

## The Legal Position of Marriage Agreement Deeds Made by Notaries in Mixed Marriages

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**Abstract.** *This research aims to determine and analyze the legal position of marriage agreement deeds made by notaries in mixed marriages. This legal act of mixed marriage will certainly give rise to legal consequences, namely that joint property will arise, and further problems will arise because foreign citizens cannot have property rights. For this reason, there is a law that regulates marriage agreements to provide legal protection for the parties. This research aims to determine the legal position of marriage agreement deeds made by notaries in mixed marriages and the legal consequences of marriage agreement deeds made by notaries in mixed marriages. To find out and analyze the position of marriage agreement deeds made by notaries in mixed marriages. The research method uses a sociological juridical approach, the type of research is qualitative, the data source uses primary data and secondary data, the data collection method for primary data is carried out by interviews, while secondary data uses library research, which is then analyzed descriptively qualitatively. The results of this research show that the legal position of marriage agreement deeds in mixed marriages is as a legal subject for Indonesian citizens and foreign citizens who have the same legal position, namely providing legal protection for the parties. According to the current law, the time for making a marriage agreement can be done before the marriage takes place, during the marriage or after the marriage takes place after the Constitutional Court decision number 69/PUU-XIII/2015 and the marriage agreement executed by the parties before a notary binds the rights and obligations of the parties. The legal consequence of a marriage agreement deed made by a notary in mixed marriages is that they both have laws that bind the parties and provide legal certainty and protection for the parties.*

**Keywords:** Agreement; Marriage; Mixed.

## 1. Introduction

Marriage according to Article 1 of Law Number 1 of 1974 concerning Marriage which states "marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the Almighty God." Marriage is a very noble way to organize household life and offspring and get to know each other, so that it will open the way for mutual help.

However, nowadays in Indonesia many people are marrying foreign nationals. Every human being has the right to be happy and have the freedom to determine their life partner regardless of race and nationality. In Indonesia, there are many marriages between people of different races and nationalities and different nationalities, even mixed marriages according to Article 57 of Law Number 1 of 1974 concerning Marriage which reads " Mixed marriage is a marriage between two people who in Indonesia are subject to different laws, due to differences in nationality and one party is a foreign citizen and one party is an Indonesian citizen." According to Prof. Wahyono Darmabarata, "Marriage must not only pay attention to state law, as stated in Article 2 paragraph (2) of the Marriage Law and its explanation, it must also pay attention to the religion and beliefs of the husband and wife. Thus, marriage is valid if it is carried out according to state law, and carried out according to the laws of their respective religions and beliefs."<sup>1</sup>

This legal act of mixed marriage will certainly give rise to legal consequences, one of which is the emergence of joint property, and further problems will arise because in this mixed marriage one of the foreign nationals cannot have property rights. For this reason, the existence of a law that regulates marriage agreements provides legal protection with the marriage agreement law. The Constitutional Court's Decision No.69/PUU.XIII/2015, the main essence of which is centered on the rules regarding marriage agreements in article 29 of the Marriage Law, indeed leaves no gaps in accordance with the original norms in article 29 paragraph 1 of the Marriage Law. marriage, according to historical flow and in fact it is It is appropriate if the marriage agreement is made before or at the time the marriage takes place. When this was declared contrary to the 1945 Constitution of the Republic of Indonesia, it was stipulated that marriage agreements could not only be made before or at the time the marriage took place, but could also be made after and during the marriage.

There are many benefits that can be taken from having a marriage agreement in a mixed marriage that is made, such as the wife being protected from the

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<sup>1</sup>Wahyono Darmabrata and Surini Ahlan Sjarif, 2004, Marriage and Family Law in Indonesia, Cet. 2, (Jakarta: Publishing Agency, Faculty of Law, University of Indonesia, p. 19

possibility of bad actions from the husband during the management of the assets in the marriage, so that certain items or all items brought by the husband or wife to the in marriage it is not included as unitary property, and the personal property brought by the wife is independent of the management carried out by the husband so that the wife can manage her own personal property.<sup>2</sup> The position of the marriage agreement, especially in mixed marriages between Indonesian citizens and foreign citizens, is very important to make in regulating property because if there is no marriage agreement then in the future there will be problems in terms of inherited and joint assets, especially for land ownership rights. . If there is no marriage agreement, the Indonesian citizen in the mixed marriage will not be able to buy land with ownership rights and a house in his own name. Because marriage with a foreign citizen means there is a mixing of assets with foreign citizens, while Indonesian law itself does not allow property rights for foreign citizens.

