

The Essence of Marriage Agreement as Protection in the Indonesian Marriage Law System

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DOI: <https://doi.org/10.35719/ijlil.v6i2.431>

Abstract: The purpose of this research is to know and understand the essence of a marriage agreement by a married couple in an effort to create a harmonious family. Indonesia, through Law Number 16 of 2019 concerning Amendments to Marriage Law Number 1 of 1974 concerning Marriage Article 29, regulates the time and object of marital agreements made by married couples. The research methodology used in this research is normative research (library research), using a statutory approach. The findings of this study show that a marriage agreement is an important legal instrument in providing protection and justice for married couples. Through this agreement, couples can formulate agreements regarding their respective rights and obligations, especially regarding property management and financial responsibilities, and create a more equal and fair relationship. In addition, the marriage agreement also acts as preventive and repressive legal protection, which can prevent conflicts and provide guidelines for settlement if disputes arise. Thus, a marriage agreement not only protects the rights of the spouses but also serves as a progressive and adaptive legal protection mechanism for changing times, providing an important guarantee of legal certainty for the parties to the marriage.

Keywords: Essence, Marriage Agreement, Protection, Marriage Law system.

Abstrak: Tujuan dari penelitian ini adalah untuk mengetahui dan memahami esensi perjanjian perkawinan oleh pasangan suami istri dalam upaya mewujudkan keluarga yang harmonis. Indonesia melalui Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan atas Undang-Undang Perkawinan Nomor 1 Tahun 1974 Tentang Perkawinan pasal 29 mengatur mengenai waktu dan objek perjanjian perkawinan yang dibuat pasangan suami istri. Metodologi penelitian yang digunakan dalam penelitian ini adalah penelitian normatif (library research), dengan menggunakan pendekatan perundang-undangan. Temuan dari penelitian ini menunjukkan bahwa Perjanjian perkawinan merupakan instrumen hukum yang penting dalam memberikan perlindungan dan keadilan bagi pasangan suami istri. Melalui perjanjian ini, pasangan dapat merumuskan kesepakatan mengenai hak dan kewajiban masing-masing, khususnya terkait pengelolaan harta dan tanggung jawab keuangan, serta menciptakan hubungan yang lebih setara dan adil. Selain itu, perjanjian perkawinan juga berperan sebagai perlindungan hukum preventif dan represif, yang dapat mencegah konflik serta memberikan pedoman penyelesaian jika perselisihan timbul. Dengan demikian, perjanjian perkawinan tidak hanya melindungi hak-hak pasangan, tetapi juga berfungsi sebagai mekanisme perlindungan hukum yang progresif dan adaptif terhadap perubahan zaman, memberikan jaminan kepastian hukum yang penting bagi para pihak dalam perkawinan.

Kata Kunci: Esensi, Perjanjian Perkawinan, Perlindungan, Sistem Hukum Perkawinan.



Introduction

Birth, marriage, and death are three important legal events. As social creatures, humans always want to live together and interact. Marriage arises from the inherent instinct of every individual to seek companionship with fellow human beings. Marriage, as defined by Law Number 16 of 2019, amending Law Number 1 of 1974 on marriage, serves as the union of a man and a woman as husband and wife, encompassing their inner and external relationship to establish a happy and enduring family unit rooted in the First Precept of Pancasila, which is the One Godhead. According to Article 28B, paragraph (1) of the 1945 Constitution, every individual can establish a family and perpetuate their children through lawful marriage. Marriage is crucial as it marks the primary step in establishing a family life. It is a sacred bond, a fundamental link between a male and a female in establishing a family or constructing a domestic space. With a marital bond between a man and a woman, the law arises regarding the rights and obligations of husband and wife, including the property issue in an identical marriage, which is realized in an agreement. The term agreement can be equated with the term Al-'ahdu or overeenkomst, which can be interpreted as a statement from someone to do or not do something and has nothing to do with the other party's will. The promise is only binding for the person concerned, as hinted at in the Qur'an Surah Ali Imran verse 76.¹

An agreement in a marriage can be included in the understanding of a contract that identifies as an agreement between the two parties that aims to bind themselves to each other, with mutual voluntariness to the agreement made by both parties, which must follow the will of Sharia (Islamic Law). This means that all agreements entered into by two or more parties are only considered valid if, as a whole, they do not conflict with Islamic law. With a marriage agreement, husband and wife can communicate openly and understand each other's wishes without any party feeling disadvantaged.²

