



Strategies for Ratifying Marriage Agreements to Avoid Partnership Liabilities

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Abstract

This research aims to analyze the regulations and strategies for validating marriage agreements. This normative juridical research prioritizes secondary data as primary, secondary, and tertiary legal materials. Data was collected through document and literature studies and then analyzed qualitatively using a statutory and historical approach. The research findings indicate that the development of marriage agreement regulation can be categorized into three phases: before the enactment of Marriage Law, after the enactment, and after the Constitutional Court Decision No. 69/PUU-XIX/2016. Moreover, regulation remains unclear and has not been followed with legislation, giving rise to "strategies" to avoid partnership liabilities. One party may create a marriage agreement after entering into Marriage, and subsequently, that party only validates the marriage agreement before a notary (waarmerking).

Keywords:

Liability; Partnership; Prenuptial or Postnuptial agreement; Validation strategies.

A. INTRODUCTION

Based on the latest data from Badan Pusat Statistik (BPS-Statistics Indonesia), the growth of micro and small companies in Indonesia has been relatively consistent from 2013 to 2021.¹ Although it was corrected in 2019-2020 due to the Covid-19 pandemic, this figure has improved in 2021. Approximately 4,000,000 businesses in Indonesia are still in the form of micro and small

enterprises. Furthermore, the data shows people's enthusiasm for running a company in Indonesia.

¹ Badan Pusat Statistik, "Jumlah Perusahaan Menurut Provinsi," Badan Pusat Statistik, 2021, <https://www.bps.go.id/id/statistics-table/2/NDQwIzI=/jumlah-perusahaan-menurut-provinsi.html>, accessed 5 July 2023.

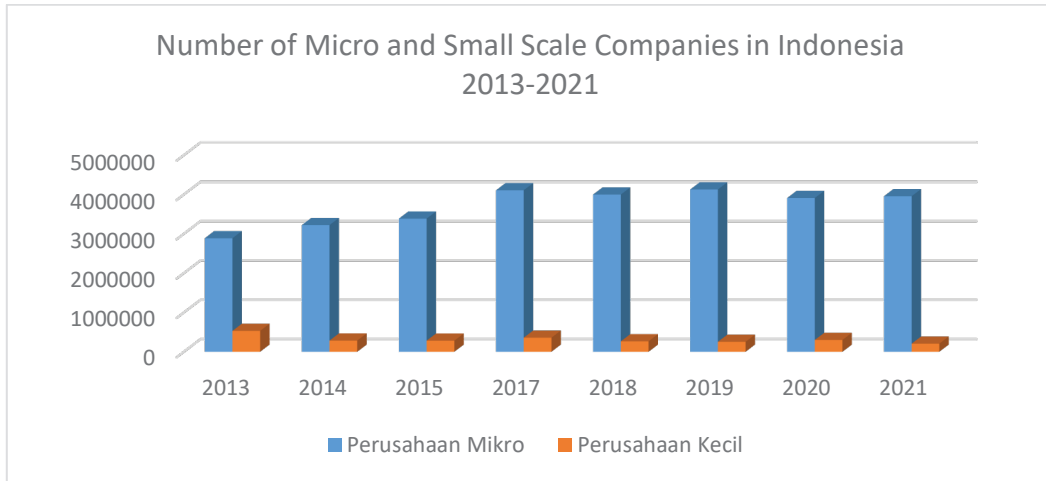


Figure 1

Number of Micro and Small Scale Companies in Indonesia

Source: BPS-Statistics Indonesia

The enthusiasm for running a company in Indonesia should come with an understanding of responsible debt management. This is important because most micro and small companies in Indonesia may not be legal entities yet. Law No. 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation (Job Creation Law) has opened opportunities for micro and small businesses to establish individual companies that are known as Individual Limited Liability Companies (PT *Perseorangan*).² However, the presence of PT *Perseorangan* does not disrupt the existence of other companies

that are not legal entities (*persekutuan* or partnership), such as civil partnerships (*persekutuan perdata* or *maatschap*), firm (Fa), or *comanditer venonschap* (CV).³

When a company is formed as a PT *Perseorangan*, its debt liability is limited to the legal entity, which means that the liability of shareholders (business owners) is limited to their investment in the company. However, the company is not a legal entity, so its debt liability can extend to business owners' personal wealth or assets and even to their spouses' assets.⁴ A marital agreement is crucial to avoiding spouses being responsible for firm debt obligations.

² Yuliana Duti Harahap, Budi Santoso, and Mujiono Hafidh Prasetyo, "Pendirian Perseroan Terbatas Perseorangan Serta Tanggung Jawab Hukum Pemegang Saham Berdasarkan Undang-Undang Cipta Kerja," *Notarius* 14, No. 2 (2021): 725-738, <https://doi.org/10.14710/nts.v14i2.43800>, p. 725.

