

## EFFECTIVENESS OF WOMEN'S AGREEMENT IN PROVIDING LEGAL PROTECTION TO THE PRIVILEGE IN MARRIAGE

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### ABSTRACT

**Objective:** The purpose of this study is to determine the effectiveness of the marriage agreement deed in providing legal protection against property in marriage, and to determine the factors that affect the effectiveness of the marriage agreement deed in providing legal protection against property in marriage.

**Theoretical framework:** It defines work discipline, explains performance management principles, incorporates legal regulations, uses theoretical models, forms research questions, and identifies variables. It also considers contextual factors and shapes expectations regarding work discipline's impact on performance.

**Methodology:** The type of research used is empirical research which is used to obtain primary data, data obtained directly from the community as the main source through field research using interviews and questionnaires. and to find the truth of the assumptions or basic assumptions used to answer the problems in this study.

**Results and conclusion:** The results showed that the effectiveness of the marriage agreement in providing protection to marital property was less affective. The factors that influence the effectiveness of the marriage agreement deed in providing legal protection against marital property are legal substance, legal structure and legal culture factors. Originality/value Suggestions from this research, the community as a legal subject should understand the rule of law and follow the development of the developing law, so as not to experience a huge loss when there are legal problems that may occur in social life later, there is a need for legal socialisation regarding the making of marital agreements both in terms of legal rules and benefit.

**Keywords:** women's, agreement, legal protection.

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## EFICÁCIA DO ACORDO DAS MULHERES NO FORNECIMENTO PROTEÇÃO LEGAL AO PRIVILÉGIO NO CASAMENTO

### RESUMO

**Objetivo:** O objetivo deste estudo é determinar a eficácia da escritura de acordo de casamento no fornecimento de proteção legal contra a propriedade no casamento e determinar os fatores que afetam a eficácia da escritura de acordo de casamento no fornecimento de proteção legal contra a propriedade no casamento.

**Estrutura teórica:** Define a disciplina de trabalho, explica os princípios de gestão de desempenho, incorpora regulamentações legais, usa modelos teóricos, forma perguntas de pesquisa e identifica variáveis. Também considera fatores contextuais e molda as expectativas com relação ao impacto da disciplina no trabalho sobre o desempenho.

**Metodologia:** O tipo de pesquisa utilizado é a pesquisa empírica, que é usada para obter dados primários, dados obtidos diretamente da comunidade como a principal fonte por meio de pesquisa de campo usando entrevistas e questionários, e para descobrir a veracidade das suposições ou suposições básicas usadas para responder aos problemas deste estudo.

**Resultados e conclusão:** Os resultados mostraram que a eficácia do acordo de casamento em fornecer proteção ao patrimônio conjugal foi menos efetiva. Os fatores que influenciam a eficácia da escritura do acordo de casamento no fornecimento de proteção legal contra o patrimônio conjugal são a substância jurídica, a estrutura jurídica e os fatores culturais jurídicos.

**Riginalidade/valor:** Sugestões desta pesquisa: a comunidade, como sujeito de direito, deve entender o estado de direito e acompanhar o desenvolvimento do direito em desenvolvimento, para não sofrer uma grande perda quando houver problemas jurídicos que possam ocorrer na vida social mais tarde; há necessidade de socialização jurídica em relação à realização de acordos conjugais, tanto em termos de regras jurídicas quanto de benefícios.

**Palavras-chave:** mulheres, acordo, proteção legal.

### 1 INTRODUCTION

Human beings are essentially social creatures and humans live side by side even in groups and often establish relationships with each other. Humans have different needs in life. If at the same time, two human beings want to fulfil the same need with only one object of need, and neither is willing to give in, then a clash may occur. Clashes occur when in a relationship between one human being and another, one does not fulfil its obligations. This kind of thing is the result of human behaviour that wants to be free. A freedom in behaviour does not always result in something good, especially if one's freedom in behaviour cannot be accepted by the social group. Therefore, in order to create order in a social group, both in a situation of togetherness and in a social situation, provisions are needed. These provisions are to limit freedom of behaviour. The necessary provisions are those that arise from the association of life on the basis of awareness, and



are usually called laws.<sup>4</sup> Law as a norm has a distinctive characteristic, which is to protect, regulate, and provide balance in maintaining the public interest.<sup>5</sup>

According to Achmad Ali, law is a set of rules or measures arranged in a system, which determines what may and what may not be done by humans as citizens in social life, which originates both from their own society and from other sources, by the highest authority in that society, and if the rules are violated it will authorise the highest authority to impose sanctions, Law as a norm or rule has the following main functions, Law as a guarantor of legal certainty, Law guarantees social justice, and Law serves as a guide.<sup>6</sup> If law enforcement is only seen from the requirements contained in legal provisions, without involving the human element, then what is seen is only an empty stereotype. For the social environment, law enforcement elements can be associated with humans personally or as law enforcers in an institution. Humans cannot live separately from one another, so it will be very common if there is a relationship between two people in the form of cooperation and interconnection to continue offspring so as not to become extinct, where the relationship is bound in a marriage. Marriage is a legal relationship that is a legal relationship between a man and a woman who have fulfilled the conditions of marriage, for all time.<sup>7</sup>

Based on Article 1 of Law Number 1 of 1974 concerning marriage (hereinafter referred to as the Marriage Law), the definition of marriage is a physical and mental bond between a man and a woman as husband and wife. With the aim of forming a happy and eternal family (household). It can be interpreted that marriage must last for life and not be broken. The Marriage Law states that the purpose of marriage is to form a happy and eternal family (household) based on God Almighty, but reality sometimes does not match what is expected, on the way to a happy and eternal household sometimes problems arise that occur against the wishes of the couple and one of them is the problem of disputes in marital property, especially if the couple divorces. Gono-gini property is one of the

