

NUPTIAL AGREEMENT IN MUSLIM MARRIAGE: A JURISTIC ANALYSIS

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ABSTRACT

The nuptial agreement has been gaining attraction in the Muslim environment in recent times because of the assumed benefit to protect either of the marital partners in the advent of divorce or separation. Prenuptial clauses usually take effect immediately after marriage consummation and every party can lay claim to the agreement in the event of a breach, while postnuptial agreements are clauses agreed upon during the marriage period. Although there are complaints that Muslims from Western and non-Islamic societies might need prenuptial agreement in the place of khul' (redemption) to protect either party in the case of future divorces or separation, however, there are concerns about the rate of interest in the new couples from Muslim society opting for a prenuptial agreement. This study explores the concepts of prenuptial and postnuptial and their associated use by Muslim couples in contemporary reality. The study examines why Muslim couples from Islamic society are opting for nuptial agreement rather than khul' regulations in Islamic law and the need to identify essential for nuptial agreements in

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a Muslim marriage, especially in the case of Shartu fāsīd (invalid conditions) in a marriage contract. The study uses a doctrinal approach to gather and analyse data from an Islamic perspective. The study found that despite the growing use of nuptial agreements to protect marital partners in modern times, Muslim couples should carefully consider Shariah-compliant nuptial agreements in marital matters.

Keywords: *pre-nuptial, post-nuptial, khul', marriage, shartu fāsīd, Islamic jurisprudence*

INTRODUCTION

Utilizing of a nuptial agreement has gained widespread recognition in Western cultures as an effective mechanism for fostering equanimity within the couple's union. The nuptial agreement can be prenuptial or postnuptial to protect either marital partner in the advent of divorce or separation. Prenuptial clauses usually take effect immediately after marriage consummation, while the postnuptial clause is a clause agreed upon after marriage consummation, and every party can lay claim to the agreement in the event of a breach of the agreement. The nuptial agreement is gaining attention in contemporary times in Western and Muslim societies but scholars are concerned about the rise in the use of nuptial agreement in place of *khul'* (redemption) in Muslim marriage to protect either of the party in the case of future divorces or separation. However, there are concerns about the rate of interest in new couples from Muslim society opting for a nuptial agreement¹.

The study examines why Muslim couples from Islamic society are opting for nuptial agreement rather than *khul'* regulations in Islamic law and the extent to create an interpolation or juristic conditioning for nuptial agreements in Muslim agreement based on the concept of *Shartu fāsīd* in marriage. A prenuptial agreement

¹ Julia Kagan, What Is a Postnuptial Agreement? How It Works and What's Included, https://www.investopedia.com/terms/p/postnuptial_agreement.asp, (2021).

is made between couples on ownership of the asset before marriage consummation. The concept of prenuptial agreement has gained wider acceptance in England because of its enforceability but there is a lacuna in other common like Malaysia might be facing challenges of enforceability challenges except when it is properly done by a competent attorney who knows how to validate and enforce the documentation.² Modern couples have recognized prenuptial agreements as the best modern method of regulating family issues related to property ownership, sharing, and transfer. However, prenuptial agreement in countries like Russia is limited to property-related issues and otherwise social issues between couples like divorce, the right to custody of children, housekeeping, and other domestic issues cannot be regulated using prenuptial agreement.³

Although there are still issues of enforceability of the prenuptial agreement in English law, the interpretation of the court in the document's clause about ownership of the family property influences the decision to share property between couples after divorce.⁴ The extension of the prenuptial agreement has developed a community impact statement (CIS) as a guide for determining rights and shares of properties between couples. Moreover, pro-CIS argued that the strength of a marriage relationship between a couple depends more on the process of the relationship in benefit, and ownership of properties rather than the social and moral relationship of marriage between couples. That is, after marriage, the reality and sustainability of the marriage relationship depend more on mutual respect for the benefit of the family properties.⁵ Although the prenuptial agreement is gaining attention because

² Rajamanickam, R., Kung, K. B., Shariff, A. A. M., Said, M. H. M., & Dahlan, N. K. Prenuptial agreement: Legal position in Malaysia. *Academic Journal of Interdisciplinary Studies* 8, no. 4 (2019a), 97-106.

