

INDONESIAN'S MIXED-MARRIAGE PURCHASED LAND IN SLEMAN REGENCY

Maria Hutapea
Faculty of Law,
University of Atma Jaya Yogyakarta, Indonesia
mariahutapea@gmail.com

ABSTRACT

Act No. 5 of 1960 of Basic Agrarian Law stipulates that only Indonesian could be the land owner. A foreigner cannot be the land owner in Indonesia. Article 26 paragraph (2) Act No. 5 of 1960 stipulates that "Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreigner, to a national possessing a foreign nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21 paragraph (2) are not valid by law, the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed." This paper based on research conducted in 2012. The problem was how did the land ownership transfer through purchase between Indonesian as seller and Indonesian's mixed-marriage couple as buyer. Article 29 paragraph (1) Act No. 1 of 1974 stipulates that: "At the time of or before the marriage took place, with the mutual consent of both parties, they can enter into an agreement approved by the Civil Registrar of marriage, after which it shall also apply to third parties as long as it involves them as well. Article 29 paragraph (1) Act No. 1 of 1974 stipulates that: "At the time of or before the marriage took place, with the mutual consent of both parties, they can enter into an agreement approved by the Civil Registrar of marriage, after which it shall also apply to third parties as long as it involves them as well. The type of data was primary data collected through questionnaire to respondents and interview with source persons such as Notary & Deed Officer, and the officer from the Land Office. Data analysis was qualitatively conducted, i.e. analysis conducted by apprehending and compiling the systematically collected data in order to gain description on understudied problem or condition. The finding shows that one of requirements Indonesian's mixed marriage couple must prepare is the existence of prenuptial agreement. In other words, the Indonesian's mixed-marriage couple must have a prenuptial agreement made by local notary before the marriage and then registered at the Office of Civil Registration and State Court. According to Article 29 paragraph (1) Act No. 1 of 1974: "At the time of or before the marriage took place, with the mutual consent of both parties, they **can** enter into an agreement approved by the Civil Registrar of marriage, after which it shall also apply to third parties as long as it involves them as well." The word **can** means optional, not a must but in fact Notary would ask the Indonesian's mixed-marriage couples the prenuptial agreements. In future, Indonesia must publish an act to clarify the Article 29 paragraph (1) Act no. 1 of 1974. There were two respondents (20 %) who did not understand the existence of prenuptial agreement, and they started their marriage lives from zero. Related apparatus such as officers from Religion Affairs, Civil Registration, Notary, Deed (Pejabat Pembuat Akta Tanah/ PPAT) need to inform this matter to Indonesian citizen who will marry with foreigner.

Keywords: land ownership right transfer through purchase, Indonesian's mixed-marriage, prenuptial agreement

Introduction

Relation between human and land is not merely as a living site for human however it is also a resource for the continuity of human life. For Indonesia society who can use these both roles maximally thus their economical life will increase, moreover if this land is ownership land.

Article 20 paragraph (1) of Basic Agrarian Law (BAL) stipulates that "the land ownership right is hereditary right and be strongest and fullest right one can have on land that may be possessed by citizen, considering the provision laid down in Article 6. " Land ownership right is hereditary rights means land ownership can continue over time as long as the owner is still alive and in the case of owner passed away thus his ownership can be forwarded by his heirs as long as fulfilled the requirements as subject of ownership. Land ownership right is strongest rights means land ownership is the strongest land rights, has no certain period limitation, easily defended from disturbance of other party and uneasily exhausted. Land ownership right is the fullest rights means land ownership gives the broadest authority to its owner if compared to other land rights, can be primary source of other land rights, not source to other land rights and the broader land use compared to other land rights.

Subject of land ownership is regulated in Article 21 BAL of which stipulates that:

- (1) Only an Indonesian citizen can have right of ownership;
- (2) Corporations may possess the right of ownership and its requirements shall be determined by Government;
- (3) Any foreigner, who after the coming into force this Act has obtained the right of ownership through inheritance, without a will or through communal marital property and any Indonesian citizen too, having the right of ownership and losing nationality after the coming into force of this law, are obliged to relinquish that right within a period of one year after the obtaining of that right of ownership is not relinquished, then it becomes invalid by the provision that the right of other parties, incumbent hereon, endure.

