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The Constitutional Court Verdict Constribution towards International Civil Law Development in Indonesia

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Abstract:
This research will be assessing the Constitutional Court verdicts related to issues of International Private Law. The assessment itself will be conducted through descriptive qualitative research method using socio-legal approach. The data collection method was carried out qualitatively, namely: through literature studies and focus group discussions. Then, the results of the evaluation will show the hypothesis of the level of development in the field of Civil law International law in Indonesia based on the legal considerations of the Constitutional Court and their impact of these decisions. Where since 2013, Constitutional Court had repeatedly contributed to the development of International Private Law in Indonesia. Although Constitutional Court remain their stands on limiting the rights on land ownership only apply for Indonesian citizen. But by 2015, through Constitutional Court Verdict No. 69/PUU-XIII/2015, the Constitutional Court determined that prenuptial agreement could be hold to secure the interest of each couple within mix marriage.

Keywords: constitutional, court, international private law.

1. Introduction

In its journey, the law (always) undergoes changes following community dynamics and development. The increasing development of all nations rapidly in the economy, trading, socials, culture, sciences, and technology has given circumstances in the development of law.

Individuals, business entities, community groups, and countries and other entities is part of an increasingly unified world. They are each other interact without significant difficulty to break through boundaries national (cross- border). These interactions occur both in the political, economic, and social fields others are no longer confined by their respective national identities. Within other words, the parties including the state, companies, civil society, and individuals from different parts of the world with each political, economic, social and cultural forces interact more closely.

Advances in transportation and communication technology have opened more many chances to visit any point in around the worlds in the same time relative quickly. The nations and society seem to be the village of the world (global villages). Interaction in the socio-cultural, can be seen from the existence of activities of Indonesian Nationalityhip who come into conduct with nationalityhip of foreign nationality, as if marriage or divorce between Indonesian nationality and foreign nationals in Indonesia or abroad, adoption of Indonesian children by foreigners, ownership of property together with Indonesian nationality and foreigners indirectly because of assets together with marriage, material guarantees, and inheritance from foreigners to Indonesian nationality.

A world without borders also opens access to trade and commerce so that the pace of the economy is getting stronger. Indonesia, in protecting the legal activities of Indonesian nationality who come into contact with Foreigners, so far still use the rules of colonial heritage, namely: *Algemeene Bepalingen van Wetgeving voor Nederlands Indie*/AB (*Staatsbald*, 1847; 23). Based on Article 1 Transitional Rules of the 1945 Constitution of the Republic of Indonesia (UUD 1945), the AB is still valid as long as there is no new one. In the world of law, a sub-system of national law that deals with Civil law issues that contain foreign elements are known under the name of International Civil Law (HPI).

Issues related to HPI may arise from determining (i) authority of the court or alternative forum for dispute resolution, (ii) determination of applicable law, (iii) the extent to which the court must give recognition and implement the decisions of foreign judges, and (iv) which national law which applies when a legal relationship has a legal aspect between law in a pluralistic national legal system.

Regarding the regulation of HPI, currently Indonesia is still relying on three the old articles of the Dutch East Indies heritage, namely Articles 16, 17 and 18 AB. Article 16 AB reads:
"The provisions of the law regarding the status and the authority of a person still applies to the Netherlands, if he is abroad. However, if he resides in the Netherlands or in one of the Dutch colonies, as long as he has a residence in there, apply regarding that section and applicable civil law there."

The above article manages in private status and power of a person, in which covers guidelines regarding individual law (*personenrecht*) and law of kinship. Article 17 AB states that "Against goods which are immovable, one's country law or preference on where the goods located shall apply So, on concern of both moving and immovable objects have to be judged in accordance to the laws of specific country or place in which the object is situated (*lex rei sitae*), regardless of the owner. Meanwhile, Article 18 AB reads as follows:
"1. The form of each legal action will be decided by the court according to legislation of the country or place, where the legal action is conducted.
2. In order to apply this article and the previous article, it must be observed differences established by legislation between people Europeans and Indonesians."