³ Andreevna, A. B., Anatol'evna, S. B., Nikolaevna, A. S., Chudeyevich, A. I., & Victorovna, D. N. *Prenuptial Agreement: Concept And Characteristics*.(2020), 3571-3577..

⁴ Lowe, N. (2007). *InDret*.

⁵ Gust, S. A., & Jordan, C. The Community Impact Statement: A Prenuptial Agreement for Community-Campus Partnerships. *In Journal of Higher Education Outreach and Engagement* 11, no. 2 (2006).

of the assumed benefit, however, there is the challenge of limited information about the legal and social implications in the application of the prenuptial clause in the marriage relationship and thus many new couples are scared because of limited information about it in the legal system about the benefit and limitation of a prenuptial agreement in marriage between prospective couples.⁶ Nevertheless, working-class couples are always interested in subscribing to the prenuptial contractual agreement to secure their future access to the benefit and ownership of the properties they labored for in the event of death or divorce in marriage.⁷

The process of dissolution of marriage in Islamic law is three, first, the *khul'* (the right of the wife to initiate dissolution), *talāq* (the right of the husband to effect dissolution), and *mabārā'ah* (the dissolution of marriage by mutual aversion of the husband and wife). *Khul'* is the right of marriage dissolution initiated by the wife but relies on consent and mutual decision to enforce dissolution.⁸ On the other hand, *talāq* is the sole right of the husband to make dissolution through a divorce. However, jurisdictions like the Pakistani court enforce the process of *khul'* rather than relying on the consent of the husband, even though this legal procedure is against the majority opinion of the Islamic jurist.⁹ An interesting lacuna in the prenuptial agreement is the lack of clarity in the enforceability among the common law jurisdictions. Although several case laws in England suggest its enforceability but remains unclear in other jurisdictions with several unpleasant experiences about its enforceability.¹⁰

⁶ Ibid.

⁷ Marija Ignjatovic. Prenuptial Agreement. *Series: Law and Politics* 5, no. 1 (2007), 61-69.

⁸ Muhammad Said Al-Mujahid, *Fiqh al-Usrah* (Juristic Study of Family Institution, International Islamic University Malaysia Press. (2016), 76-80.

⁹ Mehmood, M. I., & Farooq, S. *Khul'*(Redemption) in Islamic law and its practice in Pakistani courts, a legal critical analysis. *Mediterranean Journal of Social Sciences* 5, no. 3 (2014a). 290–297.

¹⁰ Rajamanickam, R., Kung, K. B., Shariff, A. A. M., Said, M. H. M., & Dahlan, N. K. Prenuptial agreement: Legal position in Malaysia. *Academic Journal of Interdisciplinary Studies* 8, no. 4 (2019a), 97-106.

The study uses a doctrinal approach to gather library sources and analysis of data from literature about the concept of prenuptial and postnuptial and their relationship with the concept of *khul'* in Islamic law. Considering the potential juristic issues in the concept of nuptial agreement, the study aims to explicate possible juristic conditioning for its application in a contemporary Muslim marriage. The remaining parts of this have five main sections. The first section reviews the relevant literature on the subject matter. The second section examines the convergence and divergence between nuptial agreement and the concept of *khul'*. The third section presents the juristic conditioning for the application of the nuptial agreement in a Muslim marriage. The final section highlights the conclusions and findings of the study.

THE CONCEPT OF PRENUPTIAL AGREEMENT

The concept of nuptial agreement can either be prenuptial or postnuptial, however, the concept of prenuptial relates to the contractual clauses before marriage consummation between the couples. The prenuptial agreement takes effect between a couple on the right of partners to the benefit and ownership of properties immediately after marriage consummation. A prenuptial agreement also refers to any official agreement signed and sealed by the couple before the consummation of marriage in the future of the relationship in the event of divorce or death of the partner.¹¹

The civil government recognizes that prenuptial agreements are voluntary undertakings, and their legal effect is doubtful compared to common law jurisdiction. Since the prenuptial agreement is completed before the consummation of the marriage, the contractual party to the agreement outlines their responsibility and right to property during and after marriage, while the contract states the terms and conditions between the partners concerning the division of properties in the event of marriage dissolution. Prenuptial is perceived by many celebrities and working-class

