

MIXED MARRIAGE IN INDONESIA: JOINT PROPERTY AND FOREIGN LAND OWNERSHIP RESTRICTIONS

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Abstract: *The purpose of this study is to examine joint properties in mixed marriages and restrictions on foreign land ownership, as laws pertaining to mixed marriages are frequently ambiguous and difficult to comprehend, including those regarding joint property. The majority of couples in mixed marriages don't make an agreement regarding the division of assets, as is necessary under the Marriage Law. In the absence of a marriage contract, joint assets are mixed, which means that foreigners own fifty percent of the joint assets. The Land Law (UUPA) prohibits foreigners from possessing land rights other than usufruct and rental rights. This study shows that the land ownership status of Indonesian citizens is the same as that of foreign citizens if a couple in a mixed marriage does not reach an agreement regarding the division of assets. The Marriage Law requires the separation of assets in mixed marriages both at the time of agreement and at the time of consummation, and the institution of marriage can facilitate legal evasion and smuggling in order to acquire land rights in Indonesia.*

Keywords: *land law, marriage law, foreign nationals, joint property, mixed marriages*

I. INTRODUCTION

Land is a country's main resource and an important component of people's existence.¹ Their management and use are critical for housing, agriculture, the use of natural resources, and matters of national security.² When there is a state, those who are not citizens are classified as “foreigners”, considered improper recipients of land ownership and use rights. Whereas in customary international law, no country is obliged to grant foreigners the right to own property for reasons of national interest.³ The concept of national interest may have good reasons for limiting foreign ownership of property.⁴

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¹ KOGUASHVILI, P. și, RAMISHVILI, B. Land is an essential component of a nation's existence and creativity. *Economic Profile*. 2022, Vol. 17, No. 1, [2023-09-21]. Available at: <<https://doi.org/10.52244/ep.2022.23.03>>.

² HODGSON, S., Cullinan, C., Campbell, K. Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners. *FAO Legal Papers Online*. 1999, No. 6, [2023-09-21]. Available at: <<https://www.fao.org/3/bb039e/bb039e.pdf>>.

³ FAWCETT, J. J. Evasion of law and mandatory rules in private international law. *The Cambridge Law Journal*. 1990, Vol. 49, No. 1, [2023-09-21]. Available at: <<https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/evasion-of-law-and-mandatory-rules-in-private-international-law/5AD60983336A8B8D6CB8D1370CA39E34>>.

⁴ HUIZINGA, J. A. Alien Land Laws: Constitutional Limitations on State Power to Regulate. *Hastings Law Journal*. 1980, Vol. 32, No. 1, pp. 251–283. [2023-09-21]. Available at: <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2681&context=hastings_law_journal>.

The concept of foreigners has shifted in many people's minds as a result of the increased interconnectedness of the world. This change has been brought about by a number of factors, including advancements in global communications and trade, as well as increases in overseas investment. People of different nationalities are accorded equal treatment in many different nations. Despite this, many countries continue to place limitations on the ownership and use of land by non-citizens.⁵ Reasons for limiting ownership in certain situations, including limited territory, economic interests, the national sentiment it generates, and state security considerations. Every country prohibiting foreign ownership of land has its own reasons, including Indonesia.

Increases in foreign direct investment and the number of foreign nationals inviting Indonesia home also bring advantages to the country in the form of additional businesses, jobs, and investments. As a result, the state needs to be able to provide guarantees of legal certainty in property ownership for the benefit of Indonesian citizens and foreigners. The significance of the foreigner in this context stems from not only investment but also mixed marriages. Foreigners can only be granted usage rights, rental rights, and limited flats in accordance with Land Law No. 5 of 1960 concerning Basic Agrarian Regulations (UUPA).

The foreigners referred to in this study are those who enter into mixed marriages due to differences in nationality, as outlined in Articles 57–62 of Law Number 1 of 1974 concerning Marriage (Marriage Law). Based on Article 57, what is meant by mixed marriages are marriages between two people who are subject to different laws in Indonesia, marriages due to differences in nationality, and marriages because one of the parties is an Indonesian citizen. Meanwhile, the regulation of interfaith marriages does not yet have strict provisions. Therefore, the Marriage Law prohibits interfaith marriages. However, the state still recognizes interfaith marriages if the marriage is conducted outside Indonesia and the perpetrators of mixed marriages register a proof of marriage at the Marriage Registration Office.