³ Rizha Claudilla Putri, "Bentuk Hukum Perusahaan Persekutuan Di Indonesia dan Perbandingannya Di Malaysia," *Cepalo* 4, No. 1 (2020): 15-28, <https://doi.org/10.25041/cepalo.v4no1.1913>, p. 15.

⁴ Rilda Murniati, "Asas Tanggung Renteng Pada Bentuk Usaha Bukan Badan Hukum Dan Akibat Hukum Bagi Harta Perkawinan," *Cepalo* 2, No. 2 (2019): 111-120, <https://doi.org/10.25041/cepalo.v2no2.1768>, p. 111.

Constitutional Court Decision No. 69/PUU-XIX/2016 allows a marriage agreement to be made after the marriage (*postnuptial agreement*).⁵ It does not have to be done before the marriage (*prenuptial agreement*).⁶ The marriage registrar officer or notary must ratify the marriage agreement to have binding force on third parties.

Following the Constitutional Court Decision, various strategies have emerged for ratifying marriage agreements. One of these strategies is the ratification of a marriage agreement in the form of a privately drawn-up deed (ABT), then presented to a notary (*warmeking*). The objective of this study is to conduct an analysis of the development of regulations surrounding marriage agreements as well as strategies that can

be employed to avoid the responsibility of spouses from firm debt obligations.

Previous studies have been conducted regarding marriage agreements. There is research that discusses the marriage agreement from the perspective of Islamic law.⁷ Islamic legal arrangements pertain to the nullity of the marriage agreement due to not fulfilling objective or subjective requirements.⁸ Furthermore, Article 51 of the Compilation of Islamic Law (KHI) provides for the right to annulment of an agreement due to violation of the marriage agreement.⁹

From the perspective of the Civil Code, there is previous research related to the act of renegeing on the marriage agreement as a form of unlawful act (PMH).¹⁰ Therefore, the marriage covenant must not contradict public order, morality, and religious law.¹¹

⁵ Ahmad Royani, "Perjanjian Kawin Yang Dibuat Setelah Perkawinan Terhadap Pihak Ketiga (Pasca Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015)," *Jurnal Independent* 5, No. 2 (2017): 6-16, <https://doi.org/10.30736/ji.v5i2.67>, p. 6.

⁶ Esther Masri and Sri Wahyuni, "Implementasi Perjanjian Perkawinan Sebelum, Saat Dan Sesudah Perkawinan," *Jurnal Kajian Ilmiah* 21, No. 1 (2021): 111-120, <https://doi.org/10.31599/jki.v21i1.310>, p. 111.

⁷ Tiena Masriani Yulies, "Perjanjian Perkawinan Dalam Pandangan Hukum Islam," *Serat Acitya-Jurnal Ilmiah UNTAG Semarang* 5, No. 3 (2017): 128-149, p. 128.

⁸ Iin Ratna Sumirat, "Pelanggaran Perjanjian Perkawinan Serta Akibat Hukumnya Analisis Hukum Positif Dan Hukum Islam," *Syaksia : Jurnal Hukum Perdata Islam* 20, No. 2 (2020): 279-301, <https://doi.org/10.37035/syaksia.v20i2.2353>, p. 279.

⁹ Seftia Azrianti, "Analisa Yuridis Perjanjian Perkawinan Dan Akibat Hukum Bagi Para Pihak Berdasarkan Kompilasi Hukum Islam dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Jurnal Pelita* 1, No. 2 (2014), p. 209.

¹⁰ Abdul Halim Barkatullah and Tavinayati Tavinayati, "Janji Kawin Dalam Perspektif Hukum Perdata," *Lambung Mangkurat Law Journal* 5, No. 1 (2020): 25-41, <https://doi.org/10.32801/lamlaj.v5i1.148>, p. 25.

¹¹ Hanafi Arief, "Implementasi Yuridis Perjanjian Kawin Dalam Sistem Hukum Positif Di Indonesia," *Syariah Jurnal Hukum Dan Pemikiran* 15, No. 2 (2016), <https://doi.org/10.18592/syariah.v15i2.551>, p. 141.