In the Marriage Law, marital agreements are regulated in Article 29, paragraph 4, which allows for the amendment of existing marital agreements, provided that they do not harm third parties. Article 29 stipulates that marital agreements made by the husband must be made in writing, except for ta'lik talak which the Marriage Registration Officer officially recognizes. The agreement's content is subject to the parties' agreement but must not violate legal, religious, moral, or ethical boundaries.³

This agreement is an instrument that can regulate the rights and obligations of each partner in a fair, clear, and detailed manner. Marital agreements offer a comprehensive alternative solution to various problems that often arise in marital relationships, provide legal certainty, and prevent conflict. However, while the importance of these agreements is recognized, there are still challenges that hinder their widespread acceptance. Many couples need to understand the functions and benefits of marital agreements fully. In many cases, there is a social stigma that these agreements indicate a lack of commitment or mutual trust between spouses. Marriage is considered sacred and is based on love and commitment. Many people assume that true love does not require formal arrangements; instead, there should be genuine trust between the couple. Therefore, when one or both parties propose a marital agreement, it is often interpreted as uncertainty or doubt about the future of the relationship.

¹ Fathurahman Djamil, *Hukum Perjanjian Syariah Dalam Kompilasi Hukum Perikatan* (Bandung: PT. Citra Aditya Bakti, 2003), 248.

² Puji Kurniawan, "Perjanjian Perkawinan; Asas Keseimbangan Dalam Perkawinan," *El-Qanuniyah: Jurnal Ilmu-Ilmu Kesyariahan dan Pranata Sosial* 6, no. 1 (2020): 125-137.

³ Yuga Narazua Khanza, Haruki Okubo, and Ninda Mirantama, "The Impact Of Prenuptial Agreements On Property Ownership Legal Status Of Inter-Marriages," *Sriwijaya Crimen and Legal Studies* 1, no. 2 (2023): 134-143.

Various studies have revealed the importance of implementing a marriage agreement. Fista Hery Nooryanto et al. stated that the legal protection of marital agreements on joint property due to divorce allows couples to determine the contents of the marriage agreement and protect their property in the event of divorce.⁴ In addition, other studies state that the Marriage Agreement is made before or on the date of marriage and is valid from the date of marriage. Moreover, A Marriage Agreement protects the property rights of the husband or wife. So, that property is an object in the marriage agreement. A Marital Agreement may not violate any law, religious rules, or decency and may not be amended unilaterally without both parties' consent.⁵ The marriage agreement also protects the rights to property belonging to the husband or wife.⁶ In addition to separating property and joint property in marriage, the marriage agreement also contains other matters, such as the protection of the responsibilities of both parties in marriage and the care and financing of children born in marriage.⁷

Several previous studies have discussed marriage agreements as legal protection, the time of implementation, and the object. Therefore, a study that emphasizes the essence of the practice of marriage agreements as a form of protection in the Indonesian marriage law system is very important. Thus, this article is different from previous studies. Namely, it analyzes the essence of marriage agreements as a form of protection in the legal system of marriage in Indonesia.

Research Methods

The methodology used in this research is normative research that relies on secondary data. A statutory approach will support this normative research. As a consequence of the statutory approach, this article will use primary and secondary legal materials.⁸ Primary legal materials used are laws and regulations in marriage agreements, namely the Civil Code and Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage jo. Government Regulation Number 9 of 1975 is also complemented by Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) as a support for primary legal materials. Secondary legal materials are also used in scientific works that will explain the primary legal materials used to resolve the issues raised in this study. The data from these two legal materials are analyzed qualitatively and then described through descriptive descriptions.

Results and Discussion

Marriage Agreement in Classical Fiqh Concept

Marriage agreements are often referred to as prenuptial agreements. The word comes from two roots: covenant and marriage. In Arabic, a promise or agreement is commonly called al-wa'du, which means agreement or agreement.⁹ Meanwhile, marriage means a marriage contract (agreement to become husband and wife). So, etymologically, a marriage agreement can be interpreted as an agreement made when (at the time) a couple makes a marriage contract.

