

Legal Effects of the Constitutional Court's Ruling Against Marital Agreement in Mixed Marriages

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Abstract: Prior to the issuance of the Constitutional Court (MK) decision Number 69/PUU-XIII/2015, some mixed-marriage couples complained about the state policy that does not allow mixed-marriage couples to own assets, both in the form of building use rights (HGB) and business use rights (HGU). This article examines a marriage agreement made by a mixed marriage couple, namely Indonesian and foreign couples after the Constitutional Court decision Number 69/PUU-XIII/2015. The fundamental issues that is the focus of this article is how is the legal impact of the Constitutional Court Decision Number 69/PUU-XIII/2015 on marriage agreements in mixed marriages? The following findings were obtained using a juridical-normative approach and utilizing Gustav Radburch's theory of the legal purpose: first, after the Constitutional Court decision the perpetrators of mixed marriages had a looser time to make a marriage agreement. They can agree before the marriage contract or during the marriage bond. Second, a marriage agreement made during the marriage period will be valid the moment after it is made, and the separation of the joint property of both parties can immediately follow it. Third, when viewed from the theory of Gustav Radburch's legal objectives, the Constitutional Court Decision has fulfilled the purpose of making law: the realization of justice, certainty, and legal expediency. However, on the other hand, the Constitutional Court ruling has also put third parties in a vulnerable position.

Keyword: *Constitutional Court Decision; legal effect; marriage agreement; mixed marriage*

Abstrak: Sebelum terbitnya putusan Mahkamah Konstitusi (MK) Nomor 69/PUU-XIII/2015, beberapa pasangan perkawinan campuran mengeluhkan kebijakan negara yang tidak memperbolehkan pasangan perkawinan campuran untuk memiliki aset, baik berupa hak guna bangunan (HGB) maupun hak guna usaha (HGU). Artikel ini mengkaji sebuah perjanjian perkawinan yang dilakukan oleh pasangan perkawinan campuran, yaitu pasangan WNI dan WNA pasca Putusan Mahkamah Konstitusi (MK) Nomor 69/PUU-XIII/2015. Persoalan mendasar yang

menjadi fokus artikel ini adalah bagaimana dampak hukum Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 terhadap perjanjian perkawinan dalam perkawinan campuran? Menggunakan pendekatan yuridis-normatif dan memanfaatkan teori tujuan hukum Gustav Radburch diperoleh temuan sebagai berikut: *pertama*, pasca Putusan MK Nomor 69/PUU-XIII/2015, para pelaku perkawinan campuran memiliki waktu yang lebih longgar untuk membuat perjanjian perkawinan. Mereka bisa membuat perjanjian sebelum dilakukannya akad perkawinan ataupun selama dalam ikatan perkawinan. *Kedua*, perjanjian perkawinan yang dibuat dalam masa perkawinan akan berlaku sah pada saat setelah dibuat, dan hal itu bisa langsung diikuti dengan pemisahan harta bersama kedua belah pihak. *Ketiga*, jika dilihat dari teori tujuan hukum Gustav Radburch maka Putusan MK tersebut telah memenuhi tujuan dibuatnya hukum, yakni terwujudnya keadilan, kepastian, dan kemanfaatan hukum. Akan tetapi, di sisi lain, Putusan MK tersebut, juga telah menjadikan pihak ketiga berada dalam posisi rentan.

Kata kunci: *Putusan Mahkamah Konstitusi; akibat hukum; perjanjian perkawinan; perkawinan campuran.*

Introduction

Mixed marriage is a marriage bond carried out between Indonesian citizens (WNI) and foreign citizens (WNA). The provisions regarding mixed marriage are contained in Article 57 of Law No. 1 Year 1974 concerning Marriage (Marriage Law).¹ Prior to the issuance of the Constitutional Court (MK) decision No. 69/PUU-XIII/2015, some mixed-marriage couples complained about the state policy that does not allow mixed-marriage couples to own assets, both in the form of building use rights (HGB) and business use rights (HGU). Problems arise when Indonesian citizens (WNI) and foreign citizens (WNA) marry without a marriage agreement at the beginning of their marriage. Some couples do not understand that after marriage, the property accumulated during marriage will become joint property.²

¹Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage, n.d.

²Joint property is property acquired throughout the marriage from the time the marriage takes place until the marriage ends. Also see in Wahyono Darmabrata and Surini Ahlan Sjarif, "Hukum Perkawinan dan Keluarga di Indonesia," *Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta*, 2004. p. 89

One problem that often arises in mixed marriages is when an Indonesian citizen wants to own land or a house with freehold (Hak Milik) status. Without a marriage agreement, an Indonesian citizen married to a foreigner is not allowed to have assets because there will be a mixture of assets between the two.

