

Indonesian Women in Transnational Marriages: Their Struggles, Negotiations, and Transformations on Ownership Rights as Indonesian Citizens: a Gender Studies Perspective¹

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Abstract

One of the impacts of today's increasing movement of people due to the globalizing world is a transnational marriage between an Indonesian citizen and a foreigner. Indonesian laws which are mostly developed from a patriarchal perspective, have generally disadvantaged woman, who became "invisible" with respect to her rights as an Indonesian citizen. This situation has improved but discriminative laws still exist towards Indonesian women, married to foreigners. This paper is about the discrimination of the land ownership rights of Indonesian woman, married to a foreigner. Her rights are treated differently and she is not "equal before the law" in Indonesia because of her transnational marital status. She loses her land ownership rights, unless she and her foreign husband have established a notarized prenuptial agreement prior to their marriage. With the focus on women as the subjects, this research adopts multicultural feminism and feminist legal theory perspectives by applying qualitative methods which include in depth interviews and participative observation. By presenting the insights and experiences of Indonesian women as part of the woman's movement may contribute to changing the existing discriminative laws in Indonesia and bring these in line with changes caused by rapid people's mobility as part of the globalization.

Keywords:

Indonesian women in transnational marriage; feminist methodology; Indonesian laws.

I. Introduction

The movement of people in and out of a country to get a better life or safer place in the new country is causing major changes such as "demographic growth, technological change, political conflict and warfare" as pointed out by Castles and Miller (2003). This movement of people comes either peacefully or forced and affects fundamentally economic, political and social conditions as well as the legal systems, as Castles and Miller claim (2003). One of the impacts in today's rapid movement of people in Indonesia is a transnational marriage between an

¹ This paper is adapted from my thesis "Indonesian Women in Transnational Marriages: Their Struggles and Access to Justice Concerning Their Indonesian Land and Property Rights".

Indonesian citizen and a foreigner. As stipulated in *Undang-Undang Perkawinan*, the Indonesian Marriage Law No. 1 of 1974, “a transnational marriage is a marriage between two persons, who reside in Indonesia and are subject to different laws because of their different citizenship - one of them is Indonesian, and the other is a foreigner”.

It is stated in the United Nations research paper - *Convention on the Nationality of Married Women: Historical Background and Commentary* (United Nations doc. E/CN.6/389, Sales No. 62.IV.3. p.2) that “the nationality laws of many countries disadvantage women”. This is certainly the case in Indonesia with its strong patriarchal culture where adult men control and dominate women and children.

Beckman and Beckman’s article (2009) stated that the transnational family becomes an integral part of the globalizing process “..... thus consists of a great number of chains of interaction in which legal forms are reproduced, changed and hybridized, simultaneously, in different contexts of interactions” (p. 11). In line with the recent global development, some Indonesian laws have been revoked or amended. However, quite some laws have not been changed yet, even if they are in conflict with statements of the Indonesian Government, proclaiming adherence to “respect, protect and preserve human rights”. As will be explained later, this is particularly evident in laws and regulations related to land ownership rights for Indonesian citizens in transnational marriages.

II. The Legal Position of the Indonesian Woman in a Transitional Marriage: Before 1974

Bedner and Van Huis (2010) identified four civil groups in the Indonesian society as detailed in the first Indonesian marriage law, in effect between 1945 (the year of Indonesian independence) and 1974, when these Laws were replaced. These groups, ruled by different legal regimes, were derived from the legal citizenship framework from the Dutch East Indies – or in the words of Bedner and Van Huis- “inherited from colonial state” (p.177).

The first was that of the Book of the Civil Code that applied to the European part of the population (including the Japanese) and those who had been equated with the European in certain civil matters - mainly the Chinese. The second group was the Ordinance for Christian Indonesians (S. 1933 no. 74), for whom special records were kept by the

colonial state. The third and most important group was subject to the regime for the Indonesians: either *adat* (customary law) or Islamic law applied to those Indonesians and non-Chinese Foreign Orientals who were not equated with the European group. This group concerned more than 90% of the population of the Dutch East Indies. Finally, there was a special regulation on ‘mixed marriages’ [S.1898 no. 158 ed.] for those who were subject to different regimes but still wanted to marry.

