



## RESEARCH ARTICLE

# AN INDONESIAN WOMAN'S RIGHT TOWARDS HER PROPERTY IN A MIXED MARRIAGE IN INDONESIA

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### ABSTRACT

This article aims to elaborate on the protection of the rights possessed by an Indonesian woman in relation to her property in a mixed marriage and to analyse the applicability of the postnuptial agreement as already recognized by Indonesian law to an Indonesian woman who performs mixed marriage abroad. This article uses normative legal research along with statute, analytical, and conceptual approaches. The results show that a nuptial agreement is a way to protect the rights possessed by an Indonesian woman in relation to her property in a mixed marriage. In Indonesia, after the issuance of the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015 the nuptial agreement can be made at, before (prenuptial agreement), or during the marriage (postnuptial agreement). For Indonesian citizens, including an Indonesian woman, who perform mixed marriage abroad, based on Article 56 (2) of Indonesian Law Number 1 of 1974 on Marriage, within 1 (one) year after the husband and wife return to the territory of Indonesia, their marriage certificate must be registered at the Marriage Registration Office where they live. Hence, the right to conclude a postnuptial agreement as stated in the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015 is also applicable.

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## INTRODUCTION

The rapid development of communication, technology, and transportation resulted in easier mobilization across countries (Ni Ketut Supasti Dharmawan et al, 2018). It means people can also travel or move easily from one place to another. Not only for tourism or business matters, but the trip may also lead to an attraction between a foreigner and local people where they are of different nationalities. In case such a relationship is later bound by marriage, then such a marriage can be said as a mixed marriage. With globalization, it can be argued that almost all countries in this world have mixed marriage practices nowadays. As noted, In Indonesia itself, there were more than 3 million Indonesian citizens who conducted mixed marriages in 2015 (Tempo.co, 2015). Indonesia is an archipelago country that is famous for its nature and culture. Bali, as one of the provinces in Indonesia, is well known for its tourist destination and therefore often visited by foreign tourists across the world. Before the pandemic of Covid-19 hit the world, based on data from the Bali Tourism Office, the number of foreign tourist visits to Bali in January 2020 was 528.883, an increase of 15.93 percent on an annual basis (Bisnis.com, 2020). Even now, almost two years since the pandemic of Covid-19 hit the world, the development of the Indonesian tourism world is heading towards a bright spot with the increasing number of tourist visits. Central Bureau of Statistics revealed that most foreign tourists visit through Ngurah Rai Airport, Bali as of May 2022, on an annual basis (YoY), the number of visits has soared 1.44 million percent

compared to May 2021, which was only 8 visits (TribunKaltim Travel, 2022). Hence, it is not surprising there are many practices of mixed marriages to be found in Indonesia. In order to obtain a common understanding, a mixed marriage discussed in this article should be understood as a mixed marriage between two people of different nationalities, one of them is an Indonesian citizen. However, this article specifically raised the perspective of mixed marriage practice performed by an Indonesian woman with a foreign man. Though a mixed marriage can be performed between an Indonesian man and a foreign woman, it is important to highlight it from the perspective of an Indonesian woman who conducted a mixed marriage because women are still often treated with discrimination in society. Therefore, women are assumed to be more vulnerable than men. Even though gender equality requires that women and men enjoy equal status and have the same conditions to fully realize human rights and the potential for the integrity and continuity of the household proportionally (Sarina and M. Ridwan Said Ahmad, 2021). There was a case that ultimately succeeded in standing up for women's status. A case filed by Ike Farida, an Indonesian woman who married a man of Japanese nationality has led to the issuance of a breakthrough decision, namely the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015. In the case, it is noted that she struggled to demand justice on the nuptial agreement and its relation to property (including common property) as she felt discriminatory treatment to women, such as by the developer where she bought the apartment.