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<sup>4</sup> See Lister, Matthew, Guest Editor's Introduction to Symposium on Allen Buchanan, The Heart of Human Rights, Journal Law and Philosophy, 2017, p.10, [https://www.academia.edu/56507222/Guest\\_Editor\\_s\\_Introduction\\_to\\_Symposium\\_on\\_Allen\\_Buchanan\\_The\\_Heart\\_of\\_Human\\_Rights](https://www.academia.edu/56507222/Guest_Editor_s_Introduction_to_Symposium_on_Allen_Buchanan_The_Heart_of_Human_Rights)

<sup>5</sup> R. Abdoel Djamali, 2010, Pengantar Hukum Indonesia, Rajawali Pres, Jakarta. p.1, <https://opac.perpusnas.go.id/DetailOpac.aspx?id=548022>

<sup>6</sup> Bachsan Mustafa, 2003, Sistem Hukum Indonesia Terpadu, Citra Aditya Bakti, Bandung, p. 20, <https://opac.perpusnas.go.id/DetailOpac.aspx?id=1137291>

<sup>7</sup> Rien G. Kartasoepetra, 1988, Pengantar Ilmu Hukum Lengkap, Bina Aksara, Jakarta, .p. 19, <https://onsearch.id/Record/IOS3774.JAKPU000000000012924>



objects of dispute, even though the law has regulated its distribution which is regulated in the Compilation of Islamic Law in article 97 that divorced widows or widowers are each entitled to one-half of the joint property as long as it is not specified otherwise in the marriage agreement. But there are still disputes over joint property. Therefore, a legal protection of joint property is very important to do so that there is no conflict and dispute for married couples.

Marital property disputes are motivated by various problems, starting from the bad faith of one party by transferring ownership of various goods obtained during the marriage to another party because he does not want to be divided with his ex-wife / husband after divorce as regulated by law, the absence of arrangements and mutual information from the start regarding the assets that have been obtained before and during the marriage so that there are mutual accusations and mutual claims regarding goods in joint property because each husband and wife feel they have rights, because the division of property after divorce is sometimes unfair and uneven. The main factor in property disputes is the greed and greed of the parties to the property itself.

The law gives tolerance to married couples to regulate property outside the provisions stipulated by law by making a marriage agreement, in which husband and wife agree to regulate and determine the position of their property. The marriage agreement is a deviation from the provisions of Chapter VII of the Marriage Law in Articles 35 and 36 concerning Property Rights.

In the Civil Code, namely in Article 139, which stipulates that in a marital agreement the two spouses can deviate from the provisions stipulated in the joint property, provided that the deviation is not contrary to decency and public order. It should be noted that although Islamic law does not recognise the mixing of individual property into joint property, except for what has been discussed in fiqh law regarding shirkah, if it is feared that unexpected things will happen in the future, it is permissible to enter into a marriage agreement before the marriage takes place. The agreement made between husband and wife can be in the form of merging their respective personal property into joint property, can also determine the results of merging the personal property of each husband and wife and can also determine the absence of merging personal property into joint property. If an agreement is made before the marriage takes place, then the agreement is valid and the



agreement must be implemented.<sup>8</sup> Article 47 paragraph 2 of the Compilation of Islamic Law states that the agreement that has been made can include the mixing of assets and the separation of their respective assets as long as it is not contrary to Islamic law. Article 29 paragraph 1 of the Marriage Law states that at the time or before the marriage takes place both parties by mutual consent can submit a written agreement that is legalised by the marriage registrar, after which the contents also apply to third parties. Then this rule was changed based on the Constitutional Court Decision. After the issuance of the Constitutional Court Decision No. 16/PUU-XIII/2015 that a marriage agreement can not only be made before marriage but can also be made during marriage.

The formation of a marriage agreement is made in writing or deed, either under hand or in the form of an authentic deed made by an authorised official. What is meant by a deed is a signed letter containing all events that form the basis of a right or obligation, and which is deliberately made for proof. The frequent occurrence of problems in marital property in the city of Makassar and the number of cases that enter the Court, the author sees the importance of married couples to carry out a legal protection of property in marriage in order to avoid problems, let alone disputes in the future. This protection can be done by making a marriage agreement. However, its effectiveness in social life still needs to be studied and further researched more specifically, in this case the making and application of marriage agreements in society.

## **2 PROBLEM IDENTIFICATION**

How is the effectiveness of marriage certificate in providing legal protection to property in marriage? and What factors affect the effectiveness of marriage certificate in providing legal protection to property in marriage?

## **3 RESEARCH METHODS**

The type of research used is empirical legal research, namely research conducted to obtain primary data, namely data obtained directly from the community as the main source through field research using interviews and questionnaires. to see the impact of law in society. As well as seeking the truth of the basic assumptions or assumptions used in answering the problems in this study.

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<sup>8</sup> A.Damanhuri H.R, 2007, Segi-segi Hukum Perjanjian Perkawinan Harta Bersama, Bandar Maju, Bandung, p. 45., <https://opac.perpusnas.go.id/DetailOpac.aspx?id=346215>



## 4 THEORETICAL FRAMEWORK

### 4.1 THEORY OF LEGAL EFFECTIVENESS

The term legal effectiveness theory comes from the English translation, namely the effectiveness of legal theory. Effective means there is an effect (as a result, influence, impression), can bring results, efficacious (about efforts, or actions), come into force (about laws, regulations). Legal effectiveness theory is a theory that examines and analyses the success, failure and influencing factors in the implementation and application of law. Legal effectiveness is all efforts made so that the existing laws in society actually live in society, meaning that the law applies juridically, socially and philosophically.

