

PROTECTION OF INDONESIAN CITIZENS IN MIXED MARRIAGE AGAINST OBTAINING ASSETS RIGHTS TO LAND

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ABSTRACT

Indonesian citizens have the right to own land rights. However, for Indonesian citizens who carry out mixed marriages, there are exceptions, namely the separation of assets that must be made. This type of research was normative legal research. This study analyzed the main issues by conducting a study of primary, secondary and tertiary legal materials. The results show that based on the Decision of the Constitutional Court Number 69 / PUU-XIII / 2015, an agreement to separate assets can be made at the time of marriage, before the marriage, or during the marriage bond. Then, based on the provisions of Article 21 of Law Number 5 of 1960 concerning Basic Agrarian Regulations in conjunction with Article 3 of Government Regulation of the Republic of Indonesia Number 103 of 2015 concerning Ownership of Residential or Residential Homes by Foreigners Domiciled in Indonesia, Indonesian citizens who carry out mixed marriages can have the same land rights as other Indonesian citizens who do not carry out mixed marriages, but this must be proven by an agreement to separate assets.

Keywords: Mixed Marriage, Land Rights, Agreement on Separation of Assets

A. INTRODUCTION

Marriage is a legal relationship between a man and a woman for a long time.¹ Article 1 of Law Number 1 Year 1974 Concerning Marriage (UUP) explains:

"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) based on the One Godhead."

As it is known, that Law Number 1 of 1974 was promulgated on January 2, 1974, which was then followed by the issuance of PP Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974, and declared to come into effect effectively on October 1, 1975 at throughout Indonesia. Thus, since October 1, 1975 throughout Indonesia, all marriages to be carried out are based on the Marriage Law. The purpose of this Marriage Law is to implement the legal unification of marriage in accordance with the Pancasila philosophy.

Considering that there are many mixed marriages currently in Indonesia, where there are mixed marriages between Indonesian citizens (WNI) and foreign citizens (WNA). With differences in nationality, one of which is a female citizen, various problems arise.

Indonesian citizens who are married to foreigners, after marriage, are not allowed to have rights to land in the form of Assets Rights, Business Use Rights or Building Use Rights. This is in accordance with Article 35 of the Marriage Law which states that assets obtained during marriage becomes joint assets. So, there is a mixture of assets obtained after marriage, and the husband (who is a foreigner) will also become the owner of the joint assets. Meanwhile, referring to the provisions of Law Number 5 of 1960 concerning Basic Agrarian Principles, foreigners may not have Assets Rights, Business Use Rights or Building Use Rights. For this reason, an Indonesian citizen who marries a foreigner, after marriage, can no longer obtain assets rights, or building use rights, or business use rights, because they will become part of the joint assets he has with his foreign partner.

According to Article 35 of Law no. 1 of 1974 concerning Marriage ("UUP") is regulated on Assets in Marriage, which states:

- 1) Assets acquired during marriage become joint assets.
- 2) The inheritance of each husband and wife and the assets obtained by each as a gift or inheritance is under their respective control as long as the parties do not determine otherwise.

Thus, if the assets is acquired by the husband and / or wife during the marriage, the assets are joint assets as long as there is no other agreement in the Marriage Agreement. A marriage agreement is a written agreement made before marriage and legalized by a Marriage Registry Officer regarding the position of assets in a marriage that does not conflict with Islamic law (Article 29 UUP). Furthermore, Article 36 paragraph (1) of the Company Law states, any legal action related to joint assets must be subject to the consent of the husband and wife.

In addition, mixed marital families are closely related to legal regulations, such as issues of residence, nationality of children, work permits, as well as assets ownership.

¹ Subekti, A, 2003, *Principles of Civil Law*, Intermasa, Jakarta, p. 23.