Article 2 of S. 1898/no 158 of the Law states that “*Istri yang melakukan perkawinan campuran, selama dalam perkawinannya mengikuti kedudukan suaminya dalam hukum publik dan hukum perdata*” (A wife in transnational marriage shall be dependent on her husband’s status in the public and civil laws). Consequently, the Indonesian woman in a transnational marriage -before 1974- did not have her own legal status. She had lost her own identity publicly and privately in legal matters as she became dependent on her husband’s identity. She became “invisible” as a citizen. She lost her Indonesian nationality including her rights and obligations as an Indonesian citizen. To put this all in a broader context, many countries based their legal constitution on “patriarchy. This has been well explained in the “Women 2000 and beyond” (2003, p. 5):

Historically, many States, at the beginning of the 20th century, adopted the patriarchal position that a woman’s legal status is acquired through her relationship to a man—first her father and then her husband. ---. The result of the application of this principle [dependent nationality] was that of a woman who married a foreigner automatically acquired the nationality of her husband upon marriage – and that was then usually accompanied by the loss of her own nationality. The rationale for the principle of dependent nationality was derived from two underlying assumptions: firstly, that all members of a family should have the same nationality and, secondly, that important decisions affecting the family would be made by the husband.

In summary, the principle of dependent nationality in the pre-1974 marriage law (article S.1898 no. 158) which was also confirmed in the Indonesian Citizenship Law No. 62 of 1958, caused the Indonesian woman in a transnational marriage to lose her citizenship and be treated as a foreigner.

III. Major Legal Changes in the Position of the Indonesian Woman, in a Transnational Marriage: After 1974

A variety of laws, related to women and their children were changed over the last forty years, under pressure of women rights movements and their demands for equal rights for women. For our subject matter was important the new Marriage Law, decreed in 1974, and the new Citizenship Law, established in 2006. The Marriage Law No. 1 of 1974 (the Marriage Law) was a major breakthrough, as it did away (article 66) with the four (colonial) regimes of the old Law and established (article 31) the independent legal status and capacity of the married woman. Article 66 reads as follows:

With this coming into force of this Law, in regard of marriages and any matters related thereto by virtue of this Law the provisions contained in the Civil Code, the Ordinance on Marriage of Christians Indonesians (S.1933. No. 74) and the Regulation on Mixed Marriages (S.1898 No. 158) shall cease to exist and other regulations shall be further laid down in Government Regulations.

In article 31 is stipulated that “(1). The rights and position of the wife are equal to those of the husband both in family and in social life. (2) Either party to the marriage has legal capacity. (3) The husband is the head of the family, and the wife is a housewife the mother.” The 1974 Marriage Law also explicitly stated that the Indonesian, married to a foreigner, would hold his/her Indonesian nationality. However, it did not address discrimination for transnational marriages, outlined in other laws, such as the land ownership rights (Agrarian Law) and the nationality status of the children from a transnational marriage (Citizenship Law).

The Indonesian Citizenship Law No. 62 of 1958 was not in accordance with basic human rights and equality for women and children as stated in the Universal Declaration of Human Rights and the the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). After major pressure of local woman rights groups, particularly the transnational marriage advocacy organizations, the law was revoked in 2006 and replaced by the Indonesian Citizenship Law No. 12 of 2006. In the Elucidation, this new Law adheres to principles as follows:

1. “*Ius Sanguinis*”, the principle that determines citizenship based on hereditary, not by place of birth;

2. Restricted “*Ius Soli*”, a principle that determined citizenship based on place of birth, restricted to and only applicable for children according to the provisions set forth in this Law;
3. Single Citizenship, the principle that determined only one citizenship for a person;
4. Restricted Dual Citizenship, the principle of limited dual citizenship for children as set forth by the provisions in this Law.

The 2006 law was a major improvement for the children of transnational marriages. While previously they automatically -upon birth- got the nationality of their foreign father, they were now entitled to limited dual citizenship – limited in the sense that they can have both parent nationality (Indonesian and foreign) until the age of 18 years old. Thereafter, within three years, they have to choose for one nationality only.

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 research paper.

