



# LEGAL REVIEW OF THE LEGALITY OF MARRIAGE AGREEMENTS OF BROUGHT PROPERTY AND GONO GINI PROPERTY TO REALIZE WELFARE FROM A POSITIVE LEGAL PERSPECTIVE IN INDONESIA

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Article Info	Abstract
<b>Article History</b> Received : 2024-12-03 Revised: 2024-12-10 Published: 2025-01-15  <b>Keywords:</b> <i>Marriage Agreement, Joint Property, Positive Law, Maqashid Syariah.</i>	<p>A marriage agreement is a legal instrument that provides certainty and protection for a husband and wife in regulating the ownership and division of assets, both assets brought into the marriage and joint assets. In practice, disputes regarding assets in a marriage often arise, especially in cases of divorce and inheritance. Positive Indonesian law has regulated the mechanism of a marriage agreement in Law Number 1 of 1974 concerning Marriage, the Civil Code (KUHPperdata), and the Compilation of Islamic Law (KHI). This agreement allows couples to avoid the automatic mixing of assets and regulate their ownership more clearly.</p> <p>In addition to being regulated in positive law, marriage agreements are also based on the principles of contracts in Islam, which emphasize the importance of justice and protection of the rights of couples in marriage. The principle of maqashid sharia, especially hifzh al-mal (protection of property), is the basis for recognizing this agreement as an effort to maintain the welfare and avoid disputes in the future. Constitutional Court Decision Number 69/PUU-XIII/2015 has provided flexibility for couples by allowing marriage agreements to be made not only before but also during the marriage, thus further strengthening legal protection of the rights of couples.</p> <p>However, the implementation of marriage agreements still faces challenges, especially in administrative aspects and the lack of public understanding of the urgency of this agreement. Therefore, wider socialization and harmonization of regulations are needed so that marriage agreements can function effectively in providing legal certainty and justice for married couples in Indonesia. Thus, marriage agreements can be a solution to prevent conflict and maintain household welfare in the future.</p>

## I. INTRODUCTION

In household life, property is one aspect that often becomes a source of conflict, both in divorce conditions and in terms of inheritance division. A marriage agreement is one of the legal instruments that can be used to regulate the ownership and division of property, both that brought by each party before marriage (provisional property) and that obtained during the marriage (joint property). (Ramadhanti, Medaline, and Zarzani 2022) When a husband and wife's relationship breaks down and ends in divorce, the main problem that often arises is a dispute over property. This becomes more complex when the property in question is property brought before the marriage or property inherited from one of the deceased parties. In many cases, the property left behind can be a source of dispute between the deceased's family and the spouse or children left behind.

This condition becomes more complicated if the deceased has no sons, because in some customary law systems, property tends to be

controlled by the family of the deceased's lineage, while the wife or daughters left behind often do not get a fair share. In fact, in some cases, they do not get inheritance rights at all or only get a very small share compared to other family members. This often occurs due to the interpretation of customary law that is still adhered to in some communities, which often conflicts with the principles of justice regulated in positive law. (Nelli 2017)

In addition to the problems that arise in terms of inheritance, disputes also often arise when a divorce occurs. In practice, one party often feels more entitled to joint property and property brought, resulting in unilateral control that is detrimental to the other party. In many cases, children of divorced couples also receive less attention to their rights in terms of the division of property. Therefore, although many people still consider that marriage agreements are not in accordance with cultural values, especially in Muslim societies, the benefits of this agreement are very large in providing legal certainty and

avoiding disputes that can harm one of the parties.(Grace 2020)

Rapid changes in the times also require a shift in the way of looking at marriage agreements. If in the past this agreement was considered taboo or unusual, now more and more people are realizing that a marriage agreement can be a legal protection tool for both parties. Without a marriage agreement, ownership of the assets brought in can become a problem when a divorce or death occurs. When a divorce occurs, the division of joint assets can be carried out based on applicable legal provisions, while the assets brought in remain the property of each party. However, problems often arise when one of the partners dies, because the family of the deceased often claims full rights to the assets brought in, without considering the inheritance rights of the surviving partner.(Limbong, Siregar, and Yasid 2022)

A marriage contract is one of the legal instruments that can be used to avoid this conflict. Article 104 of the Civil Code (KUHPerdata) states that a husband and wife, by binding themselves in a marriage, are automatically bound by a reciprocal agreement to care for and educate their children. In addition, Article 119 of the Civil Code states that all assets acquired during a marriage are basically joint assets, unless there is a marriage contract that stipulates otherwise. With a marriage contract made before or after marriage, couples can determine for themselves how to manage and own their assets.