The marriage agreement must also be in accordance with the principles of propriety¹² and good faith.¹³

In addition, there is research on the regulation of marriage agreements after the Constitutional Court Decision Number 69 / PUU-XIX / 2016 related to models of marriage agreements.¹⁴ The binding force of a marriage agreement is made after the Marriage takes place.¹⁵ Change of marriage agreement by determination of the District Court.¹⁶ Ambiguity of ratification of marriage agreement by notary or marriage registrar

employee.¹⁷ However, the presence of a marriage agreement is to provide legal certainty not only to the parties but also to third parties.¹⁸

Furthermore, there is research on the authority of notaries to make marriage agreements¹⁹. In this case, it relates to making an authentic deed related to the marriage agreement.²⁰ This is not only the making of a marriage agreement before Marriage but also after Marriage.²¹ However, there are differences of opinion about the calculation of the enactment of deeds in the internal notary profession.²²

¹² Sefira Rahmadika Edlynafitri, "Pemisahan Harta Melalui Perjanjian Kawin dan Akibat Hukumnya Terhadap Pihak Ketiga," *Lex Privatum* 3, No. 1 (2015): 110-123, p. 110.

¹³ Sonny Dewi, "Pertaruhan Esensi Itikad Baik Dalam Pembuatan Perjanjian Kawin Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015," *NOTARIIL Jurnal Kenotariatan* 2, No. 1 (2017): 68-83, <https://www.ejournal.warmadewa.ac.id/index.php/notariil/article/view/179>, p. 68.

¹⁴ Mahkamah Konstitusi Nomor Puu-xiii, "Model Perjanjian Kawin Yang Dibuat Setelah," *Masalah-Masalah Hukum; Vol 47, No 3 (2018): 253-267*, <https://ejournal.undip.ac.id/index.php/mmh/article/view/17297>, p. 252.

¹⁵ Imanuel Mahole, "Kajian Yuridis Terhadap Putusan Mahkamah Konstitusi Nomor 14/PUU-XI/2013," *Lex Administratum* Vol. 8 (2020): 65-77, <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/52618>, p. 66.

¹⁶ Putu Astika Yasa and Made Subawa, "Analisis Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Tentang Perjanjian Kawin," *Kertha Semaya : Journal Ilmu Hukum* 7, No. 2 (2019), <https://doi.org/10.24843/km.2019.v07.i02>, p. 11.

¹⁷ S B (Stevanus) Prasetyo, "Ambiguitas Amanat Konstitusi Mengesahkan Perjanjian Kawin Oleh Notaris Dan Pegawai Pencatat Perkawinan," *Jurnal Education and Development* 11, No. 1 (2023): 235-240, p. 235.

¹⁸ Eko Afrianto, Yaswirman, and Neneng Oktarina, "Akta Perjanjian Perkawinan: Analisis Perbandingan Antara Hukum Islam Dan Hukum Positif Serta Kedudukannya Terhadap Harta Perkawinan," *Soumatara Law Review* 3, No. 2 (2020): 197-212, p. 197.

¹⁹ Adhe Andreas, "Penerapan Perjanjian Kawin Berdasarkan Undang-Undang," *Repertorium* 6, No. 2 (2017): 131-142, <http://journal.fh.unsri.ac.id/index.php/repertorium/article/view/303>, p. 131.

²⁰ Farida Novita Sari and Umar Ma'ruf, "Perlindungan Hukum Terhadap Harta Dalam Akta Perjajian Kawin yang Dibuat Oleh Notaris Bagi Warga Negara Indonesia yang Beragama Islam," *Jurnal Akta* 4, No. 2 (2017), <https://doi.org/10.30659/akta.v4i2.1796>, p. 265.

²¹ Wahyuni Wahyuni, Rachmat Safa'at, and Muhammad Fadli, "Kewenangan dan Tanggung Jawab Notaris Dalam Pembuatan Akta Perjanjian Kawin Pasca Putusan Mahkamah Konstitusi No 69/PUU-XII/2015," *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 2, No. 2 (2017): 139-145, <https://doi.org/10.17977/um019v2i22017p139>, p. 139.

²² Ryan Permana Wijaya, I Nyoman Sujana, and Putu Ayu Sriasih Wesna, "Implementasi Pembuatan Akta Postnuptial Agreement Oleh Notaris Pasca Putusan Makamah Konstitusi Nomor 69/PUU-XIII/2015 (Studi Di Wilayah Kota Denpasar)," *KERTHA WICAKSANA* 16, No. 2 (2022): 140-148, <https://doi.org/10.22225/kw.16.2.2022.140-148>, p. 140.

Not only the creation of authentic deeds but previous research has revealed the authority of notaries to ratify marriage agreements.²³ Previous research has also discussed the responsibilities of notaries in making deeds.²⁴

Meanwhile, research linking marriage agreements with companies is still limited. There is research on the relationship between marriage agreements and bankruptcy, such as the impact of bankruptcy judgments on the property of husband and wife who do not have a marriage agreement.²⁵ There is also research linking marriage agreements with corporate law²⁶ or banking law.²⁷

The above studies are still dominated by research related to the regulation of marriage agreements in Indonesia. Therefore, there are still research gaps that can be filled, one of which is the strategy of ratifying the marriage agreement to avoid the responsibility of the wife or husband for the partnership debt.

