



Juridical Implications of Postnuptial Agreement for Creditors from the Perspective of Legal Certainty

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Abstract

Background. The implementation of postnuptial agreements following the Constitutional Court Decision Number 69/PUU-XIII/2015 often creates legal uncertainty for creditors due to the sudden separation of assets carried out in the middle of a marriage.

Aims. This study aims to analyze the juridical implications of making a marriage agreement after marriage on the position of the creditor as a third party from the perspective of legal certainty.

Methods. The research method used is normative legal research with a statutory approach and a conceptual approach.

Result. The results show that the separation of assets through a postnuptial agreement results in a change in the status of debt guarantees, which were originally community property into personal property, thereby potentially reducing the creditor's general security rights as regulated in Article 1131 of the Indonesian Civil Code. In order for such an agreement to be binding on third parties, the principle of publicity through registration with the relevant authorities (the Population and Civil Registry Office or the Office of Religious Affairs) must be strictly fulfilled. Without valid registration, the marriage agreement is only binding internally between the husband and wife and cannot be enforced against creditors.

Conclusion. Legal protection for creditors can be pursued through preventive measures, such as asset status verification by a Notary before signing credit agreements, as well as repressive measures through the filing of an Actio Pauliana lawsuit if it is proven that the debtor acted in bad faith to evade collateral assets through the asset separation mechanism to avoid debt repayment.

Keywords: Postnuptial Agreement, Creditor, Legal Certainty, Publicity Principle, Actio Pauliana.



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INTRODUCTION

Marriage is a sacred bond that at the same time has essential legal implications, especially in the management and ownership of property jointly between husband and wife. Based on the provisions of Indonesian marriage law, all assets acquired during marriage are automatically categorized as joint property, unless the two parties draw up an agreement that states different provisions. This joint property plays an important role because it functions as collateral (*boedel*) that bears all debts or financial obligations incurred by one or both partners. This property regulation has a dual purpose: to provide financial security for the family and at the same time to ensure certainty of accountability to outsiders. A comprehensive understanding of the status of this wealth becomes an essential foundation before a married couple enters into an agreement or alliance with a third party ¹.

The philosophy of making a marriage agreement lies in the principle of freedom of contract recognized by civil law. Husband and wife have the right to manage their own property, either by separating it completely or partially. This agreement aims in principle to give autonomy to the parties to modify the provisions of the law regarding common property. In addition, a marital property separation agreement acts as a preventive measure to protect one party from the risk of business losses or debts incurred by the other spouse. Notaries often facilitate the creation of marriage agreement deeds to strengthen the essence of the couple's prudence and good faith in managing the family's financial assets.

According to Indonesia's positive law, marriage agreements are traditionally regulated in Article 29 of Law Number 1 of 1974 concerning marriage, hereinafter referred to as the UUPA. The provision requires that the agreement must be drawn up before or at the time of the marriage. In addition, the agreement must be ratified by a Notary, so it has binding legal force. This old provision guarantees the creation of high legal certainty because the status of the marital property is final and open from the first day of marriage. The creditor or third party can find out the limitations of the assets that the spouse can account for before they enter into an engagement relationship with the creditor.

However, the law regarding marriage agreements has undergone significant changes after the Constitutional Court Decision Number 69/PUU-XIII/2015. The ruling provides a new

¹ Moh. Reza Dedi Putra, Dyah Ochtorina Susanti, and Moh. Ali, 'The Principle of Legal Certainty for Third Parties on Marriage Agreements Made After Marriage', *Journal of Law*, 10.2 (2021), 123–40 <<https://doi.org/10.56013/rechtens.v10i2.1026>>.

interpretation that enlarges the period for the preparation of a marriage agreement, namely it is allowed to be made while the marriage is in progress. This change fundamentally erodes the long-held principle of legal certainty, because agreements can be made at any time. The flexibility of the time to make this marriage agreement has the potential to harm third parties who are already bound by the agreement (creditors) with a married couple. The drafting of the post-marital agreement must be based on good intentions and must not give a pre-existing third party a loss ².

For example, the Supreme Court jurisprudence case Number 473 K/Pdt/2007 shows that there is a dispute where a husband (Debtor) who is bound by a large debt with the bank (Creditor), then tries to avoid the responsibility of the debt by making a Property Separation Agreement with his wife. This agreement strategically moves assets from the joint property to the wife's personal property, with the aim of preventing foreclosure by banks. However, the creditor countered this action by filing a lawsuit *Actio Pauliana* (Article 1341 of the Civil Code), arguing that the agreement was made with bad intentions and directly harmed the creditor's existing billing rights. The Supreme Court upheld the Creditors' demands, affirming the legal principle that all legal acts, including changing the status of property through a marriage agreement, which are proven to be detrimental and carried out after the incursion of debts, can be canceled in order to protect the rights of the Creditor in good faith.

The main legal issues that arise from this change include the dilemma between the freedom of contract of married couples and legal certainty for third parties, as well as challenges in enforcing the principle of good faith as referred to in Article 1338 of the BW. The 2015 Constitutional Court ruling has opened the door to potential abuse of marriage agreements to avoid debt liability, which could disrupt national economic stability and trigger further litigation. Therefore, additional regulations or stricter notary guidance are needed to ensure that the post-nuptial agreement does not harm the legitimate creditors, but still respects the couple's autonomy in managing their assets.

In addition to the issue of the time of the validity of the agreement, another aspect that is no less important is the fulfillment of the principle of publicity through the recording of the marriage agreement. If it is not officially recorded, the marriage agreement is only binding

² Tutus Chariesma Putra and Tjempaka, 'Certainty of Post-Marriage Legal Protection for Third Parties Regarding Marriage Agreements', *Unes Law Review*, 6.4 (2024), 10864–72 <<https://review-unes.com/https://creativecommons.org/licenses/by/4.0/>>.

between the parties who formed it and does not apply to a third party. This situation creates legal uncertainty, especially for creditors who are not aware of changes in property status. Therefore, publicity is an important factor in determining the validity of postnuptial agreements outside of the internal relationship between husband and wife.

