ISSN No:-2456-2165

Separation of Assets (Land and Buildings) between Indonesian Citizens and Foreign Citizens Conducting Mixed Marriages

[1]Upik Hamidah
[1]Faculty of Law, University of Lampung, Bandar Lampung, Indonesia

Abstract:- In a marriage, wealth is a necessity that must be owned, because it supports daily life. Marriages are not only carried out by fellow citizens of the country, but there are also those who carry out inter-state marriages or mixed marriages. So that before making a marriage between an Indonesian citizen and a foreign citizen, they must first make a marriage agreement regarding the separation of assets. The separation of assets in question, such as ownership of land and building rights, is stipulated in Article 29 of Law Number 1 of 1974 concerning Marriage. The agreement was made so that the wealth of economic value resulting from the existence of a mixed marriage can be protected. In realizing a sense of justice, legal certainty.

Keywords:- *Wealth, Mixed Marriage.*

I.INTRODUCTION

Foreigners who have obtained the permission of the new customary ruler can open land for farming or become a young plant garden, that is, gardens planted with plants that do not take long to collect the results, meaning only one harvest. Land that is in the territory of customary law communities is provided for the benefit of its citizens so that land with ownership rights does not fall to foreigners. According to customary law, foreigners may not own land with the status of property rights but may only control land with usufruct rights.

The UUPA distinguishes between Indonesian citizens (WNI) and foreign citizens (WNA) in land ownership in accordance with customary law attitudes, to defend national interests and strengthen the principle of nationalism. The principle of nationalism is that Indonesian citizens who only have property rights over land cannot be owned by foreign citizens. [2] If title to land can be given to foreigners, land will only be used as capital like other resources, land will become a commodity that can be traded freely. This is very dangerous because it will give birth to the practice of monopoly practices and land speculation. The above conditions require a set of laws and regulations to ensure legal certainty for foreign citizens who control land in Indonesia.

The regulation of land rights has statutory regulations governing it, namely Law Number 5 of 1960 concerning Basic Basic Agrarian Regulations. One of the national principles is that Indonesian citizens who have ownership rights over land, property rights cannot be owned by foreigners and any transfer of property rights to foreigners is prohibited. If there is a transfer of land rights, then the threat of annulment by law can be imposed.

The provisions of this principle as stated in Article 9 paragraph (1) stipulate that only Indonesian citizens can have a full relationship with Earth, Water and Space within the limits of the provisions of Articles 1 and 2. Then it is confirmed by Article 21 Paragraph (1) which determines that only Citizens The Indonesian state can have property rights. Even the UUPA prohibits foreigners from having land use rights as stipulated in Article 30 (1) that those who can have HGU are Indonesian citizens and legal entities established according to Indonesian law and domiciled in Indonesia. Article 36 Paragraph (1) determines that those who can have Building Use Rights are Indonesian citizens and legal entities established according to Indonesian law and domiciled in Indonesia.

However, the regulation prohibiting the ownership of land rights by foreigners cannot be realized in its actualization, there are always loopholes in the regulation of land law which can be easily carried out through the practice of legal smuggling. Smuggling law is a rule of foreign law which is sometimes overridden by using national law or vice versa for certain benefits or purposes. For example, the practice of buying and selling land by foreign parties by borrowing a name as if the buyer of the land is an Indonesian citizen, if the owner of the funds is a foreigner, or through a marriage institution with the concept of mixed marriage. [4]

Mixed marriages open up great opportunities for foreigners to have land rights in Indonesia, because according to Article 35 Paragraph (1) of Law Number 1 of 1974 concerning Marriage, if a husband or wife buys immovable property throughout the marriage it becomes joint property. This includes if a mixed marriage is carried out without making a separate marriage agreement, then by law, the property purchased by a husband or wife of an Indonesian citizen will automatically belong to the husband or wife who is also a foreign national.

Therefore, in every mixed marriage so that property does not move, for example land and / or buildings acquired during the marriage do not become joint assets, it is required that before a mixed marriage takes place, a marriage

agreement must be made to separate assets first, because if there is no marriage agreement, then the assets are separated before marriage. , then the husband or wife who are Indonesian citizens are considered the same as foreign citizens who are not allowed to be the subject of property rights (Article 21 Paragraph 1) and the subject of building use rights (Article 36 Paragraph 1) UUPA or cannot have rights to land and buildings in Indonesia although still as an Indonesian citizen.