Mixed marriages will result in legal consequences for the assets acquired by the husband and wife during the marriage. One of them is joint property, which pertains to land rights ownership. As stated in Article 35, paragraph 1 consequences for the assets acquired by the husband and wife during the marriage. One of them is joint property, which pertains to land rights ownership. As stated in Article 35, paragraph 1, of the Marriage Law, which stipulates that “properties acquired during marriage become joint property”. That is, the Marriage Law allows foreigners to immediately share half of the ownership of land rights. On the other hand, in the context of Indonesian land law, the prohibition of land ownership through joint property in the Marriage Law can be categorized as legal evasion or smuggling due to the strong principle of nationality upheld in the land law, which stipulates that “Only Indonesian citizens can own land rights” (Article 9 UUPA).

Observing the provisions regarding joint property in the Marriage Law and the strong principle of nationality that is reflected in the UUPA, this study will analyze joint property in mixed marriages from the perspective of national land law and jurisprudence, as well

⁵ PRICE, P. J. Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm. *American Journal of Legal History*. 1999, Vol. 43, No. 2, [2023-09-21]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=233142.

as the institution of marriage as a means of law smuggling. The method used in this research is normative legal research by examining library materials or secondary data. The approach used in this study is the statutory and case study approach. The statutory approach involves examining the provisions contained in the Marriage Law and the UUPA to produce an analysis that is useful for solving problems with the legal issues between the two laws. While the case study approach analyzes legal considerations used by judges in decisions of the Constitutional Court and the Supreme Court regarding joint assets and marriage agreements, which have implications for land ownership rights.

II. RESTRICTIONS ON LAND OWNERSHIP BY FOREIGNERS

The fundamental principle of land ownership is codified in the constitution, specifically Article 33, Paragraph 3, of the 1945 Constitution, which states: “Earth and water, as well as the natural resources contained therein, are under the control of the state and used for the greatest prosperity of the people.” This article regulates the relationship between the state and the people with regard to land ownership, which is commonly referred to as the “right to control the state”. When the Indonesian state was created, there was already a clear legal connection between the state and land. Article 2 of the UUPA describes additional arrangements regarding the state’s right to control, emphasizing that the state has the authority to regulate lands that are already possessed by a person or legal entity, as well as free land that will be directly controlled by the state.

The state’s right to control land is regulated and reduced to various types of land rights granted to individuals and legal entities, either individually or jointly with other individuals and legal entities, both Indonesian citizens and foreign nationals, with the intent that the right holder manages land in accordance with said right so long as it does not conflict with state-set boundaries. The rights proprietor is also required to register the land rights in order to establish legal certainty. Land rights include ownership, usufructuary, building use, rental, forest removal, and forest product collection (Article 16 UUPA). Other rights of a transitory nature include lien rights, production sharing rights, sharing rights, and agricultural land lease rights (Article 53 UUPA).

Establishing a legal institution for use rights and lease rights for buildings is the only way to satisfy foreigners’ need for property in accordance with the UUPA’s upheld principle of nationality. In the course of development, foreigners may receive permission to use either state land, freehold land owned by Indonesian citizens, or land with management rights. Regarding the lease right for buildings (on land with freehold rights), there has been no specific provision regulating it until now. This suggests that civil law—in this case, contract law—remains the only source of authority for foreigners with rental rights regarding land tenure. The absence of regulation on lease rights increases the likelihood of deviating from the system of land rights regulation stipulated in the UUPA.

The right to rent can be interpreted to mean that a person or legal entity can use the land rights of others with a rental agreement and by paying rent to the landowner. Lease rights do not include registered land rights and are ineligible as security for mortgage rights-secured debts. UUPA doesn’t have rules about how long a building can be leased for or what happens after the lease ends. If there are no rules about rental rights, it could lead to smuggling. The legal smuggling model involves making deals between Indonesian

citizens with property rights and foreigners by: 1) giving a lease right for a building with a “lease” period that is longer than is reasonable; 2) the rent paid is the price of the land; and 3) landowners can only get their land back if they pay the price of the land. The legal construction of granting rental rights to these types of structures to foreigners is void, and the land belongs to the state. This type of legal smuggling is not immediately detectable unless a dispute later arises and is litigated in court.