The raised point is of course ideally an Indonesian woman who will marry a foreigner must conclude a prenuptial agreement to separate their property. The purpose is to secure an Indonesian woman's right to not lose her right to buy a property and/or not lose her property inheritance rights after the marriage. This is in accordance with the provisions contained under Law 1/1974 that stated property acquired during the marriage becomes common property. However, what if the Indonesian woman who already married the foreigner did not make a prenuptial agreement and the marriage already took place, as happened in the Ike case? That is where the feeling of injustice is felt by such an Indonesian woman before the issuance of the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015. Indeed, without adequate protection such as a clear provision on legal regulation, the practice of a mixed marriage may lead to further problems in the future like property ownership or common property. Reflecting on Ike Farida's case and the rise of mixed marriages that occur in Indonesia, therefore, this article raised two legal questions namely: (1) How is the protection of the rights possessed by an Indonesian woman in relation to her property in a mixed marriage?; and (2) whether postnuptial agreement as already recognized by Indonesian law applies to an Indonesian woman who performs mixed marriage abroad? Previously, there had been studies that discussed mixed marriage in Indonesia, for example, the study conducted by Nina Ike Herawati, et al on the legal position of nuptial agreement in a mixed marriage to land ownership (Nina Ike Herawati, et al, 2021) and Herni Widanarti on the legal consequences of mixed marriages towards marriage property in relation to the Stipulation of Denpasar District Court No: 536/Pdt.P/2015/PN. Dps (Herni Widanarti, 2018). However, these studies have not specifically addressed an Indonesian woman's right towards her property in a mixed marriage in Indonesia and the applicability of the postnuptial agreement as already recognized by Indonesian law to an Indonesian woman who performs mixed marriage abroad. Hence, the issues raised in this article are important to be discussed.

## MATERIALS AND METHOD

This article employs normative legal research as well as a statute, analytical, and conceptual approaches to elaborate on the issues of an Indonesian woman's right towards her property in a mixed marriage in Indonesia and the applicability of the postnuptial agreement as already recognized by Indonesian law to an Indonesian woman who performs mixed marriage abroad. The international legal instruments used in this article is the Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The national legal instruments examined in this article are the 1945 Constitution of the Republic of Indonesia (the 1945 Indonesian Constitution), Indonesian Civil Code, Indonesian Law Number 5 of 1960 on Basic Agrarian Regulations (Law 5/1960), Indonesian Law Number 1 of 1974 on Marriage (Law 1/1974), Indonesian Law Number 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (Law 7/1984), Indonesian Law Number 39 of 1999 on Human Rights (Law 39/1999), and Indonesian Law Number 16 of 2019 on the Amendment of Law Number 1 of 1974 on Marriage (Law 16/2019). Along with that, there is also this enlightenment decision which is mainly discussed in this article namely the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015. Thus, it is very significant to explore the above materials to understand the protection of the rights possessed by an Indonesian woman in relation to her property in a mixed marriage and the applicability of the postnuptial agreement as already recognized by Indonesian law to an Indonesian woman who performs mixed marriage abroad.

## RESULTS

**The Protection of The Rights Possessed by An Indonesian Woman in Relation to Her Property in A Mixed Marriage:** Humans are social creatures. As an impact, humans cannot live alone. In other words, humans are *zoon politicon*.

The study performed by Andreas Hoffman shows that living alone even has a negative impact on health-related outcomes (Andreas Hoffman, 2020). As human nature is to live together, to blend in the society, and is driven by the biological desire to have children; therefore, humans tend to form a family and get married. Universally, marriage is one of the recognized human rights. In International for a, the UDHR is a declaration that has given recognition to the basic rights possessed by humans. Article 16 of the UDHR states the provision on equal rights, meaning no limitation related to religion, nationality, or race in relation to marriage and creating a family for men and women of full age. Such equal right shall serve as to marriage, during marriage and its dissolution. While nationally, Article 28B (1) of the 1945 Constitution recognizes that to have a lawful marriage is part of every person's human right to establish a family. In line with that, Law 39/1999 through Article 10 also states that to be married legally is everyone's right. Before moving forward to mixed marriage, it is substantial to have a clear understanding of the definition of marriage based on Indonesian laws. According to Article 1 of Law 1/1974, 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 God Almighty. Marriage is allowed if both man and woman have reached the age of 19 (nineteen) years (Article 7 of Law 16/2019). This new increment in the age limit for marriage (previously, Law 1/1974 stated a woman had to be at least 16 (sixteen) years) is one of the Indonesian government's commitments to preventing early childhood marriage (Anak Agung Istri Ari Atu Dewi, et al., 2022). Also, a marriage must be based on the consensus of the bride (woman) and the groom (man) (Article 6(1) of Law 1/1974).