In the absence of a marriage agreement for separation of assets before the mixed marriage takes place, the result is that when the husband or wife of an Indonesian citizen in a mixed marriage wants to buy the right to land and building is rejected by the developer or when he wants to make a Sale and Purchase Deed (AJB) is rejected by the PPAT, husband or wives of Indonesian citizens will never have to have property rights and building use rights for life and feel very discriminated against and their constitutional rights are violated, only because of negligence they do not understand about the existence of a marriage agreement to separate property before the mixed marriage takes place. [5]

Based on the foregoing, it is necessary to separate the assets between Indonesian citizens and foreigners who will conduct a marriage. This is done so that the ownership of assets with economic values in the future does not cause things that are undesirable to both parties. So that in this study a social and economic assessment was carried out on the existence of assets owned by Indonesian citizens and foreigners who have mixed marriages.

II.LITERATURE REVIEW

A. PROPERTY FOR WEALTH IN MARRIAGE

In marriage, there is a distinction between joint assets, inheritance and acquired assets. These three assets are assets that are obtained with different ways of obtaining them. [6] Therefore, Article 35 of the Marriage Law provides an explanation for the differentiation of these assets, namely:

1. Harat Together

Joint assets are assets acquired by husband and wife while in the marriage bond. Joint assets are controlled by husband and wife. Husband and wife can act on joint property with the agreement of both parties. With respect to joint property, husband and wife have the same rights and obligations.

If a marriage breaks up because of divorce, joint property is regulated according to their respective laws. The legal meaning of each is religious law, customary law, and other laws. This means that in the event of a divorce, joint property is divided based on the laws that have previously been applied to husband and wife, namely religious law, customary law, KUHPdt law, or other laws. This means that those who are Muslim, are subject to Presidential Instruction No.1 of 1991 concerning Compilation of Islamic Law (hereinafter abbreviated as KHI) Article 97 which regulates the distribution of marital assets for Muslims in case of divorce, divided equally (50:50) unless agreed otherwise.

It is possible that this kind of provision will obscure the meaning of ownership of joint property that is jointly acquired during marriage. There is also a possibility that there may be a tendency for unequal distribution, which will undermine the wife's share of the right to share in joint property. However, in fact, the same responsibilities throughout the marriage and after the break-up of the marriage do not mean that the assets in the marriage must be divided equally, although it is true that as long as the marriage is for family purposes, it should be shared.

2. Congenital Treasure

The assets are controlled by their respective owners, that is, the husband controls their property. Each husband or wife has the full right to take legal actions regarding their assets. However, if the husband and wife decide otherwise, for example by means of a marriage agreement, control of the assets is carried out in accordance with the contents of the agreement. Likewise, in the event of a divorce, the assets are controlled and carried by the respective owners, unless the marriage agreement stipulates otherwise.

3. Acquisition of Assets

In principle, the assets acquired by each individual are the same as the assets. Respectively, both husband and wife have the full right to take legal actions regarding the assets they acquire. If the husband and wife determine otherwise, for example, by means of a marriage agreement, control of the acquired assets is carried out in accordance with the contents of the agreement.

B. MIXED MARRIAGE

Mixed marriage is a marriage between a man and a woman, which in Indonesia is subject to different laws because of different nationalities and one of the parties is an Indonesian citizen. An element that must be considered from the concept of mixed marriages is that one of the parties that will carry out a mixed marriage must be a foreign citizen, not because of differences in religion, ethnicity, and class in Indonesia. [7]

Mixed marriages can be carried out in Indonesia and also outside Indonesia (abroad). If it is carried out in Indonesia, mixed marriages are carried out according to the Marriage Law. The conditions for mixed marriage must meet the conditions of marriage which apply according to the law of each party. The official who is authorized to provide information on the fulfillment of the conditions for mixed marriage according to the law applicable to each party is a registrar according to the law of each party. After the certificate or court decision is obtained, the mixed marriage will immediately take place. The continuation of mixed marriages is carried out according to the laws of each religion.

The marriage is carried out in front of a recording employee. This procedure is according to the marriage law if a mixed marriage is carried out in Indonesia. Meanwhile, if a mixed marriage is carried out in the other party's country, then the provisions concerning the legal procedure in that country shall apply. There is a possibility that after obtaining a certificate or court decision, the marriage will not take place

immediately. If the marriage is not carried out within six months after the certificate or court decision is given, the certificate or court decision is no longer valid. [8]

Marriage registration is recorded by an authorized registrar. Authorized registrar for those who are Muslim is a Marriage Registration Officer (PPN) / Recipient of Divorced Marriage Registrar (P3NTCR). Meanwhile, those who are not Muslim are Civil Registry Officers. If a mixed marriage is entered into without showing the registrar of a certificate or decree to substitute for a statement, the person who is married to a mixed marriage is punished with a maximum imprisonment of one month.

