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ARRANGEMENTS REGARDING PROPERTY AS A LEGAL CONSEQUENCE OF PRENUPTIAL AGREEMENTS IN MIXED MARRIAGE

**I Gusti Ayu Agung Siddhamahandari Surya Hadi Sugriwa^a; I Made
Budi Arsika^b**

ABSTRACT

The increasing intensity of mixed marriages involving Indonesian citizens and foreign citizens has given rise to legal problems related to joint property ownership. Marriage agreements have been seen as a solution to protect the legal rights of both parties. This article aims to analyze the implementation of the principle of freedom of contract in marriage agreements in mixed marriages and examine its legal consequences on the separation of immovable property, which was set as normative legal research using statutory, conceptual, and case approaches. The results suggest the principle of freedom of contract underlines that parties to a marriage agreement are free to make agreements regarding property or non-asset as long as they do not conflict with statutory regulations and legal order. However, marriage agreements should only regulate matters relating to assets because disputes on matters other than assets are relatively complex to determine the boundaries. The non-separation of immovable assets entails that Indonesian citizen partners may lose the opportunity to obtain rights over the immovable property because they will later become part of joint ownership with their foreign citizen partner. Therefore, separating assets would ensure Indonesian citizens' land rights.

Keywords: joint assets; mixed marriage; prenuptial agreement.

INTRODUCTION

The term 'mixed marriage' in Indonesia commonly refers to a type of marriage where one spouse is Indonesian and the other is a foreign national. Firstly, an Indonesian woman married a foreign man and secondly, an Indonesian man married a foreign woman.¹ According to Article 57 of Law Number 1 of 1974 regarding Marriage, mixed marriage is defined as a union between two individuals who are subject to different laws in Indonesia due to differences in their citizenship, and where one of the parties holds Indonesian citizenship.

^a Program of Law, Faculty of Law, Universitas Udayana, Jalan Raya Kampus Unud Jimbaran, Bali, Indonesia.

^b Faculty of Law, Universitas Udayana, Jalan Raya Kampus Unud Jimbaran, Bali, Indonesia, email: budi_arsika@unud.ac.id.

¹ Dewi, Atika Sandra dan Isdiana Syafitri. (2022). "Analisis Perkawinan Campuran dan Akibat Hukumnya". *Juripol*, 5(1), p. 180.

The intensifying cross-border interactions between Indonesian citizens and foreigners in the era of globalization have led to an increase in mixed marriages. According to immigration authorities in Central Java, there has been a 7% rise in mixed marriages between 2022 and 2023. Moreover, in the first three months of 2023, 21 couples who had mixed marriages were officially recorded in the province.² Currently, there is no reliable data on the number of mixed marriages in Indonesia, but it is estimated that over three million Indonesian citizens are married to foreigners.³ There isn't much information available to the public about the legal issues faced by mixed couples and their children. However, Perkumpulan Masyarakat Perkawinan Campuran Indonesia (PerCa) is a civil society organization that advocates, educates, and provides consultation services on mixed marriages.⁴

Ideally, marriage is expected to bring happiness and prosperity to both partners in the family environment that is formed.⁵ Mixed marriages can come with a range of complex issues that should be anticipated from the beginning. As a result, many mixed marriages are preceded by a prenuptial agreement, which outlines agreements on matters that are likely to become problematic in the future, as well as serves as a reminder of the commitment between the husband and wife.⁶

As per Article 119 of the Civil Code (KUH Perdata), any property acquired during marriage is considered joint property that belongs to both spouses. This includes all assets obtained by either spouse during the marriage. The joint property cannot be eliminated or changed by any agreement between the spouses as long as the marriage lasts.

Under customary law, marital property refers to all assets controlled by the husband and wife while they are still bound by marital status. These assets may include individual assets obtained through inheritance, grants, own income assets, joint livelihood assets of husband and wife, and gift items. This statement aligns with the

² Fatoni, Yusup, et al. (2023). Meningkatkan, Imigrasi Catat 21 Pernikahan Campuran Hingga Maret 2023. Available online from: <https://www.antaranews.com/video/3544230/meningkat-imigrasi-catat-21-pernikahan-campuran-hingga-maret-2023>. [Accessed October 8, 2023].

³ Syafa'ah, Naila. (2017). "Advokasi: Peran Organisasi Perca Indonesia dalam Mengatasi Permasalahan Keluarga Perkawinan Campuran (Studi di Kantor Organisasi Perca Pasuruan Jawa Timur)". *SAKINA: Journal of Family Studies*, 3(2), pp. 276-300.