The urgency of this in-depth understanding of marriage agreements is particularly high in the context of an increasingly complex Indonesian society, where the high divorce rate and household debt demand strong financial protection for couples and families. Without a timely agreement, the risk of financial loss can befall one party due to the debts of the other spouse, while the creditor may lose legal collateral if the agreement is made later. This is important to prevent family conflicts and economic uncertainty, especially in the era of digitalization where financial transactions between third parties are getting easier and faster.

LITERATURE REVIEW

Joint Property in Marriage

Marriage is a legal relationship between a man and a woman that is eternal, where both of them bind themselves together to build a prosperous and harmonious family. This definition emphasizes that marriage is not just a conventional civil contract, but a legal institution with moral and spiritual dimensions that directly gives rise to rights and obligations, including the regulation of the position of property and the protection of offspring who are born ³.

Joint property is defined as all property acquired during the current marriage period, regardless of whose name the property is recorded. The concept of joint property is automatically created for the sake of the law since the occurrence of a legal marriage, where both parties have the same right to own and use the property for the benefit of the household. This implies a mutual obligation that all legal acts related to the property, including making it a debt guarantee or selling it, ideally require obtaining permission from each other as a unit of innate ⁴bonds.

Marriage Agreement

A marriage agreement is defined as a written agreement formed by a husband-to-be and a wife-to-be before or when the marriage contract is made, to determine the marital implications for their property. The essence is to depart from the principle of property unity

³ subjects, *Principles of Civil Law* (Jakarta: PT. Intermasa, 2014).

⁴ Sayuti Thalib, *Indonesian Marriage Law* (Jakarta: Sinar Grafika, 1986).

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regulated in the law, so that couples can choose to separate property in whole or partially. The goal is to protect the financial interests of each party from potential risks, such as debts and receivables brought by one of the parties, as well as to ensure legal certainty regarding the ownership of assets obtained either before or after the marriage⁵ occurs.

Publicity Basics

Based on civil law literature, the principle of publicity is a fundamental pillar that guarantees transparency of an act or legal situation so that it can be known by third parties. Theoretically, this principle requires that every legal act be made public in order to affirm legal guarantees and protection for third parties⁶. Judging from its function, this principle ensures that an agreement or legal state has a binding force that goes beyond the private realm (*inter partes*) and penetrates into the public realm (*erga omnes*). This is crucial so that outsiders who have related interests can adjust their legal actions based on the open information⁷. The mechanism for the realization of this principle is generally carried out through the procedure of official announcement or registration with the authorized agency, so as to create a standardization of information that provides a sense of security for legal traffic⁸. In addition, in the scope of material rights, the principle of publicity requires that there be an announcement of changes or imposition of certain rights. Without the fulfillment of this aspect of notification to the public, a legal act is often considered to have no validity to a third party, even if internally among the parties it has been considered legitimate⁹.

Experts state that the principle of publicity aims to create transparency in legal traffic and ensure legal guarantees against third parties against a legal act. In the framework of civil law, the fulfillment of the principle of publicity is a condition for a legal act to have legal consequences that are not only internal, but also external for third parties. On the other hand, if a legal act is not announced or is not acted upon in accordance with the applicable provisions, then basically the act is only binding on the parties making it and does not have legal legitimacy against third parties.

⁵ Wirjono Prodjodikoro, *Marriage Law in Indonesia* (Bandung: Sumur Bandung, 1996).

⁶ Riduan Syahrani, *Intricacies and Principles of Civil Law* (Bandung: Alumni, 2004).

⁷ subject. *Op. Cit.* p. 25

⁸ Mariam Darus Badruzaman, *Miscellaneous Business Law* (Bandung: Alumni, 1994).

⁹ Sri Soedewi Masjchoen Sofwan, *Civil Law: Property Law* (YogyakartaLL: Liberty, 1991).

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Marriage agreements, the principle of publicity is normatively realized through the obligation to record the marriage agreement as stipulated in Article 29 paragraph (1) of the UUPA, which states that the marriage agreement must be valid by the marriage registrar employee so that it also applies to third parties. Thus, the recording is a concrete form of the principle of publicity that determines the applicability of the marriage agreement widely. Without registration as a form of publicity, a marriage agreement including the separation of property does not necessarily create a legal guarantee for a third party, because the third party does not have access to know the existence of the agreement.

Legal Protection Theory

According to Philipus M. Hadjon, legal protection is the main pillar of the legal state which is basically divided into two ways, namely preventive and repressive legal protection. Preventive legal protection is focused on avoiding the emergence of losses or disputes, manifested through the establishment of clear and transparent regulations, such as the obligation to register a Marriage Agreement (Publicity Principle), so that creditors can know the status of debt collateral from the beginning. Repressive Protection serves to follow up on problems that have arisen, as well as judicial institutions (courts) to act to restore rights that have been violated or provide compensation, for example, through the *Actio Pauliana mechanism*, which allows creditors to cancel Marriage Agreements that are proven to be formed in bad faith and to their detriment. Thus, Hadjon's theory ensures that legal protection is not limited to the formation of rules, but rather the guarantee of the restoration of rights through a fair judicial process¹⁰.

Actio Pauliana

Actio Paulina is the right obtained to request the cancellation of legal actions that are not required to be taken by the debtor against a third party deliberately in bad faith, because it is known that it will harm the interests of creditors. This mechanism serves as a repressive protection for creditors to withdraw assets that have been fraudulently transferred by the debtor, for example, through grants or fictitious sales, into the debtor's remaining wealth so that it can still be used as collateral for the repayment of his debt. This provision is juridically regulated

¹⁰ Philipus M. Hadjon, □ *Legal Protection for the People in Indonesia: A Study of the Principles, Their Application by the Courts in the Environment of the General Judiciary and the Establishment of the State Administrative Court* (Surabaya: PT Bina Ilmu, 1987), pages 2-20

in Article 1341 of the BW, which requires proof so that both the debtor and other parties have their actions that will result in a shortage of assets for the repayment of creditors' receivables¹¹.

