Legal Status and Implications of Prenuptial Agreements Under Hand in the Indonesian Legal System

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Abstract *: A prenuptial agreement is a legal instrument that allows prospective husband and wife to regulate legal relations, especially regarding marital property. Problems arise when the agreement is made underhand without being stated in a notary deed and/or not recorded with the marriage registrar. This study aims to analyze the legal position, implications for the parties, and legal protection of the prenuptial agreement in the Indonesian legal system. The research uses normative juridical methods with legislative, conceptual, case, and comparative approaches. Legal materials are analyzed prescriptively through systematic and conceptual interpretation. The results of the study show that the underhand agreement does not necessarily lose its validity if it meets the subjective and objective requirements of the agreement, but the position is different from the formal validity of the marriage agreement according to the marriage law regime. The most significant problem lies in the proof and binding power of third parties. The Constitutional Court Decision Number 69/PUU-XIII/2015 extends the time for the creation of marriage agreements, but the need for registration and publicity is still important to provide legal certainty. The study also finds a disharmony between Article 29 of the Marriage Law, which requires only a written agreement, and the implementing recording rules, which accept only notarial deeds. Therefore, it recommends harmonizing the form, recording authority, time limit, and consequences of late recording of marriage agreements.*

Keywords *: Deeds under hand, proof, registration, prenuptial agreement, third party*

Abstrak : Perjanjian pranikah merupakan instrumen hukum yang memungkinkan calon suami dan istri mengatur hubungan hukum, khususnya mengenai harta kekayaan dalam perkawinan. Persoalan muncul ketika perjanjian tersebut dibuat secara bawah tangan tanpa dituangkan dalam akta notaris dan/atau tidak dicatatkan kepada pejabat pencatat perkawinan. Penelitian ini bertujuan menganalisis kedudukan hukum, implikasi terhadap para pihak, serta perlindungan hukum atas perjanjian pranikah bawah tangan dalam sistem hukum Indonesia. Penelitian menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, konseptual, kasus, dan komparatif. Bahan hukum dianalisis secara preskriptif melalui interpretasi sistematis dan konseptual. Hasil penelitian menunjukkan bahwa perjanjian bawah tangan tidak serta-merta kehilangan keabsahannya apabila memenuhi syarat subjektif dan objektif perjanjian, tetapi kedudukan tersebut berbeda dari daya berlaku formal perjanjian perkawinan menurut rezim hukum perkawinan. Persoalan paling signifikan terletak pada pembuktian dan daya ikat terhadap pihak ketiga. Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 memperluas waktu pembuatan perjanjian perkawinan, tetapi kebutuhan pencatatan dan publisitas tetap penting untuk memberikan kepastian hukum. Penelitian ini juga menemukan disharmoni antara Pasal 29 Undang-Undang Perkawinan yang hanya mensyaratkan perjanjian tertulis dan aturan pelaksana pencatatan yang hanya menerima akta notaris. Oleh karena itu, direkomendasikan harmonisasi mengenai

bentuk, instansi pencatat, batas waktu, dan akibat hukum keterlambatan pencatatan perjanjian perkawinan

Kata Kunci : Akta bawah tangan, pembuktian, pencatatan, perjanjian pranikah, pihak ketiga

INTRODUCTION

Marriage is basically a legal institution that not only gives birth to a personal relationship between husband and wife, but also has legal consequences for wealth, economic responsibility, relationships with children, and legal relationships with third parties. The complexity of modern society's economic life causes marital relationships to increasingly intersect with asset ownership, business activities, debts, investments, financing, and other economic interests. In this context, a marriage agreement can function as a preventive instrument to provide certainty regarding the rights and obligations of the parties.

In the Indonesian legal system, the marriage agreement was initially placed primarily as an instrument for the regulation of marital property. The arrangement can be found in the Civil Code and then specifically in Article 29 of Law Number 1 of 1974 concerning Marriage. The development of legal doctrine shows that the marriage agreement is not solely related to the separation of property, but can also be an instrument of legal protection for couples in facing the risk of conflict or divorce (Asyatama & Fully Handayani Ridwan, 2021; Marsidah, 2020; Sukardi, 2016).

The issue became more complex after the Constitutional Court through Decision No. 69/PUU-XIII/2015 gave a new interpretation to Article 29 of the Marriage Law. The decision basically expands the possibility of making a marriage agreement, so that it is no longer limited before or at the time of marriage, but can be made during the marriage (Ngadhimah et al., 2017; Yuvens, 2017). The change is seen as a fundamental shift in the legal character of Indonesian marriage agreements (Pramasantya, 2017; Rohman, 2017).

These changes also expand the space for legal problems. If a marriage agreement can be made during a marriage, what is its position if it is only made in writing signed by the husband and wife? Is the agreement still valid under the law of the agreement? Does it have the same evidentiary force as an authentic deed? Furthermore, can the agreement be binding on creditors or third parties who never know its existence?

This question shows the need to distinguish three issues that are often equated in practice, namely the validity of the agreement, the power of proof, and the binding power of a third party. An agreement may meet the requirements of the validity of a contract, but the issue of form and recording can affect the proof and its applicability to a third party (Rahmadhani, 2020; Wardhani & Wardhana, 2020). The literature on deeds under hand shows that a writing made by the parties still has a certain evidentiary value, but its position is different from that of an authentic deed and can face problems when the signature, content, or time of its creation are disputed (Berliana et al., 2022).