Several cases can be found in the judgment of Constitutional Court (Mahkamah Konstitusi, MK). *First of all*, Mrs Ike Farida's experience as an Indonesian citizen who then wanted to buy an apartment in Jakarta. Because the person concerned is married to a foreigner, namely a Japanese man, and in marriage, no marriage agreement is made, Mrs Ike forfeited her right to obtain HGB certificate status. *Second*, a similar case was also experienced by Windy Nurhafifah Ouwerling. Windy is married to a foreigner from the Netherlands. When he wanted to buy a house with HGB certificate status in Batam City in cash, the notary refused to change the name, even though the developer had received the payment process. These two cases are just a few examples of the consequences of a mixed marriage.

Many studies have focused on marriage agreements after the issue of the Constitutional Court ruling, especially related to marriage agreements for perpetrators of mixed marriages. However, there still needs to be more focus on the legal consequences, benefits, and disadvantages obtained after the Constitutional Court decision No. 69/PUU-XIII/2015 issuance for mixed marriage actors in making marriage agreements. Several studies related to this issue have been conducted but do not elaborate specifically on the legal consequences and benefits for perpetrators of mixed marriages. Research conducted by Eva Dwinopianti, for example, examines the implications of the Constitutional Court decision Number 69/PUU-XIII/2015 and the legal consequences of making a marriage agreement after the Constitutional Court decision on the status of the property and third parties, which according to her will cause a loss.³

and Zikri Darussamin and Armansyah Armansyah, "Hak Harta Bersama Bagi Istri Yang Bekerja Perspektif Maqashid Asy-Syari'ah," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no. 2 (2017), pp. 345–65.

³Eva Dwinopianti, "Implikasi Dan Akibat Hukum Putusan Mahkamah Konstitusi Nomor 69/Puu-Xiii/2015 Terhadap Pembuatan Akta Perjanjian

Another study on marriage registration after Suhaila Zulkifli conducted the Constitutional Court ruling. He examined the issue of the implementation of the marriage agreement before the issuance of the Constitutional Court decision Number 69/PUU-XIII/2015 and the legal consequences of the implementation of the marriage agreement after the decision. He found that a positive law regarding the marriage covenant underwent a very significant change, as well as the norm of the time of manufacture changed to "within the marriage bond".⁴ In addition, there is a writing by Putri Safitry who explains that the marriage agreement after the Constitutional Court decision number 69/PUU-XIII/2015 is a means of legal protection for women who have entered into mixed marriages.⁵ The following research was conducted by Dian Ety Mayasari, who examined the marriage agreement after the Constitutional Court Number 69/PUU-XIII/2015 decision. In the paper, he argued that the decision of MK 69/PUU-XIII/2015 had expanded the understanding and scope of marriage agreements stipulated in the Marriage Law. The expansion occurred at the time of making the marriage agreement's content.⁶

In contrast to existing studies, this paper examines the legal consequences of marriage agreements made after the Constitutional Court decision number 69/PUU-XIII/2015, along with the benefits and disadvantages of the issue of the Constitutional Court decision number 69/PUU-XIII/2015. This paper is based on primary and secondary data at the same time. The primary data of this paper is based on the law and Constitutional Court Decision Number 69/PUU-XIII/2015. At the same time, secondary data is in the form

Perkawinan Setelah Kawin Yang Dibuat Di Hadapan Notaris," *Lex Renaissance* 2, no. 1 (2017), pp. 16–34.

⁴Suhaila Zulkifli, "Implementasi Dan Akibat Hukum Perjanjian Perkawinan Setelah Keluarnya Putusan MK NO. 69/PUU-XIIX/2015," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* 17, no. 3 (2018), pp. 211–17.

⁵Putri Safitry, Sri Turatmiyah, and Dian Afrilia, "Perjanjian Perkawinan Sebagai Sarana Perlindungan Hukum Bagi Perempuan Perkawinan Campuran Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015" (Sriwijaya University, 2020).

⁶Dian Ety Mayasari, "Tinjauan Yuridis Tentang Perjanjian Perkawinan Setelah Adanya Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no. 1 (2017), pp. 79–93.

of scientific works, in the form of books, journal articles, theses, and other scientific works.

Mixed Marriage and the Practice of Marriage Agreements in Indonesia

Before discussing the consequences of mixed marriage, this section will first explain the benefits of mixed marriage and marriage agreements.

In Indonesia, mixed marriages have several forms. In this case, Hilman distinguishes them into three, namely.

- 1) Mixed marriage between nationalities is a marriage between two people in Indonesia who are subject to different laws due to differences in nationality, and one of the parties is an Indonesian citizen;
- 2) Mixed marriage, in customary law, is a marriage that occurs because the customs between the husband and his wife are different, either in the unity of customary law communities in a region or because of different origins and ethnicities;
- 3) Mixed marriage between religions, namely the marriage of a man and woman who adhere to different religions while maintaining their respective religions.⁷

Thus, mixed marriage can be understood as marriage between two people subject to different laws, between two people subject to different customary laws, or between people of different religions.

