

Juridical Review of the Division of Joint Property After Divorce in Mixed Marriages

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Abstract: Mixed marriage, defined as a marriage between an Indonesian citizen (WNI) and a foreign citizen (WNA), is a phenomenon that has been increasing alongside globalization. However, when a divorce occurs in such marriages, complex legal issues emerge, particularly regarding the division of joint property. These complexities arise from differences in the legal systems of the countries involved, including restrictions on property ownership by foreigners in Indonesia as stipulated in the Basic Agrarian Law. The main problem addressed in this study is how the division of joint property after divorce in mixed marriages is regulated and implemented, as well as the obstacles encountered in the process. This research employs a normative juridical method, using a legislative approach and case studies, particularly focusing on Constitutional Court Decision Number 69/PUU-XIII/2015. The results indicate that, although Indonesian law generally regulates the distribution of joint property, its implementation in mixed marriages still faces several challenges. These include differences in legal systems between countries, the requirement for recognition of foreign judgments through exequatur, and provisions prohibiting property ownership by foreigners. Additionally, the absence of a prenuptial agreement complicates the fair distribution of property. This study underscores the importance of reforming national laws and harmonizing them with international law principles, as well as the necessity of a strong understanding of international private law concepts such as *lex rei sitae* and *lex domicilii*. Such efforts are essential to ensure legal certainty and justice in the division of joint property following divorce in mixed marriages.

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INTRODUCTION

Divorce is a legal event that ends the marital relationship between a husband and wife. In Law Number 1 of 1974 concerning Marriage, divorce can only be carried out in front of a court hearing and must be accompanied by a valid reason according to the law¹. Although marriage aims to form an eternal family, not a few couples end up deciding to divorce due to various factors such as disputes, domestic violence, and character incompatibility. In the context of mixed marriage, which is marriage between two people of different nationalities, divorce presents more complex problems, especially related to joint property².

According to Subekti, divorce is a way to end a legal marital relationship based on a judge's decision that has permanent legal force. Divorce occurs if one or both parties file a divorce lawsuit and the reasons submitted meet the requirements that have been regulated in laws and regulations³. Subekti also emphasized that divorce is not an easy thing to do, but must go through legal considerations and proof of certain causes

¹ Law No. 1 of 1974 concerning Marriage, Statute Book of the Republic of Indonesia No. 1 of 1974.

² *Ibid*

³ Subekti, *Principles of Civil Law* (Jakarta: Intermasa, 2008), p. 71.

that are the basis for divorce, such as constant quarrels, adultery, violence, or leaving one party without permission.

Juridically, divorce in Indonesia is regulated in Law Number 1 of 1974 concerning Marriage (Marriage Law), which in Article 38 affirms that marriages can be dissolved due to death, divorce, and by court decision⁴. Divorce, according to the provision, is not a trivial event, but a legal action that must be carried out formally through a procedure in court. Article 39 paragraph (1) of the Marriage Law affirms that "Divorce can only be carried out in front of the Court session after the Court has tried and failed to reconcile both parties."⁵

In addition, Indonesian law also requires that the grounds for divorce must meet the provisions as stated in Article 19 of Government Regulation Number 9 of 1975 concerning the Implementation of the Marriage Law. These reasons include one party committing adultery, drunkenness, torture, or abandoning his or her partner for a certain period of time without permission⁶. This shows that divorce in Indonesia is not an act that can be done carelessly, but must be based on valid reasons according to the law.

Divorce in the Context of Mixed Marriage In mixed marriages, divorce has a higher level of complexity compared to divorce between fellow Indonesian citizens. One of the main problems is the issue of jurisdiction, which court has the authority to process the divorce. If the divorce is carried out in Indonesia, then the provisions of Indonesian national law apply, namely through the Religious Court for Muslim couples and the District Court for Non-Muslim couples.⁷

However, if the divorce is carried out abroad, then the foreign court decision must first be recognized in Indonesia through *an exequatur* procedure in order to have permanent legal force in Indonesia.⁸ Without this process, divorce carried out abroad will have no legal consequences on marital status in Indonesia, including in terms of division of joint property.

In addition, divorce in mixed marriages also often raises legal problems related to the division of joint property. In a mixed marriage, a couple can own property spread across several countries with different ownership legal regimes. For example, based on the Basic Agrarian Law Number 5 of 1960, Foreign Citizens (WNA) cannot have ownership rights to land in Indonesia, so in the distribution of common property, ownership of land and property is an important issue.⁹ **Elements of Divorce in Mixed Marriages** There are several elements to consider:

Differences in Nationality

One of the main elements is the difference in nationality between husband and wife. This can lead to legal conflicts, such as which law will govern the terms of divorce and its legal consequences. In practice, each party's national law may specify different terms and procedures for divorce¹⁰.