¹¹ Rajamanickam, R., Kung, K. B., Shariff, A. A. M., Said, M. H. M., & Dahlan, N. K. Prenuptial agreement: Legal position in Malaysia. *Academic Journal of Interdisciplinary Studies* 8, no. 4 (2019a), 97-106.

couples as a means to effect fair benefit and share of property between couples.¹²

Despite the common intent of prenuptial agreements around the interest of substantive fair protection of the right to ownership in case of divorce or death of partners, there is another growing interest around the need to protect older couples' rights to benefit from the asset in the period of retirement and old age. An important consequence of the prenuptial agreement is that is done before the consummation of marriage and there is a need for the court to decide its enforceability as the case may arise during need; therefore, there is still uncertainty surrounding the future of the prenuptial agreement, especially in civil law jurisdiction, whether prenu makes divorce easier, and the challenge of either of the parties right to seek the court decision to invalidate the prenu agreement.¹³

THE CONCEPT OF POSTNUPTIAL AGREEMENT

In a Nuptial agreement, the postnuptial agreement is similar to a prenuptial contract, except that it is created by spouses after entering a marriage relationship. The postnuptial is done at any time during the marriage period of the couple with the intent to outline the benefit to assets and ownership of properties in the event of divorce. Postnuptial agreement during marriage sets out the couple's responsibilities to the children during marriage. The significant features of a postnuptial agreement are that it is signed after the wedding or during the marriage to protect the partner's right to inheritance after death or divorce.¹⁴ Postnuptial

¹² Subekti, S. Article ID: IJCIET_11_01_025 Doctorate Program of Law, University of 17 Agustus 1945 Semarang, Indonesia Liliana Tedjosaputro Faculty of Law, University of 17 Agustus 1945 Semarang, Indonesia Mashari Faculty of Law, University of 17 Agustus 1945 Semarang. *Indonesia International Journal of Civil Engineering and Technology* 11, no, 1 (2020), 233-241.

¹³ Ghosh, A., & Kar, P. *Pre-Nuptial Agreements in India: An Analysis of Law and Society* (2019).

¹⁴ Judiasih, S. D. Postnuptial Agreement: A Comparison of Legal Systems in Indonesia and other Countries. In *Journal of Legal, Ethical and Regulatory Issues* 24, no. 5 (2021).

Agreements also include items such as terms and conditions for the disposition of property, marital assets, and agreement in the event of separation or divorce. Apart from the challenges of enforceability of nuptial agreements in civil law jurisdiction, postnuptial agreements usually do not cover issues relating to child custody or child support and domestic affairs in the marital relationship. The postnuptial agreement in a common law jurisdiction like England is simply enforceable as long as it is legally written and signed without the element of coercion and duress between couples.¹⁵

Critics have often questioned why married couples who love one another would opt for a postnuptial agreement during their marriage life. However, reality suggests that the intent of protection during inheritance is necessary with the rising legal cases around the benefit and ownership of spousal assets during a marriage relationship. Spousal partners are interested in separating ownership rights during marriage and the right to inheritance especially when couples struggle and work together¹⁶. On the other hand, spouses willing to protect the interest of ‘*Stay-at-Home Parents*’ usually subscribe to the partition of an asset through a postnuptial agreement.

Moreover, the issues of spousal interest in business assets are more difficult to divide compared to sharing money from a bank account and retirement funds because the process of valuing companies’ assets might require legal and accounting experts, thus making it harder for the spousal relationship. The issues of repayment of gifts to either of the couples in the case of separation also postnuptial agreement because a spouse or parent might have given a gift (like a car) to the couple as marital support, and there might be a need to decide who owns it eventually in the event of divorce. As marriage leads to an uncertain future marital

¹⁵ Glazier, S. D., Shenkman, M. M., & Gassman, A. *Spring a015 DAPTs and Klabacka: At the Intersection of Estate Planning and Family Law* (2021).