The theory of legal effectiveness according to Soerjono Soekanto is that whether or not a law is effective is determined by 5 (five) factors, namely the law, law enforcers, namely those who form and apply the law, facilities or facilities that support law enforcement, society, the environment where the law applies or is applied and culture, namely as a result of work, spirit and taste based on human spirit and taste based on human spirit and taste in social life..<sup>9</sup>

In essence, the problem of legal effectiveness has a very close relationship with the problem of implementation, application, law enforcement in society in order to achieve legal objectives. This means that the law really applies philosophically, juridically, and sociologically.

Soemarjan revealed that the effectiveness of the law is closely related to the following factors, Efforts to instill law in society; namely the use of human power, tools, organisations and methods so that people know, appreciate, and obey the law, the reaction of the community based on the prevailing value system; meaning that people can reject or oppose or can also obey the law because of compliance, identification, internalisation or their interests are guaranteed to be fulfilled, The length of legal planting; namely the length of time the effort to instill the law is carried out and is expected to produce the expected results.<sup>10</sup>

Related to the issue of legal effectiveness, he identifies the law not only with external coercion but also through the court process. The threat of coercion is an absolute

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<sup>9</sup> Soerjono Soekanto, 2008, Faktor-Faktor Yang Mempengaruhi Penegakan Hukum, Jakarta, p 1.8, [https://scholar.google.co.id/scholar?q=Soerjono+Soekanto,+2008,+Faktor-Faktor+Yang+Mempengaruhi+Penegakan+Hukum,+Jakarta&hl=en&as\\_sdt=0&as\\_vis=1&oi=scholar](https://scholar.google.co.id/scholar?q=Soerjono+Soekanto,+2008,+Faktor-Faktor+Yang+Mempengaruhi+Penegakan+Hukum,+Jakarta&hl=en&as_sdt=0&as_vis=1&oi=scholar)

<sup>10</sup> Syamsuddin Pasamai, 2009, Sosiologi dan Sosiologi Hukum. Suatu pengetahuan praktis dan terapan, Umitoha Ukhuwah Grafika, Makassar, p 201, <https://onsearch.id/Record/IOS3420.slims-45758>





element for a rule to be categorised as law, so of course the element of coercion is also closely related to whether or not a legal provision or rule is effective. If a rule of law is ineffective, one of the questions that can arise is what happened to the threat of coercion? It could be ineffective because the threat of coercion is not too severe, it could also be because the threat of coercion is not adequately communicated to the public.<sup>11</sup>

## 5 THEORY OF LEGAL PROTECTION

The theory of legal protection is one of the most important theories to be studied, because the focus of this theory study on legal protection is given to the society. The society that is targeted at this theory is the society which is in a weak position, either economically or weakly from the juridical aspect. The term the theory of legal protection comes from the English language, namely legal protection theory.<sup>12</sup>

Salim HS defines protection as an attempt or form of service provided by law to the subject of law as well as matters of a protected object. Meanwhile, legal understanding can be studied from the norms listed in the Law and the legal norms that live and thrive in society. So the definition of legal protection theory is a theory that examines and analyzes the existence or form or purpose of protection, the subject of the protected law and the object of protection afforded by the law to the subject.<sup>13</sup>

According to Satjipto Rahardjo, the protection of the Law is to provide a guidance on human rights which is harmed by others and the protection is given to the community in order to enjoy all the rights granted by law.<sup>14</sup>

Legal protection is the protection of dignity, as well as recognition of human rights owned by legal subjects based on arbitrary legal provisions or as a collection of rules or rules that will protect one thing from another. According to Philipus M. Hadjon's opinion, legal protection for the people is a preventive and repressive government action. Preventive legal protection aims to prevent disputes, which directs government action to be careful in making discretionary decisions, and repressive legal protection aims to resolve disputes including judicial hand<sup>15</sup>

<sup>11</sup> Achmad Ali, 1998, *Menjelajahi Kajian Empiris Terhadap Hukum*, Yasrif Watampone, Jakarta, p, 186, <https://www.worldcat.org/title/menjelajahi-kajian-empiris-terhadap-hukum/oclc/52904182>

<sup>12</sup> Salim HS, 2016, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Rajawali Pres, Jakarta, p, 259, <https://opac.perpusnas.go.id/DetailOpac.aspx?id=968544>

<sup>13</sup> Ibid p. 262

<sup>14</sup> Satjipto Rahardjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, p, 54, <https://simpus.mkri.id/opac/detail-opac?id=10270>

<sup>15</sup> Ibid. p, 29



## 6 THE MARRIAGE AGREEMENT

R. Subekti states that a marriage agreement is an agreement regarding the property of husband and wife during their marriage which deviates from the principles or patterns established by law. In the Civil Code (BW), civil marriage agreements are generally regulated in Articles 139-154. In Article 139 it is said that "By entering into a marriage agreement, both husband and wife are entitled to make several deviations from the rules of the Law regarding the unity of property, provided that the agreement does not violate good law or public order and provided that it is also rejected according to the law." (Article 139).<sup>16</sup>

The marriage agreement does not only concern the matter of property resulting from marriage, but also includes the terms / conditions of desire that must be fulfilled by both parties as long as they do not violate the limits of religious law and morality.<sup>17</sup> Etymologically, the agreement in Arabic is called Mu'ahadah Ittifa' or akad. In Indonesian, it is known as a contract. Agreement or contract which means an act by which one or more people bind themselves to one or more people<sup>18</sup>

In Article 1 letter e of the Compilation of Islamic Law, it is stated that a marriage agreement is an agreement pronounced by the prospective bridegroom after the marriage contract which is contained in the Marriage Certificate in the form of a marriage promise that is dependent on certain circumstances that may occur in the future. The marriage agreement, which is part of marriage law, is an integral part of Islamic law which is inseparable from the dimensions of aqid and Islamic morals. On this basis, marriage law wants to realise marriage among Muslims to be a marriage of faith and morals, because such a marriage is expected to have transcendental and sacred value to achieve the purpose of marriage in line with the objectives of Islamic shari'a.<sup>19</sup>