⁴ PerCa Indonesia. Tentang Kami. Available online from: <https://www.percaindonesia.com/tentang-kami/>. [Accessed October 22, 2023]. Mengenai advokasi, lihat misalnya permohonan Uji Materiil yang diajukan Perca terhadap Pasal 3 ayat (2) PP 103/2015 pada Putusan Mahkamah Agung No. 45 P/HUM/2016.

⁵ Kasim, Nur Mohamad. (2020). "The Implementation of Modest and Simple Principle to Mahr as a Contribution to the Indonesian Marriage Law". *Hukum & Pembangunan*, 50(2), pp. 540-548.

⁶ Febriansyah, Ferry Irawan, et al. (2021). "The Urgency of the Prenuptial Agreement as an Early Marriage Agreement". *Advances in Social Science, Education and Humanities Research (ASSEHR) Atlantis Press*, 581, pp. 149-155.

provisions of Articles 35 and 36 of the Marriage Law. According to Islamic law, joint property is not considered as joint property between a husband and wife. Instead, it is regarded as the husband's property which is used for the benefit of the whole family. This is because verses 4 and 34 of the Quranic chapter An-Nisa and verse 233 of the Quranic chapter Al-Baqarah state that the man is responsible for providing for the family, and any income earned by the wife is not considered as part of the joint property.⁷

Legal issues can arise concerning the ownership of joint property if one of the spouses is not an Indonesian citizen. In the case of separation of assets, having a marriage agreement can protect both parties from the burden of their partner's debt if both have agreed to enter into a marriage agreement. Marriage is an important milestone for the current generation and also for third parties, especially when it comes to understanding the status of property in marriage.⁸

In Indonesia, marriage agreements are not common because they are viewed as solely focused on wealth and contrary to Eastern culture, which emphasizes collectivism over individualism. In reality, a marriage agreement can provide legal security for both parties by ensuring legal certainty.⁹ A marriage contract is a legal agreement that regulates matters related to the property of the individuals involved. One party is responsible for making a promise to do something, while the other party has the right to enforce the agreement.¹⁰

According to Article 29 paragraphs (1) and (2) of the Marriage Law Article 45 paragraphs (1) and (2), Article 46 paragraph (1), and Article 47 paragraph (2) of the Compilation of Islamic Law, a marriage agreement must be made before or during the wedding ceremony. Both parties involved must give their consent, and the contents of the agreement must not violate any laws, religious beliefs, or moral standards. The agreement must be in writing and must be legalized by the marriage registrar. Over time, the marriage agreement has evolved to cover more than just property issues. Individuals who have not yet tied the knot are beginning to contemplate the necessary discussions they need to have with their significant others. These discussions may involve securing equal employment opportunities, career advancements, and reproductive health rights.

⁷ Puspytasari, Heppy Hyma. (2020). "Harta Bersama dalam Perkawinan Menurut Hukum Islam dan Hukum Positif", *Jatiswara*, 35(2), pp. 129-143.

⁸ Djaja, Benny. (2020). *Perjanjian Kawin: Sebelum, Saat dan Sepanjang Perkawinan*. Depok: PT. Raja Grafindo Persada. p. 1.

⁹ Tamam, Badrut. (2019). "Implikasi Yuridis Keputusan Mahkamah Konstitusi No. 69/PUU-XIII/2015 Tentang Perjanjian Perkawinan Terhadap Harta Bersama Bagi Perkawinan Campuran". Tesis, Program Studi Hukum Keluarga Pascasarjana IAIN Jember. p. 109. Available online from: http://digilib.uinkhas.ac.id/1854/1/Badrut%20Tamam_0839117002.pdf

¹⁰ Khairunnisa, Fitri. (2018). "The Authority on Endorsement of Marriage Agreement Between Indonesian and Foreign Citizen Which Made Abroad". *Unram Law Review*, 2(2), pp. 108-125.

Furthermore, there are even couples who mutually decide to refrain from having children and make agreements to that effect.¹¹

This article aims to analyze how the principle of freedom of contract is implemented in marriage agreements for couples in mixed marriages. Additionally, it will examine the legal implications of a marriage agreement on the separation of immovable property in mixed marriages.

Several literary works have addressed topics that are comparable to those discussed in this article. Various scientific works, such as Prihandini (2019)¹², Dewi (2019)¹³, Tamam (2019)¹⁴, and Pranata and Rudy (2021)¹⁵, examine the consequences of the Constitutional Court Decision Number 69/PUU-XIII/2015 on the execution of marriage agreements in Indonesia. Dewi and Syafitri (2022) examined the legal consequences of mixed marriages for Indonesian citizens and children of mixed marriages.¹⁶ Ariyanti (2023) explores the legal implications of mixed marriages on land ownership and transactions without a marriage agreement.¹⁷ Prastyawan (2021) discusses dispute resolution over land rights in mixed marriages in Indonesia.¹⁸ The main focus of this research is the implementation of the principle of freedom of contract in marriage agreements that involve partners from different backgrounds. This is the key differentiator of this article. Meanwhile, the second part of the discussion delves deeper into the findings of previously published studies.

