

SOME PRINCIPLES OF INDONESIA MARITAL PROPERTY LAW: STUDY OF MIXED MARRIAGE COUPLES

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I. INTRODUCTION

Marriage in Indonesia is closely related not only to religion but also to law. The legal consequences of marriage can be seen in the legal rights and obligations of husbands, wives, and offspring born in the marriage, as well as in marital property relations. Marital property, which is governed by Law No. 1/1974 on Marriage (“Marriage Law”), is divided into two types, namely: personal property and common property.

As time passed and the need for developing marriage laws in Indonesia arose, the Constitutional Court issued Decision No. 69/PUU-XIII/2015. This ruling has had a major impact on the Marriage Law. It permitted the making of a marriage agreement even after the marriage has been solemnized. On the contrary, Article 29 of the Marriage Law only recognized marriage agreements made before or at the time of solemnizing the marriage.

According to the decision, a marriage agreement made after the marriage ceremony is valid if the agreement is authorized by the marriage registrar or notary, after which its contents also apply to third parties, as long as such parties are involved.

The contents of the marriage agreement may concern the marriage property or any other agreement. In principle, it cannot be changed or revoked unless both parties agree to amend or withdraw the same. However, any amendment to or withdrawal from the marriage agreement should not injure third parties.

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1. Marriage Law in Indonesia A. Marriage Law in Indonesia

1.1. Marriage Law in General

1.1.1. Elements of Marriage Institutions in Indonesia a. Elements of Marriage Institutions in Indonesia

Article 1 of the Marriage Law defines marriage as “a relationship of body and soul between a man and a woman as husband and wife with the purpose of establishing a happy and lasting family (household) founded on belief in God Almighty.”¹ Further explanation of the article clarifies that as a State based on *Pancasila*, where the first *Sila* is belief in the One Supreme, marriage has a very close relationship with religion/spirituality, so that marriage has not only the birth/physical element, but also the mind/spiritual element. The rights and obligations of parents include establishing a happy family, producing offspring which is the purpose of marriage, and maintaining and educating them.

Based on the formulation of Article 1 of the Marriage Law it can be understood that the elements of marriage institutions are: (a) inner bonds; (b) between a man and a woman; (c) as husband and wife; (d) forming a happy and lasting family (household); and (f) based on the One Supreme Godhead.

The first element of marriage is an inner bond. This means that the marital bond does not involve either bonds of birth or inner bonds alone. Rather, both must be closely integrated. Birth bond is a visible bond and reveals a legal relationship between a man and a woman who live together as husband and wife. The birth bond is referred to as a formal bond. Formal relations are real and bind husband and wife, as well as third parties. On the other hand, inner bonds are unseen, unreal ties which can only be felt by the party concerned.²

The second element of marriage requires that it only occur between husband and wife. This suggests that marriage can only be between a man and a woman. Marriages other than that are marriages between individuals of the same sex which are not possible or permitted in Indonesia. In addition, this second element indicates a related monogamous principle.³

¹ Indonesia, *Undang-Undang Tentang Perkawinan*, UU No. 1 Tahun 1974, TTLN No. 3400, art. 1.

² R. Soetojo Prawirohamidjojo, *Pluralisme dalam Perundang-undangan Perkawinan di Indonesia*, Airlangga University Press, 1988, p. 38.

³ *Id.*

The third element of the institution of marriage is the bond between a man and a woman seen as a marriage bond in a legitimate marriage. A marriage is legal when it meets the conditions prescribed by law. Under Indonesian law, the legal requirement of a marriage is divided into internal and external terms. Internal requirements relate to the parties who make a marriage, namely their agreement, skills, and the consent of the other party to marry. In contrast, external conditions are associated with the formalities that must be fulfilled in marriage.

The fourth element of the institution of marriage is forming a family, or a happy and eternal household. This element is the purpose of marriage itself. The families referred to in this case consist of fathers, mothers, and children who are the basic units of Indonesian society.

Lastly, the fifth element of marriage is a close relation to religion or spirituality. Marriage not only has a birth/physical element, but also a mind/spiritual element.⁴

In addition to the elements of marriage under the Marriage Law in Indonesia, there are also rules concerning the validity of a marriage. Marriage is a legal act that causes legal effects as well. The consequences of this law are very closely related to the validity of the act of law itself. For example, an unauthorized marriage will result in the birth of an illegitimate child.

According to Article 2, paragraph (1) of the Marriage Law, a marriage is valid if it is done according to the law of a person's religion and belief. This includes the provisions of legislation applicable to each religious class and belief, as long as it does not contradict the Marriage Law. In this regard, Hazairin states that it is not possible for a person to marry by breaking his or her own religious law.⁵

1.1.2. The Formal Validity of Marriage

Article 2, paragraph (2) of the Marriage Law stipulates that each marriage shall be recorded according to prevailing laws and regulations. The purpose of the recording is not explained. In the General Explanation, it is only said that recording each marriage is the same as recording important events in a person's life, such as birth and death. It can be said that the marriage recording aims to make the marriage event clear. The act of recording does not define the validity of a marriage, but states that the marriage event did exist and take place. Thus, it is purely administrative.⁶ Supreme Court Jurisprudence No. 1776 K/Pdt/2007 reinforces this, where it was held that the

⁴ *Id.* at 43.

⁵ Sudarsono, *Hukum Perkawinan Nasional*, Penerbit Rineka Cipta, 2005, p. 10.

⁶ *Id.* at 17.

marriage between Tjia Mie Joeng and Lion Tjoeng Tjen, which was done customarily but not recorded on civil registration, was legally valid.

The terms of marriage are set forth in Articles 6 through 12 of the Marriage Law. Article 6, paragraph (1) provides that marriage shall be based on the consent of the two prospective spouses. The existence of the agreement means that a solid foundation has been set up to foster a family and a household. This article disallows the practice of forced marriages.⁷

Article 6, paragraphs (2), (3), (4), (5), and (6) require the consent of both parents/guardians for the prospective spouse who is not yet 21 years of age. This is because marriage does not merely unite the two spouses as husband and wife, but also unites the family of the bridegroom and the family of the bride. Additionally, a child who is not yet 21 years old is still inexperienced with life. Thus, such a covenant is necessary for the purpose of marriage to be realized.⁸

Regarding age limit, Article 7, paragraph (1) of the Marriage Law stipulates that a man must have reached the age of 19 years and a woman must have reached the age of 16 years in order to be allowed to marry. If a prospective spouse has not yet reached the requisite age to marry, a dispensation from a court or other official is required.⁹

Articles 8, 9, and 10 determine marriages that are prohibited. These can be classified into seven kinds, namely:

- (a) the existence of blood relations;
- (b) a relationship of *semenda*;
- (c) the existence of a relationship;
- (d) the existence of a relationship in a polygamous marriage;
- (e) those restricted by religion;
- (f) those where a prospective spouse is still bound in marriage; and
- (g) those where a prospective spouse has been divorced both times.

