AUTHORITY AND RESPONSIBILITY OF NOTARIES IN MAKING MARRIAGE AGREEMENT DEED

Dominiqy Injili Edfiene Pungus\textsuperscript{1*}, Gunardi\textsuperscript{2}
Tarumanagara University Jakarta, Indonesia
Email : dominiqvinjili@gmail.com\textsuperscript{1*}, gunardi@fh.untar.ac.id\textsuperscript{2}

*Correspondence

\textbf{ABSTRACT}

This study discusses the authority and responsibility of notaries in making marriage agreement deeds. The purpose of this study is to describe and analyse the authority and responsibility of notaries in making marriage agreement deeds and the urgency of marriage agreements. This research method uses normative law because it is based on a statute approach and a conceptual approach. The result of this study is that the notary's authority in making the marriage agreement deed he made is limited to the content of the agreement that has fulfilled the conditions for the validity of the agreement under Article 1320 of the Civil Code, so he cannot be prosecuted in court; conversely, if the marriage agreement certificate does not meet the requirements of the validity of the agreement, then the deed made by a notary can be cancelled by the judge. The notary's responsibility in the marriage agreement is to ensure that no third party is harmed by the making of a marriage agreement after the marriage.

\textbf{Introduction}

Marriage, based on Article 1 of Law number 1 of 1974, is an inner birth bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One True Godhead. Based on these, marriage in Indonesia is based on Pancasila and law, believing in God, and starting a new life as a husband and wife couple with religious teachings (Zakiyyah & Wahyuningsih, 2021). The marriage bond results in the birth and mind of the property of the husband and wife based on the Civil Law in Article 119, namely, the property acquired during the marriage into joint property, including all marital property (Zaharnika & SH, 2019). The husband and wife can make a marriage agreement as a protection of property owned by each party so that in undergoing marriage, there is no property conflict in the future. Husbands and wives can open up to each other by making a marriage covenant. They can share a desire to be agreed upon without harming either party (Zaharnika, 2019).

A marriage agreement can also be used as a means to minimise divorce. This is intended to provide legal protection for the property of the wife or husband. If, from the beginning, it is agreed that if there is a divorce in marriage, then one of the parties is burdened with all obligations, then it will think again to file for divorce because divorce is an unwanted thing in the household (Wiryomartani, 2021).

A marriage agreement can also be a letter of agreement whether there is separation of property in marriage or there is joint property (Pratiwi, Nawi, & Khalid, 2021). The
marriage agreement has been regulated in Article 29 of the Marriage Law and Constitutional Court Decision Number 69/PUU-XIII/2015, namely:

"At any time, before or during the marriage bond, both parties by mutual consent may enter into a written agreement ratified by the registrar or notary public, after which the contents shall also apply to third parties to the extent that third parties are involved."

The Constitutional Court Decision 69/2015 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 can also be made during the marriage bond (postnuptial agreement).

The marriage agreement must be written; the contents must be made by mutual consent (husband and wife) ratified by a civil / marriage registry employee or notary. They must not contradict law, religion, and decency (Ridwan, 2020). A marriage agreement that becomes a mutual agreement between husband and wife without being notarised by a notary, just being ordinary, cannot be legally protected (Moertiono & Mansar, 2022). The marriage agreement for Muslim couples must be ratified by a notarial deed that can be recorded by the Marriage Registration Officer (PPN), while couples who are non-Muslim, legalised by a notary and reported to the Implementing Agency or Technical Implementation Unit (UPT) of the Implementing Installation (Muslim & Hadiwinata, 2017). The purpose is to fulfil the principle of publicity (Mahfiiyah & Hafidz, 2021). Based on this description, the author is interested in conducting more in-depth research entitled "Authority and Responsibility of Notaries in Making Marriage Agreement Deeds."

**Research Methods**

This research method is a normative legal or juridical research method with a research typology referring to descriptive analyses primarily related to the formation and application of the law. This detailed analysis answers the formulation of the problem: "What is the authority and responsibility of the notary in making the marriage agreement deed?" Moreover, "What is the urgency of the marriage agreement certificate?" through a statutory approach (statute approach), conceptual approach (conceptual approach), normatively, and comparative to the policy of making a marriage agreement deed. This research source uses primary legal materials in the form of laws and regulations related to marriage agreement deeds, notary authorities and responsibilities in making marriage agreement deeds. Secondary legal materials include various publications on law (journals, books, etc.) related to marriage agreement deeds, notary authorities and responsibilities in making marriage agreement deeds. At the same time, non-legal materials include various research and non-legal data. The ministry's strategic plan document is related to the implementation of making marriage agreement deeds and the authority and responsibility of notaries in making marriage agreement deeds.

