

# INTERNATIONAL JOURNAL OF LAW, TOURSIM, AND CULTURE

Published Law Departement, Universitas Pendidikan Ganesha  
Volume 1 Issue 2, August 2023| P-ISSN : 2830-6546

## THE POSITION OF NOTARIAL DEEDS AGAINST MARITAL AGREEMENTS BASED ON THE NOTARY OFFICE LAW NUMBER 2 OF 2014

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### Article Info

Received: 1 Juni 2023  
Accepted: 23 Juli 2023  
Published: 2 Agustus  
2023

#### Keywords:

Notarial deeds, marital,  
agreements

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### Abstract

Marriage is a physical and spiritual bond between a man and a woman to form a happy family. According to the Civil Code, with a marriage, from that moment on the assets, both original assets and joint assets of the husband and wife, will be united, unless there is a marriage agreement. If there is no marriage agreement in intermarriages, Indonesian citizens will lose their constitutional rights in owning land and buildings in Indonesia. This research aims to determine and analyze the position of notarial deeds regarding marriage agreements based on Notary Position Law Number 2 of 2014. The type of research used in this research is normative legal research. The legal materials used are primary, secondary and tertiary legal materials using legal material collection techniques, document study or literature study. The legal material analysis technique used is the interpretation method. The research results show that (1) A notarial deed in the form of a marriage agreement plays an important role in mixed marriages. In a notarial deed, a husband and wife regulate their rights and obligations as well as financial and other responsibilities. The position of a notary deed provides legal protection for Indonesian citizens to obtain their constitutional rights, as well as providing legal certainty and preventing future conflicts. (2) the issuance of Constitutional court decision Number 69/PUU-XIII?2015 provides legal protection for people who enter into mixed marriages who do not make a marriage agreement before the marriage takes place.

### Introduction

Indonesia is a State of law with a republican form of government based on a legal constitution, namely the 1945 Constitution of the Republic of Indonesia (UUD 1945). Indonesia consists of various tribes and nations, languages, races and religions. Indonesia is a country with thousands of diversity, but even so it does not make Indonesia divided. This diversity provides a symbol of unity, namely

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Bhineka Tunggal Ika. Indonesia is known as a country with diverse cultural customs that have been instilled since time immemorial from ancestors, as well as religions and beliefs and of course have different rules. In an effort to harmonize these diverse legal rules, a national marriage law was made which is the legal basis and main rule in marriage in Indonesia, namely Law Number 16 of 2019 Amendment to Law Number 1 of 1974 concerning marriage. Based on this marriage law, marriage is defined as a physical and mental bond between a man and a woman to form a happy and lasting family or household.

Marriage in Indonesia is not only influenced by the customs of a region but there are also marriages that are influenced by the wide knowledge of digital development so that it can result in meetings with foreign nationals. So that in this case it can cause marriage between Indonesian citizens and also foreign citizens or what will be referred to as mixed marriages. Mixed marriage is a marriage entered into by an Indonesian citizen who is married to a foreign citizen.

Mixed marriages entered into by several people will inevitably have legal consequences such as giving rise to joint property, not only that, in the future new problems will also arise because in a mixed marriage one of them is a foreign national who cannot have property rights. With the occurrence of mixed marriage, the assets will be mixed, while the law in Indonesia does not allow foreign nationals to have property rights. Therefore, every person who enters into a mixed marriage, almost all make a nominee agreement. A nominee agreement is a name loan agreement. The marriage agreement is made with the aim that if in the future they want to buy land or houses with property rights there will be no mixing of assets between Indonesian citizens and foreign citizens. Then the property and wealth can be regulated in a marriage agreement made before or when the marriage is held and cannot be changed during the marriage. In this case, married couples must follow the rules in Article 21 of Law Number 5 of 1960 concerning Basic Agrarian Regulations which states that only Indonesian citizens can have property rights. Meanwhile, Indonesian citizens who enter into a mixed marriage can be exempted from owning land rights by making a marriage agreement in accordance with the provisions of Law Number 16 of 2019 amending Law Number 1 of 1974. With the contents of the marriage agreement, there will be no mixing of assets into joint assets or it can be said that the assets owned by the parties are separate in position. Here it can be seen that there is a vacuum of norms regarding mixed marriages, where there is no law that regulates more clearly the rights of

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Indonesian citizens who enter into mixed marriages. So in this case it is often found in mixed marriages that there is a nominee. Nominee is borrowing a name for an agreement between the two parties. Based on the above background, the author is interested in conducting research with the title "The Position of Notarial Deed Against Marriage Agreement Based on the Notary Position Law Number 2 of 2014".