Chapter 11 also sets the waiting time for a woman who broke up her marriage. As such, a woman who broke up her marriage may not immediately marry again, but must defer until the requisite waiting time is up.¹⁰

⁷ *Id.* at 25.

⁸ Akhmad Munawar, *Al' Adl Volume VII Nomor 13, Januari-Juni 2015: Sahnya Perkawinan menurut Hukum Positif yang Berlaku di Indonesia*.

⁹ K. Wantjik Saleh, *Hukum Perkawinan Indonesia*, p. 26.

¹⁰ *Id.* at 27.

1.2. Mixed Marriage Couples in Indonesia

Mixed marriage occurs because of the plurality of marriage laws and the meeting of two or more marriage legal systems. Article 57 of the Marriage Law defines a mixed marriage as one between two persons in Indonesia subject to different laws because of their difference in citizenship. Given that the restrictions apply only to couples with differences in citizenship, marriages between couples of different classes or religions, but who are both Indonesian citizens, are not considered as mixed marriages.

Under Article 59, paragraph (2) of the Marriage Law, a mixed marriage in Indonesia shall take place under the applicable law of marriage in Indonesia. Similarly, all the requirements of their marital matters must also be based on the Marriage Law in Indonesia. Article 2, paragraph (1), which is based on religious law, as well as Articles 6 to 12 likewise apply.¹¹

For the material requirement, additional conditions must be complied with by foreign nationals. Foreign citizens who wish to enter into a mixed marriage must fulfill all the requirements stipulated by the law of their respective countries.¹² This must be evidenced by obtaining information from the embassy in the form of a certificate of non-impediment to marriage or a certificate of ability to marry. This document verifies that the person concerned has no obstacle to marry under its domestic law. In addition, foreign nationals must also present:

- (a) A certificate of admission to Islam for new converts to Islam;
- (b) A Letter of Self-Check (STMD) from the residence service for those who have the status of a tourist, or a Permit Stay (KITAP / KITAS) for those who have the status of a resident;
- (c) A photocopy of tax for foreign nationals;
- (d) A divorce/death certificate from the relevant civil registry office which must be translated into Indonesian, for widows/widowers;
- (e) A permit from the police; and
- (f) Six (6) sheets of 3x4 cm-sized photographs.

Article 61 of the Marriage Law prescribes that the mixed marriage certificate shall be signed by the competent recording officer. In this case, it is the Office of Religious Affairs for Muslim couples or Civil Registry Offices for Non-Muslim religious partners. Article 56, paragraph (2) provides that for marriages held abroad, the husband and wife must register their marriage certificate at the Marriage

¹¹ *Laporan Akhir Pengkajian Hukum Tentang Perkawinan Campuran (Dalam Hukum Perdata Internasional)*, Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1994, p. 28.

¹² J. Prins, *Tentang Hukum Perkawinan di Indonesia*, cet. I, (Jakarta: Ghalia Indonesia, 1982), p. 80-81.

Registering Office with jurisdiction over their domicile, within one year of returning to Indonesia.

The Marriage Law does not mention the legal consequences of mixed marriage matters to the parties that have married or to the future combatants. Articles 58 and 59 only determine the effect on citizenship.¹³

Mixed marriages may cause a change in citizenship. Law No. 12/2006 on Citizenship of the Republic of Indonesia (“Citizenship Law”) regulates the effect of mixed marriages entered into by Indonesian women with male foreign citizens. Article 26, paragraph (1) of the Citizenship Law states that an Indonesian woman who marries a male foreign national may lose the Indonesian citizenship if, according to the law of the country of origin of her husband, the citizenship of the wife follows that of the husband as a consequence of the marriage. Similarly, paragraph (2) thereof states that an Indonesian man who marries a female foreign national may lose Indonesian citizenship if, under the laws of his wife’s country of origin, the nationality of the husband follows that of the wife after their marriage.

Should the Indonesian spouse wish to retain his or her Indonesian citizenship, the aforementioned spouse may submit a declaration of his or her wish to the Official or Representative of the Republic of Indonesia which has jurisdiction over the domicile of the concerned spouse, unless the filing results in the dual citizenship of the applicant.

Mixed marriages only affect immovable objects, as land cannot be owned by a husband or wife who is a foreign citizen. This is in accordance with Article 21, paragraph (1) of Law No. 5/1960 on Basic Regulations of Agrarian Principles or the Basic Agrarian Law (“BAL”).

2. Marital Property Law and Marriage Settlements in Indonesia

2.1. Indonesian Marital Property Law

2.1.1. Indonesian Property Law in General

The notion of property itself can be found in Article 499 of the Civil Code which states that “the so-called property is, every goods and every right, which can be controlled by property rights.” On the other hand, the law of property is a collection of all kinds of rules of law about objects. Property law under the Civil Code embraces a

¹³ *Id.* at 30.

closed regulatory system, which means that a person cannot establish new property rights other than those set forth in Book II of the Civil Code.

The Civil Code distinguishes objects into several types, as follows:

- (a) Object-bodied/tangible;
- (b) Consumable and non-consumable;
- (c) Objects that already exist and objects that do not, such as tone;
- (d) Items within and outside of trade;
- (e) Replaceable and non-replaceable;
- (f) Registered and unregistered; and
- (g) Movables and immovables.

Property rights are absolute rights. As such, property rights attach to an object, giving direct power over the object which can be defended against the world. The right to own property according to the Civil Code is the right of control (*bezit*) and property rights (*eigendom*).

According to Article 529 of the Civil Code, the right to master or *bezit* includes the right to control a material, either by oneself or through the intercession of others, and the right to retain or enjoy it as its possessor. On the other hand, the right of *eigendom* or proprietary rights under Article 570 of the Civil Code is the right to enjoy and dispose of a material freely, provided it is not contrary to law, general rules stipulated by the competent authority, or with the rights other people. Notwithstanding, such rights may be revoked in the public interest based on the provisions of law and with payment of indemnity.

