**Status of Property Ownership in the Prenuptial Agreement in Inter Marriages**

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**Abstract**

Problems related to inter marriages are common in Indonesia. The legal consequence of inter marriages is subjection to a different legal system according to the nationality of each partner. The problem that then arises is about the status of property ownership such as land and other immovable objects. In Indonesia, only Indonesian Citizens (WNI) have rights to land ownership, so Foreign Citizens as spouses may not own the property. In this case, the prenuptial agreement placed as a loophole in dealing with property ownership problems between spouses. The prenuptial agreement provides an element of legality to the rights and obligations of the spouses in matters of property ownership. Therefore, this study will discuss: (a) property ownership status in inter marriages, and (b) the role of prenuptial agreements in property ownership status in inter marriages.

**Keywords : Prenuptial Agreement, Inter Marriage, Property Ownership**

1. **Pendahuluan**

Marriage is a legal relationship between a man and a woman for a long time. This is explained in Article 1 of Law Number 1 of 1974 Concerning Marriage (UUP) which stipulates that:[[1]](#footnote-1)

:“Marriage is an inner and outer bond between a man and a woman as husband and wife. with the aim of forming a happy and eternal family (household) based on Belief in the One and Only God.”

As it is known that Law Number 1 of 1974 was promulgated on January 2, 1974, which was then followed by the issuance of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974, and was declared to come into force on October 1, 1975 throughout Indonesia . Thus, since October 1, 1975 throughout Indonesia, all marriages will be carried out based on the Marriage Law. The purpose of this Marriage Law is to carry out the legal unity of marriage in accordance with the Pancasila philosophy.[[2]](#footnote-2)

Given that currently there are many inter marriages in Indonesia, where there are inter 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 land rights in the form of property rights, business use rights or building use rights. This is in accordance with Article 35 of the Marriage Law which states that assets acquired during marriage become joint property. So, there is a mix of assets acquired after marriage, and the husband (who is a foreigner) will also be the joint owner of the property. Meanwhile, referring to the provisions of Law Number 5 of 1960 concerning Agrarian Principles, foreigners may not have property rights, business use rights, or building use rights. Therefore, an Indonesian citizen who marries a foreigner, after marriage, can no longer obtain property rights, or building use rights, or usufructuary rights, because they will become part of the joint property he owns with his foreign partner.[[3]](#footnote-3)

According to Article 35 of Law no. 1 of 1974 concerning Marriage ("UUP") regulates Wealth in Marriage, which states: 1) Assets acquired during marriage become joint property. 2) Inheritance of each husband and wife and assets obtained by each as a gift or inheritance are under their respective control as long as the parties do not specify otherwise. Thus, if the assets are acquired by the husband and/or wife during the marriage, then 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 ratified by a Marriage Registration Officer regarding the position of assets in a marriage that does not conflict with Islamic law (Article 29 UUP). Furthermore, Article 36 paragraph (1) UUPT states, every legal action related to joint property must be with the consent of the husband and wife.[[4]](#footnote-4)

Problems that may arise in inter marriages are related to the status of ownership and control of marital assets due to legal conflicts, especially in immovable assets such as ownership rights to land. One of the principles upheld by Indonesian land law can be found in Law Number 5 of 1960 concerning the Basic Regulations of Agrarian Law (Indonesian Agrarian Law) is the principle of nationality; this principle indicates that only Indonesian citizens may have ownership rights. This means that apart from being Indonesian citizens, they cannot own property rights.[[5]](#footnote-5)

This is where the role of the prenuptial agreement is very important. Prenuptial agreements or prenuptial agreements are regulated in the Marriage Law in Article 29 which stipulates that this agreement is made during or before marriage. The prenuptial agreement allows the parties to enter into a written agreement which is then approved by a third party employee such as a notary for validation. . One of the prenuptial agreements is to provide a basis for the separation of the parties' assets if in the future there is a divorce conflict. In the case of inter marriages, this becomes a problem because if the party carrying out the marriage obtains assets in the form of land or property other immovable divorce, the distribution of assets will be difficult to do. This is because foreign nationals are expressly prohibited from obtaining property rights. Therefore, in the process of drafting a prenuptial agreement in inter marriages, it is necessary to place restrictions to avoid canceling the prenuptial agreement. Prenuptial agreements made by mixed marriage parties have limits when compared to ordinary marriages (not different countries).