<sup>16</sup> Hilman Hadikusuma, 2007, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama*, Mandar Maju, Bandung, p. 52,

[https://scholar.google.co.id/scholar?q=Hilman+Hadikusuma,+2007,+Hukum+Perkawinan+Indonesia+Menurut+Perundangan,+Hukum+Adat,+Hukum+Agama,+Mandar+Maju,+Bandung,&hl=en&as\\_sdt=0&as\\_vis=1&oi=scholar](https://scholar.google.co.id/scholar?q=Hilman+Hadikusuma,+2007,+Hukum+Perkawinan+Indonesia+Menurut+Perundangan,+Hukum+Adat,+Hukum+Agama,+Mandar+Maju,+Bandung,&hl=en&as_sdt=0&as_vis=1&oi=scholar)

<sup>17</sup> Henry Lee A Weeng, 1990, *Beberapa Segi Hukum Dalam Perjanjian Perkawinan*, Rimbow, Medan, p. 5. [https://www.google.com/search?q=Henry+Lee+A+Weng,+1990,+Beberapa+Segi+Hukum+Dalam+Perjanjian+Perkawinan,+Rimbow,+Medan&tbn=isch&source=univ&fir=c1PURZZUbH1WvM%252CqwHkNlket7qgkM%252C\\_%253BVZlmlUCwDo58MM%252CAdYdGbFKpVRh0M%252C\\_%253BZpfKpAskuiEcNM%252C9yuETWArFDkGdM%252C\\_%253C\\_&usg=A14\\_-kS1wuwAq470yLZuCsaoim0k\\_TtITQ&sa=X&ved=2ahUKEwiIvYieyoqAAxW-4jgGHTdDDUQQjKjEegQIDhAC&biw=1280&bih=649&dpr=2](https://www.google.com/search?q=Henry+Lee+A+Weng,+1990,+Beberapa+Segi+Hukum+Dalam+Perjanjian+Perkawinan,+Rimbow,+Medan&tbn=isch&source=univ&fir=c1PURZZUbH1WvM%252CqwHkNlket7qgkM%252C_%253BVZlmlUCwDo58MM%252CAdYdGbFKpVRh0M%252C_%253BZpfKpAskuiEcNM%252C9yuETWArFDkGdM%252C_%253C_&usg=A14_-kS1wuwAq470yLZuCsaoim0k_TtITQ&sa=X&ved=2ahUKEwiIvYieyoqAAxW-4jgGHTdDDUQQjKjEegQIDhAC&biw=1280&bih=649&dpr=2)

<sup>18</sup> Chairuman Pasaribu Dan Suhrawadi K. Lubis, 2004, *Hukum Perjanjian Dalam Islam*, Sinar Grafika, Jakarta, p. 1, <https://opac.perpusnas.go.id/DetailOpac.aspx?id=23662>

<sup>19</sup> Ansyari MK, 2010, *Hukum Perkawinan Di Indonesia*, Yogyakarta, Pustaka Pelajar, p. 10, <https://pustakapelajar.co.id/buku/hukum-perkawinan-di-indonesia/>





An agreement in Islamic law is called a contract, which means binding, linking, or connecting. The purpose of a contract is to create a legal effect. The terms of the marriage agreement in Islamic law are not explained in detail, but there are conditions for marriage that can be submitted from the parties concerned, this is the same as an agreement that contains conditions that must be fulfilled by the parties to the agreement, the party who promises to fulfil the specified conditions.<sup>20</sup>

The Qur'an has explained the importance of keeping the promises we have made. Allah Subhanahu wa Ta'ala in His word, "And fulfil the promise, surely the promise must be held accountable". The Compilation of Islamic Law explains that one of the marriage agreements is taklik talak, this can be seen in the Marriage Agreement Chapter Article 45 paragraph 1. In Indonesia, taklik talak is always included in the marriage certificate (recording), so it is as if it has been treated as one of the obligatory and ordinary ones, generally this refers to the view that when someone has stated the taklik talak pledge, it is expected to maintain the rights of the wife. Marital agreements that contain deviations from unity are usually made by couples whose wealth is very unequal - the husband-to-be is very wealthy, while the wife-to-be has none or vice versa.<sup>21</sup>

## 7 DISCUSSION

The results showed that the number of cases concerning joint property disputes at the Makassar Religious Court class IA South Sulawesi for the last 5 (five) years can be seen in the following table:

Table 1 Report on the number of cases concerning joint property disputes at the Makassar Religious Court

NO	Year	Number of Cases
1.	2018	13
2.	2019	17
3.	2020	10
4.	2021	9
5.	2022	25
<b>Amount</b>		<b>Total 74</b>

Data source: Makassar Religious Court 2022

<sup>20</sup> Amir syarifudin, 2006, Hukum Perkawinan Islam Di Indonesia; Antara Fiqh Munakahat Dan Undang-Undang Perkawinan, Jakarta; kencana, cet 1,p. 145.

<sup>21</sup> Mochamad Djais, 2008, Hukum Harta Kekayaan Dalam Perkawinan, Fakultas Hukum Diponegoro, Semarang, p. 101



Based on the table above, it shows that for 2018 the number of cases of joint property disputes was 13 cases, in 2019 there were 17 cases, in 2020 there were 10 cases, in 2021 there were 9 cases, in 2022 there were 25 cases. In total there were 74 cases. In the Makassar District Court report, the number of cases of Joint Property Disputes (gono gini property) for the last 3 years can be seen in the following table.

