

## Marriage Agreement on Common Property in Marriage (Comparative Study of Indonesia and The United States)

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### Abstract

This article provides a comparative analysis of prenuptial agreements in Indonesia and the United States, focusing on their regulation of joint marital assets. Indonesia, which adheres to a civil law legal system, bases its prenuptial agreements on Article 29 of the Marriage Law. Conversely, the United States, operating under a common law legal framework, implements the Uniform Premarital and Marital Agreements Act (UPMAA). The research methodology employed in this study is legal research, utilizing both a statutory and comparative approach. The findings highlight the rationale behind prenuptial agreements, including their ability to simplify the division of assets, which is advantageous for both parties in the event of a divorce, and to mitigate potential conflicts in the future. Key distinctions between prenuptial agreements in Indonesia and the United States include the level of autonomy granted to couples in drafting the agreement. In Indonesia, couples have significant freedom to determine the terms of their prenuptial agreement, provided these terms do not contravene legal principles, religious values, morality, or public order. In contrast, in the United States, prenuptial agreements are subject to specific restrictions, delineating what can and cannot be included. Thus, while there is flexibility in crafting prenuptial agreements in both jurisdictions, it remains constrained by legal and cultural parameters.

### Keywords

Marriage; Prenuptial Agreement; Comparison

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## 1. INTRODUCTION

Marriage, as defined in Law Number 16 of 2019, which amends Law Number 1 of 1974 on Marriage (hereinafter referred to as the *Marriage Law*), is the union between a man and a woman as husband and wife. This union encompasses both spiritual and physical bonds and aims to establish a happy and enduring family rooted in the First Principle of *Pancasila*, namely belief in the One Supreme God. Article 28B, paragraph (1) of the 1945 Constitution of Indonesia further affirms that every individual has the right to form a family and continue their lineage through a legally recognised marriage. The necessity of marriage is contingent on its compliance with the legal prerequisites outlined by the law. Marriage is deemed pivotal as it is the foundational step in forming family life (Anam, 2019).



As a legal act, marriage establishes a formal bond between a man and a woman, yielding legal consequences for the couple and other involved parties. These consequences include delineating rights and responsibilities between spouses, the rights and obligations of parents, and the civil relationship between parents and children, encompassing the child's legal status and inheritance rights. Additionally, marriage impacts marital property, wherein assets are typically merged unless specified by a prenuptial agreement (Aufia et al., 2024). Such agreements, also called marriage contracts, allow couples to separate their assets through formal documentation, often created with a notary (Ani et al., 2021).

The concept of the prenuptial agreement, originating from the Dutch term *huwelijkevoorwaarden* found in the *Burgerlijk Wetboek* (Civil Code), translates to "marriage conditions." A prenuptial agreement is thus an agreement between a prospective husband and wife concerning property arrangements (Faradilla Asyatama & Ridwan, 2021). According to the language, "huwelijk" means marriage between a man and a woman, and "voorwaard" means a condition or agreement. A prenuptial agreement is made for/in a marriage between a man and a woman. (Ani et al., 2021).

According to the Civil Code, these agreements involve the separation of property and must be formalised before a notary (Sinaga, 2020). Typically, such agreements are documented as authentic deeds (Andreevna et al., 2020). The significance of prenuptial agreements lies in their ability to delineate ownership of tangible and intangible property, including debts and receivables, ensuring that these remain each spouse's respective rights and obligations after marriage. In Indonesia, Article 29, paragraph (1) of the Marriage Law allows prospective spouses to create a written marriage agreement by mutual consent before the marriage takes place, which must be ratified by the marriage registration officer (Sopiyan, 2023). This provision was further expanded by Constitutional Court Decision No. 69/PUU-XIII/2015, which clarified that a marriage agreement could also be made during the marriage (postnuptial agreement) (Ardhya & Mertha Sujana, 2021).

As society evolves, marriage agreements have become increasingly common and widely accepted by the public (Bell, 2018). For several reasons, such agreements are often established by prospective spouses before marriage. These reasons include cases where one party possesses significantly greater wealth than the other, when both parties have substantial financial assets or property, or when each prospective spouse owns a separate business. In scenarios where one business might face insolvency in the future, the agreement ensures that the unaffected party remains uninvolved. Similarly, if one partner has pre-existing debts, the responsibility for those debts remains solely with that individual and does not implicate the other party (Assidik & Gassing, 2019).