## Research Methods

The type of research used in this research is normative legal research, normative legal research (*Legal Research*), namely research that uses sources of legal material in the form of laws and regulations, court decisions / decrees, contracts / agreements / contracts and legal theories. (Bachtiar, 2018). In normative legal *research* (legal research), namely looking for the truth of the facts to find that the rules of law are in harmony with legal norms, if there is a vacuum, vagueness or conflict of norms. (Bachtiar, 2018). In this research, it will be examined more clearly about the norm vacuum regarding the right to have property rights to property or land that is not obtained by Indonesian citizens who are in mixed marriages and examine more clearly the position of notarial deeds on marriage agreements, especially in mixed marriages.

The approach method in this writing consists of two types, namely the *Statute Approach* and the *Case Approach*. The *statute* approach is an approach that is carried out by examining all laws and regulations that are related to the problem (legal issue) being studied. The *case approach* is an approach that is carried out by examining cases related to the legal issues faced or studied and has become a court decision and has permanent legal force. (Muhaimin, 2020).

This research also uses several legal materials such as primary legal materials, primary legal materials and also secondary legal materials. Primary legal material is a legal material that has strong binding properties, for example, such as laws and regulations, court decisions, and legal documents. (Bachtiar, 2018). Such as the 1945 Constitution, UUJN, UUPK and so on. Secondary legal materials are legal materials that have a non-binding nature and can provide an explanation of primary legal materials which include draft laws, research results, opinions of legal experts, including legal papers contained in the mass media, legal books, and legal journals related to the problems being studied. Tertiary legal materials are legal materials that can be used as a guide or explanation of primary legal

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materials and secondary legal materials, for example, a large Indonesian dictionary (KBBI) and a legal dictionary. (Bachtiar, 2018).

The technique of collecting legal materials in writing this research used is document study or literature study. Literature study is legal research consisting of primary legal materials, secondary legal materials and also tertiary legal materials. Furthermore, an assessment of written information regarding these legal sources is carried out and is widely published and is needed in this normative legal research. (Muhaimin, 2020). In this research, the analysis used is qualitative, which is a descriptive data analysis method that refers to a particular problem which is then associated with literature or opinions of legal experts and based on applicable laws and regulations. The activities carried out in the analysis are collecting various legal materials, both primary, secondary and tertiary and then processing data from the three legal materials that have been collected, then analyzing them so that they can explain the problems in this study using the actual rules. After that, interpretation is carried out, namely by means of interpretation (interpretation) of the law.

## Results and Discussion

### **The Position of Notarial Deed Against Mixed Marriage Agreement Based on Law Number 2 Year 2014**

A marriage agreement is an agreement made by a prospective husband and wife to further regulate the consequences of marriage on property and wealth during marriage. The legal subjects here are Indonesian Citizens (WNI) and Foreign Citizens (WNA) whose legal position is the same, namely providing legal protection for the parties. Article 28B paragraph (1) of the 1945 Constitution states that marriage is a legal act protected by law as a human right owned by everyone. Legal events arising from the bond of a marriage between a man and a woman will have legal consequences such as property or income obtained by both of them during the marriage period. The marriage law categorizes marital property into two groups, namely joint property or often referred to as gono-gini property and their respective assets. (Judiasih, 2015).

Joint property is property obtained during the marriage bond, while innate property is the property of each husband and wife before marriage and brought into marriage. (Nugroho, 2017). This is also regulated in article 35 of the Marriage Law. Mixed marriage is a legally recognized marriage in Indonesia. The marriage law that explains the definition of mixed marriage is a marriage between

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two people who in Indonesia are subject to different laws, due to differences in citizenship, one of the parties has Indonesian citizenship (Hasan, 2018). (Hasan, 2018). Indonesian citizens who marry foreign citizens are considered to lose their rights even though the documents remain with the status of Indonesian citizens. The Indonesian citizen is considered to have the same status as a foreign citizen who has become his or her spouse, which is unable to own land or property rights in Indonesia, and can even lose property rights to land or property owned before marriage (Wihardjo, 2023). (Wihardjo, 2023). This means that Indonesian citizens can only have the right to use, as well as the rights that can be obtained for foreign citizens, if after marriage the position of the couple is the same. However, the provisions of the Basic Agrarian Law regulate land rights for foreign nationals, namely only the right to use the land within a specified period of time and the control is very strict. (Muchsin, et al., 2019). There are several legal issues that may arise as a result of mixed marriages, namely:

1. Citizenship Status
2. Position of children in case of marriage breakup
3. The status of the assets of the husband and wife obtained during the marriage and the assets obtained before the marriage (inherited assets).