IV. Land ownership rights for Indonesians, married to Foreigners

Land ownership is primarily impacted by two major laws. They are the Marriage Law and the Agrarian Law. These laws, as well as their revisions, are not harmonized, which lead to conflicting and ambiguous legal interpretations towards ownership rights, particularly for Indonesian citizens, married to foreigners. The key articles in the Marriage Law are the articles 29 and 35, respectively outlining the “Prenuptial Agreement” and “Marriage Property”. Article 29 states that:

- (1) At the time of or prior to the marriage performance, both parties may by mutual consent conclude a prenuptial agreement in writing, legalized by the registrar of marriage, where upon the contents shall also be binding on third parties in so far as third parties affected.
- (2) The contract cannot be legalized if contrary to restrictions set by the law, religion or morality.
- (3) The prenuptial contract takes effect as from the marriage being concluded.

- (4) Throughout the marriage the contract cannot be changed except by mutual agreement between the parties, provided the changes are not prejudicial to the interest of third parties.

Article 35 states that:

- (1) Property acquired during marriage shall become joint property
- (2) Property brought into the marriage by the husband and the wife respectively and property acquired by either of them as a gift or inheritance shall remain under their respective control, unless otherwise decided between the parties.

The relevant articles in the Agrarian Law are articles 21 (*hak milik*: right on land ownership) and article 36 (*hak guna bangunan*: right to construct and own buildings). Article 21 states that:

- (1) Only Indonesian citizens can have a *hak milik*.
- (2) The Government is to determine which corporate entities can have *hak milik* and the condition thereof.
- (3) A foreigner who acquires a *hak milik* through inheritance without a will or by way of joint ownership of property resulting from marriage and Indonesian citizen holding a *hak milik* who following the entry into force of this Act, loses Indonesian citizenship is obliged to relinquish that right within one year following the date the *hak milik* is acquired in the case of the latter. If the following the expiry of the said time periods, the right is not relinquished, then the said right is nullified for the sake of law and the land falls to the State with the proviso that the rights of other parties which encumber the lands remain in existence.
- (4) A person with Indonesian citizenship, who at the same time holds foreign citizenship, cannot have land with the status of a *hak milik*, and to him/her the provision as described in paragraph 3 of this article shall apply.

Article 36 of the Agrarian Law states that:

- (1) Eligible for *hak-guna bangunan* (the right to construct and possess buildings on land which is not one's own for a period of at most 30 years) are:
 - a. Indonesian citizens (foreigners are prohibited from *hak guna bangunan*) and

- b. Corporate entities incorporated under Indonesian law and domiciled in Indonesia
- (2) A person or corporate entity which holds a *hak guna bangunan* but no longer fulfills the conditions which are referred to in paragraph (1) of this article is obliged to relinquish, within one year, the *hak guna bangunan* concerned, or to transfer it to another party which is eligible for such a right. This provision applies also to parties who obtain a *hak guna bangunan* in question is not relinquished or transferred within the said period of time, it is nullified for the sake of law-with the proviso that the rights of other parties given attention, in accordance with-provisions that are to be stipulated in a Government Regulation.

Based on the above articles of the Marriage Law and the Agrarian Law, the current legal interpretation is that Indonesian citizens, married to foreigners do not have land ownership rights – *hak milik* as well as *hak guna bangunan* - UNLESS they have established a prenuptial agreement prior to marrying the foreigner.

This interpretation has recently been affirmed by the issuance of Government Regulation No. 103 of 2015 on the Rules Governing the Ownership Rights over Residential Housing by non-Indonesians residing in Indonesia.

V. The Prenuptial Agreement: Issues and Uncertainties

The above current legal interpretation on land ownership for women in transnational marriages, seems to be, in my opinion, legally ambiguous because Indonesian women in transnational marriages do not lose their citizenship - according to the Indonesian Citizenship Law No. 12 of 2006 – and as Indonesians would then have the right on land ownership - according to article 9 of the Basic Agrarian Law as *lex specialis*. As such, using the prenuptial agreement as an extra condition for the right on land ownership for women in transnational marriages, should not be required.

I am of the opinion that “the requirement of a prenuptial agreement” is anyhow inconsistent with those provisions stating “equality before the law” stated in the Indonesian constitution, *Undang-Undang Dasar* of 1945 as *lex generalis*. It is therefore deplorable that even in 2015 the Indonesian Government held on to those unjust conditions in its Regulation No. 103 of

2015 that outlines rules for Ownership Rights regarding Residential Housing for *Non - Indonesians* residing in Indonesia. There are also legal inconsistencies in the 1974 Marriage Law between Article 21 concerning the prenuptial agreement and article 35 concerning the rules for gifting and inheriting property.