Moving forward, the problem statement can be formulated as follows:

1. What are the legal implications of a marriage agreement between an Indonesian citizen and a foreigner regarding the principle of freedom of contract?

¹¹Muharram, Fadhlul. (2023). "Perjanjian Pra Nikah untuk Tidak Memiliki Keturunan dan Akibat Hukumnya dalam Hukum Keluarga Indonesia". Skripsi, Program Studi Hukum Keluarga Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah. Available online from: <https://repository.uinjkt.ac.id/dspace/bitstream/123456789/74273/1/FADHLUL%20-%20MUHARRAM%20-%20FSH.pdf>

¹²Prihandini, Yudiana Dewi. (2019). "Perlindungan Hukum Terhadap Pihak Ketiga Atas Perjanjian Perkawinan yang Dibuat Setelah Perkawinan". *Lex Renaissance*, 4(2), pp. 362-365.

¹³Dewi, Ni Komang Diah Valentina Sintya. (2019). "Perlindungan Hukum Atas Kepemilikan Hak Atas Tanah Bagi Warga Negara Indonesia yang Telah Melaksanakan Perkawinan Campuran Dengan Membuat Perjanjian Perkawinan Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 di Kabupaten Badung". Fakultas Hukum Universitas Atma Jaya Yogyakarta, p. 4.

¹⁴Tamam, Badrud. *Op. Cit.* p. 7

¹⁵P, Made Hendra Pranata Dharmaputra dan Dewa Gde Rudy. (2021). "Akibat Hukum Perjanjian Perkawinan Terhadap Hak Atas Tanah Dalam Perkawinan Campuran". *Kertha Semaya*, 9(3), pp. 426-434.

¹⁶Dewi, Atika Sandra dan Isdiana Syafitri. *Op. Cit.* p. 183,

¹⁷Ariyanti, Bella Fitria. (2023). "Perkawinan Campuran WNA dan WNI tanpa Perjanjian Nikah mengenai Hak Atas Penjualan Tanah", *Hukum dan HAM Wara Sains*, 2(04), p. 313.

¹⁸Prastyawan, Yoga Nasa. (2021). "Penyelesaian Sengketa Hak Milik atas Tanah dalam Perkawinan Campuran di Indonesia". *Media of Law and Shari'a*, 2(4), pp. 316-328.

2. What are the legal consequences of a marriage agreement on the separation of immovable property in a mixed marriage?

The purpose of this article is to analyze the application of the freedom of contract principle in a marriage agreement for a mixed marriage. It will also examine the legal implications of the marriage contract on the division of real estate property in case of separation.

RESEARCH METHODS

This article presents legal research using a statutory, conceptual, and case-based approach. The statutory approach involves examining official written laws that regulate civil status, marriage, citizenship, and agrarian affairs. In addition, the conceptual approach is used to analyze the legal ideas behind property separation arrangements and to explore the concept of mixed marriage. In this article, court decisions related to the discussed issues are analyzed using the case approach. Primary legal materials, such as laws and court decisions, and secondary legal materials, such as books, journal articles, and scientific works, are used for the analysis. The legal materials are analyzed using descriptive and evaluative methods.

DISCUSSION

Implementation of the Principle of Freedom of Contract in a Marital Agreement in a Mixed Marriage

Marital life can be challenging for many couples, and it's not always a happy journey. It's important to anticipate the possibility of disputes that may lead to divorce. However, the concept of a marriage agreement is often associated with negativity, as if it's a sign of preparing for divorce. This taboo topic raises questions in Indonesian society.

When entering into a marriage, it's important to consider more than just property issues. Health aspects, partner loyalty, and other factors should also be taken into account. The content of the marriage agreement is up to the individuals involved, following the principle of freedom of contract as set out in Article 1338 paragraph (1) of the Civil Code. The principle of freedom of contract includes various types of freedom:

- (1) Parties have the liberty to decide whether or not to agree.
- (2) Parties have the liberty to decide with whom they would like to agree.
- (3) Parties are free to choose the form of the agreement.

- (4) "The parties have the freedom to determine the content of the agreement."¹⁹ Two parties have the freedom to determine the involved parties.

It is legal for foreigners and Indonesian citizens in a mixed marriage to enter into marriage agreements. However, these agreements must comply with Indonesian laws and regulations, and should not be against public order or morality. While couples are free to make such agreements, determining the citizenship of their future children can be complicated.