The dualism of Indonesian Land Law ended with the revocation of Article II of the Civil Code regarding the earth, water, and natural resources contained therein, as well as the stipulation that *Adat* Law becomes the basis of the new Land Law as stated in Article 5 of the Basic Agrarian Law. Thus, Land Law was unified, which according to the UUPA is “in accordance with the ideals of national unity.” With the enactment of the Basic Agrarian Law, the rights regulated in the Civil Code in relation to the land are no longer valid, including all the property rights and other material rights to land and land-related objects.

Agrarian law in the broad sense is a set of laws governing the right of control over natural resources including the earth, water, and space as well as the natural wealth contained in it. Agrarian law in the strict sense (Land Law) is a set of laws governing the control of the land surface. Land tenure is a legal relationship authorizing the legal subject (person/legal entity) to act with regard to the legal object (land) under his control.

Tenure of land based on its authority can be divided into:

- (a) The right to control land which has special authority, namely public and civil authority; and
- (b) The tenure of land which gives authority of a general nature and authority in the civil nature in the control and use of land in accordance with the types of land rights granted (Individual Rights over Land).

Individual rights to land consist of:

- (a) Land rights; and
 - (1) Primary land rights: Property rights, *Hak Guna Bangunan*, *Hak Guna Usaha*, and *Hak Pakai*
 - (2) Secondary Land Rights: Right to Build, Right to Use, Lease Rights, Right of Profit-Sharing, Pawn Rights, and Right to Ride.
- (b) Warranty Rights to Land: Right of ownership of land which does not authorize its holder to use the land it owns but gives authority to sell the land through auction if the land owner defaults.

The Basic Agrarian Law prohibits foreign citizens from owning land rights as provided for in Article 21. Under Article 42 of the Basic Agrarian Law, the right to land, which may be controlled by legal subjects of foreign nationals domiciled in Indonesia, is the right to use.

2.1.2. Marital Property Law in Indonesia

Marriage is a legal relationship that affects both parties, the husband and the wife, with regard to property acquired during marriage, as well as the status and position of their offspring. In marriage, there is marital property. Such property is derived from property acquired prior to and throughout the marriage. Marital property becomes the material basis for family life.

Article 66 of the Marriage Law provides that after its effectivity, other laws regulating marriage to the extent provided for in the former shall be declared null and void. Consequently, matters relating to marital property are regulated by the Marriage Law which is supplemented by the provisions under the Indonesian Compilation of Islamic Laws for Muslims (“ICIL”).

2.2. Marriage Settlements in Indonesia

2.2.1. Marriage Settlement in Indonesia before the Constitutional Court Decree No. 69/PUU-XIII-2015

2.2.1.1. Definition of Marriage Settlement

Marriage agreements are also known in the community as pre-marriage agreements. Neither the Book of Civil Law nor the Marriage Law defines what a marriage agreement is. Marriage agreements are often confused with the mating pledge, or the promise to marry or promise to propose. Therefore, the definition of the marriage agreement must be discussed first.

Wahyono Darmabrata defines the marriage agreement as an agreement made by future husbands and future wives to regulate their rights and obligations over individual property brought into the marriage to deviate from the principle of mixing around.¹⁴ Wirjono Prodjodikoro is of the opinion that the marriage agreement is defined as a legal relation of wealth property between two parties, in which either party promises or is considered to promise to do something, while the other party has the right to demand the execution of the agreement.¹⁵ R. Subekti argues that a marriage agreement is a treaty on the property of a married couple during their marriage that deviates from the principle or pattern established by law.

The marriage agreement can also be interpreted as an agreement¹⁶ made by a married couple before or at the time of marriage which regulates the effects of marriage on their property.

Although the Marriage Law determines that a marriage agreement can only be made before or at the time of marriage, there is a Decision of the East Jakarta District Court 2173/Pdt.P/2012/PN.Jkt.Tim which allows marital agreements to be made even after the marriage takes place. The decision contemplates a situation where the reason for filing it is the ignorance of the married couple concerning the making of marriage agreements before marriage, and the married couple are at risk of burdening their personal property. In this decision, the Judge filled the legal void on marital agreements entered into within the life of the marriage, with the purpose of protecting the property of the spouses.

¹⁴ Wahyono Darmabarata, *Perjanjian perkawinan dan Pola Pengaturannya dalam Undang-Undang Perkawinan*, Hukum dan Pembangunan, 1996, No. 1 Year XXVI, p. 21.

¹⁵ Wirjono Prodjodikoro, *Hukum Perkawinan di Indonesia*, (Jakarta: Sumur Bandung, 1981), p. 8.

¹⁶ R. Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: Intermedia, 1995), p. 9.

2.2.1.2. Purposes of a Marriage Settlement

Establishing a marriage agreement is a preventive measure to anticipate conflict before marriage. The purpose of making a marriage contract is to regulate the effects of marriage on property relations.¹⁷ In general, a marriage agreement is made:¹⁸

- (a) Where there is a greater amount of wealth on one side of the other; or
- (b) Where both parties each bring considerable input.

The purposes of making a marriage contract are, among others, to:¹⁹

- (a) Restrict or completely exclude property togetherness by law;
- (b) Organize gift-giving from husband to wife or vice versa and reward gift between husband and wife (in relation to Article 168 of the Indonesian Civil Code);
- (c) Limit the right of the husband on the common property as determined by Article 124, paragraph (2) of the Indonesian Civil Code, so that without the help of his wife, the husband cannot act. This also applies to movable or immovable bodies carried by a wife or are immobile throughout the marriage in the name of a wife;
- (d) Arrange testimony from husband to wife or vice versa, or as mutual grant (as governed by Article 169 of the Civil Code);
- (e) Arrange gift-giving by a third party to the husband or the wife (as stipulated in Article 176 of the Civil Code); and
- (f) Arrange testimony from a third party to the husband or the wife (as regulated in Article 178 of the Civil Code).

In addition, there are also considerations in entering into a marriage agreement, namely:²⁰

- (a) In marriages with common property: in order for the wife to be protected from possible misconduct of the husband concerning the immovable and movable property that the wife brought into marriage; and

¹⁷ Soetojo Prawirohamidjojo, *Hukum Orang dan Keluarga*, (Surabaya: Airlangga University Press), p. 87 melalui Haedah Faradz, *Tujuan dan Manfaat Perjanjian Perkawinan* dalam *Jurnal Dinamika Hukum* Vol. 8 No. 3, 2008, Fakultas Hukum Universitas Jenderal Soedirman.

¹⁸ Haedah Faradz, *Tujuan dan Manfaat*, p. 250-251.