Jurisdictional

Issues The jurisdiction of the courts is crucial in a mixed marital divorce. Based on the provisions of Indonesian law, the divorce of Muslim couples in mixed marriages is still filed with the Religious Court, while non-Muslim couples are filed with the District Court¹¹. However, in certain situations, a divorce decree issued by a foreign court can also be recognized in Indonesia through *the exequatur process* (application for recognition of a foreign judgment).

Shared Property

The distribution of common property is one of the main problems. In a mixed marriage, joint property can be assets that are in two or more countries. Law No. 5 of 1960 concerning Agrarian Principles even limits the ownership of land rights for Foreign Citizens, so that in divorce, foreigners cannot have land ownership rights in Indonesia.¹²

⁴ Law Number 1 of 1974 concerning Marriage, Article 38.

⁵ Ibid., Article 39 paragraph (1).

⁶ Government Regulation No. 9 of 1975 concerning the Implementation of the Marriage Law, Article 19.

⁷ Compilation of Islamic Law (Presidential Instruction No. 1 of 1991), Article 115.

⁸ R. Soebekti, *Principles of Civil Law*, p. 74.

⁹ Law Number 5 of 1960 concerning Agrarian Subjects, Article 21.

¹⁰ Satjipto Rahardjo, *Legal Science*, (Bandung : Citra Aditya Bakti, 2000), p. 135.

¹¹ Compilation of Islamic Law (Presidential Instruction No. 1 of 1991), Article 115.

¹² Law Number 5 of 1960 concerning Agrarian Subjects, Article 21.

Status of Childre

In mixed marital divorce, the protection of children's rights is also a top priority. The determination of custody (*hadhanah*) must take into account the principles of child protection under national and international law, such as the Convention on the Rights of the Child which has been ratified by Indonesia.¹³

One of the key issues in a mixed divorce is the determination of jurisdiction. For example, if an Indonesian citizen is married to a foreign national, and they are domiciled abroad, then a divorce lawsuit can be filed in the court in that country. However, foreign court rulings do not automatically apply in Indonesia. According to the principles of international civil law, a foreign court decision only has legal force in Indonesia if it has gone through the *exequatur* process, namely an application for recognition and enforcement of a foreign judgment through the Supreme Court¹⁴.

In addition, divorce in mixed marriages also raises questions about the status of children and custody. Children from mixed marriages generally have a limited dual citizenship status until the age of 18, in accordance with Law Number 12 of 2006 concerning Citizenship.¹⁵ After that, the child must choose one of his or her nationalities. The problem arises when both divorced parents fight over custody, and the child is taken to another country by one of the parties without consent. Indonesia itself has not ratified the *1980 Hague Convention on Cross-Border Child Abduction*, so it does not have an international mechanism to resolve such disputes efficiently¹⁶.

In the Indonesian legal system, Joint Property (*gemeinschaft vermogen*) is property acquired during the marriage period, regardless of who produced it or in whose name it was registered. Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage (Marriage Law) states that "property obtained during marriage becomes joint property."¹⁷ This provision applies in general, including in mixed marriages between Indonesian Citizens (WNI) and Foreign Citizens (WNA).

Joint property in a mixed marriage is regulated not only by Indonesian national law, but also influenced by the provisions of foreign law that can apply to either party. The main problem that arises in the division of joint property in mixed marriages is the restriction on asset ownership by foreign nationals, as stipulated in the Basic Agrarian Law Number 5 of 1960¹⁸. According to this provision, foreign nationals are not allowed to have ownership rights to land in Indonesia, so if there is land or buildings in the common property, the ownership cannot be transferred directly to a foreign party.

To avoid problems in the division of joint property, couples in mixed marriages can make a *prenuptial agreement*. Article 29 paragraph (1) of the Marriage Law states that "at the time or before the marriage takes place, both parties by mutual consent can enter into a written agreement ratified by the marriage registrar, after which the content of the agreement also applies to the third party as long as the third party is involved."¹⁹ This marriage agreement can regulate the separation of assets from the beginning, so that it can avoid mixing ownership between Indonesian citizens and foreigners. The Constitutional Court Decision Number 69/PUU-XIII/2015 provides space for couples to make a marriage agreement not only before but also after the marriage, known as a *postnuptial agreement*.²⁰

In the case of divorce, the division of joint property in a mixed marriage must take into account the marriage agreement that has been made. If there is no marriage agreement, then the division of joint property is carried out in accordance with the provisions of the applicable law. However, in practice, the division of joint property in mixed marriages often faces jurisdictional constraints and recognition of foreign court judgments.