¹⁶ Werdinningsih, D. R. M. K. & A. H. Marriage Agreement During Marriage (A Postnuptial Agreement) Principle of Publicity as a Legal Protection for Creditors. *Journal of Law, Policy and Globalization*. (2020), 101-14.

relationship, a postnuptial agreement is a potential agreement to rebuild the spousal relationship from becoming a marriage solvent. An unfaithful spouse can simply accept a postnuptial agreement to save the struggling marriage solvent from a collapsing relationship.¹⁷

***KHUL'* (REDEMPTION) IN ISLAM**

Studies have confirmed that women have been subject to persecution in marriage since the period of Jahiliyyah. However, Islam came to protect the marital and individual rights of the couple which gave a lot of protections for self-interested women in marriage.¹⁸

Marriage unions are expected to be based on love, mercy, compassion, and trust between couples to build a balanced society. However, the rights of women in Shariah do not permit unnecessary rights to marriage because of the possible significant consequences on the entire family, children, and the couple. According to the tradition of the Prophet (PBUH) “*Whichever woman asks her husband for a divorce without a reason, the smell of Paradise is forbidden to her*”.¹⁹ However, there are reported cases whereby the couples discovered they are naturally not compatible as husband and wife, and therefore dissolution is the best option for the marriage rather than living in an unhealthy marital situation.²⁰

In the event of a marriage separation, Shariah regulates certain methods of enforcing marital legal cancellation such as *talāq* (divorce), *khul'* (redemption), and *faskh* (court separation).

¹⁷ Collins, K. E. Constructive Nonviolation in Patent Law and the Problem of Insufficient Thought Control' ed. Collins, Kevin Emerson. In *Wisconsin Law Review* 759, no. 4 (2007).

¹⁸ [Baqarah:228]: “And they (women) have rights similar to those (of men) over them in kindness”.

¹⁹ At-Tirmidhī, M. bin I. bin surah bin M. *Sunan At-Tirmidhī (Al-Jāmi'u Al-Kabīr)* (Bashar Iwad Maruf, Ed.). Dar Al-Garb Al-Islami. (1996).

²⁰ [An-Nisai: 130]: “*But if they separate [by divorce], Allah will enrich each [of them] from His abundance. And ever is Allah Encompassing and Wise*”.

For this study, *khul'* (redemption) is used to explore the convergence and divergence of Shariah alternatives to the concept of nuptial agreement in conventional law.

Khul' (Redemption) means marital separation with compensation, unlike a divorce where the husband is not entitled to any compensation after divorcing his wife. *Khul'* is the unilateral legal right offered to married women to seek separation or cancellation of marriage from their husbands. Shariah law prohibits the reclamation of dowry in (*talāq*) divorce, but permits it in (*khul'*) redemption.²¹

The Shariah justification on the right to claim and the procedure for *khul'* (redemption) is highlighted in the Sunnah of the Prophet (PBUH) based on the scenario between Thabit bin Qais and his wife (Jamilah).²² This case shows that she has a highly intense hatred for her husband Thabit, perhaps because she saw him while amid another very short, ugly, and unpleasant black complexion. She should seek dissolution through *khul'* than getting tied to infelicity after accepting faith in Islam.²³

There are exceptions to the rule of reclaiming dowry based on the situation found by the *Qādhi* to maintain justice and fear

²¹ [Baqarah:229]: “It is not lawful for husbands to take back anything of the dowry given to their wives unless the couple fears not being able to keep within the limits of Allah. So if you fear they will not be able to keep within the limits of Allah, there is no blame if the wife compensates the husband to obtain divorce”

²² (Sahih Al-Bukhārī, 2002, no 5273): “*The evidence for this from the Sunnah is that the wife of Thabit bin Qais bin Shammas, may God be pleased with him, came to the Prophet, may God’s prayers and peace be upon him, and said: O Messenger of God, Thabit bin Qais, I do not blame him in morals or religion, but I hate disbelief in Islam. The Prophet, may God’s prayers and peace be upon him, said to her: Would you return his garden to him? . He had believed her garden. She said: Yes. The Prophet, may God’s prayers and peace be upon him, said: “Accept the garden, and separate from it”.*