In Dutch, mixed marriages are known as *Regeling op de Gemengde Huwelijken* (GHR). The Dutch made the rules on mixed marriages in Indonesia to overcome the occurrence of many marriages between people subject to different laws, such as native Indonesians and Chinese.⁸

In Islamic law, mixed marriages only concern marriage between two people of different beliefs and religions. Marriage

⁷Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama* (Bandung: Mandar Maju, 2007), p. 12.

⁸Taufiqurrohmah Syahuri, *Legislasi Hukum Perkawinan Di Indonesia: Pro-Kontra Pembentukannya Hingga Putusan Mahkamah Konstitusi* (Kencana Prenada Media Group, 2013), p. 79.

between two persons of different nationalities is not known in Islamic law. The law of conducting mixed marriages in Islam is divided into two, namely, marriage between a Muslim with the Ahl al-Kitab and the marriage of a Muslim with non-Ahl al-Kitab, namely infidels and polytheists. In Islam, the marriage of a Muslim to an infidel and polytheist (other than the Ahl Kitab) is forbidden; both the woman and the man are the polytheist and the man the Muslim and the woman the infidel. It is based on the word of Allah in QS. al-Baqarah verse 221 and QS. al-Mumtahanah [60]: 10, which asserts that a Muslim man is forbidden to marry a polytheist woman, and likewise, a Muslim woman is forbidden to marry a polytheistic man.⁹ Quraish Shihab in *Tafsir Al-Mishbah*, idolatrous people perform shirk, associating something with something else. As for a mushrik, the conception of Islam is to believe that there is God with Allah. Therefore, according to Quraysh Shihab, Christians who believe in the Trinity are polytheists from the above point of view.¹⁰

As for the marriage of a Muslim with Ahl al-Kitab, QS. al-Maidah [5] verse 5 implies that Allah allows Muslim men to marry Ahl al-Kitab women. However, it does not apply the other way around: Muslim women are still not allowed to marry Ahl al-Kitab men. However, scholars differ on the limits of the permissibility of Muslim men to marry Ahl al-Kitab women. The Maliki and Shafi'i schools, for example, absolutely allow the marriage of Muslim men to Ahl al-Kitab women. It is just that according to the two, such a marriage is makruh. While the Hanafi school holds that the permissibility of a Muslim man to marry an Ahl al-Kitab woman is when the woman is or lives in a peaceful country. On the other hand, if the woman lives in the enemy's land (*Dār al-Harb*), then the marriage of a Muslim man to an Ahl al-Kitab woman is forbidden.¹¹

Seeing the development of the times and the increasing mobility of society, it does not rule out the possibility that more and more Indonesian and foreign couples are getting married. Such

⁹ QS. al-Baqarah [2]: 221 and QS. al-Mumtahanah [60]: 10.

¹⁰M. Quraish Shihab, *Tafsir Al-Mishbah: Pesan, Kesan dan Keserasian Al-Qur'an* (Jakarta: Lentera Hati, 2002), pp.472-473.

¹¹Fuad Mustafid, "Perkawinan Beda Agama dan Kebebasan Individual dalam Islam: Perspektif Teori Naskh Mahmoud Muhammad Thaha", *Musawa: Jurnal Studi Gender dan Islam* 10, no. 2 (2011), pp. 229-247.

marriages are referred to as mixed marriages. Before the issuance of the Marriage Law, Indonesia had 3 (three) legislative products related to mixed marriage, namely: *first*, the Civil Code (*Burgelijk Wetboek*); *second*, the Mixed Marriage Ordinance (HOCl) S. 1933 No. 74; *third*, the Regulation of Mixed Marriages (*Regeling og de gemengde Huwelijke* S.1989 No. 158).¹²

Meanwhile, in Law Number 1 of 1974 concerning Marriage, it is explained that what is meant by mixed marriage is a marriage carried out between two people who are in Indonesia but are subject to different laws due to differences in nationality. One of the parties is an Indonesian citizen.¹³

A marriage can be called a mixed marriage if it meets the following four elements: (1) Marriage is between a man and a woman. (2) Subject to different laws. (3) There are differences in nationality involving spouses of foreign nationals. (4) One of the parties must be an Indonesian citizen.¹⁴ The legal relationship between the two is different because both are subject to different legal systems. Cases of mixed marriages are found in Indonesia, especially among artists, such as Kridayanti (an Indonesian citizen) with Raul Lemos (a foreigner from Timor Leste); and Bunga Citra Lestari (an Indonesian citizen) and Alm. Ashraf Sinclair (as a Malaysian foreigner).

Mixed marriages have several legal consequences, including the husband or wife acquiring new citizenship from the spouse's home country. However, he will also lose his citizenship as an Indonesian citizen.¹⁵ Other legal consequences regarding the property in his possession. The Marriage Law defines marital property as property acquired during the marriage.¹⁶ Meanwhile, in the Civil Code (KUH Perdata), wealth is interpreted broadly,

¹²M. Idris. Romulyo, *Beberapa Masalah Tentang Hukum Acara Perdata Peradilan Agama Dan Hukum Perkawinan Islam* (Jakarta: Ind.Hill-Co, 1992), pp. 196.

