broadens the institution which legitimizes the marriage contract. Constitutional Court Decision Number 69/PUU/XII/2015 states that:

"A written agreement ratified by a marriage registrar or notary, after which the contents also apply to third parties as long as a third party is involved."

This is different from the provisions of Article 29 paragraph (1) of the previous Marriage Law, where the ratification of the marriage agreement was carried out by a marriage registrar. The granting of new authority to a Notary to legalize a marriage agreement in the Constitutional Court decision Number 69/PUU/XII/2015 often raises debates and questions because the new authority is beyond the authority that has been regulated in Article 15 paragraph (1) of Act No. 2 of 2014 regarding Amendments to Act No. 30 of 2004 concerning the Position of Notary.

Notary is a public official who has the authority to make authentic deeds and other authorities as referred to in paragraph (1) of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary.

Notary as a position (not a profession or a professional position), and any position in Indonesia has its own authority. Every authority must have a legal basis. When talking about authority, the authority of any official must be clear and firm in the laws and regulations governing the said official and position, so that if an official commits an act outside of his authority it is called an unlawful act. Therefore, an authority does not just appear as a result of a discussion or discussion behind the desk or because of discussions or opinions in the legislature, but authority must be expressly stated in the relevant laws and regulations.

The provisions of Article 29 paragraph (1) of the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/2015 which states that:

"..... both parties with mutual agreement can submit a written agreement that is ratified by a marriage registrar or Notary....".

The phrase "written agreement ratified" indicates that the marriage agreement has a written form and is in the form of a private deed, even though Article 29 paragraph (1) of the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/2015 does not explicitly state it. The word "legalized" in relation to marriage registrar employees and the duties of a Notary position, namely legalizing/legalizing letters or deeds made privately as stipulated in the provisions of Article 1874 of the Civil Code and Article 1874 letter a of the Civil Code and Article 15 paragraph (2) letter a Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary. The provisions of Article 1874 of the Civil Code state:

"As private writings are considered underhanded deeds, letters, registers, household affairs papers and other writings made without the intermediary of a public employee. By signing a piece of writing under the hand it is equivalent to a thumbprint, affixed with a dated statement from a Notary or another official appointed by law from which it is clear that he knows the person who put the thumbprint, or that this person has been introduced to him, that the contents the deed has been explained to the person and after that the thumbprint was affixed before the employee. This employee must attach the writing. With the law further regulations can be made regarding these statements and bookkeeping.

The provisions of Article 1874 of the Civil Code regarding the strengthening of private documents by marriage registrars and notaries state:

"If the interested parties wish, it is also possible, apart from what is meant in paragraph two of the previous article, in signed private writings, a statement from a Notary or another public employee appointed by law shall be given. ,

where did it turn out that he knew the signer or that this person had been introduced to him, that the contents of the deed had been explained to the signer and that after that the signing was carried out in front of the said official".

The provisions of Article 15 paragraph (2) letter a of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary stipulates the ratification of underhanded deeds by a Notary which states that:

"The notary has the authority to certify signatures and determine the certainty of the date of private documents by registering them in a special book."

One of the authorities of a Notary as stipulated in the provisions of Article 15 paragraph (2) letter a of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary regarding validation/legalization is the ratification of private deed read by a Notary on at the same time to guarantee the certainty of the signature/thumbprint and the certainty of the date of the deed concerned. Signature/thumbprint certainty means that it is certain that the person signing/thumbprint is the right person, not someone else. The appearers who will include their signature/thumbprint must be recognized by the Notary or introduced to the Notary,[11]

The strength of proving the marriage agreement legalized by the marriage registrar or notary lies in the affixing of the signature or thumbprint of the person who comes before the marriage registrar or notary, so that the signature or thumbprint on the legalized marriage agreement cannot be denied unless the employee marriage registrar or Notary accused of providing false information. Juridically, the validation or legalization of a marriage agreement in the form of a private deed by the parties facing it has the force of law as evidence in court.