III.RESEARCH METHODS

This research is a legal research using a socio-legal approach where in principle this study is a legal study using a social science methodological approach in a broad sense. The data used in this study consisted of two types of data, namely primary data and secondary data.

Data were collected through inventory procedures and identification of laws and regulations, observation, and classification and systematization of legal materials according to research problems. Legal materials and data collected were reviewed for completeness (editing), then classified and systematized thematically (according to the subject matter), for further analysis where the analysis was carried out qualitatively, and then described descriptively.

IV.RESULTS

The desire to own land is part of human life in trying and simply to make land a place to live for buildings to be built on that land. It would be different if the investor / prospective buyer is not an Indonesian citizen, as our legal requirement of ownership of land rights that can only be owned by Indonesian citizens.

Various concrete land problems that have not yet been resolved and resolved by various juridical provisions, therefore in the framework of future agrarian reform must be a top priority to be resolved. [9] In order for problem solving to be handled properly, there must be a juridical responsibility, although there is a possibility that this juridical provision needs to be interpreted because it is not in accordance with the sense of justice in society, as well as references to the opinions of experts whose validity must be questioned socially.

In the National Land Law system, legal relations between people, both Indonesian citizens and foreigners, as well as their legal actions related to land, have been regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles. One of the principles adhered to by the UUPA is the principle of nationality. That is, only Indonesian citizens can have a full relationship with the land as part of the earth in the phrase contained in Article 33 Paragraph (3) of the 1945 Constitution.

In general, land tenure by foreign citizens (WNA) and foreign legal entities that have representatives in Indonesia is regulated in Articles 41 and 42 of the UUPA which are further regulated in Government Regulation Number 40 of 1996 concerning Business Use Rights, Building Use Rights and Rights. Use on Land. The legal basis for the provisions in Article 42 of the UUPA is Article 2 of the UUPA which is the implementation of the mandate of Article 33 Paragraph (3) of the 1945 Constitution. One manifestation of state authority is to determine and regulate the legal relationship between people and the earth (including land), water, space. space, and the natural wealth contained therein. Based on this authority, the State can determine various land rights (Article 4 in conjunction with Article 16 UUPA), with their respective content and authority, including requirements regarding the subject (holder) of land rights. Article 9 Paragraph (1) UUPA stipulates that only Indonesian citizens (WNI) can have full relations with earth, water and space; in other words, only Indonesian citizens can have property rights. For foreigners who are domiciled in Indonesia and foreign legal entities that have representatives in Indonesia, they can be granted use rights. [10]

