Do Indonesian Citizens Who Conduct Cross-Country Mixed Marriages Still Have the Opportunity to Access Sharia Banks Financing with Mortgage Rights Collaterals?

Hartini*, Joesoef Shidqi Marsa Robiyantoko, Nur Yaumil Hikmah and Irfan Aziz Al Firdaus

Universitas Gadjah Mada, Yogyakarta, Indonesia
*hartini@mail.ugm.ac.id

Abstract. In practice, Notaries and Land Deed Officials (PPAT) often refuse to issue a deed for cross-country mixed marriage couples who intend to apply for financing at Sharia banks or credit at conventional bank with mortgage right collaterals. The reason for this reluctance is that the providing Sharia financing or credit with mortgage right guarantees is risky because, if an Indonesian citizen marries a foreigner, then the ownership of the land must be relinquished or transferred to other Indonesian citizens within a period of one year since marriage. Meanwhile, the duration for Sharia financing is generally more than a year. This paper attempts to rediscuss the phenomenon in which Notaries/PPATs are reluctant to issue a deed that grants mortgage rights for cross-country mixed marriage couples with the main question being: Is there still an opportunity for cross- country mixed marriage couples to apply for Sharia financing with mortgage rights in Indonesia according to the law and regulations? The study is carried out through document study of the relevant law and regulations. The findings of this paper are expected to provide a new comprehensive understanding on when Indonesian citizens involved in mixed marriage are prohibited and when they can access Sharia financing through mortgage rights.

Keywords: Cross-Country Mixed Marriage, Mortgage Rights, Notaries/Land Deed Officials (PPAT), Sharia Bank Financing.

1 Introduction

Notaries and Land Deed Officials (*Pejabat Pembuat Akta Tanah*/PPAT) in Indonesia are officials who are both given the authority to make authentic deeds [1]. Notaries are authorized to draw up notarial deeds for all acts, agreements and stipulations that are required by law and regulations, or that the parties involved wish to have recorded in a notarial deed.

(Article 15 of Law Number 2 of 2014 regarding Amendments to Law Number 30 of 2004 regarding Notary Position). Meanwhile, Land Deed Officials (PPAT) is a public

M. K. bin Abdullah et al. (eds.), *Proceedings of the International Seminar on Border Region (INTSOB 2023)*, Advances in Social Science, Education and Humanities Research 823,
https://doi.org/10.2991/978-2-38476-208-8_14

official who is given authority to issue authentic deeds on certain legal actions regarding land rights (*Hak Atas Tanah*) or Right of Ownership over Stacked Units (*Hak Milik Atas Satuan Rumah Susun*) [2].This is stated in Article 1 point 1 of Government Regulation Number 37 of 1998 as amended by Government Regulation Number 24 of 2016 concerning Regulation of PPAT Positions. Notaries have a wider scope of authority than a PPAT. Meanwhile, PPAT's authority is limited to certain legal acts related to land and stacked units. The authority of a PPAT has been determined by only being allowed to issue eight (8) types of deeds, namely Deed of Sale and Purchase, Exchange, Grants, entry into the company (*Inbreng*), distribution of joint rights, granting of Building Rights/Building Rights on proprietary land, granting Mortgage Rights, and the authority to impose mortgage rights, in which all deeds are only intended for the registration of transfer rights at the Regency/Municipal Land Office institutions [3].

The banking sector is one of the users of Notary services or Land Deed Officials (PPAT). Legal actions in the banking sector (either conventional banks or Sharia banks) which require the services of the two professions, among others include financing agreements that uses mortgage rights guarantees [4]. Financing agreement is a special name related to the distribution of funds to the public in Sharia banking based on the concept of profit sharing (*musyarakah, mudharabah*), the principle of buying and selling (*murabahah*), the principle of leasing (*ijarah*), and etc [5]. Meanwhile, the agreement for channeling funds in conventional banking to the borrowing customers are commonly referred to as a credit agreement [6]. Notaries play a role in making and issuing financing agreements with banks, while PPAT plays a role in the binding of mortgage rights if customers use land right certificates or right of ownership over stacked units as collateral at the bank.