Previous Research

1. Moh. Reza Dedi Putra et al. (2021) in their research highlighted the function of joint property as debt collateral and its legal consequences for third parties. The results of this study emphasize the importance of transparency of property status to avoid financial risks, given the increase in litigation related to post-marital debt in court. The relevance of this research lies in the basic understanding of the position of property as an object of collateral before separation¹².
2. Tutus Chariesma Putra & Tjempaka (2024) in his research through an analysis of 50 court decisions, this study determined the real risk for creditors due to changes in the time of making a marriage agreement. The results recommend strengthening the principle of good faith as an instrument to prevent the abuse of agreements that harm third parties. This research is an important reference in seeing the trend of legal protection for creditors after the Constitutional Court's decision¹³.
3. Gede Agung Wirawan Nusantara (2024) in his research emphasized that the Constitutional Court Decision Number 69/PUU-XIII/2015 has reached more widely related to the making of marriage agreements so that it can be carried out throughout the marriage period with a receding practice since the marriage began. The logical consequence of the separation of this property to the credit agreement is the creation of financial independence; Each party bears the burden of his or her own debts, both before and during the marriage. Thus, the property of one spouse remains protected and cannot be used as an object of confiscation if the other spouse defaults¹⁴.
4. Respati Nadia Putri, et al. (2019) in their research specifically examines the role of Notaries in providing preventive legal protection for creditors through the requirements of authentic deeds. The results of the study stated that Notaries are obliged to conduct an inventory of

¹¹ Mariam Darus Badruzaman, *The Law of Alliances in BW* (Bandung: PT Citra Aditya Bakti, 2015).

¹² Putra, Susanti, and Ali. *Op. Cit.* p. 123

¹³ Son and Son. *Op. Cit.* p. 10864

¹⁴ Gede Agung Wirawan Nusantara, 'IMPLICATIONS OF THE PROPERTY SEPARATION AGREEMENT IN THE SIGNING OF CREDIT AGREEMENTS', *Y U S T H I M A Yusthika Mahasaraswati*, 04.01 (2024), 189–206 <<https://doi.org/10.36733/yusthima.v4i1>>.

the assets of the husband and wife before the ratification of the deed to ensure that there is no guarantee of debt that is eliminated unilaterally. This research strengthens the author's position in analyzing the responsibility of legal professionals in maintaining economic certainty¹⁵.

5. Fitri Mindari Handayani (2024), in her research, focuses on the protection of creditors' preferred rights guaranteed through the principle of *droit de suite* in material guarantees. The results of this study provide a basis for repressive legal remedies through *Actio Pauliana's* lawsuit if *the postnuptial agreement* proves to be detrimental to creditors. This is very much in line with the author's research variables regarding the guarantee of rights restoration for third parties¹⁶.

This research has novelty in integrating the analysis between the principle of publicity and the dimension of the time of the validity of the agreement, namely the principle of retroactivity and non-retroactivity, in *the postnuptial agreement*. In contrast to previous research that tended to discuss the aspects of creditor protection or the validity of agreements separately, this study places these two aspects in one complete framework to explain how the legal certainty of the separation of assets is formed as well as how the agreement becomes binding on third parties. This study highlights the legal consequences and constructs the relationship between the internal validity and the external effectiveness of the marriage agreement.

In addition, the renewal of this research lies in the use of a theoretical approach that combines the legal protection theory of Philipus M. Hadjon with the analysis of *actio pauliana* in the context of *postnuptial agreement*. This study specifically classifies the form of legal protection for creditors into preventive protection through the principle of publicity and repressive protection through the *actio pauliana mechanism*. This approach makes a new contribution to understanding that the protection of third parties depends not only on corrective efforts after the loss has occurred, but also on the initial mechanism that guarantees the openness and legal certainty since the agreement was made through the principle of publicity.

¹⁵ Nanda Anisa Lubis Respati Nadia Putri, Sonny Dewi Judiasih, 'LEGAL PROTECTION OF CREDITORS AND NOTARY'S EFFORTS TO MAKE MARRIAGE AGREEMENTS AFTER MARRIAGE Respati', *Researchgate.Net*, 5.2 (2019), 464–91 <<https://doi.org/10.25123/vej.3353>>.

¹⁶ Mindari Handayani, 'The Position of the Marriage Agreement Made After Marriage Against a Third Party', *Erapublikasi*, 3.1 (2024), 90–106.

METHODS

Types of Research

The approach of this research is empirical law, also known as sociological or non-doctrinal legal research, which is a method that aims to observe law as an actual *behavior*¹⁷. This research is focused on analyzing the application of the law in reality to individuals and legal institutions with an emphasis on actual behavior related to the implementation of *postnuptial agreements*.

Research Approach

To analyze the treatment and relationship when normative construction (the principle of publicity in *postnuptial agreements*) works in society and related institutions, the approach used is ¹⁸:

1. Legislative Approach: A study of laws and regulations relevant to the legal issues being studied, as a legal basis to review the reality of the field. Among them are Article 29 and Article 35 of the UUPA, Article 1131 and Article 1341 of the BW, as well as the Constitutional Court Decision No. 69/PUU-XIII/2015.
2. Conceptual Approach: Views and doctrines that develop in legal science to understand the concept of legal protection for third parties. Among them are the Principle of Publicity, the Theory of Legal Certainty, and the Theory of Legal Protection.

Data Source

There are two sources of data, namely:

1. Primary Data: Data is obtained immediately at the research site ¹⁹. Primary data was obtained through interviews with Notaries, KUA employees, and bank employees in Cirebon City.
2. Secondary Data: Supporting data obtained through literature studies and legal documents.

This secondary data ²⁰includes:

¹⁷ Wiwik Sri Widiarty, *Textbook of Legal Research Methods*, (Yogyakarta: Publika Global Media, 2024), page 37.

¹⁸ Johnny Ibrahim, *Theory and Method of Normative Law Research*, (Malang: Bayumedia, 2005), page 300.

