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PRENUPTIAL AGREEMENTS AS INSTRUMENTS FOR PROTECTING PROPERTY RIGHTS: HARMONIZING ISLAMIC LAW AND HUMAN RIGHTS

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Abstract

*Prenuptial agreements have generally been understood as instruments for regulating marital property; however, studies that integrate the protection of property rights from a human rights perspective with the principles of Islamic family law remain relatively limited. This study offers a novel perspective by reconstructing the philosophical foundation of marital property agreements as instruments for safeguarding individual property rights while promoting distributive justice within the family. It aims to examine the philosophical underpinnings of marital property agreements in securing individual property rights under Islamic Family Law and to analyze the juridical implications of the expanded legal scope of such agreements following Constitutional Court Decision No. 69/PUU-XIII/2015 which aims to protect of the property rights of spouses. This study employs doctrinal legal research using statutory, conceptual, and philosophical approaches. The legal materials consist of legislation, judicial decisions, classical and contemporary Islamic legal literature, international human rights instruments, and relevant scholarly publications. The findings demonstrate that marital property agreements are not inconsistent with the Islamic legal principle of *infiṣāl al-dhimmah al-māliyyah*. Rather, they are consistent with the objectives of *maqāṣid al-sharī'ah*, particularly *ḥifẓ al-māl* and *sadd al-dharā'ī*, serving as preventive legal mechanisms to safeguard property rights and minimize potential disputes within the family. Furthermore, Constitutional Court Decision No. 69/PUU-XIII/2015 has broadened legal protection by recognizing the validity of postnuptial agreements, thereby providing married couples with greater legal autonomy to protect their personal assets from civil risks, including bankruptcy and third-party asset seizure. This legal development reinforces the human right to private property while preserving the principle of justice within marital relationships. The study further demonstrates that marital property agreements constitute legitimate and strategic preventive legal instruments for protecting individuals' economic rights while maintaining a fair balance of rights and obligations between spouses. These findings underscore the importance of enhancing public understanding of marital property agreements as an integral component of legal protection and human rights within the institution of marriage.*

Keywords: Prenuptial agreements; property rights; Constitutional Court Decision No. 69/PUU-XIII/2015; Islamic Family Law.

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Abstrak

Perjanjian perkawinan selama ini umumnya dipahami sebagai instrumen pengaturan harta dalam perkawinan, namun kajian yang mengintegrasikan perlindungan hak atas kepemilikan harta dalam perspektif hak asasi manusia (HAM) dengan prinsip-prinsip Hukum Keluarga Islam masih relatif terbatas. Penelitian ini menawarkan perspektif baru dengan merekonstruksi dasar filosofis perjanjian perkawinan sebagai instrumen perlindungan hak kepemilikan individu sekaligus sarana menjaga keadilan distributif dalam keluarga. Penelitian ini bertujuan untuk menganalisis konstruksi filosofis perjanjian perkawinan dalam menjamin hak kepemilikan harta individu menurut Hukum Keluarga Islam serta mengkaji implikasi yuridis perluasan substansi perjanjian perkawinan pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 terhadap perlindungan hak kepemilikan suami dan istri. Penelitian ini menggunakan metode hukum normatif (*doctrinal legal research*) dengan pendekatan perundang-undangan, konseptual, dan filosofis. Bahan hukum diperoleh dari peraturan perundang-undangan, putusan pengadilan, literatur fikih, instrumen hak asasi manusia, dan artikel ilmiah yang relevan. Hasil penelitian menunjukkan bahwa perjanjian perkawinan tidak bertentangan dengan prinsip *infithol al-dzimmah al-maliyyah* dalam Hukum Islam, melainkan sejalan dengan *maqashid al-syariah*, khususnya *hifzh al-mal* dan *sadd adz-dzari'ah*, sebagai instrumen preventif untuk melindungi hak kepemilikan harta serta mencegah timbulnya kemudharatan dalam hubungan keluarga. Selain itu, Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 memperluas ruang perlindungan hukum melalui pengakuan terhadap *postnuptial agreement*, sehingga pasangan suami istri memiliki ruang yang lebih luas untuk melindungi aset pribadi dari berbagai risiko perdata, termasuk kepailitan dan penyitaan oleh pihak ketiga. Perluasan tersebut memperkuat jaminan HAM atas hak milik pribadi tanpa menghilangkan prinsip keadilan dalam hubungan perkawinan. Penelitian ini juga menunjukkan bahwa perjanjian perkawinan merupakan instrumen preventif yang sah dan strategis untuk melindungi hak asasi ekonomi individu sekaligus menjaga keseimbangan hak dan kewajiban dalam keluarga. Temuan ini menegaskan pentingnya optimalisasi pemahaman masyarakat terhadap perjanjian perkawinan sebagai bagian dari perlindungan hukum dan HAM dalam institusi perkawinan.

Kata Kunci: Perjanjian Perkawinan; Hak atas kepemilikan harta; Putusan MK 69/PUU-XIII/2015; Hukum Keluarga Islam.

INTRODUCTION

The legal framework for marriage in Indonesia—whether derived from the Marriage Law (UUP), the Civil Code (KUHPerdata), or the Compilation of Islamic Law (KHI)—fundamentally adheres to the principle of the pooling of assets (joint property) from the moment the marriage contract is concluded. Article 35(1) of the Marriage Law (UUP) explicitly states: “Property acquired during the marriage becomes joint property.” Meanwhile, the separate property of each spouse (property acquired before marriage, gifts, or inheritances) remains under the control of the respective spouse as long as the parties do not agree otherwise (Article 35(2) of the Marriage Law) (Kurnia et al., 2024). This principle of property commingling essentially stems from the spirit of distributive justice, namely to protect the economically weaker party in the marriage, typically the wife, who chooses or is forced to manage the household and has no independent income (Ani et al., 2021).