- (4) *As long as person possesses a foreign nationality in addition to his/her Indonesian nationality he/she may not possess any land with ownership right and the provision in paragraph (3) of this Article is applicable to him/her.*

In Article 21 is also stipulated that certain legal bodies assigned by government can have ownership right. These legal bodies are regulated in Government Regulation No. 38 of 1963 on Assignment of Legal Bodies could have Land Ownership. Based on Article 1 Government Regulation No. 38 of 1963 legal bodies of which can have land ownership are:

- a. Bank established by state;
- b. Association of Agricultural Cooperation established based on Act No. 79 of 1958;
- c. Religion Bodies assigned by Agricultural/Agrarian Minister after hearing Religion Minister;
- d. Social bodies assigned by Agricultural/Agrarian Minister after hearing the Social Wealth Minister.

Article 22 of Basic Agrarian Law stipulates that:

- (1) *Origin of the right of ownership according to the Adat-law shall be regulated by Government Regulation.*
- (2) *Apart from the procedure as meant in paragraph (1) of this Article, the origin of the right of ownership is caused by :*
 - a. *A decision of the Government, in accordant with the requirements laid down by Government Regulation;*
 - b. *Provision laid down by Act.*

The transfer of land ownership right is regulated in Article 20 paragraph (2) of Basic Agrarian Law stipulating that: *"The right of ownership can change hands and be transferred to another party".*

The interpretation of this determination is land ownership can be unintentionally transferred or intentionally transferred from one to other person. Unintentionally transferred means the land ownership transfer from the owner to other party, i.e. his/her heirs so called legal event. Its legal event is inheritance caused by the passing away of land owners and then his land directly and legally transferred to his heirs as long as his heirs fulfilled the requirements as subject of ownership. Intentionally transferred means land ownership transfer from the owner to other party is caused by legal action. Transfer of land ownership can be purchase, trade, gift, investment into corporation data and legal action of transfer of other rights as regulated in regulation in Article 26 paragraph (2) Basic Agrarian Law of which stipulates that: *"Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreign, to a national possessing a foreign nationality in addition to his/her Indonesian nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21, clause (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed."*

Article 37 paragraph (1) of Government Regulation No. 24 of 1997 stipulates that: *"transfer of land ownership and apartment ownership through purchase, trade, gift, and other legal action of rights transfer except right transfer through auction should be verified by the deed issued by authorized Deed Officer (Pejabat Pembuat Akta Tanah) according to the existing legislation.* Based on this article, the deed is the basic requirement for registration of change on land registration data at the Land Office and the proof of the land right transfer.

The easier communication line make possible for people in a state or interstate to interact. Interstate interaction makes possible the different nationality marriage. In such marriage, it is possible each person still held their respective nationality. In these current years there are often marriages between Indonesian and foreigners in Indonesia. Based on Article 42 of Basic Agrarian Law, a foreigner residing in Indonesia can have right to use. Article 41 stipulates that:

- (1) *The right of use is the right to use and/or to collect the product, from land directly controlled by the state, or land owned by other person which gives the right and obligation stipulated in the decision upon granting this right by the authorized official, or in the agreement to work the land, as far as it does not conflict with the spirit and the provision of this law.*
- (2) *The right of use may be granted:*
 - a. *For a certain period of time as long as the land is utilized for a specific purpose;*
 - b. *Freely, against payment, or against services in whatever from.*
- (3) *The granting of the right of use shall not be accompanied of conditions which contain elements of human exploitation.*

The Province of Yogyakarta Special Region (Yogyakarta) is well-known as a cultural city, a tourism city and a student city. By these titles there are plenty of people either beyond Yogyakarta or abroad develop business and stay in Yogyakarta. It is often happened mixed-marriage between Indonesians and foreigners. Necessity on land is also felt by Indonesian's mixed-marriage couples living in Yogyakarta thus often happen the ownership transfer through purchase between Indonesians and Indonesian's mixed-marriage couples. The question is could Indonesian's mixed-marriage couple buy land in Indonesia, especially in Sleman Regency.

Research design

1. Type of research

This research is empirical legal research which means legal research focusing on field data where respondents as primary data. Respondent in this research totaled 15 persons comprises of five Indonesians as land seller and 10 female Indonesians married with foreigners as buyers.