Mixed marriage has been defined by Law 1/1974 as marriage between two people who in Indonesia are subject to different laws, due to differences in citizenship and one of the parties is an Indonesian citizen (Article 57). From the said provision, it can be concluded that for a marriage to be stated as mixed marriage in Indonesia, there should be an element where one of the parties to such marriage is an Indonesian. It could be a marriage between an Indonesian man and a foreign woman, or an Indonesian woman and a foreign man (Laurensius Arliman S., 2019). However, as already mentioned in the introduction, this article specifically discussed a mixed marriage conducted by an Indonesian woman and a foreign man. Such a mixed marriage must be recorded by an official registrar (Article 61(1) of Law 1/1974). In a mixed marriage, a nuptial agreement takes an important place. The benefit of a nuptial agreement is also allowing the husband and wife to become more transparent toward each other (Haedah Faradz, 2008). Before discussing the reason for such importance, since a nuptial agreement is basically an agreement, it is necessary to look into Indonesian regulations and note what is meant by an agreement. A definition of agreement can be found in Article 1313 of the Indonesian Civil Code. Such code defines agreement as an act where one or more individuals bind themselves to one another. Referring to Article 1320 of the Indonesian Civil Code, four conditions must be met for an agreement to be considered valid, namely: (a) consent from each individual who is bound to such agreement (see also Article 1321 of the Indonesian Civil Code on duress and fraud); (b) capacity to enter into an obligation (see also Article 1330 of the Indonesian Civil Code on who is considered as incompetent individuals); (c) specific subject matter (see also Article 1234 of the Indonesian Civil Code on types of performance in agreement); and (d) lawful purpose (see also Article 1337 of the Indonesian Civil Code on prohibited causes). The first and second conditions are considered subjective elements of an agreement as it relates to the parties to the agreement. Meanwhile, the third and fourth conditions are called objective elements as it connects to the object of the agreement. If the subjective elements are not met, then the agreement is voidable. In brief, the agreement is not automatically null and void by law, but must be requested for cancellation by the court. As for the non-fulfillment of the objective elements, the agreement is null and void. Other than the above four conditions of the validity of the agreement, there are also main legal principles to be found under the provision of Article 1338 of the Indonesian Civil Code.

First, is the “consensual” principle, and second is the “freedom of contract” principle by referring to the wordings of paragraph (2), “... by mutual consent...”. Third, the “*pacta sunt servanda*” principle through the provision in paragraph (1), “All valid agreement applies to all individuals who concluded such agreement as law”. Lastly, the fourth, “good faith” principle which directed from the wordings in paragraph (3) which are “the agreement must be executed in good faith”. From the above explanation, it can be assumed that four conditions stated by Article 1320 of the Indonesian Civil Code and all legal principles related to an agreement such as stated in Article 1338 must be fulfilled in creating a nuptial agreement. Indonesia is an eastern country that still upholds family values. However, due to world development and modernization as well as to provide legal certainty for both parties (husband and wife) specifically on common property, it is considered necessary to conclude a nuptial agreement, especially for those who practice mixed agreement these days. Bound by marriage and living together, the relationship of husband and wife ideally should be based on positive thinking. Paima Situmeang’s study shows that in its development, it is possible for husband and wife to face problems in married life. Thus, the marriage agreement can be used as a solution to protect each other’s property (Paima Situmeang, 2019). Other than to protect each other’s property, Nilna Fauza and Moh. Afandi argues that nuptial agreement also projected as a “weapon” for a woman upon a husband’s arbitrariness. For example, the phenomenon of the increasing number of divorce lawsuits due to the abuse of a husband against his wife, a husband who does not provide obligatory support to his wife, a husband leaving his wife for years, a husband committing violence in the household whether in the form of physical, economic or psychological (domestic violence) (Nilna Fauza and Moh. Afandi, 2020).