1. **Discussion**
	1. **Status of Property Marriage**

Inter marriages between a man and a woman subject to the laws of two different countries will result in a number of International Private Law problems in family law which include issues of actual marriage, parental authority, status of children, joint property owned jointly and others. Joint property in inter marriages creates a complex problem because it involves different legal systems, namely national law, in this case the Indonesian Marriage Law and the law of the country concerned. If a mixed marriage is to be carried out in Indonesia, the marriage and its consequences must comply with Indonesian marriage law. Indonesian Marriage Law stipulates that property acquired during marriage becomes joint property, even if only one person generates certain money or assets. Separate property is property acquired by the husband or wife before marriage.[[6]](#footnote-6)

Sudargo Gautama stated that the principle used in regulating marital assets in inter marriages is subject to the legal domicile of the couple. This is done to respect the woman in a marriage and also the interests of third parties in a marriage, who receive protection if the spouse's legal domicile is used. In other words, a third party can rely on the law of the marital property where the couple lives. The choice of legal domicile refers to The Hague Conference on Private International Law, more specifically the Convention on Law Applicable to Regimes of Matrimonial Property of 14 March 1978. Article 3 of the Convention states as follows:[[7]](#footnote-7)

The marital property regime is governed by internal laws established by the spouses prior to marriage. Spouses can only designate one of the following laws:

1. Laws of any state where either spouse is the state at the time of appointment.

2. The laws of any state where one spouse has ordinary residence at the time of appointment,

3. The law of the first state in which one spouse forms a new habit. The law, thus, was appointed to apply to their entire property. Nonetheless, the husband and wife, whether they have established a law under the previous provisions or not, can designate in respect of all or part of immovable property, the law in which these immovable property is located. They can also stipulate that any immovable property that can then be obtained will be governed by the laws of the place where the immovable property is located.

Based on the description above, it can be concluded that inter marriages can provide options for husband and wife to choose which law will apply to them in relation to marital assets. Husband and wife, based on the principle of equality in marriage, enter into an agreement regarding which law will apply to their marital property. Furthermore, husband and wife must comply with the law where property their marriage is. The principle of equality also gives equal voting rights to both parties for legal actions taken against their marital property. In court practice, data shows that prenuptial agreements in inter marriages need to be drawn up so that the parties know each other's rights and obligations at the time of marriage, and are able to anticipate what will happen to their marital property as well as their rights and obligations. against their children if the marriage is broken up by divorce.[[8]](#footnote-8)

Husband and wife are given the freedom to choose which laws apply to their marital property, but if they do not use this opportunity, it is the law of the country where the couple lives to support them. Husband and wife in marriage can also carry out legal actions with third parties, including entering into credit agreements and using their marital assets as collateral. In carrying out legal actions with third parties, Article 9 of the Convention regulates as follows:[[9]](#footnote-9)

*The influence of the marital property regime on the legal relationship between husband and wife and third parties is regulated by the law that applies to the marital property regime in accordance with statutory regulations. Nonetheless, the law of the contracting state may stipulate that the law applicable to the marital property regime cannot be relied upon by the spouse against a third party when the spouse ordinarily resides on its territory, unless there are publicity or registration requirements stipulated by that law have been complied with. , or the legal relationship between the couple and a third party arises when the third party knows or should know the law applicable to the marital property regime*

The Convention also regulates marital assets in inter marriages in the form of land; this can be found in Article 6 of the Convention which expressly states that the law that applies to this matter is the law where the property was acquired or the immovable property is located. That article stipulates that: Husband and wife, whether they have established a law under or under the previous paragraph or under Article 3 or not, can designate in respect of all or part of immovable property, the law of the place where the goods -immovable property is located. They may also stipulate that immovable property which can then be obtained will be governed by the law of the place where the immovable property is located.[[10]](#footnote-10)

1. **The Role of Prenuptial Agreements in Providing Basic Property Ownership Status in Inter Marriages**

In inter marriages, their property ownership is regulated in Government Regulation no. 103 of 2015. Article 3 paragraph (1) states that "Indonesian citizens who enter into inter marriages with foreign nationals can have equal rights with other Indonesian citizens." Which means, people who do inter marriages have the right to property rights. However, in order to have this right, an agreement on the separation of assets is required to be made by means of a notarial deed. Separation of assets is made through a prenuptial agreement or prenuptial agreement which is solely carried out to fulfill the principle of nationality in land affairs in Indonesia so that if a divorce occurs later the ownership of the property does not fall into the hands of foreign nationals.[[11]](#footnote-11)