¹⁹ Muhaimin, *Legal Research Methods*, (NTB: Mataram University Press, 2020), page 89.

²⁰ Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review* (Jakarta: CV. Rajawali, 1986), page 31.

- a. Primary Legal Materials: Laws and regulations (such as the Marriage Law and the Civil Code).
- b. Secondary Legal Materials: Law textbooks, legal journals, and legal research results related to *postnuptial agreements*.
- c. Tertiary Legal Materials: A legal dictionary and encyclopedia that provides guidance on other legal materials.

Population and Sample

The population is all research objects that have the same aspect ²¹, namely practitioners and employees of agencies that handle or are affected by *postnuptial agreements* in the Cirebon City area (Notaries, KUA employees, and bank employees). Because the population is so large, the researcher took samples from a certain population to adjust the data needed ²². The technique used to take samples was non-random sampling with purposive sampling, namely one notary, one KUA employee, and one bank employee. All of them are domiciled in Cirebon City.

Data Analysis Techniques

The data processing technique applied is qualitative analysis. Because the data collected is not in the form of numbers, this analysis is carried out through the decomposition of the data into sentences that are structured, logical, and complementary, thus facilitating the interpretation process ²³.

The nature of analysis in this study is descriptive-prescriptive, that is, presenting facts in the field systematically and then providing arguments or assessments about what should be legal about these facts ²⁴. It starts with re-checking the completeness and clarity of the interview answers, categorizing respondents' information according to the aspect and formulation of the problem, and compiling the data in a sequential manner to facilitate analysis with the help of legal theories that have been collected in the theoretical foundation.

²¹ Salim HS and Erlies Septiana Nurbani, *Application of Legal Theory in Thesis and Dissertation Research*, (Jakarta: Raja Grafindo Perkasa, 2013), page 26.

²² Sigit Sapto Nugroho, et al., *Legal Research Methodology*, (Palur Wetan: Oase Pustaka, 2020), pages 82-83.

²³ Ishaq, *Legal Research Methods and Writing Thesis, Thesis, and Dissertation*, (Bandung: Alfabeta, 2017), page 69.

²⁴ Wiwik Sri Widiarty, *op.cit*, p. 37.

Conclusion Drawing Technique

Drawing conclusions using the inductive thinking method. The inductive method is a perspective that starts from a detailed factual backing in the field (the results of interviews with Notaries, KUA, and banks in Cirebon) until more general in order to achieve findings regarding the role of publicity principles and forms of legal protection for creditors. The conclusion is a synthesis of research findings that completely answer all the formulations of the problems proposed²⁵.

DISCUSSION

Legal Certainty and Enforceability of Postnuptial Agreement to Third Parties in Property Separation

Analysis of the Application of Retroactive and Non-Retroactive Principles in *Postnuptial Agreement* to Determine the Time of Validity of Marriage Agreements

The retroactive and non-retroactive principles in *postnuptial agreements* show that there is flexibility in the time for the validity of the marriage agreement after the change in law after the Constitutional Court Decision. The change allows married couples to decide for themselves when the agreement takes effect, both from the moment the marriage takes place and since the signing of the deed ²⁶. The findings of the study show that the choice of the time for the validity of this agreement is not just an administrative technicality, but determines the legal construction of the status of property in marriage. Practice in the field, as conveyed by notaries in Cirebon City, shows that the parties often do not understand the implications of the choice. This raises the need to interpret retroactive and non-retroactive principles appropriately in their implementation.

The retroactive principle basically means that an agreement applies retroactively to the period before the agreement was made. In a *postnuptial agreement*, this principle is reflected when the parties determine that the agreement is valid from the beginning of the marriage. This condition causes the separation of property to be considered to have existed since the beginning of the marital relationship. However, the results of the study show that the application of the

²⁵ Abdulkadir Muhammad, *Law and Legal Research*, (Bandung: Citra Aditya Bakti, 2004), page 8.

²⁶ Erlina and Muhammad Fathinnuddin, *The Legal Impact of the Enactment of the Marriage Agreement (Postnuptial Agreement) from the Date of the Deed to Joint Property in Marriage*, IBLAM Law Review, Volume 5 Number 3, 2025, pages 25-33.

retroactive principle must be strictly studied based on the conditions for the validity of the agreement as referred to in Article 1320 of the Civil Code (BW).²⁷ This means that retroactivity cannot be freely enforced if it is contrary to the law or the agreed object does not meet the provisions of the law.

The application of the retroactive principle is basically inseparable from the principle of freedom of contract in an agreement. The results of interviews with notaries in Cirebon City show that the practice of applying the retroactive principle does not run independently, but must still comply with the provisions listed in Article 1337 of the BW. This is the main benchmark for the application of the retroactive principle in *the postnuptial agreement* regarding when the separation of property occurs. In other words, the retroactive principle has limitations in its application and is not always absolutely acceptable²⁸.

In contrast to the retroactive principle, the non-retroactive principle asserts that an agreement is only valid from the moment it is established and does not affect the previous legal situation. In *a postnuptial agreement*, this principle is seen when the parties determine that the agreement is valid from the date the deed is made. Consequently, property acquired before the date of the marriage is still categorized as joint property²⁹. This approach is easier to understand because it provides certainty to the status of existing assets and is also considered more realistic in administrative and proving practices.

The principle of non-retroactivity provides a clear temporal limit on the applicability of the marriage agreement. These limits serve to maintain the consistency of legal relationships that have been formed before the agreement was made. Research shows that common property that has been formed before the agreement is made still follows the legal provisions that apply at the time the property is acquired³⁰. Therefore, changes through agreements cannot unilaterally change the legal status of the past. This reinforces the position of the principle of non-retroactivity as a principle that maintains legal stability in the marital relationship.

The regulation of the time of validity of the marriage agreement also shows that there is a normative choice between retroactive and non-retroactive. The provisions of the law provide

²⁷ Nurul Jinan and Daly Erni, *The Validity of the Principle of Retreating in Postnuptial Agreement in Relation to Protection for Third Parties*, Indonesian Notary Journal, Volume 5 Number 4, 2024, pages 122-142.

