



Marital Property in Marriages of Different Nationalities in Indonesia According to National Law and Islamic Law

History of Author	Abstract
<p>Bani Syarif Maula^{1*}, Muhammad Fuad Zain², Syifaun Nada³</p> <p>^{1,2,3} Universitas Islam Negeri Profesor Kiai Haji Saifuddin Zuhri Purwokerto</p> <p>Corresponding Author: ✉ ¹banisyarifm@uinsaizu. ac.id, ✉ ²fuad.zain@uinsaizu.ac.id, ✉ ³syifaunnada@uinsaizu. ac.id</p> <p>DOI: https://doi.org/10.24090/el-aqwāl.v3i1.10508</p>	<p><i>Indonesian legislation stipulates that individuals from foreign countries residing in Indonesia and foreign legal entities with representatives in the country are expressly barred from possessing land. This provision poses challenges for individuals in marriages involving different nationalities, particularly when one spouse is an Indonesian citizen, as it complicates the process of acquiring ownership rights and building usage rights for a property. This research explores the legal regulations pertaining to communal property in marriages involving individuals of distinct nationalities, navigating the intersection between national law and Islamic law. Employing qualitative research methods with a normative approach, the study relies on legal materials as primary data sources. The findings of this study indicate that, in accordance with national law, assets acquired during the course of marriage are deemed joint property. Nonetheless, it is noteworthy that this provision does not extend to communal assets in the form of land and buildings for foreign spouses. Conversely, Islamic law does not explicitly delve into this matter. Nevertheless, it delineates that the resolution of joint property in marriages encompassing individuals of diverse nationalities is governed by national laws pertaining to citizenship rights. In the case of foreign citizens, the relevant statute is the Agrarian Law, which specifically governs ownership rights concerning land and buildings.</i></p> <p>Keywords: Marital property, Marriage law, Different nationalities, Indonesian law</p>

Introduction

The regulations governing ownership rights to land and buildings in a country for foreign citizens are determined by the laws of that particular nation. This includes provisions pertaining to the ownership rights of land and buildings, referred to as “property” in this study, arising from joint marital assets. The age of globalization necessitates legal frameworks that can serve as the foundation for all citizen activities. Advancements in communication technology, migration, and enhanced travel convenience can broaden the opportunities for individuals to engage in cross-border marriages.¹ Indonesia is a region where numerous transnational marriages, also referred to as mixed marriages, take place. These are unions between two individuals who, in the Indonesian context, are subject to distinct legal systems owing to differences in nationality, with one of the parties being an Indonesian citizen.² The phenomenon of mixed marriages is discernible in the attributes of transnational spaces and the resultant social structures that evolve within these environments. This is particularly evident in regions such as Bali Province, where transnational spaces attract diverse individuals from various countries. Being an internationally renowned tourist destination, this province witnesses a considerable number of mixed marriages, bringing together Indonesian citizens

¹ Katharine Charsley, *Transnational Marriage: New Perspectives from Europe and Beyond* (London: Routledge, 2013), 5.

² Article 57 of Law Number 1 of 1974 concerning Marriage.

and foreign nationals. According to the Association of Indonesian Mixed Marriage Communities, there were over 1200 registered cases of foreigners participating in mixed marriages in Bali within their community.³

Marriages involving individuals of different nationalities are frequently linked not solely to social, cultural, and economic considerations but also encompass more extensive political dimensions, including issues such as nationalism, globalization, transnationalization, international migration, human trafficking, vertical social mobility, and the establishment of symbolic boundaries between ethnic groups, religious denominations, or social classes.⁴ Nevertheless, concerning the individuals entering into matrimony, namely the husband and wife, each is subject to legal responsibilities, rights, and obligations as stipulated by the law.

The marital partners bear the responsibility of upholding the household, which constitutes the fundamental unit of every society. The rights and duties of a wife must harmonize with those of her husband in both domestic life and social interactions within the community. In the Indonesian context, the husband is acknowledged as the head of the family, with the wife traditionally assuming the role of the homemaker. In his capacity as the head of the family, a husband is obligated to safeguard his wife and cater to the household necessities to the best of his abilities. Simultaneously, a wife is mandated to efficiently oversee domestic affairs. The distinct allocation of responsibilities between spouses results in each partner possessing equal entitlements to the property acquired throughout the marriage. In accordance with Indonesian law, in instances where either the husband or wife neglects their obligations, the couple has the option to petition the court for a suitable resolution, enabling them to assert a fifty percent share of the communal property.⁵

In Indonesia, akin to various other jurisdictions, marriage bears legal implications for the assets of both spouses, encompassing gifts, inheritances, and properties acquired during the marriage. Additionally, there are legal ramifications for the disposition of these assets in the event of a divorce. Assets individually brought into the marriage by the husband and wife, along with assets acquired through gifts or inheritance by each party, maintain their distinct ownership status unless explicitly agreed upon otherwise by the individuals involved. Each party retains exclusive rights and interests in their respective properties, regardless of the nature of such assets, upon the divestiture of said individual properties. Assets procured during the course of a marriage become shared property between the husband and wife. Both the husband and/or wife possess legal authority to utilize these assets, contingent upon the mutual consent of both parties. As stipulated by Law Number 1 of 1974 regarding Marriage (hereinafter referred to as the Marriage Law), such assets are referred to as joint assets. Article 35 of the Marriage Law explicitly asserts that assets acquired during marriage assume the status of joint property. Should the marriage dissolve through divorce, the disposition of joint assets must be administered in accordance with prevailing laws in Indonesia.⁶