Table 2 In the report of the Makassar District Court, the number of cases of Joint Property Disputes (gono gini property) for the last 3 years can be seen in the following table

<b>NO</b>	<b>Year</b>	<b>Number of Cases</b>
1.	2020	1
2.	2021	1
3.	2022	1
<b>Amount</b>		<b>Total 3</b>

Data source: Makassar Religious Court 2022

Based on the table above, it shows that for 2020 the number of cases of joint property disputes is 1 case, in 2021 there is 1 case, in 2022 there is 1 case, a total of 3 cases.

From the data above, it can be seen that how many joint property disputes occur in the lives of the people of Makassar city. Household problems and conflicts over joint property often occur against the wishes of married couples. The goal of an eternal and lasting marriage and mutual love, affection as expected is not achieved in its entirety. The large number of cases of property disputes in the Makassar Religious Court compared to the Makassar District Court is due to the majority Muslim community of Makassar city, as well as the lack of awareness and legal knowledge in managing property.

Therefore, making a marriage agreement is one form of legal protection of property that can be done by a married couple in accordance with a mutual agreement in order to avoid problems and disputes in the future.

Legal protection is an effort or form of service provided by law to legal subjects and things that become protected objects. Legal protection can be divided into 2 (two), namely: Preventive legal protection is protection provided by the government with the intention of preventing violations before they occur. In relation to the legal protection of property in marriage, the parties, in this case the prospective husband and wife, can agree on the arrangement of the position of property in marriage as outlined in the marriage agreement to prevent property disputes in the future. In accordance with the provisions of Article 139 of the Civil Code that a married couple can deviate from the provisions



stipulated in the joint property regulated in the Law, in article 29 of the Marriage Law which has been amended by the Constitutional Court Decision No.16-XIII/2015 that a marriage agreement can not only be made before marriage but also during marriage. Article 47 of the Compilation of Islamic Law that the agreement that has been made can include the mixing of assets and the separation of assets. Referring also to the provisions of Article 1338 of the Civil Code that all agreements made legally shall apply as a law to the parties. Based on the provisions of the above rules can be used as a legal basis to prevent property disputes in the future. Repressive Legal Protection aims to resolve disputes, including handling in judicial institutions.

In relation to the legal protection of property in marriage, if the marriage agreement deed is made before a Notary, it will have more legal force in accordance with the provisions of Article 15 of Law. No. 2 of 2014 on the Amendment to Law No. 30 of 2004 on the Office of Notary that Notary is a Public Official authorised to make authentic deeds regarding all acts, agreements, and provisions made in the form stipulated by law. Referring to the provisions of Article 1870 of the Civil Code that an authentic deed is a perfect means of proof for the parties and their heirs and those entitled to what is contained in the deed. Based on the above provisions, then in the event of a dispute, a marriage certificate that has been made before a Notary can be used as concrete evidence that has legal force and can be used as perfect evidence in court.

According to the above regulation, the marriage certificate that has been prepared and legalized by a Notary must also be reported to the Registrar of the District Court in the jurisdiction where the marriage took place. This is done to record the information in the deed, so that it can be accessed by third parties. Furthermore, this step aims to strengthen the legal force of the marriage certificate.

In the process of making a marriage deed, the parties who have mutually agreed must do so before a Notary, who is a state official authorized to draw up such deeds in order to obtain legal validity. According to Article 152 of the previous Civil Code, any marriage agreement that has been made before a Notary must also be registered at the District Court. The content of the article is as follows: "The clauses contained in the marriage agreement, which contain provisions that violate the unity under the law in whole or in part, shall not be valid against third parties before they are recorded in the public register set up for that purpose at the Registrar's Office of the District Court in the



jurisdiction where the marriage took place, or if the marriage took place abroad, at the Registrar's Office in the place where the marriage agreement is registered."

According to the above regulation, the marriage certificate that has been prepared and legalized by a Notary must also be reported to the Registrar of the District Court in the jurisdiction where the marriage took place. This is done to record the information in the deed, so that it can be accessed by third parties. Furthermore, this step aims to strengthen the legal force of the marriage certificate.

1. Based on the results of the author's research, those who registered the marriage agreement deed at the Makassar Class IA District Court during the last 6 (five) years were registered and recorded in the waar sign, namely: For the year 2007 there are 2 married couples on behalf of:
  - a. Munafri Arifuddin and Melinda Aksa (Muslim)
  - b. Rudy Chandra and Dessy Adriana Simon (Non Muslim)
2. For 2008 there are 3 married couples on behalf of:
  - a. Anton Lomewa and Nur muliana Sutardjie (Muslim)
  - b. Max Tengkanoo and Gladis Jenny (Non Muslim)
  - c. Stepan Martin Sauter and Erika Enqline (Non Muslim)
3. For the year 2009 there are 2 married couples on behalf of:
  - a. Hilton Tandjung and Erlina (Muslim)
  - b. Eddy Halim and Suldrasa (Muslim)
4. For the year 2010 there are 2 married couples on behalf of:
  - a. Karim Zarkeneus and Lisa Soetanto (Non Muslim)
  - b. Frieda Louise Sinanu and David Michael Scott (Non Muslim)
5. For 2011 there is 1 married couple on behalf of Frans Polim and Erika (Non Muslim)
6. For 2013 there is 1 married couple on behalf of Michael Albert Rimmer and Ratna Trisia Chacha (Non Muslim)

The data shows that in the last 6 years, there have been 10 couples in Makassar City who have obtained a marriage certificate from a notary public and registered it with the Makassar District Court. Of these, 4 couples adhere to Islam and 6 couples adhere to religions other than Islam. In relation to the making of a marriage contract, there is an assumption in the community that this is generally done by non-Muslim couples.



However, in reality, there are several Muslim couples who also make a marriage agreement deed in Makassar City.