The above articles mentioned above are no longer adequate, considering that apart from because it is a colonial relic, but also because it still uses statute theory-style approach (16th and 17th centuries) with an emphasis on territory enforceability. HPI is no extensive based on rigid and "fast" values serve. HPI wants to be realized as an method in dealing by cases in the area of civil law which include foreign elementn. In addition to the regulation by AB as a legal product inherited from the colonial era, HPI problems are also regulated by legal products after independence. These arrangements, among others, are the Marriage Law, Regulation Nationalityhip, and the Investment Law. HPI principles contained in positive law will help interpret these arrangements more systematic.

The need for written rules related to Indonesian HPI has long felt. The need, which is actually urgent for realized, born because of the principle differences in legal politics our country, especially after the Amendment to the 1945 Constitution. In addition, this written rule It is also needed as a guide for judges in court in dealing with cross- border civil cases which are still using the Civil Code (*Burgerlijk Wetboek*).

Furthermore, in future developments there have been many the passing of laws relating to HPI-related issues. Even, after the reform era, a new state institution known as the Supreme Court of the Indonesia. Where exactyl, the Constitutional.Court making supermacy to observe the law.against the UUD 1945. This encourages the idea that the Constitutional Court in its development, of course, directly or indirectly, have participated in the development of regulations related to HPI through its decisions. That condition which was prompted the initiation of research related to evaluation of Constitutional Court verdicts relating to HPI development.

2. Method

This research conduct is using a descriptive qualitative research with socio-legal approach. The data collection method was carried out qualitatively, namely: through literature/literature studies and focus group discussions (FGD). This study takes a theoretical approach from Meuwissen which argues that the establishment of legislation decides twice central moments..law establishment, explicitly political ideal instants also procedural moments (Sidharta, 2007;10). Political ideal relates to the desired legislation content, which is related to articulate or cultivate political goals, while the technical moment related to the technical process of legal drafting. These two moments create conditions for the complexity of legislation. Complexity development of legislation in line with put forward as opinion by Satjipto.Rahardjo (2007) that legislation increase is a multipart process..This.multipart then become important highlights in the context of follow-up legislation to simplify it to be able to have the power.

3. Results and Discussion

After efforts have been made to compile and evaluate the verdicts of Constitutional Court from 2003-2021. We found at least 2 (two) verdicts of Constitutional Court that dealing with international civil law. The Constitutional Court Verdic No. 69/PUU-XIII/2015 submitted by Mrs. Ike Farida and Constitutional Court Verdict No. 101/PUU-XV/2017 which submitted by Mrs. Oljte J. K Pesik. In both applications, the applicants filed a review upon constitutionality of Law Number 5/1960 regarding the Agrarian Regulations Number 1/1974 upon the topic Matrimonial.

In general, the two applicants apply with based on the existence of mixed marriages which resulted in the emergence of property inheritance/*harta gono-gini*. However, Law no. 5 of 1960 which concern on the key guidelines, by principle the Agrarian do not recognize land ownership rights for foreigners. This is what the two parties then sought to examine for their constitutionality applicant. As for the detailed description of each case can be described as follows:

3.1 Court Verdict on the constitution No. 69/PUU-XII/2015

The applicant is an individual Indonesian citizen based on evidence: (i) Indonesian citizen Identity Card Number 3175054101700023, (ii) Non national Visa on Visit Number DA 3078438 (released by the government of Japan), and (iii) Family certificate No. 3175051201093850. The applicant is a married woman with a male who is a Japanese citizen based on a valid marriage license and has been registered at the Makassar District Religious Affairs, East-Jakarta City Number 3948/.VIII/.1995, 22 August 1995, then has been registered. by the Jakarta Civil Registry Office by indicated within the Proof. of Matrimonial Statement Number 36/KHS/AI/1849/1995/1999, by May 24, 1999. In relation to the marriage, the Applicant does not own any matrimonial contract to separate property, let go of his citizenship and keep voting Indonesian citizenship and live in Indonesia.