¹³Article 57 of Law Number 1 of 1974 concerning Marriage.

¹⁴Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

¹⁵MR. Martiman, *Hukum Perkawinan Indonesia* (Jakarta: CV Karya Gemilang, n.d.), p. 16.

¹⁶ Article 35, Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

including objects and property rights, including intangible receivables and property rights.¹⁷

According to Subekti, a marriage agreement is an agreement regarding the property of the husband and wife during the marriage.¹⁸ Meanwhile, according to Soetojo and Asis, marriage agreements are made or intended to regulate the consequences of marriage on their property.¹⁹

In Article 29 of the Marriage Law, joint property in a marriage is part of the discussion in the marriage agreement. However, the marriage agreement itself is included after the discussion of property in marriage.²⁰ A marriage agreement is not an agreement made in order to prepare for divorce. However, people often assume that the marriage agreement is made to prepare for divorce. Despite the negative perceptions that develop in society, the marriage agreement benefits from providing legal protection for the property of the husband and wife during the marriage bond or after divorce.

In the marriage, the bond is known as joint property. Shared property is said to be liquid (*gono-gini*), property obtained by husband and wife during their high school life. This joint property does not include property because it was acquired and owned before the marriage.²¹ This joint property applies to all types of marriages. Therefore, in mixed marriages, Indonesian citizens who carry out mixed marriages cannot have Property Rights, Business Use Rights, or Building Use Rights. This is because the joint property will arise in a marriage, which causes foreigners to own these assets. Therefore, when an Indonesian citizen has a mixed marriage and plans to have assets, he needs to make a marriage agreement so there is no property mixing. An Indonesian citizen needs to make a

¹⁷H S Salim, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2002), p. 64.

¹⁸R. Subekti dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, p. 9.

¹⁹Soetojo dan Asis, *Hukum Orang Dan Keluarga* (Bandung: Penerbit Alumni, 1987), p. 57.

²⁰Article 29, Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage.

²¹Pusat Bahasa Kemdikbud, "Kamus Besar Bahasa Indonesia (Jakarta: Pusat Bahasa Departemen Pendidikan Nasional, 2011).

marriage agreement to get ownership rights of an asset, such as property or land.

If the perpetrator of a mixed marriage does not have a marriage agreement, in the case of separation of property, the Indonesian citizen can still be the holder of the Right to Use, which is the right to use or collect proceeds from land directly controlled by the state or land owned by others, which authorizes obligations and is determined in the decision given by the authorized official.²² Therefore, it does not matter, even if one of the two is still a foreigner, as long as the Indonesian citizen does not want asset ownership in HGU (Hak Guna Usaha) or HGB (Hak Guna Bangunan).

If the husband and wife have a marriage agreement, the status of land rights owned by the husband and wife in a mixed marriage can still be owned. However, if there is no marriage agreement and the right to the land is in the form of inheritance land, within a maximum period of 1 (one) year, the land must be transferred. Because if the land is not immediately transferred, then the status of land rights passes to the state.²³ If the Indonesian citizen has a marriage agreement containing the separation of property, he can have the right to the land using his name. Weak public knowledge in land dispute cases is generally due to a need for more public awareness or understanding of laws in the land sector. Therefore, care and accuracy are needed if you want to obtain legal certainty in the implementation of land registration.²⁴

Indonesian citizens who are still Indonesian citizens can still enjoy all land rights in Indonesia. However, if a mixed marriage perpetrator wants to own an asset in his name, he must have a marriage agreement. Thus, marriage registration is necessary to preserve rights and obligations in marriage, not as mere administrative completeness. It has both legal and religious

²²Jayadi Setiabudi, *Pedoman Pengurusan Surat Tanah Dan Rumah Beserta Perizinnannya*, 19 (Yogyakarta: Penerbit Buku Pintar, 2015), p. 55.

²³Aislie Anantama Septiawan, "Perjanjian Perkawinan Pada Perkawinan Campuran Dalam Kepemilikan Tanah Di Indonesia," *Lambung Mangkurat Law Journal* 2, no. 1 (2017), p. 68.

²⁴Zainuddin, "Idealisasi Pembuatan Akta Tanah Guna Menjamin Kepastian Hukum," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no. 1 (2017), pp. 149–70.

implications.²⁵ However, in mixed marriages, a marriage agreement can also be necessary if the person bound by it wants exclusive rights.

