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Discrimination Against Women With Foreign Spouses In Relation To Land Ownership In Indonesia

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Abstract

Discrimination against women in Indonesia has been exists since the time of Dutch occupation for over 400 years. Married woman is not allowed to execute any legal action, as they are considered incapable of law. In the previous law concerning citizenship (Law No. 62 of 1958) stipulated that Indonesian women whom married to foreigners (mixed marriage women) have no right to keep their nationality. Her Indonesian nationality will be automatically revoked at the time of marriage, unless she expresses her intent to remain her Indonesian nationality. Further, based on Article 21 and 36 of Agrarian Law and Article 35 of Marriage Law, mixed-married women are not allowed to own property. This discriminative treatment underlies the Constitutional Court decision No. 69/PUU-XIII/2015, in essence that the Constitutional Court granted a petition for judicial review by allowing mixed married women to own property as other common Indonesian citizens with condition of making a marriage agreement. This study uses doctrinal legal research method with conceptual approach used to understand the concept of human rights. This study analysed how far the Constitutional Court verdict can provide justice and human rights in reducing the problem of gender discrimination in related to property ownership for mixed married women, as the theory of justice by John Rawls' stated "*social and economic inequalities are to be arranged so that they both (a) reasonably expected to be to everyone's advantage...*". The Constitutional Court decision must be followed by issuing new law or amending the existing laws, however the Ministry of Home Affair only issued an internal guidance letter. Therefore the legal assurance and justice to remove discriminative treatments against mixed married women maybe far to be achieved.

Keywords: Gender, Discrimination, Property Ownership, Rights, Law

Introduction

Objectives

Law is basically applied to provide protection, welfare, truth, equality, and justice. Therefore, law and regulation which issued by the legislative should reflect justice for all. However, the reality is that existing laws becomes a gender-biased rule, which is a disadvantageous and favorable for one gender only. These rules are regarded as the result of a developed reflection of the stereotype value in society: the gender differences causes different degrees among men (masculinity) and women (feminimality). The stereotype has spread over the centuries as a growing customary paradigm in Indonesia, as stated by Yusril Ihza Mahendra in the Constitutional Court (2015) "*In Practice, for example Batak custom law, Simbolon married to Siregar clan, he must join the clan Siregar, no longer using Simbolon clan, or sometimes in*

Javanese customary law as well. A woman named Sakinah is married to Dahlan, the next she has been called as Mrs. Dahlan, no longer called as Mrs. Sakinah."(p.94).

In mixed marriages, gender discrimination occurs in women who marry to foreign nationality's men. Those women are discriminated not only on her citizenship's status, but also on the ownership of property and land. The Article 21 paragraph (1) of Law No. 5 of 1960 on the Basic Agrarian Law (Agrarian Law) and Article 35 paragraph (1) of Law No. 1 Year 1974 on Marriage (Marriage Law) used as excuses for developers to refuse the purchase of property by mixed married women. This situation comes into the climax when a mixed married woman brought her case to the Constitutional Court to be judicially reviewed by the court.

The judicial review of case No. 69/PUU-XIII/2015 lasts for approximately 1 year, with support from thousands of Indonesian mixed married women all over the world. The government on their statement admits that there is legal blankness, therefore it is necessary for the government to facilitate and provide the same treatment to women who married to foreigners. Finally, on October 27, 2016, the Constitutional Court issued the verdict No. 69/PUU-XIII/2015, which was viewed by many parties as a phenomenal verdict, and it has carved out a new history of constitutional law in Indonesia. The Court in its decision states that Article 29 paragraph (1), (3) and (4) of Law No. 1 year 1974 concerning Marriage is contradictive to the 1945 Constitution. Therefore, the Constitutional Court decided:

1. Article 29 paragraph (1) of the Marriage Law shall be interpreted "*At the time, before to the proceeding or during the marriage both of parties for consentaneity may proffer a written agreement authorized by the marriage or notary registry officer after which the contents also apply to the third party concerned*";
2. Article 29 paragraph (3) of the Marriage Law shall be interpreted "*The agreement shall come into force since the marriage take place, unless otherwise provided in Marriage Agreement*";
3. Article 29 paragraph (4) of the Marriage Law shall be interpreted "*During marriage, marriage agreement may relate to marital property or other agreements, irrevocable or revoked, unless on both sides there is agreement to amend or withdraw, and any change or revocation it does not harm a third party*".

By this verdict, the terms of the marriage agreement in the Marriage Law have changed significantly. Now anyone, during the marriage can make a marriage agreement on separation of the assets. However, with this verdict, will the discrimination against women who married to foreigners disappear?