Applicants often aspire to be able to buy an apartment ("*Rusun*") in the area of Jakarta, and through all hardwork for the manyyears the Applicant saves, finally on May 26, 2012 the applicant buys 1 (one) apartment unit. However, after the Applicant has paid it, the flat were never handed over. Even then the agreement of the purchase was withdrawn separately by the contractor with reason stating the husband's Applicant is a foreigner, and the Applicant is unable to proof an ownership of Marriage Contract. Under his letter Number 267/S./LNC./X./2014/IP, on 8 October.2014 at number 4, basically a developer state:

According to Art. 36 p (1) of the Agrarian Law and Art. 35 p (1) of the Indonesian Marriage Law, determined that a woman.who marries a foreigner restricted from buying land-living and or properties under the status of *Hak Guna Bangunan* (HGB). Hence, one contractor settled to unable to carry out a *Perjanjian Pengikatan Jual Beli* (PPJB) or Akta Jual Beli (AJB) alongside to the Petitioner, due to a chance of violation on Art. 36 p (1) of the Basic Agrarian Law.

Developer Letter Ref. 214/LGL./CG--EPH/.IX/.2012, on Sept 17th 2012, number 4 metioned: "According to stipulation on Art. 35 of Law Number 1/1974 concerning Marriage (Marriage Law) which orders the following: "Wealth acquired during marriage becomes joint property". Based on that requirements, we can conclude that

when a spouse buys immovable objects (within this topic is a flat/apartment) during the marriage, later the apartment shall being a joint asset/*harta gono-gini* of those marriage pair who involved. Embracing also the case of marriage when it is a mix matrimonial (the marital that connect the Indonesian national along with foreigner person) who is exclusive of establishing a detached property.marital contract, after that on concern of the law of an purchased apartment by a spouse of an Indonesian citizen with itself becomes the property of the spouse who is a foreign person as well.

This disappointment and deprivation of the Applicant's human rights has not disappeared, as well as feelings of being discriminated against by the contractor, the Applicant surprised by the refusal to obtain from the contractor which then confirmed by the District Court of East Jakarta through Stipulation Number 04/CONS/2014/PN.JKT.Tim, dated November 12th 2014, which in its order stated: "Ordered the Registrar/Secretary of the East Jakarta District Court... make an proposal to: IKE FARIDA, S.H., LL.M, having its location at..... Which later suggested to as the REPRESENTATIVE CONSIGNATE. As Deposit/.Consignatie on behalf of expense to the defendant because of withdrawn of the Letter of command as an outcome of not to complete unbiased perequisite for the validity of a contract as regulated in Art. 1320 of the Indonesia Civil Code, entitled a harm of Art. 36 p (1) of the Law No. 5/1960 concerning Agrarian Law.

It can be concluded that the right of the APPLICANT to own the Flat is destroyed by the enactment of Art. 36 p (1) of the Agrarian Law and Art. 35 p (1) of the Indonesia Marriage Law. Furthermore, as well to the articles aforementioned, Art. 21 p (1) and (3) of the UUPA and Art. 29 p (1), (3) and (4) of the Marriage Law also has the potential to harm the Applicant constitutional rights, because these articles can eliminate and rob the Applicant rights to be bright to have Ownership Rights and HGB. With the entry into force of the articles "Object of Testing" in the Application, this causes the applicant's right to have property rights and use rights of buildings on land become lost and looted forever. So that the applicant as an Indonesian citizen will never be entitled to have the right to own and use the building for the rest of their life.

The Applicant were highly discriminated against and their constitutional rights were violated. As an Indonesian citizen, the Applicant has the right to: the same constitutional rights as other Indonesian citizens as ensured in Art. 28D p (1), Art. 27 p (1), Art. 28E p (1), Art. 28H p (1) and p (4) of the UUD 1945. Article 28D paragraph (1) of the UUD 1945: "(1) One and all undergo the right of acknowledgement, guarantee, protection and reasonable legal certainty and equal treatment before the law." Art. 27 p (1) of the UUD 1945: "One and all are equal before the law and authority and is indulged to hold the law and the authority by no exclusion." Art. 28E p (1) of the UUD 1945: "Everyone is free…., chooses a domicile to living in the area of the nation…." Article 28H paragraph (1) of the UUD 1945: "One and all own the right to live in physical and spiritual wealth, to living, and get a fine and well alive situation and have the right gain health services." Art. 28H p (4) of the UUD 1945: "Everyone own the right to have privat property rights and also these rights of property cannot be taken over arbitrarily by anyone" Art. 28I paragraph (2) of the UUD 1945: "One and all carry the right to express freedom from beaing treated discrimination of any element and are eligible of guarded toward action that is discriminatory."