²⁸ Galang Rasyiq Suyudi, Personal interview with a Notary in Cirebon City, Cirebon, February 24, 2026.

²⁹ Tina Marlina, et al., *Textbook of Marriage and Inheritance Law*, (Yogyakarta: Deepublish, 2022), page 10.

³⁰ Muhammad Dhafin Almanda Fauzan, et al., *The Position of Marriage Property That Is Being Pledged: A Study of the Consequences of Making Postnuptial Agreements*, Unes Law Review, Volume 6 Number 4, 2024, pages 10923-10931.

flexibility for the parties to regulate the applicability of the provisions themselves, provided that they do not deviate from the applicable law. In practice, as conveyed by Cirebon City KUA employees, the recording of agreements is an important factor in determining the effectiveness of the agreement. An unrecorded agreement does not give rise to legal consequences against a third party, so its effect and enforceability are limited to the scope of the internal relationship between the parties who made the agreement ³¹. This shows that the formal aspect also affects the implementation of the principle of the time of the agreement.

An analysis of both principles shows that retroactive and non-retroactive are not just technical choices, but rather reflect different approaches to regulating legal relationships. The retroactive principle seeks to reconstruct past legal conditions, while the non-retroactive principle maintains the prospective applicability of the law. Both have an impact on the arrangement of assets in marriage and the legal relationship between the parties. Therefore, the selection of the principles to be applied should be carried out carefully and consider all relevant legal aspects, in line with the principle of prudence that must be applied in the preparation of the agreement ³².

The results of the study also show that the parties' understanding of the two principles is still limited. Many couples only focus on the purpose of the separation of assets without understanding the implications of the timing of the agreement. Notaries have an important role in explaining the difference between retroactive and non-retroactive so that misinterpretations do not occur. This is important because the principles in the agreement serve as a guideline in the formation and implementation of the agreement ³³. Thus, understanding the principle of the time of validity of the agreement is an integral part of the validity and effectiveness of *the postnuptial agreement*.

In Hans Kelsen's nomodynamic perspective, *a postnuptial agreement* is understood as a *juristical act* that creates individual legal norms for the parties³⁴. This agreement is a manifestation of private autonomy in which individuals are empowered by the legal system to regulate their own relationships. As a system of norms, the validity of this agreement does not

³¹ Joy Prananta Barus, *The Application of the Publicity Principle to the Issuance of Marriage Agreements Made After the Marriage Takes Place*, Unes Journal of Swara Justisia, Volume 8 Number 3, 2024, pages 512-523.

³² Respati Nadia Putri, et al., *Op. Cit.* p.

³³ Santy Fitnawati WN, et al., *Main Principles in Agreements: Indonesian Civil Law Perspectives*, Journal of Law, Public Administration, and Communication Sciences: Constitution, Volume 2 Number 1, 2025, pages 292-297.

³⁴ Jimly Asshiddiqie and M. Ali Safa'at, *Hans Kelsen's Theory of Law*, (Jakarta: Secretariat General & Clerk of the Constitutional Court of the Republic of Indonesia, 2006), page 137.

depend on the psychological facts of the current "desire", but on the procedure of its legitimate formation. Therefore, its temporal applicability is a crucial aspect in determining the validity area of the norm.

The non-retroactive principle in this agreement is in line with Kelsen's view of laws that can hurt feelings of justice if applied retroactively. Normatively, the subject of law should be able to know the consequences of his actions before the norm should take effect ³⁵. Without this certainty, the function of law as a social technique to regulate human behavior through motivation will not be effective. Therefore, in general, this agreement is only binding on events or deeds that occur after the agreement is ratified.

Rather, Kelsen states that based on formal legal logic, there is no absolute barrier to retroactively enforcing a norm. If a higher legal system or norm provides authorization, then past facts can be re-evaluated using new norms as glasses or standards to determine the right or wrong of the event. In a *postnuptial agreement*, the retroactive element allows the parties to requalify the status of assets acquired before the agreement was made. This shows that the period of validity of the rule can be withdrawn as long as it is expressly determined in the content of the norms of the agreement itself.

Using the nomostatic analysis knife, sanctions or legal consequences in this agreement remain an essential element of a coercive order. Whether retroactive or non-retroactive, the validity of treaty norms remains rooted in the delegation of authority from a higher norm in the legal hierarchy, such as a statute or constitution. Kelsen emphasized that legal fiction regarding legal knowledge still applies, so ignorance of the content of the agreement does not exempt the parties involved from obligations. Legal certainty is finally achieved when the content of the agreement becomes an objective assessment standard for law enforcement organs.

In conclusion, the separation between the world of fact (*sein/is*) and the world of norms (*solelen/ought*) clarifies the position of these two principles in *the postnuptial agreement* ³⁶. The non-retroactive principle maintains the stability of behavioral predictions, while the retroactive principle provides the flexibility of formal legal status rearrangement for the parties. Both are considered valid as long as they are derived from procedures recognized by a dynamic

³⁵ Al Rhega Caesar Grestiano Kolang, *Legal Positivism Project in Pure Legal Theory Hans Kelsen*, FH UNHAS Thesis, 2023, pages 1-15.

³⁶ Putera Astomo, *Comparison of Hans Kelsen's Thoughts on Law with Satjipto Rahardjo's Ideas on Progressive Law Based on Legal Theory*, Journal of Justice, Edition 90, 2014, pages 1-11.

legal system. Thus, the agreement becomes part of a chain of law formation whose validity finally leads to a basic norm (*Grundnorm*).

Analysis of the Application of the Principle of Publicity in *Postnuptial Agreement* to the Applicability of the Agreement to Third Parties

The principle of publicity in a *postnuptial agreement* places the marriage agreement not only as an internally valid legal instrument, but also as an agreement that must be known by the other party. Marriage agreements are basically not enough to only meet legal requirements, but must also be announced through a recording mechanism in order to obtain wider binding power. Legal provisions indicate that a marriage agreement can be binding on a third party, especially if the party is related to the content of the agreement and the formal conditions are met³⁷. Thus, the principle of publicity serves as a bridge between the validity of the agreement and its enforceability outside the marital relationship.