²³ Mehmood, M. I., & Farooq, S. *Khul'*(Redemption) in Islamic law and its practice in Pakistani courts, a legal critical analysis. *Mediterranean Journal of Social Sciences* 5, no. 3, (2014b), 290-297.

dealing between the couple.²⁴ The concept of *khul'* (redemption) from a marital relationship requires that the wife seek *wālī* (guardian) intervention to enforce the *khul'* (redemption) on the husband with an agreement of compensation based on negotiation between the husband and wife. *Talāq* is the marital right of the husband while *khul'* (redemption) is the right of the wife to seek separation based on just and acceptable reasons.²⁵

There are certain scenarios where a woman is permitted to seek *khul'* (redemption) in Islamic law. Firstly, concurrent natural dislike is when she has a dislike for the husband which will reoccur in her memory, thus permitting her to better seek the redemption of the marriage relationship because concurrent dislike is against the fundamentals of marriage based on love, mercy, and tranquillity as mentioned in the Quran.²⁶ Secondly, when the wife dislikes the husband because of his unreligious attitudes and practices like intentional and continuous engagement in unlawful practice without an attempt for *tawbah* (repentance) and turning a better life, the wife can seek *khul'* (redemption) of marriage and return the dowry to the husband.

Also, women may seek *khul'* (redemption) of marriage in the event of incompatibility of temperament leading to domestic abuse and unbearable violence. *Khul'* is one of the powers of the Qadi (judge) to annul a marriage based on the application of the

²⁴ The shariah objective for the need to return (mahr) the dawry was because she was responsible for the separation either through (khul) redemption or sepration by the court. However, the wife might not be require to return the dawry if the call for separation was a mutual agreement between the couple or in the event the court found the request by the woman for separation was as a result of ill treatment and injustice of the husband.

²⁵ Ibn Quddāmah, A. bin M. bin Q. A.-J. A.-M. *Al-Mughnī* (At-Turki wa Al-Halu, Ed.). Dar alali al-Kutub, 1997).

²⁶ [Ar-Rum:21]: “And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect”.

wife with the condition of mutual (*ta'wīd*) compensation to the husband.²⁷

CONVERGENCE AND DIVERGENCE BETWEEN NUPTIAL AGREEMENT AND *KHUL'* (REDEMPTION)

A nuptial agreement is a conventional legal option in marriage on the right and ownership of the property in the event of separation or death of the partner. Prenuptial and postnuptial agreements are meant to serve the same purpose, except that the former is done before marriage consummation, while the latter is done after and during the marriage relationship.²⁸ The rate of nuptial agreement in Muslim community marriages calls for an understanding and distinction between *khul'* and related Shariah concepts. Although, the nuptial agreement might have some similarities with the concept of *khul'* (redemption), but there are several differences.²⁹

First, the nuptial agreement is mostly used in the common law with little application under civil law. The concept of *khul'* is purely a Shariah concept based on the Quran and Sunnah and other juristic evidence.

Secondly, a nuptial agreement is a mutual agreement either before or after marriage on the right and ownership of properties in the event of divorce, separation, and death of either of the partners. On the other hand, *khul'* is a means of marriage dissolution right initiated by the wife based on agreed compensation.

Thirdly, nuptial agreements sometimes involve the right to property in inheritance upon the death of the partner while *khul'* has no relationship with inheritance. This is because inheritance in

²⁷ Mehmood, M. I., & Farooq, S. *Khul'*(Redemption) in Islamic law and its practice in Pakistani courts, a legal critical analysis. *Mediterranean Journal of Social Sciences* 5, no. 3, (2014b). 290–297.

²⁸ Sharon Thompson, *Prenuptial Agreement and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Oregon, Oxford: Hart Publishing, 2015), 64-58.

²⁹ Lawal Mohammed Bani & Hamza A. Pate, Dissolution of Marriage (Divorce) under Islamic Law, *Journal of Law, Policy and Globalization* 42, (2015), 2224-3259.

Islam is categorized as *hudud* (fixed issues) in Shariah. Therefore, a marital agreement between couples to trigger the right to property benefit and ownership can be achieved during the life of either party under the contract of Hibah (gift), Wasiyyah (Islamic will), and Waqf (Islamic endowment).