Research Question

As the background described aboved, researcher will analyze the causes of gender bias rules analyzed based on the history of laws and regulations of post Constitutional Court decisions in terms of justice, with the focus of research are (research question):

- 1 Does the current laws reflecting gender discrimination in term of land ownership?
- 2 How the position of women with foreign spouses in relation to land ownership after the verdict of Constitutional Court No. 69/PUU-XIII/2015?

Theory

This research will use the Theory of Justice put forward by John Rawls as the basis for the analysis of discrimination in women with foreign spouses from the point of justice and equality of rights. Equality principle is the benefit of a man to be treated according to the principles of justice, the foundation that distinguishes man

from other God's creatures (John Rawls 1999, p.441). Similarly, Pancasila (State Ideology) and the 1945 Constitution guarantees the existence of justice and equality in the law of citizens. But, the reality of many regulations that have deviated from what aspired in Pancasila and the 1945 Constitution, resulting in the loss of rights of a group in this case are Indonesian women who are married to foreign citizens. Therefore, the state must regulate in such a social gap that exists in society, so that everyone will get the same justice with other citizens. This is in line with the theory of justice put forward by John Rawls, "*social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage ...*" (Rawls, 1999, p 53). The government should be able to guarantee the Primary Social Goods that everyone entitles to are all social values, freedoms and opportunities, income and wealth, and the social bases of self respect (Rawls, 1999, p.54), which includes the right to have a place to live and property, in this case is land and property.

Methodology

This research used doctrinal legal research methods that include research on legal objects that are conceptualized as rules of legislation (Irianto and Shidarta, 2011, p.124-125). This study is based on a secondary data study consisting of primary legal materials and secondary legal materials. The data used in this study was conducted on secondary data, namely data obtained from the literature of legal science (Soekanto & Mamudji, 1994, p.13-14). This doctrinal legal research method also refers to research that leads to a philosophical basis to overcome the solution to the problem of gender bias in the rules of property ownership.

Researcher will review object of study that is gender discrimination of ownership land and property from side of legislation. For that, (*Statute Approach*) (Ibrahim, 2013, p. 302) is used to understanding gender discrimination against women in land ownership based on laws regulation and amendment after verdict of Constitutional Court No. 69/PUU-XIII/2015.

Literature Review

Justice and Equality are the Absolute Need of Human Being

Referring to Rawls's view about equality, human traits are entitled to benefit from the principle of justice. This is what distinguishes human beings from other living beings. The application of justice is determined by *justice as fairness*, which means equal justice for all members of society. According to Rawls equality is divided into three levels of enforcement (Rawls, 1999, p.441)

The first level is the concept of equality in the system of public rules. As Rawls (1999) mentioned "*It implies the impartial application and consistent interpretation of rules according to precept as to treat similar cases similarly (as defined by statutes and precedents) and like*" (p. 442). At the second level, Rawls (1999) said "*Here the meaning of equality is specified by the principles of justice which require that equal basic rights be assigned to all persons.*" (p. 442). The third level explained that equality at first and second levels can only be given for moral persons. Rawls (1999) said that "*Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan a life); and second they are capable of having (and are assumed to acquire) a sense of justice...*" (p.442). In other words, equality must be regulated in full, both in the law and regulation.

Findings

Gender Discrimination in Property Ownership

In the General Explanation of Agrarian Law, the main objective of Agrarian Law is to lay the groundwork for the drafting of national agrarian law, which is a tool for building a just and prosperous society and to provide legal certainty on land rights for the people of Indonesia. Justice is one of the major pillars in the formation of Agrarian Law, not as an impediment to what has been aspired. Therefore, Article 9 Paragraph (2) of Agrarian Law regulates *"Every Indonesian citizen, both men and women have equal opportunity to obtain a right to land and to get the benefit and the result, both for themselves and for their families"* (Agrarian Law, Art 9, Par 2). But in the reality that Indonesian women in mixed marriages have difficulty to buy property and land in Indonesia.