This study analyzes legal regulations related to marriage agreements, Constitutional Court Decision Number 69/PUU-XIX/2016, and the development of legal practices related to the implementation of these rulings in partnership debt liability. Thus, the results of this study are expected to provide a clearer and more comprehensive understanding of marriage agreements in the context of partnership company debt responsibility. This research is expected to provide recommendations or guidance for legal practitioners, academics, and the general public regarding the application of marriage agreements in relation to partnership debt responsibility.

B. RESEARCH METHODS

This study is normative legal research that places emphasis on secondary sources of information in relation to primary legal materials such as the Marriage Law, Civil Code, Constitutional

²³ Wira Dharma Pratiwi, Syahrudin Nawi, and Hasbuddin Khalid, "Kewenangan Notaris Dalam Pengesahan Perjanjian Kawin," *Journal of Lex Theory (JLT)* 2, No. 1 (2021): 77-88, p. 77.

²⁴ Made Topan Antakusuma, Dewa Gde Rudy, and I Nyoman Darmadha, "Perlindungan Hukum Terhadap Harta Suami - Istri Dengan Adanya Perjanjian Kawin," *Ilmu Hukum* 6 (2017): 1-5, p. 1.

²⁵ Lenny Nadriana, "Perlindungan Hukum Terhadap Harta Ahli Waris Dari Pewaris Penjamin Akta Personal Guarantee Di Perusahaan Pailit," *Jurnal Bina Mulia Hukum* 2, No. No 1 (2017): 93-105, <http://jurnal.fh.unpad.ac.id/index.php/JBMH/article/view/jbmh%2Cv1n1%2Ca8>, p. 93.

²⁶ Elvareta Bayu Samudra, "Pendirian Perseroan Terbatas Oleh Suami Istri Tanpa Perjanjian Kawin Ditinjau Dari Undang-Undang No 40 Tahun 2007 Tentang Perseroan Terbatas," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 21, No. 2 (2018): 359-379, <https://doi.org/10.15642/alqanun.2018.21.2.359-379>, p. 359.

²⁷ Kadek Megah Bintaranny, I Nyoman Putu Budiarta, and I Wayan Arthanaya, "Perlindungan Hukum Bagi Kreditur Bank Pada Perjanjian Kawin Dalam Perkawinan Campuran," *Jurnal Interpretasi Hukum* 1, No. 1 (2020): 37-43, <https://doi.org/10.22225/juinhum.1.1.2182.37-43>, p. 37.

Court Decision No. 69/PUU-XIX/2016, Law No. 6 of 2023, and relevant literature. Data is collected through document and literature studies, with a focus on both statutory and historical approaches. Qualitative analysis is used to interpret the data obtained.

C. RESULTS AND DISCUSSIONS

Before discussing the strategy for ratifying the marriage agreement to avoid the responsibility of the wife or husband for the debt of the partnership, the development of the arrangement for the ratification of the marriage agreement, the ratification of the marriage agreement by the marriage registrar or notary official, and the responsibility of the husband or wife of the ally for the obligations of the partnership debt.

1. Development of Marriage Agreement Confirmation Arrangement

The development of marriage agreement ratification arrangements is divided into 3 (three) phases. First, before the presence of Law No. 1 of 1974 as amended by Law No. 16 of 2019 on Marriage ("Marriage Law"). Second, the phase after the enactment of the Marriage Law. Third, after the presence of Constitutional Court Decision Number 69/PUU-XIX/2016.

a. Regulation of Marriage Agreement before the Enactment of the Marriage Law

The marriage agreement is regulated in Articles 139 to Article 154 of the Civil Code. Article 147 of the Civil Code stipulates that: "*A marriage agreement must be made by notarial deed before the Marriage takes place, and will become void if it is not made in such a manner. The agreement shall enter into force at the time of the Marriage, no other time shall be specified for it.*" This article shows that the marriage agreement is a formal agreement.

In case the formal agreements do not comply with legal requirements governing their creation and ratification, they become null and void and cannot be enforced. Experts define a formal agreement as an agreement that is not only based on the agreement of the parties but also by law. It also requires certain formalities that must be fulfilled in order for the agreement to be valid for the sake of law.²⁸

The formalities, for example, about the form or format of the agreement, must be made in the form of an authentic deed. For example, the Power of Attorney to Grant Land Mortgage (*Surat Kuasa Membebankan Hak Tanggungan* or "SKMHT ") must be made by the Land Deed Official (*Pejabat Pembuat Akta Tanah* or PPAT), as mentioned in Article 15 paragraph (1) of Law No. 4 of 1996 on

²⁸ Herlien Budiono, *Ajaran Umum Hukum Perjanjian Dan Penerapannya Di Bidang Kenotariatan* (Bandung: Citra Aditya Bakti, 2009), p. 47.