³ Michael Sima Sengkey, "Implikasi Keabsahan Perkawinan Campuran Di Luar Negeri Yang Belum Didaftarkan Di Indonesia Terhadap Proses Jual Beli Harta Bersama (Studi Putusan Pengadilan Negeri Denpasar Nomor 851/Pdt. G/2016/Pn. Dps. Tahun 2017)," *Indonesian Notary* 1, no. 004 (2020).

⁴ Anne-Marie D'Aoust, "Introduction," in *Transnational Marriage and Partner Migration: Constellations of Security, Citizenship, and Rights*, ed. Anne-Marie D'Aoust (New Brunswick: Rutgers University Press, 2022), 4.

⁵ Ibnu Elmi A S Pelu and Ahmad Dakhoir, "Marital Property within the Marriage Law: A Debate on Legal Position and Actual Applications," *Al-Jami'ah: Journal of Islamic Studies* 59, no. 2 (2021): 287–316.

⁶ Mark E Cammack, "Marital Property in California and Indonesia: Community Property and Harta Bersama," *Wash. & Lee L. Rev.* 64 (2007): 1417.

Indonesia, as articulated in Law Number 5 of 1960 pertaining to Agrarian Regulations, fundamentally upholds the principle of nationalism concerning land, encapsulated in the “prohibition of land alienation” (*gronds verponding verbod*). This principle dictates that land in Indonesia is exclusively eligible for ownership by individual Indonesian citizens or Indonesian Legal Entities. In accordance with this principle, foreign nationals are precluded from possessing land with freehold status.⁷ The corollary of this guiding principle is that foreigners are ineligible to attain ownership of land with freehold status in Indonesia; instead, they are limited to acquiring usage rights only. This is explicitly stipulated in Article 42 of the Agrarian Law. Consequently, the restriction on rights held by foreigners entails that ownership of a residential property, such as a house, is permissible only on land with usage rights or controlled through an agreement. Additionally, for ownership of apartment units, it is restricted to those constructed on land with usage rights within state-owned land. In essence, the Agrarian Law fundamentally proscribes foreigners from obtaining ownership rights or building usage rights over both land and structures.

The Agrarian Law stipulates that individuals from foreign countries residing in Indonesia and foreign legal entities with representatives in the country are barred from land ownership. They are exclusively granted land use rights and building rental rights. Even in marriages involving individuals of different nationalities, particularly when one spouse is an Indonesian citizen, challenges arise in securing ownership rights and building usage rights for a property, in accordance with the provisions of the Agrarian Law. Despite the Agrarian Law being over six decades old, these regulations persist in the contemporary era of globalization.

In addition to the Marriage Law, Islamic law in Indonesia, as outlined in the Indonesian Compilation of Islamic Law (hereafter referred to as the Compilation of Islamic Law), acknowledges the concept of joint property within marriage, co-owned by both husband and wife. According to the Compilation of Islamic Law, marital assets encompass properties acquired during the marriage through the endeavors of either partner. The regulations in the Compilation of Islamic Law distinguish joint property from separate property, defining the latter as all assets owned by one of the spouses before marriage or acquired during marriage through gifts or inheritance.⁸

This study delves into the legal analysis of joint marital assets, particularly immovable properties such as land and buildings, within marriages involving spouses of diverse nationalities, with one being an Indonesian citizen. As per the legal stipulations in Indonesia, in the event of a divorce, husband and wife, both being Indonesian citizens, are inherently entitled to an equal division of the joint assets derived from the marital union. Nevertheless, these legal regulations do not uniformly apply when one of the spouses is a foreign national, as property ownership for foreigners is intricately linked to the provisions of the Agrarian Law. Concurrently, Islamic law, including its manifestation in Indonesia as articulated in the Compilation of Islamic Law, does not specifically govern the joint ownership of assets in marriages involving individuals of different nationalities. Hence, the exploration of how the legal framework safeguards ownership rights for parties within such marriages is a compelling and noteworthy area of study.

This study employs qualitative research methods with a normative approach, drawing upon data obtained through a comprehensive literature review. Normative legal research involves

⁷ Irma Devita Purnamasari, *Kiat-Kiat Cerdas, Mudah, Dan Bijak Mengatasi Masalah Hukum Pertanahan: Panduan Lengkap Hukum Praktis Populer* (Bandung: Mizan, 2010), 13.

