

Perspective Legal Theory Analysis Mixed Marriage Arrangements As An Instrument Of Prevention Legal Smuggling In Business Development

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Abstract.

Various cases of mixed marriages show that not all mixed marriages are based on the motive of forming a happy family and continuing offspring, but there are also mixed marriages with other motives, including business, by using the Indonesian citizen partner as a tool to control land, property rights status and carrying out business activities at lower costs. According to the Basic Agrarian Law in Indonesia, foreign nationals are prohibited from controlling land with ownership status. The Basic Agrarian Law in Indonesia prohibits Indonesian citizens from controlling land with ownership status and only allows foreigners to hold land rights on Right to Use or Right to Use Building if they have formed a Limited Liability Company. The research method used in this research is the normative juridical research method. The research results show the importance of a legal theoretical basis in establishing mixed marriage arrangements as an instrument for preventing legal smuggling in business development in Indonesia, and proportionally placing marriage and business as different legal events, in accordance with statutory regulations, as well as returning mixed marriages to their natural, social and cultural aims and objectives, so that Indonesian citizen couples in mixed marriages can enjoy their constitutional rights as partners in a marriage like marriage in general.

Keywords: *Legal Theory, Mixed Marriage Arrangements and Prevention Legal Smuggling.*

I. INTRODUCTION

Article 21 paragraph (1) Law no. 5 of 1960 concerning the Basic Agrarian Law determines that only Indonesian citizens can have ownership rights to land in Indonesia. Article 21 paragraph (3) of the Basic Agrarian Law stipulates that foreigners who obtain property rights due to inheritance or commingling of assets due to marriage are obliged to relinquish those rights within a period of 1 (one) year. In the event that the right is not released within that time period, the right is extinguished by law and the land under the right falls to the state. The same provisions apply to Indonesian citizens who lose their citizenship. Article 26 paragraph (2) determines that foreign nationals who obtain ownership rights to land due to various legal events, such as: sale and purchase, exchange, gift, gift by will, gift according to custom and other transitional acts, directly or indirectly, result in null and void and the land falls to the state. Indonesian citizens who also have foreign citizenship, the same provisions apply. However, other rights encumbering the land continue. These two provisions expressly stipulate that foreign citizens by any legal action, directly or indirectly, including Indonesian citizens with foreign citizenship (dual citizenship), cannot control land with ownership status. Article 49 paragraph (2) of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration determines that foreigners can hold use rights, for the period as regulated in Article 52 of Government Regulation Number 18 of 2021 namely 30 (thirty) years, can be extended for 20 (twenty) years, and renewed for a period of 30 (thirty) years. Foreigners can also hold building use rights by first forming a Limited Liability Company and holding Building Use Rights under the form of a legal business entity in accordance with the provisions of Article 36 paragraph (1) letter b of the Basic Agrarian Law and Article 34 of Government Regulation Number 18 of 2021, including the requirement that the Limited Liability Company must be domiciled in Indonesia.

These provisions emphasize that foreign citizens may not hold rights to land with property rights status and female or male Indonesian citizens parties to a mixed marriage can still hold rights to land with property rights status. In practice, some foreigners try to take control of land under ownership status by marrying Indonesian citizens, either in the variants of Indonesian men and Indonesian women or Indonesian women and foreign men for the purposes of carrying out business activities, even including selling, -buy or rent property. The citizenship of the Indonesian citizen, male or female, in the marriage is left to the

Indonesian citizen so that the foreigner in the marriage can indirectly control land under ownership status. Barriers to land control with property rights status for foreigners as regulated in the Basic Agrarian Law and Government Regulation Number 18 of 2021 in this case are overcome through a tenure scheme, namely through a marriage scheme, by using their Indonesian citizen partner to control land with property rights status. or carrying out property business through land control with freehold status for the purpose of avoiding various burdens of legal obligations that must be borne by foreigners, such as: the obligation to form a PT PMA Legal Entity, for land control with HGB status, the obligation to extend rights in terms of use rights, and tax obligations resulting from the PT's activities or in the case of individuals avoiding obligations imposed for control with use rights, including taxes. The benefits obtained through this avoidance are, among other things, free costs for establishing a PT PMA legal entity, including the obligation to place capital which is equivalent to the obligation to provide a certain amount of money at the start of business activities, and various other obligations relating to the business activities carried out.