After the Decision of the Constitutional Court Number 69/PUU/XII/2015 for Muslim couples, the registration was carried out based on the Letter of the Director General of Islamic Community Guidance, Ministry of Religion Number B.2674/DJ.III/KW.00/9/2017 (Ministry of Religion Letter 2017) . The 2017 Ministry of Religion Letter stipulates that marriage agreements can be made before, during and during the marriage which is legalized by a Notary and can be recorded by a Marriage Registrar (PPN). The recording of the marriage agreement is carried out in the notes column on the marriage certificate and in the marital status notes column in the quotation of the marriage certificate. The 2017 Ministry of Religion Letter is in accordance with Article 29 paragraph (1) of

[11]Gunarto, 2014, Law Enforcement Agenda and Its Relevance to Nation Development,http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/PH/article/view/1455/1126, Journal of Legal Reform, (Volume I No.1 January –April 2014).

the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/2015, so that the marriage agreement is made in the form of a private deed and legalized/validated by a Notary. Unlike the case for couples with religions other than Islam, the recording of marriage agreements is carried out based on the Letter of the Director General of Population and Civil Registration of the Ministry of Home Affairs Number 472.2/5876/DUKCAPIL concerning the Recording of Reporting of Marriage Agreements (Letter of Director General Number 472.2/2017) which states that marriage agreements can be made before, during and during the marriage takes place with a Notary deed and reported to the Implementing Agency or Technical Implementation Unit (UPT) of the Implementing Agency.

The Director General's Letter Number 472.2/2017 contradicts Article 29 paragraph (1) of the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/2015, because Article 29 paragraph (1) of the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/ 2015 stipulates that marriage agreements are required to be made in written form and ratified by a Marriage Registrar or Notary. As mentioned above, the provisions of Article 29 paragraph (1) of the Marriage Law after the Constitutional Court Decision Number 69/PUU/XII/2015 changed to "….. both parties with mutual consent can submit a written agreement which is legalized by employees marriage registrar or Notary .....". Therefore, related to the problem of the marriage agreement, it can be done under the hand, which is then asked to register with the Notary,

As for the role and authority of the Notary in making the Marriage Agreement Deed, it still refers to the provisions of Article 1320 of the Civil Code regarding the terms of the validity of the agreement, in which the content and form of the marriage agreement is based on the agreement of the parties (husband and wife) while still referring to the provisions of Article 1338 of the Civil Code. Furthermore, regarding the validity of the marriage agreement, the Constitutional Court in its decision Number 69/PUU/XII/2015 stated that "The agreement comes into force from the time the marriage takes place, unless otherwise specified in the Marriage Agreement".

Based on the decision of the Constitutional Court Number 69/PUU/XII/2015 above, it can be concluded that the parties (husband and wife) can determine when the Postnuptial Agreement will take effect. Even though the marriage agreement is made while in the marriage bond, the validity period of the agreement can be determined from the time the marriage takes place. That is, land that has been purchased before the marriage agreement is made can become the object of the marriage agreement as long as the parties agree to

arrange it.[12]However, if the parties (husband and wife) mutually agree to determine that the marriage agreement made will take effect from the date the marriage agreement is made and signed, then this is also not prohibited. Thus, the parties (husband and wife) are free to choose or determine whether the land that has been purchased before the marriage agreement will be divided into assets or will remain joint property.

With regard to the validity period of the marriage agreement as stipulated in the Constitutional Court decision Number 69/PUU/XII/2015 linked to the terms of the validity of the agreement in Article 1320 of the Civil Code, freedom of contract in Article 1338 of the Civil Code, and provisions in the Marriage Law, a Notary has the authority to provide legal counseling to the parties (husband and wife) as mandated in Article 15 paragraph (2) letter eAct No.2 of 2014 concerning the Position of a Notary, which states that a Notary has the authority to provide legal counseling in connection with making a deed.

The marriage agreement is made with a written agreement and ratified by the Marriage Registrar or Notary, this shows that the marriage agreement is made in the form of a private deed and legalized/validated by the Marriage Registrar or Notary not with a Notary deed or also known as a notarial deed which made in the form of an authentic deed. Regarding the ratification of the marriage agreement, the Constitutional Court's decision provides an alternative to the legalization of the marriage agreement by a Notary. If you look at the provisions in Article 29 paragraph (1) and paragraph (2) of Act No. 1 of 1974 junto Article 12 letter h PP No. 9 of 1975, the ratification of a marriage agreement carried out by a marriage registration employee is not solely about whether the marriage agreement is valid or not,

The marriage agreement ratified by the marriage registration officer is an integral part of the marriage certificate where the agreement is recorded on the marriage certificate with the aim that third parties are aware of the existence of a marriage agreement so that the marriage agreement also applies to third parties.[13]

Regarding the authority of a Notary in terms of ratifying a marriage agreement, it cannot be denied that it will cause legal uncertainty in society, especially among

[12]Tri Ulfi Handayani, Agustina Suryaningtyas, and Anis Mashdurohatun, 2018, The Urgency of the Notary Honorary Council in Enforcing the Notary Code of Ethics in Pati Regency,http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/akta/article/viewFile/2531/1893, Deed Journal, (Vol 5 No 1 January 2018), p. 52.
[13]Martiman Prodjohamidjojo, 2002, Indonesian Marriage Law, (Indonesia Legal Center Publishing, Jakarta), p. 30.