⁸ Cammack, “Marital Property in California and Indonesia: Community Property and Harta Bersama.”

investigations based on established provisions or theories derived from materials comprising primary legal sources, specifically research materials constituted by fundamental legal regulations. The primary legal materials utilized in this research encompass Law Number 5 of 1960 concerning on Agrarian Regulations, Law Number 1 of 1974 concerning Marriage, the Indonesian Compilation of Islamic Law, Constitutional Court Decision Number 69/PUU-XIII/2015 of 2015, Denpasar District Court Decision number 536/Pdt.P/2015/PN.Dps, and Denpasar Religious Court Decision number 358/Pdt.G/2019/PA.Dps. Secondary legal materials, in this context, serve as supporting data for the analysis of primary legal materials. The secondary legal materials employed in this study encompass law books, legal scholarly journals, and expert opinions within the legal domain that are directly relevant to the subject matter of this research.

The Concept of Marital Property

Matrimony not only influences the individual identities of the husband and wife, family dynamics, and the rights and responsibilities within the familial context, but it also exerts a significant impact on the assets jointly accrued by the husband and wife during the course of their marriage.⁹ This implies that marriage entails implications within the realm of Family Property Law. Following a divorce, the apportionment of assets frequently emerges as a significant point of contention. The inclusion of a partner's name on the title deed of a marital asset does not conclusively determine the entitlement of that partner to the asset. Nevertheless, the determination of ownership for marital assets post-divorce hinges upon whether the assets are categorized as the separate property of one spouse or as joint marital property of the couple. Separate property pertains exclusively to one spouse and may include assets such as those owned by a spouse before the marriage, gifts or inheritances received by either spouse prior to or during the marriage, and assets that the couple has expressly agreed upon in writing—typically formalized through a legally valid pre-nuptial agreement.¹⁰

In contradistinction to separate property, marital property refers to assets jointly acquired by a couple throughout the duration of their marriage. This encompasses the residence, as well as other assets such as vehicles, furnishings, or artworks, unless acquired by either party as separate property. Even an individual bank account, legally owned by an individual, can be categorized as joint marital property if the funds within the account constitute income earned during the course of the marriage.¹¹ The legal delineation of marital property serves as a fundamental measure for safeguarding the rights of spouses. Indonesian laws intricately govern joint marital property, detailing the procedures for its division in the event of marital dissolution, particularly through divorce.¹²

Under certain circumstances, separate property may undergo a transformation into joint marital property. This typically transpires when separate assets become commingled or merged with assets considered joint marital property. Consider a scenario where individual A possesses a pre-wedding deposit of 20 million. Typically, this deposit would be regarded as the separate property of spouse A

⁹ John L McCormack, "Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage," *Val. UL Rev.* 42 (2007): 461.

¹⁰ Anthony Luyirika Kafumbe, "Women's Rights to Property in Marriage, Divorce, and Widowhood in Uganda: The Problematic Aspects," *Human Rights Review* 11, no. 2 (2010): 199–221.

¹¹ Alessandro Cigno, "The Economics of Marriage," *Perspektiven Der Wirtschaftspolitik* 12, no. Supplement (2011): 28–41.

¹² Herni Widanarti, "Akibat Hukum Perkawinan Campuran Terhadap Harta Perkawinan (Penetapan Pengadilan Negeri Denpasar No: 536/Pdt. P/2015/PN. Dps.)," *Diponegoro Private Law Review* 2, no. 1 (2018).

and would not be incorporated into the communal property in the event of a divorce. However, if A places the deposit funds into a joint account with their spouse, B, during the marriage, the deposit is no longer exclusively A's separate property as it has been commingled with joint assets. Furthermore, there are instances where certain, albeit not all, separate property may assume the status of joint marital property. This often occurs when one spouse makes contributions that enhance the value of the other spouse's separate property. For example, if individual A owned a house before marriage, maintaining sole ownership on the certificate, and during the marriage, the couple utilized marital funds for home improvements, the house generally remains separate property. However, B may be entitled to a portion of the increased value resulting from these improvements.¹³

In numerous instances where a married couple engages in disputes over assets during divorce proceedings, the court meticulously examines the specific circumstances to determine the classification of assets as separate property or joint marital property. Once the differentiation between separate assets and joint marital assets is established, the court proceeds to distribute the joint assets between the spouses in accordance with legal provisions. During the distribution of marital assets, the court considers an array of factors including the duration of the marriage, the value of the marital assets, each spouse's contribution to the property, their respective income or earning capacities, age, and other relevant considerations. Additionally, the responsibilities undertaken by each spouse, regardless of whether they are homemakers or pursue careers outside the home, will be subject to equitable division. The court typically allocates joint assets equally between the primary income earner and the homemaker, unless specific circumstances exist that warrant an uneven distribution, as determined by the court.¹⁴ As exemplified in Supreme Court Decision Number 226K/AG/2010, the court ruled to allocate only a 1/4 (one fourth) share to husbands who have a history of domestic violence against their wives, whereas wives are entitled to a 3/4 (three quarters) share. In a similar vein, Supreme Court Decision Number 266K/AG/2010 stipulates a distribution of 1/5 for widowers and 4/5 for widows. The primary consideration in this case is the absence of permanent employment for the ex-husband, coupled with poor moral conduct, such as a propensity for alcohol consumption. Consequently, the court concluded that the income contributing to marital property is predominantly derived from the wife's earnings.