In addition, the nuptial agreement may cover custody of children and the maintenance of children in the event of divorce. The enforcement of the nuptial agreement on guardianship rights is subject to the legality of the document in the jurisdiction and interpretation of the court of law, however, *khul'* does not involve the right to guardianship, and maintenance of the children is primarily given to the wife until the age of maturity except otherwise deemed appropriate by the *Qādi* (judge).

Although scholars are unanimous that the primary right of custody after separation belongs to the mother, based on the hadith of Abdullah bin Umar when a woman came to the “Messenger of God, (PBUH) and said: “Oh, Messenger of God, this my son was housed in my stomach, he had my breasts as his waterskins” and how can his father just take him away from me, the prophet (PBUH) replied: you are more rightful to the custody in as much you have not remarried”.³⁰

This hadith suggests that the mother has more right to custody at the early childhood age when she did not remarry but the custody right can be transferred to the father as soon as the child gets to the age of maturity, can make distinctive decisions, and choice of interest.

Despite the differences between the concept of *khul'* and nuptial agreement, there seems some convergence between them especially in the protection of the woman’s interest to quit marriage at her will. Women seem to be at the receiving end of marriage and divorce and both concepts have created an exit safety net for women especially when the event arises for separation. Nevertheless, as much as nuptial agreement falls within the socio-economic matters of marital relationships, there is possible juristic

³⁰ Abu Abdullah Ahmad bin Muhammad bin Hanbali bin Hilal bin Asad As-Shaibani. *Musnad Al-Imam Ahmad bin Hanbal* (S. Al-Arnuth, Ed.). Muasasat Ar-Risalah. (2001).

conditioning for its application to enhance shariah compliance that is not categorized as nullity conditions in marriage relationships.

In sum, the nuptial agreement is used by partners to clarify their financial and civil affairs for transparency and guarantee for the weaker contractual party in the marriage to have a sense of financial security during and in the event of separation. A nuptial agreement is a means of reaching certainty on property right inheritance in the event of the death of the partner while *khul'* does not cover inheritance agreement.

SHART FĀSID IN MARRIAGE CONTRACT

In Muamalat (socio-economic transactions), like sales and marriage, there are *Shartu sahih* (valid condition) and *Shartu fāsīd* (invalid conditions).³¹ Since the valid conditions are contractual stipulations that usually fall under the consequences (*Hukm Wada'i*) that determine permissibility, there is a need to focus on invalid conditions to determine the position of clauses in the nuptial agreement and its validity in Shariah. *Shart fāsīd* is therefore any condition or clause in the contract that rendered it defective. The presence of certain clauses that considered the contract lacked sufficient legality, incomplete, and incorrectness

³¹ Nuptial agreement in marriage may be categorized as *shart sahih* (valid condition) or *shart fāsīd* (invalid condition) depending on the intent and indication of the condition. It is becoming popular in recent times because couples' interest in determining benefit and ownership to the property. The nuptial agreement is enforceable in the common law jurisdiction with a qualified attorney. On one hand, Nuptial agreement encourages hard work and guarantee of future access to property benefits and ownership, while others consider it as a modern means of addressing marital threats between couples. However, Islam promotes marital relationships based on love, consideration, understanding, generosity, rather than invalid clauses and conditions similar to business contractual relationships. Another concern about the nuptial agreement is its incessant favors for the wife in the marital relationship despite concerns about its level of Shariah compliancy under Muslim legal jurisdictions. Therefore, marital conditions such as nuptial agreement must not violate Shariah fundamentals and observed certain juristic conditioning.

because of non-shariah compliance in the contract.³²

An arching condition in the validity of a contract is to maintain balance in the interest of the contractual parties and one party should not get benefit at the expense of the other. For instance, a marriage contract in which either of the partners gives a condition not to be responsible for any marriage responsibility, like the father working to earn money and spending on the upkeep of the wife and children, is fundamental in marriage. Moreover, the condition is considered invalid when it defeats the purpose of the contractual agreement. For instance, a couple that gives the condition that after marriage, there shall not be a conjugal relationship with the partner rendered the marriage contract invalid until this condition was rectified, because one of the fundamental purposes of marriage is to engage in sexual relations with one another. This *shart fāsīd* defeated the purpose and is rendered an invalid marriage contract.³³