In order to be legally valid, a marriage contract must be made authentically before a notary. The notary is responsible for ensuring that the contract is made based on the agreement of both parties, without any element of coercion or pressure. This agreement includes the separation of personal and joint property, as well as responsibility for each party's debts. From a civil law perspective, a marriage contract has a strong legal basis as regulated in Article 1320 of the Civil Code which requires four elements of a valid contract, namely agreement of the parties, capacity to make a contract, clear object, and cause permitted by law. In addition, Article 139 of the Civil Code also emphasizes that in making a marriage contract, both parties have the freedom to determine the contents of the contract, as long as it does not conflict with the law, religion, and morality.

Law Number 1 of 1974 concerning Marriage also regulates marriage agreements in Article 29 paragraph (1), which states that marriage

agreements can be made in writing and agreed upon by both parties before or after the marriage takes place. With this agreement, each party has clearer rights to the property they own, and avoids conflict in the future. Article 147 of the Civil Code also emphasizes that marriage agreements must be made in the form of an authentic deed before a notary, and if not, the agreement can be considered null and void by law.(Wulandari 2023)

From an Islamic legal perspective, a marriage contract also has a strong basis. The concept of justice in Islam teaches that every individual has the right to own property and can manage it according to mutual agreement, as long as it does not conflict with sharia principles. A marriage contract can be categorized as a form of *maslahah* (benefit), because it can prevent disputes and provide legal clarity for married couples. The Compilation of Islamic Law (KHI) also recognizes the existence of a marriage contract, as regulated in Articles 48 and 49 of the KHI, which emphasize that the husband still has an obligation to meet household needs even though there is a separation of property in the marriage contract. In addition, Article 50 of the KHI stipulates that a marriage contract is valid from the date the marriage takes place and can be revoked with the consent of both parties, as long as it does not harm a third party.

With a clear legal basis, a marriage agreement can be a solution for couples who want to avoid future conflicts, both in terms of divorce and inheritance. This agreement can provide legal certainty for married couples in regulating the ownership and management of their assets. Therefore, it is important to increase public awareness of the benefits of a marriage agreement, as well as encourage its implementation as part of better family legal planning.(Lestari and Midia 2021)

Based on the problems that have been described, this study aims to analyze the legality of marriage agreements related to property and joint property from the perspective of positive law in Indonesia. This study will also evaluate the extent to which marriage agreements can realize the welfare of husband and wife and how they are implemented in the Indonesian legal system. Thus, this study is expected to contribute to the development of family law in Indonesia and provide solutions for couples who want to ensure their rights in terms of property ownership in marriage.

## II. RESEARCH METHODS

This research method uses a normative legal approach that refers to norms in laws and regulations, legal doctrine, and court decisions to analyze the legality of marriage agreements related to property brought and joint property.(Prasetyo 2015)The data used consists of primary legal materials such as Law Number 1 of 1974 concerning Marriage, the Civil Code, and the 1945 Constitution of the Republic of Indonesia, as well as secondary and tertiary legal materials in the form of books, journals, and legal encyclopedias. Data collection techniques are carried out through literature studies, while data analysis uses descriptive-analytical methods to organize and interpret data in order to answer research problems.(Yam 2022)

## III. RESULTS AND DISCUSSION

### A. Regulations on Marriage Agreements in the Legal System in Indonesia

A marriage agreement is a legal instrument that provides certainty and protection for husband and wife in the legal aspects of property and other aspects that they agree on before or during marriage. In the Indonesian legal system, the regulation of marriage agreements has developed over time, both in positive law and in the perspective of Islamic law.

In the context of positive law, a marriage agreement is regulated in Article 29 of Law Number 1 of 1974 concerning Marriage, which was later amended through Law Number 16 of 2019. This article states that a marriage agreement can be made before or during a marriage and is binding on the parties and third parties since its registration. This revision is important because previously, a marriage agreement could only be made before marriage, which resulted in limitations for married couples in managing their assets after marriage.(Habiansyah et al. 2022)

In addition, the changes in this regulation are also in line with the Constitutional Court's decision Number 69/PUU-XIII/2015, which confirms that a marriage agreement can still be made and is valid as long as it is agreed by both parties. This decision provides more flexibility for couples in determining the arrangement of assets, both to protect personal interests and in the context of other legal obligations.

From the perspective of Islamic law, the marriage contract has its basis in the principle of akad (agreement) which is part of Islamic teachings. In QS. Al-Maidah verse 1, Allah says:

*"O you who believe, fulfill the covenants (agreements)."*

This verse confirms that Islam respects and requires the fulfillment of the agreed contract. In the context of marriage, the marriage contract does not only include the ijab and kabul, but can also include certain agreements that are drawn up in the form of a marriage agreement, as long as it does not conflict with Islamic law.