2. Type of data

The data in this research comprises of primary data and secondary data.

- a. Primary data relates to the behavior of society, in this matter behavior of Indonesian and Indonesian's mixed-married couples in conducting land ownership transfer through purchase.
- b. Secondary data comprises of primary legal source and secondary legal source.
 - 1) Primary legal source this research comprises of Act No. 5 of 1960, Act No. 1 of 1974, Government Regulation No. 24 of 1997, Government Regulation No. 71 of 2000, Government Regulation No. 79 of 1999, Government Regulation No. 27 of 1996, Government Regulation No. 48 of 1994, Regulation of Agrarian State Minister No. 3 of 1997.
 - 2) Secondary legal source in this research was legal opinion in literature, result of internet browsing (website) relating to the topic.

3. Technique in data collection

- a. Primary data was collected by using questionnaire and through interview. Questionnaire is used to collect data from respondents. Interview was conducted to source person.
- b. Secondary data comprises of primary legal source and secondary legal source was conducted by literally study and internet browsing, i.e. studying, comprehending, and analyzing legislation, books and paper relating to the problem.

4. Data analysis

The collected data was qualitatively analyzed i.e. analysis conducted by systematically comprehending and compiling collected data thus it gain description on studied problem or condition.

Based on this analysis it draws conclusion by using inductive reasoning method, i.e. reasoning method is driven from specific knowledge furthermore evaluate general incident.

5. Discussion

a. Subject of land ownership

Article 21 Basic Agrarian Law stipulates that:

- 1) *Only an Indonesian citizen may have rights of ownership;*
- 2) *Corporations which may possess the right of ownership and its requirements shall be determined by Government;*
- 3) *Any foreigner, who after the coming into force this Act has obtained the right of ownership through inheritance, without a will or through communal marital property and any Indonesian citizen too, having the right of ownership and losing nationality after the coming into force of this law, are obliged to relinquish that right within a period of one year after the obtaining of that right of ownership is not relinquished, then it becomes invalid by the provision that the right of other parties, incumbent hereon, endure;*
- 4) *As long as person possesses a foreign nationality in addition to his Indonesian nationality he/she may not possess any land with ownership right and the provision in paragraph (3) of this Article is applicable to him/her.*

Certain legal bodies assigned by government can have ownership are regulated in Government Regulation No. 38 of 1963 are:

- 1) Association of Agricultural Cooperation established based on Law No. 79 of 1958;
- 2) Religion Bodies assigned by Agricultural/Agrarian Minister after hearing Religion Minister;
- 3) Social bodies assigned by Agricultural/Agrarian Minister after hearing Social Wealth Minister.

b. Steps of land ownership transfer through purchase

Article 37 paragraph (1) Government Regulation No. 24 of 1997 stipulates that *"Land ownership transfer and apartment ownership transfer through purchase, trade, present, investment into corporation and other legal action of rights transfer, except rights transfer through auction can be merely registered after it has been verified to be certificate by authorized Deed Officer according to the existing legislation."*

Before buying the land, eight respondent buyers (80 %) were having consultation with their lawyer and friends who had experience in the similar matter and browsing related internet sites. They were conducting the land purchase before the Deed Officer (*Pejabat Pembuat Akta Tanah*).

Steps conducted by seller and buyer as follows:

- 1) Seller and buyer agree the price;
- 2) Seller and buyer mutually appear before the Deed Officer. In this matter:
 - a) The seller prepared:
 - (1) Right verification or certificate. If there is no certificate, thus it should be converted through Deed Officer;

- (2) Identity card or Passport. If the holders have been married, they must attach identity of their husband or wife. If they have had family, they must attach their family cards;
- (3) Land and Building Tax of which has not been amortized in period of last five years. Land and Building Tax comprises of Notification Letter of Indebted Tax and Receipt of Payment;
- (4) Tax Payer Number;
- (5) The seller paid Income Tax: 5% multiply selling price if the price had been accepted by the seller more than IDR 60,000,000,- (sixty millions rupiah) and the seller includes ad businessmen class having income below the Untaxed Income. If the selling price is less than IDR 60,000,000,- (sixty millions rupiah), the sellers is free or may not pay Income Tax however attached notification of tax free issued by Directorate General of Taxation. Selling price less than 60 millions rupiah is not caused by the split land; for example a seller has 150 meter land he will sell for IDR 1,000,000,- (one millions rupiah) per meter. If it is sold with one certificate it means IDR 60,000,000,- (sixty millions rupiah). It is prohibited.
- (6) Validation of payment of Income Tax to Tax Office. Concerning on Income Tax is regulated in Government Regulation No. 71 of 2000 of which is revision of Government Regional No. 27 of 1996 and Government Regulation No. 48 of 1994.