Additionally, a prenuptial agreement may put Indonesian women in a dilemmatic situation, to choose between her Indonesian ownership rights or joint marital property built and provided by her foreign husband. A prenuptial agreement may put more hardship for those women who do not have their own incomes, and only dependent to their spouses as they cannot have their access to their joint properties made and provided by working spouses as breadwinners. In short, a prenuptial agreement can not be applied for all women.

Finally, a major issue is, that the concept of a prenuptial agreement is not very well known or culturally accepted in Indonesia. As a result, most partners in a transnational marriage have no idea that a prenuptial agreement is a “must” to retain the land ownership rights of the Indonesian partner – this phenomenon is in line with observations in the United Nations report (2003, p.3), more specifically “.... Often laws are rarely simple or comprehensive and their technical nature makes them inaccessible to many people”.

VI. The Indonesian woman in Transnational Marriage - Their Struggles as the “Other” in Coping with Discriminations and Their Transformations

Indonesia is one of the countries which was previously colonized by the Dutch and then by the Japanese. After the independence, the Indonesian people have strong force to establish in the name of “nationality” referring to only Indonesian people who have access to soil, water, airspace within the territory of the Republic of Indonesia. Based on the nationality principle, expatriates/foreigners are not allowed to have *hak milik*, they can only have *hak pakai* (right to use for certain period of time).

The provisions to establish a prenuptial agreement to access the right of ownership for Indonesian in transnational marriage to prevent foreigners to access the ownership rights. As a result, the Indonesian citizens are not treated equally because of their marital status. They treated differently when they do not have a prenuptial agreement. The States will regard them as the “other”, as described vividly by Simone de Beauvoir (1949) on woman to be regarded

as the other, the same situation like Indonesian citizens in transnational marriage who are not regarded as a member to Indonesian community to exercise their full status as citizen. Concurrently, they are required to fulfil their obligations as Indonesian. As Irianto (2006, p. 28) identified -from a point of feminist legal theory's perspectives- implications on gender from that seemingly neutral laws, as stated in the Government Regulations No. 103 of 2015 to acquire a prenuptial agreement for both Indonesian men and women to access the ownership rights, it may cause more hardship to Indonesian women than to Indonesian men in a patriarchal society. By presenting women's point of views and insights below, this paper may influence to change the law in accordance to "equality before the law".

Aside from the legal and practical issues, the Indonesian women in transnational marriages have to continue to live and cope with the situation. They need to find a way to establish a place that they can call home, in Indonesia. I have in-depth interviewed with six married women to foreigners to explore their perspective on land ownerships. They are Ibu Yuyun, married to a French man; Ibu Yessi, the wife of a Spanish man; Ibu Nuning, married to an American man; Ibu Inge, married to a German man; Ibu Dias, married to a Japanese man; and Ibu Ike Farida, who is also married to a Japanese man. I intentionally do not use their real names in order to protect their identity in line with the "Ethics of Research" - except for ibu Nuning and ibu Ike – these are their real names as they are already well known publicly.

With regards to citizenship, I agree with Indradi Kusuma and Wahyu Effendi 2002, p. vii) that citizenship comes with rights and obligations, specifically:

Citizens as collective populations are one of the principle and basic element of a State. Citizenship stat us shall create reciprocal relationship between the citizen and his/her country. Every citizen has the rights and obligations toward their country. In return, the State has obligations to render protection towards its citizen.

In line with the above, my six "research subjects" are all exemplary Indonesian women and citizens. They obey and follow the laws and regulations in Indonesia, and fulfill their obligations such as paying taxes, getting officially their driving license in order to drive responsibly and safely. In contrast though, the State of Indonesia has not fully provided their full rights on land ownership. All my research subjects do not have a prenuptial agreement. Consequently, they struggle in many different ways to be allowed to own land. Some were

even urged to divorce first and then remarry after they made a prenuptial agreement. Another woman has fought her issues up to the Constitutional Court.