Mortgage; Deed of Establishment of a Limited Liability Company based on Article 7 paragraph (1) of Law No. 40 of 2007 on Limited Liability Companies; Deed of Granting of Fiduciary Guaranty Right based on Article 5 paragraph (1) of Law No. 42 of 1999 on Fiduciary Guaranty Right; or Deed of Dispute Resolution Agreement through arbitration after the dispute has occurred, as mentioned on Article 9 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Non-fulfillment of legal provisions on how to ratify the agreement, as required by laws and regulations, results in the formal agreement being null and void. Consequently, a marriage agreement is valid under Article 147 of the Civil Code if (a) it is made by notarial deed and (b) it is made before the wedding takes place. If one of these conditions is not fulfilled, then the marriage agreement is null and void.

b. Regulation of Marriage Agreement After the Enactment of the Marriage Law

Article 139 to Article 154 of the Civil Code is no longer valid due to Article 29 of the Marriage Law. This is in accordance with Article 66 of the Marriage Law, as mentioned below:

“For marriage and everything related to marriage based on this law, with the enactment of this law, the provisions stipulated in the Civil Code (Burgerlijk Wetboek), the Indonesian Christian Marriage Ordinance (Huwelijks Ordonantie Christen Indonesiers S.1933 No. 74), the Mixed Marriage Regulations

(Regeling op de gemengde Huwelijken S. 1898 No. 158), and other regulations governing marriage to the extent that have been stipulated in this law, declared invalid.”

Compared to the Civil Code, the Marriage Law has limited regulation of marriage agreements, with only one article, which is Article 29 as mentioned below:

- (1) *At or before the Marriage takes place, both parties, by mutual consent, may enter into a written agreement ratified by the marriage registrar officer, after which the contents shall also apply to third parties to the extent that third parties are involved.*
- (2) *Such agreements cannot be ratified if they violate the boundaries of law, religion, and decency.*
- (3) *The agreement comes into force from the moment the Marriage takes place.*
- (4) *During the Marriage, the agreement cannot be changed unless both parties agree to change and the change does not harm the third party.*

Taking into account the provisions of Article 29 of the Marriage Law, a marriage agreement with a written agreement can be made before or at the time of the Marriage.

The word “may” in Article 29(1) indicates that the provision is optional, so it does not prohibit making a marriage agreement “after” Marriage. In contrast, the word “must” implies an imperative meaning. This argument can be proven by court decisions, such as in the Decision of East Jakarta District Court

Number 2173 / Pdt.P / 2012 / PNJkt.Tim, dated 6 December 2012, and Decision of Surabaya District Court Number 41 / Pdt.P / 2015 / PN. Sby. dated 27 January 2015. These decisions indicate that a marriage agreement may be formed after the marriage ceremony has taken place.

The format of a marriage agreement is flexible; it can be an authentic deed or a privately drawn-up deed. Thus, since the introduction of the marriage law, the marriage agreement has no longer been a formal agreement. This is because Article 29 of the Marriage Law does not contain any provisions regulating that the agreement will become void if not made by notarial deed before the Marriage takes place.

Paragraph (2) of Article 29 of the Marriage Law states that a marriage registrar officer will approve a marriage agreement if it does not cross legal, religious, or moral boundaries. This means the purpose of the probate is to review violations of the law, religion, and morality by the marriage registrar officer. If an agreement violates the law, religion, or morality, it is considered null and void according to Article 1320 of the Civil Code. Therefore, since the beginning, there was never an agreement.

In addition, Article 29 (1) of the Marriage Law does not specify a timeframe for ratification of the marriage agreement, nor does it threaten cancellation if not ratified within a certain period. Consequently, the validity of the marriage agreement is entirely subject to Article 1320 of the Civil Code. This is

because Article 29 paragraph (2) of the Marriage Law is not a formal agreement.

The phrase “after which” in Article 29 paragraph (1) means that after the marriage registrar officer ratifies the marriage agreement, the contents also apply to third parties as long as the third party is involved. During the Marriage, the marriage agreement cannot be changed unless there is an agreement between both parties to change and the change does not harm the third party. The prohibition of making a marriage agreement is entirely subject to Article 1320 jo. Article 29 paragraph (2) of the Marriage Law. The marriage agreement must not violate the boundaries of law, religion, and morality.