In general, the legal act of making a Marriage Agreement carried out by the parties will certainly involve a notary. And the form of responsibility of the Notary in making the marriage agreement deed as in the MK.No.69/PUU.XIII/2015 decision regarding the contents of the marriage agreement. that in the case of making a marriage agreement, the notary's responsibility is only limited to the formality of the deed he makes, the parties are responsible for the content and intent of the deed of agreement, while the notary as a public official only has the authority to express in the deed what is their will and their agreement.

Based on the background above, the researcher is interested in discussing the study with the title Legal Status of Marriage Agreement Deeds Made by Notaries in Mixed Marriages.

## **2. Research Methods**

The research approach used is the sociological juridical research method. This research focuses more on studying legal phenomena that occur in society. Sociological juridical is an approach that focuses on the rule of law combined with examining social facts that exist in society and is related to research. The sociological juridical approach in this research aims to describe it systematically and accurately. The type of research is qualitative, the data source uses primary data and secondary data, the data collection method for primary data is carried out by interviews, while secondary data uses library research, which is then analyzed descriptively qualitatively.

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<sup>2</sup> J Andy Hartanto. 2012. Marital Property Law. Yogyakarta: Laksbang Graphics, pp. 19-20

### 3. Results and Discussion

#### 3.1. Legal Position of Marriage Agreement Deeds Made by Notaries in Mixed Marriages

The legal subject of Indonesian Citizens (WNI) and Foreign Citizens (WNA) has the same legal position, namely providing legal protection for the parties. According to the current Marriage Law, there is already a time setting for marriage agreements to be made before the marriage, but after the Constitutional Court's decision, marriage agreements can be made during the marriage or after the marriage takes place. However, it is best to notarize it before the marriage takes place, because before that everything has been prepared, before there is any mixing of assets, there will be complications with the assets that have already occurred.<sup>3</sup>

Marriage Law Marriage agreements are made with an authentic deed, referring to Article 39 of the Law on the position of notary concerning provisions for courtship, that the procedure for making a marriage agreement at the office of Notary Dr. Typhoon Fajar Riyanto SH,. M.kn before the Constitutional Court decision Number 69/PUU-XIII/2015 was as follows:

- 1) Prospective husband and wife who want to make a marriage agreement must appear to make a marriage agreement deed.
- 2) The notary writes down the wishes or contents of the marriage agreement that they want.
- 3) After the marriage agreement deed is made, it is then registered at the Religious Affairs Office (KUA) for Muslims and the Occupation and Civil Registry Service (Dukcapil) for non-Muslims.
- 4) Furthermore, after the prospective husband and wife carry out the marriage contract and the marriage agreement is ratified by the marriage/marriage registration officer, the contents of the marriage agreement will be written in the marriage book of both parties.<sup>4</sup> The marriage agreement is binding and valid as law for husband and wife and third parties, as far as the parties are concerned. If there is a dispute regarding changes to the contents of the marriage agreement after the Constitutional Court decision Number 69/PUU-XIII/2015, it can be resolved through litigation and non-litigation disputes. Therefore, in order for

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<sup>3</sup>Interview with Dr. Dahniarti Hasanah, SH, M.Kn. Semarang Regency Notary, 25 August 2023

<sup>4</sup>Interview with Notary Dr. Taufan Fajar Riyanto SH,.M.kn on August 25 2023 at the Notary's office.

this marriage agreement to be binding on the parties and be used by third parties, it must be registered and ratified by a marriage registration officer or local civil registry office. So that there is validity from the authorized official which will have an impact on the validity of the contents of the agreement itself for the parties and third parties related to the agreement.

Based on the provisions of Article 29 of the UUP, marriage agreements can be made before and/or at the time the marriage takes place. Marriage agreement before Constitutional Court decision no. 69/PUU-XIII/2015 in principle cannot be changed throughout the marriage unless both parties have an agreement to change it and the change does not harm a third party.<sup>5</sup> Marriage agreements usually contain matters regarding joint profits and losses, joint results and income and the elimination of any shared assets (separating assets altogether): 16 Marriage agreements must be made in written form or in the form of a notarial deed which is usually done: made before the marriage takes place, or in marriage bonds based on the decision of the district court, and made in marriage bonds referring to the decision of the Constitutional Court No. 69/PUUXIII/ 2015.

The existence of Article 35 of the UUP shows that there are differences in the regulation of joint assets which are regulated into inherited assets and joint assets. Article 29 of the UUP which regulates systematic marriage agreements, the arrangement of legal rules, is incorrectly placed. The provisions of the marriage agreement should be made after the articles governing joint property, not the other way around.<sup>6</sup> In general, Article 29 of the UUP has 4 (four) paragraphs, namely: 1) At or before the marriage takes place, both parties, with mutual consent, can submit a written agreement that is ratified by the marriage registrar, after which the contents also apply to the third parties involved, 2 ) The marriage cannot be legalized if it violates the boundaries of law, religion and morality, 3) The agreement begins to take effect from the time the marriage takes place, 4) As long as the marriage takes place the agreement cannot be changed, unless there is agreement from both parties to change and amend does not harm third parties.