¹³ The *Convention on the Rights of the Child* was ratified through Presidential Decree No. 36 of 1990.

¹⁴ Jhessica Hawana Gultom et al., "Legal Analysis of Dispute Resolution of Mixed Marriage Divorce", *Sharia: Journal of Legal Science*, Vol. 1, No. 4, 2024.

¹⁵ Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia.

¹⁶ Anggraeni Dewi, "The Urgency of Ratification of the Hague Convention on International Child Abduction for Indonesia", *Lex Generalis*, Vol. 3, No. 1, 2022.

¹⁷ Law Number 1 of 1974 concerning Marriage, Article 35 paragraph (1).

¹⁸ Subekti, *Marriage Law*, Jakarta: PT Intermasa, 1988.

¹⁹ Law Number 1 of 1974 concerning Marriage, Article 29 paragraph (1).

²⁰ Constitutional Court Decision No. 69/PUU-XIII/2015.

In accordance with the provisions of Article 436 of the Reglement op de Burgerlijke Rechtsvordering (Rv), a foreign court decision can only take effect and be executed in Indonesia if it has obtained recognition from an Indonesian court through an *exequatur* process.²¹ This poses administrative and juridical obstacles to the implementation of cross-border joint property distribution. The division of joint property in a mixed marriage is also influenced by the principles of international civil law, such as the principle of *lex rei sitae*, which is the law that applies based on the place of the property. If the assets of a spouse are in two or more countries, then each property is subject to the laws of the country in which it is located.²²

METHOD

In this study, the first approach is used, the *Statute Approach* (Approach to Legislation) and also the second approach, the *Case Approach* (Case Approach). The selection of this approach is in accordance with the legal problems that are determined as legal problems.

RESULT AND DISCUSSION

Distribution of joint property in a mixed marriage after divorce Constitutional Court Decision (69/PUU-XIII/2015)

In the first decision, the decision of the Constitutional Court Number 69/PUU-XIII/2015²³. In this case, Mrs. Ike Farida, an Indonesian citizen, faced a complicated legal injustice after she married a Japanese man. Although Ike remains an Indonesian citizen and has never renounced his citizenship, he is faced with a bitter reality: his desire to buy an apartment unit in Jakarta was rejected by the developer. In fact, he has paid in full.

The reason, as stated by the developer, lies in the agrarian law and Indonesian marriage law that is currently in force. In the developer's view, because Ike is married to a foreigner and does not have a prenuptial agreement, all property acquired during the marriage, including the apartment, is considered joint property. As a result, legally, the husband, who is a foreign national, automatically owns half of the rights to the apartment. This is problematic, because based on the Basic Agrarian Law (UUPA), foreign nationals are not allowed to have property rights or building rights over land in Indonesia. Because of that reasoning, the developer did not want to take risks, so they canceled the sale and purchase agreement, and even took this case to the district court. In the end, the East Jakarta District Court in its decision strengthened the position of the developer, who stated that the cancellation was valid because it violated agrarian rules.

Feeling very disadvantaged, treated discriminatory, and his rights as an Indonesian citizen deprived, Ike Farida did not stay silent. He took his case to the Constitutional Court, applying for a test of several articles in the Basic Agrarian Law and the Marriage Law. According to Ike, these rules — which require a separation of assets agreement for Indonesian citizens who are married to foreigners in order to own property — have violated his rights guaranteed by the constitution.

In his application, Ike explained that every Indonesian citizen, regardless of who his or her spouse is in marriage, should still have the same right to own land or buildings in Indonesia. He adheres to the principle of equality before the law as stipulated in Article 27 paragraph (1) of the 1945 Constitution, which states that all citizens have equal standing in the law. In addition, he emphasized that the right to own property is part of the human rights protected by the 1945 Constitution, especially in Article 28H paragraph (4).

Furthermore, Ike explained that discrimination against him — just because he was married to a foreigner — was contrary to the principle of non-discrimination in Article 28I paragraph (2) of the 1945 Constitution. In his narration, Ike shows how he, and many other Indonesian citizens who are married to foreigners, have suffered as a result of this rule: not being able to buy a house, not having access to property ownership, and even having to be forced to change their status documents to be considered "unmarried".

In the hearing at the Constitutional Court, Ike did not only bring his personal case. He also brought the voice of the community — showing that this problem is not just an individual problem, but has become a widespread social problem, afflicting many mixed families in Indonesia. He conveyed the true stories of other

²¹ Regulations on Civil Procedure (Rv), Article 436.

