

Marriage Agreement as A Legal Protection Measure For Marital Property in Mixed Marriages

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Abstract. *This study aims to analyze the position of the marriage agreement as an instrument of legal protection for property in mixed marriages, especially in providing legal protection and certainty for the control and management of marital property. This research uses normative legal research methods with a legislative approach and a conceptual approach. Primary legal materials include the Civil Code, Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law, and Constitutional Court Decision Number 69/PUU-XIII/2015, which is supported by secondary legal materials in the form of relevant books and scientific journals. The analysis was carried out qualitatively using the theory of legal protection of Philipus M. Hadjon and the theory of legal certainty of Gustav Radbruch. The novelty of this research lies in the analysis of marriage agreements as an instrument of legal protection in mixed marriages by relating aspects of legal protection and legal certainty to the position and control of property after the Constitutional Court Decision Number 69/PUU-XIII/2015. The results of the study show that the marriage agreement is a form of preventive legal protection that provides certainty for the parties in regulating the status and control of marital property. The Constitutional Court Decision Number 69/PUU-XIII/2015 also expands the space for legal protection by allowing marriage agreements to be made during the marriage bond. Therefore, consistent legal application and more comprehensive arrangements are needed so that the protection of the rights of the parties to mixed marriage can be optimally realized.*

Keywords: *Marital Property; Marriage Agreement; Mixed Marriage; Protection.*

1. Introduction

Marriage is a fundamental institution based on affection and affection between individuals, with the main goal of forming a harmonious and happy family (Sari & Ma'ruf, 2017). This bond of birth and mind has significant implications for the parties involved, both husband and wife, as well as on their wealth assets, both before and after marriage. In Islamic teachings, marriage is considered a pure and sacred act, in which the two brides-to-be are united as one family, asking for Divine blessing in expecting a life partner (Mardani, 2016).

Law Number 1 of 1974 concerning Marriage (Marriage Law) not only regulates the civil aspect, but also refers to the sharia aspect. In national law, the regulation of marriage and its consequences is included in the Civil Law. As stated by Sudikno Mertokusumo, in

his book *Introduction to Written Civil Law (BW)* that Civil Law regulates family relationships and relationships in society related to property, law of engagement and inheritance law (Imaniyati, 2023).

The source of disputes in the household can be caused by obligations, rights between spouses and property. In an effort to anticipate this, prospective couples make a marriage agreement before or during the wedding (Mardani, 2016). Islamic law defines marriage as a contract (agreement) between the prospective husband and the future wife's guardian. The content of the agreement contains things that are desired and in accordance with their interests, as long as they do not conflict with religious norms and the order of society. According to Article 29 paragraph (1) of the Marriage Law, a marriage agreement is a written agreement made by both parties before or at the time of the marriage, and ratified by the authorized official. This Agreement is also binding on interested third parties. As long as the marriage bond is still in force, the agreement cannot be amended except with the consent of both parties and does not harm the other parties involved (Lestari, 2017).

The Compilation of Islamic Law (KHI) also regulates marriage agreements, in Article 45 states that prospective husband and wife can make marriage agreements, including *taklik talaq* and other agreements, as long as they do not conflict with Islamic law. One example of an object in a marriage agreement is regarding the arrangement of marital property. If the husband violates the marriage agreement, the wife has the right to apply for the annulment of the marriage or make it the reason for a divorce lawsuit (Sukardi, 2016).

The Marriage Law recognizes two types of property in marriage: original property and joint property. Article 35 Paragraph 1 and Paragraph 2 of the Marriage Law states that original property is an asset that has been owned before marriage, which is the personal right of each couple. Joint property includes all assets acquired by the couple during the marriage, either individually or jointly (Djuniarti, 2017). Original Property and Joint Property are not only regulated in the Marriage Law, but are also regulated in the Compilation of Islamic Law. Article 91 of the Compilation of Islamic Law states that common property can be in the form of tangible objects (movable and immovable) as well as intangible objects such as securities, rights and obligations. A marriage agreement serves as a guarantee and legal protection for the assets of the husband and wife for the creation of a harmonious family. Through a marriage agreement, the husband and wife obtain legal certainty regarding each other's assets (Pakaya, 2016). Behind a marriage it is expected to be eternal and eternal in its journey, and it is possible that if a household does not run harmoniously, caused by quarrels, disputes and even violence between the two parties with the existence of a marriage agreement can avoid unexpected things during the marriage (Iliyin et al., 2023).

There was a legal reform regarding the timing of the marriage agreement, based on the decision of the Constitutional Court (MK) Number 69/PUU-XIII/2015 (Yuvens, 2017). The current marriage agreement can be made before or during the marriage, and it can also be made after the marriage takes place, that is, during the marriage bond. The Constitutional Court gave a constitutional interpretation to Article 29 of the Marriage Law, which expands the meaning of the marriage agreement. The Constitutional Court's decision states that Article 29 paragraph 1 of the Marriage Law is not contrary to the constitution if it is interpreted that "At the time, before it takes place or during the

marriage bond both parties by mutual consent can submit a written agreement that is ratified by the marriage registrar or notary, and the contents are valid and binding on the third party as long as the third party is involved".