The United States, alongside Indonesia, permits the establishment of marriage agreements both before and during marriage (Leeson & Pierson, 2016). Such agreements are typically formulated by

couples either to preempt potential future disputes or to address existing conflicts. In the United States, marriage serves multiple purposes, including securing social legitimacy, acting to attain elevated social status, and achieving economic stability. Additionally, marriage in the United States is often perceived as a contractual arrangement, reflecting the individualistic tendencies of its society. Most states have adopted the **Uniform Premarital and Marital Agreements Act (UPMAA)**, formulated by the Uniform Law Commission, which standardises legal provisions regarding marital agreements (Fatnisary, 2021).

Chapter II, Article 2 of the UPMAA defines a marital agreement as a contract between spouses who intend to remain married, specifying, amending, or relinquishing rights and obligations arising during the marriage or in the event of separation, divorce, or the death of a spouse. These agreements have recently gained significant popularity, particularly among affluent couples.

The primary aim of this study is to analyse marital property agreements through a comparative lens, examining the practices in Indonesia and the United States. This comparison is significant because the cultural and legal interpretations of marriage in these two countries differ profoundly. Indonesia regards marriage as a sacred and lifelong bond, as outlined in Article 29 of its Marriage Law, and adheres to a civil law system (Jibril et al., 2023). Conversely, the United States, governed by a common law system, treats marriage as a contractual relationship underpinned by the provisions of the UPMAA.

## 2. METHOD

The research methodology employed in this study is normative juridical research. Data collection techniques involve an extensive literature review relevant to the research topic, including laws, regulations, scholarly articles, and books. The data are analysed through classification and categorisation processes tailored to each discussion's specific aspects. This study constitutes legal research employing both statutory and comparative approaches. The statutory approach involves examining legislation, focusing on Indonesia's *Marriage Law*, which governs the regulation of marriage agreements in the country. Meanwhile, the *Uniform Premarital and Marital Agreements Act* (UPMAA) serves as a reference framework for analysing the regulation of marriage agreements in the United States.

The comparative approach contrasts legal provisions from two jurisdictions—Indonesia and the United States. Indonesia follows a civil law system, which significantly emphasises codified legal norms. In this context, couples in Indonesia have broad discretion to determine the content of marriage agreements, as no specific laws comprehensively regulate their content. Conversely, the United States operates under a standard law system, where jurisprudence and the doctrine of precedent are fundamental. While couples in the United States also have considerable freedom in drafting marriage agreements, this freedom is subject to specific limitations regarding permissible and impermissible

provisions.

### **3. FINDINGS AND DISCUSSION**

#### **3.1. Arrangement of Marriage Agreement on Matrimonial Property in Indonesia**

All assets acquired by spouses during their marriage are classified as marital property. This classification encompasses assets obtained individually through gifts, personal income, joint acquisitions by spouses, and inheritances (Djuniarti, 2017). Marital property constitutes a fundamental aspect of marriage; hence, it is unsurprising that many married couples in Indonesia enter into marriage agreements concerning such property. A marriage agreement is a legally binding contract executed by prospective spouses before an authorised official, typically a notary, and formalised as an authentic deed (Sopiyan, 2023).

In the contemporary millennial era, increasing awareness among Indonesians regarding the significance of legal measures for self-protection has become evident. One such measure includes safeguarding individual rights within marital relationships. Under Indonesian positive law, these rights can be protected through a marriage agreement. The regulation of marriage in Indonesia has been in effect since the ratification of the Civil Code on May 1, 1848 (Jibril et al., 2023).

Fundamentally, a marriage agreement must comply with the principles and legal stipulations outlined in the Civil Code (Civil Code, n.d.). Article 29, paragraph (1) of the Marriage Law states that before the marriage occurs, prospective spouses, through mutual consent, may enter into a written agreement—referred to as a marriage agreement—that is subsequently ratified by a marriage registration official (Novita Sari & Ma'ruf, 2017). Once ratified, the agreement becomes legally binding for both parties and extends to third parties when applicable. However, its validity is nullified if the prenuptial agreement contravenes legal norms, religious principles, or moral values. Prenuptial agreements are integral from the onset of marriage. Once established and ratified, such agreements cannot be altered during the marriage unless both parties mutually consent to the modification. Furthermore, any amendments must not infringe upon the rights of third parties (Novany, Nadia, & Putra, 2007).

An affirmation must be grounded in comprehension, preparedness, and adherence to the essence of the agreement. In the context of a marriage contract, the involved parties are free to define the terms of the agreement as stipulated in Article 1338 of the Civil Code, provided that the validity requirements outlined in Article 1320 are met (Tutik, 2006). The concept of marriage may be interpreted formally, signifying an agreement that, while seemingly not contingent upon mutual consent, must nonetheless be expressed through a specific arrangement adhering to established customs, such as an authentic deed.