One instance of a court case is a dispute over land leases between Indonesian citizens and foreigners that took the form of a nominee agreement that American citizen Gary Wynne La Bar signed. La Bar rents land for a building with an area of 1000 m² in the province of Bali. The lease agreement contains a lifetime term. According to the court’s decision, Indonesia’s positive law does not regulate nominee agreements, and the issue of the agreed lifetime lease term can be classified as a non-binding agreement in violation of Civil Code Article 1548, which expressly specifies a period of time, allowing it to be calculated and mathematically determined in order to provide legal certainty for the parties to an agreement.

Use rights are similar to rental rights in that foreigners can own them. The granting of usufructuary rights to foreigners on the condition that the foreigner is domiciled in Indonesia and whose presence in Indonesia will benefit national development. A very important issue in the granting of usufructuary rights to foreigners is the issue of the term and status of the right to the land where the building on the usufructuary is erected. In general, housing developers object to land with usage rights status because the time period is shorter, it is less attractive to the banking sector as collateral, and because flats are generally built on land with the right to use the building, foreigners cannot own flats.

The next problem is the status of the rights to the land where the building is located. Legal rules say that use rights can be granted on state land, land with ownership rights, and land with management rights. Foreigners prefer usufructuary rights over state land, but foreigners are still less interested because they think that usufructuary rights are not land rights. For this reason, it is necessary to socialize the fact that usufructuary rights over state land are strong land rights because if the usufructuary rights expire, foreigners still have priority rights to apply for new rights.

On the other hand, a lack of understanding or distrust of usufructuary rights results in legal smuggling through notarized agreements between Indonesian citizens holding property rights and foreigners, allowing foreigners to “own” property rights materially even though Indonesian citizens are legal property rights holders. The position of an Indonesian citizen in this agreement is “trustee” or “nominee”. Violations of Article 26 paragraph (2) of the UUPA with agreements intended to indirectly transfer property rights to foreigners result in the agreement being null and void, the land returning to the state, and payments received by Indonesian citizens cannot be reclaimed. It is evident that foreign nationals do not get legal protection under this type of agreement.⁶

⁶ SUMARDJONO, M. SW. *Regulasi Pertanahan dan Semangat Keadilan Agraria. [Land Regulation and the Spirit of Agrarian Justice]*. Yogyakarta: STPN Press, 2018, p. 87. [2023-09-21]. Available at: <<https://pppm.stpn.ac.id/wp-content/uploads/2018/05/regulasi-pertanahan.pdf>>.

III. MIXED MARRIAGE PROPERTY IN LAND LAW

The Indonesian Marriage Law of 1974 was the first national law to regulate marriage, unifying and standardizing existing laws. In the past, a variety of laws governed marriage, including customary law for indigenous groups, Islamic law for Muslims, Dutch Indian government ordinances for Christians in Java, Minahasa, and Ambon, and the Civil Code for Indonesian citizens. European and Chinese ancestry, as well as mixed marriage regulations.⁷ The marriage law is therefore intended to unify and standardize the various marriage laws.⁸ In accordance with the social, cultural, and political conditions of the time, the marriage law was the best work created during that era. Nonetheless, as a legal product, the Marriage Law should ideally be reviewed in terms of its efficacy in regulating marriage in light of the rapid transformation of society. Unfortunately, after 49 years, the government has made no serious effort to evaluate the marriage law's effectiveness. People who believed their human rights were violated by the marriage law filed lawsuits with the Supreme Court and the Constitutional Court as institutions of judicial authority. One of them is the issue of marriages between people of different nationalities.

The division of assets that were acquired during marriage is one of the repercussions that must be faced when a couple decides to end their marriage. The Marriage Act includes a provision for a concept known as “joint property.” Despite the fact that fiqh literature does not acknowledge the concept of “joint property” in the context of the institution of marriage, this concept is more commonly referred to as *syirkah*.⁹ Etymologically, *syirkah* is a mixture, while in terminology, it is a guarantee of the right to something that is done by two or more people in general. In addition, *syirkah* can also be said to be a contract that shows the right to something that is done by two or more people, according to public opinion.¹⁰ Thereafter, the concepts of “property in marriage” (Articles 35–37 of the Marriage Law) and “wealth in marriage” (Articles 85–97 of the Compilation of Islamic Law) are both governed by the Law on Marriage and the Compilation of Islamic Law, respectively. Marriage is a form of *syirkah*, or the coming together of individuals for the purpose of establishing a household.