Sharia bank financing which involves customers who perform mixed marriage with foreign nationals require attention. Based on interviews with Notaries/PPAT (Land Deed Officials) in the Special Region of Yogyakarta (Daerah Istimewa Yogyakarta/DIY) and Purwokerto City, Central Java, Indonesia, we obtained data that most Notaries/PPATs are reluctant or even refuse to make a Sharia financing deed with mortgage rights guarantees (*Jaminan Hak Tanggungan*). In general, those who think that providing mortgage rights binding for financing at a bank is very risky because of the misunderstanding that Indonesian citizens who marry foreigners will lose their citizenship which qualifies them as foreigners who must relinquish land ownership rights based on the principle of nationality in Agrarian Law. In addition, there are also concerns that there will be a joining of assets due to mixed marriage which causes foreigners to partially own the joint asset in the form of rights over the land. On the other hand, the latest development in the agrarian sector actually provide opportunities for foreign nationals to have land rights in Indonesia, which include Usage Rights (*Hak Pakai*) or Right of Ownership over Stacked Units. In marriage law, there is also a new norm regarding the possibility of making an agreement during a marriage based on the Constitutional Court Decision Number 69/PU-XIII/2015.

2 Research Problems

Based on the introduction above, a research question is formulated, namely: Is it possible for cross-country mixed marriage couples to apply for financing at Indonesian Sharia banks with Mortgage Rights binding based on Indonesian laws and regulations, namely the Indonesian Marriage Law, Indonesian Citizenship Law, and the principle of nationality of the Indonesian Agrarian law, and regulations in the banking sector?

3 Research Methods and Benefits

This research is based on literature research and Indonesian regulations. The purpose of this research is to provide an alternative perspective from what has been commonly understood so far by most Notaries/PPATs who assumes that Indonesian citizens involved in cross-country mixed marriage cannot enter a mortgage rights agreements in Sharia banking financing because it is considered risky. The new perspective that will be discussed is the availability of opportunities for mixed marriage Indonesian couple to obtain Sharia bank financing through mortgage rights agreements. This perspective was put forward after a comprehensive analysis was carried out based on the development of existing laws and regulations in Indonesia.

4 Analysis and Discussions

The definition of mixed marriage is regulated in Article 57 of the Law of the Republic of Indonesia Number 1 of 1974 (*UU RI Nomor 1 Tahun 1974*) concerning Marriage (hereinafter referred to as the Marriage Law). Article 57 of the Marriage Law explains mixed marriage as "Marriage between two people who in Indonesia are subject to different laws, because of differences in nationality and one of the parties is an Indonesian citizen." This means that in terms of cross-country mixed marriages, there are foreign elements that enter into it, which in this case, will affect the rights and legal status of an individual as the subject of a property right.

One of the material rights that is linked to the principle of nationality is land rights in Indonesia. Article 21 paragraph (1) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (hereinafter referred to as the Basic Agrarian Law/Undang-undang Pokok Agraria/UUPA) prohibits foreign ownership of land ownership rights [7]. Article 21 Paragraph (3) of the Basic Agrarian Law stipulates:

> "*Foreigners who after the enactment of this law obtain ownership rights due to inheritance without a will or mixing of assets due to marriage, as well as Indonesian citizens who have ownership rights and after the enactment of this law loses their citizenship are obliged to relinquish that right within one year from the obtainment of those right or the loss of citizenship. If after this period of time the right of ownership is not relinquished, then the right is annulled because of the law and the land falls under the possession of the State, and the regulations that the rights of other parties burdening it continue to exist*."