Notaries in carrying out their duties and positions.[14]This is because the ratification of the marriage agreement is not only about whether the marriage agreement is valid or not, but also related to recording it in the marriage certificate with the aim that third parties know that there is a marriage agreement so that the marriage agreement applies to third parties as well. Notaries do not have the authority to record marriage agreements in a marriage certificate, because the authority to make marriage certificates is the authority of the marriage registration officer where the marriage is registered.

If you pay attention to the ruling of the Constitutional Court Number 69/PUU/XII/2015, it can be seen that the Constitutional Court has added the phrase "or Notary" after the phrase ".....validated by the marriage registration officer". This is a new thing related to the legalization of marriage agreements, although it has long been known in current practice that marriage agreements are always made in the form of a notary deed as stipulated in Article 147 of the Civil Code, but based on Article 29 paragraph (1) of Act No. 1 of 1974, the obligation to make a marriage agreement with a notary deed is no longer binding. In addition, the Constitutional Court also changed the phrase "enter into a written agreement" in Article 29 paragraph (1) of Act No. 1 of 1974 to "submit a written agreement".

Based on the addition and change of phrases made by the Constitutional Court to the formulation of Article 29 paragraph (1) of Act No. 1 of 1974, when associated with the phrase ".....after which the contents also apply to third parties as long as a third party is involved" which is still maintained by the Constitutional Court, it is found that the Constitutional Court gives new authority to Notaries to ratify marriage agreements with the aim bind third parties. Here it can be said that the role of a notary is to legalize existing marriage agreements and not to make marriage agreements. This is due to the change in the phrase "enter into a written agreement" to "submit a written agreement".

The Constitutional Court granted new powers that were not previously regulated in the Notary Office Law (UU No. 2 of 2014). The authority is to ratify the marriage agreement submitted by both parties (husband and wife). A marriage agreement made into a notarial deed does not necessarily legally bind third parties, but only applies legally to the parties who made it because to bind third parties requires action related to the principle of publication.

[14]Umar Ma'ruf and Dony Wijaya, 2015, Legal Review of the Position and Function of a Notary as a Public Official in Making Authentic Deeds (Case Study in Bergas District, Semarang Regency),http://jurnal.unissula.ac.id/index.php/PH/article/view/1507/1174, Journal of Legal Reform, (Volume II No.3 September - December 2015), p. 300.

The principle of publication is the obligation to disclose information so that the public (general public) knows that information. The publication principle appears to be contrary to the confidentiality principle used by a Notary in carrying out his duties and positions[15]as regulated in Article 16 paragraph (1) and Article 54 paragraph (1) of Act No. 2 of 2014.

Article 16 paragraph (1) letter f of Act No. 2 of 2014 states that a Notary is obliged to "keep secret everything regarding the deed he made and all information obtained for making the deed in accordance with the oath/pledge of office, unless the law determines otherwise". Article 54 paragraph (1) No. 2 of 2014 states "Notaries can only give, show or notify the contents of the deed, grosse deed, copy of the deed or excerpt of the deed to people who have a direct interest in the deed, heirs or people who obtain rights, unless otherwise stipulated by laws and regulations".

Based on this, if during the ratification of the marriage agreement the Notary then records it in the repertorium like the recording of other Notary deeds, then this cannot be said to be a publication principle where the marriage agreement is then binding on third parties, because the repertorium cannot be accessed by the general public.

The repertorium can only be accessed by parties who have a direct interest in the deed, heirs or people who obtain rights. In contrast to the recording into a marriage certificate that is carried out by employees of the marriage registration which can be accessed by the general public. In addition, the marriage agreement must be recorded in the marriage certificate if there is one as stipulated in Article 12 letter h PP No. 9 of 1975 and Notaries do not have the authority to record marriage agreements in a marriage certificate, because the authority to record marriage agreements in a marriage certificate is the authority of the Office of Religious Affairs for those who carry out marriages according to the Islamic religion and the Civil Registry Office for those who enter into marriages according to religions other than Islam (Article 2 PP No. 9 of 1975).