Applicant were highly discriminated against and their constitutional rights were violated. As an Indonesian citizen, the Petitioner has the right to: the same constitutional rights as other Indonesian citizens as pledged in Art. 28D p (1), Art. 27 p (1), Art. 28E p (1), Art. 28H p (1) and p (4) of the UUD 1945. Art. 28D p (1) of the UUD 1945: "(1) One and all has the. right of respect, guarantee, security and objective legal conviction and equal before the law."

Article Number 27 p (1) of the UUD 1945: "One and all are equal before the law and authority and is obliged to hold the law and the authority by there is no exception."Art 28E p (1) of the UUD 1945: "One and all is free…., chooses a place to live in the territory of the country…." Article 28H paragraph (1) of the UUD 1945: "One and all has the right to live in physical and nonphysical prosperity, to be alive, and carry well and healthful living surroundings and own the right to gain health services." Art. 28H p (4) of the UUD 1945: "One and all own the

right to own personal property rights and the property rights" are unable to be occupied subjectively by anybody”

Article 28I p (2) of the UUD 1945: "One and all own the right to have a freedom from being discriminated of any elements also authorized to protection against treatment that is discriminatory.” Art. 28I paragraph (4) of the UUD 1945: "Protection, promotion, enforcement and fulfillment of human rights" is the obligation of the state, especially the authority.” In the points of the provisions of the Act, which resulted in the applicant's constitutional disadvantages include:

a. the enactment of Art. 21 p (1), p (3) and Art. 36 p (1) of the Agrarian Law and Art. 29 paragraph (1), paragraph (3), paragraph (4) and article 35 paragraph (1) of the Marriage Law;
b. the destruction of the right to own property rights and building use rights caused by the enactment of article 21 paragraph (1), paragraph (3) and article 36 paragraph (1) tribute; and article 29 paragraph (1), paragraph (3), paragraph (4), and article 35 paragraph (1) The Marriage Law is like experienced by all Indonesian nationality others who are married to foreign nationals;
c. Article 21 paragraph (1), paragraph (3) and Article 36 paragraph (1) of the Agrarian Law are contradictory with the 1945 constitution;
d. the phrase “Indonesian citizen” in article 21 paragraph (1) and article 36 paragraph (1) of the Agrarian Law, as long as it is not interpreted as "an Indonesian citizen without except in all marital status, whether nationality Indonesians who are not married, Indonesian nationality who are married with fellow Indonesian nationality and Indonesian nationality who marries a foreign national" is contrary to the UUD 1945;
e. the phrase "since obtained" in Article 21 paragraph (3) of the Penal Code, as long as it does not interpreted "since ownership of the right to transfer" is contrary to the UUD 1945;
f. Article 21 paragraph (1), paragraph (3) and Article 36 paragraph (1) of the Agrarian Law has eliminate, destroy and deprive the applicant have the right of ownership and the right to use the building ever;
g. revocation and deprivation of the applicant's human rights to have ownership and building rights over land is a violation the applicant's constitutional rights to recognition, guarantees, protection, and fair legal certainty and fair treatment equal before the law as regulated in article 28D paragraph (1) and Article 27 paragraph (1) of the UUD 1945;
h. revocation and removal of the applicant's right to have rights property and building rights are discrimination and violations against the provisions of Article 28I paragraph (2) of the UUD 1945;
i. revocation and removal of the applicant's right to have rights property and building rights is a violation of article 28H paragraph (1) of the UUD 1945 and discrimination and violation of universal provisions regarding human rights;
j. that article 29 paragraph (1), paragraph (3), paragraph (4) and article 35 paragraph (1) of the Marriage Law is against the UUD 1945;
k. that the phrase "at or before the marriage takes place" in article 29 paragraph (1) of the Marriage Law; Article 29 paragraph (3) of the marriage law; and the phrase "during the marriage takes place" in article 29 paragraph (4) of the law marriage is against the UUD 1945 constitution;
l. the phrase “joint property” in article 35 paragraph (1) of the Marriage Law as long as is not interpreted as “joint property except for property in the form of rights”. Property and building use rights owned by nationality Indonesians who marry foreign nationals are "contradictory" with the UUD 1945 constitution
m. The Constitutional Court has the powers granted by state to uphold the applicant's human rights that have been deprived and discriminated against because of the enactment of article 21 paragraph (1), paragraph (3) and Article 36 paragraph (1) of Agrarian Law; Article 29 paragraph (1), paragraph (3), paragraph (4) and Article 35 paragraph (1) of the Marriage Law. The basis of the applicant's consideration has been based on law, correct, complete, and perfect as referred to in the regulations legislation based on the reasons for the application, the applicant has petition as follows:
    1. Granting the Applicant application in its entirety;
    2. Stating the phrase “Indonesian citizen” in Article 21 paragraph (1) and Article 36 paragraph (1) of the Agrarian Law as long as it is not interpreted as "citizen" Indonesia without exception in all