¹⁹ Soetojo Prawirohamidjojo dan Martalena Pohan, *Hukum Orang dan Keluarga*, (Surabaya: Airlangga University Press, 2000), p. 74-75.

²⁰ J. Satrio, *Hukum Harta Perkawinan*, p. 148-149.

- (b) In marriages with separate property: for certain goods or all goods brought by husbands or wives into the marriage not to enter into the union of marital property and thus remain private property.

In cases of personal property, the wife can act thereon regardless of the management of the husband. This shall be expressly stipulated in the marriage agreement.

2.2.1.3. Requirements of a Marriage Settlement

The conditions for the validity and the applicability of marriage agreements can be divided into three categories:

- (a) Requirements about person

As a contract, marriage agreements must also fulfill the requirements for valid contracts under Articles 1320 to 1337 of the Indonesian Civil Code. The spouses must have the legal capacity to enter into a contract. The spouses must be adults who are not under guardianships. In order to determine maturity, reference may be made to some rules given differences depending on what legal deeds are done.

Article 1330 of the Indonesian Civil Code provides that an adult is 21 years old. Article 7 of the Marriage Law provides that the age of marriage for men is 19 years and for women is 16 years, while Article 47, paragraph (1) of the law stipulates that children who have reached the age of 18 years are no longer under the authority of a parent or guardian. Thus, when referring to Article 7, those who are competent to marry should also be able to make a covenant. On the other hand, when referring to Article 47, a child who has attained the age of 18 is considered capable of legal action.

Article 39, paragraph (1) of Law No. 30/2004 regarding Position of Notary requires that those who appear must be:²¹

- (1) At least 18 years of age or married; and
- (2) Capable of legal action.

²¹ Indonesia, *Undang-undang Jabatan Notaris*, UU No. 30 year 2004, LN No. 117 year 2004, TLN No. 4432.

Given the differences above, the solution offered is that a marriage contract may be made by parties who are minors, provided that:²²

- (1) The person concerned is eligible for marriage;
- (2) The party is assisted by persons whose permission is required for marriage (The assistance herein is not representative of persons granting permission to marry in the form of signing a marriage agreement or written permission which states the consent of the marriage agreement. This is a logical consequence of the provisions of Article 6, paragraph (2) of Law No. 1/1974 stating that a person under the age of 21 if wishing to marry must first obtain permission from a parent); and
- (3) If the marriage takes place with the permission of the judge, then the plan of the marriage agreement must be approved by the court.

(b) Requirement of marriage agreement and its validity

Articles 1330 to 1337 of the Indonesian Civil Code does not specify whether agreements should be written or not. However, marriage agreements in particular must be written as stipulated in the Indonesian Civil Code and Law No. 1/1974.

Article 147 of the Indonesian Civil Code provides that marriage agreements must be set forth in the form of notarial deeds. If this is not met, then there is a threat of irritation. On the other hand, the Marriage Law does not require notarization. Article 29 thereof does not limit the form of the marriage agreement to be authentic or under the hand. However, it must be authorized by the Employee of Marriage. The decision of Constitutional Court No. 69/PUU-XII/2015 affirms that a candidate for marriage has the option of passing a marriage agreement to a marriage or notarial employee.

The marriage agreement may also relate to a third party other than the married couple. Article 152 of the Indonesian Civil Code provides for the registration of a marriage agreement to the Court Clerk in order to allow third parties the opportunity to know and ascertain their interests. If a marriage agreement has not been registered, a third party may consider that he or she is not aware of the marriage agreement.²³

²² J. Satrio, *Hukum Harta Benda Perkawinan*, (Bandung: Citra Aditya Bakti, 1991), p. 151.

²³ R. Soebekti, *Kaitan Undang-undang Perkawinan dengan Penyusunan Hukum Waris*, Kertas Kerja Simposium Hukum Waris Nasional di Jakarta, 1983, p. 38.

(c) The term of marriage agreement

The Indonesian Civil Code provides that the focus of marriage contracts is to give freedom to married couples to make aberrations of the basic form of marital property, which is a unified union with several restrictions of the law.²⁴ Marriage agreements, like other agreements, may not contain forbidden causes because they are prohibited by law, or are contrary to morality and public order.²⁵

2.2.1.4. Variety of Marriage Agreements under Indonesian Law

(a) Profit and Loss Joint Marital Property

Article 155 of the Indonesian Civil Code states that if a prospective couple agrees that between them there will be a unity of profit and loss, then such provision is assumed to mean that between the parties there shall be no unity of property unanimously, while the profits earned and the losses suffered throughout the marriage shall be divided between husband and wife.²⁶ The existence of a profit and loss association can occur because the parties expressly commit it in their marriage agreement, or the parties only agree that between them there is no unity of property.²⁷ With such agreements the following property groups are formed:²⁸

- (1) Limited marital property, in the form of profit and loss union;
- (2) Husband's personal property; and
- (3) Wife's personal property.

(b) Joint Marriage Property Regarding Income

The provision regulating this form of marriage agreement is in Article 164 of the Indonesian Civil Code. In this form, husbands and wives are given the right to make calculations with the unity of results and income, but with the limitation that the amount should not exceed the existing assets in unity. The unity of yield and income is almost equal to the unity of profit and loss, only with

²⁴ Oetari Darmabrata, *Hukum Perdata I*, p. 219.

²⁵ J. Satrio, *Hukum Harta Benda Perkawinan*, p. 157.

²⁶ J. Satrio, *Hukum Harta Perkawinan*, p. 174.

²⁷ *Ibid*, p. 176.

²⁸ *Ibid*, p. 175.

the restriction that the debts that exceed the assets of the unity of yield and income are borne by the debtor.²⁹

(c) Split Marital Property

If the couple wishes to have their property during the marriage separated altogether, then the parties in the marriage agreement must state that between them there will be no mixing of property and, in addition, expressly provide that they also do not want any unity of profit and loss.

With such a marriage agreement, each husband and wife remain the owners of the goods they bring into the marriage. Likewise, because of every form of union they have excluded, whatever they each earn during the marriage, whether in the form of profits of business or outcome of their personal property, remains the private property of each husband and wife concerned. Thus, there will only be two groups of property, that is, the husband's personal property and the wife's personal property.³⁰

2.2.1.5. Marriage Agreement According to the ICIL³¹

The ICIL regulates the marriage agreement in Chapter VII. Article 47 thereof provides that at the time of or before the marriage, the spouses-to-be may conclude a written agreement authorized by the Registrar of Marriage Registry concerning property relations in marriage. Such agreements may include the mixing of personal property and the separation of their respective livelihoods as long as it is not contrary to Islamic Law. In addition to the above provisions, it may also specify the authority of each to enter into a mortgage bond on personal property and common property, or property of the company.