Joint property is wealth acquired during the marriage that was not a gift or an inheritance, i.e., assets acquired through the efforts of the spouses or individually during the

⁷ NURCHOLISH, A. Interfaith Marriage in the Constitution and the Islamic Law Dynamics in Indonesia. *Al-Mawarid*. 2015, Vol. 15, No. 2, [2023-09-21]. Available at: <https://www.researchgate.net/publication/315968035_INTERFAITH_MARRIAGE_IN_THE_CONSTITUTION_AND_THE_ISLAMIC_LAW_DINAMICS_IN_INDONESIA>.

⁸ CAMMACK, M. Islamic Law in Indonesia's New Order. *International & Comparative Law Quarterly*. 1989, Vol. 38, No. 1, [2023-09-21]. Available at: <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/islamic-law-in-indonesias-new-order/56A8EEEE9263FF1C750A32315B84A664>>.

⁹ ZUBAIDI, Z. Problematika Pembagian Harta Bersama di Samalanga-Bireuen [Problems of Sharing Common Assets in Samalanga-Bireuen]. *Jurnal Al-Ijtima'iyyah*. 2019, Vol. 5, No. 1, [2023-09-21]. Available at: <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/islamic-law-in-indonesias-new-order/56A8EEEE9263FF1C750A32315B84A664>>.

¹⁰ FAIZAL, L. Harta Bersama dalam Perkawinan [Joint Property in Marriage]. *Ijtima'iyya: Jurnal Pengembangan Masyarakat Islam*. 2015, Vol. 8, nr. 2, pp. 77–102. [2023-09-21]. Available at: <<http://ejournal.radenintan.ac.id/index.php/ijtima'iyya/article/view/912>>.

marriage.¹¹ Joint property can be defined as any property acquired during the marriage, regardless of whose name it is registered under. Unless otherwise specified, each party has the right to half of the marital assets upon divorce name it is registered under. Unless otherwise specified, each party has the right to half of the marital assets upon divorce. In the absence of a marriage agreement, if a husband or wife acquires property during the marriage, it automatically becomes shared property. By entering into a marriage agreement, the husband and wife agree not to mix their respective assets with those of each other. The wealth and income of the husband and wife depend on whether or not a prenuptial agreement exists.

Mixed marriages allow foreigners to acquire private property in Indonesia by marrying Indonesian citizens. Foreigners frequently use marriage as a means of legal smuggling to acquire land with private rights.¹² The practice of conveying foreign land ownership rights through illegal means the issue of marital assets, whether joint property, innate property, or acquired property, affords foreigners numerous opportunities to acquire and own land in Indonesia. Therefore, a marriage agreement is needed to facilitate the division of divorce assets. The marriage agreement also regulates matters related to assets. Mixed marriages between Indonesians and foreigners require a marriage agreement to separate property under national land law. Indonesian citizens lose land rights without a marriage agreement. Indonesians can only use or rent land, like foreigners. A marriage agreement makes property division in divorce easier. The marriage agreement also governs asset-related issues.

The principle of nationalism in UUPA says that, in general, only Indonesian citizens can have the fullest relationship with land in the country of Indonesia. The topic of property rights is related to this principle. So, to stop property rights from being given to people who don't meet the requirements for property owners, Article 21 paragraph 3 of the UUPA says:

“Foreigners who, after the enactment of this law, obtain property rights due to inheritance without a will or a mix of assets due to marriage, as well as Indonesian citizens who have property rights and, after the enactment of this law, lose their citizenship, are obliged to relinquish these rights within one year from the acquisition of said right or the loss of said nationality. If after that period of time the ownership rights are not relinquished, then these rights are null and void because the law and the land fall on the state, provided that the rights of other parties burdening them continue.”

Based on the provisions of Article 21 paragraph (3), there are at least three legal events that cause the transfer of property rights to foreigners, including: a) a mixture of assets

¹¹ ROFIQ, A. *Hukum Perdata Islam di Indonesia. [Islamic Civil Law in Indonesia]*. Jakarta: PT Raja Grafindo Persada, 2015, p. 161. [2023-09-21]. Available at: <<http://repository.iainpare.ac.id/1143/1/Buku%20Perdata%20Hukum%20Islam.pdf>>.