marital status, both Indonesian nationality who are not married, Indonesian nationality who are married to fellow Indonesian nationality, and nationality Indonesian state who marries a foreign citizen" contrary to the UUD 1945;

3. Stating the phrase "Indonesian citizen" in Article 21 paragraph (1) and Article 36 paragraph (1) of the Agrarian Law as long as it is not interpreted as "citizen" Indonesia without exception in all marital status, both Indonesian nationality who are not married, Indonesian nationality who are married to fellow Indonesian nationality, and nationality Indonesian state who marries a foreign citizen" has no binding legal force;
4. Stating the phrase "since the rights have been obtained" in Article 21 paragraph (3) of the Agrarian Law as long as it is not interpreted "since the ownership of the right is transferred" contrary to the UUD 1945;
5. Stating the phrase "since the rights have been obtained" in Article 21 paragraph (3) of the Agrarian Law as long as it is not interpreted "since ownership of the right to transfer" does not have binding legal force;
6. Expressing the phrase "At or before marriage" held" in Article 29 paragraph (1) of the Marriage Law contradicts with the UUD 1945;
7. Expressing the phrase "At or before marriage" held" in Article 29 paragraph (1) of the Marriage Law does not have binding legal force;
8. To state that Article 29 paragraph (3) of the Marriage Law is contrary to the UUD 1945;
9. Stating Article 29 paragraph (3) of the Marriage Law does not have binding legal force;
10. Stating the phrase "During the marriage takes place" in Article 29 paragraph (4) the Marriage Law contradicts the UUD 1945;
11. Stating the phrase "During the marriage takes place" in Article 29 paragraph (4) of the Marriage Law does not have binding legal force;
12. Stating the phrase "joint assets" in Article 35 paragraph (1) of the Law Marriage as long as it is not interpreted as "common property except" property in the form of Ownership Rights and Building Use Rights owned by an Indonesian citizen who marries a foreign national" contrary to the UUD 1945;
13. Stating the phrase "joint assets" in Article 35 paragraph (1) of the Law Marriage as long as it is not interpreted as "common property except" property in the form of Ownership Rights and Building Use Rights owned by an Indonesian citizen who marries a foreign national" doesn't have binding legal force;
14. Order the announcement of this decision to be published in the State Gazette Republic of Indonesia;

On the basis of the petition and the reasons for the petition, the Court have the following opinion:

1. Considering whereas the main point of the Applicant applications is testing constitutionality of the norms of the Act, in casu Article 21 paragraph (1) and paragraph (3) as well as Article 36 paragraph (1) of Law 5/1960 and Article 29 paragraph (1), paragraph (3), and (4), as well as Article 35 paragraph (1) of Law 1/1974 which states: Article 21 paragraph (1) and paragraph (3) of Law 5/1960:

(1) Only Indonesian nationality can have property rights. (2) ...

Foreigners who after the representation of this Law acquire property rights due to legacy without a will or involvement of assets due to marriage, as well as nationality the Indonesian state which has property rights and after the representation of this law loses his nationality must abandon that right within one year from the date of the acquisition of these rights or the loss of nationality. If after that period of time has elapsed, the ownership rights are not is released, then the right is nullified because of the law and the land falls on the State, provided that the rights of the other party that burdened him continued.

Article 36 paragraph (1) of Law 5/1960:

Those who can have the right to use the building are:

Indonesian nationality;

legal entity established under Indonesian law and domiciled in Indonesia.