²² Cik Hasan Bisri, *Indonesian International Civil Law*, (Jakarta: Kencana, 2012), p. 45.

²³ <https://putusan3.mahkamahagung.go.id/peraturan/detail/11ead07ae29e12208cb7303933343339.html> accessed on 06-05-2025, at 01.45

Indonesian citizens who failed to buy houses or apartments because of this rule, showing how deep the wounds caused by this injustice are.

Ike asked the Constitutional Court to reinterpret the articles in the UUPA and the Marriage Law, so that the phrase "Indonesian citizen" must include all Indonesian citizens without exception, including Indonesian citizens who are married to foreigners. He also asked that "since the acquisition of rights" be interpreted as "since there has been a lawful transfer of rights to a foreigner," not directly when the Indonesian citizen is married. For him, this struggle is not just about one apartment that he failed to own, but about dignity and human rights as a citizen that should not be differentiated just because of personal choice in marriage matters. After listening to Ike Farida's application, the Constitutional Court (MK) processed this case seriously. The Constitutional Court examines the Applicant's statements, hears witnesses and experts, and examines the evidence submitted.

Distribution of Joint Property in a Mixed Marriage After Divorce

In its deliberations, the Constitutional Court understood Ike's anxiety. The court recognized that as an Indonesian citizen, Ike retains full constitutional rights, including the right to own property such as a house or land. The Constitutional Court agreed that marital status should not be a reason to revoke these rights.

But the Court also did not turn a blind eye to the state's concerns: that there is a ban on foreign nationals owning land in Indonesia to maintain national sovereignty over land. In this context, the state must still be careful, especially since land is a very sensitive matter in Indonesian law. Finally, the Court took a middle ground.

With this ruling, the Court paves the way for Indonesian citizens like Ike to still be able to buy and own land or apartments in Indonesia, even if they are married to foreigners, as long as there is clarity that the property does not automatically mix with the property of their foreign spouse. For Ike Farida himself, this is a big victory. His long struggle showed that an individual, when he fought for rights persistently and courageously, could bring about a change that had far-reaching consequences for many others. She is not only fighting for herself, but also for thousands of other Indonesian citizens who are intermarried and have been living in legal uncertainty.

Obstacles that arise in the process of dividing joint property after divorce in mixed marriages

Mixed marriage is a form of marriage that involves two individuals from different countries or nationalities. This phenomenon is increasingly common along with increasing global mobility and international relations. However, behind the cultural and social complexities surrounding mixed marriage, there are legal problems that are no less complicated, especially in the context of divorce and the division of joint property. One of the main issues that often arise after a divorce in a mixed marriage is how the division of joint property is carried out fairly and in accordance with the law, considering that the parties are subject to different legal systems.

In practice, the division of joint property in mixed marriages faces a number of obstacles. These obstacles not only stem from legal differences between countries, but also from the administrative, technical, and psychological aspects of the parties. These issues need to be thoroughly examined so that justice and legal certainty can be achieved. One of the main obstacles in this context is the difference in the legal system that applies between the country where one of the parties originates and Indonesian national law. Each country has its own legal principles in regulating property in marriage, both regarding *community property*, *separation of property*, and *mixed property*. This has led to the absence of an international standard that can be universally used in determining the division of property in a mixed marriage divorce.

In Indonesia, the division of joint property is regulated in Law Number 1 of 1974 concerning Marriage, especially in Articles 35 to 37. In this provision, it is emphasized that the property acquired during the marriage period becomes joint property and at the time of divorce will be divided fairly. Nevertheless, this arrangement has not yet reached the complexities that occur in mixed marriages. For example, if one of the spouses is a foreign citizen and the divorce is carried out abroad, then the regulations in that country may be different from those that apply in Indonesia. This asynchrony often leads to conflicts over who has the authority to decide on the distribution of property and how the mechanism is run.

The next problem that is no less important is the problem of jurisdiction. Jurisdiction concerns the authority of a court to adjudicate a case. In a mixed marriage divorce, the question arises: whether the Indonesian court has jurisdiction over property located abroad, or whether the foreign court can decide the division of property located in Indonesia. A process of ratification or acknowledgment called exequatur is required. This process requires submitting an application to the District Court, accompanied by original judgment documents, official translations, and legalization from the embassy. Unfortunately, this process takes a long time, is expensive, and does not always lead to the recognition of the verdict.