Additionally, the ruling from the Demak Religious Court, specifically Decision Number 1708/Pdt.G/2014/PA.Dmk, establishes the allocation of joint assets in a two-to-one ratio. In this arrangement, the defendant (ex-wife) is entitled to 2 shares or 2/3 of the joint assets, while the plaintiff (ex-husband) is granted 1 share or 1/3 of the joint assets. The rationale behind this decision, as articulated by the panel of judges, is grounded in the Compilation of Islamic Law, which dictates an equal 1/2 distribution of joint property for both spouses. However, the court considered the prevalent domestic structure in Indonesia, where households generally feature the husband as the head, tasked with fulfilling all household needs, and the wife assuming the role of a housewife. Nevertheless, in this particular instance, the dynamics of the households of the plaintiff and defendant were distinctly reversed. The defendant (wife) grappled with the responsibility of meeting all household needs, whereas the plaintiff (husband) was largely unemployed and without a job. Similarly, the ruling from the Brebes Religious Court, specifically Decision Number 1102/Pdt.G/2017/PA.Bbs, dictates that the

¹³ Kafumbe, "Women's Rights to Property in Marriage, Divorce, and Widowhood in Uganda: The Problematic Aspects."

¹⁴ Ermi Suhasti Syafei and Siti Djazimah, "Mediation In Settlement of Joint Marital Property Disputes: Study At Tanjung Karang Religious Court, Lampung," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 867–91.

ex-wife is entitled to a greater portion of the joint property compared to the ex-husband's share. This determination stems from the consideration that the wife served as the primary breadwinner in the family, having been employed in Taiwan for a period of 8 years and 2 months.

Regulations on Marital Property in Indonesia

Regulations pertaining to joint marital property in Indonesia are outlined in Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law, and the Civil Code. However, it is crucial to note that the provisions of the Civil Code concerning marital assets are applicable exclusively to marriages predating the enactment of the Marriage Law. This is due to the legal principle *lex posterior derogat lex priori*, which holds that if a new law is introduced to govern the same subject matter as an existing law, the subsequent law takes precedence over the prior one.¹⁵

The Marriage Law encompasses four key provisions regarding marital property, specifically articulated in Article 35, paragraphs (1) and (2), Article 36, paragraphs (1) and (2), Article 37, and an additional article addressing marriage (nuptial) agreements, namely Article 29, paragraphs (1), (2), (3), and (4). Article 35 of the Marriage Law explicitly stipulates that “(1) Property acquired during marriage becomes joint property; and (2) The innate assets of each husband and wife and the assets obtained by each as a gift or inheritance, are under their respective control as long as the parties do not determine otherwise”.¹⁶

From the stipulations of Article 35, paragraph (1) mentioned above, it becomes evident that the Marriage Law adheres to legal principles regarding marital property that significantly differ from those outlined in the Civil Code. In contrast to the Civil Code, which categorizes assets brought into the marriage and those acquired during the marriage as part of a singular set of assets known as unitary assets, the Marriage Law presents a distinct perspective. Additionally, Article 35, paragraph (2) of the Marriage Law addresses “inherited assets”, implying the assets brought into the marriage by each spouse. It specifies that these innate assets are under the “control” of the respective spouse.

The Compilation of Islamic Law provides guidelines for marital assets through Articles 85 to 97. According to Article 85, “The existence of joint assets in marriage does not preclude the possibility of assets belonging to each husband or wife”. Article 86 further delineates that: “(1) Essentially, there is no commingling of the husband's assets and the wife's assets as a consequence of marriage; (2) The wife's assets retain her rights and are entirely under her control, similarly, the husband's assets remain his rights and are fully under his control”.

Article 87 stipulates that: “(1) The innate assets of each husband and wife and the assets acquired through gifts or inheritance are subject to their individual control, unless otherwise specified in the marriage agreement; (2) Husband and wife possess full rights to undertake legal actions concerning their respective assets in the form of grants, gifts, alms, or others”. Additionally, Article 92 asserts that “A husband or wife is prohibited from selling or transferring joint property without the consent of the other party”.

Therefore, from a formal juridical standpoint, it can be comprehended that joint property refers to the assets obtained by the husband and wife during the course of their marriage.¹⁷ The Marriage

¹⁵ Pelu and Dakhoir, “Marital Property within the Marriage Law: A Debate on Legal Position and Actual Applications.”

¹⁶ Innate assets refer to possessions obtained by either the wife or husband prior to entering into marriage.

¹⁷ Evi Djuniarti, “Hukum Harta Bersama Ditinjau Dari Perspektif Undang-Undang Perkawinan Dan KUH Perdata,” *Jurnal Penelitian Hukum De Jure* 17, no. 4 (2017): 445–61.

Law and the Compilation of Islamic Law expressly define the scope of joint property to encompass assets acquired during the marital union. Notably, these legal frameworks delineate three distinct categories of assets: joint assets, innate assets, and acquired assets. Joint assets, as articulated in Article 35, Paragraph (1) of the Marriage Law, involve “property acquired during marriage becoming joint property”. On the other hand, innate assets and acquired assets, elucidated in Article 35, Paragraph (2) of the Marriage Law, specify that “innate assets of each husband and wife and assets obtained by each as a gift or inheritance, are under the control of each party unless otherwise determined”.