Another advantage is, by prioritizing Indonesian citizens in marriage, as business actors, all costs and tax obligations imposed on business actors are domestic costs and tax burdens which are generally lower than the costs and tax burdens on PT PMA or foreigners. Through this business scheme, foreigners enjoy double benefits, namely low costs and taxes as well as the treatment of domestic law in all aspects of business activities, especially those related to costs, such as free land rights processing fees, free land rights extension fees, free formation processing fees. The business entity has the legal entity PT PMA, and is exempt from taxes that should be paid for the purposes of managing land rights and establishing a business entity. International Private Law qualifies such acts as acts of legal smuggling. The term legal system according to Lawrence M. Friedman (1984, 2009) states that the legal system is a collection of subsystems, namely Legal Structure, Legal Substance and Legal Culture. The legal system in a simple sense is likened to the work of a machine. Where, legal structure is likened to a machine, legal substance is what is done and produced by the machine, while legal culture is anything or anyone who decides to turn the machine on and off. So that the relationship between the three legal systems (elements of legal system) is like turning on a machine which means that law enforcement cannot be achieved without the three elements of the legal system (elements of legal system). The collaboration of legal structure, legal substance and legal culture will be able to realize legal objectives.

Where the purpose of the law must be able to provide legal certainty, legal justice and benefits for the community. The principle of legal protection for Indonesian citizens over the ownership of land is basically similar to the principle of protection in "In principle, the protection of consumers aims for development, to develop human beings as a whole to create a just and equitable". society both materially and spiritually, and to improve the welfare of all people in a country" (Rumiarta, et al, 2020). Law is man's work in the form of norms, containing behavioral instructions. It is a reflection of human will; about how the community should be built and where it should be directed. Therefore the law is first of all, it contains a record of the ideas chosen by the society in which it was created. These ideas are ideas about justice (Satjipto Rahardjo in Abdullah Sulaiman: 2005). Various cases of mixed marriages show that not all mixed marriages are based on the motive of forming a happy family and continuing offspring, but there are also mixed marriages with other motives, including business, by using the Indonesian citizen partner as a tool to control land. property rights status and carrying out business activities at lower costs. According to the Basic Agrarian Law in Indonesia, foreign nationals are prohibited from controlling land with ownership status. The Basic Agrarian Law in Indonesia prohibits Indonesian citizens from controlling land with ownership status and only allows foreigners to hold land rights on Right to Use or Right to Use Building if they have formed a Limited Liability Company. The research results show the importance of a legal theoretical basis in establishing mixed marriage arrangements as an instrument for preventing legal smuggling in business development in Indonesia.

II. MATERIALS AND METHODS

The research method used in this research is the normative juridical research method. With regard to this research, apart from focusing on research on norms from statutory regulations, legal principles and legal

doctrine, research is also carried out on mixed marriage patterns as required by statutory regulations and pseudo-mixed marriage patterns which are a form of legal encroachment so that it can be easily distinguished between mixed marriages that comply with statutory regulations and mixed marriages that are a form of legal smuggling.

III. RESULTS AND DISCUSSIONS

Perspective Legal Theory Analysis Mixed Marriage Arrangements as an Instrument of Prevention Legal Smuggling in Business Development.

The basis of legal theory in establishing a mixed marriage arrangement as an instrument to prevent legal smuggling in business development in Indonesia, in this case can use legal theory, namely the theory of legal smuggling and the theory of state sovereignty, this is with the aim and purpose of preventing such legal smuggling and placing proportionally marriage and business as different legal events, in accordance with statutory regulations, as well as returning mixed marriages to their natural, social and cultural aims and objectives, so that Indonesian citizen couples in mixed marriages can enjoy their constitutional rights as spouses in marriage like marriage in general. In practice, some foreigners try to take control of land under ownership status by marrying Indonesian citizens, either in the variants of Indonesian men and Indonesian women or Indonesian women and foreign men for the purposes of carrying out business activities, even including selling, -buy or rent property. The citizenship of the Indonesian citizen, male or female, in the marriage is left to the Indonesian citizen so that the foreigner in the marriage can indirectly control the land under ownership status, the foreigner enjoys double benefits, namely low costs and taxes as well as the treatment of domestic law in all aspects of activities business, especially those related to costs, such as free fees for processing land rights, free fees for extending land rights, free fees for forming a PT PMA legal entity, and free tax fees that should be paid for the purposes of managing land rights and forming a business entity. International Private Law qualifies such acts as acts of legal smuggling. The rule of law is not only subject to the rule of law, but also includes ethical (moral) values, good norms in this case contained in the law or as a civilization that lives in society for the public interest which has an impact on society. There is equality before the law, in this case everyone regardless of their position and class in society is subject to the same law.