Property is one aspect of marriage life that is considered a crucial issue. Moreover, according to Article 28H(4) of the 1945 Indonesian Constitution, owning personal property is part of every person’s right as human right. The consequence of being married is there will be a union of property, specifically property acquired during the marriage becomes common property (Article 36(1) of Law 1/1974). Further, the law regulates that the inherited property of each husband and wife and property each obtained as a gift or inheritance is under the control of each party as long as the parties do not determine otherwise. This is where the nuptial agreement plays its role. One of them is to make a deviation from this regarding their property. In most cases, this agreement is made because the property of one party is greater than the other party (*Ibid*), although this is not always the case. Other than regulating each party’s property, the nuptial agreement can also be filled with other subject matters such as a term that regulates husband is not allowed to practice polygamy without the permission of the wife (Puji Kurniawan, 2020) and etcetera. In a mixed marriage aspect, there was a case that successfully make Indonesian law recognize the postnuptial agreement. Such a case resulted in the issuance of the Constitutional Court of Indonesia’s Decision Number 69/PUU-XIII/2015. Before the issuance of such a decision, the nuptial agreement in Indonesia can only be performed at or before the marriage takes place (prenuptial agreement). While after the issuance of such a decision, Article 29 (1) of Law 1/1974 is considered contrary to the 1945 Indonesian Constitution as long as it is not interpreted as (or in other words it should be understood as) “both parties based on mutual agreement at, before, or during the marriage bond, can conclude a written agreement that is legalized by the marriage registrar or notary, after which the contents also apply to third parties as long as the third party is not involved.” The arrangement before the decision entered into force was considered as not providing enough justice, especially for the woman, as the postnuptial agreement was not recognized by the law. A nuptial agreement can be the answer to protect the rights possessed by an Indonesian woman in relation to her property in a mixed marriage. Moreover, after the issuance of Constitutional Court of Indonesia’s Decision Number 69/PUU-XIII/2015, Indonesia now legally recognizes a nuptial agreement made at, before (prenuptial agreement), or during the marriage (postnuptial agreement). This decision is issued pursuant to the lawsuit filed by Ike Farida, an

Indonesian woman who perform amixed marriage to a Japanese man, to the Constitutional Court of Indonesia. She struggled to demand justice regarding the nuptial agreement and its relation to property (including common property) as she felt discriminatory treatment to women such as by the developer where she bought the apartment on 26 May 2012. However, after she fully paid for the apartment, the developer never delivered the apartment to her. Moreover, the developer canceled the purchase agreement unilaterally by reason her husband is a foreigner and she did not have a nuptial agreement. The developer used the argument that according to Article 36 (1) of Law 5/1960 and Article 35 (1) of Law 1/1974, an Indonesian woman who marries a foreign man is prohibited to purchase land and or building with the Right to Build status. The developer further highlighted that based on Article 35 of Law 1/1974 where property during the marriage becomes common property, therefore, in a mixed marriage where no prenuptial agreement is made to separate the property, then by law, the apartment purchased by the Indonesian wife/husband automatically also becomes the property of a foreign husband/wife. As already mentioned before, the problem arises when the Indonesian woman who already married the foreigner did not make a prenuptial agreement and the marriage already took place, as happened in the Ike case. As noted, the land or building with right of ownership or right to build status is not allowed by law to be owned by a foreign husband or even the Indonesian wife as she was an Indonesian citizen who performed mixed marriage with no nuptial agreement that regulates the separation of properties. Thus, it can be assumed that for those engaged in a mixed marriage agreement with no prenuptial agreement and due to the provision of property during the marriage becomes common property, actually, the Indonesian wife, in this case, was not allowed to purchase land and or building, one of them, with the Right to Build status. In addition, based on Indonesian law, foreigners may not own property with the right of ownership status and can only possess the right to use (Oly Viana Agustine, 2017). Hence, she felt discriminated upon such treatment. Whereas, according to Article 28I(2) of the 1945 Indonesian Constitution, every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. Moreover, to protect and uphold the rights of women, in 1984 the Indonesian government has actually ratified Law 7/1984 on the ratification of CEDAW (Mutiarah Hikmah, 2004). An Indonesian citizen who marries a foreign citizen and does not lose her/his nationality is an Indonesian citizen who has the same right as another Indonesian citizen.