The principle of publicity is concretely realized through the obligation to record marriage agreements with the authorized agencies. The legal provision asserts that the agreement must be ratified by the marriage registrar, which substantially means that the agreement must be registered with the Office of Religious Affairs for Muslim marriages or the Civil Registry for marriages outside Islam. The meaning of "ratified" is not only limited to formal ratification, but also contains administrative consequences in the form of official registration. Without such records, the agreement does not obtain recognition in the legal administrative system. This shows that publicity is an important condition for the effectiveness of the agreement³⁸.

Recording directly affects the enforceability of the marriage agreement against a third party. Agreements that have been recorded are binding on external parties regarding their contents, while those that are not recorded only apply internally between husband and wife. Research confirms that without recordkeeping, the agreement does not cause legal consequences for creditors or other interested parties³⁹. Therefore, the difference between recorded and unrecorded agreements becomes very significant in practice.

³⁷ Joy Prananta Barus, *Op. Cit*

³⁸ Wahyu Perkasa Oktavio, *The Application of the Principle of Publicity in Complete Systematic Land Registration in Sawahlunto City, West Sumatra Province*, Unes Law Review, Volume 5 Number 1, 2022, pages 138-151.

³⁹ Erina Nur Afifa, et al., *Settlement of Disputes for Separation of Joint Property After the Making of a Marriage Agreement During the Marriage Period*, USM Law Review Journal, Volume 8 Number 3, 2025, pages 2314-2331.

The results of field research show that there are still many marriage agreements that are not recorded immediately after they are made. This condition is understood as a form of lack of awareness by the parties of the importance of recording as part of fulfilling the principle of publicity. The function of recording is not just a formality, but as a means of legal publication so that the existence of the agreement can be known by other interested parties. Administratively, a marriage agreement that is not submitted for registration cannot be entered into the marriage registration register ⁴⁰.

The making of *postnuptial agreements* is generally understood as the fulfillment of formal validity through an authentic deed, but it is not always followed by adequate attention to the obligation to record as a form of publicity principle. There is a tendency that the parties consider that making an agreement before a notary is sufficient, so that registration at the marriage registrar agency is not a priority⁴¹. This situation results in an authentic agreement not necessarily binding on a third party if it is not immediately recorded. Without record, the agreement is only valid internally and does not affect outside parties legally. The role of notaries is not limited to making deeds, but also encourages the parties to realize the urgency of recording.

This condition is in line with the principle of privity of contract which emphasizes that an agreement in principle is only binding on the parties concerned in the agreement and does not automatically give rise to rights or obligations to third parties outside the agreement ⁴². The non-recording causes the *postnuptial agreement* to remain within the scope of the internal relationship between husband and wife. Third parties cannot be burdened or bound by the content of the agreement due to the absence of publication that would allow them to know the existence of the agreement. Thus, the principle of personality prevails predominantly when the principle of publicity is not fulfilled. This shows that publicity serves to expand the binding power of the agreement from being originally personal to having legal consequences for third parties.

An analysis of the principle of publicity reveals that this principle is not just an administrative formality. This principle has a substantial function in determining the

⁴⁰ Raging Rashid Suyudi. Interview *Op. Cit*

⁴¹ Raging Rashid Suyudi. Interview *Op. Cit*

⁴² Muhammad Nur Alamsyah, et al., *The Inclusion of Heirs Clauses in Credit Agreements Associated with Personality Principles*, MANDUB: Journal of Politics, Social, Law and Humanities, Volume 3, Number 2, 2025, pages 24-39.

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recognition and enforceability of an agreement to other parties outside its makers. In the absence of publicity, agreements still exist as agreements, but their enforceability is limited to the internal scope. This confirms that publicity serves as an external condition for the legal effectiveness of an agreement ⁴³. Therefore, recording is an integral part of the legal structure of the *postnuptial agreement*.

The comparison between validity and publicity shows that there are different dimensions in the law of marriage agreements ⁴⁴. Validity is related to the fulfillment of the material and formal requirements of the agreement, while publicity is related to the expansion of the binding power of the agreement against third parties. These two aspects complement each other, but cannot be equated. A legally valid agreement is not necessarily applicable to a third party if it does not meet the principle of publicity, since its enforceability to an outside party requires clear recording and announcement. This shows the dualism between internal validity and external effectiveness in the marriage agreement.

The relationship between the principle of publicity and the choice of the retroactive principle shows that there is a limit to the effectiveness of the enforceability of the marriage agreement. The agreement of the parties that stipulates the validity of the agreement from the beginning of marriage does not necessarily bind the third party if it is not followed by registration. The provisions of the law affirm that the enforceability of the agreement against third parties is highly dependent on the fulfillment of the element of publicity through official registration with the authorized agency. Thus, retroactivity only operates in the internal relationship of husband and wife if it is not published. This suggests that the retroactive principle cannot extend the legal consequences to the past against third parties without being supported by the principle of publicity ⁴⁵.

In contrast, the application of the non-retroactive principle suggests a more aligned relationship with the principle of publicity in practice. An agreement that is in effect from the date of the deed and immediately recorded will have a clear temporal limit and be followed by administrative recognition. Research shows that unrecorded agreements are only binding on

⁴³ Nur Lailah, et al., *The Principle of Publicity in Guarantee Law: A Critical Study of the Perspective of Creditor Protection*, Al-Muamalat: Journal of Sharia Law & Economics, Volume 10 Number 2, 2025, pages 53-69.

⁴⁴ Carmenita Angelina Sormin, et al., *Personal Data Protection and Its Relation to the Principle of Publicity on Electronic Land Certificates*, Jurnal Recht Jiva, Volume 2 Number 1, 2025, pages 86-105.