In cases where a marriage agreement is established, the separation of assets typically occurs (Sarizal et al., 2019). Such agreements grant spouses the autonomy to manage their respective properties without requiring consent from the other. Generally, marriage agreements are made for the following purposes:

1. To safeguard personal assets acquired before marriage.
2. To protect business interests and uphold the dignity of each party.
3. To address disparities in wealth between the parties.
4. To regulate significant income generated by either party.
5. To mitigate financial risks, particularly in cases where one party operates a business, ensuring that the other party remains unaffected by potential bankruptcy.
6. Assign sole responsibility for debts and liabilities to the party incurring them, preventing financial entanglements.

The primary purpose of a marriage agreement is to provide legal clarity regarding the ownership and management of property—whether jointly or separately held—and to safeguard the positions of both parties in the event of marital disputes. Additionally, such agreements serve as preventative measures designed to anticipate and minimise conflict within the marriage (Masri & Wahyuni, 2021). By establishing a clear legal foundation, the agreement promotes security and harmony in the marital relationship. Given the traditionally dominant role of husbands within marriage, the agreement also provides women with explicit legal protection, ensuring their rights and responsibilities are clearly defined (Rahman et al., 2020).

Marriage agreements further serve as legal assurances for third parties entitled to protection, such as creditors. These agreements often include provisions limiting their application to property acquired during the marriage. The rights of third parties in marriage agreements have been shaped by Constitutional Court Decision No. 69/PUU-XIII/2015, which redefined the legal standing of marital property. "Third parties" primarily refer to creditors and debtors (Dwinopianti, 2017). The delineation of marital property is critical for creditors, as it directly impacts the ability to collect debts. When marital property is fully consolidated, both spouses may bear responsibility for outstanding liabilities (Giyanthi et al., 2022).

The issuance of Constitutional Court Decision No. 69/PUU-XIII/2015, which strengthens the regulation of prenuptial agreements under Article 29 of the Marriage Law, underscores the provision of legal guarantees for dignity, respect, and the recognition of fundamental human rights. According to Hartono (2020), the human rights safeguarded by this decision pertain to the rights of Indonesian citizens who enter marriages with foreign nationals. Before the enactment of this decision, Indonesian citizens marrying foreigners faced significant legal challenges. Specifically, they could not enter a

prenuptial agreement after the wedding day or during their marriage. This restriction often resulted in the forfeiture of their property rights within Indonesia, as marital arrangements without such agreements were legally binding. Consequently, Indonesian citizens were compelled to forgo claims to property unless a prenuptial agreement had been executed on or before the wedding day (Iswantoro, 2019).

Prenuptial agreements typically outline the assets owned by each spouse, specifying which assets will remain separate in the event of a divorce. They also provide guidelines on the division of assets acquired during the marriage in case of separation (Ani et al., 2021). Furthermore, these agreements address responsibilities related to debts incurred before and during the marriage and certain spousal benefits, such as allowances, in the event of marital dissolution (Alvira Damayanti & Yunanto, 2024).

### **3.2. Arrangement of Marriage Agreement on Marital Property in the United States**

In a marriage agreement, prospective spouses may outline their terms regarding marital property, including whether personal property will be combined entirely, partially, or remain separate throughout the marriage (Mangarengi & Hanza, 2021). Indonesia operates under a civil law legal system that emphasises codified laws as primary sources of legal authority and enforces these codifications through its legal procedures. Conversely, the United States follows a standard law system, which derives its legal principles from judicial precedents. Consequently, the American legal system is deeply intertwined with societal objectives and political, ethical, religious, and economic considerations.

The United States has established the Uniform Premarital and Marital Agreements Act (UPMAA) to enhance the enforceability of marriage agreements, ensure consistent recognition across jurisdictions, and standardise the legal framework governing such agreements. The UPMAA applies to prenuptial and postnuptial agreements, treating postnuptial agreements under the same principles as prenuptial ones. It is noteworthy, however, that legal standards for such agreements vary across U.S. states, with some imposing stricter requirements on postnuptial agreements (Andreevna et al., 2020).