Property Ownership in Marriages of Different Nationalities

1. According to Indonesian National Law

The regulations governing marriage in Indonesia are outlined in Law Number 1 of 1974, encompassing various provisions related to joint property, particularly articulated in Article 35 through Article 37. According to Article 35 of the Marriage Law, assets acquired during the marriage are designated as joint property. Additionally, the innate assets of each spouse, along with assets acquired through gifts or inheritance, remain under their respective control unless otherwise specified by mutual agreement.

Article 36 of the Marriage Law specifies that concerning joint property, both husband and wife may act with the mutual consent of both parties, and each spouse possesses complete legal autonomy to undertake actions pertaining to their respective properties. Meanwhile, Article 37 of the Marriage Law stipulates that in the event of a divorce leading to the dissolution of the marriage, the regulation of joint property is guided by the respective laws. The term “respective laws” in Article 37 encompasses three possibilities: First, adherence to religious law if it constitutes a prevailing legal framework in overseeing divorce proceedings; Second, implementation of distribution rules in accordance with customary law, provided that customary law is a prevalent legal framework within the relevant community; Third, adherence to other applicable national laws.¹⁸

In instances of joint ownership arising from marriages involving individuals of different nationalities, particularly where one is an Indonesian citizen, the regulations pertaining to property ownership rights for foreign citizens in Indonesia become applicable. This matter is governed by the Agrarian Law. To preempt any disputes related to joint ownership in the event of marital dissolution, the court, as exemplified by the Denpasar District Court Decision Number 563/Pdt.P/2015/PN.Dps, establishes legal precedent. The court emphasizes the importance of married couples, especially those with diverse nationalities involving an Indonesian citizen, entering into a prenuptial agreement before acquiring real estate such as land or buildings. The marital agreement delineates the division of assets between the husband and wife, and it can be formalized either prior to the marriage (pre-nuptial agreement) or during the marriage (post-nuptial agreement). This latter provision aligns with the guidance provided by Constitutional Court Decision Number 69/PUU-XIII/2015.

In particular, the provisions related to marriage agreements are codified in a distinct chapter, namely Chapter V, dedicated to marriage agreements. According to Article 29, paragraph (1), it is affirmed that a marriage agreement can exclusively be established either prior to or at the time of the marriage. Such an agreement is commonly referred to as a pre-nuptial agreement or pre-marital

¹⁸ M. Yahya Harahap, *Pembahasan Hukum Perkawinan Nasional Berdasarkan Undang-Undang Nomor 1 Tahun 1974, Peraturan Pemerintah Nomor 9 Tahun 1974* (Medan: Zahir Trading Co., 1975), 125.

agreement, succinctly termed as a pre-nupt. Diverging from several neighboring countries in ASEAN, including Singapore and Malaysia, as well as other nations globally, Indonesia does not acknowledge the validity of marriage agreements formulated after the marriage has occurred. Post-marital agreements, commonly referred to as post-nuptial agreements or post-nupt, are not recognized in the legal framework of Indonesia. The legal proceedings presented before the Indonesian Constitutional Court, initially seeking equal property rights for Indonesian citizens in mixed marriages (involving Indonesian citizens and foreigners) comparable to other Indonesian citizens, inadvertently led to the acknowledgment of post-marital agreements (post-nuptial agreements) in Indonesia.

Consequently, Constitutional Court Decision Number 69/PUU-XIII/2015 introduces a novel legal provision, allowing the formulation of a marriage agreement, which was originally confined to prospective husbands and wives before marriage (prenuptial agreement), to now be established by the husband and wife during the course of their marriage while still married. The decision rendered by the Constitutional Court modifies the stipulations of Article 29, Paragraph 1 of the Marriage Law. Following the Constitutional Court's decision, Article 29, Paragraph (1) of the Marriage Law is construed as follows: "At the time, either before the marriage occurs or during the marriage, both parties may, through mutual consent, present a written agreement duly ratified by a marriage registrar or notary, after which the contents thereof shall also have legal effect on third parties, provided that third parties are involved".

The Constitutional Court offers a constitutional interpretation allowing the crafting of a marriage agreement to be tailored to the legal requirements of each couple. Preceding the Constitutional Court's decision, Indonesian citizens marrying foreigners faced limitations on owning a house with property rights or building use rights unless a pre-marital agreement was established regarding asset separation. However, subsequent to the issuance of the Constitutional Court's decision, couples of different nationalities can now formulate a marriage agreement during the ongoing marriage, ensuring clarity in property ownership.¹⁹

Through a marriage agreement, spouses can delineate the division of their assets, affording both parties the autonomy to deviate from the legal norms governing the consolidation of assets, provided that the agreement remains within the bounds of law, religion, and morality. A marriage agreement constitutes a contractual arrangement specifying the separation of assets between husband and wife during their marriage, deviating from the legal principles or established patterns, namely the amalgamation of assets during marriage. Similarly, the obligations of each party will persist as the responsibility of the respective party who incurred the debt. The commingling of assets between Indonesian citizens and foreigners results in the forfeiture of the couple's entitlement to land and buildings with ownership rights, building use rights, or business use rights.²⁰

Indonesian citizens intending to wed foreign citizens must enter into a marriage agreement to establish asset separation. The primary objective behind this asset separation is to ensure that Indonesian citizens retain their entitlement to acquire property and safeguard their inheritance rights to their assets. This arises from the regulations outlined in Marriage Law, wherein assets acquired during the marriage are deemed joint property. Consequently, if the husband and/or wife make

¹⁹ Muhammad Havez et al., "The Constitutional Court Verdict Contribution towards International Civil Law Development in Indonesia," *Journal of Advance in Social Sciences and Policy* 2, no. 2 (2022): 81–89.