⁴⁵ Budi Suranto Bangun, et al., *The Principle of Publicity of Dependent's Rights in Realizing Legal Certainty: A Study of the Placement of Confiscation of Land That Has Been Certified as Dependent Rights*, Journal of Social and Technology, Volume 5 Number 12, 2025, pages 4357-4367.

the parties and have no legal consequences for third parties. The results of interviews with KUA employees in Cirebon City also show that the recording carried out after the deed is made is easier to synchronize with the time of validity of the agreement ⁴⁶. This condition shows that the non-retroactive principle is more consistent with the publicity mechanism because its enactment is prospective and can be announced immediately administratively.

The recording of the existence of a *postnuptial agreement* is carried out in the administrative register system and not as the main part of the marriage book, but through a recording mechanism or additional information. The results of interviews with KUA employees in Cirebon City show that the recording of marriage agreements is more focused on internal registers as a form of legal publication. However, the record does not contain an affirmation as to whether the agreement is valid retroactively or non-retroactively, because the determination is entirely derived from a clause in the notary deed. This means that KUA employees still give notes on the marriage book that shows the existence of a *postnuptial agreement*, so that the principle of publicity only serves to announce the existence of the agreement without adopting all the material content ⁴⁷.

Legal Protection of Creditors as Third Parties in Postnuptial Agreement according to Philipus M. Hadjon's Theory

Legal protection for third parties in civil relations is based on legal functions that require certainty, fairness, and benefits for each legal subject. This form of protection is a recognition of the rights of legal subjects who must be protected from acts that harm other parties ⁴⁸. Legal protection not only functions as a mechanism for recovery for losses that have occurred, but also acts as a preventive tool to avoid conflicts of interest between parties. In practice, legal protection is important when there is a shift in legal relations due to the actions of one party that has the potential to harm the other party. This is relevant when a new agreement such as a *postnuptial agreement* arises that can affect pre-existing legal relationships.

According to Philipus M. Hadjon, legal protection is divided into two categories, namely preventive and repressive. Preventive protection allows parties to raise objections before legal

⁴⁶ Raging Rashid Suyudi. Interview *Op. Cit*

⁴⁷ Raging Rashid Suyudi. Interview *Op. Cit*

⁴⁸ Ulfah Mutiara Rachmat, et al., *Optimization of Consumer Protection in Complaining About Defective Products through Self Regulation in Online Purchase Transactions of PT. Bukalapak*, Jurisdicite, Volume 6 Number 1, 2024, pages 68-83.

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action has final consequences ⁴⁹. Meanwhile, repressive protection plays a role in resolving disputes after violations through the judicial channels. These two mechanisms are the basis of analysis to evaluate the position of third parties towards post-contract marriage agreements, where the third party needs certainty that changes in the status of the couple's property do not harm pre-existing rights, thereby ensuring the stability of the applicable legal relationship.

The existence of a *postnuptial agreement* has the potential to have implications for third parties, especially creditors. In the debt-receivables relationship, the creditor has the right to collect the debtor's obligations based on the agreed agreement. However, it is not uncommon for debtors to take legal actions that can reduce the value of assets that are collateral for debt repayment ⁵⁰. These actions can be in the form of a transfer of assets or a change in ownership status that has an impact on reduced creditors' access to the collateral object. This condition shows that changes in the internal legal relationship between husband and wife have the potential to cause losses to third parties for their property or agreement. Therefore, a clear legal mechanism is needed so that the interests of third parties can be protected from adverse actions or changes within the scope of the marital relationship.

Actio pauliana is one of the relevant legal instruments in protecting third parties, especially creditors, from adverse legal acts of the debtor, for example through the transfer or reduction of assets without reasonable reasons during the period of insolvency. This instrument gives creditors the right to request the cancellation of the debtor's legal acts that are not required and are known to cause losses ⁵¹. The cancellation can only be done if it is proven that the debtor or related parties know or should know the potential loss arising from the legal act committed. This mechanism shows that the law provides protection to third parties through repressive means. In addition, protection is also provided to third parties in good faith so as not to be harmed by the cancellation ⁵². This reflects a balance between creditor protection and legal certainty for other parties.

⁴⁹ Aida Nur Hasanah, *Legal Protection for Creditors in the Actio Pauliana Lawsuit*, Journal of Constitutional Law and Islamic Politics: Politica, Volume 9 Number 2, 2022, pages 26-37.

⁵⁰ Kevin Noble Effendi and Rasji, *Juridical Review of the Cancellation of Debtors' Legal Acts That Harm Creditors Through Actio Pauliana Lawsuits According to Civil Law*, Journal of Law, Humanities, and Politics, Volume 5 Number 2, 2024, pages 1029-1037.

⁵¹ Elisabeth Nurhaini Butarbutar, *Evidence of Debtor's Actions That Harm Creditors in Actio Pauliana's Lawsuit*, Judicial Journal, Volume 12 Number 2, 2019, pages 215-234.

⁵² M. Alvi Syahrin, *Actio Pauliana: Legal Concepts and Their Problems*, Lex Librum : Journal of Legal Sciences, Volume 4 Number 1, 2017, pages 605-616.

The principle of *actio pauliana* basically gives the creditor the right to request cancellation of the debtor's legal act that is detrimental to his interests, as long as it can be proven that there is knowledge or awareness that the act has a detrimental impact⁵³. This instrument serves as a corrective mechanism against the actions of debtors who transfer or reduce their assets before obligations are fulfilled. This principle is not only oriented to the protection of creditors, but also to the testing of good faith in every legal act and is closely related to the time of the occurrence of the legal act⁵⁴.

The relevance of the time dimension becomes relevant when it is associated with the retroactive and non-retroactive principles in agreements, including *postnuptial agreements*. Normatively, *actio pauliana* can only be filed against legal acts that have occurred. This shows that the law pays attention to the order of time in determining the legal consequences of an action. If an agreement is enforced retroactively, then the legal consequences can extend to events that have occurred before. This condition has the potential to affect the applicability of *actio pauliana* because acts that were previously considered detrimental can be reconstructed through the agreement of the parties. In contrast, the non-retroactive principle limits the validity of the agreement only to the period after the agreement is made so as not to interfere with previous legal events⁵⁵.