B. THEORETICAL FRAMEWORK

The theoretical basis in this research is as follows:

1. Justice Theory

According to Aristotle, namely "a political policy whose rules are the basis of state regulations and these rules are a measure of what is right. Aristotle argues that in the science of law justice is divided into two parts, namely:

- a. *Distributival* Justice, namely justice that gives each person a share according to his services.
 - b. justice *Commutativa*, namely justice that provides each person as much as not remembering individual merits.²
- "Fair does not mean the same". So strictly speaking, justice in law means justice *distributive* and not justice *communal*.³ Ulpianus argued that justice is a permanent and unending will to give to everyone who is due and the basic rules of law are to live properly, not to harm others, to give others what is their part.⁴

2. Legal Certainty Theory

In order to achieve order in society, it is endeavored to establish certainty. Certainty here is defined as certainty in law and certainty because of the law. This is because the definition of law has two aspects. The first aspect is that there is a definite law for concrete events, the second aspect is the existence of a legal protection against arbitrariness (*LJ Van Apeldoorn Inleiding tot de studie van het Nederlandse Recht, 1995*).⁵

Legal certainty in mixed marriages, especially for Indonesian citizens (WNI), who have fulfilled the requirements for a legal marriage and are registered as stipulated in the UUP. Certainty in terms of ownership of land and buildings in Indonesia, of course, must also be a concern of the government. The vacillating status of Indonesian citizens who are already bound by mixed marriages in terms of ownership of land is of course a concern for them where they cannot enjoy their rights as Indonesian citizens, especially in terms of ownership of land rights.

3. Theory of Legal Protection

Legal protection is born from a provision of law and all legal regulations given by the community which are basically the agreement of the community to regulate the behavior relationship between community members and between the company and the government which is considered to represent the interests of society.

According to Phillipus M. Hadjon's opinion, legal protection for the people is a government action that is preventive and repressive in nature.⁶ In this preventive legal protection, legal subjects have the opportunity to submit objections and opinions before the government gives the final decision. This legal protection is contained in statutory regulations which contain signs and limitations in doing something. This protection is provided by the government to prevent a violation or dispute before it occurs.

4. Welfare Theory

Welfare can have four meanings (Indonesian Dictionary). In general terms, prosperity refers to a good state, the human condition in which people are prosperous, in a state of health and peace. In economy, prosperity is associated with material gain. Prosperity has a special official or technical meaning, as in the term social welfare function. In social policy, social welfare refers to the range of services to meet community needs. This is the term used in the idea of a prosperous state. In the United States, welfare refers to money paid by the government to people who need financial assistance, but are unable to work, or whose income they receive to meet basic needs is insufficient. The amounts paid are usually well below the poverty line, and also have special conditions, such as evidence of looking for work or other conditions, such as incapacity or child care, which prevent them from working. In some cases grantees are even required to work, and this is known as *workfare*.

According to Law No.11 of 2009, regarding Social Welfare, social welfare is a condition for the fulfillment of the material, spiritual and social needs of citizens in order to live properly and be able to develop themselves, so that they can carry out their social functions. The problems of social welfare that are developing today indicate that there are citizens whose rights to basic needs have not been properly fulfilled because they have not received social services from the state. As a result, there are still citizens who experience obstacles in the implementation of social functions so that they are unable to live a decent and dignified life.

C. RESEARCH RESULTS AND DISCUSSION

1. Acquisition of Joint Assets and Assets Acquired by Indonesian Citizens in Mixed Marriage

Joint assets are a legal consequence of marriage. According to Article 35 paragraph (1) of the Company Law, assets acquired during marriage become joint assets. This means that joint assets absolutely exists and cannot be negated by the parties. The source of joint marital assets is acquired during marriage.

Since the beginning of the marriage, a mixture of the asset of the husband and the asset of the wife occurs, if no agreement is made, this situation continues and cannot be changed again during the marriage.

² Abdullah Sani, 1977, *Judges and Legal Justice*, Bulan Bintang, Jakarta, p. 71.

³ Ibid. p. 72

⁴ Ibid. p. 73.

⁵ Soerjono Soekanto and Mustafa Abdullah, 1980, *Sociology of Law in Society*, Rajawali Pers, Jakarta, p. 32.

⁶ Phillipus M. Hadjon, 1987, *Legal Protection for the Indonesian People*, PT. Bina Ilmu, Surabaya, p. 2.

Mixing of wealth, is about all assets and liabilities both brought by each party into the marriage and which will be obtained at a later date during the marriage. The joint asset is called by law "*gemeenshapp*".

Meanwhile, what is meant by assets obtained during marriage is that assets obtained here must be interpreted as a result of their cooperation. The word cooperation here must be interpreted loosely, so that it does not mean physical cooperation. In this sense, if the assets are obtained by one of them, for example the husband's salary, it is seen as the result of cooperation even though physically there is no cooperation there.