Ibu Yuyun is originally from Tanjung Uban, Riau, Sumatera, 50 years old. Her husband is French. She got her master degree in Engineering from the University of Pau and *Pays de L'Adour*, in the city of Pau in France. When she was in France, she and her husband bought there a house where they resided without any difficulties. However, when she was about to buy land in Indonesia, she was informed that she was required to have a prenuptial agreement. She was not aware of this, thinking that she was legally entitled to land ownership as she was still holding only the Indonesian citizenship. To circumvent the issues, Ibu Yuyun uses now her sister to buy land on her behalf. She does not want to make a prenuptial agreement as she thinks it is not in her favor in case of divorce or death of her husband.

It is different with ibu Yessi, a housewife, 64 years old, originally from Bukittinggi, Sumatera. She is married to a Spanish man and the mother of 3 (three) adult children. She completed her high school and then worked as a cashier in a casino where she met her husband in 1974. Both of them worked very hard but at the time they could not afford to buy a house for her and their three children. They lived with her mother instead occupying one of her two-bedroom house because they did not want to waste money to keep renting a house, they wanted to save money to have a house. After going through the hardship of losing and finding jobs, and trying to save some money for many years, she and her husband could finally afford to buy a simple three-bedroom house enough for 5 (five) of them. When she was about to finalize the process in acquiring the land, she was also shocked to be asked about the prenuptial agreement by land officer from the Agrarian office. Her husband was the one who reminded the Agrarian officer that his wife, ibu Yessi is Indonesian and has no other citizenship. She was then asked by the officer of the Agrarian Office to make a statement that she is still Indonesian. After signing the statement, she was granted her land ownership rights in 1991.

Ibu Inge who is from West Java, Indonesia, married to a German, was formerly a stewardess after completing her high school. She is now 45 years old, a housewife and a mother of a 12-year old daughter. They do not want to be bothered with potential issues regarding owning land and property in Indonesia, so they keep renting an apartment in Jakarta and, as investment, bought apartments in Singapore, Bangkok and Germany under her own and husband's names on those properties which are not possible in Indonesia.

Ibu Dias is originally from a central Java. After finishing her vocational studies majoring in accountancy (under a bachelor degree), she worked in a Japanese restaurant as a cashier where she met her Japanese husband then he was as a cook. She is now 53 years old and a business woman, and a mother of one daughter. She and her husband work hard and have built their restaurant business from scratch – they own now three Japanese restaurants. For various reasons she and her husband do not want a prenuptial agreement. To own a land and property, she has made a fake ID stating that she is a single.

Ibu Nuning is a candidate PhD, a professional and activist, 43 years old. She is married to an American and mother of three daughters. She does not have a prenuptial agreement as she was not aware of such a regulation at time of marriage - anyhow she married on young age and would not have had anything to put in the agreement.

Ibu Ike Farida is Sundanese, from West Java. She is a lawyer, 46 years old and married to a Japanese citizen. She did not want to take illegal steps such as using a fake ID or getting divorced and then remarry after establishment of the prenuptial agreement. After learning that the developer backed away from his promise to give her the ownership documents, although fully paid for by her, she decided to go to court. Her case was dismissed in the East Jakarta District Court.

All these six women reside in Jakarta. They struggle, negotiate and transform in many different ways to claim their land ownership rights. They all are Indonesian women but differ from each other in terms of race, class, and ethnicity as acknowledged by multicultural feminists. They have their own identity but like to be united in forming sisterhood as the idea of hooks and Lorde - as pointed out by Tong (2009) - "*in the sense of being political comrades*" (p. 235) in order to voice their same goal, i.e. to exercise their land ownership rights. Initiated by Ibu Ike Farida and supported by women in the transnational marriage advocacy organizations, the Indonesian women in transnational marriage continue fighting and bringing the issue to the Constitutional Court requesting amendment of the discriminative regulations on landownership for Indonesian citizens, married to foreigners. A ruling by the Constitutional Court is due soon. In the meantime, the transnational marriage advocacy organizations also pursuing the voices to the Indonesian House of Representatives.

Concluding Remarks

In line with recent global developments, and influenced by major pressures of local woman rights groups, some Indonesian laws have been revoked, and amended to the principles to “respect, protect, and preserve human rights”. However, there still remain various laws and regulations that discriminate Indonesian citizen-in this research- married to foreigners concerning rights on land ownership unless they have established a prenuptial agreement that may cause Indonesian women in a dilemmatic situation and this law is not in accordance to “equality before the law”.

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