Based on the descriptions above, currently a Notary cannot ratify the marriage agreement as intended in the Constitutional Court Decision Number 69/PUU-XIII/2015. For this reason, a new mechanism is needed that can be regulated in implementing regulations. An example (analogy) is the registration of wills, registration of fiduciaries, associations, foundations or ratification of limited liability companies which are centered at the Directorate General of General Legal Administration of the Ministry of Law and Human Rights of the Republic of

[15]Ratih Mega Puspa Sari and Gunarto, 2018, The Role of PPAT in Land Certification Due to Sale and Purchase, https://media.neliti.com/media/publications/324960-peranan-ppat-dalam-pensertifikatan-tanah-e029b56a.pdf, Journal Deed, (Vol 5 No 1 March 2018), p. 244.

Indonesia, so that the ratification of the marriage agreement carried out by a Notary is accessible to the public and can be provide legal certainty for the parties involved in the marriage agreement (including third parties) as well as notaries who certify.

Prior to the existence of an integrated recording system for the ratification of marriage agreements by a Notary, it was appropriate that the ratification of the marriage agreement with the aim of binding third parties should still be carried out by the marriage registration employee. In other words, currently the Notary is still carrying out his previous role, namely as the party ratifying the marriage agreement as a written agreement (making the marriage agreement into a Notary deed) if desired by the parties.

Regarding the authority of a Notary in ratifying a marriage agreement, according to Philipus M. Hadjon in his writings on authority which stated that "The term authority is equated with the term "bevoegdheid" in terms of Dutch law. These two terms have a slight difference which lies in their legal character, namely the term "bevoegdheid" is used both in public law concepts and in private law concepts, while the term authority or authority is always used in public law concepts. As a concept of public law, authority (bevoegdheid) is described as legal power (rechsmacht), where the concept mentioned above is also related to the formation of besluit (government decisions) which must be based on an authority. In other words, it can be said that this authority must be clearly regulated and stipulated in the applicable laws and regulations. this means that, "…..at least the basis of authority must be found in a law, if the authorities want to place obligations on the citizens. Thus there is a democratic legitimacy in it. Through laws, parliament as legislator representing the electorate participates in determining what obligations are appropriate for citizens. From here, the attribution and delegation of authority must be based on formal law, at least if the decision places obligations on society.

Based on this explanation, it can be seen that the authority possessed by a Notary is an attribution authority originating from statutory regulations. This shows that all the powers of a Notary are valid if carried out in accordance with applicable law, namely in the form of statutory regulations. This provision can be explicitly found in Article 15 paragraph (1), paragraph (2), and paragraph (3) UUJN.

4. Conclusion

Marriage agreements made while in a marriage bond can be carried out after the decision of the Constitutional Court Number69/PUU-XII/2015, while regarding land purchased before the marriage agreement is made it will remain joint property as stipulated in Article 35 paragraph (1) of the Marriage Law, because marriage agreements made while in a marriage bond only bind to the assets that

will be obtained later after the marriage agreement was made. The same goes for theorylegal certainty in the opinion of Gustav Radbruch, in principle has been fulfilled properly considering that the marriage agreement was made as a legal means to protect the rights and obligations of the husband and wife when the marriage life took place, which was made in accordance with the agreement of the parties to be ratified by the marriage registrar employee or notary. Meanwhile pThe role and authority of a Notary in a marriage agreement is based on additions and changes to phrases made by the Constitutional Court against the formulation of Article 29 paragraph (1) of Act No. 1 of 1974 concerning Marriage, which is connected with the phrase "…..after which the contents also apply to third parties as long as a third party is involved" is still maintained by the Constitutional Court, it is found that the Constitutional Court gives new authority to Notaries to ratify marriage agreements with third party binding purposes. In this case it can be said that the role of the Notary is to ratify the existing marriage agreement and not to make marriage agreements. This is due to the change in the phrase "enter into a written agreement" to "submit a written agreement".

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[8] Umar Ma'ruf & Dony Wijaya, 2015, Tinjauan Hukum Kedudukan & Fungsi Notaris Sebagai Pejabat Umum Dalam Membuat Akta Otentik (Studi Kasus di Kecamatan Bergas Kabupaten Semarang), http://jurnal.unissula.ac.id/index.php/PH/article/view/1507/1174, *Jurnal Pembaharuan Hukum*, (Volume II No.3 September - December 2015).