This type of research data collection is based on literature studies and searches for various research materials and data through available media, such as the Internet and legal documentation networks relevant to this research. This research data analysis technique
uses qualitative data analysis methods by elaborating and analysing various secondary data and legal materials obtained to answer each problem formulation.

Results and Discussion
Authority and responsibility of notary in ratifying marriage agreement

Authority is a legal act given and regulated to a position based on applicable laws and regulations governing the position concerned. In Administrative Law, authority can be obtained by attributes, delegation, or mandate (Prasetyawan, 2018). The authority of notaries in making authentic marriage agreement deeds is in Article 15, paragraph 1 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions that Notaries are authorised public officials to make authentic deeds regarding all deeds, agreements, and determinations required by laws and regulations and desired by those interested to be stated in the meet authentic, guarantee quotations of the deed, all of it so long as they making of the deed is not also assigned or exempted to any other officer or other person prescribed by law.

The notary is also authorised to certify the signature and establish the certainty of the date of the letter under the hand by registering in a special book; bookkeeping letters under hand by registering in a special book; make copies or copies of the originals of the letters underhand in the form of copies containing descriptions as written and described in the letters concerned; attestation of the photocopy match with the original letter, providing legal counselling in connection with the preparation of the deed; make deeds relating to land; or make a deed of auction minutes.

After the Constitutional Court decision Number 69 / PUU-XIII / 2015 concerning the basis for making marriage agreements that can be made before, during, and after the occurrence of marriage, many have become notary studies. This decision is a jurisprudence that is one of the sources of law. Jurisprudence is a decision that has permanent legal force (Eintracht vangewijsde), and the decision of the Constitutional Court (MK) is final and binding.

In the field of making marriage\ agreement deeds, notaries may use the provisions in the Civil Code (KUH Percivil) or follow the provisions in the Constitutional Court Decision (MK) Number 69 / PUU-XIII / 2015 concerning amendments to Article 29 of Law Number 1 of 1974 which allows marriage agreements to be made before, during and after the occurrence of marriage as long as it is still in the marriage period. Researchers get an idea of the legal implications of the Constitutional Court Decision (MK) No.69/PUU-XIII/2015 that because this Constitutional Court (MK) Decision is final and binding so that no more legal remedies can be taken, the decision must be implemented.

Notaries and parties are given freedom of choice in making marriage agreements, whether to comply with the rules in Constitutional Court Decision No.69 / PUU-XIII / 2015 regarding marriage agreements can be made before, during and after the occurrence of marriage as long as it is still in the marriage period and as long as it is not detrimental to the interests of third parties, or notaries. The parties will be subject to the regulations.
Authority And Responsibility Of Notaries In Making Marriage Agreement Deed

contained in the provisions of Law No.1 of 1974 concerning Marriage and the provisions in the Civil Code, which states that a marriage agreement can only be made before the occurrence of marriage. The notary's authority in making the marriage agreement deed he makes is limited to the content of the agreement that has fulfilled the conditions for the validity of the agreement under Article 1320 of the Civil Code, namely "some of the conditions for the validity of an agreement requires the agreement of those who bind themselves, then he cannot be prosecuted in court.

The responsibility of the notary, as mentioned in Article 139 of the Civil Code, that in the marriage agreement, both prospective husband and wife can deviate from the provisions stipulated in the joint property, provided that these deviations do not conflict with decency and public order (openbare orde) by also heading the contents of the provisions mentioned after article 139 of the Civil Code.

The Notary's responsibility is limited only to the formalities of the deed he made because, as a partij deed, the parties are responsible for the content and intent of the deed of agreement. At the same time, the notary, as a general office, is only authorised to pour into his deed what are their will and agreement. The notary's responsibility in the marriage agreement is to ensure that no third party is harmed by the making of a marriage agreement after the marriage. In the Civil Code are given several restrictions on the content of the marriage agreement, namely:

a. The agreement must not be contrary to decency or public order (Article 139);

b. The agreement must not deviate from the power granted by the Civil Code to the husband as the head of the household; for example, it should not be promised that the wife will have her residence (Article 140) paragraph (1)

c. In the covenant, the husband and wife may not will their right to inherit the estate of their children (Article 141);

d. In the agreement, it shall not be specified that in the event of interference of property if the common property is terminated, the husband or wife will pay the share of the debt over the balance and mutual benefit (Article 142);

e. The treaty shall not be generally referred to as the regulations applicable in a foreign country (Article 143).