However, in an increasingly complex modern society, the principle of community property actually gives rise to serious new vulnerabilities regarding human rights, particularly the right to property and the right to a decent standard of living. Economic domestic violence is a form of violence that is difficult to prove but has devastating consequences. Examples include: a husband’s control over his wife’s entire income, prohibiting the wife from working, draining the wife’s assets for the husband’s

business interests, or selling joint property without the wife's consent (Wulandari et al., 2023).

In a system without a prenuptial agreement, such actions are difficult to prevent because, legally, the husband is often granted authority as the "head of the household" and the manager of joint property (Article 124 of the old Civil Code prior to its reinterpretation). In fact, Article 36(2) of the Marriage Law already recognizes that each party has full rights to their separate property. However, because the definition of "separate property" is very narrow, all income and assets acquired during the marriage—even if in the wife's name—automatically become joint property and can be seized to cover the husband's debts (Kurnia et al., 2024).

Furthermore, gender bias in the calculation of domestic contributions is also a serious issue. Wives who have devoted themselves to managing the household and raising children for decades often have their economic contributions unrecognized. In the event of a divorce, she receives only half of the joint property registered in the husband's name, but the husband has often already hidden assets or transferred them to a third party. From a human rights perspective, such a wife loses her right to an adequate standard of living, as guaranteed by Article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which Indonesia has ratified through Law No. 11 of 2005 (Mahbub, 2019).

One way to prevent conflicts and divorces that are detrimental to both parties is through the creation of a marriage agreement (prenuptial or postnuptial agreement) (Wulandari et al., 2023). A marriage agreement is a written agreement between a prospective husband and wife (or a married couple) that governs their rights and obligations, particularly those related to property, debt management, and other matters deemed necessary, provided they do not violate the law, religion, or public morality. Under Article 29 of the Marriage Law, a marriage contract is validated by a marriage registrar (Office of Religious Affairs [KUA] for Muslims, the Population and Civil Registry Office for non-Muslims) or a notary, and its provisions are also binding on any third parties involved (Kurnia et al., 2024).

However, the drafting of prenuptial agreements within Indonesian society is generally still considered taboo and rarely practiced. People believe that discussing property before or during marriage will cause offence to the prospective spouses and their families (Rosita & Novitasari, 2022; Wulandari et al., 2023). Furthermore, entering into a prenuptial agreement is also viewed as unethical because it seems to imply an expectation of divorce in the future. This negative stigma is reinforced by a patriarchal culture that views a wife who requests a prenuptial agreement as "not trusting" her husband or "too materialistic" (Assidik & Gassing, 2019). By contrast, in many developed jurisdictions, marital property agreements have become a widely accepted legal instrument and are commonly recommended by financial advisors as part of estate planning and asset protection strategies (Fatnisary, 2021).

In reality, a prenuptial agreement is not a tool for "planning a divorce," but rather a risk-mitigation instrument to prepare for the worst-case scenario—just as people

purchase health insurance not because they hope to get sick. With a prenuptial agreement, couples can have a stronger source of legal protection both during the marriage and in the event of a divorce (Wulandari et al., 2023). This agreement allows couples to determine for themselves how their assets will be managed, separated, or pooled, thereby reducing the potential for future conflicts (Ni'mah & Yunanto, 2023).

The most revolutionary milestone in Indonesian marriage law occurred on October 27, 2016, when the Constitutional Court (MK) issued Decision No. 69/PUU-XIII/2015. Prior to this decision, Article 29(1) of the Marriage Law explicitly stipulated that a prenuptial agreement could only be made “at the time of or before the marriage takes place” (Suhartanto et al., 2024). This strict time constraint barred access for thousands of couples who had been married for years but only recently realized the need for property separation—for example, because one spouse intended to start a high-risk business or due to economic conflicts within the household. As a result, many couples are trapped in a community property regime they do not want, with no way out except divorce (Erlina & Fathinnuddin, 2025).

In its ruling, the Constitutional Court (MK) stated that Article 29(1) of the Marriage Law (UUP) conflicts with the 1945 Constitution to the extent that it is not interpreted as including the phrase “or during the marriage.” Thus, postnuptial agreements (marriage agreements entered into after the marriage has taken place) are legal and valid in Indonesia, provided they are made with the mutual consent of both parties, documented in the form of a notarial deed (or a notarized private document), and certified by a marriage registrar (Kurnia et al., 2024). This ruling also reaffirms that a marriage agreement may be amended or revoked by mutual agreement of both parties, provided it does not harm a third party.

The impact of this ruling is extraordinary. The rigidity of marriage law, which has persisted for more than four decades, has finally been broken. Couples who have been married for 10, 20, or even 30 years can now enter into a marriage agreement retroactively (effective going forward, not retroactively). This provides legal certainty and justice for those who previously lacked access to or awareness of the option to enter into such an agreement before marriage. Notary Priyo Haryatmoko, S.H., stated in an interview that following the Constitutional Court’s ruling, requests to draft prenuptial agreements—whether before or during marriage—have increased significantly, particularly from business couples and professionals who recognize the importance of asset separation (Wulandari et al., 2023).