¹² SUMARJA, FX. *Hak Atas Tanah Bagi Orang Asing: Tinjauan Politik Hukum dan Perlindungan Warga Negara Indonesia. [Land Rights for Foreigners: Review of Legal Politics and Protection of Indonesian Citizens]*. Yogyakarta: STPN Press, 2015, p. 255. [2023-09-21]. Available at: <<https://pppm.stpn.ac.id/wp-content/uploads/2017/08/Hak-Atas-Tanah-bagi-Orang-Asing.pdf>>.

due to mixed marriages; b) inheritance without a will; and c) Indonesian citizens who lose their citizenship. If there is a transfer of land tenure to a foreigner as referred to in Article 21 paragraph (3) of the UUPA, the foreigner who marries an Indonesian citizen is obliged to relinquish their rights within one year of the mixing of assets due to marriage. The same applies to foreigners; if they do not have a marriage agreement, they must release it within one year. The release of rights is interpreted as releasing the legal relationship between the holder of the land rights and the land owned by them to other Indonesian citizens who are entitled.

In most cases, the state or the next eligible subject of rights will pay monetary or other forms of compensation when a party relinquishes land rights. However, Sitorus stated that if it is determined that a foreigner engaged in legal smuggling, the compensation will be nullified and the foreigner will be punished.¹³ If one year has passed, the government is no longer required to compensate the affected individual. The state may have justification if the individual has been given the option to transfer his or her rights to a third party. Moreover, the state is permitted to transfer land rights to a third party at the request of the next interested party. However, foreign nationals can still retain their land by decreasing their property rights by submitting a change of property rights to usufructuary rights or rental rights for buildings, provided that the foreigner is domiciled in Indonesia.

The practice of supervision or law enforcement of the obligation to relinquish rights within a period of one year is not properly supervised because, after one year, it does not automatically become state land because there is no separate institution that supervises and enforces the law in the event of law evasion or smuggling. So far, the authority in the land sector is the National Land Agency of the Republic of Indonesia (BPN-RI); however, in the program and activity records of BPN-RI, there are no supervisory activities regarding the transfer of ownership rights to land to foreigners due to inheritance without a will, mixing of assets due to marriage, loss of Indonesian citizenship, the occurrence of dual citizenship, as well as buying and selling, exchange, grants, grants by will, and other acts intended directly or indirectly to transfer land ownership rights to foreigners.

The polemic on “joint property” and “marriage agreement” has been judicially reviewed in Article 29 and Article 35 of the Marriage Law, and Article 21 paragraphs (1) and (3) of the UUPA became the subject of judicial review before the Constitutional Court with decision number 69/PUU-XIII/2015. The request for review is related to the phrase “Indonesian citizen” in Articles 21 and 36 of the UUPA, which does not mean “Indonesian citizen without exception in all marital status”. The Constitutional Court is of the opinion that the application of the citizenship principle is a guarantee of citizens’ rights in matters relating to the land system and a limitation of foreign citizens’ rights to land in Indonesia. Based on the opinion of this Constitutional Court, if an Indonesian citizen marries a foreigner, he will lose the right to own land if he does not have a marriage agreement, and if the marriage breaks up, the mixing of assets as a result of a mixed marriage creates a legal

¹³ SITORUS, O. Penataan Hubungan Hukum dalam Penguasaan, Pemilikan, Penggunaan, dan Pemanfaatan Sumber Daya Agraria: Studi Awal terhadap Konsep Hak Atas Tanah dan Ijin Usaha Pertambangan. [Structuring Legal Relationships in the Control, Ownership, Use and Utilization of Agrarian Resources: Preliminary Study of the Concept of Land Rights and Mining Business Permits]. *BHUMI: Jurnal Agraria dan Pertanahan*. 2016, Vol. 2, No. 1, pp. 1–11. DOI: <<https://doi.org/10.31292/jb.v2i1.29>>.

obligation for the foreigner concerned to relinquish his ownership rights within 1 year of the mixing of assets.

Judicial review of Article 29 of the Marriage Law, regarding the phrase “at the time or before the marriage takes place”. Prior to the decision of the Constitutional Court, marriage agreements were made before or at the time the marriage took place, whereas in reality there is a phenomenon of husband and wife who, for certain reasons, only feel the need to make a marriage agreement while in a marriage bond. With this decision, it has extended the time for making a marriage agreement and has positive implications for married couples who did not have a marriage agreement at the start of their marriage. Now the marriage agreement can be made after the marriage has taken place or while in the marriage bond. Then Judicial review of Article 35 of the Marriage Law related to the phrase “joint property”. If an Indonesian citizen marries a foreigner, all assets owned by the couple become joint property. In relation to Article 21 paragraph (3) of the UUPA, the fragment of the clause that reads: “Foreigners who, after the enactment of this Law, acquire property rights due to a mixture of assets due to marriage” is appropriate because all assets owned by the Indonesian citizen by law become joint property with the foreigner. However, the notion of common property, particularly regarding land, has become a problem in practice, which has led to the loss of the constitutional rights of Indonesian citizens to own land with the status of property rights in Indonesia.