Based on the author's interviews with individuals who have entered into a marital agreement, they revealed that this agreement is not a materialistic act. It is natural for married couples to organize their finances in order to understand each other, including transparency regarding property ownership, the amount of debt before marriage, and assets in marriage. With this agreement, they effectively get legal protection, prevent possible conflicts in the future, and avoid losses to the parties involved. Some people who are unfamiliar with the process and benefits of a marriage certificate may have a negative view of it, especially if very sensitive matters such as property are discussed. However, by organizing these matters from the outset, it will make it easier to resolve disputes in the future. It can also reduce losses in terms of time, finances, energy, and mentality, and prevent damage to social relationships due to such disputes. Types of marriage agreements made by the parties and already registered in the Makassar District Court are:

1. Marriage agreements outside each fellowship of property (separation of property)
2. Mixing / unity of results and income.

Several clauses contained in the deed of marriage agreement of the parties include:

- 1) Agreement to give each other transparent information to their partners about all assets / property that have been owned before the marriage or which will be obtained during the marriage.
- 2) Free parties' agreement to guarantee, sell or transfer assets acquired by each party acquired before the marriage takes place.
- 3) The property brought into their marriage as a congenital property, as well as the property earned by each party, both before and after the marriage takes place, as a gift, gift, grant, testament or inheritance. Including the proceeds or the profits, remain the property of each party who obtained it.
- 4) The property acquired during the marriage takes place deriving from the work of the parties and the result of the joint effort between the parties is a common property.
- 5) All debts owed by husbands or wives to their marriages remain a responsibility for each party.



- 6) All expenses incurred for the purposes of the household and the care and education of children born into marriage between the parties shall be borne together.

Based on the findings of the author's research, there are interesting facts regarding the validity of marriage agreements. Starting from 2014 until now, the Makassar District Court has stopped the marriage certificate registration process. This is because marriage agreements are no longer required to be registered in court. This is done to avoid potential imbalances in authority. Since it is regulated in the Law on Marriage, a marriage agreement made before a Notary, who is also authorized to make marriage certificates, has complete legal validity in the eyes of the court. Registering with the court indirectly makes the Notary doubt his own authority by involving the court. Although it is written in the Civil Code, with the existence of a special Marriage Law, the rules in general law such as the Civil Code no longer apply, except for matters that are not regulated in the Marriage Law. This legal principle is known as *lex specialis derogat legi generalis*, which is a principle that states that a special law (*lex specialis*) outweighs a general law (*lex generalis*). Therefore, the marriage agreement deed that has been drawn up is valid and recognized as a state document because it has been made before an authorized official. The court will intervene and get involved only in situations of dispute.

At present, the process of making a Marriage Agreement can only be done before a marriage registrar employee, or also before a Notary if you want it to be recognized as an authentic deed. This refers to Article 29 paragraph 1 of the Marriage Law which has been revised through the Constitutional Court Decision No. 16/PUU-XIII/2015. Article 29 paragraph 1 states that before or during marriage, with the consent of both parties, they may prepare a written agreement which will be legalized by a Marriage Registrar or Notary. The contents of this agreement will also apply to third parties, as long as the third party is related to the agreement. People can make marital agreements related to property arrangements, especially with the amendments based on the Constitutional Court Decision, which allows the making of marital agreements not only before marriage, but also when the marriage is taking place. This makes it easier for husband and wife to make such agreements. If you want the agreement to have authentic force, it must be drawn up before a Notary. In the event of a dispute related to property, the marital agreement regarding property arrangements that have been mutually agreed upon can be used as strong evidence. Despite this, there are still not many requests to make a marriage





agreement at a Notary's office, because the participants are still rare. Not everyone is willing to do so.

Marriage agreements can encompass the arrangement of property through either a combined wealth agreement or a separate wealth agreement. However, the more commonly adopted approach is the separate wealth agreement, as it provides a simpler means of managing each party's assets and helps mitigate potential risks stemming from one spouse's business activities that may impact jointly-owned property. The concept of separate wealth is outlined in both the Civil Code and Compilation of Islamic Law.

Article 186 of the Civil Code outlines the rationale for separate property, stipulating that in cases where a husband exhibits detrimental behavior by recklessly depleting assets from shared property and jeopardizing the household's stability due to mismanagement of assets, it serves as a safeguard for the wife's matrimonial property and her legally entitled rights. Additionally, it provides protection in cases where significant neglect in managing the wife's marital assets puts the wealth at risk. Under Article 193 of the Civil Code, even in cases of separate property, the wife is obligated to maintain a balance between her assets and those of her husband, contributing to household finances and the upbringing of children born to the couple. Separate property agreements are also applicable to Indonesian citizens married to foreign nationals. In Indonesian law, in the event of property amalgamation through marriage, the foreign spouse is only entitled to rights of usage over the acquired property. These rights must be relinquished within a year, failure to do so resulting in the property reverting to the state. This regulation stems from Article 35 of the Marriage Law, which designates property acquired during marriage as communal. Challenges arise due to the restrictions on property ownership for foreign nationals, as articulated in Article 21 of the Basic Agrarian Law No. 10/1999.

This article specifies that property rights are exclusive to Indonesian citizens. Foreigners who acquire property through inheritance or marital property mixing, as well as Indonesian citizens who lose their nationality after owning property, must surrender these rights within a year. Given these legal parameters, opting for a separate property marriage agreement provides a legal safeguard for the property and assets of Indonesian citizens. This ensures that Indonesian citizens retain ownership of their property. One of the government's measures to enforce separate property agreements for Indonesian citizens married to foreigners is to prevent the acquisition of land and property in Indonesia by foreign nationals who marry Indonesian citizens solely to gain property



rights within the country. Based on the writer's research there are 10 Judges, 10 Advocates, have their own statement about effective, less effective and ineffective if husband and wife make marriage agreement in order to do legal protection to property in the marriage that the author thoroughly through the distribution of questionnaires in Religious Courts class IA Makassar and The Makassar District Court. The reason the author distributes questionnaires to judges, advocates, because the judges and advocates often handling cases and make the process of settling the dispute over the property in the marriage indirectly already very know about the main causes of the dispute of property so that it can be asked his opinion about the solution in providing legal protection to the property in marriage. To know it can be seen in the table below:

Table 3 Respondents' Responses (Judges and Advocates) Concerning the Effectiveness of Making the Marriage Agreement

Statement	Frekuensi	(%)
.Effective	15	75,0
Less effective	5	25,0
Ineffective	0	00,0
Amount	20	100,0

Data Source: Primary Data Processed Year 2022

According to the data listed in the table above, 75.0% of the judges and advocates were of the opinion that making a marriage agreement deed is effective in protecting property.