⁴ Fista Hery Nooryanto, Maria Yosepin Endah Listyowati, and Diyah Setyaningrum, "Perlindungan Hukum Terhadap Perjanjian Perkawinan Atas Harta Bersama Akibat Perceraian," *UNES Law Review* 5, no. 4 (2023): 4588–4596.

⁵ Ni Kadek Ani, I Nyoman Putu Budiartha, and Ida Ayu Putu Widiati, "Perjanjian Perkawinan Sebagai Perlindungan Hukum Terhadap Harta Bersama Akibat Perceraian," *Jurnal Analogi Hukum* 3, no. 1 (2021): 17–21.

⁶ Sriono, "Perjanjian Kawin Sebagai Bentuk Perlindungan Terhadap Harta Kekayaan Dalam Perkawinan," *Jurnal Ilmiah "Advokasi"* 04, no. 02 (2016): 69–80.

⁷ Mira Wulandari, Puji Sulistyaningsih, and Dakum, "Perjanjian Perkawinan Sebagai Sarana Perlindungan Hukum Bagi Kedua Belah Pihak Dalam Perkawinan," *Borobudur Law and Society* 2, no. 3 (2023): 94–101.

⁸ Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2023), 181.

⁹ Mahmud Yunus, *Kamus Arab-Indonesia* (Jakarta: PT Mahmud Yunus Wadzuariyyah, 2010), 283.

According to the term, a marriage agreement is made by a couple who will marry at the time or before the marriage. A marriage registration officer agrees in writing, and its contents also apply to third parties as long as agreed.¹⁰ In Islam, the legal basis that shows a marriage agreement expressly and explicitly does not exist, but Islam generally regulates agreements, as in QS. Al-Maidah verse 1, namely:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُهُودِ

"O you who believe, fulfill those contracts...".

Also in QS. Al-Isro verse 34, namely:

وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولاً

".... And fulfill your promise; Verily, a promise must be accounted for....".

The marriage agreement is not explicitly mentioned in the concept of conventional fiqh. However, the embryo of the marriage agreement in conventional fiqh is often referred to as taklik talak. Taklik in Arabic comes from the root word علق- يعلق from a linguistic point of view, means hanging.¹¹ Meanwhile, in terms of terms, taklik means hanging or linking something to something else.¹² Meanwhile, divorce, in Arabic, comes from the root word طلق - يطلق, which, in terms of language, means to release a bond.¹³ According to the term, divorce means breaking the marriage bond directly or at a predetermined time with certain conditions.¹⁴ Ahmad al-Dardir defines divorce as "Breaking the bond of marriage with a clear word, or a clear word of kinayah, or any other word accompanied by intention."¹⁵

Talak taklik, according to the term, is linking the fall of the divorce to something, either because of the husband's actions, the wife, other people, circumstances, the future, and so on.¹⁶ For example, a husband tells his wife: "If you leave the house, you are divorced." If the wife leaves the house, she is divorced.¹⁷ This term is also referred to as talak mu'allaq and talak muqayyad.¹⁸ The basis for the permissibility of taklik talak is the word of Allah SWT in Surah al-Baqarah, verse 229, which means:

الْطَّلاقُ مَرَّتَانِ فَإِمْسَاكٌ يَمْعَرُوفٌ أَوْ تَسْرِيْحٌ بِإِحْسَانٍ

"There are only two divorces (which may be reconciled). After that, he may either reconcile and properly keep her or properly divorce her....".

The concept of taklik talak in classical fiqh is usually included in the explanation of the divorce chapter, which is related to the pronunciation of divorce. The utterance of divorce is sometimes instantaneous, and sometimes, it is linked to a future time. As for the instantaneous (munjizah), that is, the utterance of divorce that is not dependent on any conditions and is not associated with a future time but is intended to take effect immediately as soon as it is uttered by the person who imposed the divorce, such as the husband saying to his wife: "I divorce you." This kind of divorce takes effect as soon as the husband utters the word of divorce.¹⁹ As for the dependent divorce (mu'allaq), that is, the husband in imposing his divorce is dependent on a condition; for example, the husband says to his wife: "If you go to the city, then my divorce will fall on you, or if you work outside

¹⁰ Gatot Supramono, *Segi-Segi Hukum Hubungan Luar Nikah* (Jakarta: Djambatan, 1998), 39.