The issue of marriage agreements is increasingly important because the legal relationship formed does not only have an internal impact on the husband and wife. The arrangement of marital property can affect creditors, heirs, buyers, financing institutions, and other parties who have a legal relationship with one or both spouses (Maharani, 2021). The literature on the principle of publicity emphasizes that recording has an important function to provide an opportunity for third parties to know about changes in the property regime in marriage (Prananta Barus, 2024; Werdiningsih, 2023).

Previous research has discussed various aspects of marriage agreements. Anas et al. (2023) highlighted the legal certainty of notary authority after the Constitutional Court Decision Number 69/PUU-XIII/2015. Charissa (2022) discussed the role of notaries and the importance of recording for third parties. Alexandros and Tanawijaya (2021) specifically analyzed unrecorded marriage agreements and their consequences for third parties. Meanwhile, research on underhand deeds

discusses the power of proof and the consequences of waarmerking and legalization (Hafiz et al., 2025; Rahmadhani, 2020; Wardhani & Wardhana, 2020).

Previous studies, however, approach the issue from different angles and with different objects. Table 1 maps the studies closest to this article in order to show precisely where this study departs from them.

Table 1. Position of this study relative to the closest prior research

No	Study	Main focus	Object examined	Aspect developed in this study
1	Anas et al. (2023)	Legal certainty of the notary's authority to ratify marriage agreements after Constitutional Court Decision Number 69/PUU-XIII/2015	Notarial ratification of marriage agreements	Position of agreements made without any notarial involvement
2	Charissa (2022)	Role of notaries and the importance of recording for third parties (Decision Number 59/Pdt.G/2018/PN Bgr)	Notarial marriage agreements	Evidentiary position of a private writing between the spouses
3	Alexandros and Tanawijaya (2021)	Validity and third-party consequences of a marriage agreement not recorded at the Civil Registry (Decision Number 449/PDT/2016/PT.BDG)	Unrecorded marriage agreements	Distinction between an agreement that is merely unrecorded and one that cannot be recorded because it is underhand
4	Novany and Putra (2023); Werdiningsih (2023); Prananta Barus (2024)	Publicity principle and protection of third parties	Postnuptial agreements	Prenuptial agreements and the uncertain date of an underhand deed under Article 1880 of the Civil Code
5	Rahmadhani (2020); Wardhani and Wardhana (2020); Berliana et al. (2022); Hafiz et al. (2025)	Evidentiary power of underhand deeds, *waarmerking*, and legalization	Underhand deeds in general civil transactions	Application to the matrimonial property regime and to third parties dealing with the spouses
6	This study	Legal position of underhand prenuptial agreements read jointly through contract law, the law of evidence, marriage law, and the publicity principle	Prenuptial agreements made underhand, with or without legalization or *waarmerking*	Three-layer framework; date problem under Article 1880; disharmony between Article 29 of the Marriage Law and the recording rules; concrete regulatory recommendations

Source: compiled by the author from the literature cited.

Table 1 shows that the existing literature has developed along two largely separate lines. Studies on marriage agreements generally assume a notarial deed and concentrate on notarial authority, recording, or postnuptial agreements, whereas studies on underhand deeds examine evidentiary strength in general civil transactions without relating it to the matrimonial property regime. The novelty of this study lies in bringing the two lines together in three respects. First, it treats the underhand prenuptial agreement as a distinct object, separate from both the notarial agreement that is merely unrecorded and the postnuptial agreement. Second, it develops a three-layer framework—contractual validity, evidentiary strength, and external binding force—and applies it consistently, including the consequence of Article 1880 of the Civil Code that the date of an underhand deed cannot be asserted against third parties, a point that is decisive for an agreement whose very nature depends on having been made before the marriage. Third, it identifies a normative disharmony that the studies in Table 1 do not take as their main object: Article 29(1) of the Marriage Law requires only a written agreement, whereas the implementing recording rules accept only notarial deeds, so that an underhand prenuptial agreement is administratively excluded from the publicity mechanism. On this basis, the study formulates concrete recommendations on

the form, recording authority, time limit, and consequences of late recording of marriage agreements.

This problem is increasingly relevant because the flexibility introduced by the Constitutional Court Decision does not automatically remove the need for a mechanism of formality and publicity. Some studies even show that there is a lack of uniformity in understanding the mechanism for recording, ratifying, and the legal consequences of marriage agreements after the decision (Amalia & Erliyani, 2024; Anas et al., 2023; Hamnan & Cahyono, 2024; Iqbal Maulana et al., 2026).

Based on this description, this study formulates three problems. First, what is the legal position of prenuptial agreements made under hand in the Indonesian legal system? Second, what are the legal implications of an underhand prenuptial agreement on the rights and obligations of the parties? Third, what is the legal protection for parties who use underhand prenuptial agreements?

This study aims to analyze the legal position of prenuptial agreements under hand based on Indonesian contract law and marriage law, identify its implications for husbands and wives and third parties, and formulate a construction of legal protection that is able to balance freedom of contract with legal certainty.

RESEARCH METHODS

This research is normative *legal research* that is oriented towards the analysis of norms, principles, concepts, and court decisions to obtain prescriptive arguments regarding the legal position of prenuptial agreements. The approaches used consist of a statute *approach*, a conceptual *approach*, a *case approach*, and a limited functional comparative approach.