This is done to prevent possible disputes in the future, because of the agreement and mutual consent that has been established from the start. Meanwhile, 25.0% were of the opinion that this method was less effective because marital agreements still felt unfamiliar, even taboo, especially if the couple had an inadequate understanding of the matter. No respondents stated that this process was ineffective. In addition, judges and advocates also provided responses regarding the extent to which it is important for married couples to organize and determine the position of assets from the start in order to avoid disputes in the future.

Table 4 Response of respondents (Judges and advocates) regarding the Establishment and arrangement of positions of property from the beginning to prevent disputes

Statemen	Frekuensi	(%)
Important	17	85,0
Not too important	1	5,0



Not important	2	10,0
Jumlah ( n)	20	100,0

Data Source: Primary Data Processed Year 2022

Based on the data in the table, 85.0% of the respondents (judges and advocates) considered it important for husband and wife to organize and manage their property position from the start. Meanwhile, 5.0% thought that this was less important, and 10.0% stated that it was not considered important. In the case of disputes over joint property, disputes generally arise because the parties involved make claims against each other over items included in the joint property. The main factors that trigger conflict are often greed and avarice. The resolution of joint property disputes always involves a complex and time-consuming process, not only at the initial level, but may also require further legal action. This is due to the dissatisfaction of one party who feels that the division of joint property is unfair. Therefore, making a marital agreement is a wise and beneficial action for both the candidate and the married couple. This agreement is notarized and aims to protect marital property. With this agreement in place, it is hoped that in the event of a divorce, the parties involved will not be involved in disputes regarding the division of joint property.

The marriage agreement contains agreements and arrangements for the acquisition of property before and during marriage beyond the provisions provided for by law on property in marriage and excluding talaq. But its application in the community is still less effective because the knowledge of the people about the property is still lacking, let alone about the making of the marriage certificate agreement both in terms of legal rules and benefits. Based on the results of the research shows that, the public has answers about his knowledge in distinguishing shared property and luggage based on questionnaires that the author distributed to the community (respondents) amounted to 40 people can be seen in the following table:

Table 5 People's knowledge of differences loot and common property

<b>Statemen</b>	<b>Frekuensi</b>	<b>Persentase (%)</b>
Know	7	17,5
Do not know	33	82,5
<b>Amount</b>	40	100,0

Data Source: Primary Data Processed Year 2022

In this table it is stated that 17.5% know about the difference between congenital property and joint property, 82,5% do not know at all.



In addition to the limited knowledge of the community in distinguishing shared property and common property, knowledge about the existence of a marriage agreement on the hartapun very limited. To make a marriage agreement these two things must be well understood.

Based on the authors' research, the knowledge of the community regarding the existence of marriage agreement on the property whose benefits to protect the property can be seen in the following table:

Table 6 Knowledge of respondents regarding the existence of marriage agreements on assets whose benefits to protect property

<b>Statemen</b>	<b>Frekuensi</b>	<b>Persentase (%)</b>
Know	7	17,5
Do not know	13	32,5
Do not know it at all	20	50,0
<b>Amount</b>	<b>40</b>	<b>100,0</b>

Data Source: Primary Data Processed Year 2022

Based on the table, 17.5% of respondents knew about the existence of a marital agreement related to property that has the benefit of protecting property, 32.5% had less knowledge about this, and 50.0% of respondents did not know at all. When making a marital agreement that regulates property management, the parties involved have understood the risks and consequences involved. If at any time one of the parties does not comply with the contents of the marital agreement and causes harm to the other party, then the injured party has the right to file a claim for compensation through the courts.

These claims include demands for compliance with the terms of the agreement as well as compensation for any losses incurred. While marital agreements are often seen as an influence of Western culture and therefore less common and considered taboo, it is important to remember that many problems in marital relationships occur because one party does not always act in good faith. In the context of providing protection, especially to women, a marital agreement can serve as a guarantee against possible arbitrary actions and domestic violence, especially in the event of divorce. Therefore, it is important to make agreements and arrangements together, especially for matters that are considered crucial in married life.<sup>22</sup>

<sup>22</sup> Interview with Cening Budiana SH., MH. The civil court judge of Makassar, on 10 April 2017.



In the negative aspect, marital agreements reflect the selfish and individualistic orientation of married couples. This is because the agreement takes into account the financial situation of each party in the marriage and gives the freedom to not be responsible for the spouse's debt if one party has a debt to a third party and is unable to repay it. On the positive side, this agreement provides clarity in establishing the position of property, preventing conflict and competition over property in the future because each party has known and agreed to this.<sup>23</sup>

Protecting joint property by making a marriage agreement on property arrangement is to protect the rights of both parties because the marriage agreement is a law which provides legal guarantees for the parties. The making of a marriage agreement must be made by the parties who are competent in committing a legal act, not in an ability, there is no coercion.<sup>24</sup>