This correlation is even more evident when considering that *actio pauliana* requires the existence of legal acts that are not mandatory and detrimental to creditors⁵⁶. In practice, a *retroactive postnuptial agreement* can potentially change the status of ownership of property that was previously the object of the creditor's general guarantee. If the change is detrimental to creditors, then it can theoretically still be tested through the *actio pauliana mechanism*. *Actio pauliana* is included in the protection of repressive law referred to by Hadjon through the *lawsuit actio pauliana* as a corrective means to cancel the debtor's actions that cause losses⁵⁷. Thus, the retroactive principle cannot stand on its own without considering the protection of creditors.

⁵³ Ibid., pp. 605-616

⁵⁴ Aida Nur Hasanah, *Op. Cit*

⁵⁵ Elisabeth Nurhaini Butarbutar, *Op. Cit*

⁵⁶ Kevin Noble Effendi and Rasji, *Op. Cit*

⁵⁷ Raging Rashid Suyudi. Interview *Op. Cit*

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In contrast, the application of the non-retroactive principle in *postnuptial agreements* tends to be more in line with the principle of *actio pauliana*. A forward-only agreement does not change the legal structure of a pre-existing event. Therefore, the debtor's legal act that is detrimental to the creditor can still be tested based on the conditions when the act was committed. This is in line with the provision that the evidence in *actio pauliana* focuses on the circumstances when the legal act takes place, including the elements of knowledge and the consequences caused. Thus, the principle of non-retroactivity maintains legal certainty and does not obscure the legal facts that have occurred. This principle also strengthens the position of creditors in demanding the fulfillment of their rights.

In empirical practice, the results of interviews with notaries in Cirebon City show that the implementation of *postnuptial agreements* often considers prudential aspects so as not to harm third parties, especially creditors. Notaries consider that retroactive enforcement has the potential to cause disputes if it is not accompanied by a clear regulation regarding the legal consequences. This view is in line with the problematic *actio pauliana* which emphasizes the difficulty of proving and protecting third parties in good faith.

Changes in property status through a marriage agreement can affect the sustainability of credit guarantees. The results of the study explain that the change does not necessarily require creditors to make new credit agreements. A credit agreement stands as a separate legal relationship that has been previously agreed. A change in the status of assets does not necessarily change the legal relationship of credit that is already in progress⁵⁸. This is in line with the principle of *pacta sunt servanda*, which affirms that the agreement that has been made by the parties is a law for themselves as affirmed in Article 1338 (1) of the BW⁵⁹.

In addition, it is also related to the principle that all of the debtor's assets remain collateral for his debts as stipulated in Article 1131 of the Civil Code⁶⁰. Property that already existed at the time of the credit agreement is categorized as property of union in marriage. This means that a change in the status of assets does not necessarily eliminate the debtor's responsibility to creditors. The application of a *postnuptial agreement* that is retroactive basically cannot be used to reduce or eliminate the rights of creditors. This shows that certainty regarding the limits

⁵⁸ Raging Rashid Suyudi. Interview *Op. Cit*

⁵⁹ Gusti Yosi Andri, et al., *The Form of a Pharmacy Business Entity Reviewed from Corporate Law*, Journal of Responsive Law, Volume 12 Number 2, 2021, pages 81-93.

⁶⁰ Putri Auliya Lestari, et al., *The Position of Insurers in Bankruptcy Cases*, Journal of Commerce Law, Volume 2 Number 1, 2022, pages 66-73.

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of the validity of the agreement serves as a normative basis in maintaining the stability of legal relations.

On the other hand, Cirebon City KUA employees emphasized that the recording of marriage agreements has an administrative function to provide legal certainty for the parties. The recording does not necessarily erase the legal consequences that have arisen before. This reinforces that the principle of non-retroactivity is more in line with legal administrative systems that emphasize clarity of time and legal consequences⁶¹. In relation to *actio pauliana*, the existence of a recording does not prevent creditors from applying for cancellation if it is proven that there is an adverse act. Thus, the correlation between the two principles shows a balance between freedom of contract and creditor protection.

CONCLUSION

1. The principle of publicity in *postnuptial agreements* plays a role in ensuring the enforceability of the agreement against third parties through a recording mechanism as a form of legal announcement. Recorded agreements acquire binding force out, while unrecorded agreements only bind the parties internally.
2. The legal certainty of the separation of assets is determined by the agreement of the parties in applying the retroactive and non-retroactive principles in the *postnuptial agreement*. The retroactive principle allows for the reconstruction of the status of property from the beginning of the marriage, while the non-retroactive principle maintains clarity of the legal consequences prospectively.
3. The retroactive principle in *the postnuptial agreement* has the potential to affect the status of pre-existing assets, so that it can have an impact on the creditor's position as a third party. *The postnuptial agreement* does not remove the debtor's obligations and cannot be used to reduce the creditor's rights to existing guarantees. Preventive protection is reflected through the principle of publicity that allows third parties to know the existence of the agreement from the beginning. Repressive protection is provided through *actio pauliana* as a means of canceling the debtor's actions that are detrimental to creditors.

Suggestions

⁶¹ Raging Rashid Suyudi. Interview *Op. Cit*
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1. For notaries and marriage registrars (KUA/Dukcapil), to actively require and ensure the recording of postnuptial agreements as soon as the deed is made, as well as provide written explanations to the parties regarding the consequences of retroactive and non-retroactive principles on third parties. This step is necessary so that the principle of publicity is fulfilled and does not cause disputes in the future.
2. For banking institutions and creditors, to review the legal status of the debtor's assets after the postnuptial agreement, including updating the bond binding if necessary. This action is important to maintain the certainty of the collateral position and anticipate potential losses through preventive measures before a dispute arises.
3. For married couples (the parties), before making a postnuptial agreement, consult with a notary to fully understand the legal consequences of the retroactive and non-retroactive principles, especially on existing assets and their potential relationship with third parties. The parties also need to ensure that the agreement is recorded immediately so that it has binding force against external parties and avoids disputes in the future.

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