Article 48 of the ICIL provides that if a marriage agreement is made concerning the separation of joint property or property of the company, the agreement shall not eliminate the obligation of the husband to fulfill the household's needs. If a marriage agreement does not meet the provision, it is deemed to be the case of separation of joint property or *shari'a* property with the obligation of the husband to bear the cost of household needs.

Article 49 of the ICIL states that a treaty for the mixing of private property may include all property, whether brought into the marriage or obtained by each spouse

²⁹ *Ibid*, p. 182-183.

³⁰ J. Satrio, *Hukum Harta Perkawinan*, p. 164-165.

³¹ In bahasa, *Kompilasi Hukum Perkawinan Indonesia (KHI)*.

during the marriage. Without undermining such provision, it may also be agreed that the mixing of personal property shall be limited only to personal property brought at the time of marriage, so the mixing does not cover personal property acquired during marriage or otherwise.

Article 50 of the ICIL stipulates that the marriage agreement concerning property shall be binding on the parties and the third party from the date of the marriage, in the presence of the Registrar. The marriage agreement concerning such property may be withdrawn upon the consent of the spouse and shall register it to the Registrar's Office of Marriage where the marriage takes place. After the registration, the retraction will bind the husband and wife. However, it will only bind third parties after the announcement of the date of registration by the husband and wife in a local letter of *kabuh*. If within six months, the announcement is not made by the person concerned, then the registration of the revocation shall automatically be void and not binding to a third party. Revocation of a marriage agreement concerning property shall not prejudice any agreements previously made with a third party.

Article 51 of the ICIL provides that breach of a marriage agreement grants the wife the right to request for the cancellation of the marriage or to file it as the reason for the divorce in the Court of Religion. Article 52 determines when marriages with second, third, or fourth wives may be promised on residence, turn time, and household expenses for the wife to be married.

It can be seen that the arrangement on the ICIL concerning the marriage agreement is more detailed than the existing arrangement in the Marriage Law where it is only governed by Article 29.

2.2.2. Marriage Settlement after the Constitutional Court Decree No. 69/PUU-XIII-2015

After the Decision of the Constitutional Court No. 69/PUU-XIII/2015, Article 29 of the Marriage Law is read as follows:

- (1) At the time of, prior to, or during the marriage, the two parties by mutual consent may lodge a written agreement authorized by the marriage or notarial registry officer, after which the content also applies to third parties as long as the third party is involved.
- (2) The agreement cannot be ratified when it violates legal, religious, and moral boundaries.
- (3) The Agreement shall enter into force upon the date of marriage, unless otherwise specified in the Marriage Agreement.

- (4) During marriage, marriage agreements relating to marital property or other agreements are irrevocable, unless on both sides there is agreement to amend or withdraw, and such amendment or revocation shall not harm a third party.

The consideration of the Court is that the phrase “at the time or before the marriage takes place” in Article 29, paragraph (1), the phrase “... since marriage takes place” in Article 29, paragraph (3), and the phrase “during marriage takes place” in Article 29 paragraph, (4) of the Marriage Law limits the freedom of two individuals to decide when to enter into an agreement, and as such are contrary to Article 28 E, paragraph (2) of the 1945 Constitution which provides that “[e]veryone has the right to freedom of belief, expression of thought and attitude, his conscience.”³²

Changes in Article 29 of the Marriage Law had an impact on the terms of making a marriage agreement. Article 29 of the Marriage Law prior to the issuance of Constitutional Court Decision No. 60/PUU-XIII/2015 did not limit the form of a marriage agreement to be authentic or under the hand, but only required it to be authorized by the employee of the Marriage Register. The verdict only reinforced the choice to make an agreement in notarial deed as an option, and not a requirement.³³

Regarding the time of validity, it is clearly different as the making of marriage agreements were only allowed at or before marriage, prior to Constitutional Court Ruling No. 60/PUU-XIII/2015. However, after such decision, the making of a marriage agreement during the marriage was allowed. Such agreements made during the marriage are not deemed to have been valid from the moment of marriages. Rather, their validity is determined by the parties themselves. Furthermore, marriage agreements made during marriage are not required to have a court appointment to be ratified because there has been an option to certify them through a marriage registrar or with the help of a notary.³⁴

3.2.2.1. Registration of Marriage Settlements

Article 29, paragraph (1) now reads as follows: “At the time of, prior to, or during the marriage, the two parties by mutual consent may submit a written agreement authorized by the marriage or notary[.]” The word “authorized” in that sentence does not mean that if the marriage agreement is not endorsed by the Registrar, then the

³² Mahkamah Konstitusi, Putusan Nomor 69/PUU-XIII/2015, p. 154.

³³ *Ibid.*, p. 156-157.

³⁴ Alwesius, *Pembuatan Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi*, 2016.

marriage agreement becomes invalid. Such endorsement is merely the accounting or recording of the marriage agreement in the list book which is provided for the listing.

The recording of a marriage agreement is made at the Office of the Employee of Marriage Record, which is in the Civil Registry Office for married couples abroad and non-Muslim couples or the Office of Religious Affairs for Muslim couples. This also applies to marriage agreements made during marriage. The amendment to Article 29, paragraph (1) also causes this ratification to be made on a notary.

3.2.2.2. Applicability of Marriage Agreements

Article 29, paragraph (3) after the promulgation by the Constitutional Court of Decision No. 60/PUU-XIII/2015 now reads as “[t]he treaty becomes effective from the moment the marriage takes place, unless otherwise specified in the Marriage Agreement.” This can be said to be the effect of the permissibility of making a marriage contract during marriage. If the marriage agreement is valid only after the marriage takes place, then the agreement will affect the condition of the marriage property prior to the making of the marriage agreement. For example, it can eliminate the unity of joint property from the beginning of marriage to the time the marriage agreement is made.

There is also a Circular Letter of Directorate General of Islamic Community Guidance B.2674/DJ.III/KW.00/9/2017 concerning Records of Marriage dated September 28, 2017. It is stipulated therein that the registration of a marriage agreement made before marriage, at the time of marriage, or during marriage authorized by the notary may be registered by the Registrar. This is so that marriage agreements authorized by a notary can be accessed and known by the general public.