In terms of land ownership, especially for Indonesian citizens, mixed marriages can result in land belonging to Indonesian citizens mixing in joint assets with foreigners. Therefore, an Indonesian citizen cannot own land with assets rights after marrying a foreigner.

In joint assets, the assets acquired by husband and wife during the marriage are not controlled by each husband and wife, but are in joint ownership. Thus, in such joint assets, land that is owned by Indonesian citizens will become part of the joint assets also owned by foreigners so that this can transcend the boundaries of the principle of nationality.

The Basic Agrarian Law (UUPA) already regulates land rights available under the national land law and which legal subjects can control land rights in Indonesia. Ownership rights can only be owned by individuals with the status of Indonesian citizens and certain legal entities based on Government decrees, this is because assets rights are the strongest and fullest rights and can be inherited from generation to generation. Apart from assets rights, there are also rights to build and use rights which can only be controlled by Indonesian citizens and legal entities which are established under Indonesian law and domiciled in Indonesia. Only the right to use is possible to be controlled by foreigners and foreign legal entities that have representatives in Indonesia.

In this regard, it is in accordance with the provisions in the Marriage Law that the marriage assets system in Indonesia recognizes the existence of shared assets and assets. Inherited assets are assets owned by each spouse that were obtained before marriage and assets which is a gift or inheritance. Meanwhile, joint assets are all assets obtained during the marriage (Article 35 of the Marriage Law). Thus, if an Indonesian citizen (who is in a mixed marriage with a foreigner) buys a assets in accordance with the legal subject for an Indonesian citizen, the assets will automatically become a joint assets between the Indonesian citizen and the foreigner who is currently married. Therefore, this is not legally possible. This is in accordance with the provisions of Article 21 paragraph (3) of the UUPA that foreigners who obtain assets rights due to inheritance or mixture of assets due to marriage or Indonesian citizens who lose their citizenship are obliged to relinquish their acquired ownership rights within a period of one year, otherwise the right is will remove by law and the land becomes state land. For these reasons, assets ownership by Indonesian citizens conducting mixed marriages can only be carried out by Indonesian citizens who have made a pre-marriage agreement (agreement to separate assets in marriage) first.

One solution which is also a strong legal basis so that it can be used for land ownership with the status of ownership rights, namely "court order for separation of assets".

The determination of the separation of assets court is a court ruling regarding the separation of assets with husband and wife after the application for separation of assets is granted or this court decision is issued. What previously occurred in a mixed marriage, shared assets / assets were mixed, after the enactment of this stipulation they became separate. What is produced by the husband after this determination is only the assets of the husband and vice versa, what the wife produces is that it belongs to the wife completely. However, a husband who is a foreign national as the head of the family will and must remain fully responsible for the cost of living for the family and also the education of the children who have been and will be born by his wife who is an Indonesian citizen.

2. Transfer of Assets Rights to Land in Mixed Marriages After the Constitutional Court Decision Number: 69 / PUU-XIII / 2015

Constitutional Court Decision No. 69 / PUU-XIII / 2015 has relaxed the meaning of a marriage agreement. With the Constitutional Court's decision, now an agreement no longer means an agreement made before marriage (*prenuptial agreement*) but can also be made after the marriage takes place.

Article 21 paragraph (3) of UUPA gives the right to foreigners to receive HM because of inheritance or a mixture of assets due to marriage. However, for Indonesian citizens in mixed marriages, they can have HM "since the right is obtained." Furthermore, the HM must be released (resold) within one year of the acquisition of the HM.

According to the Petitioner, any Indonesian who marries a foreigner as long as they do not have an agreement to separate assets will never be able to own a house with HM or HGB status. Even if a mixed-married Indonesian citizen has an agreement to separate the assets, he still cannot buy a house because there is an obligation to relinquish this right within a year.

Ike Farida, as the petitioner, welcomed the Constitutional Court's decision, and stated that the decision was related to the interests of the perpetrators of the marriage. The benefits are not only felt by the perpetrators of mixed marriages (WNI-WNA), but also perpetrators of non-mixed marriages (fellow Indonesians). "Every married couple can make a marriage agreement at any time when needed," he said after the trial.