The statutory approach is used to examine the provisions of the Civil Code, Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Government Regulation Number 9 of 1975, as well as regulations related to marriage registration and notary positions. A conceptual approach is used to analyze the principles of freedom of contract, pacta sunt servanda, good faith, legal certainty, the principle of publicity, and the concept of legal protection. The case approach is used by analyzing the Constitutional Court Decision Number 69/PUU-XIII/2015 as well as a number of court decisions related to marriage agreements, registration, and third parties.

The comparative approach is deliberately limited and functional. It does not aim at a full comparison of family law systems but asks one question: how do other jurisdictions secure the form and publicity of marriage agreements vis-à-vis third parties? Four jurisdictions were selected on two criteria. The Netherlands and France represent the civil law tradition from which the Indonesian Civil Code originates and illustrate two publicity techniques, namely a public register and an annotation on the marriage certificate. England and Wales and Australia represent common law systems that rely on judicial scrutiny rather than registration and are discussed in the international literature used in this study (Kaye et al., 2024; Thompson, 2025). The comparison draws on the statutory provisions and leading judgments of those jurisdictions and is used to test, not to transplant, the solutions proposed for Indonesia.

Primary legal materials consist of the Civil Code (in particular Articles 147, 152, 1320, 1340, 1341, 1867, 1874, 1874a, 1875–1877, and 1880); Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019 (Articles 29, 35, and 66); Government Regulation Number 9 of 1975; the Compilation of Islamic Law (Articles 45–52); Law Number 30 of 2004 concerning the Position of Notary as amended by Law Number 2 of 2014 (Article 15(2)); Minister of Religious Affairs Regulation Number 30 of 2024 concerning Marriage Registration; the Letter of the Director General of Population and Civil Registration Number 472.2/5876/DUKCAPIL of 2017 concerning the Recording of Reports of Marriage Agreements; and Constitutional Court Decision Number 69/PUU-XIII/2015. Court decisions concerning marriage agreements and underhand deeds, namely Decision Number 449/PDT/2016/PT.BDG, Decision Number 59/Pdt.G/2018/PN Bgr, Decision Number 598 PK/Pdt/2016, and Decision Number 29/Pdt.G/2019/PN Pya, are examined as analysed in the secondary literature. For the comparative approach, Articles 1:115–1:116 of the Dutch Civil Code, Article 1394 of the French Civil Code,

Part VIIIA of the Australian Family Law Act 1975, and the judgment in *Radmacher v Granatino* [2010] UKSC 42 are used.

Secondary legal materials were collected through a structured literature search in Google Scholar, the Garuda (Garba Rujukan Digital) portal, and the websites of the journals concerned, using combinations of Indonesian and English keywords: "perjanjian perkawinan", "perjanjian pranikah", "perjanjian kawin", "akta di bawah tangan", "*waarmerking*", "legalisasi", "pencatatan perjanjian perkawinan", "asas publisitas", "Putusan MK 69/PUU-XIII/2015", "prenuptial agreement", and "nuptial agreement". The inclusion criteria were: (a) peer-reviewed journal articles; (b) published between 2016 and 2026, a period covering the debate surrounding and following Constitutional Court Decision Number 69/PUU-XIII/2015, which was pronounced on 27 October 2016; (c) addressing at least one of the following themes: the form and validity of marriage agreements, notarial authority, the evidentiary power of underhand deeds, recording and the publicity principle, or disputes over marriage agreements; and (d) available in full text. Writings that discussed marriage law in general without addressing marriage agreements or underhand deeds, non-peer-reviewed writings, and duplicate publications were excluded. The final corpus consists of 36 journal articles (34 national and 2 international), grouped into five clusters: the concept and regulation of marriage agreements (7 articles); Constitutional Court Decision Number 69/PUU-XIII/2015 and notarial authority (10); the evidentiary power of underhand deeds (4); recording, publicity, and third parties (10); and disputes, annulment, and comparative perspectives (5).

The collection of legal materials is carried out through literature studies. The analysis is carried out qualitative-prescriptive through grammatical, systematic, conceptual, and teleological interpretations. Conclusions are drawn deductively from general legal norms to specific problems regarding prenuptial agreements.

RESULTS AND DISCUSSION

The Concept and Regulation of Prenuptial Agreements in the Indonesian Legal System

A prenuptial agreement is basically a form of agreement made by the prospective husband and wife before marriage to regulate certain legal consequences of the marriage to be held. In the terminology of the Marriage Law, the term used is a marriage agreement. Thus, the term "prenuptial agreement" is more appropriately understood as one of the forms or times of making a marriage agreement, namely before marriage.

In the perspective of the Civil Code, the marriage agreement has a close relationship with the matrimonial property regime. The presence of an agreement allows the prospective spouse to determine a different property arrangement from the regime that applies by *default*. Sukardi (2016) shows that the arrangement of marriage agreements can be reviewed comparatively through the Civil Code, Marriage Law, and Compilation of Islamic Law. The difference in these regimes shows that the marriage agreement is at the intersection between general civil law and family law.

Law Number 1 of 1974 provides special provisions through Article 29. Prior to the Constitutional Court Decision Number 69/PUU-XIII/2015, the construction of Article 29 was understood to be that the agreement was made before or at the time the marriage took place and was ratified by the marriage registrar. After the Constitutional Court's ruling, the construction changed significantly. Agreements can be made before, at the time of, or during the marriage.