²⁰ Heriyanti Heriyanti, Elvira Fitriyani Pakpahan, and Diana Diana, "The Several Unlawful Act after Nuptial Agreement in Indonesia," *International Journal of Law Reconstruction* 5, no. 2 (2021): 328–40.

property purchases after marriage with ownership status, the property is considered jointly owned. However, in accordance with the Agrarian Law, foreigners are restricted from owning property with ownership rights, building use rights, or business use rights. Instead, they are only permitted to hold use rights and rental rights. Hence, it is imperative to establish a marriage agreement for the purpose of asset separation, ensuring that property acquired during the marriage period can be registered under or in the name of the Indonesian citizen spouse.²¹

The scenario outlined in the Denpasar Religious Court Decision Number 358/Pdt.G/2019/PA.Dps exemplifies the consequence of a marriage between Indonesian citizens and foreigners, wherein ownership rights to joint property, such as land and buildings, are forfeited. Similarly, the Denpasar District Court Decision Number 563/Pdt.P/2015/PN.Dps mandates that Indonesian citizens and foreigners must engage in a marriage agreement prior to jointly purchasing any property. The Constitutional Court ruling mentioned earlier permits married couples to establish post-nuptial agreements. In addition to this, Constitutional Court Decision Number 69/PUU-XIII/2015 has led to the issuance of Government Regulation Number 103 of 2015 concerning Ownership of Residential Houses by Foreigners.

Article 3 of Government Regulation No. 103 of 2015 stipulates that Indonesian citizens engaged in mixed marriages with foreign citizens retain equal rights to land as other Indonesian citizens not involved in such marriages. These individuals maintain the entitlement to land ownership rights akin to other non-participants in mixed marriages with foreign citizens. Furthermore, their name can still be recorded on the title certificate as evidence of ownership. The prerequisite for Indonesian citizens engaged in mixed marriages to maintain land rights is that the land rights possessed by the Indonesian citizen should not be classified as joint property. Indonesian citizens engaging in mixed marriages with foreign citizens are required to safeguard their land rights from becoming joint property through the establishment of a marriage agreement.

2. According to Islamic Law

The concept of joint marital property is not explicitly mentioned in the Qur'an, Hadith, or classical jurisprudence books, as it originates from customary law ('urf) in societies that acknowledge the pooling of assets in marriage, such as Indonesia. Islamic law, however, emphasizes the distinct ownership of property between spouses. According to Islamic law, the husband's and wife's properties are separate entities. Whatever the husband acquires is his individual property, and likewise, the wife's acquisitions belong solely to her. Islamic law grants both partners, husband and wife, the right to personal ownership that remains inviolable by the other party. Consequently, a husband's control over gifts, inheritances, and other acquisitions is unrestricted, without any interference from the wife.²² Islamic law stipulates that the property acquired by the husband during marriage is exclusively his, and the wife is entitled to the financial support provided by the husband. Similarly, a wife who receives a gift, inheritance, or other assets has complete control over such property without any intervention from her husband. Therefore, Islamic law establishes a framework for the separation of assets between the husband and wife unless otherwise specified in a marriage agreement. Islamic law

²¹ Sri Subekti, Liliana Tedjosaputro, and Mr Mashari, "Legal Protection Concept: Separate Maintenance for the Third Party in Prenuptial Agreement," *International Journal of Civil Engineering and Technology* 11, no. 1 (2020).

²² M Siraj Sait, "Our Marriage, Your Property?: Renegotiating Islamic Matrimonial Property Regimes," in *Changing God's Law: The Dynamics of Middle Eastern Family Law*, ed. Nadjma Yassari (London: Routledge, 2016), 245–86.

also allows both parties the flexibility to create a marriage agreement according to their preferences, and such agreements hold legal validity.²³

The concept of joint marital property is a modern issue not addressed in classical Islamic law. Contemporary Islamic legal perspectives on joint property are examined through an *ijtihad* approach, involving legal exploration and reasoning.²⁴ Research in Islamic jurisprudence has led to the interpretation that joint marital property can be likened to *syirkah*. In this context, joint assets are considered to be products resulting from the collaboration of a husband and wife within the confines of marriage, essentially forming a partnership (*syirkah*) involving the combination of their assets. Fiqh experts define *syirkah* as an agreement between two individuals who share capital and profits in a partnership.²⁵