The substance of the marriage agreement is handed over to the prospective spouse, who will marry on conditions that its contents must not conflict with public order, decency, law, and religion. Basically, the law imposes a burden of liability or responsibility for the action committed. However, it does not mean that every loss to third parties is entirely the responsibility of the notary or the responsibility.

The law itself provides signs and boundaries of graceful lawsuits and notary responsibilities so that not all losses become the responsibility of the notary. This is what in legal science is known as a form of legal protection for Notaries as general officials in charge of providing public services. According to Article 147 of the Civil Code (BW) that, the Marriage Agreement must be made before the marriage takes place, and the agreement must be made before a Notary; if it is not done before a Notary, then the agreement is void. These Terms are intended to:
The marriage agreement is set forth in the form of an authentic document that has strong evidentiary power; therefore, when the notary is subject to liability, the notary's position on this matter is relevant. Notaries, when carrying out their duties in the field of notary, hold the position of the executor of the law. However, when the notary is subject to liability, the notary's position may differ in certain cases.

To make a marriage agreement, it takes someone who really masters the law of marital property and can formulate all the conditions carefully. This relates to the provision that the form of marital property must remain throughout the marriage. The marriage agreement made into a Notary Deed does not necessarily legally bind third parties. However, it only applies legally to the parties who make it because to bind third parties requires action related to the principles of publication. The principle of publication is the obligation to disclose information so that the public (general public) knows the information. The principle of publication seems to be contrary to the principle of confidentiality used by Notaries in their duties and positions as stipulated in Article 16 paragraph (1) and Article 54 paragraph (1) of Law number 2/2014. Article 16 paragraph (1) letter f of Law 2 of 2014 states that Notaries must "keep everything about the deed made secret and all information obtained for the preparation of the deed in accordance with the oath/promise of office unless the law specifies otherwise".

Article 54, paragraph (1) of Law number 2 of 2014 states, "Notaries can only provide, show, or notify the contents of the deed, gross deed copy, or quotation of the deed to persons directly interested in the deed, heirs, or persons who obtain rights unless otherwise stipulated by laws and regulations." Based on that, if in the ratification of the marriage agreement, the Notary records it into the repertorium like the recording of other Notary Deeds, then it cannot be said to be a publication principle where the marriage agreement is binding on third parties because the repertorium is not accessible to the general public. The Repertorium is accessible only to parties directly interested in the deed, heirs, or persons acquiring rights. In contrast to the recording of marriage certificates carried out by marriage registration employees, which the general public can access. The law imposes a burden of liability or responsibility for the action committed. However, it does not mean that every loss to third parties is entirely the responsibility of the notary or the responsibility. The law itself provides boundaries and signposts of liability and notary responsibility so that not all losses become the responsibility and responsibility of the notary. This is what in legal science is known as a form of legal protection for Notaries as general officials in charge of providing public services.

Article 54 of the UUJN regulates notary rights. Notaries are not allowed to give Grosse, copies, or quotations, nor are they allowed to show or disclose the contents of deeds other than to persons directly interested in the deed, such as heirs or persons who obtain/beneficiary of their rights, unless otherwise stipulated by laws and regulations and obtain honorarium for legal services provided in accordance with their authority and so on.

Notaries, when carrying out their duties in the field of notary, hold the position of the executor of the law. However, when the notary is subject to liability, the notary's position...
as subject to the law faces the application of sanctions. Limitations on notaries' responsibilities can be requested as long as they are still authorised to carry out the duties of the notary office, mistakes committed in the course of these duties, and sanctions that can be imposed on authorised notaries to carry out their positions as notaries.

This notary responsibility arises from the obligations and authorities given to him. These obligations and authorities are legally bound to come into effect from the moment the notary takes his oath of office as a notary. It is the oath that has been pronounced that should control all actions of notaries in the course of their office.