¹¹ Muhammad ibn Abu Bakr, *Mukhtār Al-Sīhāh* (Beirut: Maktabah Lubnan, 1986), 189.

¹² Wizarah Al-Awqaf, *Al-Mawsū'ah Al-Fiqhiyyah* (Kuwait: Wizarah al-Awqaf wa al-Shu'un al-Islamiyyah, 1988), 298.

¹³ Abu Bakr, *Mukhtār Al-Sīhāh*.

¹⁴ Syamsuddin Ar-Ramli, *Nihāyah Al-Muhtāj Ila Syarh Al-Minhāj*, Juz V. (Beirut: Dār al-Fikr, 1984), 423.

¹⁵ Ahmad Al-Dardir, *Al-Syarh Al-Kabīr* (Beirut: Dār Al-Kutub Al-Ilmiyyah, 2000), 347.

¹⁶ Al-Dardir, *Al-Syarh Al-Kabīr*.

¹⁷ Ibn Qudamah, *Al-Muġnīy* (Al-Qāhirah: Maktab al-Qāhirah, 1968), 434.

¹⁸ Ibn Rusyd, *Bidāyah Al-Mujtahid* (Al-Qāhirah: Dār al- Hadiṣ, 2004), 99.

¹⁹ Muhammad bin Qasim Al-Ghazy, *Fatḥu Al-Qarīb Al-Mujīb* (Surabaya: Al-Hidayah, 1999), 48.

the home, then my divorce will fall on you." This kind of divorce is called taklik talak, a divorce dependent on a condition.²⁰

The concept of taklik talak in classical fiqh differs from that of marital agreement. Taklik talak in classical fiqh is more likely to show the figure of a very superior husband, a husband who is in control of imposing divorce on his wife at will and arbitrarily, without regard for the rights of the wife; however, with the metamorphosis of taklik talak into the concept of marital agreement that is currently practiced. The concept of taklik in classical fiqh has undergone an extraordinary indulgence; from a gender-biased concept, it has now turned into a weapon to protect women from their husband's arbitrariness and discriminatory actions, as well as a stabilizing tool and reference for resolving domestic conflicts.²¹

There are several opinions about the law of taklik talak, namely: First, according to the majority of scholars from the Malikiyah, Shafi'iyah, Hanafiyah, and Hanabilah madhabs, taklik talak is valid if the requirements are met. This is based on QS. Al-Baqarah: 229. In this verse, there is no difference between a continuous divorce (munjiz) and a suspended divorce (muallaq), and there are no signs that indicate a certain type of divorce (muṭlaq).²²

Secondly, according to the Malikiyah, Shafi'iyah, Hanafiyah, Hanabilah, and Muhammad Yusuf Musa schools of thought, the talk talaq pronounced by the husband can cause the husband's divorce from the wife if it meets the following conditions:

1. That what is promised is something that does not yet exist when the talk is pronounced but may occur in the future;
2. At the time the talk talaq is pronounced, the object of the talk (wife) has already become the legal wife of the talk pronouncer;
3. When the taklik talak is pronounced, the husband and wife are in the assembly.²³

Marriage Agreement in Indonesian Legislation

Specifically, marriage agreements in Indonesia are regulated by three laws: the Civil Code and Law Number 16 of 2019, which amends Law Number 1 of 1974 about marital jo. The Compilation of Islamic Law in Indonesia, established and disseminated through Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (from now on referred to as KHI), is a supplementary rule for judges in religious courts, complementary to Government Regulation Number 9 of 1975.²⁴ Based on the provisions of Articles 119 through 198 of the Civil Code, it can be concluded that there are 3 (three) types of contract marriages, among others:²⁵

1. Marital agreement to separate the assets of each husband or wife. This separation of property is separated from the inherited property of each husband and wife obtained before the marriage relationship. Therefore, inherited wealth such as grants, inheritances, and so on remain under the control of each spouse. Regarding the property obtained after the marriage, the relationship remains the joint property of both of them;
2. Marital agreement of profit and loss separation. This separation includes separation if there is a profit after the existence of marital relations between husband or wife, then

²⁰ Achmad Baihaqi, "Hak Istri Dalam Taklik Talak Di Tinjau Dari Perspektif Hukum Islam," *Khuluqiyah* 3, no. 2 (2021): 74-97.