Marriage agreement after Constitutional Court Decision No. 69/PUU-XIII/2015 has provided another interpretation and meaning to Article 29 Paragraph (1), paragraph (2), paragraph (4) of the UUP. Article 29 UUP after Constitutional Court Decision No. 69/ PUU- the third is stuck. Second, the agreement comes into force from the time the marriage takes place, unless otherwise specified in the marriage agreement. Third, as long as the marriage is in progress, the marriage agreement can be regarding marital assets or other agreements,

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<sup>5</sup>Ibid, p. 2.

<sup>6</sup>Moch. Isnaeni, Palu Sledgehammer Constitutional Court Judge Denies the Essence of Marriage Agreements, Ibid, p. 10.

cannot be changed or revoked,

Based on Constitutional Court Decision No. 69/PUU-XIII/2015 there are changes relating to the making of marriage agreements. Previously, marriage agreements could only be made before or at the time of marriage, but now marriage agreements can be made by husband and wife throughout their marriage. Husband and wife can make a marriage agreement in writing and then have it ratified by a marriage registrar or they can ask a notary for help to make a deed of the marriage agreement. In this case, the notary does not simply provide assistance in making the marriage agreement, but the notary must obtain assurance that the marriage agreement being made will not harm third parties.

Legal norms for marriage agreements to be binding on third parties must be registered at the Civil Registry Office or Religious Court. A marriage agreement made after the Constitutional Court's decision is submitted to the court for an order to order the civil registry office or religious affairs office to register or record it.<sup>7</sup> In accordance with the provisions of Article 29 paragraph (1) UUP, the marriage agreement is ratified by the Marriage Registrar. According to the author "validated" in the sentence provisions of Article 29 paragraph (1) of the UUP is meaningless if the marriage agreement is not ratified by the Marriage Registrar then the marriage agreement is invalid. The word "ratified" in the sentence What this means is that the marriage agreement must be "recorded", and If the marriage agreement is not recorded then the marriage agreement it is not binding on third parties.<sup>8</sup>Registration of the marriage agreement after The enactment of the UUP will no longer be carried out at the District Court Registrar's Office but it is carried out by Marriage Registration Employees at the Civil Registry Office (Population and Civil Registry Service Office) or Religious Affairs Office.

Based on this, the legal position of marriage agreement deeds made by notaries in mixed marriages in this research is seen from the basic perspective of authority, namely the notary in carrying out his office to make authentic deeds in the case of marriage agreements in mixed marriages. The legal status of the deed of agreement is valid and provides legal protection for the parties.

### **3.2. Legal Consequences of Marriage Agreement Deeds Made by Notaries in Mixed Marriages**

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<sup>7</sup>Ibid, p. 58.

<sup>8</sup>Y. Sari Murti Widiyastuti, 2017, Analysis of Constitutional Court Decision No. 69/PUU-XIII/2015, Regional Seminar Paper on the Existence of Marriage Agreements After the Constitutional Court Decision, Faculty of Law, Atmajaya University, Yogyakarta, p. 10.

Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the "Marriage Law") provides a more concrete understanding in relation to marriage where in Article 1 it is stated that what is meant by Marriage is "the inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the Almighty God." To say that a marriage is valid, the Marriage Law then provides provisions regarding several requirements for the validity of a marriage, which are then divided into material requirements and formal requirements. Material requirements are "requirements regarding the personality of the prospective husband and wife who will enter into marriage", while formal requirements are "requirements regarding the formalities that must be fulfilled or carried out at the time of the marriage" (Darmabrata, 2015). The material requirements are divided into two, namely: "(i) absolute material requirements, where the man and woman (both candidates) are not married, their age must meet the provisions of the regulations. The problem formulation consists of at least two problems. The problem statement must be short, clear and concise and describe the title of the research. applicable legislation, as well as having passed the waiting period for women; and (ii) relative material requirements where the prospective bride and groom do not have a very close blood or family relationship, have never committed overspel (adultery) and have never reparatie huwelijk (remarriage) for the third time" (Cahyani, 2020). Furthermore,