The urgency of the marriage agreement deed

The urgency of a marriage agreement certificate is useful in protecting all rights and obligations between husband and wife regarding joint property and assets, ensuring that conflicts are minimised and clarity is established, especially in the event of a future divorce. A marriage agreement is a contract that regulates the consequences of the marriage bond, one of which pertains to property. Marriage agreements are rare in Indonesia. This is because most people in Indonesia hold the belief that marriage is sacred, binding the hearts and minds of husband and wife based on faith. However, some argue that marriage is a mutual agreement in society, akin to agreements in buying and selling or renting. The existence of customary law and the strong kinship relationship between prospective husband and wife are also factors contributing to the rarity of marriage agreement deeds in Indonesia.

There are three (3) products of existing laws and regulations in Indonesia that regulate the issue of marriage agreements, namely the Civil Code (KUHPerdata) or Burgerlijk Wetboek (BW), Law Number 1 of 1974 jo Law Number 16 of 2019 concerning Marriage, and Presidential Instruction Number 1 of 1974 concerning the Compilation of Islamic Law. Since the enactment of Law Number 1 of 1974 jo Law Number 16 of 2019 concerning Marriage, there has been unification in the field of Marriage Law in the State of Indonesia, except as long as it has not been or is not regulated in the law, the old regulations can be used. Although the law regulates marriage, it further regulates matters related to marriage or all legal consequences related to marriage so that it can be categorised as Family Law.

Basically, the marriage agreement is not as bad as society thinks, which most people consider incompatible with Eastern culture and less ethical. The marriage agreement is not only limited to promising property or financial problems; other important things are promised, such as domestic crimes, promising one party to continue his career even though he is married, and so on. The benefits of the marital covenant for the state are enormous. The existence of a marriage agreement provides limits for married couples to reduce and prevent marital conflicts. The marriage agreement can be a reference for each husband and wife to find out their rights and obligations if a conflict arises in the future, even though the conflict is not desired, such as when there is a conflict that must end in divorce. By making a marriage agreement, married couples have the
opportunity to open up to each other and share their feelings for the agreed desire to live the contents of the agreement.

A marriage agreement, according to Article 139 of the Civil Code, is actually an agreement between a prospective husband and wife to regulate the effect of marriage on their property. Therefore, a marriage agreement can be made either if the husband and wife will marry a mixture of property unanimously or if they covenant the existence of separate property or property outside the union. The function of making a marriage agreement according to Indonesian Marriage Law is as follows:

a. Made to protect property legally, both the property of each party and joint property.

Regarding the separation of property, if there is no property, the condition must be made before b. A guide that regulates the rights and obligations of husband and wife regarding the future of the family, both in terms of children's education, business, residence, and others, as long as they do not conflict with law and decency.

b. Protect family members from the threat of domestic violence.

Given the importance of the marriage agreement, it turns out that there are many benefits for husband and wife. Without a marriage agreement, in the process of dividing property, there are often conflicts/disputes. The benefit of a marriage agreement is that it can regulate the resolution of problems that will arise during the marriage, including:

The marriage and must be recorded at the place of marriage registration or notary.

a) Regarding the separation of debts, the marriage agreement can be arranged regarding the issue of debts that will remain the responsibility of the party that incurred the debt. The debt in question is the debt that occurred before marriage, during the marriage, after divorce, and even death.

b) Responsibility for the children resulting from the marriage is mainly regarding the issue of children's living costs, and the cost of education must be regulated in such a way as to contribute to each parent. In this case, the aim is that the welfare of the children remains guaranteed. The marriage agreement stipulated in Article 29 of the Constitutional Court Decision Number 69 / PUU-XIII / 2015 of the Marriage Law states that the marriage agreement can be made at the time before it takes place or during the marriage bond both parties by mutual consent can enter into a written agreement ratified by a marriage registrar or notary official, after which the contents also apply to third parties as long as the third party is involved. The description of the contents contained in the Act is as follows:

c) At any time, before or during the marriage union, both parties, by mutual consent, may submit a written agreement ratified by the marriage registrar or notary official, after which the contents shall also apply to third parties to the extent that third parties are involved.

d) The agreement cannot be ratified if it violates the boundaries of law, religion, and decency.

e) The agreement shall enter into force from the moment the marriage takes place unless otherwise provided in the Marriage Agreement.
f) During the marriage, the marriage agreement may be regarding marital property or other agreements, cannot be changed or revoked unless both parties agree to change or revoke, and the change or revocation is not detrimental to a third party.