Each U.S. state has its regulations regarding the creation of prenuptial agreements. Among the fifty states, laws and practices vary, but the American Bar Association highlights that all states require prenuptial agreements to be procedurally and substantively "fair" (Kagan, 2024). A survey conducted by the American Academy of Matrimonial Lawyers in 2022 revealed that 50% of divorce attorneys reported an increase in consultations regarding postnuptial agreements over the preceding three years (Beauliu, 2024). Assessing the fairness of such agreements necessitates a thorough understanding of fundamental contract law principles, including capacity, coercion, fraud, and undue influence. Nevertheless, having a marriage agreement does not guarantee marital harmony. On the contrary, prenuptial agreements can sometimes be a source of discord, particularly when one partner possesses

significantly more wealth than the other. In cases of divorce involving a prenuptial agreement, courts must evaluate whether the agreement is equitable and enforceable (Royani et al., 2024)

Married couples in the United States have the liberty to choose any state where either party resides, plans to reside, or intends to marry to enforce a prenuptial agreement (Driscoll, 2022). However, due to the non-uniform adoption of the **Uniform Premarital and Marital Agreements Act (UPMAA)** across all states, couples entering into prenuptial agreements are restricted to selecting jurisdictions that have enacted the UPMAA (Ryznar, 2017). Approximately 26 states have adopted the **Uniform Prenuptial Agreement Act (UPAA)**, while 24 states either adhere to their distinct legislative frameworks or rely on common law (Sembiring et al., 2019). Despite variations in state-specific requirements, the fundamental principles for creating enforceable prenuptial agreements across the United States are primarily consistent:

1. **Written Documentation:** The agreement must be documented in writing. Under the UPMAA, a valid prenuptial agreement requires only the signatures of both parties. However, additional formalities are necessary for states such as Minnesota, which still need to adopt the UPMAA, including signatures witnessed by two individuals and notarisation.
2. **Timing of Execution:** All states mandate that prenuptial agreements be signed before marriage. The agreement must be finalised and executed at least 24 hours before the wedding ceremony.
3. **Legal Counsel Involvement:** While the parties are entitled to consult legal counsel during the drafting of the agreement, failure to involve an attorney does not automatically render the agreement unenforceable.
4. **Marriage as a Prerequisite:** The agreement becomes effective only upon the formalisation of the marriage.
5. **Adherence to Public Policy:** Prenuptial agreements cannot contain provisions that violate public policy.
6. **Substantive Fairness:** The agreement must satisfy standards of substantive fairness. These standards address unforeseen changes in marital circumstances that might result in undue hardship for one party.
7. **Financial Disclosure:** The agreement must comprehensively disclose each party's financial assets and liabilities. This ensures transparency and informs the decisions of all parties involved.
8. **Comprehensive Scope:** Prenuptial agreements often address not only rights and obligations during the marriage but also those related to divorce or the death of a spouse. Attorneys drafting such agreements must have expertise in the jurisdiction's applicable laws to ensure enforceability.

Historically, courts in the United States were reluctant to enforce prenuptial agreements, particularly those altering spousal rights upon divorce, as such agreements were perceived as undermining marital stability and potentially encouraging divorce (Alvira Damayanti & Yunanto, 2024). However, between the 1970s and 1980s, most states began to recognise prenuptial agreements, albeit with significant variability in regulatory standards (Ryznar, 2017).

The Uniform Premarital Agreement Act (UPMAA), in Chapter II, Article 2, defines a marriage agreement as a contract between a husband and wife who intend to remain married, outlining provisions that affirm, modify, or waive rights or obligations arising during the marriage or upon separation, divorce, or the death of a spouse (Uniform Premarital and Marital Agreements Act [UPMAA], n.d.). Article 4 of the UPMAA specifies that marital rights or obligations refer to those arising within the context of the marriage relationship. These rights and responsibilities include the following:

1. The right to spousal support,
2. Property rights, encompassing characterisation, management, and ownership,
3. Liability for debts,
4. Rights and responsibilities related to property and liabilities in cases of separation, dissolution of marriage, or the death of a spouse, and
5. Provisions regarding attorney's fees and associated costs.

Marriage agreements are standard in the United States, particularly among couples preparing for marriage. Prenuptial agreements typically address the division of property, spousal support, and child custody in the event of divorce (Rimi, 2023). Additionally, the content of these agreements may include provisions consistent with individual U.S. states' public policy. Such provisions may consist of:

1. The rights of one or both spouses to interests in trusts, inheritances, gifts, and expectations created by third parties,
2. The designation of fiduciaries, guardians, conservators, or agents for managing personal or property matters,
3. Tax-related arrangements,
4. Mechanisms for resolving disputes arising under the agreement,
5. The choice of law governing the agreement's validity, enforceability, interpretation, and construction, and
6. Formalities are required to amend the agreement beyond those stipulated by the UPMAA.