Presidential Instruction No. 1 of 1991, dated 10 June 1991, better known as the Compilation of Islamic Law (*Kompilasi Hukum Islam “KHI”*), also regulates marriage agreements. Precisely from Article 45 to Article 52. Article 47, paragraph (1) of the KHI stipulates, “*At or before the marriage takes place, the bride and groom can make a written agreement ratified by the Marriage Registration Officer regarding the position of property in the marriage.*” Furthermore, Article 50 paragraph (1) of the KHI stipulates that “*The marriage agreement regarding property is binding on the parties and third parties starting from the date of marriage before the Marriage Registration Officer.*”

Considering the provisions of the KHI regarding marriage agreements for Islamic communities, it can be seen that the arrangements are not much different

from the Marriage Law. This is because the provisions of Article 4 of the KHI explicitly stipulate that Marriage for Islamic communities remains subject to the Marriage Law.

c. Regulation of Marriage Agreement After Constitutional Court Decision No. 69/PUU-XIX/2016

The provisions of Article 29 of the Marriage Law were blurred, leading to the Constitutional Court Decision (*Mahkamah Konstitusi* or "MK") No. 69/PUU-XIX/2016, as follows: "*Article 29 paragraph (1) of Law Number 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) has no binding legal force as long as it is not interpreted "At the time before it takes place or during the marriage bond both parties by mutual consent may submit a written agreement that is **ratified** by a marriage registrar officer or a notary, after which the contents shall also apply to third parties to the extent that third parties are involved."* The recent decision by the Constitutional Court has strengthened and legitimized the opinions and practices of district court decisions, as previously stated. This means that any marriage agreements signed by the parties while in the bond of marriage before the Constitutional Court Decision Number 69/PUU-XIX/2016 are legally binding in accordance with the provisions of Article 1320 and Article 1338 of the Civil Code, as well as Article 29, paragraph (1) and (2) of the Marriage Law.

The phrase "submit a written agreement ratified by a marriage registrar officer or notary" in Constitutional Court Decision No. 69/PUU-XIX/2016 provides the understanding that (a) the marriage agreement is ratified by the marriage registrar officer or (b) a notary ratifies the marriage agreement. The word "or" in the constitutional court decision indicates that the ratification is optional, not cumulative. Therefore, a marriage agreement can also be ratified by a notary. Then, if a notary has ratified it, it no longer needs to be authorized by the marriage registrar officer.

The problem is that the constitutional court decision did not explain the meaning of the phrase "ratified by a notary"; hence, there is a blurring of norms that creates uncertainty. This is because ratified by a notary does not always mean "made in form notarial deed," as stipulated in Article 147 of the Civil Code.

According to Law No. 2 of 2014, which amends Law No. 30 of 2004 on Notary (*Jabatan Notaris* or "UUJN"), the term "authorized by a notary" mentioned in Article 15 of the UUJN refers to the legal authority given to a notary to perform specific legal acts: (a) certify the signature and determine the certainty of the date of the letter under the hand by registering in a particular book, or (b) book the letter under hand by registering in a particular book. In practice, the two notary powers are known as legalization and *warmerking*. Both notary authorities have authorized the notary to provide

attestation or certainty of the date of registration or attestation regarding the certainty of the date and the parties involved in the signing process. Once this attestation is given, neither party can dispute that they were unaware of the contents of the deed.

It is important to note that the agreement that a notary authorizes is still considered a privately drawn-up deed (*Akta Bawah Tangan* or "ABT"). This means that if the parties have created and signed a marriage agreement from ABT, the notary can only authorize the agreement's registration date and not its contents.

Following the decision of the Constitutional Court in case number 69/PUU-XIX/2016, there currently needs to be more laws and regulations that clearly and firmly govern the process of ratifying marriage agreements for marriage registration. This has led to confusion and uncertainty regarding the norms and procedures involved.

As an illustration for Islamic communities, the KHI has yet to incorporate the Constitutional Court Decision Number 69/PUU-XIX/2016 for those who practice Islam. Conversely, the Ministry of Religious Affairs' Directorate General of Islamic Community Guidance has released Circular B.2674/DJ. III / KW.00 / 9/2017 pertains to the documentation of marriage agreements following the Constitutional Court's decision. In number 1 of the Circular, it is explained that "*The recording of marriage agreements made before marriage,*

at the time of marriage, or during the marriage bond authorized by a notary can be recorded by the Marriage Registration Officer." The problem is that the circular seems to undermine the meaning of the Constitutional Court decision that allows marriage agreements to be ratified by a notary without being recorded again by a marriage registration officer (*Pegawai Pencatat Nikah* or "PPN"). The term "may" in the circular also provides uncertainty because marriage agreements ratified by notaries may or may not be recorded to PPN.