Referring to Article 21 paragraph (3) of the Basic Agrarian Law, the potential for the loss of land ownership rights for cross- country mixed marriage couples is if the Indonesian citizen involved in mixed marriage loses Indonesian citizenship and/or, when in a mixed marriage, there is no marriage agreement on the separation of marital assets.

Regarding the loss of Indonesian citizenship, there is a kind of misunderstanding that often occurs as of today, namely that an Indonesian citizen who marries a foreign citizen will immediately lose his/her Indonesian citizenship. In this case, it is necessary to analyze by correlating between several regulations. Article 58 of the Marriage Law stipulates that people of different nationalities who conduct mixed marriages can both obtain and lose citizenship from their partner according to the methods stipulated in the current Citizenship Law of the Republic of Indonesia. For this, it is necessary to link with Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia (hereinafter referred to as the Citizenship Law). Article 26 of the Citizenship Law states that a female or male Indonesian citizen who marries a foreign national loses Indonesian citizenship if, based on the law in the partner's country of origin, the citizenship follows the spouse's citizenship because of marriage (Article 26 paragraph (1) and paragraph (2)). Meanwhile, individuals facing citizenship loss can resolve the issue by submitting a formal statement expressing their desire to choose and maintain Indonesian citizenship to the designated Official or Representative of the Republic of Indonesia. This procedure is in accordance with Article 26, paragraphs (3) and (4) of the Citizenship Law.

This is further regulated in Article 55 of Government Regulation Number 2 of 2007 concerning Procedures for Acquiring, Losing, Canceling and Regaining Indonesian Citizenship.

Based on the provisions of Article 26, Paragraphs (1) and (3) of the Citizenship Law, it is evident that if the foreign spouse's country of origin law bestows citizenship to the spouse due to mixed marriage, the Indonesian citizen spouse can lose Indonesian citizenship, unless they submit a statement to remain an Indonesian citizen. It is imperative to note that this statement must be submitted at the latest, prior to the foreign spouse acquiring citizenship [8]. This means that an Indonesian citizen who is married to a foreigner is still allowed to retain Indonesian citizenship as long as the Indonesian citizen declares it officially. Thus, when the Indonesian is still an Indonesian citizen, he or she is still entitled to have land rights as what a common Indonesian citizens would have in general.

In relation to the application for Sharia bank financing with mortgage rights, Indonesian citizens who engage in cross- country mixed marriages need to see Bank Indonesia Regulation Number 7/14/PBI/2005 concerning Restrictions on Rupiah Transactions and Provision of Foreign Exchange Credit by Banks (hereinafter referred to as PBI Number 7/14/PBI/2005). In this Bank Indonesia Regulation, there is a prohibition on lending in rupiah and/or foreign currency by Banks to Foreign Parties (Article 3 letter a of PBI Number 7/14/PBI/2005). This prohibition also applies to similar transactions based on Sharia Principles (Article 5 of PBI Number 7/14/PBI/2005). As for what is meant by Foreign Parties according to this PBI are: 1) foreign nationals; 2)

foreign legal entities or other foreign institutions; 3) Indonesian citizen who has permanent resident status in another country and is not domiciled in Indonesia; 4) overseas Bank offices from Banks with head office in Indonesia; and 4) overseas corporate office of a company with status as an Indonesian legal entity. By referring to the provisions of PBI Number 7/14/PBI/2005, it can be concluded that, for Indonesian citizens who engage in cross-country mixed marriages, there is a prohibition against applying for financing in Sharia banks in Indonesia even if the person concerned is still an Indonesian citizen, that is, if an Indonesian national is a permanent resident of another country and has no domicile in Indonesia.