b) The buyer prepared:

(1) Identity card or Passport;

In the implementation of land ownership transfer through purchase, the Notary & Deed Officer asked the existence or inexistence of prenuptial agreement whereas Notary & Deed Officer of the eight buyers respondents requested the prenuptial agreements while the Notary & Deed Officer of the two buyers respondents did not. Prenuptial agreement is regulated in Article 29 of Act No. 1 of 1974 on Marriage Law stipulating that:

- (a) During or before the marriage is held, both parties based on mutual agreement can have written agreement of which is legalized by marriage notifying officer, afterward its contain is also valid towards the third party as long as third party related.
- (b) This agreement cannot be legalized if violated legal, religious and moral limits.
- (c) This agreement started to valid since the marriage is held.
- (d) During the marriage this agreement cannot be changed except if and both parties had agreed to change and this change bring no suffers for third party.

Prenuptial agreement or often mentioned as premarital agreement is made before held marriage. Prenuptial agreement is made before the Notary and registered in marriage registration office (Religion Concerns Office or Civil Record). Prenuptial agreement or premarital agreement contains on the property shared between husband and wife thus in the case of there is a case in marriage their respective property will not loose or should have not been shared. If there is no prenuptial agreement thus Indonesian marriage with foreigners will be equalized his position with his foreigner couple. Foreigner is prohibited as land ownership holder instead as subject or holder of land right to use thus Indonesian who have not made prenuptial agreement is the subject or holder of land rights to use. There are two respondents (20%) who did not have prenuptial agreements or premarital agreements. They did not comprehend on prenuptial agreement or premarital agreement. They argued that they married and started all of these from zero. While the bought those land (in 1998 and 2009) Deed Officer did not request them prenuptial agreement. They comprehended that Indonesian's mixed marriage couples cannot be subject or land ownership holder based on information from their friends who are also mixed-marriage couples. Because of that they planned to sell the land to Indonesians who also live in Sleman Regency.

(2) Tax Payer Number;

(3) Payment of Acceptance Cost of Land and Building Rights of 5% multiplied (buying price minus Untaxed Income);

(4) Management of validation on tax payment;

Income Tax (*PPh*) and Payment of Acceptance Cost of Land and Building Rights (*BPHTB*) must be paid previously before the signing of Deed of Purchase. It is regulated in Article 91 paragraph (1) of Act No. 28 of 2009 which states that Notary & Deed Officer could only merely sign the Deed of Purchase land and/or building rights after taxpayer conveyed the proof of tax payment;

(5) Meanwhile Deed Officer conducted examination on the originality of certificate in local Land Office. It is regulated in Article 97 paragraph (1) of Regulation of Agrarian State Minister/Head of State Land Body No. 3 of 1997 on Determination of Implementation No. 24 of 1997 on Land Registration of which stipulates that before conducting issuance of certificate on transfer or change of Land Rights or Ownership of Apartment Deed Office must previously conduct examination in local Land Office by showing the authentic certificate. The examination of certificate intended to examine whether there is a problem with the certificate (called material truth) and whether the certificate is authentic (called formal truth). In addition, Deed Officer insures that seller and buyer pay tax of which is his/her responsibility.