Based on Ike’s case, it can be argued that the right of an Indonesian woman is not well protected in a mixed marriage before the issuance of the Constitutional Court of Indonesia’s Decision Number 69/PUU-XIII/2015. But, after the issuance of such a decision, it can be assumed that the recognition of the postnuptial agreement has provided more justice in relation to the right of an Indonesian woman towards her property. It provides room and time for an Indonesian woman who is unaware of those regulations on property and marriage to still be able to create a postnuptial agreement during the marriage. More than expected, Nirmala argues that the above-mentioned lawsuit in the Constitutional Court which initially only demanded the rights of Indonesian citizens who were involved in mixed marriages to have the same material or property rights as other Indonesian citizens also turned out to cause Indonesia to recognize the nuptial agreement after the marriage took place (postnuptial agreement) (Nirmala, 2017). Similar to Indonesia, Sonny Dewi Judiasih *et al*’s study shows that the Netherlands also recognizes the postnuptial agreement (Indonesia, Sonny Dewi Judiasih *et al*, 2021). In brief, it can be noted that the right of an Indonesian woman in a mixed marriage practice in Indonesia has been protected through *a quo* decision (Constitutional Court of Indonesia’s Decision Number 69/PUU-XIII/2015) where postnuptial agreement is recognized under the law and, therefore, is allowed to be done.

**The Applicability of The Postnuptial Agreement as Already Recognized by Indonesian Law to An Indonesian Woman Who Performs Mixed Marriage Abroad:** The rights of an Indonesian woman who performs mixed marriage abroad becomes essential to be

discussed. It is because a mixed marriage is closely related to a nuptial agreement. Therefore, it is important to understand the regulation on mixed marriage performed abroad (outside Indonesia) between an Indonesian citizen and a foreigner under Law 1/1974. Although Law 1/1974 does not regulate such provision specifically for women (as the provision applies both to women and men), this chapter still emphasizes the discussion on the protection of an Indonesian woman who performs mixed marriage abroad and its relation to the nuptial agreement, as women are sometimes still considered more vulnerable than men. In terms of a mixed marriage performed outside Indonesia, it is considered valid if carried out according to the law in force in the country where the marriage took place and for Indonesian citizens, it does not violate the provisions of Law 1/1974 (Article 56 (1) Law 1/1974). Hence, from such provision, it is noted that Indonesia follows *lex loci celebrationis*. Therefore, within 1 (one) year after the husband and wife return to the territory of Indonesia, their marriage certificate must be registered at the Marriage Registration Office where they live (Article 56(2) of Law 1/1974). Following such marriage registration in Indonesia, then as a consequence, the right to conclude a postnuptial agreement as stated in the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015 is also applicable. The knowledge of mixed marriage, mainly on a mixed marriage performed outside Indonesia by an Indonesian woman, is crucial to be explored as it is related not only to the protection of an Indonesian woman's right who performs mixed marriage abroad but also to the status of the children.

## CONCLUSION

The right to own property is part of human rights recognized in Indonesia. To protect the rights possessed by an Indonesian woman in relation to her property in a mixed marriage, a nuptial agreement can be the solution. Moreover, after the issuance of the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015 the nuptial agreement can be made at, before (prenuptial agreement), or during the marriage (postnuptial agreement). For Indonesian citizens, including an Indonesian woman, who perform mixed marriage abroad, based on Article 56 (2) of Indonesian Law Number 1 of 1974 on Marriage, within 1 (one) year after the husband and wife return to the territory of Indonesia, their marriage certificate must be registered at the Marriage Registration Office where they live. Hence, the right to conclude a postnuptial agreement as stated in the Constitutional Court of Indonesia's Decision Number 69/PUU-XIII/2015 is also applicable.

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