Thus, it is very necessary for a marriage agreement to regulate everything that happens in marriage, especially in a mixed marriage. To ensure the certainty and correctness of the marriage agreement that can bind the parties, the form of the marriage agreement according to the Civil Code must be made with the following provisions:

1. By Notarial Deed

A marriage agreement must be made before a notary before the marriage takes place, but after the issuance of the Constitutional Court Decision Number 69/PUU-XIII/2015, the marriage agreement can be made during the marriage bond and then the marriage agreement will be void if it is not made in this way. This is regulated in Article 147 of the Civil Code which states that "Marriage Agreements must be made by notarial deed before the marriage takes place, and will become void if not made in this way." The marriage agreement must be made in an authentic deed which has strong evidentiary power. The requirement that a marriage agreement must be made by notarial deed (authentic deed) is intended to:

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- a) So that the marriage agreement has perfect evidentiary power if there is a dispute in the future. An agreement that is poured into an authentic deed will have perfect evidentiary power, this means that the formal and material truth of the authentic deed is strong evidence in court.
- b) With a marriage agreement outlined in a notarial deed, it will provide legal certainty regarding the rights and obligations of husband and wife towards their property.
- c) As the only legal evidence
- d) To prevent the possibility of hasty action, because of the consequences of a marriage contract that will last a lifetime.

## 2. Before the marriage takes place

Article 147 of the Civil Code also emphasizes that a marriage agreement is a deviation from the provisions of the law. By entering into a marriage agreement, both husband and wife have the right to prepare and convey what will be stated in the deed regarding the unity of property. (Edlynafitri, 2015).

The position of a marriage agreement, especially in mixed marriages between Indonesian citizens and foreign citizens, is a very important thing to make in order to regulate property. If there is no marriage agreement, in the future a problem will arise in terms of inherited property and joint property, especially for land ownership rights. (Septiawan, 2017). Notarial deeds have an important position in the context of marriage agreements in Indonesia, in order to protect the rights of citizens that should have been owned from the start. Especially in mixed marriages, where if a mixed marriage does not make a marriage agreement, the Indonesian citizens who are bound in the marriage cannot have the rights and obligations that they should have from the beginning of their acceptance.

## **Legal Protection of Mixed Marriage Agreements After the Constitutional Court Decision Number 69 / PUU-XIII / 2015**

Constitutional Court Decision Number 69/PUU-XIII/2015 was issued on October 27, 2016 on a judicial review request from an Indonesian citizen who entered into a mixed marriage with a foreign citizen from Japan. The petition for *judicial review* was against the former Marriage Law No. 1/1974 Article 29 paragraph (1), paragraph (3), and paragraph (4) which were considered contrary to Article 28E paragraph (2) of the 1945 Constitution. *Judicial review* is a test of the 1945 Constitution conducted by the Constitutional Court.

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*The judicial review* conducted by the Constitutional Court against Law Number 1 of 1974 was initiated by the case of an Indonesian citizen, Mrs. Ike Farida, who entered into a mixed marriage with her husband from Japan, then Ike Farida felt that her constitutional rights were deprived by several articles in the law. In her petition, Ike Farida stated that she could not own the property because she was in a mixed marriage and did not make a marriage agreement.

The perpetrators of mixed marriages who make a marriage agreement for the separation of property can own land with the status of property rights and building use rights, however, the marriage agreement can only be made before or during the marriage. This is of course detrimental to the perpetrators of mixed marriages who do not make a marriage agreement. Therefore, the Constitutional Court states that the making of a marriage agreement can be made after the marriage takes place, thus Article 29 of Law Number 1 of 1974 concerning marriage no longer violates the constitutional rights and human rights of citizens. In essence, the making of a marriage agreement is the same as making an agreement in general. The agreement must have a basis as it should be done in making the agreement.

However, even though the Constitutional Court has allowed for marital agreements to be made during marriage, they are only related to the ownership of land and buildings in Indonesia. This means that husbands or wives who are foreign nationals still cannot own property rights or building use rights (HGB). However, Indonesian citizens (WNI) who enter into a mixed marriage with foreigners are given protection by being allowed to make a marriage agreement during the marriage bond for couples who are married but have not made a marriage agreement before. So that in this case Indonesian citizens (WNI) still get their constitutional rights to ownership of land and buildings in Indonesia.

Apart from that, the making of a marriage agreement before the issuance of the Constitutional Court Decision Number 69/PUU-XIII/2015 did not guarantee the rights of Indonesian citizens who entered into mixed marriages. Meanwhile, after the issuance of the Constitutional Court's decision, the law guarantees the rights of Indonesian citizens to own property rights to land in Indonesia. Furthermore, the marriage agreement made by the perpetrators of mixed marriages must not harm third parties. This means that if in the future there is a dispute related to debt and credit made by one of the parties before marriage or after marriage, it must not harm third parties.