The change is an important consequence of the Constitutional Court Decision Number 69/PUU-XIII/2015. Yuvens (2017) identified the decision as a fundamental change because the character of the marriage agreement is no longer purely prenuptial agreement, but includes *the possibility of postnuptial* agreement. Ngadhimah et al. (2017) and Pramasantya (2017) also pointed out that the ruling changed the legal formulation of marriage agreements in the national legal system.

These changes also provide greater space for the autonomy of the parties. However, this freedom is not unlimited freedom. Judiasih (2017) places the principle of good faith as an important

aspect in making a marriage agreement after the Constitutional Court's ruling. This means that the expansion of the freedom to make agreements should not be used as a means to harm spouses or third parties.

Marriage agreements also no longer have to be understood only as an instrument of separation of property. Research by Anas et al. (2023) shows that after the Constitutional Court's decision, the scope of the agreement can include other objects as long as it relates to the legal relationship of the parties and does not contradict the provisions of the law. Nur Hidayah and Nurmiati Muhiddin (2024) also place prenuptial agreements as an instrument to provide legal certainty and prevent disputes.

From the perspective of contract law, the existence of a marriage agreement must still meet the general principles of contract. Article 1320 of the Civil Code requires consent, capacity, a certain object, and a lawful cause (causa). Therefore, the formal form cannot be analyzed separately from material requirements.

This is where there is a difference between contractual validity and legal formality of marriage. A written agreement between the prospective husband and wife can show the existence of a contractual will, but its recognition as a marriage agreement in the family law system requires further analysis of Article 29, its record, and its legal consequences for third parties.

Therefore, the Constitutional Court's Decision cannot be interpreted as the elimination of all formalities. The decision actually expands the temporality of the making of agreements while maintaining the importance of ratification or recording for certain interests. Anas et al. (2023) show that the expansion of notary authority after the Constitutional Court's decision still raises issues of legal certainty because the technical mechanism is not yet fully harmonized.

Legal Status of Prenuptial Agreements Made Under Hand

The main issue is whether the absence of a notary deed automatically renders the agreement invalid. The answer cannot be given simply by equating "underhand" with "invalid".

Article 1320 of the Civil Code distinguishes the legal terms of an agreement based on the elements of agreement, competence, certain objects, and halal causa. These four elements are the material basis for the validity of an agreement. Therefore, if the prospective husband and wife freely agree on the content of the agreement, have competence, the object is clear, and the causa does not conflict with the law, morality, or public order, then in contractual law there is a basis for recognizing the existence of the agreement.

However, the problem changes when the agreement is to be positioned as a marriage agreement that has legal consequences in the matrimonial property regime. Marriage law gives a special character that is not identical to an ordinary private contract. The agreement is related to the legal status of marriage and can affect third parties.

This difference shows that authentic deeds and underhand deeds have different functions. Authentic deeds provide a higher level of evidentiary certainty because they are made by or in the presence of authorized officials in the form prescribed by law. In contrast, underhand deeds are basically made by the parties themselves. Their evidentiary strength depends, among other things, on acknowledging or proving the authenticity of the signature and the content of the deed.

Rahmadhani (2020) shows that the underhand deed that is *waarmerking* is still an underhand deed. *Waarmerking* does not change the nature of the document into an authentic deed. Wardhani and Wardhana (2020) make a similar point in their discussion of the responsibility of notaries for underhand deeds that are *waarmerking*. Notaries in principle provide certain administrative actions, not converting private documents into authentic deeds.

Berliana et al. (2022) also emphasized the difference in the power of proving legalized deeds and authentic deeds. Thus, if a couple only makes a prenuptial agreement underhand, the main risk is not solely in the existence of the agreement, but in the ability to prove its content and enforceability when a dispute occurs.

Article 1867 of the Civil Code recognizes proof by authentic writings and by underhand writings. Under Article 1875 of the Civil Code, an underhand writing that is acknowledged by the party against whom it is used, or that is legally deemed to have been acknowledged, provides

complete evidence, equal to that of an authentic deed, against the persons who signed it, their heirs, and those who derive rights from them. Accordingly, once both spouses acknowledge their signatures, an underhand prenuptial agreement binds the judge as conclusive proof of its content in the relationship between the spouses, and the party who disputes that content bears the burden of proving otherwise. The position is different when a signature is denied. Article 1876 requires the party confronted with the writing to expressly acknowledge or deny the signature, while heirs and successors may simply state that they do not recognize it, and Article 1877 then requires the judge to order an examination of the authenticity of the writing before the court. Until its authenticity is established, the writing cannot serve as complete evidence and must be supported by other means of proof.

The complete evidentiary force under Article 1875 is, moreover, limited to the signatories and their successors. With regard to third parties, Article 1880 of the Civil Code provides that an underhand deed has no force as to its date unless it has been endorsed by a notary or another official designated by law and recorded in accordance with the law (see Article 1874a), or from the day of the death of a signatory, the day on which its existence is proven by an authentic deed, or the day on which the third party concerned acknowledges it in writing. This rule is particularly significant for prenuptial agreements. The essence of a prenuptial agreement is that it was concluded before the marriage; without legalization or one of the other events listed in Article 1880, however, that pre-marital date cannot be asserted against a creditor or purchaser, and the agreement is exposed to the suspicion that it was drawn up later, or even backdated after a dispute has arisen. Thus, the law of proof does not treat an underhand writing as a document without legal value, but it confines its conclusive force to the internal relationship of the parties.