Marriage agreements are not limited to property matters only. Any mutual agreement between the husband and wife can be included in the agreement. The contents of the agreement are based on the intentions of both parties, reflecting the principle of freedom of contract. However, Article 29 of the Marriage Law, which governs the creation of such agreements, doesn't provide any guidance on the aspects that should be included in the agreement. It only states that *taklik talak* cannot be included in the agreement.

A prenuptial agreement can include a provision to allocate a portion of the assets that belong to both partners for child support. It can also stipulate personal accountability for any debts accrued by either spouse. However, it's important to note that a prenuptial agreement does not release the husband from the obligation to provide for the household's needs.²⁰ Married couples enjoy the freedom to decide the matters that need to be regulated in their marriage agreement, as long as both parties mutually agree. This is also indicated in the Constitutional Court Decision Number 69/PUU-XIII/2015 on Article 29 of the Marriage Law. Each party has the right to manage their property, and the household expenses can be borne by either the husband or jointly by both parties. There are consequences for each party in terms of the costs associated with household needs.²¹ In addition to property, marital and non-property agreements can be included in a marriage agreement.

The Marriage Law has specific provisions for the marriage agreement in Chapter V, while Chapter VII covers the regulation of property in marriage. The Indonesian Civil Code is applied based on the principle of concordance and provides more detailed regulations on marriage agreements in Articles 139 to 185. Article 139 of the code permits the prospective husband and wife to deviate from the laws and regulations regarding joint property through a marriage agreement, as long as it conforms with good morals

¹⁹Darmawan, Marchelo Ivan dan Nany Suryawati. (2023). "Analisa Yuridis tentang Perjanjian Sewa Menyewa Tanpa Batas Waktu". *Law, Development JusticeReview*, 6(2), p. 187.

²⁰Damanhuri. (2020). *Segi-Segi Hukum Perjanjian Perkawinan Harta Bersama*. Bandung: Mandar Maju. p. 12.

²¹Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015, Lihat juga: Ahyani, Sri. (2018). "Implikasi Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015 terhadap Pasal 29 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan". *Wawasan Yuridika*, 2(1), pp. 81-94.

and public order, and certain provisions are observed. This means that a marriage agreement can be made to deviate from the provisions of marital property.²²

Every marriage agreement between each couple must address different aspects of their union, which makes it unique and authentic, and it must be formalized and legalized before a notary acquires legal validity. The notary is responsible for ensuring that both parties have agreed upon and consented to all the terms and conditions in the agreement. However, with the introduction of the Marriage Law, it is now possible for a Marriage Registration Officer (PPN) to legalize marriage agreements in addition to notaries.

A marriage agreement should be made according to the preferences and needs of each married couple, which can cover a variety of topics, such as domestic crimes, promises that one party can still have a career even after marriage, the roles and obligations of spouses, child custody, and others, which are not just financial or property agreements. Thus, a marriage agreement can be said to be in line with the principle of freedom of contract that prioritizes individual interests. For example, an agreement that a husband or wife can remarry someone else because the first spouse cannot provide offspring. Another example is an agreement not to commit infidelity adultery, or remarry if one spouse has an accident and is disabled or infertile.

In a marriage agreement, it is common for the wife to state from the beginning that if certain circumstances arise, the husband is prohibited from divorcing her or marrying someone else. This condition must also be agreed upon by the husband to avoid any discrepancies in the marriage agreement. Additionally, a marriage agreement can also outline the choice of citizenship for the children of a mixed-marriage couple. Nowadays, some couples also pre-arrange matters related to child custody to avoid lengthy court procedures and ensure a peaceful settlement in case of a divorce.²³

When creating a marriage agreement, it is important to consider the citizenship of children born to couples of mixed marriages in Indonesia. However, it is important to note that the principles of citizenship that apply in Indonesia and the foreign spouse's country of origin must be taken into account. Although marriage agreements are bound by the principle of freedom of contract, it is not possible to choose or impose the citizenship of a child based on a marriage agreement. If both partners of a mixed marriage come from countries that follow the *ius sanguinis* principle (law of the blood),

²²Hernoko, Agus Yudha, et al. (2017). "Nuptial Agreement in Indonesia: A New Change in Indonesian Marriage Law". *Advances in Social Science, Education and Humanities Research (ASSEHR) Atlantis Press*, 131, pp. 24-27.