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The fact of making a marriage agreement during marriage is a legal protection that occurs in the community which has been considered by the Constitutional Court to declare Article 29 paragraph (1), paragraph (3) and paragraph (4) of Law Number 1 Year 1974. The reason for making a marriage agreement is the consequences that may arise from joint property in a marriage because the work of the husband and / or wife has consequences and responsibilities up to their respective personal property. In addition, one of the reasons used as the basis for making a marriage agreement after marriage as stated by the Judge of the East Jakarta Court, namely (Rohman, 2022):

1. The negligence of Law Number 1 Year 1974 is the existence of a provision that regulates marriage agreements before/at the time of marriage.
2. There are risks that may arise from joint property afterwards.
3. The development of individuality in society can influence the mindset of husbands and wives to make marital agreements to protect the assets of each party.
4. There is a desire to still have a certificate of ownership of land and also the right to use buildings even though he is an Indonesian citizen (WNI) who has a mixed marriage with a foreigner (WNA).

With the acceptance of this *judicial review* application, it provides legal protection and justice guaranteed by the 1945 Constitution for the Indonesian people for their constitutional rights in making an agreement (the principle of freedom of contract) in this case a marriage agreement, especially in a mixed marriage. Legal protection of marriage agreements involves the fulfillment of local legal requirements, transparency and equality between the couples involved. In the process of making it, it is recommended that each couple get legal assistance to ensure a full understanding of the legal implications, especially in mixed marriages.

## Conclusion and Suggestions

Based on the results of the discussion and research regarding the position of notarial deeds against mixed marriage agreements based on UUJN Number 2 of 2014 and also the legal protection of mixed marriage agreements after the Constitutional Court Decision Number 69/PUU-XIII/2015, the following conclusions can be drawn:

1. The position of a notarial deed plays an important role in making a marriage agreement, especially in mixed marriages. The position of a notarial deed guarantees the status of the parties as Indonesian



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citizens. The making of a marriage agreement in Indonesia ensures that the agreement between the two parties is made legally and transparently. In a notarial deed, married couples can regulate their respective rights and obligations such as the division of joint property, financial responsibility, and child custody. The notarial deed also provides legal protection to Indonesian citizens who should have received their constitutional rights from the start despite entering into a mixed marriage. Recording or making a marriage agreement is a fitting and important step to ensure its legal validity and so that it can be known by third parties. Notarial deeds also create transparency regarding the rights and obligations of spouses, provide legal certainty and prevent future conflicts.

2. In order to maintain human rights and also the constitutional rights of Indonesian citizens and provide legal protection to people who enter into mixed marriages, the Constitutional Court gave a decision on the making of a marriage agreement in decision number 69/PUU-XIII/2015. Where before the issuance of the Constitutional Court's decision, the marriage agreement could only be made before or at the time of marriage, but after the issuance of the Constitutional Court's decision, the marriage agreement could be made before, during or during the marriage bond. Apart from that, the marriage agreement must not harm third parties in any way. Thus, legal protection of marriage agreements can be guaranteed by the 1945 Constitution for the community for their constitutional rights in making a marriage agreement. This legal reform brings goodness to anyone who will marry, especially to mixed marriage couples. In the end, they can focus on forming a prosperous family without having to think about a marriage agreement because at this time it can be done at any time including during the marriage bond.

Some suggestions that can be given are as follows:

1. For the government related to mixed marriage agreements, it is expected to help encourage legal counseling to the public about the importance of mixed marriage agreements in accordance with the decision of the Constitutional Court Number 69/PUU-XIII/2015 so that people can understand their rights and obligations through information campaigns or socialization. Furthermore, the government is also expected to organize training for notaries, advocates and other legal workers to improve their understanding of mixed marriage agreements and ensure that the services provided are in accordance with legal standards.

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2. Notary practitioners and advocates are expected to continue to improve their technical skills in drafting a marriage agreement such as an in-depth understanding of the legal provisions related to marriage agreement regulations and recent legal changes in order to provide sufficient education to clients regarding the meaning and implications of marriage agreements. Providing transparent information will help clients make more informed decisions. Notaries and advocates work together in drafting a marriage agreement, having good communication can optimize the process and avoid potential legal conflicts in the future.
3. For legal drafters to be able to accommodate the decision of the Constitutional Court Number 69 / PUU-XIII / 2015 as a form of input for improving regulations, so that there are guarantees of marriage agreements that can be accommodated for couples of Indonesian citizens and foreign citizens so that they can provide guarantees of legal certainty and guarantee the constitutional rights of citizens to get more justice.

For people / couples who enter into a mixed marriage, it is very necessary to make a marriage agreement in the form of an authentic deed made before a notary which aims to protect their constitutional rights to reside with property rights status in the country of Indonesia. However, before making a marriage agreement, it would be better to consult with a notary to understand the legal implications, rights and obligations including what aspects are regulated in the marriage agreement.

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