Referring to the Constitutional Court verdict No. 69 / PUU-XIII / 2015 which essentially examines several articles in the Land Law and marriage laws which, if provisions are juxtaposed, cause the constitutional rights of the perpetrators of intermarriage disappear. The petitioner states that any developer, argued that Article 36 Paragraph (1) of the Agrarian Law and Article 35 Paragraph (1) of the Marriage Law prohibit mixed marriage women to purchase any property without prenuptial agreement, as the original quotation from the developer is as follows *"a woman who marries with foreign nationals are prohibited from buying land and/or buildings with Building Use Right status. Therefore, the developer decides not to enter into a Sale and Purchase Agreement or the Deed of Sale and Purchase with the Petitioner, as it would violate Article 36 Paragraph (1) of the Agrarian Law."* Apparently, the rejection of the purchase of property is confirmed by the State District Court Decision stating that purchases made by the applicant violate the law namely violation of Article 36 paragraph (1) Agrarian Law. The view is influenced by a dogma that if a Indonesian woman buys a property it will merge with her husband's wealth of foreign nationality, so that the ownership of half the property will be owned by a foreigner. It violates Article 21 paragraph (1) of Agrarian Law which prohibits foreigners to own property with an absolute or Right to Use right (Constitutional Court, 2016, p.5-6).

The discrimination is experienced by petitioner was also experienced by hundreds of women with foreigner spouses. This thing proven from witnesses which attended in stand trial, all witnesses mostly mixed married women from various territory in Indonesia, which gives almost same information, that is cannot have property because their husband are foreigners.

Discussion

Limitations

In this research, gender discrimination will be analyzed from the equality and position of women with foreign spouses with respect to their rights to own land and property, in the approach of laws regulation. In other words, the object of research will be seen from the point of public rules and its implications in gender equality.

Gender Discrimination in Indonesia Legal System

Gender discrimination to the wome in laws already felt for long time. According to Gender Analysis Pathway (GAP), which developed by National Development Planning Agency (BAPPENAS) and Women's Support Phase II – CIDA, it is well known there are still many problem and injustice of gender that women is facing. (Katjasungkana & Sadiawati, 2001). Even though, states had been ratified several

convention against women discrimination, such as Convention on The elimination of All Forms of Discrimination Against Women with Law No. 7 Year 1984 (Convention of Women Law). According to explanation from Convention of Women Law, this is because the existing legal system still gives different treatment to women. If it refers to the explanation of the Women's Convention Law, it is stated that the signatory is an affirmation of Indonesia's attitude in its participation to eliminate all forms of discrimination against women. In the field of land, government guarantees against the prohibition of gender discrimination also stipulated in Article 9 paragraph (2) of the Agrarian Law, which guarantees equality of ownership of land and property (Agrarian Law, Art 9 Par 2). However, other laws such as Civil Code, Marriage Law and Citizenship Law that caused the legal system to become gender biased.

Indonesia Civil Code. Discrimination regulated by the Laws and Regulation has been in place since the regulation has made during Colonial period. For example, Article 105 Indonesian Civil Code which regulate that women for doing legal action should represent by their husbands for things that related to outside household including to take care of his wife's property (Civil Code, Art. 105). Even openly Article 1330 Indonesian Civil Code is considered women as individual who cannot be able to do any legal action and must be under guardianship of their husband (Civil Code, Art 1330).

Eventhough Article 139 Indonesian Civil Code allowed couple to arrange marriage agreement and allowed wife financially independent from their her husband, however that independence is denial by Article 140 Indonesian Civil Code, which states that "*marriage agreements*" should not undermine all things that lean to husbands as husbands. Thus, the phrase "*The right which is lean to husband as husband*" in Article 140 of Civil Code when connected with Article 105 of the Civil Code "*The husband is the head of the union of husband and wife*" and "*the husband is obliged to be his wife's guardian to face the court (performing the law)*". It means that the wife under the husband's abilities. In addition, Article 105 of Civil Code provides that "*The husband is obliged to take care of his wife's personal property (unless otherwise stated in the marriage agreement) but every transfer of property must be approved by his wife.*" (Civil Code, Art 105). Even husband can sell or transfer consiliation property (property acquired together during marriage) without wife's approvement (Civil Code, Art 124). Although that rules is no longer valid by the issuance of Marriage Laws. However, in researcher's opinion set of mind and stereotype of man superiority, adopted by Civil Code still influences Marriage Law.

Marriage Laws. Although in Marriage Law is clearly stated in Article 31 Paragraph (1) that "*The right and the position of wife is equal with rights and position of husband in household living and living harmonies in society*" (Mariage law, Art. 31 Par. 1). However, in paragraph (3), Marriage Law recreates discrimination towards women position (Katjasungkana & Sadiawati, 2001, p. 34).