3.2.2.3. Third Party Protection from Separation of Marital Property Taken After Marriage

Separation of property with marriage agreements made after or during marriage in Indonesia may be authorized by the Office of Marriage or Notary. After that, the new marriage agreement can be said to bind a third party. Marriage agreements certified by a notary can be registered by the Registrar of Marriage Officer based on the Circular Letter of Directorate General of Islamic Community Guidance No. B.2674/DJ.III/ KW.00/9/2017 concerning the recording of a marriage agreement. However, this is not enough to provide legal certainty to third parties.

Applications for separation of property with Judicial Separation of Property in the Philippines are brought to justice. The application must be accompanied by a list of creditors of married couples. Then the creditors are notified to allow them to attend

the session and defend their interests.³⁵ The application may also be supplemented by a plan for the separation of property which the couple wishes, and may be granted for as long as it does not conflict with legislation or general principles.³⁶

Mechanisms provided in Indonesia can be said to be good enough. A marriage certificate endorsement through a notary can now be registered to a Marriage Officer. However, the rights and obligations of third parties in making this marriage agreement are not yet clear. It would be better for third parties should they be more involved. However, disallowing third parties from intervening in the making of the agreement further facilitates the stage of separation of property after marriage.

3. Joint Martial Property (*Harta Bersama*) in Indonesia

3.1. *Adatrecht*

According to customary law, the property of the marriage consists of luggage (Lampung: *sesan*, Javanese: *gawan*: Batak: *yeast*), treasure (Minangkabau: property of *suarang*, Java: *gana-gini*, Lampung: *masses besesak*), and treasure (inheritance) may also be added to the gift treasure. The marital property relations depend on the form of marriage, local customary law, and the circumstances of the indigenous peoples concerned, whether the community is still strongly maintaining patrilineal, matrilineal, or parental/bilateral patrimony lines, or adhering to religious law, or having advanced and following the times.³⁷

In this patrilineal society, there is essentially no separation of common property and congenital property. All the treasures that enter into marriage bonds become common property or property of unity which is controlled by the husband as the head of the family. All legal acts pertaining to marital property must be known and approved by the husband, and the wife shall not act alone on his/her possessions without the consent of the husband.³⁸

In the matrilineal society, common property can be separated from the innate possessions of the wife and those of the husband, including the treasures of gift and/or inheritance which are brought by each into the marriage. Thus, the common property is jointly owned, while other property such as possessions, including those of gift or

³⁵ Desiderio P. Jurado, *Civil Law Reviewer*, Quezon City: Rex Printing Company Inc., 2009, p. 203 & 205.

³⁶ Melencio Santos Santa Maria, *Persons and Family Relations Law*, Manila: Rex Printing Company Inc., 2010, p. 564.

³⁷ *Ibid.*

³⁸ *Ibid.*

inheritance, are not a matter of dispute, unless the property involved is mixed into the common property.³⁹

In a parental society, which is only tied to household-to-house relationships under the leadership of the father and mother and is not bound by extensive kinship relations, the marriage is commonly in the form of free marriage or independent marriage. In such cases, the marital status after marriage is equally balanced, and each is free to determine his or her own residence. Their marriage property is close to what is stipulated in the Marriage Law, that is, the existence of joint property controlled by husband and wife together, and the existence of luggage that remains controlled and each owned by the husband and wife, unless otherwise determined.⁴⁰ The separation of joint property and possessions during the marriage bond is intended to facilitate settlement should there later be a dispute or divorce.⁴¹

Marital property includes:⁴²

- (a) The husband's or wife's property acquired before marriage or as inheritance (original or alien);
- (b) The husband and wife's property earned on the proceeds of the business before or during the marriage (the treasure or celebrating property);
- (c) Treasures acquired by the husband and wife together during marriage (*gono-gini*); and
- (d) Treasures given to the bride when married.

The first marriage property is usually called the property of origin, while the second, third, and fourth marriage properties (limited) are called joint possessions. The joint treasure is the property the husband and wife obtain on their own or together during the marriage, unless the property is given or inherited. The existence of joint property depends on the following conditions:⁴³

- (a) Husband and wife live together;
- (b) The position of husband and wife are equal; and
- (c) Not affected by Islamic Law.

³⁹ *Ibid*, p. 125.

⁴⁰ *Ibid*, p. 125-126.

⁴¹ *Ibid*, p. 126.

⁴² Soerjono Soekanto, *Intisari Hukum Keluarga*, p. 61-62.

⁴³ *Ibid*.

For Batak people (indigenous peoples on the island of North Sumatra, Indonesia) joint treasures are distinguished in staples and fruits from staples. The consequence is that wives are not free to commit possessions of basic property. Because of this, in urgent circumstances when the husband is unable to give permission, such permission is required from the husband's family.

Customary Law in Indonesia concerning property follows a different principle, so that for the separation of the property that the husband or wife brings to the common property, there is no need to go through the marriage agreement. Concerning the marriage agreement, Hadikusuma argues that agreements made before or at the time of marriage apply not only between the two prospective spouses, but also between their relatives in customary law. The marriage agreement in customary law is largely not made in writing but is announced in the presence of relatives or neighbors present at the marriage ceremony. Traditional *adat* marriage agreements do not require the approval of the marriage registry officer, but it is necessary that it is known by the Head of Traditional or Relative Heads of both parties.⁴⁴

3.2. Islamic Law

Article 1(f) of the ICIL states that what is meant by wealth in marriage or *shirkah* is the treasure obtained either individually or by a husband and wife during the marriage. This is hereinafter called joint treasure, without questioning if it is registered on behalf of anyone. According to Sayuti Thalib, *syirkah* is about arranging the association or cooperation in trade or service which is then also applied on the matter of joint property of husband and wife when talking about marriage laws.⁴⁵

There are various kinds of *syirkah*, but they can be divided into two groups, namely:⁴⁶

- (a) *Shirkah* that is allowed, including, among others, *shirkah al-'Inan* (*shirkah* treasure), *shirkah al-Abdan* (*syirkah* work), *syirkah mudharabah*, *syirkah* property, and *shirkah 'Uquud*; and
- (b) *Shirkah* that is not allowed, including *syirkah Mufaawadhah* and *syirkah Wujuh*.

⁴⁴ H. Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, p. 58-59.

⁴⁵ Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, (Jakarta: UI – Press, 2015), p. 79.

⁴⁶ Neng Djubaedah, Sulaikin Lubis, dan Farida Prihatini, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: PT. Hecca Mitra Utama, 2005), p 122.