The Indonesian Ulema Council asserts that joint assets can be conceptually aligned with *syirkah*, representing assets accumulated throughout the marriage that should be fairly divided in the event of a divorce. The justification for associating joint assets with *syirkah* lies in recognizing the wife as a contributing partner, even if her work is not in the conventional sense of earning a living. This perspective acknowledges the significant role of wives involved in household activities, encompassing responsibilities like cooking, laundry, childcare, housekeeping, and other domestic duties, which are regarded as valuable contributions.²⁶

Essentially, Islamic scholars do not explicitly specify the exact method for distributing *syirkah* assets between two individuals when the partnership dissolves. However, from a logical standpoint, in the event of a termination of the relationship, such as a divorce, the marital assets should be divided equally. The division may be based on factors like which party invested more in the collaboration, whether it be the husband or the wife, or it can be an equal distribution where each party receives half. Therefore, in cases of divorce where husband and wife need to divide joint property, they can opt for an amicable resolution (*al-sulh*), which involves deliberation and agreement between them.²⁷

When discussing Islamic law, particularly concerning joint property, one cannot disregard the formal legal framework outlined in the Indonesia Compilation of Islamic Law, which was endorsed through Presidential Instruction Number 1 of 1991. The Compilation of Islamic Law represents the application of Islamic law in Indonesia, shaped by the *ijtihad* (legal reasoning) of Indonesian scholars. Marital assets, as per the Compilation of Islamic Law, are delineated in Articles 85 to 97. The architects of the Compilation of Islamic Law approached joint property from a *syirkah* perspective in harmony with customary law. This approach harmoniously integrates *urf* (customs/traditions) as a legitimate source of law, aligning with the principle *al-‘adatu muhakkamah* (customs become the basis of law). In their view, joint property results from the marital relationship between a man and a woman, leading to the production of assets through their collaborative efforts during the marital union. Marriage,

²³ Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints," *American Journal of Comparative Law*, no. 2 (1978): 213–18.

²⁴ Mohammad Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law & Jurisprudence* 21, no. 1 (2008): 5–69.

²⁵ Besse Sugiswati, "Konsepsi Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat," *Perspektif* 19, no. 3 (2014): 201–11.

²⁶ Mark E Cammack and R Michael Feener, "Joint Marital Property in Indonesian Customary, Islamic, and National Law," in *The Law Applied: Contextualizing the Islamic Shari‘a*, ed. Peri Bearman, Wolfhart Heinrichs, and Bernard G. Weiss (London: I.B. Tauris, 2008), 92–115.

²⁷ Sugiswati, "Konsepsi Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat."

viewed as syirkah (cooperation) between husband and wife, subsequently entails legal consequences, including the classification of property as joint assets.²⁸

Article 91 of the Compilation of Islamic Law outlines various forms of joint property. Firstly, joint property may manifest as either tangible or intangible items. Secondly, tangible joint assets encompass both movable and immovable objects, along with other securities. Thirdly, intangible joint assets may take the form of rights or obligations. Lastly, joint assets can serve as collateral for one party with the consent of the other party. On the other hand, according to Article 92 of the Compilation of Islamic Law, neither the husband nor the wife is allowed to sell or transfer joint property without the consent of the other party. Thus, when it comes to joint assets, both the husband and wife share equal responsibility, and in the event of the termination of marriage due to death, divorce, or a court decision, the joint assets will be divided equally or in a fifty-fifty manner. In case of a disagreement concerning joint property, Article 88 of the Compilation of Islamic Law stipulates that the matter should be referred to the appropriate Religious Court. The procedures for filing petitions for the division of joint assets are outlined in Article 86, paragraph (1) of Law Number 7 of 1989 concerning Religious Courts.²⁹

The Compilation of Islamic Law does not specifically address joint property arising from marriages involving individuals of different nationalities. This omission is reasonable since the provisions in the Compilation of Islamic Law are generally in harmony with the Marriage Law and other applicable laws within the Republic of Indonesia. Moreover, when resolving marital property disputes in the Religious Court, the legal framework pertaining to citizenship rights will be applied, with the Agrarian Law being relevant for the property rights (land and buildings) of foreign citizens.

Rules for marital property in marriages of different nationalities

Islamic law, as outlined in the Indonesian Compilation of Islamic Law, does not specifically address the matter of marriages between individuals of different nationalities or the regulation of joint property arising from such marriages. However, the Compilation of Islamic Law dictates the resolution of joint property matters based on applicable laws recognized as customs. Mixed marriages, as defined in Article 57 of the Marriage Law, involve unions between two individuals subject to different legal systems in Indonesia due to citizenship disparities, with one party being an Indonesian citizen.³⁰ Mixed marriages conducted in Indonesia are executed in compliance with Article 59 of the Marriage Law. An ensuing legal implication of divorce is the distribution of joint assets between the husband and wife. As articulated in Article 35 of the Marriage Law, assets acquired during marriage are categorized as joint property, irrespective of individual contributions, ownership titles, or the absence of a legal entity, gift, inheritance, and/or a marriage agreement pertaining to property ownership.