However, this position cannot be directly translated as equivalent to an authentic deed. In a dispute, the party relying on the underhand document may face objections regarding the signature, date, content, authority, or circumstances when the document was made. Hafiz et al. (2025) show the importance of the issue of proving the underhand letter registered in a special book by a notary. This shows that certain notarial actions can strengthen the administrative and evidentiary aspects, but do not necessarily change the nature of the document.

In the context of marriage agreements, the role of notaries has become more important after the Constitutional Court Decision Number 69/PUU-XIII/2015. Adonara (2020) and Prasetyawan (2018) place notaries as one of the important actors in the implementation of these decisions. However, the authority of notaries does not mean that all agreements made outside of a notary automatically do not have legal consequences.

A more appropriate construction is to distinguish three levels of position. First, at the level of internal relations, an underhand agreement can be evidence of the agreement of the parties as long as the material conditions are met. Second, at the level of proof, its power is more vulnerable than that of an authentic deed. Third, at the level of external relations, especially with third parties, its enforceability is highly dependent on the fulfillment of the recording and publicity mechanisms prescribed by law.

The three-tier approach avoids two extremes. The first extreme is to consider all underhand agreements invalid. The second extreme is to assume that all underhand agreements are automatically binding on all parties. Both are incompatible with the legal character of the agreement and the law of proof.

Legal Implications of a Prenuptial Agreement on the Parties

1. Implications for marital property

Marriage agreements most obviously have implications for property regimes. Without a differentiated agreement, marriage law specifies certain consequences regarding property acquired during a marriage. A marriage agreement can be used to regulate the separation of property or other arrangements that are permitted by law.

Ani et al. (2021) show that a marriage agreement has a function of legal protection for common property, especially when the marriage ends due to divorce. Kurniawan (2020) emphasizes the importance of the principle of balance in marriage agreements so that agreements

do not become a tool of domination by one of the parties. If the prenuptial agreement is made under the hand and substantially meets the contractual conditions, the agreement can be evidence of the parties' will. However, problems arise when one of the parties denies the agreement or when the other party needs formal recognition of the change in the property regime.

In such conditions, the existence of an underhand document can help prove the existence of an agreement, but it does not provide certainty equivalent to an agreement made and recorded through the mechanism determined by the marriage law. This risk becomes even higher when the agreement is used in the divorce process. Zahara and Sigit (2023) show that the registration of a marriage agreement during the divorce process can have its own juridical implications. This shows that the time and mechanism of recording have relevance to the legal consequences of the agreement. Thus, the underhand agreement provides protection that is relative, not absolute. It can be an instrument to prove internal relationships, but the level of legal certainty is lower when compared to agreements that are formally made and recorded.

2. Implications for third parties

The issue of third parties is the most crucial aspect. A third party cannot be considered to know an agreement just because the agreement was made by the husband and wife privately.

The principle of publicity serves to overcome this problem. Third parties who make transactions with their husbands or wives need to obtain certainty about the applicable marriage property regime. Maharani (2021), Prananta Barus (2024), and Werdiningsih (2023) all place publicity as an instrument of third-party protection.

Alexandros and Tanawijaya (2021), through an analysis of the West Java High Court Decision Number 449/PDT/2016/PT. BDG, show the importance of recording marriage agreements against third parties. Charissa (2022) also emphasized that recording is an important aspect in determining the applicability of agreements to parties outside the spouse.

Consequently, unrecorded underhand prenuptial agreements face serious limitations when used to deny the rights or claims of third parties acting on legal circumstances that they can trust. In a creditor-debtor relationship, for example, creditors need certainty about which assets can be used as collateral or become the object of repayment of obligations.

Novany and Putra (2023) specifically concluded that unannounced or unregistered marriage agreements should not be enforced to the detriment of third parties who are unaware of their existence. The study affirms the function of registration as a means of publicity.

Therefore, the principle that can be established is that the agreement is valid internally does not necessarily mean that the agreement has external force. This distinction is an important point in the legal construction of the marriage agreement.

3. Implications when divorce occurs

Divorce often becomes momentum when the existence of a marriage agreement is tested. Under normal conditions, a clear agreement can help determine the division or management of property. However, if the agreement is only an underhand document, the dispute can develop on two levels: a dispute over the content of the agreement and a dispute over its legal status.

The problem is not only whether the husband and wife have signed the document, but also whether the document has met the necessary formalities to be used to determine the marital property regime.

Permatasari et al. (2020) show that defects of will can be the basis of problems in marriage agreements. This means that the court still needs to check whether the agreement was born from free will or there are elements of pressure, error, fraud, or other conditions that affect the agreement.

Syaputra (2025), through a study of Decision Number 598 PK/Pdt/2016, shows that the issue of annulment of marriage agreements can continue to a higher level of justice. Erina Nur Afifa and Dwi Aryanti Ramadhani (2025) also show that changes in property arrangements during marriage can result in disputes that require a clear settlement mechanism.

Therefore, an underhand prenuptial agreement can provide preventive benefits, but these benefits are diminished when the document lacks adequate administrative legitimacy and proof.