However, behind this progress, major challenges remain. Research in Blok Duku Village, Cibubur, East Jakarta, shows that public awareness of the importance of prenuptial agreements remains very low. Many residents are unaware that a prenuptial agreement can be drawn up after marriage, and do not even understand the difference between joint property and separate property (Kurnia et al., 2024). Moreover, persistent social stigma continues to discourage couples from entering into marital property agreements, while the procedural requirements—including notarization and

registration with either the Civil Registry Office or the Office of Religious Affairs (KUA) are widely perceived as burdensome, costly, and administratively complex.

LITERATURE REVIEW

Previous research on prenuptial agreements in Indonesia has generally shown a strong focus on procedural aspects of normative civil law and the protection of property. Wulandari et al. (2023) and Suhartanto et al. (2025), for example, highlight how prenuptial agreements in various regions and celebrity cases effectively separate separate property and prevent civil disputes, provided they are drawn up by a notary and carefully reviewed. From an Islamic legal perspective, Assidik and Gassing (2019) as well as Putri and Salma (2024) affirm that such agreements are valid as long as they do not violate Sharia law; in fact, their scope can be expanded to cover aspects of communication, spousal support, and efforts to foster a happy family. Meanwhile, studies by Ani et al. (2021) and Kurnia et al. (2024) reinforce the argument that the legality of asset separation provides legal certainty that is binding on third parties from the outset of the marriage. However, the majority of this literature still has limitations because it tends to get bogged down in technical discussions of asset division and has not yet addressed more substantive dimensions of justice..

Although research on this topic is already quite extensive, there are crucial research gaps that warrant further exploration. First, there are still very few studies that explicitly link marriage contracts to the discourse on human rights, particularly economic rights such as the right to property and the right to a decent standard of living for each spouse in the event of a conflict. Second, there has been no in-depth analysis dissecting the philosophical construction of marriage contracts in Islamic Family Law through the analytical framework of the *maqasid al-shariah* theory and the principle of distributive justice. Finally, the legal implications following Constitutional Court Decision No. 69/PUU-XIII/2015 – which opened the door to the creation of postnuptial agreements – have not been comprehensively explored, particularly regarding the protection of personal assets from the risk of claims by third parties or creditors. These gaps provide a space for innovation in this study to offer a more comprehensive academic contribution.

Against this background, this study seeks to examine the philosophical foundations of marital property agreements in safeguarding individuals' property rights without compromising the principle of distributive justice under Islamic Family Law. It further analyzes the juridical implications of the expanded legal scope of marital property agreements following Constitutional Court Decision No. 69/PUU-XIII/2015 in mitigating potential human rights violations relating to the ownership of spouses' personal assets.

METHODS

This study employs a normative legal research (doctrinal legal research) methodology that examines law as a system of written norms found in legislation, court decisions, and legal doctrine. To analyze the issue comprehensively, a multi-approach

methodology is employed. First, the conceptual approach is used to examine fundamental concepts such as property rights, joint property, marriage contracts, distributive justice, and human rights protection based on fiqh literature and civil law doctrine. Second, the statutory approach through a systematic analysis of Law No. 1/1974 as amended by Law No. 16/2019 on Marriage, the Compilation of Islamic Law (KHI), the Civil Code, Law No. 39/1999 on Human Rights, and Constitutional Court Decision No. 69/PUU-XIII/2015. Third, the philosophical approach to explore the values of justice, public interest, and human rights that underpin the regulation of marriage contracts from the perspective of *maqāṣid al-sharī'ah*.

The data sources used in this study rely entirely on three types of legal materials. Primary legal materials include the 1945 Constitution, the Marriage Law, the KHI, the Civil Code, Constitutional Court Decision No. 69/PUU-XIII/2015, the Human Rights Law, and Law No. 11/2005 (Ratification of the ICESCR). Secondary legal materials consist of reference journal articles and are supplemented by books on *Fiqh al-Munakahat* (marriage law) as well as related academic texts. Tertiary legal materials, such as legal dictionaries and encyclopedias, were used to verify technical terms. All of these legal materials were collected and analyzed using content analysis with a deductive-qualitative method. The analysis process was conducted by classifying the data according to the research questions, then interpreting the texts grammatically, teleologically, and systematically to draw transparent and accountable legal conclusions.

RESULT AND DISCUSSION

The Philosophical Framework of the Marriage Contract in Guaranteeing the Inherent Right to Property Ownership Without Negating Distributive Justice in Islamic Family Law

One of the most pervasive misconceptions in society is the assumption that marriage in Islam automatically merges the property of spouses into a single, inseparable estate. This view, however, finds no solid basis in the primary sources of Islamic law. In *fiqh al-munākahāt* (Islamic family jurisprudence), the marriage contract is classified as an '*ʿaqd tabsīṭ*—a contract intended to establish lawful companionship and mutual cooperation—rather than an '*ʿaqd tamlik*, which transfers ownership rights over property (Assidik & Gassing, 2019; Lamuri et al., 2024). Consequently, when a man and a woman enter into a marriage contract, what changes is the legal status of their relationship, not the ownership status of their respective properties, which remains independent as it was prior to the marriage.