The rapid globalization in all fields, including the field of information, causes state borders not to be an obstacle to interaction. Relations between people between countries are no longer limited to land or sea areas. Human communication in one country with another can be done at the same time. This has an impact on the increase in marriages with foreign nationals in Indonesia. Article 57 of the Marriage Law regulates Mixed Marriage, which is a marriage between two people who are subject to different laws due to differences in nationality, where one of the parties is an Indonesian citizen. Because of these legal differences, there needs to be an understanding for Indonesian citizens who carry out mixed marriages, especially regarding the arrangement of joint property that will be formed.

This study aims to find out the marriage agreement as a form of legal protection for the parties to regulate the status and control of property in a mixed marriage and provide legal certainty for the parties to avoid disputes and as an instrument for achieving benefits and justice for related parties.

2. Research Methods

This research is a normative legal research using a statutory *approach* and a *conceptual approach*. Primary legal materials include the Civil Code, Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law, and Constitutional Court Decision Number 69/PUU-XIII/2015. Secondary legal materials are obtained from books, scientific journals, and relevant legal literature. The collection of legal materials is carried out through library *research*, then analyzed qualitatively by descriptive-analytical methods. The analysis uses Philipus M. Hadjon's legal protection theory and Gustav Radbruch's theory of legal certainty as analytical knives to assess the extent to which a marriage agreement in a mixed marriage is able to provide protection for property rights while ensuring legal certainty for the parties.

3. Results and Discussion

Marriage is a very important legal event for humans with various legal consequences, Therefore, the law needs to regulate the issue of marriage in detail. In Indonesia, the regulation of Marriage is Law No. 1 of 1974 concerning Marriage and the implementing regulations of the Marriage Law which apply to all Indonesian people, regardless of religion, region, origin and others (Fuady, 2019).

The rapid development of science and technology has a great influence, such as the easier to have relationships between fellow humans, between ethnic groups, and even the state in all aspects of life (Pertiwi et al., 2019). Mixed Marriage is one of the results of the rapid influence of development in all things. Because in Mixed Marriage there are regulations about the form, concept of marriage and family are different in each country (United Nations, 2018). In Indonesia, Mixed Marriage is regulated in the Marriage Law is a marriage that is performed between two different citizens and one of them is an Indonesian citizen (Pertiwi et al., 2019).

In a marriage, property will be formed which is referred to as marital property (United Nations, 2018). Property acquired during marriage becomes joint property, while the inherited property of each spouse and property obtained by each spouse as a gift or inheritance include original property (Pertiwi et al., 2019).

The Marriage Law, in Article 36 paragraph 1 states that joint property can be managed together, but in the event of any legal act related to joint property, there must be agreement from both parties. Meanwhile, in the case of the original property, each husband and wife has the full right to carry out legal acts regarding their property as stipulated in Article 36 Paragraph 2 of the Marriage Law (Pertiwi et al., 2019).

Article 91 of the Compilation of Islamic Law states that joint property can be in the form of tangible and intangible objects. Tangible common property can include fixed objects, movable property and securities. Intangible common property can be in the form of rights and obligations (Anhar, 2024).

The development of family law in Indonesia continues to show complex dynamics, especially related to marital property and forms of marital property. The division of tangible and intangible objects has an important meaning in the law of consequences for these objects. Especially regarding the transfer or handover of the object to another party (Pertiwi et al., 2019).

Subekti in his book *Principles of Civil Law* states that it can be classified as property because of its nature or because of the law. Frieda Husni gave an example in the case of inheritance of property into 2 groups, namely inheritance according to its nature and inheritance according to the law.

One of the efforts of married couples in mixed marriages is to regulate marital property by making a prenuptial agreement to regulate the consequences of marriage related to property. In the Civil Code, Article 119 states that property brought into marriage will be combined. In its development, there is an expansion of the regulation of making a marriage agreement based on the results of the Constitutional Court Decision No. 69/PUU-XIII/2015 concerning the making of a marriage agreement can also be made at the time of the marriage taking place with the provisions of its registration or registration. The definition of an agreement is not explained in detail in the Marriage Law but only mentions the terms and regulates the aspects of validity, the period of validity and the possibility of modification of the agreement (Hapsari, 2023).

In the book *Pluralism in Marriage Legislation in Indonesia*, Sotojo Prawirohamidjojo states that a marriage agreement can be interpreted as an agreement made by prospective husband and wife before or during the marriage, aiming to regulate the financial consequences of marriage on wealth.

The purpose of making a marriage agreement is to provide legal protection for married couples in a marriage, especially in mixed marriages. Because in mixed marriages there are parties who are subject to other laws besides Indonesian law.