The legal rules for prenuptial agreements are regulated in Article 29 paragraph (1) of the Marriage Law jo. Decision of the Constitutional Court Number 69/PUU-XIII/2015 which states, "At the time, before it takes place or while in a marriage bond the two parties with mutual consent can submit a written agreement which is ratified by a marriage registrar or notary, after which the contents also apply to the parties third party as long as a third party is involved. The importance of the prenuptial agreement is to give an element of legality and publicity to the rights and obligations of the husband and wife, especially in matters of property ownership. Implicitly in Article 29 of the Marriage Law stipulates the conditions for making a prenuptial agreement, including:[[12]](#footnote-12)

a) Conducted by both parties and may involve third parties;

b) Does not violate the boundaries of law, religion and decency;

c) The agreement comes into effect from the time the marriage takes place;

d) During marriage, the agreement cannot be changed without the consent of the parties involved.

In general, the contents of the pre-nuptial agreement contain provisions between the rights of the prospective husband and wife, especially in managing inherited assets before marriage. The contents of the prenuptial agreement generally regulate; inheritance in marriage, debt, management of each other's assets, and so on.[[13]](#footnote-13)

In terms of property ownership by couples from inter marriages Article 3 PP No. 103 of 2015 also stipulates that foreign nationals who have a residence permit in the territory of Indonesia, in accordance with statutory provisions, can have a house as a place of residence or residence through the Right to Use. The national principle in the Indonesian Agrarian Law completely prohibits foreign nationals from owning land foreign nationality. Therefore, marital assets in inter marriages cause foreign citizens to have the same authority and position as Indonesian citizens to own marital assets in the form of property rights.

rights).

Even so, land ownership rights can still be owned by foreign countries, because in some circumstances foreign nationals can legally have legal land ownership rights. One of them is through the fusion of assets in marriages between Indonesian citizens and foreign nationals, or 'inter marriages' as referred to in Article 57 of the Indonesian Marriage Law.

Marriages carried out by Indonesian citizens, which are carried out legally according to applicable law, will bring legal consequences; this includes marriages between Indonesian citizens and foreign nationals who are subject to the laws of different countries. One of the consequences of marriage is the melting of property between the wife and husband which then becomes joint property owned by the husband and wife. If the husband or wife of an Indonesian citizen buys land with ownership rights during the marriage, then the land will become the property of the husband and wife marriage. As a result, the land purchased by the husband or wife of an Indonesian citizen according to the law will belong to the spouse who is a citizen of Indonesia.[[14]](#footnote-14)

To overcome this possibility, the Indonesian Agrarian Law requires foreign citizens who have ownership rights to land as a result of consolidating assets in inter marriages, to relinquish these rights within 1 (one) year after receiving these rights. If after this time limit the property right is released, then the right is lost by law and the land becomes the property of the state. Relinquishment of ownership rights to land can be done by buying and selling or grants (grants). According to Article 20 paragraph (2) of the UUPA, property rights can change hands and be transferred to other parties. A change/transfer of rights means that the ownership rights to land are transferred to another party due to a legal action. .36 Such legal actions can be carried out through buying and selling, exchange, grants (grants), participation of assets in equity participation (inbreng), auctions, sharing of joint rights, granting of building use rights or usufructuary rights over land, guarantees of rights (mortgage rights). ) and power of attorney to grant security rights. One of the legal actions that are allowed to prevent the consolidation of assets in inter marriages is through the making of a prenuptial agreement.[[15]](#footnote-15)

However, the role of the prenuptial agreement here is only as a reference if in the future there is a divorce and conflict over the division of assets. The prenuptial agreement must remain in accordance with the principles of nationality and applicable law. This means that a prenuptial agreement cannot save joint assets in the form of ownership of property for foreign nationals, but only regulates the mechanism for distributing assets as fairly as possible. In the event that a foreign national has ownership rights over an immovable property, then based on Article 21 Paragraph (3) of the Indonesian Agrarian Law, the foreign citizen will receive his portion of the land and only has 1 (one) year of ownership rights over the land, then he must relinquish his right to the land through the act of selling or handing over the ownership rights to the land.[[16]](#footnote-16)

1. **Conclusion**

Ownership status of immovable property in inter marriages cannot be owned by husband and wife in that marriage, unless a prenuptial agreement is made. Even if one of the people in a mixed marriage is an Indonesian citizen, the Indonesian citizen cannot purchase land with freehold rights during the marriage because the land will be jointly owned with the foreigner he is marrying. This is contrary to the national principle which states that only Indonesian citizens have the right to own land.

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