This principle is recognized in Islamic jurisprudence as *infiṣāl al-dhimmah al-māliyyah*, referring to the separation of each individual's proprietary legal personality. Every legally competent adult possesses an independent legal capacity (*dhimmah*), including the capacity to own and control property. Neither the Qur'an nor any authentic ḥadīth provides that marriage automatically results in the commingling of the spouses' assets. On the contrary, numerous Islamic legal sources affirm the protection of individual property rights. For instance, with respect to mahr (dower), the Qur'an states: "Give women their dowries as a gracious gift" (Qur'an 4:4). The mahr belongs

exclusively to the wife and may not be appropriated by the husband under any circumstances. It remains her exclusive property throughout the marriage, thereby demonstrating that Islamic law fully recognizes a wife's independent ownership rights over her property (Gustawinata et al., 2026; Hud, Eka Nuraini, 2022).

Similarly, regarding spousal support, the husband is obligated to provide for his wife from his own assets, not from joint assets. If their assets were automatically commingled, the concept of “maintenance from the husband’s assets” would become meaningless. Scholars from the four schools of Islamic jurisprudence (Hanafi, Maliki, Shafi’i, Hanbali) agree that the wife has full rights to her own assets, and the husband has no right to take them without her permission (Weldra & Salma, 2024). Any unauthorized appropriation of the wife's property constitutes *akl al-māl bi al-bāṭil* (unlawful consumption of another person's property), an act that is unequivocally prohibited under Islamic law (Wahbah Az-Zuhaili, 2011, hal. 98).

Indonesian positive law actually recognizes this principle through Article 36(2) of the Marriage Law (UUP), which states: “Each party has the right to perform legal acts concerning their own property.” Similarly, Article 35(2) of the Marriage Law distinguishes between joint property and separate property. However, problems arise because the definition of “separate property” in the Marriage Law is very narrow – covering only property acquired before marriage, gifts, or inheritances. Meanwhile, all property acquired during the marriage – whether in the husband’s or wife’s name, and whether from professional work, business, or investments – is by default categorized as joint property (Article 35(1) of the Marriage Law) (Kurnia et al., 2024). Consequently, if a wife works as a doctor or lawyer earning tens of millions per month, while her husband owns a bankrupt business and owes debts to many parties, then all of the wife’s income and assets acquired during the marriage can be seized to pay off her husband’s debts – because they are considered joint property. This is the critical point where the Islamic principle of *infiṣāl al-dhimmah al-māliyyah* is disregarded by positive law if there is no prenuptial agreement (Ramadani et al., 2025).

A prenuptial agreement serves to reaffirm this principle of *infiṣāl al-dhimmah al-māliyyah* (Tuti & Mustafida, 2021). By entering into a property separation agreement, a couple can agree that the assets each acquires during the marriage – whether in the form of salary, bonuses, dividends, or investment returns – remain the separate property of each spouse (unless explicitly agreed upon as joint property). Under the “separate property regime,” there is no commingling of assets whatsoever (Wulandari et al., 2023). Under the “community of acquests” regime, only income and earnings during the marriage are pooled, while separate property and initial investments remain separate. This flexibility allows couples to tailor their property regime to their individual economic circumstances without compromising protections for the weaker party.

The Dialectic of Joint Property as Distributive Justice: Protecting the Vulnerable

Indonesian positive law and the KHI continue to uphold the concept of “joint property” as the default, as it is rooted in the theory of distributive justice. Family law, whether in Islam or in the civil law tradition, seeks to protect the economically

vulnerable party in a marriage. In traditional patriarchal societies, wives are often “forced” (socially and culturally) to manage the household, give birth to and raise children, and sacrifice their professional careers. Without the concept of community property, a wife who has devoted decades of her life to the marriage could be “cast out” without taking a single penny of property in the event of a divorce, since all assets are registered in the husband’s name (Ani et al., 2021).

Article 35 of the Marriage Law is intended to prevent such exploitation. Under the principle of joint property, a wife’s non-financial contributions (domestic work, child-rearing, moral support) are considered equivalent to her husband’s financial contributions. In the event of a divorce, the wife is entitled to 50% of all assets acquired during the marriage, regardless of who earned the money. This is a form of compensatory justice that is crucial for protecting women’s rights (Rahman et al., 2026).

Nevertheless, distributive justice does not necessarily require the adoption of a universal community of property regime. The law allows spouses to choose alternative marital property arrangements, provided that such arrangements do not unfairly prejudice either party. The Indonesian Civil Code recognizes three principal forms of contractual marital property regimes that may be adopted through a marital property agreement (Wulandari et al., 2023).

1. Community of Profit and Loss: Only specified categories of property are pooled as joint marital property. Profits generated during the marriage are shared equally, while losses are borne jointly (Articles 155–156 of the Indonesian Civil Code).
2. Community of Acquests: Only income and earnings acquired during the marriage are treated as joint property, whereas premarital assets remain separately owned. Unlike the first regime, this arrangement does not extend to the sharing of profits and losses arising from individual assets (Article 164 of the Indonesian Civil Code).
3. Separate Property Regime: No commingling of assets occurs during the marriage. Each spouse retains exclusive ownership, control, and management of his or her own property throughout the marital relationship.

This third type of total exclusion is often chosen by couples who both possess significant assets prior to marriage and wish to protect them from their spouse’s business risks. However, it should be noted that total separation does not eliminate the husband’s obligation to provide maintenance. Article 48 of the Islamic Family Law (KHI) explicitly states: “An agreement to separate joint property shall not eliminate the husband’s obligation to meet the household’s needs” (Assidik & Gassing, 2019). Accordingly, even where spouses elect to maintain separate property, the husband remains legally obligated to provide reasonable maintenance (*nafaqah ma’rūf*) for his wife and children. This obligation constitutes an indispensable safeguard of distributive justice that cannot be waived through private agreement.