Thus, the marriage agreement has a crucial function and position, even more so in mixed marriages. The function of marriage agreements in mixed marriages, especially related to the separation of property, is to protect the property rights of Indonesian citizens, such as the right to own land with property rights status. In addition, it can also be a solution if, in the future, there is something undesirable. Because there is freedom in determining the content of the marriage agreement, everyone who wants to make a marriage agreement must pay attention to the existing clauses, especially regarding land derived from property. This is important to note to provide legal certainty for the property of one of the parties. If there is a future problem, the property has been stipulated in the marriage agreement.

Marriage Agreement before Constitutional Court Decision No.69/PUU-XIII/2015

Before issuing the Constitutional Court (MK) ruling, provisions on marriage agreements were regulated in Islamic Law, the Civil Code, the Marriage Law, and the Compilation of Islamic Law (KHI). However, there needs to be an adequate explanation of the meaning or significance of the marriage covenant. Concerning the marriage agreement, Yahya Harahap stated as follows:

The marriage agreement is made at or before the marriage takes place and by mutual consent. The marriage agreement is in writing and ratified by the marriage registrar. The agreement cannot be ratified if it violates the limits of law, religion, or decency. The agreement enters into force from the moment the marriage takes place, and the content of the agreement can only be changed if both parties want an agreement to change it.²⁶

²⁵Mesraini Mesraini, "Praktik Perkawinan Bawah Tangan Di DKI Jakarta," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no. 2 (2017), p. 251–86.

²⁶M. Yahya Harahap, *Pembahasan Hukum Perkawinan Nasional* (Medan: CV Zahir Tranding Co, 1975), p. 84.

In Islamic law, marriage is not an ordinary covenant. It is a strong covenant (*miṣāqan ghalīẓan*). This phrase implies that the agreement's content should not contradict the law. The phrase *miṣāqan ghalīẓan* is taken from QS. an-Nisa (4): 21. In *Tafsir Al-Maraghi*, it is explained that in this verse, Allah wants to awaken people with a question, "How do they allow themselves and want to take this right from women, after the relationship between husband and wife begins to be established with a bond?" Each is a part of the other, so the husband should not take the dowry given.²⁷

Sayyid Sabiq, in the book of *Fikih Sunnah*, states that there are at least three points that must be fulfilled in the agreement: *first*, it does not violate the agreed law and shari'a; *second*, it must be equally sincere and willing because coercion does not include the will and there is no respect for the contract (agreement) so that it does not full fill the validity of the agreement; and *third*, the agreement must be clear and straightforward, there is no complexity that causes disputes at the time of application.²⁸ If you look at the above points, the essence of a covenant in Islam is that it is made without violating the law, done sincerely, and made clear. Although there are no significant rules regarding marriage covenants in Islam, the above points can be referenced when making a marriage agreement.

While in the Civil Code, the marriage agreement is regulated in Articles 147-154. Article 147 states that the marriage agreement must be made by notarial deed and executed before marriage. If this is not done this way, the agreement is considered void. Article 148 of the Civil Code explains that an amendment to the agreement can only be made before the marriage takes place. Meanwhile, Article 149 of the Civil Code clearly states that the marriage agreement must not be changed in any way.

If you look at the provisions above, it is clear that making a marriage agreement in terms of time is very limited because it can only be made before the marriage takes place. Regarding content, the marriage agreement cannot be changed flexibly due to time constraints. Therefore, a marriage agreement can only be made or

²⁷Ahmad Mustafa. Al-Maraghi, *Terjemahan Tafsir Al-Maraghi* (Semarang: PT Toha Semarang, 1986), p. 389.

²⁸Sayyid Sabiq, *Fikih Sunnah*, translated by Moh. Talib (Jakarta: Cakrawala Publishing, 2009), p. 116.

amended before the marriage occurs, that is before the marriage contract is carried out.

The Marriage Law regulates marriage agreements in only one article, namely Article 29. The article explains the following: *First*, a marriage agreement can be made before or during marriage. *Second*, a marriage agreement is made in writing, and during the marriage, the marriage agreement cannot be changed unless the couple desires a change and the change does not harm a third party. *Third*, the marriage agreement is made freely, in the form of an authentic deed or a deed under hand.

The Compilation of Islamic Law (KHI) does not explain the meaning of the marriage agreement. KHI only mentions that the agreement in question is not a unilateral agreement. KHI allows for a marriage agreement as stipulated in Articles 45 to 52. KHI states that couples can enter into a marriage agreement in 2 (two) forms, namely in the form of taklik talaq and other agreements that do not contradict Islamic law.

Islamic law recognizes a marriage agreement as taklik talaq, a unilateral declaration of will from the husband. It is immediately pronounced after the marriage contract occurs and is listed in the marriage certificate book.²⁹ However, the marriage agreement is made and carried out separately from the marriage contract, so there is no legal relationship between the legally executed marriage contract and the implementation of the conditions specified in the agreement. Therefore, if the marriage agreement is not fulfilled, it will not cause the cancellation of the marriage contract.³⁰ Thus, the marriage agreement in the KHI consists of two kinds: marriage agreements in the form of taklik talaq and other agreements made without violating Islamic law.