Legal Protection Model for Parties to Underhand Prenuptial Agreements

Sections 2 and 3 have established the legal position of an underhand prenuptial agreement and its consequences for the spouses and third parties. This section does not repeat that analysis but addresses a different question: what instruments are available, and which are still lacking, to protect those who use such an agreement. Legal protection is examined in two forms: preventive protection, which aims to prevent disputes by strengthening the form and publicity of the agreement, and repressive protection, which operates once a dispute has arisen. In both forms, the protection of the spouses should not come at the expense of third parties acting in good faith, while the interests of third parties should not be used to nullify a valid agreement between the spouses without adequate legal grounds.

The starting point is a normative disharmony that directly limits preventive protection. Article 29(1) of the Marriage Law, as interpreted by Constitutional Court Decision Number 69/PUU-XIII/2015, requires only a written agreement ratified by the marriage registrar or a notary, and Article 47(1) of the Compilation of Islamic Law likewise speaks of a written agreement ratified by the marriage registrar; neither requires a notarial deed. The implementing recording rules, however, are narrower. For Muslim couples, Article 39(2) of Minister of Religious Affairs Regulation Number 30 of 2024 requires the marriage agreement to be made before a notary, and Article 40(2) provides that the KUA records it by entering the deed number, the name of the notary, and the date of the deed in the *Akta Nikah* and *Buku Nikah*. For other couples, the Letter of the Director General of Population and Civil Registration Number 472.2/5876/DUKCAPIL of 2017 requires a legalized copy of the notarial deed as a condition for the marginal note on the marriage certificate. For those still subject to the Civil Code, Article 147 requires a notarial deed on pain of nullity and Article 152 makes registration a condition for effect against third parties, although the extent to which these provisions survive Article 66 of the Marriage Law remains debated. Consequently, an underhand prenuptial agreement may satisfy the statutory requirement of a written agreement, yet it has no administrative route to recording. It is thus structurally excluded from the very publicity mechanism that Article 29(1) makes the condition for its effect against third parties.

The protection available to the parties therefore depends on the form that the agreement takes. Table 2 summarizes the gradation of forms and their consequences across the three layers developed in this study.

Table 2. Gradation of the forms of a prenuptial agreement and their legal consequences

Form of agreement	Contractual validity between the spouses	Evidentiary strength	Certainty of date against third parties	Effect against third parties
Underhand agreement only	Valid if Article 1320 of the Civil Code is met	Complete proof only if the signatures are acknowledged (Art. 1875); if denied, authenticity must be examined (Arts. 1876–1877)	None (Art. 1880)	Not enforceable against third parties unaware of it (Art. 1340); cannot be recorded under current rules
Underhand agreement with signatures legalized by a notary (Art. 1874a Civil Code; Art. 15(2)(a) Notary Law)	Valid if Article 1320 is met	Identity and signatures certified; the content remains an underhand deed	Certain from the date of legalization	Enforceable only against third parties who know of it; cannot be recorded under current rules
Underhand agreement registered in the notary's special book (*waarmerking*) (Art. 15(2)(b) Notary Law)	Valid if Article 1320 is met	Remains an underhand deed; proves only that the document existed on the registration date	Certain only from the registration date, not from the signing date	As in the previous row

Form of agreement	Contractual validity between the spouses	Evidentiary strength	Certainty of date against third parties	Effect against third parties
Notarial deed, not recorded	Valid if Article 1320 is met	Complete evidentiary force of an authentic deed	Certain	Uncertain; general effect against third parties requires recording
Notarial deed recorded by the KUA or Dukcapil	Valid	Complete evidentiary force of an authentic deed	Certain	Binding on third parties from recording (Art. 29(1) Marriage Law)

Source: author's analysis of the Civil Code, the Marriage Law, the Notary Law, and the recording rules.

For the spouses, Table 2 shows that preventive protection is largely a matter of upgrading the form of the agreement. The minimum step is to have the signatures legalized by a notary at the time of signing, which secures the identity of the signatories and the date of the agreement and thereby overcomes the weakness under Article 1880. A stronger step is to restate the agreement in a notarial deed and have it recorded by the KUA or Dukcapil; the use of a confirmation deed (*akta penegasan*) in relation to the publicity principle is discussed by Maharani (2021). In this process, the notary performs a preventive function: ensuring that the will of the parties is clearly stated, that the content does not exceed the limits of law, religion, and morality, and that the parties understand the consequences of each form (Adonara, 2020; Pradana & Endah Hartati, 2024). Recording practice, however, remains uneven. Hamnan and Cahyono (2024) question whether recording in mixed marriages still requires court ratification, Nastiti and Sarono (2023) highlight the legal remedies needed when an agreement is recorded late, and Anas et al. (2023) show that the expansion of notarial authority through the Constitutional Court Decision has not been followed by uniform implementing rules.

Repressive protection operates differently for each party. Between the spouses, the party relying on the agreement is protected by the law of evidence: once the signatures are acknowledged, the agreement constitutes complete proof (Article 1875), and if they are denied, the judge must order an examination of their authenticity (Article 1877). A spouse who claims that the agreement was concluded under duress, mistake, or fraud may seek its annulment on the ground of a defect of will (Permatasari et al., 2020). For third parties, protection rests on three rules. First, Article 1340 of the Civil Code limits the binding force of an agreement to its parties, so that an unrecorded underhand agreement cannot as such be invoked against a creditor who was unaware of it. Second, Article 29(4) of the Marriage Law, as interpreted by the Constitutional Court, provides that the amendment or revocation of a marriage agreement must not prejudice third parties. Third, where spouses use an agreement, or a backdated document, to place assets beyond the reach of creditors, a creditor may seek its annulment through the *actio pauliana* under Article 1341 of the Civil Code. These rules indicate that third parties are already relatively protected; the more acute gap lies with spouses who act in good faith but whose underhand agreement cannot be made public.