In practice, however, not all prenuptial agreements reflect substantive fairness. A notable example is the widely publicized divorce between Indonesian public figures Ari Wibowo and Inge Anugrah. The prenuptial agreement signed by Inge approximately seventeen years earlier stipulated that no joint marital property would

arise during the marriage and that each spouse would retain exclusive ownership of his or her respective income. Consequently, following the dissolution of the marriage, Inge neither received spousal maintenance nor obtained any share of the assets accumulated during the marriage because, as a matter of law, all of the assets were registered in Ari Wibowo's name (Suhartanto et al., 2024).

This case illustrates that distributive justice cannot be achieved merely through the existence of a prenuptial agreement; rather, the substantive terms of the agreement must themselves be fair, proportionate, and capable of protecting the legitimate interests of both parties. Accordingly, notaries and marriage registration officials bear not only a legal responsibility but also an ethical obligation to ensure that prenuptial agreements do not contain manifestly unfair provisions that disproportionately disadvantage either spouse, particularly where one party has not been represented by independent legal counsel.

Reconstructing Prenuptial Agreements through the Lens of Maqāṣid al-Sharī'ah: Safeguarding Family Welfare

From the perspective of *maqāṣid al-sharī'ah* (the higher objectives of Islamic law), prenuptial agreements are not merely legally permissible; under certain circumstances, they constitute a significant *maṣlaḥah* (public benefit) and may even approach the level of *ḍarūrah* (legal necessity). Al-Ghazālī explains that the primary objectives of the Sharī'ah are the preservation of five essential interests (*al-kullīyyāt al-khams*), namely religion, life, intellect, lineage, and property. Any measure that protects these essential values constitutes *maṣlaḥah*, whereas anything that undermines them constitutes *mafsadah* (Al-Ghazali, n.d.). Within this framework, at least four *maqāṣid*-based principles are particularly relevant to the legal justification of prenuptial agreements.

1. *Hifẓ al-māl* (the protection of property). The preservation of property constitutes one of the five essential objectives (*al-ḍarūriyyāt al-khams*) that Islamic law seeks to protect alongside religion, life, intellect, and lineage (Auda, n.d.). During the Farewell Pilgrimage, the Prophet Muhammad declared: "Indeed, your blood, your property, and your honour are inviolable to one another." (Al-Bukhari, n.d.). Within this normative framework, a prenuptial agreement that protects an individual's property from the financial risks arising from the other spouse's business activities or personal liabilities represents a practical manifestation of *hifẓ al-māl*. Consider, for example, a woman who established a successful business before marriage. Although the business itself constitutes her separate property, the profits generated during the marriage may, under Indonesian law, be treated as joint marital property in the absence of a prenuptial agreement. Consequently, where the husband subsequently incurs substantial debts through failed business ventures or irresponsible financial conduct, those profits may become subject to claims by creditors. Such a situation is inconsistent with the objective of *hifẓ al-māl*. A carefully drafted prenuptial agreement may prevent this outcome by expressly stipulating that the profits derived from the wife's business remain her exclusive property.

2. *Sadd al-dharā'i* (blocking the means to harm). This principle recognizes that Islamic law may restrict conduct that is otherwise legally permissible when such conduct is likely to become a means of producing greater harm (Asep Saefullah & Diyatulharamain, n.d.). Accordingly, the execution of a prenuptial agreement should not be interpreted as reflecting an expectation of divorce or a lack of trust between prospective spouses. Rather, it functions as a preventive legal mechanism intended to minimize future conflicts (Wulandari et al., 2023). Numerous divorce proceedings become prolonged and emotionally burdensome because disputes over marital property consume considerable financial resources, generate protracted litigation, and adversely affect the psychological well-being of children. By establishing clear rules governing property ownership from the outset, a prenuptial agreement facilitates a more efficient and equitable resolution should divorce ultimately occur. This approach is consistent with the established juristic maxim *dar al-mafāsīd muqaddam 'alā jalb al-maṣāliḥ* (preventing harm takes precedence over attaining benefit).
3. Prenuptial agreements embody the principle of *tabayyun* (clarification) rather than *sū' al-ẓann* (unwarranted suspicion) in financial relations between spouses. Islamic law strongly encourages transparency (*al-wuḍūḥ*) and legal certainty in every contractual relationship. The marriage contract itself is described in the Qur'an as *mīthāqan ghalīẓan* (a solemn covenant) (Qur'an 4:21). Accordingly, incorporating additional provisions governing property rights constitutes a logical extension of the Shari'ah's commitment to contractual clarity. Asy-Syātibī, in *Al-Muwāfaqāt*, emphasizes that the ultimate objective of Islamic law is the realization of public welfare (*maṣlahah*) and the prevention of harm (*mafsadah*) (Asy-Syathibi, n.d.). A fairly negotiated prenuptial agreement that safeguards each spouse's economic rights without diminishing the husband's continuing obligation to provide maintenance therefore falls squarely within the objectives of the Shari'ah. Consequently, no legitimate Shari'ah-based justification exists for rejecting or stigmatizing prenuptial agreements (Wulandari et al., 2023).
4. *Hifz al-nasl* (the protection of lineage and future generations). The significance of prenuptial agreements extends beyond safeguarding the economic interests of spouses and also encompasses the protection of children, particularly within reconstructed or blended families (Al-Juwaini, n.d.). Where a woman enters a subsequent marriage while supporting children from a previous marriage, those children may face substantial economic vulnerability if the new marriage is governed by the default regime of joint marital property. Without a prenuptial agreement providing for the separation of property, assets and income accumulated by the wife during the subsequent marriage may become part of the jointly owned marital estate. Consequently, in the event of divorce or the wife's death, the new husband may acquire legal entitlement to a share of those assets, thereby reducing the economic resources available to support the wife's biological children from her previous marriage, including their education, welfare, and inheritance expectations.