Likewise, state functionaries are subject to the same laws as those that apply to ordinary people. Law which is a series of regulations and or laws and regulations that give birth to state institutions and or government agencies that have their respective authorities granted by the laws and regulations, where such authority and power cannot be used outside the legal corridor. This is because it must be subject to the principle of equality before the law (Rumiarta, 2022). Law enforcement regulates an effort to turn ideas and concepts into reality. Law enforcement is a process of realizing legal desires into reality. What are referred to as legal desires here are nothing other than the thoughts of the law-making body which are formulated in the legal regulations. Discussions about the law enforcement process also extend to law making. The formulation of the thoughts of legislators (laws) as outlined in legal regulations will also determine how law enforcement is carried out (Satjipto Rahardjo, 2007). According to A.V. Dicey put forward three main elements in the rule of law related to law enforcement which include: Supremacy of law; means that no one can be punished except for violating the law. Equality before the law; This means that everyone has the same position before the law. Due process of law; means that all state actions must be based on law and there is no action that does not have a legal basis (Rumiarta, 2022). In legal smuggling theory (fraudulent in law) generally means actions carried out for the purpose of taking advantage or advantage by avoiding various obligations specified in a certain legal provision. The basic concept of legal smuggling is fraud in the form of actions or statements carried out in accordance with/complying with the law, but in fact the action is carried out with a different intention or purpose (Law Insider, 2023).

The doctrine of legal smuggling that has developed in countries adhering to the 'common law' legal tradition, such as England, the United States, and Canada, shows that legal smuggling in mixed marriages is placed under the theoretical study of marriage law and immigration law based on the doctrine of marriage annulment as a result of elements of 'common law'. fraud' and the legal doctrine of crimes as a result of an

element of fraud by one of the parties in the marriage (Kerry Abrams, 20120. So, support from other legal doctrines is needed, especially legislation, which can help formulate problem solutions that are in accordance with the characteristics and needs of problem solving , namely preventing legal smuggling and its consequences. Furthermore, the theory of state sovereignty, the theory of state sovereignty is part and continuation of the theory of the state. According to Aristotle, the state is needed by humans to maintain a good life, so that life continues well and humans can live well. Hobbes said that the state is needed to maintain civilization, without the state there is no possibility of civilization. The state has the power to build and create security, security to control human life and death. According to Lock, the state has organs that have the power to make rules that are mutually acceptable to humans, they are the ones who give humans the right to life, freedom and ownership of an object of ownership, including the right to enjoy the benefits of that object of ownership. According to Rousseau, the state is an entity with certain characteristics (statehood), which has the power to make laws and by obeying these laws humans can obtain and enjoy freedom compared to freedom in pre-civil society. Hegel stated that the state is a Divine Idea that exists on this earth and is the source of the dignity of every human being (Harold J. Laski, 1965).

That the state is the integration of all forms of human social units into one social unit called the state. The state is a unit of society that is integrated into a larger social unit with the power to make rules and impose sanctions on people who violate the rules. The state is a unit that has supreme power over every human individual and smaller social units within that social unit and has the power to force every person or entity to obey state law. Such power is called sovereignty and with this sovereignty the state is distinguished from other human social units. The state is called sovereign, according to Bodin, because the state gives orders to anyone and does not accept orders from anyone (Harold J. Laski, 1965). There are various theories about the source of state power called sovereignty. In the 5th century to the 16th century, the theory developed that state power originates from God (Theory of the Sovereignty of God), developed by theocratic believers, such as: Augustine, Thomas Aquinas, and Marsilius. After that, Machiavelli, Jean Bodin, and George Jellinek stated that state power originates from the state itself and is transformed by the state into the form of state law (State Sovereignty Theory). Then, Leon Duguit and Krabbe argued that state power does not originate from the state, because in reality the state itself is subject to the law. According to Dugit and Krabbe, state power is subject to higher power, namely human legal consciousness (Legal Sovereignty Theory). In the 18th century, after human thought experienced rapid development, based on facts, John Lock emerged with the theory of human rights, the implementation of which should not be hindered by anyone, not even kings. Lock coined the theory of the division of power, as later developed by Montesquieu and Immanuel Kant under the name Trias Politica. At the same time, Rousseau introduced the theory of Popular Sovereignty, the people as the source of state power, as is generally accepted today.