After the decision of the Constitutional Court, it is not appropriate to issue a circular as a follow-up. Circulars are not considered a part of laws and regulations. They are only official texts containing notices, explanations, or instructions binding only on the official agency that issues them. Therefore, to ensure legal certainty following the ruling of the Constitutional Court, there should be further regulation in laws and regulations for the ratification of marriage agreements for Islamic communities.

2. Marriage Agreement Ratification Strategies to Avoid Husband or Wife's Liability for Firm Debt

There are three types of partnership companies in Indonesia: civil partnership (*persekutuan perdata* or *maatschap*), Firm Partnership (Fa), and *commanditaire vennootschap* (CV). These distinctions are based on the different fundamental responsibilities of each type of company.

In a civil partnership (*maatschap*), an ally's actions are the responsibility of all allies unless there is unanimous agreement or consent among them. If all allies agree, they are equally liable for the debts, even if one ally has a smaller income than the others. Since this partnership is not a legal entity, all allies have personal liability. All personal assets of the allies are considered as a single unit with the company assets. If the company's assets are insufficient to pay off its debts, then the personal wealth of the allies is used to fulfill the company's obligations. The personal wealth of the ally's spouse is also considered in this case.

A firm partnership (Fa) is a civil partnership where all members share a common name. This means that each member is authorized to represent the firm without requiring power of attorney or consent from other members. Any actions a member takes are considered binding on the other firm members as long as those actions fulfill obligations to third parties. Unlike civil partnerships (*maatschap*), members of the firm partnership (Fa) do not require power of attorney from other members to act on behalf of the firm. However, all firm members are fully liable on a "solidary" basis, meaning that they share joint and several liabilities with third parties.

Commanditaire Vennootschap (CV) is a business partnership where one or more partners provide capital while another partner manages the business. The legal framework for *Commanditaire Vennootschap* (CV) is derived from two

primary sources: (a) the Civil Code, which governs partnerships in general, and (b) the Commercial Law Code (*Kitap Undang Undang Hukum Dagang* or "KUHD"), which regulates explicitly firms and *Commanditaire Vennootschap* (CV) in Articles 16-35.

Article 19 of the KUHD regulated as follows: "*An alliance by way of borrowing money, also called a communion of commanditers, is held between one or more allies who are personally responsible and for the whole with one or more as lenders of money*" Thus, in a *Commanditaire Vennootschap* (CV), there are one or several commanditer allies. Allied commanders only hand over money, goods, or energy as capital to the partnership. As an ally who only lends capital to the alliance, the commanditer ally is only responsible for the amount of capital that is issued unless he intervenes in managing the *Commanditaire Vennootschap* (CV).

Regarding the accountability of allies for outside legal matters, only complementary allies are responsible for any actions taken with third parties. Complementary allies are personally and wholly responsible for their actions, which differs from the position of allies who are just investors. The responsibility of complementary allies on the CV is the same as the responsibility of the Firm. This responsibility is confirmed in Article 18 of the KUHD, which states that "*In partnership with the firm, each ally is personally and wholly responsible for the actions of the partnership.*"

In practice, each member of the partnership is not held responsible directly for their personal properties. Instead, the first collection is from the firm's assets or cash. If the firm's assets are insufficient to cover the costs, then each ally will be held responsible in a joint and several manner. Each ally should pursue accountability if the creditors want to hold CV accountable. Bearing in mind, all active allied members of the Firm are fully liable in "**solidary**" (*solitaire aanspraakelijkheid*) or **joint liability** (*hooftdelijke aanspraakelijkheid, jointly and several liability*) **to third parties**.

This principle is also regulated in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations ("Bankruptcy Law"). If we want to file for bankruptcy against the Firm/CV, Article 5 of the Bankruptcy Law stipulates, "*The application for bankruptcy statement against a firm must contain the name and residence of each person who is jointly bound to all debts of the firm.*" Therefore, if a creditor files a lawsuit only to one of the complementary allies to hold him accountable, the lawsuit is categorized as *an error in persona* in the form of a *plurium litis consortium* or a less-party lawsuit. In a sense, the party withdrawn as a defendant is incomplete, or other persons must act as plaintiffs or withdrawn as defendants.²⁹ In such a case, the lawsuit needs to be formally qualified. Therefore, the suit is qualified

to contain a formal defect and must be declared inadmissible (*niet ontvankelijke verklaard*).

As explained earlier, Article 29, paragraph (1) of Marriage Law does not specify whether a notary can ratify a marriage agreement. However, attesting to a notary provides certainty of the date of registration. The ratified deed remains a privately drawn-up deed (*Akta Barwah Tangan* or ABT), but the difference is that the ABT has a precise date. Therefore, the party can no longer dispute that they were unaware of the contents of the deed.