²¹ Henry Lee A Weng, *Beberapa Segi Hukum Dalam Perjanjian Perkawinan* (Medan: Rainbow, 1990), 5.

²² Muhammad Afandy, Maghfirah, and Ahmad Zikri, "Konsekuensi Pengucapan Sighat Taklik Sebagai Perjanjian Dalam Pernikahan (Studi Analisis Dalam Mazhab Imam Syafi'i)," *Journal of Sharia and Law* 2, no. 3 (2023): 890-906.

²³ Wahbah Zuhaili, *Al-Uṣūl Al-Fiqh Islamiy*, 2nd ed. (Beirut: Dār al-Fikr, 2001), 430.

²⁴ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia* (Jakarta: Kencana, 2011), 1.

²⁵ *Kitab Undang-Undang Hukum Perdata*, n.d.

the profit will be divided equally to both. Meanwhile, if there is a loss after the marriage relationship, then the loss is the responsibility of each of the husband or wife;

3. Marital agreement of complete separation of property. This separation of property means that all property in marriage, both property that existed before a marital relationship and property arising during the marital relationship, becomes the right of each husband and wife. With the making of a marital agreement for the separation of property in this round, the two of them can carry out a legal action on their own from their property without the consent of the husband/wife.

In general, the parties will determine the content of the marriage agreement. However, Article 139 through Article 143 of the Civil Code regulates the limitations of provisions that may not be included in a marital agreement, among others:²⁶

1. A marriage contract must not contravene the principles of decency and public order;
2. Marital agreements must not interfere with or reduce the rights granted to the husband in his position as head of the household;
3. Marital agreements are not allowed to interfere with the legal rights of the husband or wife or the longest surviving spouse;
4. Marital agreements are not allowed to waive their legal obligations regarding the inheritance of their descendants and are not allowed to regulate the inheritance of their descendants;
5. Marital agreements are not allowed to provide that one party will be responsible for a greater share of the debts of the joint property than the other party;
6. The parties cannot agree that their marriage bond will be governed by foreign laws and customs that once prevailed in Indonesia and its colonies.

Meanwhile, the marriage agreement contained in Article 29 of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage regulates several things, namely:²⁷

1. At or before the solemnization of a marriage, the parties by mutual consent may enter into a written agreement which shall be certified by the marriage registrar, after which the contents shall also apply to third parties to the extent that third parties are concerned;
2. Such agreement shall not be validated if it violates the limits of law, religion, and decency;
3. The agreement shall come into force from the date of the marriage;
4. During the marriage, the agreement can only be changed if both parties agree to change and the change does not harm third parties.²⁸

Article 29 of the Marriage Law stipulates that a marriage is only valid if officially recorded and legalised by a Marriage Registration Officer. The momentum calculation starts from the administrative date of the marriage registration. The current marriage agreement is binding on the parties and third parties. The Civil Code and the Marriage Law have different guidelines for registering marital agreements. Article 152 of the Civil Code mandates that marital agreements must be registered in the public register at the registrar of the District Court, whose jurisdiction covers the location where the marriage occurs. The current enforceability stems from the legal principle of *lex specialis derogate legi generalis*, as stipulated by both provisions. The Marriage Law supersedes the rules in the Civil Code regarding the enforceability of marriage agreements. In addition, this is based on the

²⁶ Ibid.

²⁷ *Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan* (Indonesia, 2019).

²⁸ Amir Syarifuddin, *Hukum Perkawinan Di Indonesia* (Jakarta: Kencana, 2009), 150.

principle of *lex posterior derogate legi priori*, which states that the most recent legislation supersedes the previous legislation, so the most recent provision applies.²⁹

The Marriage Law does not only focus on property when defining the terms of a marriage agreement, Article 29 paragraph (2) of the Marriage Law explicitly specifies that the agreement cannot be legally legitimate if it infringes against the principles of law, religion, and morality. According to Article 1338 of the Civil Code, the principle of freedom of contract allows for the inclusion of supplementary clauses in a marriage agreement as long as they do not infringe against the boundaries of law, religion, and decency. This also applies to the standards outlined in Articles 140, 141, 142, and 143 of the Civil Code, which prohibit the reduction or elimination of the rights of both husband and wife. Instances of marriage agreements beyond the property include domestic crimes and commitments from one spouse to pursue their job further while married.³⁰