A marital agreement is a wise measure to organize property, and the process of making one should be based on the agreement of the parties who wish to preserve and protect their property, as well as avoid future conflicts over it. Moreover, in the context of divorce, if there is a dispute over joint property that must be resolved through a religious court, the process can be lengthy and complicated. Article 86 paragraph (1) of Law No. 7 of 1989, as amended by Law No. 3 of 2006 and Law No. 50 of 2009 on Religious Courts, allows lawsuits related to disputes over joint property between husband and wife to be filed simultaneously with a divorce lawsuit or can also be filed separately after a divorce verdict that has permanent legal force. This should allow the divorce process to be resolved more simply, quickly, and at a more affordable cost. However, in practice, often the settlement of joint property disputes in court is carried out separately, which results in a long, complicated, and often confusing process, especially if the parties are dissatisfied with the judge's decision.<sup>25</sup> Agreement must be made in the presence of a Notary, and it is obligatory for the parties creating the marriage deed to report it to the Office of Religious Affairs (for Muslims) and the civil registry (for non-Muslims) for couples who create a marriage agreement before the wedding, in order to ensure that the marriage contains a marriage agreement and is duly recorded.<sup>26</sup>

<sup>23</sup> Interview with Heintje Johannes Anekotta S.H. Advocate at the Makassar District Court. April 5, 2017

<sup>24</sup> Interview with Hasanuddin S.H., M.H. Religious Court Judge of Makassar. March 28, 2017

<sup>25</sup> Interview with Sudirman Sunusi S.H. Advocate in Makassar Religious Court, active in Legal Aid Institute of UMI and lecturer of Law Faculty of Muslim University of Indonesia. March 29, 2017

<sup>26</sup> Interview by Widartiningsih, SH. Notaris dan PPAT Kota Makassar, pada tanggal 13 april 2017



Termination of the agreement can be done by the parties regardless of the reason. If the agreement only involves two parties and does not involve a Notary, it is enough for them to agree to cancel the contents of the agreement. However, if the agreement involves a Notary, the parties must visit the Notary again and state their intention to cancel the contents of the agreement. This is because the deed that has been made by the Notary has the status of a state document.

A marriage agreement drafted through a Notarial deed can serve as strong evidence in the future for the parties involved and for their heirs, as well as all parties entitled to what is stated in the deed. This is because at present, agreements are based on the principle of trust, and oral agreements cannot be considered as valid evidence in the event of a dispute.

A deed prepared by a Notary is a written document that is able to provide a guarantee of legal certainty. The assessment of a Notarial Deed should be based on the principle of legal assumption that a Notarial Deed must be considered valid until a party proves that the deed is invalid. To declare that a deed made by a Notary is invalid, a lawsuit is required to the court and it must be proven that the deed has no validity. During the lawsuit process until there is a court decision that has permanent legal force, the deed made by the Notary is still considered valid and binding on the parties.<sup>27</sup>

In Islam, a marital agreement regarding the arrangement of joint property is optional and not an obligation. However, it is only permitted as long as what is included in the agreement does not violate Islamic principles. In the process of recording the marriage certificate at the Office of Religious Affairs (KUA), there are a number of points that discuss the marriage agreement. The sixth bullet point includes the number and date of the letter, the content of the marriage agreement, and the name of the Notary who drafted and legalized the agreement. Therefore, if a couple has a marital agreement before marriage, it must be reported to the KUA to be recorded on the marriage certificate, so that it is known that there is a marital agreement in the marriage, apart from Takliq Talak. The Recording Officer will record and give a copy of the marriage certificate to the couple, which is commonly referred to as the Marriage Book. The Nikah Book is given to the couple as official proof that the marriage has taken place, while the Nikah Certificate will be kept at the KUA.

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<sup>27</sup> Ibid





In practice, in the community, often the making of a marriage contract before marriage is not considered a very important matter. This may be due to the fact that many brides-to-be do not have sufficient financial means, coupled with the strong influence of local culture. Customs still dominate, and shame is a fundamental value that is applied in the life of the Bugis-Makassar community.

The existence of anxiety and doubt about how family members or other people will respond or view the marriage agreement related to property arrangements is natural. Currently, there is no registration of property-related marital agreements at the Tamalanrea KUA after the changes based on the Constitutional Court's decision. However, by reporting and recording it at the KUA, the publicity aspect has been fulfilled and the agreement is also binding on third parties. If it is not reported to the KUA, then the agreement will only bind the husband and wife as the parties involved..<sup>28</sup>

Based on the data obtained in the research, the author argues that in the context of its application in the Makassar City community, the effectiveness of marriage certificates in providing legal protection for property in marriage is still relatively lacking. This can be seen from the limited number of people who make the marriage certificate. The limited knowledge of the community regarding property and the benefits of marriage certificates and the persistence of a culture of shame in the community, namely a sense of shame and reluctance to discuss property arrangements, are the main factors that cause this. In addition, there are concerns about the response from relatives if a member of a marriage enters into a marital agreement related to property arrangements. From a benefits perspective, marriage certificates have proven effective in protecting the rights and property of both parties, as well as preventing potential disputes in the future. The marriage certificate serves as a legal form for the parties and serves as strong evidence.

## 8 CONCLUSION

Based on the data obtained in the research, the author argues that in the context of its application in the Makassar City community, the effectiveness of marriage certificates in providing legal protection for property in marriage is still relatively lacking. This can be seen from the limited number of people who make the marriage certificate. The limited knowledge of the community regarding property and the benefits of marriage certificates and the persistence of a culture of shame in the community, namely a sense of shame and

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<sup>28</sup> Interview by ,H. Abd. Wahab, SH,MH. Kepala Kantor Urusan Agama (K.U.A) Tamalanrea pada tanggal 3 mei 2017



reluctance to discuss property arrangements, are the main factors that cause this. In addition, there are concerns about the response from relatives if a member of a marriage enters into a marital agreement related to property arrangements.

From a benefits perspective, marriage certificates have proven effective in protecting the rights and property of both parties, as well as preventing potential disputes in the future. The marriage certificate serves as a legal form for the parties and serves as strong evidence.



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