Legal protection is therefore not enough just to give the spouse the option to make an agreement. The state needs to ensure that the spouse knows the difference in consequences between a private agreement, a legalized or certified agreement, a notary deed, and a recorded agreement, and—more fundamentally—needs to align the implementing recording rules with Article 29 of the Marriage Law.

Critical Analysis of the Existence of Prenuptial Agreements in the Indonesian Legal System

The prenuptial agreement is still relevant as a manifestation of freedom of contract. However, its relevance must be placed proportionately. It is not an instrument that can replace the entire function of a notary deed and marriage registration. A more appropriate legal construction is to look at the agreement through three legal dimensions.

a. First, the contractual dimension. In this dimension, the main question is whether there is an agreement that meets Article 1320 of the Civil Code. If fulfilled, the agreement has a basis to be recognized as an agreement of the parties.

b. Second, the evidentiary dimension. In this dimension, the relevant question is whether the document can prove the existence, content, date, and will of the parties. Authentic deeds provide stronger evidentiary certainty, while underhand deeds have a greater risk of rebuttal.
c. Third, the publicity dimension. In this dimension, the question shifts from the relationship of husband and wife to the relationship with a third party. An agreement that changes the matrimonial property regime requires a mechanism so that the third party can be aware of the change.

From these three dimensions, it can be seen that the term "valid" should not be used singularly to describe all the legal consequences of an underhand prenuptial agreement. An agreement can exist as a private agreement, but it does not necessarily have the same validity against third parties.

This concept is also consistent with the development of the literature. Iqbal Maulana et al. (2026) show that the implementation of marriage agreements and their registration are closely related to legal certainty. Addinur and Djajaputra (2025) place registration as an important factor even in the context of authentically made marriage agreements. This means that the problem of legal certainty is not solved by simply making a deed; the publicity aspect remains relevant.

On the other hand, overemphasizing formality also has the potential to ignore the principle of freedom of contract. Agreements made consciously by spouses should not lose all legal value simply because they have not met the administrative mechanisms, especially in the internal relations of the parties. A more proportionate approach is to recognize its contractual value as long as the legal conditions are met, but limit its applicability to third parties if the element of publicity is not met.

This construction is also in line with the principle of good faith. Judiasih (2017) emphasizes the importance of good faith in making a marriage agreement. In the context of a third party, good faith has two directions: the husband and wife are obliged to act honestly towards the third party, while the third party who transacts must also act based on trustworthy legal circumstances.

From a comparative perspective, the Indonesian problem becomes clearer when it is set against the way other jurisdictions regulate the form and publicity of marriage agreements. Table 3 summarizes the four jurisdictions selected in the research method.

Table 3. Form and publicity of marriage agreements in selected jurisdictions

Jurisdiction	Form requirement	Publicity mechanism	Effect against third parties
Netherlands	Notarial deed, on pain of nullity (Art. 1:115 Dutch Civil Code)	Entry in the public matrimonial property register kept at the district court registry (Art. 1:116)	Provisions may be invoked against third parties who were unaware of them only if registered; a third party who knew of them is bound
France	Notarial deed; the notary issues a certificate to be handed to the civil registrar before the marriage (Art. 1394 French Civil Code)	Mention in the marriage certificate; publication in the commercial register if a spouse is a trader	If the marriage certificate states that no contract was made, the spouses are deemed, as regards third parties, married under the default regime unless they declared the contract in their dealings with those third parties
England and Wales	No statutory form; not binding by statute, but courts give effect to an agreement freely entered into with full appreciation of its implications unless it would be unfair (*Radmacher v Granatino* [2010] UKSC 42)	No register	Operates mainly between the spouses on divorce; proposals for binding "qualifying nuptial agreements" (Law Commission, 2014) have not been enacted (Thompson, 2025)
Australia	Binding financial agreement under Part VIIIA of the Family Law Act 1975, requiring independent legal advice for each party	No register	The agreement may be set aside, among other grounds, if it was made to defraud or defeat creditors (Kaye et al., 2024)

Jurisdiction	Form requirement	Publicity mechanism	Effect against third parties
Indonesia	Written agreement ratified by the marriage registrar or a notary (Art. 29(1) Marriage Law after Decision Number 69/PUU-XIII/2015); recording rules accept only notarial deeds	Note in the *Akta Nikah* and *Buku Nikah* (KUA) or marginal note on the marriage certificate (Dukcapil)	Applies to third parties after ratification and recording insofar as they are concerned (Art. 29(1)); no explicit rule for underhand agreements

Source: compiled by the author from the legislation and judgments cited.