The same thing is in the decision of the Supreme Court Number 34 P/HUM/2016 in the judicial review of Government Regulation Number 103 of 2015 concerning ownership of residential or residential houses by foreigners domiciled in Indonesia. Judicial review regarding the obligations of the separation of assets agreement is a condition for Indonesian citizens to intervene to buy land rights with the status of building use rights and ownership rights. In the absence of a property separation agreement, Indonesian citizens involved in mixed marriages cannot purchase land with the status of building use rights and ownership rights, even if the buyer is an Indonesian citizen. The agreement on the separation of joint assets is an absolute requirement for mixed marriage couples to be drawn up with a notarial deed.

An important point in the decisions of the Constitutional Court and the Supreme Court is whether or not there is a marriage agreement to separate assets. Because it has broad implications for both foreigners and Indonesian citizens. For foreigners, it has been expressly stated in the UUPA that they can only have usufructuary rights and rental rights, while Indonesian citizens will lose their rights to acquire property rights or building use rights, even though they are Indonesian citizens. However, after a decision by the Constitutional Court, a marriage agreement can be made at any time, even though the majority of Indonesian citizens consider it taboo (prohibited) to discuss marriage agreements.¹⁴

Marriage is a contract, and it is different from other contracts, so the legal rules that apply to other contracts do not necessarily apply to marriages. Marriage is both a status

¹⁴ AGUSTINE, O. V. Politik Hukum Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 dalam Menciptakan Keharmonisan Perkawinan. [The Political Law of Marriage Agreements After the Decision of the Constitutional Court Number 69/PUU-XIII/2015 in Creating Marital Harmony]. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*. 2017, Vol. 6, No. 1, [2023-09-21]. Available at: <<http://dx.doi.org/10.33331/rechtsvinding.v6i1.121>>.

and a contract, so countries pay attention to this important relationship.¹⁵ Arrangements regarding the marriage agreement are limited to regulating property. The nature of this marriage agreement is to provide protection for husband and wife while bound by marriage and/or at the time of divorce. Currently, there is no regulation regarding the contents of the marriage agreement, but it must be in written form and must not conflict with law, religion, or decency. The husband and wife are free to determine the contents of the agreement, for example, regarding honesty, loyalty, expenses, and income to meet their needs. life, or it could be about his hobby. However, the marriage agreement at least contains a matter of property separation that is greater for one party than for the other party; both sides each bring a lot of input; each has his own business, and if one party goes bankrupt, the other is not involved; for the debts they incurred before marriage, each will be responsible for them alone.

IV. LEGAL SMUGGLING OF LAND RIGHTS IN MIXED MARRIAGES

Legal smuggling is defined as a legal act that is contrary to the law. Not because of a legal need, but intentionally carried out to avoid the law and to look for holes in the legal network to avoid statutory regulations with bad intention. Legal smuggling is a way of avoiding legal requirements determined by applicable laws and regulations with the aim of avoiding an unwanted legal consequence or realizing a desired legal consequence.¹⁶

Mertikusumo explains four ways of transferring land belonging to the Indonesian nation to non-Indonesian people; Marriage mixed assets, abintestato inheritance, status change, and naturalization all transfer land belonging to the Indonesian nation to non-Indonesian people.¹⁷ The most important details are the models of legal smuggling in agreements regarding land tenure by foreigners. The master agreement consists of a land agreement and power of attorney, where the Indonesian citizen acknowledges that the land registered in their name does not belong to them and gives irrevocable power to the foreigner to take all legal actions against the land and building rights. The option agreement gives the Indonesian citizen the option to purchase the land and building rights; the Lease Agreement regulates the term of the lease; and the Power of Attorney to Sell contains the granting of power of attorney with substitution rights from the Indonesian citizen (authorizer) to the foreigner (endorsee). In the statement letter of the heirs, the wife of the Indonesian citizen and their child stated that although the land and building were registered in the name of her husband, her husband was not the real owner of the land.