²³Ghose, Akansha dan Pallavi Agarwal. (2014). "Prenuptial Agreement: A Necessity of Modern Era", 2 *International Journal of Research and Analysis*, pp. 4-6.

they can make a marriage agreement regarding the citizenship of their child. This is because the *ius sanguinis* principle grants the child two citizenship - one from an Indonesian parent and another from a foreign parent. In such a scenario, a marriage agreement can be used to determine the citizenship that will be given to the child. When an Indonesian citizen marries a foreigner from a country that follows the *ius soli* principle (citizenship based on the place of birth), there are some important considerations to keep in mind. If their child is born in Indonesia, they cannot be compelled to acquire foreign citizenship at any cost simply because they were not born in the foreign country. Legally, the child will only retain Indonesian citizenship because it follows the citizenship of one of its Indonesian parents.

In Religious Court Decision Number 0172/Pdt.G/2019/PA.Tgrs, a marriage agreement was created. It covers agreements to be done if the couple divorces due to the husband's infidelity.²⁴ It is common to include child custody arrangements in a marriage agreement, with the wife being given full custody. However, this may not always be appropriate as it is impossible to predict the future and unforeseen circumstances can arise that may affect the suitability of either parent to care for the child. R. Sardjono believes that marriage agreements should only cover legal aspects of wealth, as long as it is not in violation of the law and cannot be interpreted otherwise.²⁵ Based on the assumption that issues other than property are unpredictable events or disputes, it is often challenging to implement a marriage agreement that regulates dynamic and uncertain matters. When considering the content of the marriage agreement, both the judge and the Marriage Registrar can only make assumptions.

It is possible to regulate matters other than property in a marriage agreement. Even though it has elements of an agreement, the marriage agreement is unique, especially for mixed marriage couples, as it is part of the binding regulations in family law based on the Civil Code.

Legal Effects of Marital Agreements on Immovable Property in Mixed Marriages

Article 108 of the Civil Code used to state that married women were not allowed to act alone in legal matters and needed their husband's assistance. This was because they were considered to lack the capacity to act independently. However, this provision has been revoked by Supreme Court Circular Letter (SEMA) Number 3 of 1963, which

²⁴Pengadilan Agama Tigaraksa, Putusan No. 0172/Pdt.G/2019/PA.Tgrs, Lihat juga: Ramadhani, Dinda. (2022). "Analisis Pencantuman Klausul Kompensasi dalam Perjanjian Perkawinan sebagai Implementasi Asas Kebebasan Berkontrak", *Lex Patrimonium*, 1(1), pp. 1-15.

²⁵Werdiningsih. (2023). "Asas Publisitas Perjanjian Perkawinan (Post Nuptial Agreement): Konsep Kepastian dan Perlindungan Hukum bagi Pihak Ketiga", *Jurnal Ilmu Kenotariatan*, 4(1), pp. 45-64.

means there is no longer any discrimination against married women in Indonesia. The circular clarifies that married women have the same legal rights and capacities as their husbands and can act independently in legal matters.

As a result of this idea, the following articles of the *Burgerlijk Wetboek* are considered invalid by the Supreme Court:

1. Articles 108 and 110 of the Indonesian Civil Code grant wives the authority to perform legal actions and appear before a court without the permission or assistance of their husbands. As a result, all Indonesian citizens are treated equally in this regard.²⁶

Article 31 of the Marriage Law reaffirms what was previously stated:

- 1) The position and rights of both spouses are equal in the household and society.
- 2) "Both parties have the right to carry out lawful actions."
- 3) The husband is the head of the family and the wife is the housewife

In reality, when an Indonesian citizen wife in a mixed marriage wants to apply for a Home Ownership Credit (KPR) from a bank, the husband's consent is one of the requirements that must be fulfilled. However, if the head of the family is a foreign national and there is no marriage agreement, it becomes increasingly problematic because there is a mixing of assets in a mixed marriage.²⁷ Indonesian law does not regulate property ownership for foreigners, which causes disputes over immovable property in mixed marriages.

A marriage agreement is a contract between two people who are getting married or plan to do so. This agreement regulates the property of the parties involved and outlines the consequences of the implementation of the marriage. It is important to note that marriage agreements are not only for wealthy individuals, as they are not solely focused on property. Any person, including those who are classified as financially average, can be the subject of a marriage agreement. This is because forming such an agreement is a preventive measure for financial security against uncertain events in the future.²⁸

Marriage agreements are defined according to the substance of Article 29 paragraphs (1) and (4) of the Marriage Law. However, these provisions limit the rights of married couples, including mixed-race couples, who wish to make a marriage agreement. The restriction on making a marriage agreement before or at the time of

²⁶Surat Edaran Mahkamah Agung Nomor 3 Tahun 1963, p. 70.

²⁷Amma, Muhammad Hapli, et al. (2023). "Tinjauan Yuridis tentang Harta Bersama Warga Negara Indonesia dan Warga Negara Asing dalam Perkawinan Campuran Menurut Sistem Hukum di Indonesia". *Universitas Sam Ratulangi*, 11(5), pp. 1-7.