In addition, the marriage agreement is contained in a notarial deed as authentic evidence needed to provide legal certainty and prove the agreement's validity. The role of notaries in this case is very important because they organize many things to be used as authentic evidence. The notarial deed will be perfect evidence that is binding and cannot be refuted if a bad possibility occurs, such as when the judge decides the marriage is invalid.³¹

The Compilation of Islamic Law (KHI) differs from the Marriage Law in describing marriage agreements. KHI contains it in 8 articles (articles 45 to 52). Article 45 clarifies the form of the marriage agreement, namely taklik talak and other agreements that are not contrary to Islamic law. At the same time, the UUP does not state taklik talak as a marriage agreement. Taklik talak is listed in the Marriage Books with standardized wording, and it is considered one of the available forms of marital agreement that the bridegroom always pronounces after the marriage contract.³² KHI deals not only with property issues but also with the breach of the marriage agreement by the husband. This gives the wife the right to request an annulment of the marriage or file a divorce suit with the Religious Court. If a husband enters into a marriage with a second, third, or fourth wife, it may be agreed regarding the place of residence, shift times, and household expenses for the wife he married.³³

Along with the development of Indonesian society, the formulation of taklik talak has changed in terms of the elements and the redaction. After Indonesia's independence, Talk Talk Sigh was formulated by the Ministry of Religious Affairs of the Republic of Indonesia. This is intended so that the use of the taklik talak formula is not misused freely, which harms the husband or wife, or even contradicts the objectives of shara' law. Since the enactment of Law Number 22 of 1946, jo. Law No. 32 of 1952, the provisions on the taklik talak sighat have been applied uniformly throughout Indonesia. Since being taken over by the Ministry of Religious Affairs, the taklik talak sighat has undergone several changes, which concern not only the essential elements, but also the quality of the taklik conditions and the amount of 'iwad. These changes align with the original mission of institutionalizing taklik talak, which was to protect women from the abuses of their husbands.³⁴

²⁹ Padma D Liman and Aulia Rifai, "Legal Implication of Marriage Prenuptial Agreement," *Jurnal Magister Hukum Udayana* 12, no. 3 (2023): 539–552.

³⁰ Nuyun Nurillah, "Tinjauan Yuridis Perjanjian Pra Nikah Dalam Perspektif Hukum Islam Dan Hukum Positif Indonesia," *Jurnal Ilmiah Wahana Pendidikan* 9, no. 2 (2023): 427–436.

³¹ Ida Bagus Kade Wahyu Sudhyatmika and I Nyoman Bagiastra, "Authority of a Notary Related to Marriage Agreements," *Udayana Master Law Journal* 11, no. 4 (2022): 758–771.

³² Surya Fadhlil. H and Yusticia Putri, "Analisis Sighat Taklik Talak Dalam Perkawinan Dan Relevansinya Dengan Pasal 45 Kompilasi Hukum Islam," *Sakena: Jurnal Hukum Keluarga* 8, no. 1 (2023): 1–12.

³³ Nurhadi Nurhadi, "Analysis of Lafadz Ta'Liq Talak in Islamic Law Perspective and Civil Law of Marriage/Compilation of Islamic Law," *Jurnal Hukum & Pembangunan* 49, no. 3 (2019): 757–767.

³⁴ Nilna Fauza and Moh Afandi, "Perjanjian Perkawinan Dalam Menjamin Hak-Hak Perempuan," (*Al-Manhaj: Journal of Indonesian Islamic Family Law*) 2, no. 1 (2020): 1–17.