The marriage agreement is entered into in writing by the agreement and consent of both parties, husband and wife. It must meet the general requirements of an agreement unless, in special regulations, otherwise provided. This has legal consequences that mean the parties have bound themselves to the agreement and must not violate the agreement, as stated in Article 1313 of the Civil Code. The parties must comply with this agreement as stipulated in the Civil Code. As an agreement, if one party commits a violation (broken promise), a lawsuit can be made, either a divorce lawsuit or compensation (Zaharnika, 2019).

The marriage agreement must be in written form and must be notarised by a notary. The marriage agreement for Muslim couples must be ratified by a notarial deed that can be recorded by the Marriage Registration Officer (PPN). In contrast, couples who are non-Muslim are legalised by a notary and reported to the Implementing Agency or Technical Implementation Unit (UPT) of the Implementing Installation (Situmeang, 2019).

The terms of validity of an agreement are regulated in Article 1320 of the Civil Code. The marriage agreement must also be executed in good faith, in accordance with the provisions of Article 1338, i.e., the agreement made validly applies as law to those who make it. The marriage agreement as an engagement or agreement between prospective husband and wife is, in principle, the same as agreements in general because each other is bound by Article 1320 of the Civil Code regarding the terms of validity of agreements. A Marriage Agreement that satisfies the conditions regarding the validity of the agreement, the agreement according to Article 1320 of the Civil Code, must be deemed valid by the Law for the contracting party.

Based on Article 139 of the Civil Code (BW), the existence of a marriage agreement is an exception to the provisions of Article 119 of the Civil Code, namely when the marriage takes place, then legally, a unanimous union applies between the wealth of the husband and the wealth of the wife or in other words limited to regulating. This is by Article 1338 paragraph (1) of the Civil Code, which reads: "all agreements made validly and valid as law for those who make them".

The marriage agreement that is made is formal because an agreement is reached between the parties who make it; then, by itself, the marriage agreement binds the parties who make it when both agree on the marriage agreement made. Marriage agreements made by the parties, both those stipulated in the provisions of the Civil Code, Law Number 1 of 1974 jo, Law Number 16 of 2019 concerning Marriage, and those based on the determination of the District Court, have binding legal consequences for husband and wife who agree to make them. In other words, both parties, namely husband and wife, remain bound by the agreement contained in the marriage agreement. It can be said that couples who bind themselves in the marriage agreement will get guarantees during the
marriage and afterwards so that to break the marriage means also breaking the agreement; it is very rare considering the legal consequences that will be borne / risk if one party disobeys the marriage agreement, there are usually sanctions that must be imposed on the party who violates the agreement.

Legal protection of property in the marriage agreement applies when the marriage takes place, which aims to protect/protect the property of the bride and groom, where the parties can determine each other's property. The property of each husband and wife and the property acquired by each as a gift or inheritance shall be under the control of each so long as the parties do not specify otherwise. A marriage agreement after marriage is entered into to regulate the cause and effect of marital property after the marriage has occurred when there is an unequal or greater amount of property on one side of the husband or wife. So, the marriage agreement after marriage is always related to the issue of property in marriage.

Article 149 of the Civil Code expressly states that after the marriage takes place, the marriage agreement in any way may not be changed. This is different from Law Number 1 of 1974 concerning Marriage, where in Article 29, paragraph (4), it is stated that a marriage agreement cannot be changed unless there is agreement from both parties and does not harm third parties. This principle of irrevocability of the marriage agreement relates to the system of marital property chosen by the husband and wife at the time of the marriage, which awakens to the point of concern that during marriage, the husband may force the wife to make changes that his wife does not desire. In essence, the prohibition to change the marriage agreement is to protect the interests of third parties, namely to prevent losses from the possibility of abuse by husband and wife, which is deliberately done to avoid responsibility.

**Conclusion**

Notaries have the authority and responsibility to make marriage agreement deeds. The notary's authority is authorised to ratify a written marriage agreement. To the extent that the content of the agreement has fulfilled the conditions for the validity of the agreement under Article 1320 of the Civil Code, then he cannot be prosecuted in court. Conversely, if the marriage agreement certificate does not meet the requirements of the validity of the agreement, then the deed made by a notary can be cancelled by the judge. The notary's responsibility in the marriage agreement is to ensure that the making of a marriage agreement harms no third party after the marriage occurs.
Authority And Responsibility Of Notaries In Making Marriage Agreement Deed

Bibliography