JURISTIC CONDITIONING FOR NUPTIAL AGREEMENT

Nuptial agreement in a marriage relationship is gaining attraction among young couples in the working class because of the associated benefit that protects interest in the use of the property and claims to the asset in the event of divorce or death of the partner. Nuptial agreement before marriage or after marriage consummation may be appropriate for Muslim couples in certain circumstances that require juristic conditioning because of the Islamic jurisprudence principle of (*al-aslu fi ashya al-Ibāḥah illa ma warada an-nas litahrīmihi*) everything is permissible unless it has been declared as prohibited.

Firstly, the nuptial agreement might be appropriate for Muslim families in the common law jurisdiction because of the need for

³² Muhammad Fuad Sawari. *Al-Madkhal Ila Dirasat Usul al-Fiqh al-Islami* (3rd ed.). Research Management Centre, IIUM. (2009).

³³ Harun, N., Bidin, A., Salleh, K., & Hamid, N. 'Ashikin. Minor's Capacity to Contract in Malaysia: Issues and Challenges. *International Journal of Academic Research in Business and Social Sciences* 8, no. 12 (2019), 1549-1556.

enforceability of the prenuptial or postnuptial agreement, the clauses of which do not violate Shariah principles.

Secondly, the clauses in the nuptial agreement must not violate any fundamental principles of Shariah, especially in Islamic marriage law. Although Islamic legal maxims (*Al-muslimūn 'alā shurūtihim*) Muslims are bound by their contractual clauses, the clauses in the socio-economic contract between Muslims must not violate the fundamentals of the contract itself. The clause must not be in the partial or disadvantageous interests of the other party. For example, a nuptial agreement requesting ownership and benefit of the entire asset at the expense of the other party's interests does not guarantee the survival and post-marital relationship of either party.

Thirdly, the nuptial agreement in Muslim marriage should entail conditions and terms that strengthen the essence of marriage and protect the parties to the marriage. For instance, after marriage consummation, couples can enter into a postnuptial agreement to address concerns from either party. A postnuptial agreement can be used to enhance reconciliation, which demands either party to make it up to the other. However, the terms must not violate fundamental principles of the Islamic law of marriage.

CONCLUSION

The nuptial agreement is commonly used in the modern era because of the associated benefits of protecting either marital partners in the advent of divorce or separation, but there are concerns about its legality in Shariah and enforceability in certain jurisdictions. Although nuptial agreements seem to have some convergence features with *khul'* (redemption), especially regarding on the right of the wife to initiate divorce after marriage, there are several other divergences. Thus, the application of nuptial agreements in Muslim marriages might require juristic conditioning. This study found that nuptial agreements enhance a couple's mutual consent toward ownership and property benefits. Despite the challenges of enforceability of nuptial agreements in some jurisdictions, it remains an effective tool in marriage to guarantee future access to property benefits and ownership. The juristic condition from

the Shariah perspective focuses on the challenges of using nuptial agreements in Muslim marriages such as refocusing marriage relationships on clauses and conditions rather than consideration, generosity, and love. The challenge of partial benefit, whereby nuptial agreement in marriage usually favors the wife in the marital relationship rather than the husband, might trigger Shariah compliance issues because the contractual agreement is required to be a mutual benefit for the parties. This study suggests the need for Muslim countries, especially among the commonwealth states to adopt the necessary juristic conditions for the effective and valid application of the nuptial agreement in a Muslim marriage.