With the mixing of assets that occurs as a result of marriage, this creates problems related to joint property ownership in marriage between Indonesian citizens and foreigners, especially related to joint property ownership in the form of land. Indonesian citizens who marry foreigners after the marriage are not allowed to have rights to land in the form of ownership rights, business use rights or building use rights. This is in line with the provisions in Article 35 of the Marriage Law, where the article states that property acquired during marriage becomes joint property, giving rise to a mixture of assets and causing the foreigner who is the spouse of the Indonesian citizen to also become the owner of the joint property. Therefore,

One of the legal consequences that has an impact on property ownership after marriage is joint property. This creates problems in the event that the marriage is a mixed marriage, where this marriage can limit the rights of Indonesian citizens to property ownership, especially ownership of land rights. Law no. 1 of 1974 concerning Marriage provides a legal exception to prevent mixing of assets as a result of marriage by allowing marriage agreements to be ratified by a marriage registration officer or notary.

A marriage agreement based on Article 29 paragraph (1) of the Marriage Law is an agreement made by a prospective husband and wife during or before the

marriage takes place. This suggests that the marriage agreement itself does not necessarily have to be in the form of an authentic deed, but only in written form is sufficient (Adonara, 2020). Furthermore, the Constitutional Court has also issued Decision Number 69/PUU-XIII/2015 which provides an expansion of the meaning of Article 29 of the Marriage Law which has not been fully accommodated, where the main essence of the Constitutional Court's decision is regarding the regulation of marriage agreements regulated in Article 29 Marriage Law. The Constitutional Court's decision is considered to have changed and added to the norms of a marriage agreement regulated by Article 29 of the Marriage Law.

1. "Before the Constitutional Court Decision, marriage agreements could only be made before or at the time the marriage took place, after the Constitutional Court Decision marriage agreements could be made before, when the marriage took place or during the marriage period.
2. Before the Constitutional Court's decision, the marriage agreement was ratified by a marriage registration officer. After the Constitutional Court's decision, the marriage agreement was ratified by a marriage registration officer or notary.
3. Before the Constitutional Court Decision, the marriage agreement comes into force after the marriage takes place, after the Constitutional Court Decision the marriage agreement comes into force after the marriage takes place, or as long as it is otherwise stipulated in the marriage agreement.
4. Before the Constitutional Court Decision, marriage agreements could only be changed with the consent of both parties as long as the changes did not harm a third party, after the Constitutional Court Decision marriage agreements could be changed or revoked with the consent of both parties as long as the changes and revocation did not harm a third party."

With the enactment of Decision Number 69/PUU-XIII/2015, notaries have given more authority regarding the ratification of marriage agreements. The legalization carried out by a Notary is of course different from the Civil Registry. The parties can make a marriage agreement not in the form of a notarial deed which is then legalized or validated by a notary and then recorded by a marriage registration officer. So, with the issuance of Decision Number 69/PUU-XIII/2015, marriage agreements can be made in the form of private agreements which are legalized/ratified by a Notary. However, based on the provisions of 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 Marriage Agreement Reports ("Letter of the Director General 472.2/2017"), a marriage agreement can be made before, at the time and during the marriage with a



Notarial deed and reported to the Implementing Agency or Technical Implementation Unit (UPT) of the Implementing Agency. So, based on these regulations, marriage agreements must still be made in the form of a notarial deed. With this, it can be said that the Marriage Agreement Deed made by the Petitioners is an authentic deed, where the nature of an authentic deed is that it has perfect evidentiary power for the legal position of the parties within the scope of private law.

Thus, the urgency of making a marriage agreement in mixed marriages is very important because it concerns the rights of Indonesian citizens to own property located in Indonesian territory. Based on the description above, we can see that only Indonesian citizens can have ownership rights to land. Article 21 paragraph (1) of Law 5/1960 determines that only Indonesian citizens can have property rights. Problems that arise as a result of mixed marriages are the status of residence permits, issues of assets or property owned by each of them during the period of the marriage and regarding the rights and obligations that arise when the marriage ends.

Based on this description, the legal consequences of marriage agreement deeds made by a notary in mixed marriages in this research, seen from the theory of certainty, are to provide legal certainty regarding the property status of the parties. And in this case, it can be seen from the theory of legal protection, namely that an agreement made before a notary can provide legal protection for the assets of each party.

#### **4. Conclusion**

The legal status of a marriage agreement deed made by a notary in mixed marriages, basically for legal subjects Indonesian citizens (WNI) and foreign citizens (WNA) have the same legal position, namely providing legal protection for the parties. When a marriage agreement is requested by the parties from a notary, including marriage agreements in mixed marriages, the notary is obliged to carry it out. The marriage agreement is based on the Marriage Law (article 29 of the Marriage Law). The marriage agreement does not consider whether the parties are from abroad or within the country as long as the marriage agreement deed is made in the notary's work area.

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