Shirkah may be implemented by the husband and wife, as follows:⁴⁷

- (a) *Shirkah* may be held by entering into an agreement clearly written or spoken before or after the marriage ceremony, whether for individual property, or property acquired during marriage but not on their own, or from their livelihood;
- (b) It may also be stipulated by law that property acquired on the business of husband or wife or both during the marriage shall be the common property or the property of husband and wife; or
- (c) In addition to the abovementioned ways, *shirkah* wealth of husband and wife can also occur with the reality of the couple's life. This is especially the way for joint possessions gained during marriage. In a quiet way, *syirkah* happens if in fact they are united in seeking livelihood and finances. Finding livelihood here should not mean that those who earn a living should do so alone, but must also be seen from the division of labor in the household. *Shirkah* like this can be called *shirkah abdaan*.

Sayuti Thalib argues that the various treasures of the husband and wife can be seen from three points of view, that is:⁴⁸

- (a) Viewed from the point of origin of husband and wife, property can be classified into three groups:
 - (1) The property that each husband and wife had before they marry, whether acquired inheritance, gifts, or other efforts, is referred to as a congenital treasure;
 - (2) The property of each husband and wife acquired during marriage, but acquired not on their joint or individual endeavors, but acquired by inheritance, testament, or grant for each; and
 - (3) The property acquired after they are in a married relationship for the business of both of them or one of the parties is called a livelihood.
- (b) Viewed from the point of use, this treasure is used to finance:
 - (1) The household, family, and education of children; and
 - (2) Other assets.

⁴⁷ *Ibid.*, p. 84-85.

⁴⁸ *Ibid.*, p. 83.

- (c) Viewed from the point of relationship of property with individuals in society, the treasure is:
- (1) The joint property of husband and wife;
 - (2) One's possessions, but bound to the family; and
 - (3) One's possessions expressly stated by the person concerned.

Basically, according to Islamic Law, the properties of the husband and the wife are separate, so each spouse has the right to spend or use his or her property wholly without being disturbed by any other party. The property which is entirely owned by each party shall be the property of each before the marriage, or the property acquired by each of them on their own. This also includes the property received by a husband or wife because of grants, inheritance, or gifts after they get married. The Qur'an is not set about the joint property of husband and wife in marriage.⁴⁹

Provisions on joint property in the Marriage Law in Articles 35 and 36 are also found in the ICIL Articles 85 and 86, paragraph (1). The arrangements in these articles are essentially the same, but with different formulas. The important thing is to not contradict the Koran and Sunnah of the Prophet. Article 86, paragraph (1) of the ICIL stipulates that "basically there is no mixing between husband's property and wife's property by marriage." However, the ICIL acknowledges the common property of married couples in marriage as found in Article 85, which states that "the existence of joint property in the marriage does not exclude the existence of the property of each husband or wife."⁵⁰

The above must have an impact on the mastery and use of property in marriage. Article 86, paragraph (2) of the ICIL states that "[t]he estate of the wife shall remain the wife's right and is fully controlled by her, so the husband's property shall remain the husband's right and be fully controlled by him." Article 87, paragraph (1) of the ICIL also provides that "the property of each husband and wife and the property acquired respectively as a gift or inheritance shall be under their respective control, as long as the parties do not specify otherwise in the marriage agreement." Therefore, both husband and wife are entitled to control their property as long as they do not stipulate otherwise in the marriage agreement.

Although husbands are entitled to control over their property, they retain a responsibility to safeguard other assets, as set forth in Articles 89 and 90 of the ICIL. Article 89 provides that "the husband is responsible for the maintenance of the common property, the property of his wife, and his own property." Article 90 states

⁴⁹ Neng Djubaedah *et. al.*, *Hukum Perkawinan Islam*, p. 122.

⁵⁰ *Ibid.*, p. 125-126.

that “the wife shall be responsible for the maintenance of the common property and the property of her husband.” Therefore, husbands and wives have an obligation to keep their personal property, the property of their spouses, and the joint property of the husband and wife.⁵¹

Basically, according to Islamic law, the husband’s estate and the wife’s estate are separated, then the marriage agreement can be done. The ICIL regulates marriage agreements in Chapter VII of Articles 45 to 52.

Article 45 provides that the prospective bridegroom may enter into a marriage agreement in the form of:

- a. *Taklik talak*; and
- b. Other agreements that are not contrary to Islamic Law.

3.3. Indonesian National Marriage Law: Law No. 1/1974

The Marriage Law does not govern the property of married persons after their marriage dissolves. There are only provisions concerning property in marriage (Articles 35-37). From the provision of Article 35, paragraph (1) that property acquired during marriage becomes a common property, R. Soetojo Prawirohamidjojo argues that since the position of husband and wife is equal, there is no such joint property to be halved. The treasures and possessions gained by both as gifts and inheritance will return to their rightful owner.⁵²

Article 35 of the Marriage Law determines that property acquired during marriage becomes a common property. If each spouse brings property into his or her marriage, or if during the marriage, each gets a treasure for a gift or an inheritance, then the property is still respectively controlled by each, unless determined to be a joint treasure. Both husband and wife can use the joint property with the consent of their husbands or wives. However, with regard to inheritance, each spouse has the full right over their respective properties. If the marriage breaks up, then the joint property is regulated by their respective laws. The meaning of “law” here is religious law, customary law, and other laws.⁵³

According to the article, that which becomes joint property is the property obtained during the marriage. On the contrary, innate property is the property acquired by each spouse as a gift or inheritance. Thus, the possessions that have been

⁵¹ *Ibid.*

⁵² R. Soetojo Prawirohamidjojo, *Pluralisme dalam Perundang-undangan*, p. 147.

⁵³ *Ibid.*, p. 35.

acquired at the time of (or brought into) the marriage lie outside the joint treasure. The abovementioned provisions do not specify where or whom the property is from, so we may conclude that included in the joint property are:⁵⁴

- (a) Results and income of the husband;
- (b) Results and income of the wife; and
- (c) The proceeds and income from the personal property of husband and wife— even if the estate is not included in the joint property, provided all of it is obtained during the marriage.

Harahap states that basically, all of the wealth gained during marriage form part of the common property. Based on these developments, the marriage property that forms part of the joint property is as follows:⁵⁵

- (a) The property purchased during the marriage. Who buys, on whose behalf it is registered, and where it is situated is immaterial;
- (b) Treasures purchased and built post-divorce financed from joint property;
- (c) Proven assets obtained during marriage bonds; and
- (d) Earnings of common property and possessions.