Various parties have criticized the practice of pronouncing taklik talak after the marriage contract. The Indonesian Ulema Council (MUI) decision on 23 Rabiul Akhir 1417 AH, or September 7, 1996, concluded that the sighthat taklik talak is no longer necessary. This is due to several reasons. First, Law No. 1 of 1974 on Marriage (UUP) and Law No. 7 of 1989 on Religious Courts include taklik talak material. Secondly, according to the Compilation of Islamic Law (KHI), the taklik talak agreement is not a condition for marriage (KHI article 46 paragraph 3). Thirdly, for historical reasons, the pronunciation of *taklik talak* sighthat was used to protect women's rights. With this regulation, the pronunciation of taklik talak sighthat is no longer necessary.³⁵

The Constitutional Court made new provisions for marital agreements in 2016. The Constitutional Court issued Decision No. 69/PUU-XIII/2015, which regulates the timing of marriage agreements. In the Civil Code and the Marriage Law, the making of an agreement is only regulated at the time or before the marriage takes place. This provision has been amended and refined after the Decision of the Constitutional Court of the Republic of Indonesia Number 69/PUU-XIII/2015, which stipulates that the meaning of Article 29 paragraph (1) of the Marriage Law is that both parties involved in a marriage can execute an agreement at the time or during the marriage bond, upon the willingness of both parties to register a written agreement legalized by a marriage registrar or notary. The validity can also bind third parties as long as there is a connection. According to Article 29, paragraph 4, marital agreements regarding marital property or other agreements cannot be amended or revoked during the marriage unless both parties agree to do so and the amendment or revocation does not negatively affect third parties.³⁶

Justice and Protection in Marriage Agreements in Indonesia

The Marriage Law, in determining the contents of the marriage agreement, does not emphasize property alone, in accordance with Article 29 paragraph (2) of the Marriage Law, which states that the Agreement cannot be validated if it violates the limits of law, religion, and decency. An ideal marriage agreement can protect and provide justice for the parties to the marriage. A marriage agreement contains a deep meaning related to justice in the relationship between husband and wife. The increasingly complex changes in global society have made marriage agreements a legal instrument based on the philosophy of justice.³⁷

A marriage agreement aims to formulate a clear agreement regarding the rights and obligations of each partner, especially in terms of property management and financial responsibility. Marital agreements reflect the search for justice in a bond that is often fraught with uncertainty. In this context, justice is not only about fair distribution but also includes recognizing the value and dignity of each spouse as an equal partner. Sayeed Sabiq argues that "respect for an agreement is obligatory, if the agreement has a positive effect, its role is huge in maintaining peace, and is urgent in overcoming ambiguity, resolving disputes and creating harmony".³⁸

The philosophy of justice, as put forward by John Rawls, emphasizes the importance of equality in social interaction, especially the interaction of married couples. In this case, the marriage agreement becomes a means to ensure that both parties can form a household relationship with the same clarity and commitment. When couples draft this agreement,

³⁵ Rahmad Ibrahim Harahap and Ramadhan Syahmedi Siregar, "Kedudukan Dan Urgensi Shigat Taklik Talak Perspektif Ketentuan KHI Dan Hukum Fiqh Klasik," *Tasyri' Journal of Islamic Law* 1, no. 2 (2022): 351–396.

³⁶ Badrut Tamam, "Implikasi Yuridis Keputusan Mahkamah Konstitusi No . 69 / PUUXIII / 2015 Tentang Perjanjian Perkawinan Terhadap Harta Bersama Bagi Pernikahan Campuran," *Indonesian Journal of Islamic Law* 4, no. 2 (2021): 1–19.

³⁷ Faradilla Asyatama and Fully Handayani Ridwan, "Analisis Perjanjian Perkawinan Menurut Undang-Undang Perkawinan Di Indonesia," *Ajudikasi : Jurnal Ilmu Hukum* 5, no. 2 (2021): 109–122.

³⁸ Sayyid Sabiq, *Fiqh As-Sunnah* (Beirut: Dār al-Fikr, 1983), 99.

they not only consider the material aspects but also organize space to respect and support each other's aspirations. As such, marital agreements can serve as a reflection of substantive justice not just a legal formality.³⁹

In addition, the marriage agreement is also a negotiation arena where the values and expectations of each spouse are tested. A marital agreement can create an order that allows for balance in the relationship. When each party has the opportunity to express their views and wishes, this process not only results in an agreement but also reinforces a sense of fairness. This underscores the importance of dialogue and active participation in creating justice in a marital relationship. In the philosophy of justice, each individual is considered to have inherent value and should be treated as an end, not as a means to achieve the ends of others. Through this principle, marital agreements give each partner the right to self-determine their fate and organize their rights in the relationship. This confirms that justice in marriage is not just about the division of property but also about the recognition of individual dignity and choice.⁴⁰