The Civil Code provides several restrictions regarding the contents of a marriage agreement, namely: The

- a. agreement must not be contrary to decency or with public order (Article 139 of the Civil Code).
- b. The agreement may not deviate from the power given by the Civil Code to the husband as the head of the household, for example, it cannot be promised that the wife will have her own place of residence (Article 140 paragraph (1)).
- c. In this agreement the husband and wife may not let go their right to inherit the inheritance of their children (Article 141).
- d. In the agreement it should not be stipulated that either party will bear a debt greater than its share in the profits (Article 142). Pitlo argues that such a promise should be considered null and void because It is against the law. Thus the husband and wife each bear half of the debt as well as the profits.
- e. In such an agreement it is not allowed to be generally appointed to the regulations in force in a foreign country (Article 143). What is prohibited is not mentioning the contents of the law. foreign to the details of article by article, but refers generally to hu that foreign kum. This prohibition is intended to provide legal certainty regarding the rights of husband and wife, especially for the benefit of third parties who may not control the law of the designated foreign country.

- f. This promise must not be made in general words that their position will be regulated by customary law and so on (Article 143 of the Civil Code).

3. Protection of Indonesian Citizens in Mixed Marriages Against Acquiring Assets Rights to Land

Court ruling as legal certainty of land ownership for Indonesian citizens in mixed marriages. The National Land Agency (BPN) states that as stated in Article 21 paragraph (3) of Law Number 5 of 1960, Indonesian citizens who carry out mixed marriages without a marriage agreement have the same status as their land rights with their foreign partners, which is only limited to use rights. This is because the land with the status of ownership rights is also owned by the foreign spouse because of a mixture of assets due to mixed marriages.

A new marriage agreement is deemed necessary when the marriage has been legalized and the husband and wife have lived life in the household. In some circumstances they feel the need or even have to make a marriage agreement. The absence of a marriage agreement in a marriage between Indonesian citizens may not have much effect. It is different with mixed marriages that occur between Indonesian citizens and foreigners. In mixed marriages that occur without a marriage agreement, one of the causes is that Indonesian citizens cannot have the same land rights as Indonesian citizens who do not carry out mixed marriages.

The provisions in Article 29 of the Marriage Law were deemed out of date until the issuance of the Constitutional Court Decision Number 69 / PUU-XIII / 2015 which amended the provisions of Article 29 paragraph (1), paragraph (3), and paragraph (4) of the Law. The marriage thus becomes as follows:

Article 29 paragraph (1): At the time, before taking place or while in the marriage bond, the two parties with mutual consent may submit a written agreement which is legalized by a marriage registrar or a notary public, after which the contents also apply to the party. third as long as the third party is involved;

Article 29 paragraph (3): The agreement shall take effect from the time the marriage takes place, unless the Marriage Agreement stipulates otherwise;

Article 29 paragraph (4): As long as the marriage is in progress, the marriage agreement can be regarding the assets of the marriage or other agreements, it cannot be changed or revoked, unless there is an agreement between the two parties to change or revoke, and the amendment or revocation does not harm the third party.

Based on the above decision of the Constitutional Court, the marriage agreement can be made at the time, before it is held or while in the marriage bond. Thus, after a marriage is legalized, a marriage agreement can still be made. The marriage agreement shall take effect from the time the marriage is carried out, unless the Marriage Agreement is stipulated otherwise. In connection with the decision of the Constitutional Court, if it is not determined when the marriage agreement comes into effect, the marriage agreement shall come into effect as of the time the marriage took place.

As a result of the unauthorized marriage agreement, either by a Marriage Registry Officer or a notary, is invalid, the marriage agreement does not have legally binding power, so the principle of the position of assets in marriage applies (Article 35 of the Marriage Law). Thus, it means that there is separation of assets or togetherness of assets only limited to joint assets, namely assets obtained during the marriage that do not come from gifts / grants or inheritance.

The arrangements for the marriage agreement contained in the Marriage Law and the implementing regulations are deemed incomplete, resulting in multiple interpretations, especially regarding the substance of a marriage agreement. This resulted in the parties referring to other provisions that were in effect before the Marriage Law through a legal loophole, namely Article 66 of the Marriage Law which states that:

For marriage and everything related to marriage based on this Law, then with the enactment of this Law the provisions - provisions stipulated in the Civil Code (*Burgerlijk Wetboek*), Indonesian Christian Marriage Ordinance (*Huwelijks Ordonantie Christen Indonesiers S.1933 No. 74*), Mixed Marriage Regulations (*Regeling op de gemengde Huwelijken S.1898 No. 158*), and other regulations governing marriage to the extent provided for in this Law are declared invalid.