Before the issuance of Constitutional Court Decision No. 69/PUU-XIX/2016, married couples had the option of ratifying their marriage agreements with a notary to provide certainty on the date of the agreement. It is important to note that at that time, the marriage registrar officer only accepted the recording of marriage agreements made before the Marriage took place. During that period, individuals had the alternative to seek a determination from the District Court. If the marriage arrangement were not registered with the marriage registrar officer, it would still be upheld by the concerned parties. However, according to Article 29, paragraph (1) of the Marriage Law, the marriage agreement has yet to be enforced by third parties. Similarly, suppose the District Court confirms the validity of the marriage agreement. In that case, it will remain binding on the

²⁹ M Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2014), p. 112.

parties but not on third parties since the marriage registration officer has yet to ratify it.

Before the Constitutional Court Decisions were issued, there was no legal requirement for a court's ruling on a marriage agreement to be ratified by a marriage registrar employee to be binding on a third party. The implications of Constitutional Court Decision Number 69/PUU-XIX/2016 are particularly relevant for marriage agreements entered into during a marriage. First, If the marriage agreement is made after the decision of the Constitutional Court, it can be ratified by a notary or marriage registration official. Second, If a marriage agreement was made before the decision of the Constitutional Court and has obtained a court determination stating that "the property of the married couple has been separated," then the marriage agreement still needs to be ratified by either the marriage registrar or a notary. Please note that the Constitutional Court does not interpret that a marriage agreement can be ratified through a court determination.

The problem is, If a marriage agreement was made and ratified by a notary before the decision of the Constitutional Court, is it necessary to re-ratify it by a notary or marriage registration official? The lack of clarity in this situation leads to legal uncertainty.

It is important to note that ratifying a marriage agreement before or after a Constitutional Court decision will result in the exact date for the agreement. It wouldn't make sense to repeat the

agreement to the notary if the legal consequences were different. Repeating the agreement would only confuse the registration date for the parties involved.

Constitutional Court Decision No. 69/PUU-XIX/2016 provides a specific interpretation of a norm, known as interpretative decisions, as a condition for its constitutionality. Therefore, this interpretation must always apply retroactively from when the norm was created. This is because the interpretation aims to provide a meaning to the norm. This aligns with the Constitutional Court's decision in Number 110-111-112-113/PUU-VII/2009, dated 7 August 2009 (p. 108), where it was stated that interpretative decisions must retroactively apply: *"decisions that give a certain interpretation as a condition of the constitutionality of a norm (interpretative decisions), such decisions must naturally always apply retroactively from the creation of the interpreted legislation, because it is intended to be the meaning given and attached to the interpreted norm."*

There is a blurring of norms regarding the ratification of marriage agreements, leading to "strategies" to avoid partnership debt. For instance, one of the partners may create a marriage agreement after the Marriage has been consummated. Then, they can certify the agreement with a notary (*warmmerking*) without notifying the third party.

The strategy of ratifying a marriage agreement is legal because there is still a blurring of norms that can be interpreted. However, this strategy can be misused

by business actors who are allies in the partnership and/or by a notary (“rogue notary”) to avoid debt obligations of business actors who are allies in the partnership to creditors or third parties. In addition, this can harm the states as creditors in corporate tax debt.

Creditors, third parties, and states need to have the ability to hold allies responsible for their wealth, which includes the property owned by their spouses. However, when a marriage agreement is formally ratified by a notary (*warmeking*), the property of the ally’s spouse becomes exempt from being seized to fulfill the partnership’s debt obligations.

This study proposes a norm to make arrangements for announcing the marriage agreement as a form of publicity, which can better protect the interests of third parties. If it is difficult to realize the proposed norm, the government should integrate data on legalizing marriage agreements in notaries with those on marriage registration employees. This can be achieved by creating new information systems or utilizing existing ones. By doing so, both notaries and marriage registrars can access the system.

D. CONCLUSIONS

After the decision of the Constitutional Court Number 69/PUU-XIX/2016, there is confusion surrounding the norms related to the regulation of the ratification of marriage agreements. This confusion can be exploited as a “strategy”

in ratifying marriage agreements to avoid partnership debt. Moreover, business actors and/or a notary (“rogue notary”) can misuse the existence of a marriage agreement. Therefore, to safeguard the interests of creditors or third parties, it is imperative to regulate the obligation to announce the marriage agreement as a form of publicity. Alternatively, the data on the legalization of the marriage agreement at the notary should be integrated with that of the marriage registrar employee in one information system.

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