²⁸Kumar, Vijender. (2015). "Matrimonial Property Law in India: Need of The Hour". *Indian Law Institute*, 57(4), pp. 499-522.

marriage creates difficulties for couples who want to agree to their marriage for specific reasons.

There have been changes in the rules governing marriage agreements since the Constitutional Court Decision Number 69/PUU-XIII/2015. The article in the Marriage Law (Article 29) that deals with marriage agreements posed some problems, which led to a request to review the article through the Constitutional Court.²⁹ This has led to an expansion of the meaning of the provisions regarding the marriage agreement in Article 29(1) of the Marriage Law.

In terms of legal interpretation, the principle of *Lex Specialis Derogat Legi Generalis* applies. This means that legal regulations that are more specific (*Lex Specialis*) will override more general legal regulations (*Lex Generalis*) if they deal with the same material content both the Marriage Law and the Constitutional Court Decision deal with marriage agreements. However, the Constitutional Court Decision takes a more in-depth look at the issue of separation of property in marriage, especially in mixed marriages. Accordingly, the validity period of the marriage agreement is in line with Constitutional Court Decision Number 69/PUU-XIII/2015.

In the Marriage Law, Article 29 paragraphs (1) and (4) discuss the provisions related to the marriage agreement. These paragraphs include the phrases "at or before the marriage takes place" and "during the marriage". The applicant, Ike Farida, argued that these provisions are in contradiction with Article 28E paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Therefore, the Constitutional Court has provided a constitutional interpretation of this article through its Decision Number 69/PUU-XIII/2015, which allows couples to create individualized marriage agreements according to their needs. The verdict states that Article 29 paragraphs (1) to (4) of the Marriage Law are conditionally unconstitutional insofar as they are not interpreted to include during marriage.

The following text has been corrected and rewritten to enhance its clarity:

The recent legal case has been considered as a breakthrough in determining the legal implications of a marriage contract. This verdict has led to an increase in the regulation of marriage contracts in Indonesia. Previously, a marriage contract could only be drawn up before or during the marriage ceremony. However, after this decision, it is now possible to draft a marriage contract at any time, even after or during the marriage, provided that it is immediately legalized by the marriage

²⁹ Ahyani, Sri. (2018). "Implikasi Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015 Terhadap Pasal 29 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan". *Wawasan Yuridika*, 2(1), 81-94.

registrar.³⁰ In this decision, the marriage agreement covers not only marriages between Indonesian citizens but also mixed marriages.

Since the ruling of the Constitutional Court, there is no longer a party who feels disadvantaged when married to the WNA³¹ According to the recent ruling, the marriage agreement that governs the separation of immovable property in mixed marriages has legal consequences. Firstly, it relates to the ownership of immovable property such as land and buildings for Indonesian citizens involved in mixed marriages. Specifically, this applies to land rights in Indonesia for Indonesian citizens who are married to non-Indonesians. Secondly, there are legal consequences that affect the property rights of women who are involved in mixed marriages about owning land in Indonesia.

Article 35 paragraph (1) of the Marriage Law determines that common property is born because of the marriage bond. In mixed marriages, property ownership, especially for immovable property, is one of the legal consequences that must be faced. In this case, the immovable property can be in the form of land, houses, shop houses (shops), apartment units, and anything that is due to nature or human actions, or, for the sake of the designation or purpose attached to the ground. This is where the marriage agreement takes the role because the property does not move and can not be owned by a stranger. The marriage agreement can be said to have a dual purpose, which is not only to separate property but also to combine wealth based on the agreement of the parties.

Under the Decision of the constitutional court, Article 29 paragraph (4) of the Marriage Law must be read "As long as the marriage takes place, the marriage agreement regarding marital property, or any other agreement, cannot be changed or revoked, except when from both parties there is an agreement to change or revoke, and the change or revocation does not harm the third party". This means that the content of the marriage agreement is about property and is binding and cannot be changed unless there is an agreement between the two parties. The position of the marriage agreement according to Hilman Hadikusuma in Aislie Anantama Septiawan is very crucial to avoid problems related to property in the future.³²

Therefore, it is important to establish a marriage agreement clearly and anticipate situations such as divorce, death, or other reasons that can end the marriage. These situations will be helped by a marriage agreement and help prevent prolonged conflict.

³⁰Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015, Lihat juga: Yasa, Putu Astika dan Made Subawa. (2019). "Analisis Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 tentang Perjanjian Kawin". *Kerthasemaya*, 7(12), pp. 1-14.

³¹Widanarti, Herni. (2020). "Implementasi Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 terhadap Hukum Perkawinan di Indonesia". *Law, Development, & Justice Review*, 3(1), pp. 121-141.