In practice, Islamic law recognizes the concept of ta'liq talak, which is a form of agreement in marriage related to certain conditions agreed upon by the husband and wife. Ta'liq talak is widely applied in Indonesia and has become part of the Islamic marriage law system implemented by the Religious Court. In addition, Ibn Qudamah in his book Al-Mughni states that an agreement in marriage is permissible as long as it does not allow what is forbidden or forbid what is permissible. This confirms that Islamic law provides space for couples to make agreements that aim for the good of the household.(Amri, Dedi, and Saputra 2020)

In the Indonesian civil law system, the marriage agreement also has its roots in the Burgerlijk Wetboek (BW) or Civil Code, specifically Article 119 BW which regulates that in marriage there is a mixing of assets between husband and wife, unless there is another agreement that regulates otherwise. Therefore, the marriage agreement becomes a legal instrument that allows couples to avoid the automatic mixing of assets system and regulate their ownership more clearly.

On the other hand, in practice, the implementation of marriage agreements in Indonesia still faces various challenges. One of the main challenges is the lack of public understanding of the urgency and benefits of marriage agreements. Many couples still consider this agreement as something that is less common or even considered taboo because it is perceived as a form of distrust in household relationships. In fact, in many cases, marriage agreements are actually an effective tool to protect the rights and obligations of each party, especially in situations of disagreement or divorce.

Apart from that, in the realm of Islamic law, marriage agreements can also be linked to the principles of maqashid sharia, namely the objectives of sharia which include protection of religion (hifz ad-din), soul (hifz an-nafs), reason (hifz al-aql), descendants (hifz an-nasl), and assets (hifz al-mal). A marriage agreement can be considered as part of an effort to protect property

and offspring in a marriage. From the perspective of *maslahah murrasa*, which is a benefit that is not explicitly mentioned in the text but is still in line with Islamic principles, a marriage agreement can be considered as a legal instrument that provides benefits for both parties in maintaining justice and household welfare.

Furthermore, in terms of Islamic jurisprudence, a marriage contract can be categorized as a valid form of contract as long as it does not contain elements of *gharar* (uncertainty) or elements that conflict with *sharia* principles. Imam Malik in his school of thought emphasized the importance of openness and clarity in the agreement, which in the context of marriage can be realized through a written agreement between husband and wife. Thus, Islamic law and positive law in Indonesia actually have similarities in providing space for marriage contracts, although their implementation still requires further socialization to the community.(ANNISA 2017)

In judicial practice, the Supreme Court through the Circular of the Supreme Court (SEMA) No. 7 of 2012 has also emphasized that a marriage agreement that has been ratified by an authorized official must be respected by the judge in deciding divorce cases. This shows that the judicial institution in Indonesia recognizes the validity of a marriage agreement as part of legal protection for married couples.

From a legal policy perspective, the Indonesian government also continues to review regulations on marriage agreements to be more responsive to social developments and community needs. Along with the increasing number of couples who have different economic interests or involvement in the business world, the existence of a marriage agreement is increasingly becoming a relevant legal need to avoid disputes in the future.(Firm 2023)

## **B. Legality of Marriage Agreements Regarding Joint Property to Realize the Public Interest in the Perspective of Positive Law in Indonesia**

A marriage contract is an important legal instrument in maintaining clarity of property status in marriage in Indonesia. This agreement has the main purpose of providing legal protection for the property of each husband and wife in order to avoid disputes related to joint property in the future. From the perspective of positive Indonesian law, marriage contracts have been regulated in various laws and regulations, such as Law Number 1 of 1974 concerning

Marriage, the Civil Code (KUHPerdata), and the Compilation of Islamic Law (KHI). These provisions regulate the procedures for making, the form, and the legal implications of the agreement for the parties who make it.(Hibatullah 2024)

In general, a marriage agreement aims to protect each party's assets, both assets brought before marriage and assets acquired during the marriage, which are regulated by agreement of the parties. Article 29 of Law Number 1 of 1974 concerning Marriage stipulates that both parties may make a written agreement at the time or before the marriage takes place, which is legalized by a marriage registrar. The contents of the agreement include regulations on the legal consequences of the marriage on their assets, including the option to merge or separate assets.

The application of the principle of freedom of contract as regulated in Article 1338 paragraph (1) of the Civil Code provides space for prospective couples to determine the content and form of the agreement according to their needs, as long as it does not violate the boundaries of law, religion, and morality. In Indonesian positive law, a marriage agreement must be stated in the form of an authentic deed that has strong evidentiary power and provides legal certainty. Therefore, a notary plays an important role in making the agreement to ensure the validity and completeness of the resulting document.