PBI No. 7/14/PBI/2005 does not explicitly mention the financing application for sharia bank financing by cross-country mixed marriage couples who are still Indonesian citizens and domiciled in Indonesia. However, from the provisions of this PBI, it can be interpreted that banks in Indonesia are prohibited from providing credit or financing to parties with "foreign elements". For this reason, it is necessary to link it to the provisions in marriage law regarding the entry of foreign elements to property rights in marriage. This can occur in mixed marriage couples, namely if they do not enter into a marriage agreement, especially for assets obtained during a marital relationship because the property will be classified as joint property (Article 35 paragraph (1) of the Marriage Law). However, this can now be resolved with the Constitutional Court Decision Number 69/PU-XIII/2015 which provides a new interpretation that allows cross-country mixed marriage couples to enter into marriage agreements during the marriage.

Therefore, it is still possible for Indonesian citizens who conduct cross-country mixed marriages to apply for financing at a sharia bank with mortgage rights guarantees over land in the form of ownership rights, Cultivation Rights (*Hak Guna Usaha*), Building Usage Rights, and other rights that can only be owned by Indonesian citizens. The requirements that must be fulfilled by the Indonesian citizen in question are maintaining their citizenship, namely Indonesian citizenship and not having dual citizenship status which is obtained as a result of cross-country mixed marriage, do not have the residence status of any other country that makes them non-resident in Indonesia, having a marriage agreement that separates assets between husband and wife, and the collateral value is sufficient and within the appropriate criteria to apply for financing at Islamic banks.

5 Conclusion

Referring to several regulations comprehensively, it is possible for Indonesian citizens who are married to foreigners to retain their land ownership rights. With the Decision of the Constitutional Court Number 69/PU-XIII/2015, there is an opportunity to separate joint assets as long as the couple is still in marital status so that Indonesian citizens who are married to foreigners should still have the opportunity to use Mortgage Rights on Sharia banking financing with the same conditions of a normal Indonesian citizens as explained in the analysis/discussion above. Article 21 of the Basic Agrarian Law is a legal provision that is coercive (*dwingen recht*, mandatory rules) which cannot be

overridden by the contractual agreement of the related parties [9]. However, it is necessary keep in mind that Indonesian citizens who marry foreigners do not automatically lose their citizenship and become foreigners.

Acknowledgment

We would like to express our gratitude to the Research Directorate at Universitas Gadjah Mada (UGM) for their support and funding of this paper as part of the 2021 Final Project Recognition (RTA) Grant with the title “The Practice of Adjusting Clauses of Deeds Granting Mortgage Rights by Land Deed Officials (PPAT) on Musyarakah Mutanaqishah Financing in Purwokerto City”.

References

1. Sjaifurrachman, Adjie, H.: Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta. Mandar Maju, Bandung (2011).
2. Harsono, B.: Tugas dan Kedudukan PPAT. Jurnal Hukum & Pembangunan 25(6), 477-483 (2017).
3. Badu, S.A.: Tugas dan Kewenangan Pejabat Pembuat Akta Tanah (PPAT) Dalam Pelaksanaan Pendaftaran Tanah di Indonesia. Lex Administratum 5(6), 82-90 (2017).
4. Syahdeni, S.R.: Hak Tanggungan: Asas-Asas, Ketentuan Pokok dan Masalah yang dihadapi oleh Perbankan (Suatu Kajian Mengenai Undang-Undang Hak Tanggungan). Penerbit Alumni. Bandung (1999).
5. Haron, S., Nursofiza Wan Azmi, W.: Islamic finance and banking system: philosophies, principles and practices. McGraw-Hill Education, Selangor (2009).
6. Supramono, G.: Perbankan dan Masalah Kredit: Suatu Tinjauan di Bidang Yuridis. Rineka Cipta, Jakarta (2009).
7. Budiono, H.: Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan (Buku Kesatu). Citra Aditya Bakti, Bandung (2016).
8. https://www.hukumonline.com/klinik/detail/ulasan/lt50ea879fa70a6/status-kewarganegaraan-akibat-perkawinan-dengan- wna, last accessed 2021/08/09.
9. Gautama, S.: Pengantar Hukum Perdata Internasional Indonesia, Cetakan kelima. Binacipta, Jakarta (1987).