Marriage Agreement after Constitutional Court Decision Number 69/PUU-XIII/2015

The original purpose of establishing the regulation on marriage agreements was to regulate property in marriage. However,

²⁹Sayuti Talib, *Hukum Kekeluargaan Indonesia* (Bandung: PT Refika Aditama, 2016), p. 106.

³⁰Amir Syarifuddin, *Hukum Kewarisan Islam*, 5th ed. (Jakarta: Prenadamedia Group, 2015), p. 146.

the issuance of the Constitutional Court ruling has expanded the substance of the marriage agreement. The judgment covers marital property and other matters covered therein, as long as both parties agree and do not harm third parties.

Each spouse is free to make a marriage agreement, including things mutually agreed upon in the agreement. However, certain things should not be in the marriage agreement, namely:

- 1) Abolishing the power of the husband as the head of the marriage or the power of the father;
- 2) The husband will bear a larger share in assets than the passive. That is, do not let the wife benefit herself from the loss of third parties;
- 3) Foreign laws will control the relationship between husband and wife.³¹

Mahkamah Constitutional Court has conducted a judicial review of several articles that have been requested, namely: Article 21 paragraph (1), paragraph (3), and Article 36 paragraph (1) of the Basic Agrarian Law (UUPA/Undang-Undang Pokok Agraria); and Article 29 paragraph (1), paragraph (3), paragraph (4) and Article 35 paragraph (1) of the Marriage Law. These articles are considered by perpetrators of mixed marriages as detrimental and deprive them of their rights as Indonesian citizens due to having entered into mixed marriages.³²

The applicant submitted several articles that were considered to eliminate the rights of Indonesian citizens, such as Article 21, paragraph (1) in the UUPA. The verse reads, "Only Indonesian citizens can have Hak Milik." Through this article, the perpetrator of mixed marriages feels aggrieved because he cannot buy a property to be used as property. This is because Indonesia has rules in terms of land ownership. This is contained in Article 1, paragraph (1) of the UUPA, which states that "The entire territory of Indonesia is the

³¹I Ketut O. S., *Hukum Perorangan Dan Kebendaan* (Jakarta: Sinar Grafika, 2016), p. 54.

³²Putusan Mahkamah Konstitusi Republik Indonesia Nomor 69/PUU-XIII/2015 (n.d.).

unity of the homeland of all Indonesian people."³³ Looking into the principle of nationality, which restricts land traffic, it is clear that Article 1 paragraph (1) of this Law only gives Indonesian citizen rights in land ownership. Thus, there is no right for foreigners to own land.³⁴

Furthermore, Article 21, paragraph (3) of the UUPA:

"Foreigners who, after the enactment of this law, acquire property rights due to testamentary inheritance or mixing of property by marriage, as well as Indonesian citizens who have property rights and after the entry into force of this law lose their citizenship, must relinquish such rights within one year of the acquisition of such rights or loss of such citizenship. If, after that period, the property is not relinquished, it shall cease to be abolished by law, and the land shall rest with the state, provided that the rights of others encumbering it shall continue."³⁵

Article 21, paragraph (3) of the UUPA, according to the perpetrators of mixed marriages, has deprived them of their right to own land. The article aims to ensure that land ownership, control, and utilization through mixed marriages do not fall to foreigners or foreigners. Therefore, Indonesian citizens who have mixed marriages with foreigners or have given up their status, starting from one year when they lose their status as Indonesian citizens, must relinquish their property rights to the land, or these rights fall to the state.

The last UUPA article requested for judicial review is Article 36, paragraph (1). The article explains that those who can have the right to use buildings are only Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia.³⁶

³³Basic Agrarian Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles (n.d.).

³⁴Tuti Susilawati Kartadimadja and Janet Elizabeth Tenges, "Analisis Keabsahan Kepemilikan Tanah Oleh Orang Asing Di Indonesia (Studi Kasus Nomor: 9/Pt. G/2018/PN. SKB)," *Jurnal PALAR (Pakuan Law Review)* 6, no. 01 (2020), pp. 28–52.

³⁵Article 21 Paragraph (3) Basic Agrarian Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

³⁶ See Article 36 paragraph (1) Basic Agrarian Law.

Through this article, the perpetrators of mixed marriages feel that their rights are eliminated because a mixture of property is considered joint property. This seems to make him a foreigner.

In addition to the articles in the UUPA, there are other articles requested in the judicial review, namely articles in Law Number 1 of 1974 concerning Marriage. The articles in question are Article 29, paragraph (1), paragraph (3), paragraph (4), and Article 35, paragraph (1) of the Marriage Law.

Article 29, paragraph (1) explains that a marriage agreement can only be made at or before the marriage is carried out by mutual consent and ratified by the marriage registrar officer, the contents of which also apply to the third party concerned.³⁷ The article is considered detrimental to the perpetrators of mixed marriages, so it is requested for a material review.