The agreement is legal smuggling and cannot be sheltered in the name of freedom of contract. However, freedom of contract cannot be exercised if it is contrary to decency,

¹⁵ SMITH, C. H. A Review of the State of the Law on Marriage Evasion. *Wyoming Law Journal*. 2019, Vol. 11, No. 2, pp. 2–5. [2023-09-21]. Available at: <<https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1442&context=wlj>>.

¹⁶ KOLOPAKING, A. D. *Penyelundupan Hukum Kepemilikan Hak Milik Atas Tanah di Indonesia*. [Legal Smuggling of Land Ownership Rights in Indonesia]. Bandung: Alumni, 2013, pp. 55–56. [2023-09-21]. Available at: <<https://onsearch.id/Record/IOS3504.libra-063403116001404>>.

¹⁷ MERTOKUSUMO, S. *Perundang-undangan agraria Indonesia*. [Indonesian agrarian legislation]. Yogyakarta: Liberty, 2011, p. 94. [2023-09-21]. Available at: <<https://opac.perpusnas.go.id/DetailOpac.aspx?id=853542>>.

public order, or there is a cause that is not prohibited and there is good faith.¹⁸ Agreements made between Indonesian citizens and foreigners based on false causes. Agreements made under the pretense to hide the true cause are not allowed. In this case, the agreement is considered null and void from the start. The judge is authorized, because of his position, to pronounce the cancellation, even though it is not requested by any party. In addition, not all agreements made have binding force as law, only agreements made legally, which bind both parties.

Legal smuggling can also occur through marriage institutions when foreigners marry Indonesian citizens in order to obtain land rights in Indonesia by using the name (nominee) of an Indonesian citizen. Legal smuggling is conducted using the name of an Indonesian citizen obtained through marriage, which is typically an unofficial union. Using the name of an Indonesian citizen, which is bound by a notarized agreement between the foreigner and the Indonesian woman partner, so that the Indonesian woman whose name is on the land rights feels bound by the trustee agreement that becomes the basis for making a nominee agreement in her name for the ownership of the land rights. In the agreement, foreigners may state that the funds used to purchase land or buildings are private funds belonging to foreigners and receive permission to sell or release land or buildings that have been in the names of Indonesian citizens. In the notarial agreement only as a “guise” for foreigners to transfer land rights indirectly to foreigners with an agreement attached to a lease deed, acknowledgment of debt using land certificate guarantees, granting power of sale, and Deed of Granting Mortgage Rights. This activity is considered a form of legal smuggling in the institution of marriage in order to circumvent the prohibition on transferring land rights to foreigners.

In the agreement, the position of the Indonesian citizen is as a “trustee” or “nominee”. In this kind of agreement, foreigners do not get legal protection. The embodiment of this nominee is in the agreement letter between a foreigner and an Indonesian citizen as a nominee, which was created through a package of agreements using such power of attorney. Using an Indonesian citizen as a nominee constitutes legal smuggling because the substance is contrary to the UUPA. The nominee agreement to indirectly transfer property rights to foreigners violates Article 26 paragraph (2) of the UUPA, which results in the agreement being null and void by law. The land falls to the state, and money for the purchase of land or buildings that have been issued by foreigners to Indonesian citizens cannot be returned.

On the other hand, Article 2 paragraph (1) of the Marriage Law says that “marriage is legal if it is done according to the laws of each religion and belief.” This means that marriage institutions can be used to get around national and religious laws. When this article goes into effect, it could be interpreted in a wide range of ways. This could lead to legal smuggling in the area of marriage law, such as: First, holding weddings outside of Indonesia is a way to get around the fact that interfaith marriages are illegal or have no rules in Indonesia. In this situation, Indonesian citizens can get married to foreigners or to other Indonesian citizens. But no matter where a person gets married, it has to follow the mar-

¹⁸ BUELL, S. W. Good Faith and Law Evasion. *UCLA Law Review*. 2011, Vol. 58, pp. 611–666. [2023-09-21]. Available at: <https://scholarship.law.duke.edu/faculty_scholarship/2320>.

riage law in his home country. Article 56 of the Marriage Law says that the law of the country where the marriage takes place applies. For Indonesian citizens, this means that the marriage does not break Indonesian marriage law and must be registered at the Marriage Registration Office in their place of residence within one year of their arrival in Indonesia. If it's true that interfaith marriages are held abroad on purpose to get around the rules of the Marriage Law, then this could be called “legal smuggling.”