The legal consequences above use the basis of legal theory, namely the theory of legal certainty. With the Constitutional Court Decision Number 69 / PUU-XIII / 2015 which amended the provisions of Article 29 paragraph (1), paragraph (3), and paragraph (4) of the Marriage Law, it provides binding strength for the parties making the marriage agreement, so that the parties are also obliged to obey the things that have been agreed upon in the agreement. For their marital assets, with an agreement to separate the assets, the assets of each party will be separated. As a legal consequence for a third party, if the agreement to separate the assets has been legalized by a marriage registrar or notary public, then the agreement also applies to the Third Party.

Without legalization from the marriage registrar or notary public, the agreement is only binding on the parties who made it (husband and wife) and the third party the agreement does not apply. After the agreement is made, if there is a legal action, it will only involve one party, because there is separation of assets in the marriage, it is no longer the responsibility of both parties.

From the results of an interview with an Indonesian citizen who is involved in mixed marriages, to have a land title that he purchased after the mixed marriage is to make a transaction and sign a Sale and Purchase Deed before a Notary using his old Identity Card (KTP) which is still "unmarried" ".⁷

⁷ Results of an interview with Citra Kirana, Actor of Mixed Marriage in Semarang, on October 5, 2018.

D. CONCLUSION

1. Conclusion

- a. Arrangements for acquiring land rights in mixed marriages with or without a marriage agreement are in accordance with the principle of nationality as long as Indonesian citizens retain their citizenship. Assets rights obtained by Indonesian citizens in mixed marriages without a marriage agreement do not transfer to foreigners and only transfer because of the inheritance of mixed assets due to marriage as referred to in Article 21 paragraph (3) of Law No. 5 of 1960. If you want to retain rights to land after marrying a foreign citizen (WNA), you must make a marriage agreement or a prenuptial agreement that regulates the separation of your assets from your wife's assets. A marriage agreement may be made at the time, before, or during the marriage bond. This has been regulated in Article 29 of the Marriage Law jo. Constitutional Court Decision Number 69 / PUU-XIII / 2015
- b. Transfer of ownership rights to land in mixed marriages after the Constitutional Court Decision Number 69 / PUU-XIII / 2015. This decision is deemed sufficient in theory to accommodate the constraints of land ownership for perpetrators of mixed marriages at this time, especially for existing marriages. With the existence of a marriage agreement for separation of assets between the partners of mixed marriage, the rights as Indonesian citizens can be obtained without neglecting the principle of nationality.
- c. To have land rights, Indonesian citizens who carry out mixed marriages must have an agreement to separate their assets as proof that ownership of the land rights of the Indonesian citizens is not a joint assets. The agreement on the separation of assets as referred to in Article 3 PP 103/2015 is the same as the marriage agreement referred to in the Marriage Law. So that in relation to the time of making the agreement on the separation of assets, it refers to the Decision of the Constitutional Court Number 69 / PUU-XIII / 2015 which states that a marriage agreement can be made at the time of marriage, before the marriage takes place, or during the marriage bond.

2. Suggestion

- a. For Indonesian citizens who are going to have a mixed marriage, it is better if they make a marriage agreement that is legalized by a marriage registrar regarding the separation of assets at all, namely the assets obtained during the marriage are owned by each, as well as the rights and obligations obtained before or after the marriage are the responsibility of each. -Each. In the case of a foreigner having many assets outside Indonesia, it is better not to enter into a marriage agreement because it will be detrimental to the Indonesian citizen if there is a separation of assets.
- b. For mixed marriage couples whose marriage period has been running, but have never made a marriage agreement before, can make a marriage agreement during the marriage period, as an opportunity provided by the Constitutional Court Decision Number 69 / PUU-XIII / 2015. However, it must have an inventory of assets obtained by an inventory of assets obtained during the marriage bond, and be accompanied by a statement that assets have never been transacted in any form and to anyone, so as not to harm third parties who are involved and not cause disputes in later.
- c. It is hoped that the legislators will disseminate the importance of making an agreement on separation of assets for Indonesian citizens carrying out mixed marriages in order to protect their rights to have the same land rights as other Indonesian citizens who do not carry out mixed marriages. PP 103/2015 needs to include the meaning of the agreement on the separation of assets in general provisions so that it does not cause multiple interpretations.

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