In Article 35, paragraph (2) of the Marriage Law, it is stated that “property acquired by each as a gift or inheritance is under their control as long as the parties do not specify another.” The article provides an opportunity to deviate from the arrangements concerning property contained in the law. If one wishes to deviate from that general rule, he must indicate his intent in a marriage covenant.⁵⁶

Article 36 of the Marriage Law regulates the mastery or the management of joint property and property of married couples. Paragraph (1) provides that in respect of joint property, the husband or wife may act upon the agreement of both parties. In principle, the common property is managed together and all acts must be mutually agreed upon. Whereas, in paragraph (2), it is determined that in respect of their respective possessions, the husband and wife have the full right to engage in legal acts concerning their possessions. Over such items, they have full *beheer* or *beschikking* authority unless one of the spouses were not of age before the marriage.

⁵⁴ J. Satrio, *Hukum Harta Perkawinan*, (Bandung: PT. Citra Aditya Bakti, 1993), p. 189.

⁵⁵ M. Yahya Harahap dalam Badul Manaf, *Aplikasi Asas Equalitas Hak dan Kedudukan Suami Istri dalam Penjaminan Harta Bersama pada Putusan Mahkamah Agung*, (Bandung: CV. Mandar Maju, 2006), p. 59-60.

⁵⁶ Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT Intermasa, 2010), p. 31.

Regarding authority over common property, there is jurisprudence by the Supreme Court (2691PK/Pdt/1996) which says that any action on joint property by the husband or wife should have the approval of the other spouse. If an action is taken without the requisite consent, the said act is unlawful.

Article 37 of the Marriage Law determines that in the event of divorce, the joint property shall be regulated according to their respective laws. The “law” contemplated herein refers to religious law, customary law, and other laws. Supreme Court Decision No. 1002K/Sip/1976 states that in the case of a divorced husband and wife where property has been divided into two, property does not necessarily become personal property after reconciling the same, but still remains a joint treasure of both. Supreme Court Decision No. 1476K/Sip/1982 also states that according to customary law even if a wife is *nusyuz* (ego or run), she does not lose her right to get her share of the joint property acquired during marriage.

4. Land Ownership by Mixed Marriage Couples

The most fundamental change which occurred in land law is the enactment of the BAL or *Undang-Undang Pokok Agraria*. Before the BAL, land law had a dualistic system (*adat* law and Western law). The BAL explicitly revoked the *Agrarische wet* of 1870, *domainverklaring* (domain declaration), and most of Book II of the Indonesian Civil Code. Article 5 of the BAL states that:

The agrarian law applicable to the earth, water, and airspace is *adat* law provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation, all with due regard to elements which are based on religious law.⁵⁷

Article 5 of the BAL provides that customary law is the basis of land law in Indonesia, but the *adat* law was modified by principles introduced in the BAL.⁵⁸ It is interesting to note that BAL follows the principle of Single Indonesian Nationality. This is reflected firstly in Article 9, paragraph (1), which states that “[o]nly Indonesian citizens can have the most complete relationship with the earth, water, and airspace.” Secondly, in Article 21, which provides that principally, land ownership rights as the most powerful rights are only owned by Indonesian citizens. Thirdly, Article 36 reads as follows: “Those eligible for building rights (*hak guna bangunan*) are as follows: Indonesian citizens, and corporate bodies incorporated under Indonesian law and domiciled in Indonesia.” Foreigners, according to BAL, only have the right of use (*hak*

⁵⁷ Article 5, Law No. 5 Year 1960 concerning The Basic Provisions Concerning The Fundamentals of Agrarian Affairs.

⁵⁸ Sudargo Gautama, Indonesian Business Law, (Bandung: PT. Citra Aditya Bakti, 1995), P. 149.

pakai) and the right to rent land (*hak sewa*) owned by other parties.⁵⁹ This rule also applies to Indonesian nationals who have dual nationalities.⁶⁰

In the case of *Eugene Tilaar v. Jurgen Kunzel*,⁶¹ Mrs. Eugene Tilaar (an Indonesian citizen) bought two pieces of land (the first land with land ownerships rights or *hak milik*, and the second land with building rights or *hak guna bangunan*). Mrs. Eugene Tilaar had a child who was an artist, Nola Tilaar, who lived together with her manager, Jurgen Kunzel. Mrs. Eugene Tilaar made a written statement that the purchase of the two parcels of land along with the house on top was obtained from a potential ex-spouse, Jurgen Kunzel, who was a German citizen. Because of that, Mrs. Eugene Tilaar made a Notarial Deed No. 135 concerning an Irrevocable Statement and Power of Attorney to hand over the house and land to Jurgen Kunzel. In 1982, the relationship between Nola Tilaar and Jurgen Kunzel ended. Mrs. Eugene Tilaar refused to hand over the two plots of land which prompted Jurgen Kunzel to file a lawsuit in court. Jurgen Kunzel asked the court to require Eugene Tilaar to convey the land to him.

The East Jakarta District Court decided in favor of Mrs. Eugene Tilar who refused to convey the subject lots of contrary to Notarial Deed No. 135 concerning an Irrevocable Statement and Power of Attorney. The court reasoned that because Jurgen Kunzel is a foreign citizen, then he cannot own land in Indonesia based on the BAL.

The decision of the Jakarta High Court states that the absolute power of attorney is not valid because it is contrary to the provisions of Article 1335 of the Indonesian Civil Code, as well as Articles 21 and 26 of the BAL. Because it is contrary to the Act, the agreement does not meet the objective requirements for the validity of the agreement⁶² that its purpose be lawful. As a result, it is null and void. Because Jurgen Kunzel is a German citizen, the condition for the power of attorney is a false or forbidden cause. Since it aims to circumvent the provisions of Articles 21 and 26 of the BAL and Article 1335 of the Indonesian Civil Code, the power of attorney is not binding and is null and void.

⁵⁹ BAL art. 21 (3) and 42.

⁶⁰ BAL art. 21 (4).

⁶¹ Decision of East Jakarta District Court No.97 / JT / 1983 / G November 19, 1983. Decision of Jakarta High Court No.63 / PDT / PT DKI dated April 30, 1984.

⁶² Article 1320 Indonesia Civil Code. "To establish a valid contract, four elements are required under article 1320 the Civil Code. They are mutual consent of the parties; legal capacity to contract; a certain subject matter and legal cause. Mutual consent and legal capacity are called subjective requirement that those are related to contracting parties. A certain subject matter and legal cause are classified as objective requirements that they related to contains of contract."

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