A theoretical foundation that is able to explain the relationship between legal norms, justice values and the practice of sharing common property. namely the theory of Legal

Protection put forward by Philipus M. Hadjon. According to Philipus M. Hadjon, legal protection is an effort to maintain human dignity and ensure the recognition of human rights inherent in every legal subject (Haryono, 2024). The protection is provided based on the applicable legal provisions to prevent arbitrary actions, and functions as a set of norms that aim to protect an interest from potential violations by other parties. In other words, that in theory it is used to protect those who are less or not strong in their position.

Hadjon distinguishes legal protection into 2, namely preventive protection and repressive protection (Purwito, 2023). Preventive legal protection provides opportunities for interested parties to prevent problems from occurring. This is what the Marriage Agreement is used for especially in Mixed Marriages. The parties try to anticipate problems that will or are likely to occur, by looking at existing regulations. An example is the prohibition of land ownership by Foreign Citizens (WNA). So that one of the parties as an Indonesian Citizen (WNI) can still be protected by his marital property ownership rights, especially in the form of land ownership.

Repressive legal protection is provided after a violation occurs through dispute resolution or restoration of rights. This protection model in principle aims to keep parties in vulnerable positions from being harmed by arbitrary actions (Santoso et al., 2020). This repressive protection cannot be applied to the maximum in the Marriage Agreement. Although the Marriage Agreement with a Constitutional Court Decision can be made throughout the marriage, there are conditions that must be met so that it is not abused by certain parties.

Preventive legal protection is reflected in the provisions of the Compilation of Islamic Law in the Marriage Law which from the beginning provides certainty regarding the existence of joint property and the basis of its distribution mechanism, so that the norm in principle serves to prevent injustice between husband and wife in the event of a marriage breakdown. When the preventive protection does not run optimally and disputes over the distribution of common property still occur, it is necessary to have other protection efforts, namely repressive legal protection is important through a judge's decision. In this study, the form of repressive legal protection will then be analyzed to assess the extent to which the consideration of the marriage agreement has accommodated the imbalance of contribution after the breakdown of the marriage.

When the preventive mechanism is inadequate and the repressive decision does not adequately consider the conditions of the parties how it is constructed in legal norms, then there is a potential for injustice to one of the parties. The need to make a Marriage Agreement in accordance with the provisions of the law, both in the form of forms, authorized officials, recording and so on needs to be done correctly.

In addition to the theory of preventive Legal Protection, it is also necessary to discuss the theory of Legal Certainty. Gustav Radbruch argued that in the Theory of Legal Certainty there are three fundamental goals, namely justice, usefulness and legal certainty. According to Gustav, the law should provide clear guidelines so that everyone can understand what behavior is and is not allowed, while also providing protection from the authorities (Aulia et al., 2024). Written law is one aspect of legal certainty, while the other aspect is consistency and certainty for the community who carry out their legal activities. Gustav stated that in practice, the three values often contradict each other. So

Gustav offers the concept of priority principles in determining the order of justice, usefulness and legal certainty (Afdhali & Syahuri, 2023).

Legal certainty has two fundamental dimensions that are relevant to this writing, namely certainty in norms and consistent application in its implementation. According to Sudikno Mertokusumo, legal certainty serves as a foundation that ensures that every individual in society can rely on the law as a clear guideline. With legal certainty, individuals in society are protected from unfair treatment. The application of legal certainty must be carried out universally and consistently so that all individuals receive equal treatment before the law. Legal certainty is a very important guarantee to ensure that the legal system can function consistently and efficiently in society. Legal certainty creates a framework for individuals to clearly understand their rights and obligations (Nuswanto, 2024).

A Marriage Agreement made by a couple from a Mixed Marriage is an effort by the parties to provide legal certainty for the control of rights to existing or existing marital property. Legal certainty and justice are often considered to be closely related, but the two have fundamental differences. Legal certainty emphasizes consistency and predictability in legal settings, while justice involves subjective judgments of individual situations and cases. Therefore, the legal system needs a balance of certainty and justice in order to function optimally in protecting the rights of the parties. Marriage Agreements, especially in Mixed Marriage, have the function of providing legal certainty for the parties to the control of marital property along with matters related to it. Apart from the need to achieve benefits and justice for all parties involved.

4. Conclusion

Marriage Agreements in mixed marriages have an important role in providing legal protection and certainty for marital property. This agreement is a preventive step for the parties to regulate rights and obligations from the beginning and anticipate potential disputes, especially due to differences in nationality that bring legal consequences to property ownership, including land rights. Although the Constitutional Court Decision Number 69/PUU-XIII/2015 provides the opportunity to make an agreement during the marriage, its implementation must still meet the applicable legal and recording provisions. Therefore, consistency in the application of the law is needed so that the marriage agreement does not only meet formal requirements, but is truly able to provide protection, certainty, and justice for the parties and prevent disputes in the future.

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