Nevertheless, the regulations outlined in Article 35 of the Marriage Law do not extend to couples consisting of Indonesian citizens and foreign citizens. In the case of Indonesian citizens marrying

²⁸ Andi Herawati, "Kompilasi Hukum Islam (KHI) Sebagai Hasil Ijtihad Ulama Indonesia," *Hunafa: Jurnal Studia Islamika* 8, no. 2 (2011): 321–40.

²⁹ Elimartati Elimartati and Elfia Elfia, "Kritik Terhadap Kompilasi Hukum Islam Tentang Ketentuan Harta Bersama Dalam Perkawinan," *Juris: Jurnal Ilmiah Syariah* 19, no. 2 (2020): 231–43.

³⁰ Adi Purwanto, "Analisis Hukum Atas Pembagian Harta Bersama Dalam Perkawinan Campuran Pada Putusan Mahkamah Agung Nomor 1400 K/Pdt/2017," *Recital Review* 4, no. 1 (2022): 90–113.

foreigners, subsequent to the marital union, they are prohibited from possessing land rights in the form of ownership rights, business use rights, or building use rights. This restriction arises due to the amalgamation of assets acquired post-marriage, where the foreign spouse also gains ownership of joint property. This contradicts Law Number 5 of 1960 (Agrarian Law), which stipulates that foreigners are not entitled to property rights, business use rights, or building use rights. According to Article 21 Paragraph (3) of the Basic Agrarian Law, it is specified that: “Foreigners who, after the enactment of this Law, acquire property rights through inheritance without a will or commingling of assets through marriage, as well as Indonesian citizens who possess ownership rights and, after the enactment of this Law, lose citizenship, must relinquish such rights within one year from acquiring or losing citizenship. If these ownership rights are not relinquished within this timeframe, they are automatically void by law, and the land reverts to the State, subject to any existing encumbrances by other parties”.

Article 21, Paragraph (3) of the Agrarian Law mentioned earlier is linked to the Marriage Law concerning marital joint property. Marriage establishes an equal position for both spouses, treating them as a unified entity that complements each other. Consequently, marital unions lead to the commingling of assets between husband and wife. In the case of an Indonesian citizen marrying a foreigner, the individual loses the ability to acquire ownership rights, building use rights, or business use rights after marriage, as these assets become part of the joint property shared with their foreign spouse. To retain rights to land, an Indonesian citizen marrying a foreigner must enter into a marriage agreement or prenuptial agreement specifying the separation of assets.³¹

A marital agreement, as permitted by Article 29 of the Marriage Law and Constitutional Court Decision Number 69/PUU-XIII/2015, can be established prior to, during, or at the time of marriage. Typically, such agreements cover various aspects, including: 1) Assets brought into the marriage, encompassing possessions derived from individual businesses, as well as gifts, inheritances, or donations obtained by each party during the marriage; 2) All debts incurred by the husband or wife within the marriage, remaining the responsibility of the respective party; 3) The wife’s management of her personal assets, both movable and immovable, along with the entitlement to collect (enjoy) the proceeds and income from her property, work, or other sources; 4) The wife’s independent management of her assets without requiring assistance or authorization from her husband; 5) and so forth.³²

Conclusion

The Marriage Law specifies that assets obtained during marriage become joint property, without delineating the contributors, recipients, or in whose name the property is registered. However, these provisions outlined in Article 35 do not extend to couples involving Indonesian citizens (WNI) and foreign citizens (WNA). Indonesian citizens marrying foreigners are prohibited from holding land rights such as ownership rights, business use rights, or building use rights after marriage. This is due to the amalgamation of assets occurring post-marriage, designating the foreign spouse as a co-owner

³¹ Aislie Anantama Septiawan, “Perjanjian Perkawinan Pada Perkawinan Campuran Dalam Kepemilikan Tanah Di Indonesia,” *Lambung Mangkurat Law Journal* 2, no. 1 (2017): 62–74.

³² Justitia Henryanto Ghazaly, “Kepemilikan Hak Atas Tanah Dalam Perkawinan Campuran,” *JCH: Jurnal Cendekia Hukum* 5, no. 1 (2019): 117–30.

of joint property. This stands in contrast to Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (Agrarian Law), which prohibits foreigners from possessing property rights, business use rights, or building use rights. Constitutional Court Decision Number 69/PUU-XIII/2015 reinforces the provisions of Article 35 of the Marriage Law. The application of these provisions is evident in the Denpasar District Court Decision Number 536/Pdt.P/2015/PN.Dps, which mandates the creation of marriage agreements for the separation of assets in marriages of different nationalities. Similarly, the Denpasar Religious Court Decision Number 358/Pdt.G/2019/PA.Dps rejected the determination of joint property in marriages of different nationalities.

On the other hand, Islamic law, as outlined in the Compilation of Islamic Law, does not specifically address joint property in marriages involving different nationalities. This alignment is rooted in the principle that the rules within the Compilation of Islamic Law do not contradict the Marriage Law and other applicable laws within the territory of the State of the Republic of Indonesia. Furthermore, when addressing disputes related to joint marital property, particularly within the Religious Court, the resolution is expected to be guided by laws pertaining to citizenship rights. For foreign citizens, this involves the application of the Agrarian Law concerning ownership rights to land and buildings.

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