Furthermore, obstacles arise when the common property to be divided is abroad. Based on the principles of international law, the division of property is subject to the laws of the country in which the property is located, known as the *lex site* principle. This means that even if the property is acquired during the marriage period and is recognized as joint property under Indonesian law, the division must still follow the rules of the country where the property is located. This poses difficulties for Indonesian citizens who have to deal with foreign legal processes, both in terms of cost, time, and legal understanding. In fact, in some cases, Indonesian citizens find it difficult to get equal legal access in the country of their foreign spouse, especially if the country does not provide equal legal protection for foreigners.

Another significant obstacle is the absence of a prenuptial agreement. In many cases, couples in mixed marriages do not make agreements regarding the separation of property, so when a divorce occurs, they must submit to the common laws of their respective countries. In fact, a prenuptial agreement can be a very important legal tool to avoid disputes in the future, because it serves to establish the rights and obligations of each party from the beginning. In Indonesia, the existence of a marriage agreement is regulated in Article 29 of the Marriage Law, but in practice it is still rarely used, mainly due to ignorance or the assumption that it is not important.

In addition to the substantive legal aspects, administrative and technical obstacles cannot be ignored either. Many couples face difficulties in taking care of documents, such as marriage certificates, proof of property ownership, and valid divorce judgments in two countries. Translation of official documents, legalization, and cross-border bureaucracy often slows down and complicates the completion process. This is exacerbated if there are differences in language, civil registration systems, and legal procedures between the two countries. It is not uncommon for additional disputes to occur due to different perceptions of property rights, because in certain cultures or legal systems, personal property can be considered part of the common property, and vice versa.

No less important, psychological barriers also play a role in complicating the process of dividing property. Divorce itself has become an emotional and stressful event, especially in mixed marriage situations where communication, trust, and cross-border coordination are key factors. Distrust, conflicts of interest, and differences in cultural backgrounds make the process of negotiating the division of wealth very difficult. In some cases, one party uses the legal superiority of its country to pressure the other, reflecting an imbalance in position in the settlement of cases.

From the perspective of international law, there have actually been several conventions that can be used as a reference to solve this problem, one of which is *the Hague Convention on the Law Applicable to Matrimonial Property Regimes* (1978). However, Indonesia is not yet a party to the convention, so its implementation in national law is still very limited. As a result, the settlement of property division cases in mixed marriages is still highly dependent on interpersonal negotiations or unilateral decisions from one jurisdiction, which does not always benefit both parties fairly.

Overall, these obstacles show that the division of property in mixed marriages is not a simple matter. Comprehensive efforts are needed in terms of law, public policy, and public education to overcome this problem. There is a need for national legal reform that is more responsive to cases of mixed marriage, including clearer arrangements for jurisdiction, recognition of foreign judgments, and protection of the rights of the parties. In addition, public awareness of the importance of marriage agreements and cross-border legal information needs to be continuously increased so that property conflicts in divorce can be minimized.

CONCLUSION

The division of joint property in a mixed marriage after divorce is basically subject to the Indonesian national legal system, but in practice it intersects with foreign law if one of the parties is a foreign citizen. In the Indonesian legal system, joint property should ideally be divided fairly between husband and wife, unless there is a marriage agreement that provides otherwise. The Constitutional Court through Decision No. 69/PUU-XIII/2015 has provided legal space for mixed couples to make marriage agreements, both before and after the marriage takes place, in order to protect property ownership rights, especially for Indonesian Citizens (WNI).

Although there is a legal basis that allows the distribution of common property to be carried out fairly, this process still faces various obstacles. Some of the main obstacles that arise include: *First*, the lack of public understanding of the importance of marriage agreements in the context of mixed law; *Second*, the difficulty of recognizing and executing foreign divorce judgments in Indonesia; *Third*, the difference in the legal system between the husband and wife countries can give rise to jurisdictional conflicts; and *Fourth*, the lack of legal tools that technically regulate the implementation of cross-border joint property distribution. These obstacles not only complicate the legal process, but also have the potential to result in losses for one of the parties, especially the Indonesian citizen in defending the rights to the property acquired during the marriage period.

SUGGESTIONS

The government and the legislature need to consider revisions to regulations related to mixed marriages, especially the Marriage Law and the Basic Agrarian Law. This reformulation aims to make the law more adaptive to global social conditions, including by providing legal space for property separation agreements both before and during the marriage period. In addition, clearer arrangements on the procedure for the recognition and enforcement of foreign court judgments in Indonesia are important to provide legal certainty and protection for Indonesian citizens.

Strategic steps are needed to increase public understanding of the legal aspects of cross-border marriage, especially the importance of making marriage agreements and cross-jurisdictional legal procedures. This education can be facilitated through notaries, courts, and government agencies, to help mixed couples to be more legally and administratively prepared when facing the divorce process or the division of joint property.

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