3) The seller and buyer determine time to conduct transaction and reading of Deed of Purchase;

- 4) Signing the Deed of Purchase by seller, buyer, witness and Deed Officer;
- 5) Registration of rights transfer (name transfer) in local Land Office;
- 6) Entrustment of certificate to buyer.

c. The Existence of Prenuptial Agreement in Purchasing Land

Article 29 paragraph (1) Act No. 1 of 1974 stipulates that: *“At the time of or before the marriage took place, with the mutual consent of both parties, they can enter into an agreement approved by the Civil Registrar of marriage, after which it shall also apply to third parties as long as it involves them as well.”* The idea of having a prenuptial agreement for mixed-marriage couples, among others, is to have a property separation regime in your marriage since the Indonesia’s Marriage Law is assuming joint property ownership in all marriages. The Marriage Law is applicable to all Indonesians and to all marriages registered in Indonesia. But Article 29 paragraph (1) does not contain an obligation by putting word **“can”**. Prenuptial agreement or often mentioned as premarital agreement is made before held marriage. It is made before the Notary and registered at the Civil Registration Office (*Kantor Catatan Sipil*) and the Office of Religion Affairs (*Kantor Urusan Agama*).

Prenuptial agreement contains the property shared between husband and wife thus in the case of there is a case in marriage their respective property will not loose or should have not been shared. If there is no prenuptial agreement thus Indonesian marriage with foreigners will be equalized his position with his foreigner couple. And the Indonesian spouse cannot be the landowner.

It is correct that Act No. 5 of 1960 does not allow foreigners to have land in Indonesia. Therefore, when an Indonesian will marry with a foreigner, she/he will be precluded to legally own land in Indonesia. If an Indonesian wishes to protect assets that predate the marriage, a prenuptial agreement is required. The prenuptial agreement is made in the local area where the couple. Two witnesses over the age of 18 are required when signing a prenuptial agreement.

Conclusion and recommendation

The existence of prenuptial agreement for Indonesian’s mixed-marriage couple is a must when purchasing land in Sleman Regency, Indonesia. Act No. 5 of 1960 of Basic Agrarian Law does not stipulate prenuptial agreement for Indonesian’s mixed-marriage couple buying land. Article 26 paragraph (2) Basic Agrarian Law stipulates that *“Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreign, to a national possessing a foreign nationality in addition to his/her Indonesian nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21 paragraph (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed.”*

Even though Act No. 5 of 1960 does not regulate the prenuptial agreement but Article 29 paragraph (1) Act No. 1 of 1974 stipulates that: *“At the time of or before the marriage took place, with the mutual consent of both parties, they can enter into an agreement approved by the Civil Registrar of marriage, after which it shall also apply to third parties as long as it involves them as well.”* This Article, in fact, has been applied on the wrong way. The agreement is not a must but has been applied as a must. There are two respondents (20%) who did not make prenuptial agreements before their marriages. They did not understand that they should make the prenuptial agreement and they began their marriage lives from zero.

In future, Indonesia must publish an act to clarify the Article 29 paragraph (1) Act No. 1 of 1974 that a prenuptial agreement is not a must. And government through related apparatus such as officers from Religion Affairs, Civil Registration, Notary & Deed (*Pejabat Pembuat Akta Tanah/PPAT*) need to inform and increase socialization on prenuptial agreement to Indonesians who will marry foreigners. For Indonesians who will marry foreigners, they have to seek information and comprehend regulations relating to marriage with foreigner.

References

Books :

- Boedi Harsono. (2002). *Hukum Agraria Indonesia* Himpunan Peraturan-peraturan Hukum Tanah. Jakarta: Djambatan.
- Moh. Nazir. (2003). *Metode Penelitian*. Jakarta: Penerbit Ghalia Indonesia.
- Redaksi RAS. (2009). *Tip Hukum Praktis: Tanah Dan Bangunan*. Jakarta.
- Sutrisno Hadi. (1986). *Bimbingan Menulis Skripsi Thesis*. Yogyakarta: Yayasan Penerbit Psikologi.
- Soerjono Soekanto. (1986). *Pengantar Penelitian Hukum*. Jakarta: Penerbit UI Press.
- Urip Santoso. (2005). *Hukum Agraria dan Hak-hak Atas Tanah*. Jakarta: Kencana.

Regulations :

- Act No. 5 of 1960
- Act No. 1 of 1974
- Government Regulation No. 24 of 1997
- Government Regulation No. 71 of 2000
- Government Regulation No. 79 of 1999

Government Regulation No. 27 of 1996
Government Regulation No. 48 of 1994
Regulation of Agrarian State Minister No. 3 of 1997

Websites :

<http://indonesia.angloinfo.com/family/marriage/prenuptial-agreements/>
<http://indonesian-mixed-marriages.blogspot.com/p/preparation.html>