The division of joint property in marriage is often a complex issue, especially when a divorce occurs. In Islamic law, the property of a husband and wife is basically separate, unless there is a marriage agreement that stipulates otherwise. The Compilation of Islamic Law (KHI) stipulates that each spouse has full rights to their own property, while joint property must be divided fairly according to the agreement of the parties. Article 97 of the KHI states that in the event of a divorce, each party is entitled to half of the joint property, unless otherwise specified in the marriage agreement.(Triyanto 2010)

In practice, the division of joint property often involves the discovery of law (*rechtvinding*) by the judge by considering the principles of justice and welfare. For example, in some cases, the judge gives a larger portion to one of the parties who has a greater contribution to the acquisition of joint property. This approach is in line with the principle of *maqashid sharia* in Islamic law, which emphasizes the protection of five basic aspects of human life, namely religion (*hifzh al-din*), soul (*hifzh al-nafs*), reason (*hifzh al-*



'aql), descendants (hifzh al-nasab), and property (hifzh al-mal).(Shidqi 2021)

In addition, a marriage agreement can also prevent losses for one party in the event of bankruptcy or other legal actions involving a third party. With the separation of assets, legal responsibility for each party's financial obligations can be separated, so as not to burden joint assets. In this context, a marriage agreement provides significant legal protection for married couples, especially in facing financial risks and legal problems in the future.(Sholehah 2022)

Constitutional Court Decision Number 69/PUU-XIII/2015 is an important milestone in the regulation of marriage agreements in Indonesia. This decision expands the scope of time for making marriage agreements, which previously could only be made before or at the time of marriage, to be made during the marriage bond. This change provides flexibility for married couples to adjust their agreements according to the needs and developments of the situation. This decision also emphasizes that marriage agreements must be legalized by a marriage registrar or notary in order to have binding legal force, both for the couple who made it and for related third parties.

However, problems often arise related to the registration of marriage agreements at the authorized agency. In some cases, marriage agreements are declared void because they are not registered at the Population and Civil Registration Service or at the marriage registrar's office. For example, in the Judicial Review Decision Number 598 PK/PDT/2016, the Supreme Court stated that marriage agreements that are not registered at the relevant agency do not have binding legal force, so that assets obtained during the marriage are considered joint assets that must be divided equally.

The opinions of legal experts show different views regarding the validity of unregistered marriage agreements. Some experts argue that registration is not a requirement for the validity of an agreement, but only serves to fulfill the principle of publicity so that the agreement is known to third parties. However, in practice, registration is still necessary to ensure the validity of the agreement for third parties and provide stronger legal protection for the parties.(SALSABILA 2023)

From the perspective of welfare, a marriage contract can be considered as a form of protection of individual property rights in marriage. In Islam, the concept of welfare (maslahah) emphasizes the

importance of maintaining welfare and avoiding harm to humanity. Therefore, a marriage contract made with the aim of protecting the property of a husband and wife is in line with the principles of maqashid sharia, especially in terms of maintaining and preserving property (hifzh al-mal). With this agreement, a husband and wife can manage their property more transparently and responsibly, thereby reducing the potential for future conflict.

In the context of positive Indonesian law, a marriage contract has an important role in providing legal certainty, justice, and benefits for the parties who make it. Therefore, socialization regarding the importance of a marriage contract needs to be increased so that the public better understands its benefits and legal implications. In addition, there needs to be harmonization of related laws and regulations to eliminate ambiguity and inconsistency in the application of the law, so that a marriage contract can function effectively as an instrument of legal protection in marriage. Thus, a marriage contract not only protects the rights and obligations of a husband and wife, but also contributes to realizing justice and prosperity in family life.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

A marriage agreement is a legal instrument that provides certainty and protection for a husband and wife in regulating the ownership and division of property, both inherited and joint property. In the Indonesian positive legal system, this agreement is regulated in Law Number 1 of 1974 concerning Marriage, the Civil Code, and the Compilation of Islamic Law, which emphasizes that couples have the freedom to regulate the status of their property as long as it does not conflict with the law and the principles of justice. The existence of a marriage agreement can prevent conflicts in terms of divorce or inheritance, and provide legal protection for the entitled party. From an Islamic legal perspective, this agreement is also in line with the principle of maqashid sharia, especially in maintaining and protecting property (hifzh al-mal) and creating welfare in household life.

Although marriage agreements have a strong legal basis, their implementation still faces various challenges, especially the lack of public understanding and administrative constraints in recording them. Constitutional Court Decision Number 69/PUU-XIII/2015 has provided flexibility by allowing marriage agreements to be

made before or during marriage, thereby strengthening legal protection for married couples. Therefore, wider socialization is needed regarding the benefits of marriage agreements and harmonization of laws and regulations so that this legal instrument can function effectively in providing legal certainty, justice, and welfare for couples who are married in Indonesia.

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