By executing a prenuptial agreement—whether before marriage or, following Constitutional Court Decision No. 69/PUU-XIII/2015, during the marriage through a legally recognized postnuptial agreement—the wife is able to preserve the legal separation of her personal assets. Such preventive legal protection ensures that her property may be allocated primarily for the welfare, future security, and economic rights of her children, while simultaneously promoting distributive justice within the broader family structure (Taimiyah, n.d.).

Based on the foregoing analysis, it can be concluded that the philosophical foundation of prenuptial agreements under Islamic Family Law is fully consistent with the protection of individual property rights and the economic interests of children from previous marriages, while simultaneously advancing the broader objective of safeguarding family welfare. Provided that such agreements do not negate the husband's fundamental obligations—including the duty to provide maintenance (*nafaqah*), to treat his wife fairly, and, where stipulated, to refrain from entering into a polygamous marriage without the wife's consent—and are concluded on the basis of the free and informed consent of both parties without coercion or fraud, they are considered both legally and ethically valid within the framework of Islamic law (Wahbah Az-Zuhaili, 2011). Rather than undermining distributive justice, prenuptial agreements provide a more contextual and mutually agreed legal mechanism through which the principles of fairness and the protection of rights may be effectively realized.

Juridical Implications of the Expanded Scope of Marital Agreements Following Constitutional Court Decision No. 69/PUU-XIII/2015 from a Human Rights Perspective

Prior to Constitutional Court Decision No. 69/PUU-XIII/2015, Indonesia's marriage law regime adopted a highly restrictive approach to the regulation of marital agreements. Article 29(1) of the Marriage Law (UUP) permitted such agreements to be executed only "at or before the marriage is solemnized." Consequently, couples who were already married—whether for one week, one year, or even ten years—had no legal opportunity to establish a property separation agreement unless they resorted to the absurd course of first dissolving their marriage and subsequently remarrying under a new agreement. Such a legal framework was clearly unreasonable and inconsistent with the principles of legal certainty and justice. Many couples who initially failed to appreciate the importance of a marital agreement because they were young and had not yet accumulated significant assets only became aware of its necessity once their businesses expanded and financial risks increased. Nevertheless, the law effectively denied them any legal avenue to protect their property interests. This situation created a manifest injustice (Suraharta, 2025).

Through its landmark decision, the Constitutional Court introduced a progressive legal reform. The Court held that Article 29(1) of the Marriage Law (UUP) was inconsistent with the 1945 Constitution (UUD) insofar as it was interpreted to permit marital agreements only "at or before the marriage is solemnized," and ruled that the provision must instead be construed as allowing such agreements to be made "at the time of, before, or during the marriage" (Kurnia et al., 2024). In other words, the Court

explicitly recognized the legal validity of postnuptial agreements. The Court further ruled that marital agreements may be legalized not only by marriage registration officials but also by a notary. This provides a more practical alternative while ensuring stronger evidentiary value, as a notarial deed constitutes an authentic instrument possessing conclusive evidentiary force (Suhartanto et al., 2024).

The juridical implications of this decision are significant in three respects:

1. Temporal flexibility: Married couples may execute a marital agreement at any time during the marriage, rather than being limited to the period before or at the time of its solemnization. This enables the protection of property interests on an ex post facto basis.
2. Flexibility of legal form: Marital agreements may be executed either in the form of a notarial deed, which carries greater evidentiary authority, or as a privately executed agreement that is subsequently registered with the competent marriage registration authority. Compliance with the principle of publicity remains necessary to ensure that the agreement is enforceable against third parties.
3. Amendment and revocation: Previously, Article 29(4) of the Marriage Law stipulated that a marital agreement could not be amended during the marriage. The Constitutional Court reinterpreted this provision by allowing amendments, provided that they are mutually agreed upon by the spouses and do not prejudice the rights of third parties. This interpretation provides greater flexibility for couples to adapt their marital agreements to changing economic circumstances.

The Constitutional Court's decision also implicitly recognizes the principle of freedom of contract within family law, an area in which contractual autonomy had previously been subject to substantial restrictions. Husbands and wives are regarded as equal and legally competent parties entitled to regulate their proprietary relationship autonomously, provided that their agreement does not contravene statutory law, religious principles, or public morality. The decision therefore, represents a significant affirmation of responsible individual autonomy and respect for personal self-determination, both of which are fundamental values underpinning international human rights law (Fransisca et al., 2024, hal. 8857).

Marital Agreements as a Shield for Individual Economic Rights

From a human rights perspective, the right to property is recognized as a fundamental right under both international and domestic legal instruments. Article 36 of Law No. 39 of 1999 on Human Rights provides that "every person has the right to own property, either individually or jointly with others, for the purpose of personal development." Furthermore, property rights may not be arbitrarily deprived. Article 38(1) of the same law guarantees that "every person has the right to fair and non-discriminatory legal certainty in every judicial proceeding." Likewise, the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Indonesia

through Law No. 11 of 2005, guarantees under Article 11 the right of every individual to an adequate standard of living, including adequate housing, food, and clothing (Masri & Wahyuni, 2021).