The perpetrators of mixed marriages objected to the existence of the article because it made it difficult for them to make a marriage agreement after the marriage contract was carried out. Many mixed marriage actors need to be made aware of the importance of making a marriage agreement, especially regarding the separation of property. In the concept of property ownership, especially after marriage and without an agreement, the property will become joint.

Article 29 paragraph (3), also requested for judicial review, implies that the agreement shall enter into force from the moment the marriage occurs.³⁸ The aims and objectives of Article 29 paragraph (3) certainly return to the aims and objectives in Article 29 paragraph (1). Meanwhile, Article 29 paragraph (4) explains that during the marriage, the marriage agreement cannot be changed unless there is agreement from both parties to change and certainly does not harm the third party.³⁹

Article 29 paragraph (1), paragraph (3), and paragraph (4) have a relationship with one another. The essence of the three articles is that the perpetrators of mixed marriages who have entered into a marriage contract can no longer make a marriage agreement.

³⁷See Article 29 paragraph (1) Basic Agrarian Law.

³⁸See Article 29 paragraph (3) Basic Agrarian Law.

³⁹See Article 29 paragraph (4) Basic Agrarian Law.

In addition, the marriage agreement that has been made is also only possible to change if there is agreement from both parties to change and certainly does not harm the third party. These articles certainly deter the perpetrators of mixed marriages who, before the marriage contract, did not have time to make a marriage agreement, which was considered detrimental to them.

The last article requested for judicial review by the Constitutional Court is Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage. Article 35 paragraph (1) contains material about property in marriage. The article explains that property acquired during the marriage will become joint property. The article is requested to be tested because if a person has entered into a marriage without agreeing to the separation of property, the property they own will blend and be known as joint property.⁴⁰

The initial problem for the perpetrators of mixed marriages is when they do not make a marriage agreement before the marriage contract is carried out so that when one partner has an asset, the asset will be mixed and become the property of the husband and wife. Therefore, when a husband and wife in a mixed marriage have a property that is not separated, it becomes joint property. Meanwhile, Articles 21 and 36 of the UUPA affirm that Indonesian citizens can only own Property Rights and Building Use Rights. Therefore, foreigners are not allowed to have this right.⁴¹

The articles submitted for material review are partly included in the judgment so that changes occur. This is following what was pleaded by the Applicant. However, other articles, namely Article 21 paragraph (1) and paragraph (3) and Article 36 paragraph (1) of the Basic Agrarian Law, also submitted by the Applicant, still need to be granted. Likewise, Article 35, paragraph (1) of the Marriage Law, which discusses joint property, is also not granted. The Constitutional Court felt that the UUPA had the right intent and purpose. If there are changes to these articles, it will be a problem for the state and Indonesian citizens, primarily related to the possibility of foreign asset control.

⁴⁰See Article 35 paragraph (1) Law Number 1 of 1974 concerning Marriage.

⁴¹Article 21 and 36 Basic Agrarian Law.

Thus, foreigners do not have the right to own land ownership rights in Indonesia. They are only allowed to have a house for a residence or dwelling or apartment, but with several conditions, namely: *first*, have a stay permit in Indonesia; *second*, land ownership only with a right to use the certificate with a period of only 30 years, while Indonesian citizens are only 25 years; *third*, must not own more than one plot/person or one plot/family and not more than 2,000m²; *fourth*, ownership at the price of houses or apartment units is limited by the provincial government.⁴²

Legal Effects After the Constitutional Court Decision Number 69/PUU-XIII/2015 on Marriage Agreements in Mixed Marriages

A law that is born will undoubtedly give rise to cause and effect.⁴³ The issuance of Constitutional Court Decision (MK) Number 69/PUU-XIII/2015 was due to a request for judicial review from Mrs. Ike Farida, an Indonesian citizen who carried out mixed marriages. The legal consequences arising after the issuance of Constitutional Court Decision Number 69/PUU-XIII/2015 are:

- 1) The law stipulates that it is permissible to make a marriage agreement before the marriage is performed or during the marriage. The birth of this Constitutional Court decision has legal consequences on marriage agreements that can now be made during or during the marriage period.
- 2) A marriage agreement made before and during the marriage period is declared valid and valid the moment after the agreement is made, followed by the separation of the joint property of both parties.
- 3) Legal consequences against third parties. Suppose the marriage agreement is not registered, and the third party is not registered or ratified by the marriage registrar. In that case, the marriage agreement has no binding force against the third party.
- 4) Children of mixed marriages who have dual nationality and receive an inheritance without a will also get legal

⁴²Gunanegara, *Mengenal Hukum Agraria Dan Real Estate Law* (Jakarta: Tatanusa, 2018), p. 212.