³²Septiawan, Aislie Anantama. (2017). "Perjanjian Perkawinan Pada Perkawinan Campuran Dalam Kepemilikan Tanah di Indonesia". *Lambung Mangkurat Law Journal*, 2(1), pp. 63-75.

The legal consequences of the marriage contract then create difficulties for foreigners to hold HM status over land or buildings in Indonesia due to the legal basis in Article 9(1) of Law No. 5 of 1960 on the Basic Regulations on Agrarian Principles (UUPA), which reserves exclusive access to the earth, water, space and all natural resources in Indonesia only to those who are citizens.³³ Article 21(1) of the UUPA also stipulates that only Indonesian citizens are entitled to hak milik status.³⁴ In the provisions of the UUPA, there is an important principle relating to land ownership in Indonesia called the principle of nationality. This principle confirms that foreigners to acquire HM over land in Indonesia because the principle of nationality gives ownership rights over land only to Indonesian citizens, without exception.

The UUPA contains several primary rights, namely HM, Hak Guna Bangunan (HGB), Hak Guna Usaha (HGU), and, Hak Pakai (HP). These rights are acquired by anyone who owns land that has been registered with the National Land Agency (BPN) and secured by the existence of an authentic deed. Upon registration, the landowner, as the subject of these rights, receives administrative legal certainty to use the land tenure rights by their designation.

Article 26(2) of the UUPA provides that the transfer of title to foreigners may result in the title being declared null and void. All land ownership and use must be based on the authority granted and protected by law. The existence of a legal basis creates a concrete legal relationship between the landowner and the land he owns. Such legal tenure entitles the landowner to physical possession of the land and to use the land by the UUPA and other relevant laws and regulations³⁵ article 42(b) of the UUPA jo. Article 49(2)(e) of Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Dwelling Units, and Land Registration explicitly restricts non-Indonesian citizens from owning HM on land in Indonesia, but only to the right of use for 30 years.

The different treatment of Indonesian citizens and foreigners who wish to own land in Indonesia is a consequence of the principle of nationality. Article 26(3) of the UUPA even provides for the release of property rights for foreigners who acquire property rights after the enactment of the UUPA due to certain situations such as inheritance without a will or mixing of assets through marriage. The mixing of assets through marriage will eventually result in the immovable property also becoming the property of the foreigner, even though this is not allowed. Conversely, it does not

³³Ghazaly, Justitia Henryanto. (2019). "Kepemilikan Hak Atas Tanah dalam Perkawinan Campuran". *Jch (Jurnal Cendekia Hukum)*, 5(1), pp. 117-130.

³⁴Herawati, Nina Ike, et al. (2021). "Kedudukan Hukum Perjanjian Perkawinan dalam Perkawinan Campuran terhadap Kepemilikan Hak Atas Tanah". *Lex Suprema*, 3(1), pp. 518-532.

³⁵Judiasih, Sonny Dewi. (2015). "The Status of Matrimonial Property Ownership in Mixed Marriages". *Mimbar Hukum*, 27(1), pp. 145-154.

necessarily mean that the ownership of the immovable property falls into the hands of Indonesian citizens. This is also a legal consequence that is reinforced in the provisions of Article 26 paragraph (1) of Law No. 12 of 2006 on Citizenship, which discusses that the female party who is an Indonesian citizen will lose her Indonesian citizenship if she marries a foreign man who follows the laws of her husband's country of origin because the result of the marriage is that the wife's citizenship follows the husband's citizenship. Similarly, Article 26(3) of the UUPA mentions Indonesian citizens who acquired property rights to land in Indonesia after the enactment of the UUPA but then lost their citizenship, so they must also renounce their property rights.

Once an Indonesian marries a foreigner, he or she loses the opportunity to obtain Hak Milik (HM), Hak Guna Bangunan (HGB), or Hak Guna Usaha (HGU) as the property becomes part of joint ownership with the foreign spouse. Consequently, to obtain a land title in Indonesia, one must be a full Indonesian citizen (not holding more than one nationality) and have a marriage agreement. In other words, a marriage agreement can save an Indonesian citizen married to a foreigner from losing his or her right to own a land title certificate, especially HM, HGB, and HGU.³⁶ given this situation, the marriage agreement becomes a crucial aspect of regulating the division of the couple's assets so that the party who is an Indonesian citizen can still hold land rights after marrying a foreigner. Thus, a prenuptial agreement can be seen as an effective tool to ensure the equitable division of matrimonial property.³⁷ A marriage agreement enables both parties to avoid the legal mixing of assets. In the absence of such an agreement, the applicable law for divorce is either the law used for marriage or the law in effect at the time of marriage.³⁸