Article 29 paragraph (1), paragraph (3), and paragraph (4) of Law 1/1974:
(1) At or before the marriage takes place, both parties with mutual consent can enter into a written agreement which is legalized by the marriage registrar, after which its contents also apply to third parties as long as the third party stuck.
(2) ...
(3) The contract comes into force from the time of marriage took residence.
(4) During the marriage, the contract cannot be amended, except from both parties there is an contract to change and change does not harm third parties.

Article 35 paragraph (1) of Law 1/1974:
Property acquired during marriage becomes property together.
Those stipulation above are against Article 28D paragraph (1), Article 27 paragraph (1), Article 28E paragraph (1), and Article 28H paragraph (1) and paragraph (4) of the UUD 1945.

According to the Applicant, the representation of Article 21 paragraph (1) and paragraph (3) as well as Article 36 paragraph (1) of Law 5/1960 and Article 29 paragraph (1), paragraph (3), and paragraph (4) as well as Article 35 paragraph (1) of Law 1/1974 deprives him of his constitutional rights as a citizen. The constitutional rights, among others, are to live and get a moral living environment.

Everyone (citizen) wants to have provide provisions for himself and his childrens for the future which is one of them by purchasing land and buildings for the purpose of residence, shelter, and also as savings or provision in future. Examination of Article 21 paragraph (1) and paragraph (3) as well as Article 36 paragraph (1) of Law 5/1960, that matched with the view of life of the nation and state, mindfulness, and legal standards of the Indonesian nation based on Pancasila. The land is a gift from God Almighty for all Indonesian people which must be grateful for its existence. The form of gratitude is that land must be managed properly for the benefit of Indonesia's human development is completely in accordance with the development Indonesian civilization and culture. Land management should be based on legal arrangements that are able to unite the nation which consists of various cultural backgrounds and customs Indonesian people who are communal and religious. For that, setting land management must be in line with democratic values including economic democracy, namely by accommodating the interests of all ethnic groups Indonesian nation. Thus, it is expected that land as a resource capital and social resources can be used as a source of welfare and social fairness for all Indonesian people.

Ordered the formation of Law 5/1960 is Article For realize the philosophical-ideological ideals above, constitutionally The UUD 1945 has set the political foundation of land law as part of the regulation of the earth, water, and natural resources that controlled in it. This is confirmed by Article 33 paragraph (3) the 1945 Constitutional that the earth, water and natural resources contained in it is controlled by the state and used for the chief people's prosperity. Related to that, it was later validated and Law 5/1960 was promulgated. However, the Constitutional Court then acknowledge that the prenuptial agreement could be conduct to secure the interest of the marriage couple. The prenuptial agreement itself could be conducted before or even after the marriage ceremony conducted. But the prenuptial agreement could not be the justification or transfer of Ownership Rights of immovable object, since only Indonesian citizen who can able to has Ownership Rights on immovable object.

3.2 Constitutional Court Verdict No. 101/PUU-XV/2017
This applications were based on the nullification of the transfer of legal ownership of land, because it was found out that the land was obtained by direct/indirect purchased by foreigner. Thus, the Applicant try to file an application to constitutionally review the Article 25 paragraph (1) and 26 paragraph (2) of Agrarian Law against Article 24 paragraph (1) of the UUD 1945. However the Constitutional Court decided to void this application, since it was found out that the problem emerge because of the implementation of the Law not the formulation of the Law. Besides that, those problem in implementation law could be avoided by the prenuptial agreement.
Based on the analysis that has been done in the previous section, it can be a conclusion was drawn that both in the verdict of the Constitutional Court Number 69/PUU-XIII/2015 and the verdict of the Constitutional Court

Number 101/PUU-XV/2017. Second the decision stipulates that foreigners are prohibited from having the right ownership of the land. However, in the Constitutional Court verdict Number 69/PUU-XIII/2015 is recognized for the holding of a marriage agreement that can be the interests of both parties in the case of ordinary marriages and mixture.

4. Conclusion

In the development of the existence of the Constitutional Court since 2013 until now, it has also contributed to the development of international civil law, especially related to mixed marriages. However, in the end, the Constitutional Court still interprets property rights to land as the exclusive rights of Indonesian nationality. However, through the verdict of the Constitutional Court Number 69/PUU-XIII/2015 is recognized for the holding of a prenuptial agreement that can secure interests of both parties in the case of ordinary or mixed marriages.

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