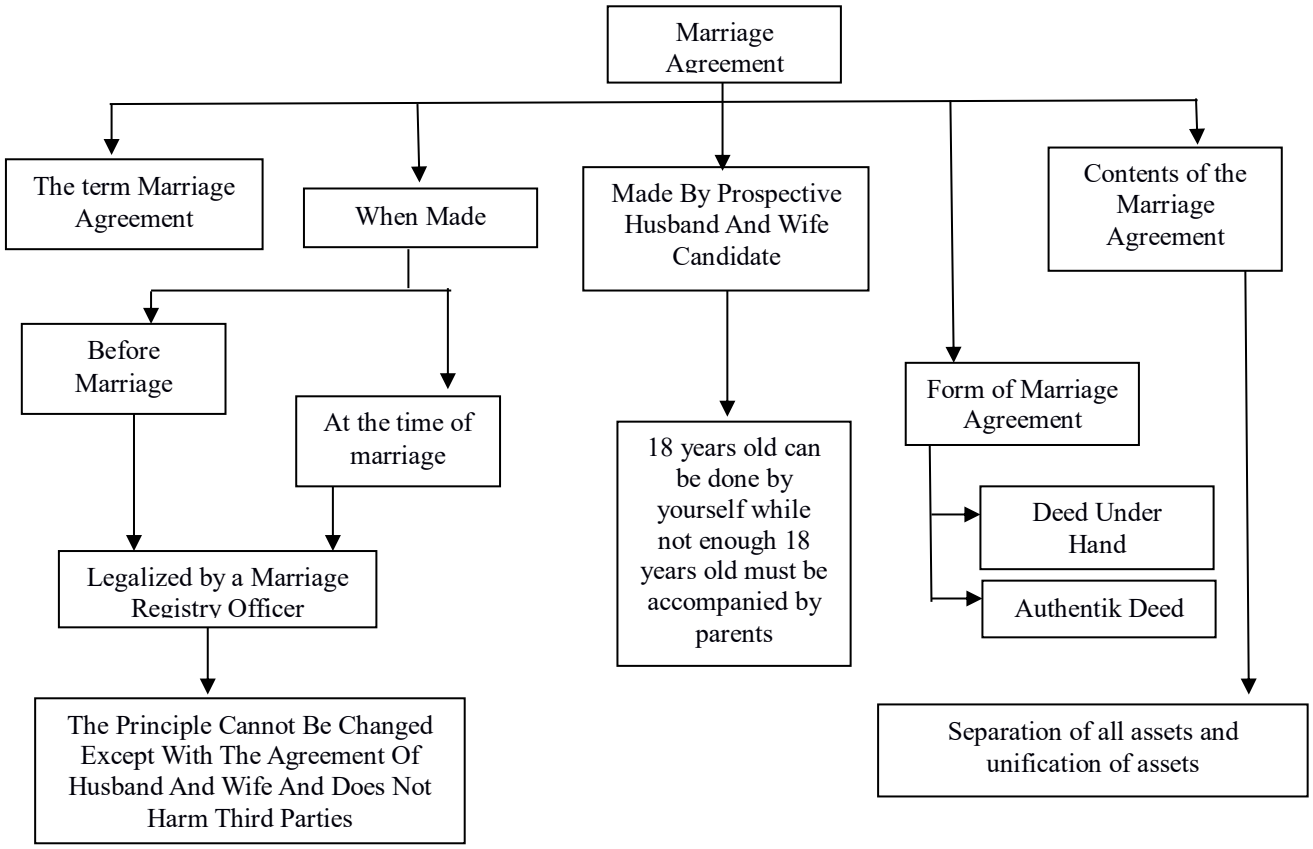
In order to address the problems of ownership of land rights carried out by foreigners and legal entities, there is a need for legal order over the concept of ownership of land rights by foreigners and legal entities associated with the development of Indonesian land law and the realization of permits granted by the Government in the context of foreign investment in Indonesia with discipline the law both to law enforcers, namely the Indonesian Land Agency "BPN", as the state administration organizing institution as well as legal subjects in the context of issuing ownership of land rights in Indonesia. [11]

Mixed marriages are indicated as one of the legal smuggling attempts by foreigners to obtain freehold land in Indonesia. However, this statement seems not to be justified by the perpetrators of mixed marriages domiciled in Indonesia. One example is Mrs. Ike Farida, SH, LL.M, an advocate as well as perpetrator of mixed marriage who is also the Petitioner for the judicial review lawsuit of Article 21 Paragraph (1), Paragraph (3), and Article 36 Paragraph (1) UUPA; Article 29 Paragraph (1), Paragraph (3), Paragraph (4), and Article 35 Paragraph (1) of the Marriage Law on the 1945 Constitution.

Articles 9 and 21 of the UUPA which emphasize the principle of nationality or nationality do not question the origin of Indonesian citizens, but what is questioned is that these Indonesian citizens have assets mixed with foreign assets, especially Article 21 paragraph (3) of the UUPA. The assets that have foreign elements are a barrier to obtaining the right to property for the Indonesian citizen, but this is not the case for land with usufructuary rights or lease rights for buildings. Marriage property matters are not included in the UUPA, but are included in the content of marriage law. So in 1974, the Marriage Law was born which regulates the rights (indirectly) of Indonesian citizens who marry foreigners to obtain ownership rights to land. Indonesian citizens who are married to foreigners are entitled to freehold land,

Without a marriage agreement regarding the separation of assets, the perpetrators of mixed marriages are prevented from obtaining property rights, because there are assets that are jointly owned by foreigners. In other words, there are assets that have foreign elements. This foreign element was also emphasized by the Ministry of Law and Human Rights, Directorate General of Human Rights as referred to in Letter Number HAM2-HA.01.02-10, dated January 20, 2015, which stated: acquired during marriage becomes joint property, so that here is the ability of the property, and the husband who is a foreigner will also be the owner of the property. This provision, may be exempted by the existence of a marriage agreement for separation of assets made before marriage vide Law Number 1 Year 1974 concerning Marriage ". [12]

Marriage Agreement Scheme:



A husband and wife candidate at the time or before the marriage takes place, the two parties with mutual consent can enter into a written agreement either in the form under the hand or an authentic deed, the contents of which do not violate legal, religious and moral boundaries, valid for husband and wife since the marriage took place. . The making of a marriage agreement in the form of a deed is prone to disputes because it is difficult to prove the validity of the marriage agreement. In practice it is usually made in the form of an authentic deed. The marriage law states that its contents will also apply to third parties as long as the third party is involved after being legalized by the Marriage Registry Officer.