The discussion is relevant to Supreme Court Decision Number 45 P/HUM/2016, which was petitioned by Perkumpulan Masyarakat Perkawinan Campuran Indonesia (PERCA Indonesia). The emergence of Government Regulation No. 103/2015 on the Ownership of Residential Houses by Foreigners Residing in Indonesia differentiates the rights of Indonesian citizens who are in a mixed marriage from other Indonesian citizens who are not in a mixed marriage. PERCA Indonesia filed an objection related to Article 3 paragraph (2) of Government Regulation No. 103/2015. The article explains that Indonesian citizens married to foreigners can own land rights if there is a property separation agreement between them, proving that the purchased land will not be joint

³⁶Heriyanti, et al. (2021). "The Several Unlawful Act After Nuptial Agreement in Indonesia". *IJLR (International Journal of Law Recontruction)*, 5(2), pp. 328-340.

³⁷Kumar, Vijender. (2018). "Quest for Prenuptial Agreement in Institution of Marriage: A Socio-Legal Approach". *Indian Law Institute*, 60(4), pp. 406-426.

³⁸Judiasih, Sonny Dewi. *Op. Cit.* p. 148.

property. The provision mentions the property separation agreement as an element of a marriage agreement. The regulation was deemed to be in contradiction with the UUPA, so a judicial review was necessary. Ultimately, the objection was rejected by the Supreme Court. As a result, Indonesian citizens who enter into mixed marriages must still have a property separation agreement if they wish to retain ownership of Hak Milik (HM) and HGB. This shows how important the existence of a marriage agreement is to claim ownership of rights to an immovable object in a mixed marriage.

Winanto Wiryomartani is of the view that there is still a possibility for married couples who are married but do not have a marriage agreement and the marriage does not last for one year, to transfer land rights to a third party. But if one year has passed, what applies are the HM and HGB provisions in the UUPA. In other words, the state gains power over the land. Moreover, Indonesian citizens who have lost their citizenship and do not have a marriage agreement are required to relinquish the HM, HGB, and HGU within one year. This is regulated in Article 21 paragraphs (3) and (4) UUPA, "namely:

- (3) Foreigners who, after the enactment of this Law, acquire property rights due to inheritance without a will or mixing of assets due to marriage, as well as Indonesian citizens who have property rights and after the enactment of this Law lose their citizenship, are obliged to relinquish those rights within one year. since the acquisition of that right or the loss of that citizenship. If after this period the ownership rights have not been released, then these rights are extinguished by law and the land falls to the State, provided that the rights of other parties encumbering them continue.
- (4) As long as a person in addition to his Indonesian citizenship has foreign citizenship, he cannot own land with ownership rights and for him, the provisions in paragraph (3) of this article apply."

In this situation, the disputed land cannot even be sold because mixed marriages have resulted in the loss of Indonesian citizenship. Then, if after one year the ownership rights have not been released, the burdensome rights of other parties will continue while the rights mentioned above are extinguished by law and the land falls to the state.

CONCLUSION

Regarding matters that can be contained in a marriage agreement, based on the principle of freedom of contract, it is stated that the contents of a marriage agreement are free to adapt to the needs of each married couple as long as it does not conflict with statutory regulations and legal order. Both regarding marital assets and other non-property agreements can still be matters contained and agreed upon as the contents of

the marriage agreement provided that both parties must have agreed to the contents of the agreement. However, marriage agreements should only discuss matters relating to assets because disputes outside of assets are difficult to determine the boundaries of.

The mixing of assets that occurs in a mixed marriage causes the party who is an Indonesian citizen to lose the opportunity to obtain Ownership Rights, Building Use Rights or Business Use Rights because these assets will later become part of joint ownership with their foreign partner. Where the UUPA states that foreigners are not permitted to hold ownership rights to land in Indonesia. Based on such problems, finally, joint property assets in the form of immovable property in mixed marriages must be regulated in a marriage agreement agreed upon by both parties so that there is separation of property and the party who is an Indonesian citizen can still have rights to the land.

Several suggestions can be given, namely, firstly, in making a marriage agreement, a husband and wife should include certain things and avoid agreeing on things that are very easy to change over time. It is best if the contents of the marriage agreement are very important things and really must be agreed upon at the start to avoid the risk of loss due to agreeing too quickly on something without considering external factors. Of course, both parties must mutually agree on the matters that will be agreed upon in the agreement.

Second, every Indonesian citizen who marries a foreigner is expected to make a marriage agreement to avoid the merging of assets to protect land ownership rights in Indonesia. Next, immediately record or register the marriage with an authorized agency such as the Civil Registry Office, to provide legal protection and legitimacy for married couples and gain international recognition which will make it easier for mixed marriage couples when dealing with foreign parties.

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