Basically, state power originates from the power of the people, the people are the highest source of state power, therefore the state creates laws based on state sovereignty which originates from the people to respect and maintain the rights of the people (Schmid, Von, 1965). Mochtar Kusumaatmadja stated that the word «sovereignty» comes from the English word 'sovereignty' which comes from the Latin word 'superanus' which means 'the top'. The state is called sovereign because sovereignty is the most basic characteristic of the state. A sovereign state means that the state has supreme power. Supreme power means power above which there is no other power. This theory has become a long-standing debate in the social system between nations because in reality countries are governed by higher laws which originate from the joint power of countries which makes it difficult for international society to develop. According to Mochtar, this view is a wrong view because it is based on a wrong way of thinking about the world state. The reality shows that today's international community is a society consisting of independent countries, free from the power of one country or another. Based on the origins of the term, sovereignty means supreme power, which means that the state does not recognize any power higher than its own. However, such power is accompanied by limits, not unlimited power. The scope of the application of such powers is the territory of the state itself. The state has supreme power within its territorial boundaries.

The state does not have such power within its territory. A country that lives side by side, between one country and another, then that one country has such power within its territory. One country does not

have such power within the territory of another country. Within the territory of another country, the other country has the highest power. According to Mochtar Kusumaatmadja, the notion of sovereignty has two important limitations, namely: (1) power is limited to the territorial boundaries of the state that has that power; and (2) that power ends where the limits of another state's power begin. This limitation is inherent in the notion of sovereignty (Mochtar Kusumaatmadja, 1985). Within its territory, every sovereign state has the power to regulate all events, objects and actions that exist and/or occur within its territory. The power to regulate (to govern) people and objects within its territory is called state jurisdiction. The state's jurisdiction includes the power to make laws (power to prescribe rules – prescriptive jurisdiction) and the power to enforce the laws they make (enforcement jurisdiction). Law enforcement jurisdiction includes executive and judicial jurisdiction. State jurisdiction can be exclusive, owned only by that country alone, or it can also be concurrent, shared by countries or several countries. Therefore, in matters regarding people and objects, the country's jurisdiction can be exclusive, only applying the law of one country, or it can also be concurrent, applying the jurisdiction of several countries.

For this second type of jurisdiction, in the case of civil incidents, person-to-person relations, the rules of private international law apply. According to Mochtar Kusumaatmadja, International Private Law is the totality of legal rules and principles that regulate civil relations that cross countries. Or, the law that regulates civil legal relations between legal actors, each of whom is subject to civil (national) law in a different country (Harris, 1983). This theory gives each sovereign country the power to form and enforce its own laws within its territorial boundaries, including laws governing marriage. In the event that the law governing marriage does not provide enough normative material that is useful or necessary to protect Indonesian citizens who are partners in mixed marriages, to prevent legal smuggling or prevent marriage from being used as a tool to carry out legal smuggling which results in the Indonesian couple experiencing losses or losing their rights. the right to a normal marriage, then the country concerned, especially Indonesia, can use its power to improve legislation, especially those governing mixed marriages, to add provisions that can be used as a basis for directing a mixed marriage to be in accordance with the aims and objectives. true marriage, namely to form a family and continue offspring, not for other purposes, including business, which could be detrimental to the Indonesian citizen partner.

IV. CONCLUSION

That there are several foreigners who are trying to take control of land under ownership status by marrying Indonesian citizens, both Indonesian men and Indonesian women and Indonesian women and foreign men for the purpose of carrying out business activities, even including selling- buy or rent property. The citizenship of the Indonesian citizen, male or female, in the marriage is left to the Indonesian citizen so that the foreigner in the marriage can indirectly control the land under ownership status, the foreigner enjoys double benefits, namely low costs and taxes as well as the treatment of domestic law in all aspects of activities business, especially those related to costs, such as free fees for processing land rights, free fees for extending land rights, free fees for forming a PT PMA legal entity, and free tax fees that should be paid for the purposes of managing land rights and forming a business entity . International Private Law qualifies such acts as acts of legal smuggling. According to the Basic Agrarian Law in Indonesia, foreign nationals are prohibited from controlling land with ownership status.

The Basic Agrarian Law in Indonesia prohibits Indonesian citizens from holding land with ownership status and only allows foreigners to hold land rights on Hak Pakai or Hak Guna Bangunan in the event that they have formed a Limited Liability Company, the importance of a legal theoretical basis in forming a marriage arrangement mixed as an instrument to prevent legal smuggling in business development in Indonesia, the legal theory in question is the theory of legal smuggling and the theory of state sovereignty, this is with the intent and purpose of preventing such legal smuggling and proportionally placing marriage and business as different legal events, in accordance with statutory regulations, as well as returning mixed marriages to their natural, social and cultural aims and objectives, so that Indonesian citizen couples in mixed marriages can enjoy their constitutional rights as partners in marriages like marriages in general.

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