Moreover, prenuptial agreements may include provisions concerning the forfeiture of property in cases of infidelity. In the United States, such agreements are often initiated by individuals with significant assets or those at risk of substantial financial loss in divorce, particularly in states adhering to community property laws (Leeson & Pierson, 2016).



A primary motivation for establishing prenuptial agreements is wealthier individuals' protection of assets. Older couples may seek these agreements to safeguard assets or retirement income and to ensure that children from previous marriages receive an inheritance (Malik, 2024). Under the UPMAA, prospective spouses have considerable autonomy in determining the terms of their marital agreements. However, these agreements remain subject to specific restrictions imposed by U.S. law, prohibiting certain provisions (Manullang & Sudiro, 2023). Consequently, while the UPMAA offers significant flexibility in drafting marriage agreements, their scope is ultimately constrained by applicable legal and regulatory frameworks.

### Comparison Table of Marriage Agreement Arrangements between Indonesia and the United States

| Difference                        | Indonesian   | United States  |
|-----------------------------------|--|--|
| Settings                          | Article 29 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage  | Pasal 2 Bab II <i>Uniform Premarital and Marital Agreements Act</i>  |
| Purpose of the Marriage Agreement | To separate and protect the property of one party  | To anticipate the occurrence of <i>real estate</i> mortgages, motor vehicle financing, loan guarantees, income tax payments, and property ownership  |
| Terms of the Agreement            | Each couple is free to determine the content of the marriage agreement if it does not conflict with the law, religion, propriety, decency, or public order (Article 29 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage) | Each couple has specific restrictions on what can and cannot be written in the marriage agreement. So, a marriage agreement is still bound and limited to specific points. (Explanation of Article 6 Chapter II <i>Uniform Premarital and Marital Agreements Act</i> ) |
| Certifying Board                  | Marriage Registrar (Article 29 paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage)   | A notary or authorized attorney in the state where the agreement was made  |

The distinction between marriage agreements in Indonesia and the United States lies in their regulatory frameworks and limitations. In Indonesia, spouses have considerable freedom to determine the contents of their marriage agreements, provided these do not violate applicable laws, religious principles, decency, morality, or public order. This flexibility exists because Indonesia lacks specific regulations governing the substance of marriage agreements. In addition to provisions concerning

marital property, Indonesian law allows parties to regulate other matters independently if they adhere to general legal frameworks such as the Civil Code and the Marriage Law (Nandapratwi et al., 2022).

Conversely, marriage agreements in the United States are governed by the **Uniform Premarital and Marital Agreements Act (UPMAA)**, a regulation designed to enhance the validity and enforceability of such agreements. This act also aims to standardise the rules surrounding marriage agreements across jurisdictions (Mangarengi & Hanza, 2021). While couples in the United States can freely negotiate the terms of their agreements, the UPMAA imposes specific restrictions on what can and cannot be included. Consequently, the autonomy granted to parties in drafting marriage agreements is subject to defined legal boundaries.

#### 4. CONCLUSION

A marriage agreement is a legal contract entered into by prospective spouses. Such agreements are essential in Indonesia and the United States as they facilitate the division of marital assets and provide a framework for resolving disputes in divorce cases. Consequently, a marriage agreement serves as a preventive measure to address potential conflicts arising from marital dissolution. The objectives of marriage agreements differ between Indonesia and the United States. In Indonesia, the primary purpose is to segregate and safeguard the property of one party. In contrast, in the United States, these agreements address real estate mortgages, motor vehicle financing, loan guarantees, income tax obligations, and property ownership.

The cultural and legal interpretations of marriage vary significantly between the two countries. Indonesia perceives marriage as a sacred and enduring union, whereas the United States, with its predominantly individualistic society, views marriage more as a contractual relationship between two parties. Legally, Indonesia operates under a civil law system, with marriage agreements governed by Article 29 of the Marriage Law, as outlined in *Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 on Marriage*. In contrast, the United States follows a standard law system and applies the Uniform Premarital and Marital Agreements Act (UPMAA) to regulate such agreements.

In Indonesia, couples are granted the autonomy to determine the content of their marriage agreements, provided that the terms do not violate legal, religious, moral, or public norms. This flexibility exists partly because Indonesia lacks specific regulations governing the content of marriage agreements. Conversely, in the United States, while couples also have the freedom to decide the terms of their agreements, certain legal restrictions exist, delineating what can and cannot be included. Consequently, drafting marriage agreements in the United States is subject to more explicit limitations than in Indonesia.

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