Through the essence of a marriage agreement that is full of justice, it makes an-effort to protect the law in the future. Philipus M. Hadjon defines *legal protection* as "... protection of dignity, and recognition of human rights owned by legal subjects based on legal provisions from arbitrariness or as a collection of rules or rules that will be able to protect one thing from another." The type of legal protection is divided into two. The first is preventive legal protection, "legal protection provided by the government to prevent violations before they occur." The second is repressive legal protection, which Philipus M. Hadjon defines as, "a form of legal protection which is more aimed at dispute resolution".⁴¹

Legal protection in marriage can be in the form of preventive, which is the prevention of the emergence of disputes, and repressive, which is the settlement if a dispute occurs. This preventive legal protection prioritizes prevention so that the rights of husbands and wives in marriage can be protected by law, in this case, with a marriage agreement. The marriage agreement made by the husband and wife in marriage aims to provide preventive and repressive legal protection, namely, in addition to preventing problems in the household, if one day a conflict arises, the marriage agreement can be used as a reference and one of the foundations for each partner in carrying out and providing the limits of rights and obligations between them. All matters deemed necessary to safeguard the rights and interests of all parties can be contained in a marriage agreement, whether it concerns property, accounts payable, company ownership, childcare and education, division of household roles, avoidance of domestic violence (KDRT), attitudes towards polygamy, and so on. These points are flexible according to the agreement of both parties without any pressure or coercion from any party. They are made in a conscious and responsible condition as long as they do not conflict with the limits of legal norms, religion, and decency as part of an effort to respond to the protection of women's rights.⁴²

Marital agreements provide legal protection for wives who want to avoid the worst possibilities during marriage. A marriage agreement that is not limited in time will further protect each spouse from achieving marriage goals as an anticipatory step if, in achieving these marital goals in the middle of the road, there is a shock that threatens himself or herself and each spouse's family. With this change, each couple at the beginning of the

³⁹ Sunaryo, "Konsep Fairness John Rawls, Kritik Dan Relevansinya," *Jurnal Konstitusi* 19, no. 1 (2022): 1–22.

⁴⁰ Sabine Salloch, "Zum Begriff Des Wertes in Der Ethik Immanuel Kants," *Deutsche Zeitschrift für Philosophie* 69, no. 4 (2021): 553–575.

⁴¹ Laode Husen et al., "Implementation of Legal Guarantees for Human Rights Protection In Indonesia," *Journal of Law and Sustainable Development* 11, no. 4 (2023): 1–13.

⁴² Arifah Millati Agustina, "Assessing Women Ulama 'S Perspectives on Gender Contestation and Law," *Ijlil: Indonesian Journal of Law and Islamic Law* 4, no. 1 (2022): 1–35.

marriage focuses on the purpose of marriage.⁴³ The marriage agreement is a manifestation of the creation of progressive law and can cover the needs of society along with the times. A marriage agreement made in the form of a Notarial Deed can provide legal certainty and legal protection for prospective spouses, husbands, and wives who will be guaranteed their rights.⁴⁴

Conclusion

Marital agreements play an important role in creating justice in marital relationships by providing clear and substantial legal protection for both parties. The philosophy of justice embodied in marital agreements emphasizes the importance of equality in the relationship between husband and wife and the recognition of each other's dignity. Through open dialogue and clear agreements, marital agreements not only provide preventive legal protection against potential conflicts but also become a tool for fair dispute resolution if disputes occur. Thus, a marital agreement that is drafted in good faith and in accordance with the principles of justice provides guarantees of rights and protection for both spouses and enables the creation of a more harmonious and respectful relationship.

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⁴³ Moh. Faizur Rohman, "Implikasi Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015 Tentang Perjanjian Perkawinan Terhadap Tujuan Perkawinan," *Al-Daulah: Jurnal Hukum dan Perundangan Islam* 7, no. 1 (2017): 1–27.

⁴⁴ Hera Alvina Satriawan, "Pengaturan Perjanjian Perkawinan Berdasarkan Peraturan Menteri Agama Nomor 19 Tahun 2018 Tentang Pencatatan Perkawinan," *Unizar Law Review* 1, no. 2 (2018): 168–176.

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