REFERENCES

- Abu Abdullah Ahmad bin Muhammad bin Hanbali bin Hilal bin Asad As-Shaibani. *Musnad Al-Imam Ahmad bin Hanbal* (S. Al-Arnuth, Ed.). Muasasat Ar-Risalah. (2001).
- Andreevna, A. B., Anatol'evna, S. B., Nikolaevna, A. S., Chudeyevich, A. I., & Victorovna, D. N. *Prenuptial Agreement: Concept and Characteristics* (2020), 3571-3577.
- At-Tirmidhī, M. bin I. bin surah bin M. *Sunan At-Tirmidhī (Al-Jāmi'u Al-Kabīr)* Bashar Iwad Maruf, Ed. (n.p.: Dar Al-Garb al-Islami, 1996).
- Collins, K. E. Constructive Nonviolation in Patent Law and the Problem of Insufficient Thought Control' (2007) 2007(4) *Wisconsin Law Review* 759 MLA 9th ed. Collins, Kevin Emerson. In *Wisconsin Law Review* 759, no. 4 (2007).
- Ghosh, A., & Kar, P. *PRE-NUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS OF LAW AND SOCIETY*. (2019). <http://aaml.org/about-the-academy/press/press-releases/prenuptial-agreements-rise-finds-survey>
- Glazier, S. D., Shenkman, M. M., & Gassman, A. *Spring a015 DAPTs and Klabacka: At the Intersection of Estate Planning and Family Law* (2021). .

- Gust, S. A., & Jordan, C. The Community Impact Statement: A Prenuptial Agreement for Community-Campus Partnerships. In *Journal of Higher Education Outreach and Engagement* 11, no. 2 (2006).
- Harun, N., Bidin, A., Salleh, K., & Hamid, N. 'Ashikin. Minor's Capacity to Contract in Malaysia: Issues and Challenges. *International Journal of Academic Research in Business and Social Sciences* 8, no. 12 (2019), 1549-1556.
- Ibn Quddāmah, A. bin M. bin Q. A.-J. A.-M. *Al-Mughnī* (At-Turki wa Al-Halu, Ed.). Dar alali Al-kutub. (1997).
- Judiasih, S. D. Postnuptial Agreement: A Comparison of Legal Systems In Indonesia And Other Countries. *Journal of Legal, Ethical and Regulatory* 24, no. 5 (2021).
- Julia Kagan, What Is a Postnuptial Agreement? How It Works and What's Included, available at: https://www.investopedia.com/terms/p/postnuptial_agreement.asp, (2021).
- Lawal Mohammed Bani & Hamza A. Pate, Dissolution of Marriage (Divorce) under Islamic Law, *Journal of Law, Policy and Globalization*, vol. 42 (2015), 2224-3259.
- Lowe, N. (2007). *InDret*.
- Marija Ignjatovic. Prenuptial Agreement. *Series: Law and Politics* 5, no. 1 (2007), 61-69.
- Mehmood, M. I., & Farooq, S. Khul' (Redemption) in Islamic law and its practice in Pakistani courts, a legal critical analysis. *Mediterranean Journal of Social Sciences* 5. no. 3 (2014a). 290–297.
- Muḥammad bin Ismā'īl Al-Bukhārī, A. A. *Saḥīḥu Al-Bukharī*. Dār ibn Al-Kathīr. (2002).
- Muhammad Fuad Sawari. *Al-Madkhal Ila Dirasat Usul al-Fiqh al-Islami* (3rd ed.). Research Management Centre, IIUM (2009).
- Muhammad Said Al-Mujahid, Fiqh al-Usrah (Juristic Study of Family Institution, International Islamic University Malaysia. (2016) 76-80.

- Rajamanickam, R., Kung, K. B., Shariff, A. A. M., Said, M. H. M., & Dahlan, N. K. Prenuptial agreement: Legal position in Malaysia. *Academic Journal of Interdisciplinary Studies* 8, no. 4 (2019a), 97-106.
- Sharon Thompson, *Prenuptial Agreement and the Presumption of Free Choice: Issues of Power in Theory and Practice*, Oregon, Oxford: Hart Publishing, 2015).
- Subekti, S. Article ID: IJCIET_11_01_025 Doctorate Program of Law, University of 17 Agustus 1945 Semarang, Indonesia Liliana Tedjosaputro Faculty of Law, *Indonesia International Journal of Civil Engineering and Technology* 11, no. 1 (2020), 233-241.
- Werdinningsih, D. R. M. K. & A. H. Marriage Agreement During Marriage (A Postnuptial Agreement) Principle of Publicity as a Legal Protection for Creditors. *Journal of Law, Policy and Globalization*. (2020).