⁴³Soeroro, *Pengantar Ilmu Hukum* (Jakarta: Sinar Grafika, 2006). h. 295.

consequences even though both parents have separated property. This is because there is a regulation in Article 21 paragraph (3) of the UUPA which states that children resulting from mixed marriages cannot own land with the status of Hak Milik, except because there is an inheritance that is limited to 1 (one) year and must relinquish the right within one year of obtaining the right or renounce their foreign nationality.⁴⁴

Looking at the explanation above, the marriage agreement for mixed marriage couples is fundamental to protect their rights. If the decision of the Constitutional Court is analyzed using the legal concept of Gustav Radbruch, it can be explained as follows.

Gustav Radbruch's concept of law uses three general teachings: justice, expediency, and legal certainty. Therefore, Radbruch defined law as the complex of *general precepts for the living together of human beings*. These three legal teachings help us determine the law's content and the outcome of different views in different countries. Radbruch also said that the essence of justice is equality. Thus, justice is fundamental in teaching the law, undoubtedly directed toward equality.⁴⁵

The aspect of justice achieved in the Constitutional Court Decision is related to the time allowance in making a marriage agreement, which does not have to be made before the marriage takes place but can also be made during the marriage period. The Constitutional Court ruling affirms that marriage agreements made before or during the marriage period are equally valid and have legal force. However, another side felt not to provide the value of justice, such as applying marriage agreements to third parties. The marriage law only stipulates that if the marriage registration officer has ratified the marriage agreement, the marriage agreement can only be binding on third parties.

The meaning of legal certainty in Radburch's concept is that the law must follow the reality that arises in society and the needs of

⁴⁴Dian Andriani, Bambang Santoso, and Oksidelfa Yanto, "Pemisahan Harta Perkawinan Campuran Dan Akibat Hukumnya Jika Diwariskan Tanpa Wasiat Pada Anak Berkewarganegaraan Ganda," *Jurnal Lex Specialist* 1, no. 1 (2020).

⁴⁵Association of American Law Schools. Editorial Committee et al., *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press, 1950), p. 72.

society. If it is related to the intention in the Constitutional Court Decision, the legal certainty manifests itself following the reality needed by the perpetrators of mixed marriages.

While on the value of usefulness, Radbruch stated that the value of expediency has a high and good purpose in a law.⁴⁶ Meanwhile, it is related to the Constitutional Court ruling. In that case, the benefit is that mixed marriage actors can make marriage agreements at any time without time limits, such as before the Constitutional Court decision. So if they have yet to plan to make a marriage agreement at the beginning of the marriage, then in the middle of the marriage, they can make a marriage agreement. This means that the legal objectives in this decision have been well achieved because initially, the agreement could not be made within a specific time; now, the agreement can be made at any time.

However, on the other hand, the ruling is also still considered to have no benefit to third parties. For example, when a husband and wife enter into a credit agreement with a bank, with a guarantee of a house that was initially joint property, but then in the middle of a marriage, they make a marriage agreement that regulates the separation of property and divides their property into their respective control. On this basis, if there is a change in the ownership status of the house used as credit collateral, the bank's position as a creditor will be vulnerable to harm because, in the event of default, the bank will not efficiently execute the collateral object.⁴⁷ This still needs to be solved to find a solution.

Conclusions

This article has reviewed and analyzed the legal consequences of Constitutional Court (MK) Decision Number 69/PUU-XIII/2015. From the explanation in the arts, it can be concluded as follows. *First*, the perpetrators of mixed marriages are given the flexibility to make a marriage agreement, either before the marriage contract is carried out or during the marriage bond. The marriage agreement is declared valid and has legal force for the parties who make it. *Second*, a marriage

⁴⁶Anton-Hermann Chroust, "The Philosophy of Law of Gustav Radbruch," *The Philosophical Review* 53, no. 1 (1944): 23–45.

⁴⁷Yudiana Dewi Prihandini, "Perlindungan Hukum Terhadap Pihak Ketiga Atas Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan," *Lex Renaissance* 4, no. 2 (2019): 354–66.

agreement made during the marriage period is valid the moment after it is made, and the separation of the joint property of both parties can immediately follow it. *Third*, the Constitutional Court's decision regarding marriage agreements binding on third parties has put third parties in a vulnerable position.

If the Constitutional Court decision Number 69/PUU-XIII/2015 is associated with Gustav Radburch's theory of legal objectives, it can be stated that the Constitutional Court Decision has fulfilled the purpose of making law, which includes aspects of justice, certainty, and expediency. The aspect of justice in the Constitutional Court Decision lies in the loose time given to the perpetrators of mixed marriages. They can make a marriage agreement before entering into a marriage contract and make it during their marriage. The aspect of legal certainty lies in its conformity with the reality required by the perpetrators of mixed marriages. While the expediency aspect is that mixed marriage couples can separate property from their spouses. Thus, Indonesian citizens who engage in mixed marriages also retain rights to assets, such as land, which Indonesian citizens can only own.

Conflicts of Interest

The author has no conflict of interest with any party in writing this article.

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