Three lessons can be drawn from this comparison. First, the civil law jurisdictions that share the historical root of the Indonesian Civil Code address the third-party problem by combining a strict form with a single, clear publicity rule: the agreement can be invoked against an unaware third party only after registration or annotation. The Dutch register model is mirrored in Articles 147 and 152 of the Indonesian Civil Code, which require a notarial deed and registration at the district court registry. Second, both civil law systems protect third parties through a knowledge test: a third party who actually knew of the agreement cannot rely on the absence of registration (the Netherlands), and spouses who declared their contract in their dealings with a third party may invoke it against that party (France). This test is useful for Indonesia because it reconciles the publicity principle with the principle of good faith discussed above. Third, the common law jurisdictions do not register nuptial agreements because spouses' property there remains separately owned during the marriage and is redistributed by the court only on divorce; the agreements therefore operate mainly between the spouses, and creditors are protected through set-aside grounds rather than publicity. Thompson (2025) shows that the main concern in England and Wales is uncertainty about when courts will regard an agreement as unfair, while Kaye et al. (2024) show, in the Australian context, that prenuptial agreements are frequently shaped by the wider family rather than by the couple alone, an insight relevant to assessing free consent under Article 1320 of the Civil Code.

Indonesia, whose default regime is joint marital property under Article 35 of the Marriage Law, faces a third-party problem closer to the civil law model. The comparison therefore supports retaining a publicity mechanism. Unlike the Netherlands and France, however, Indonesia need not make the notarial form a condition of contractual validity, because Article 29 of the Marriage Law requires only a written agreement. What is needed is an administrative route through which an underhand agreement, once its signatures and date have been secured, can enter the publicity system. The comparative material cannot be adopted directly, but it confirms that transparency and third-party protection are common concerns in the regulation of marriage agreements.

Thus, Indonesian legal reform should not be directed to prohibit underhand agreements absolutely. Instead, reform needs to provide a clear classification of legal consequences. Agreements that meet contractual conditions can be recognized in internal relationships, but to produce consequences against third parties must meet clear publicity requirements.

Reform also needs to answer the problems that arise after the Constitutional Court Decision Number 69/PUU-XIII/2015. Technical arrangements need to provide certainty about who makes the recording, when the recording is made, how the amendment or revocation of the agreement is recorded, and since when the legal consequences against third parties take effect.

In this context, notaries have a strategic position. The function of notaries is not just to create formal documents, but also to help ensure that the wishes of the parties are clearly stated and do not contradict the law. Pradana and Endah Hartati (2024) show the importance of the limits of notary responsibility in making and ratifying marriage agreements. Thus, increasing the use of notary services can be seen as an instrument for dispute prevention, not just an administrative formality.

In the end, the issue of the prenuptial agreement is not merely a question of "notary or non-notary", but rather a question of how far the law recognizes the agreement and to whom the legal consequences can be enforced. This distinction is an important conceptual contribution in understanding the relationship between contract law and marriage law.

CONCLUSIONS AND SUGGESTIONS

A prenuptial agreement made under the hand cannot be automatically declared invalid just because it is not stated in a notary deed. As long as it meets the legal requirements of the agreement based on Article 1320 of the Civil Code, the document can have value as an agreement between the prospective husband and wife. However, this position must be distinguished from the position of the marriage agreement that meets the formalities of marriage law.

The legal implications of an underhand agreement are mainly seen in three aspects. First, for husband and wife, the agreement can be the basis for showing a will regarding the arrangement of property and other legal relationships, but it is vulnerable to evidentiary disputes. Second, for marital property, the agreement can serve as a preventive instrument to reduce disputes, especially when the marriage ends. Third, for third parties, an unrecorded agreement faces limited validity due to the failure to fulfill the publicity function optimally.

The Constitutional Court Decision Number 69/PUU-XIII/2015 has expanded the temporal space for the creation of marriage agreements and strengthened the autonomy of the parties. However, the ruling does not eliminate the need for legal certainty, recording, and protection of third parties. Therefore, the validity of the agreement needs to be understood based on three layers, namely contractual validity, evidentiary strength, and external binding force. In addition, the implementing recording rules, which accept only notarial deeds, are narrower than Article 29 of the Marriage Law, so that underhand agreements are administratively excluded from the publicity mechanism.

Ideal legal protection neither treats the underhand agreement as worthless nor gives it absolute effect against third parties. To that end, this study puts forward four concrete recommendations. First, as to the legal basis, Article 29 of the Marriage Law should be amended, or Government Regulation Number 9 of 1975 supplemented with a specific chapter on marriage agreements, to state expressly that a written agreement may take the form of an underhand deed provided that the signatures are legalized by a notary, and to distinguish the legal consequences of private agreements, legalization or *waarmerking*, notarial deeds, and recorded agreements; Article 39(2) of Minister of Religious Affairs Regulation Number 30 of 2024 and the Dukcapil technical rules should then be adjusted so that legalized agreements can also be recorded. Second, as to the recording authority, recording should remain with the KUA for Muslim couples and with Dukcapil for other couples, while the notary acts as the authenticating official rather than as the registrar; the two systems should be integrated into a single electronic register that can be consulted by parties with a legitimate interest, such as banks, notaries, and land deed officials (PPAT). Third, as to the time limit, recording should be required within a fixed period, for instance 30 days after the marriage for a prenuptial agreement, or after signing for an agreement made during the marriage. Fourth, as to late recording, the agreement should remain binding between the spouses from the date agreed but bind third parties only from the date of recording, without retroactive effect on rights acquired in good faith before that date and without the need for a court decision. These measures would make the recording mechanism simple, uniform, and transparent, thereby balancing freedom of contract, spousal protection, legal certainty, and the interests of third parties.

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