A marital agreement serves as a legal shield protecting these economic rights against both internal threats arising from the spouse and external claims brought by third parties, particularly creditors.

1. Protection against third-party creditors

This represents the most significant function of a property separation agreement. In the absence of such an agreement, marital property automatically constitutes collateral for debts incurred by either spouse, provided that the debts are contracted for the benefit of the family (Article 35 of the Marriage Law). Problems arise, however, when debts are incurred for high-risk personal business ventures or even speculative or unlawful activities. A wife who has no involvement in such activities may nevertheless bear the financial consequences. In judicial practice, creditors may seize assets registered in the wife's name, including bank accounts, residential property, or vehicles, on the grounds that they constitute marital property.

Where a property separation agreement has been executed before a notary and duly registered, thereby satisfying the principle of publicity, creditors are legally bound to respect the agreed separation of property. If the agreement establishes a separate property regime under which assets acquired during the marriage remain the exclusive property of each spouse, creditors may enforce claims only against the debtor's personal assets and not against those belonging to the other spouse. This constitutes a concrete safeguard of the constitutional right to property (Wulandari et al., 2023). Such protection also extends to premarital property, which is already recognized as separate property under Article 35(2) of the Marriage Law. Moreover, through a marital agreement, any income or benefits derived from premarital property during the marriage may likewise be designated as the exclusive property of the respective spouse rather than becoming part of the marital estate.

2. Prevention of economic domestic violence

Domestic violence encompasses not only physical and psychological abuse but also economic abuse. Law No. 23 of 2004 on the Elimination of Domestic Violence explicitly recognizes economic abuse as a form of domestic violence. Examples include prohibiting a wife from working, appropriating her income without consent, disposing of marital assets without her approval, or concealing family assets. In practice, wives are frequently the primary victims of such conduct due to their weaker bargaining position within the marital relationship (A'yun & Hidayatullah, 2023).

A well-drafted marital agreement may incorporate clauses expressly prohibiting such conduct. For example, it may require that any sale or transfer of marital property – or property designated under the agreement as jointly owned on a limited basis – must be executed with the signatures of both spouses. It may also require that joint bank accounts be managed transparently and that periodic financial reports be made available to the wife. Should the husband breach these contractual obligations,

the wife would possess a stronger legal basis for bringing a civil claim based on an unlawful act. Furthermore, some marital agreements provide that violations of clauses relating to economic domestic violence may constitute grounds for divorce or the annulment of the marriage under Article 51 of the Compilation of Islamic Law (KHI) (Wulandari et al., 2023).

3. Protection of the wife's rights to property acquired during the marriage in the event of divorce

Even under a completely separate property regime, a wife who does not engage in paid employment is not left without legal protection upon divorce. As stipulated in Article 48 of the Compilation of Islamic Law (KHI), the separation of marital property does not extinguish the husband's obligation to provide for the family's maintenance (Assidik & Gassing, 2019). Accordingly, the husband remains legally obligated to fulfil *nafkah mādīyah* (outstanding maintenance accrued during the marriage) and to provide *mut'ah* (a consolatory financial provision granted to a divorced wife). Furthermore, where the wife has contributed either indirectly – for example, by assisting in her husband's business without remuneration – or directly by earning income that was subsequently used to acquire assets registered solely in the husband's name, the marital agreement may include provisions granting compensation for such non-financial contributions. This reflects the recognition that domestic labour possesses measurable economic value (Weldra & Salma, 2024).

Unfortunately, not all marital agreements are responsive to gender equality concerns. Many merely replicate standard contractual templates without adequately considering legal protections for the more vulnerable spouse. Accordingly, greater efforts are required to ensure that notaries provide comprehensive legal advice regarding the legal consequences of each contractual clause before the agreement is executed (Habib et al., 2025).

Reconstructing Gender-Responsive and Human Rights-Based Marital Agreements

Constitutional Court Decision No. 69/PUU-XIII/2015 not only expanded the temporal scope for executing marital agreements but also implicitly broadened their permissible substantive scope. Article 29 of the Marriage Law does not prescribe the matters that may be included in a marital agreement; instead, it merely imposes a negative limitation by providing that its contents must not contravene statutory law, religious principles, or public morality. Likewise, Article 45 of the Compilation of Islamic Law recognizes two forms of marital agreements, namely *ta'liq talak* and other agreements that are not inconsistent with Islamic law. Accordingly, spouses enjoy considerable contractual autonomy to incorporate innovative provisions into their marital agreements, provided that such provisions do not violate these fundamental legal norms (Assidik & Gassing, 2019).