Article 31 paragraph (3) of Marriage Law which stipulates "*Husband is head of family and wife is housewife*", has put men position as superior ones than women's (Mariage law, Art. 31 Par. 1). This means that the rule puts women in the domestic work's scope, such as cooking, cleaning the house, take care for children, in other words women who have been married automatically agreed to spend time at home. A further implication of this provision is to justify the social and cultural constructions that treat women unjustly. In other words, it already established a point of view or moreover belief that domestic affairs, caring for children, cooking, and the like is a natural duty of women, so from the beginning they must be prepared to possess these

skills. The law has standardized the role of gender or the role of female's stereotypes as a domestic and economically dependent to her husband. (Harahap, 2003, p.96-97)

The Old Citizenship Laws. In Article 8 Law No. 62 Year 1958 concerning citizenship (The Old Citizenship Law), regulated that women who married with foreign Citizenship men might lose their citizenship if they did not submit a written declaration stated that she wanted to keep and choose the Indonesian Citizenship at the latest 1 year after their marriage (Indonesia, 1958, Citizenship Law No. 62, Art 8). However, that rule is not applied for man. In case man get married with foreign woman citizenship, that foreign women will receive man citizenship (Indonesia, 1958, Citizenship Law No. 62, Art 7), and the men will not loose the Indonesian citizenship.

The Implications for Mixed Marriage Women

After the establishment of Law No. 12 Year 2006 concerning Citizenship, citizenship system has changed i.e., previously the Indonesian woman who marry the foreigner automatically will lose her citizenship, but after the Citizenship Law established, the said woman can still maintain her citizenship (Indonesia, 1958, Citizenship Law No. 62, Art 26). Previously women relied on their husband, in citizenship, civility, and legal action, but now women become independent. But the current civil law system is not ready for the changes of the system. Women are still not independent to do legal act, and this mindset that affects the rights of women in land property ownership. There is a presumption that husband who has give income to the family so the land and property will be purchased by and on behalf of the husband. This proves that the property ownership in Indonesia is still dominated by men.

For example in Poso and Ponorogo, based on summary data of the research by one of women organization, it shows that 90% land ownership is under the name of the men, and only 10% is under the name of women. This also proves that the involvement of women in making decision related land is still less (NJA, 2017, January 2011). Meanwhile, the involvement of women in ownership, usage, and administration of rights of "join assets" land in Sleman Regency, Yogyakarta (Central Java), the majority of certificates are still under the name of the husband (Mahfiana, L, 2016, p. 31). Therefore, the consequence, access and wife's control towards join assets still low. These things prove that there is biased gender in the current legal system, especially related to the enforcement of Article 21 paragraph (1), 36 paragraph (1) Agrarian Laws and Article 35 paragraph (1) Marriage Law.

Based on these descriptions it is clear that in land ownership is strongly influenced by the steortype adopted by the Civil Code which prohibits women from committing legal acts. Moreover, the old Citizenship Law has given a mindset that women who marry foreign men will automatically become foreigners. Therefore, before the issuance of the verdict of the Constitutional Court No. 69/PUU-XIII/2015 mixed married women cannot own land and property.

Position of Mixed Married Women in Land Ownership Following Verdict of Constitutional Court No. 69/PUU-XIII/2015

The granting of the judicial review of Article 29 paragraph (1), (3) and (4) of Marriage Law, according to the Constitutional Court is as a result of changing of era in society (Constitutional Court, 2016). The law no longer fulfills the need to guarantee and protect the rights of individuals. Therefore, there is a need to have procedures to changes the legal provisions in order to be able to meet human needs, including the provisions of the Constitution (Constitutional Court, 2016).

According to the Court in practice today, the need for a new marriage agreement is felt by every couple after the couples have married. The need is not only needed by mixed married couples, but also by other Indonesian couples. In simple words, the Constitutional Court's decision can be understood as follows:

1. Marriage Agreement could be made before, at the time, or during marriage periode. It is means the marriage agreement can be made at any time by the parties when the couples are felt it necessary.
2. The said agreement shall be made in writing authorized and legalized by the marriage registration officer or public notary.
3. The contents are binding on third party, therefore the content of the Agreement shall not harm any third party.
4. The Marriage Agreement is valid from the moment of the marriage takes place. However, if the parties agree, it can be enforced in accordance with the wishes of husband and wife.
5. During the marriage periode, the Marriage Agreement shall not be revoked or amended, either partially or the whole. However, if agreed by the parties, and as long as it does not harm to any third party, the changing or revocation of agreement is allowed. (Constitutional Court, 2016, p.156-157).

Therefore, according to the Constitutional Court, the Marriage Agreement is the best solution to facilitate the needs of women who are married with foreigners to own land and property. With the Marriage Agreement, it is expected to eliminate discriminatory treatment against women who are married to foreigners will be lost/ended. Therefore the Court gives freedom for married couples to be able to make a Marriage Agreement at anytime, even in the middle of marriage takes place. Thus the property purchased by the Indonesian wife will not mix with her husband, so women who marry with foreigners can buy and own property in Indonesia.