Second, have traditional marriages. This method is usually not written down, so it goes against everything the Marriage Law says is normal. Even though customary law is the basis for national land law, not all original customary land laws are directly used as the basis, and customary law does not go against national or state interests. Third, temporarily change your religion before getting married. Changing religions only as a requirement for the marriage to be legal and then going back to following the rules of their own religions Fourth, a “semi-” or “fake” marriage is required to get Indonesian citizenship because the requirements for becoming a citizen are less strict than those for becoming a naturalized citizen. Foreigners can get land rights in Indonesia through customary marriages, religious conversions, and “quasi” or “fake” marriages. Foreigners only marry Indonesian citizens to get the rights to their property, so the marriage is just a front.

Foreigners can only lease and use land under the UUPA and its regulations. Lease rights allow a person or legal entity to build on other people's land by paying rent before or after use. Lease rights are not registered land rights and cannot be used as collateral for mortgage-encumbered debts. The UUPA does not regulate time after lease expiration. The lack of lease rights rules can lead to legal smuggling by: 1) granting lease rights for buildings with a “rent” period that exceeds the reasonable limit; 2) giving “rent” that is actually the land's price; and 3) the land owner can only get his land back by paying the price. Thus, legal smuggling cannot be detected until a dispute is resolved in court.¹⁹ Thus, legal smuggling cannot be detected until a dispute is resolved in court. Similar to rental rights, foreigners can own use rights. State land, land with management rights, and land with ownership rights are all eligible for a right of use. The right of use is granted for an indefinite period as long as the land is used for certain purposes, such as government agency offices, foreign country representative offices, and international agency representatives, as well as the residences of the Head of Representatives and the performance of the functions of religious and social bodies. However, foreigners are uninterested in land use rights because they have tenure and land ownership.

Legal issues in Article 35 and Article 36 of the Marriage Law for some foreigners as a mode of legal smuggling are linked to the principle of nationality in Articles 21 and 26 of the UUPA that prohibits the transfer of rights to foreigners directly or indirectly. Regardless of a separation agreement, Indonesians and foreigners suffer. Indonesians lose because they have no property separation agreement and land rights are equal to foreigners. Even though they retain citizenship, Indonesian citizens in mixed marriages cannot buy land with building, property, and cultivation rights. Marriage is a noble and sacred

¹⁹ SUMARDJONO, M. SW. *Alternatif Kebijakan Pengaturan Hak Atas Tanah Beserta Bangunan bagi Warga Negara Asing dan Badan Hukum Asing. [Alternative Policies for Regulating Land and Building Rights for Foreign Citizens and Foreign Legal Entities]*. Jakarta: Buku Kompas, 2007, pp. 45–46. [2023-09-21]. Available at: <<https://simpus.mkri.id/opac/detail-opac?id=7637>>.

institution that unites a man and a woman as husband and wife to form a family without regard to ethnicity, race, or religion. The wife must manage household affairs and the husband must protect and provide for her. Mixed marriages and property should have special rules. Marriage affects citizenship status, inheritance, joint property, and the transfer of land rights through buying, selling, exchanging, giving, and wills.

V. CONCLUSION

The state's right to control land is regulated and reduced to various types of land rights granted to individuals and legal entities, both Indonesian citizens and foreign nationals. Establishing a legal institution for use rights and lease rights for buildings is necessary to satisfy foreigners' need for property in accordance with the UUPA's principle of nationality. Foreigners can own usufructuary rights on condition that they are domiciled in Indonesia, but the term and status of the right to the land where the building is erected are important. Foreigners should socialize themselves with the fact that usufructuary rights over state land are strong land rights, as they have priority rights to apply for new rights if the usufructuary rights expire. Violations of the UUPA with agreements intended to transfer property rights to foreigners result in the agreement being null and void, and payments received by Indonesian citizens cannot be reclaimed.

The Marriage Law and the Land Law have a conflicting concept of joint property, which cannot be applied to national land law. If land ownership is transferred to foreign nationals, mixing of assets in mixed marriages, inheritance without a trustee, and Indonesian citizens losing their citizenship require Indonesian citizens to relinquish their rights to the state or transfer them to other parties. Additionally, an asset separation agreement must be drawn up for Indonesian citizens who engage in mixed marriages to buy land rights with a status other than usufructuary rights and lease rights. It must be made by mutual consent, with a written agreement ratified by the marriage registrar. The content of the agreement depends on the agreement of the parties, as long as it does not conflict with the law, religion, or decency. Both parties are given the widest possible freedom of contract.