Consistent with the spirit of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Indonesia through Law No. 7 of 1984, Article 16(1)(c) requires States Parties to guarantee women equal rights in marriage, including "the same rights and responsibilities during marriage and at its

dissolution" and equal rights relating to the ownership, acquisition, management, administration, enjoyment, and disposition of property. Marital agreements can serve as an effective legal instrument for translating these guarantees into practical legal protection. The following provisions are recommended for inclusion in gender-responsive and human rights-based marital agreements:

1. Domestic labor compensation clause: This clause provides that, notwithstanding the separation of property regime, a wife who does not participate in paid employment is entitled to receive periodic financial compensation from her husband, either monthly or annually, in recognition of her contribution to household management and childcare. Such compensation may be invested in assets registered exclusively in the wife's name.
2. Clause prohibiting polygamy without consent: This provision constitutes a form of *ta'liq talak*. Where the husband enters into a polygamous marriage without the wife's consent and without fulfilling the agreed conditions, the wife shall be entitled to petition for divorce while retaining full rights to the marital property or to an agreed form of financial compensation.
3. Protection against economic abuse clause: This clause requires that all significant financial decisions—including the acquisition of real property, investments, the disposal of assets, and the incurrence of bank loans—must receive the prior written consent of both spouses. It further provides that the husband has no authority to appropriate the wife's income or dispose of her personal assets without her express authorization.
4. Domestic responsibility-sharing clause: Although the legal enforceability of such a provision may be limited, its inclusion serves an important educational function and may assist in the mediation of future marital disputes. For example, the agreement may allocate specific childcare responsibilities to the husband on designated days or require him to participate in household duties.
5. Child custody and financial support clause: A marital agreement may comprehensively regulate the financing of a child's education, healthcare, and other essential needs, even before the child is born. Such provisions enhance legal certainty and reduce the likelihood of future disputes concerning parental responsibilities.
6. Divorce contingency clause: This provision may stipulate that where the marriage is dissolved due to the husband's misconduct, including *nusyuz* or domestic violence, the wife shall be entitled to a larger share of the marital property or to specified assets as compensation.
7. Clause Protecting the Economic Rights of Children from a Previous Marriage: This clause expressly designates certain assets, real property, or investment instruments owned by the wife as being exclusively reserved for the maintenance, educational support, and inheritance protection of children from a previous marriage. Contemporary scholarship in family law recognizes such gender-responsive contractual provisions as a concrete manifestation of the protection of the right to an adequate standard of living guaranteed under Article 11 of the International

Covenant on Economic, Social and Cultural Rights (ICESCR). The clause legally binds the subsequent husband to refrain from asserting any proprietary claim over the designated assets, both during the marriage and upon its dissolution.

Nevertheless, it should be emphasized that not every contractual provision may be included without limitation. Article 140 of the Indonesian Civil Code prohibits agreements that eliminate the husband's legal rights as the head of the family or undermine parental authority. Likewise, Article 141 of the Indonesian Civil Code prohibits agreements that absolutely determine the inheritance rights of children, particularly those relating to the legitime portion. These statutory restrictions, however, do not preclude contractual provisions intended to clarify or safeguard the rights and obligations of the parties, provided that such provisions do not contravene public order or mandatory rules of law (Wulandari et al., 2023).

Ultimately, an ideal marital agreement is one that results from an honest and equitable negotiation between both parties, facilitated by a competent and ethically responsible notary. It should not be an agreement imposed by one party through coercion, undue pressure, or the concealment of material information, as illustrated in the Ari Wibowo case. From a human rights perspective, informed consent constitutes a fundamental principle. Accordingly, the notary is under a legal obligation to provide a comprehensive explanation of the legal consequences of every contractual provision, and, where necessary, each party should be represented by independent legal counsel.

CONCLUSION

The philosophical foundation of marital agreements in Islamic family law is fully consistent with the principle of the inherent right to individual property ownership (*infiṣāl al-dhimmah al-māliyyah*). Marriage does not, by itself, extinguish or merge the proprietary rights of either spouse. Moreover, when drafted in a fair and proportionate manner, marital agreements do not undermine the principle of distributive justice. On the contrary, viewed through the lens of *maqāṣid al-sharī'ah*—particularly *ḥifẓ al-māl* and *sadd al-dharī'ah*—marital agreements function as preventive legal instruments that safeguard the overall welfare (*maṣlaḥah*) of the family. Distributive justice does not necessarily require the complete unification of marital assets; rather, it may be achieved through alternative arrangements, such as a separate property regime combined with the sharing of economic benefits and burdens or through the continued fulfilment of the husband's maintenance obligations. Marital agreements therefore, provide spouses with the contractual autonomy to formulate a model of justice that best reflects their economic circumstances and mutual agreement, thereby promoting a more contextual and participatory approach to family property relations.

The juridical implications of the expanded scope of marital agreements following Constitutional Court Decision No. 69/PUU-XIII/2015 are highly significant in mitigating human rights violations relating to individual property ownership. The decision dismantled the rigidity of Indonesia's marriage law by recognizing the legal validity of postnuptial agreements, expanding both the temporal and procedural framework for their execution, and enabling married couples to protect their assets without first

dissolving their marriage. From a human rights perspective, marital agreements function as a three-tiered legal safeguard: (1) protecting individual property rights against enforcement actions by third-party creditors, particularly in relation to business debts; (2) preventing economic domestic violence and providing a legal basis for seeking remedies against the unilateral control or misappropriation of assets; and (3) safeguarding a wife's right to an adequate standard of living following divorce through financial compensation and the fulfilment of maintenance obligations. Furthermore, the substantive content of marital agreements may be reconstructed in a more gender-responsive manner by incorporating provisions on compensation for domestic labor, the prohibition of polygamy without the wife's consent, and the equitable allocation of domestic responsibilities, all of which are consistent with the principles embodied in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Accordingly, both prenuptial and postnuptial agreements should not be regarded as instruments that are incompatible with local cultural values or Islamic teachings. Rather, they constitute strategic, rational, and equitable legal mechanisms for safeguarding the fundamental rights of every individual within the institution of marriage.

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