Is the Marriage Agreement a Solution, or a Form of Discrimination?

The thinking of the panel of judges to the Constitutional Court which states that by opening an opportunity to make a Marriage Agreement even though marriage has been held for women who marry foreigners is a form of solution. However, another opinion states that if analyzed further, the verdict of the Constitutional Court No. 69/PUU-XIII/2015 precisely as if providing an additional requirement for women married to foreign men to make a Marriage Agreement. In this case, the requirement has created a distinction of new treatment (discrimination) against mixed marriage women. Since these requirements are not required on other women who marry Indonesian men. Other citizens can directly buy and own land and property, women who marry a foreigner has obligation to make a marriage agreement, in case they want to buy property, this will inevitably cost and time to make it. This situation can be concluded that the position and rights of women whom married to foreigner in the ownership of land and property after the verdict of the Constitutional Court No. 69/PUU-XIII/2015 are still treated in a discriminatory manner.

The State should guarantee all citizens without exception in order to have equal rights in land and property ownership, regardless of sex, whether male or female, or marital status. Because the constitutionally the 1945 Constitution has laid down the political ground of national land law as part of the regulation on earth, water and natural resources contained therein as affirmed by Article 33 Paragraph (3) of the 1945 Constitution "*Earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people*", as well as equal rights in Article 27 paragraph (1) Of the 1945 Constitution stated that all

citizens in their position before the law and government are obligated to uphold the law and the government with no exceptions.

Recommendation

In this case, the government must hold its commitment to eliminating all forms of discrimination, especially against women as has been ratified in the Convention of Women Law. The solution to eliminating women discrimination has been offered by the United Nations, that should be carried out seriously by the State. The solution is mentioned in 3 basic principles, are: i) State obligations, ii) non-discriminatory principles, iii) equality in opportunities. Therefore, the State has obligation to create an order which is free from discrimination by implementing principle of equality on all of social orders, including in the legal system.

The state has an obligation to make the rules that guarantee a fully equality can applied, so that the just society order as proposed by Rawls will be realized. Furthermore, regarding the rules that do not reflect the principle of justice, Rawls states "*likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust*" (Rawls, 1999, p.3). Therefore it is necessary for the state to make or amend the Marriage Law as a follow up to the issuance of the Constitutional Court Verdict No. 69/PUU-XIII/2015.

Alternative Discussion on Similar Research

As far as researcher knows there is another research whose object of research is almost similar with this research, that is a research by title "*Indonesia Women in Transnational Marriages: Their Struggles, Negotiations and Transformations on Ownership Rights as Indonesian Citizens: a Gender Studies Perspective*" wrote by Rinawati Prihaningsih. There is similarity between this research and Rinawati's research. Basing on those two researches, it can concluded that discrimination upon mixed married women in related to property ownership caused by gender-biased rules. Precisely, Rinawati explained on her research that "*However, as of today there still remain various laws and regulations that discriminate Indonesian citizen, married to foreigners. The Most conflicting ones are the laws regulating land ownership – the subject of this paper.*" (Prihatiningsih, pg. 345).

As explained above, researcher is also discussing Constitutional Court Verdict No. 69/PUU-XIII/2015 and also its impact for mixed married women which analyzed based on statute approach. This makes the differences of this research with Rinawati's research. On this research also discusses the offered solution to government to obtain justice for all parties including women married to foreigner.

Conclusion

The laws applicable prior the issuance of Constitutional Court verdict No. 69/PUU-XIII/2015 still reflects gender-biased rules, limiting the rights of citizen who married to foreigner in land and property ownership. The discriminatory rule is alive, because of the influence of the rules that have lived for hundreds of years in the Indonesia Civil Code, especially for Indonesian women. With the issuance of the Constitutional Court verdict, the government considered that the discriminatory treatment faced by Indonesian women who marry foreign men in relation to property ownership will be ended. Because the Indonesian women are now able to purchase the land, though the couple just has to make a marriage agreement that shares their assets clearly that the ownership of the land can belong to the Indonesian women.

But another opinion says that it is precisely with the obligation of making a marriage agreement for mixed married couples, actually intervenes proves that the government still treats discriminatively citizen who has foreign spouse. Article 9 of the Agrarian Law clearly provides that only Indonesian citizenship can own land ownership rights. So the marriage agreement which is defined in Marriage Law should not be necessary at all. Further, for the legal certainty, it is necessary to make or amend the Marriage Law as a follow up to the issuance of the Constitutional Court Verdict No. 69/PUU-XIII/2015.

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