With regard to the provisions concerning the time of making the marriage agreement, namely at the time or before the marriage took place, a “breakthrough” has been made by submitting an application for a decision to the district court by the husband and wife as the Petitioner who has neglected, forgotten or ignored the Petitioner of the time when the marriage agreement was made. It is generally accepted that what is meant by the marriage agreement is a deviation from the general provisions regarding the (mixed) assets of husband and wife. The contents of the marriage agreement are not limited to matters relating to marriage assets as long as the contents do not violate legal, religious and moral boundaries, and apply to husband and wife since the marriage took place. During the marriage, the marriage agreement cannot be changed unless both parties agree and the change does not harm the third party.

Article 3 of Government Regulation Number 103 of 2015 stipulates that Indonesian citizens who carry out marriages with foreigners can have the same land rights as other Indonesian citizens. The land title is not a joint property as evidenced by the agreement on the separation of assets between husband and wife, which is made by a notary deed. This means that the rights given to Indonesian citizens who perform mixed marriages to obtain ownership rights to land with conditions or conditional rights. The condition is that these assets are not joint assets or assets that are clean from foreign elements. The evidence required is a marriage agreement for separation of assets.

The problem is that the provisions of Article 3 of PP 103/2015 do not automatically give rights to Indonesian citizens who are married to mixed marriages to acquire freehold land. This article does not confirm the timing of the agreement for separation of assets. The agreement for separation of assets is still subject to the provisions of

Article 29 of the Marriage Law, namely before or at the time of the marriage. Article 3 of PP 103/2015 does not automatically apply to Indonesian citizens who have carried out a marriage but have not entered into a marriage agreement for separation of assets.

Article 3 PP 103/2015 is also not a new norm established by the national land law, but only as a norm that reinforces the provisions of Article 21 paragraph (3) of the UUPA. Even though it is only as an affirming norm, the impact will be more widespread that Indonesian citizens who are married to foreigners have the same rights as other Indonesian citizens, as long as the rights to the land that are owned have no foreign elements. The requirement is that the land rights have no foreign elements, then there must be a confirmation that the land rights are not joint assets as evidenced by a notarial deed. Article 3 of PP 103/2015 will spur a person to enter into a marriage agreement for separation of assets. This will further provide legal certainty guarantees for Indonesian citizens who are married to foreigners to retain ownership rights over land.

Ownership of land use rights, which requires the legal subject to be an Indonesian citizen or legal entity established according to Indonesian law and domiciled in Indonesia, has the same consequences as ownership of land with ownership rights.64 Likewise, ownership of the right to cultivate is regulated in the provisions of Article 30 of the UUPA.

For mixed married couples, with the existence of Government Regulation Number 103 of 2015 jo. Regulation of the Minister of Agrarian and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 29 of 2016, allows foreigners to own a residential or residential house in Indonesia with usage rights. The term of use rights originates from the ownership rights granted for a period of 30 (thirty) years and can be extended for a period of 20 (twenty) years and renewed for a period of 30 (thirty) years. For use rights derived from the right to use the building and the right to use the system, it is further regulated in Government Regulation Number 103 of 2015.

The making of a marriage agreement can be made at the time, before it takes place or during the marriage bond, which means that a marriage agreement can be made at any time, namely before marriage according to the law, each religion and belief, before the registration of the marriage of a Marriage Registry Officer or during the marriage. Apart from when the marriage agreement is made, it is permissible for the marriage to take place with the consent of both parties (husband and wife) to change or revoke the marriage agreement regarding marriage assets or other agreements, as long as the change and revocation do not harm the third party. [14]

In order to support the increasing development along with the cooperation between Indonesia and friendly countries, and the increasing number of foreigners working and running their business in Indonesia, the demand for housing or shelter for foreigners is increasing, so it is necessary to make policies that provide certainty. law and the ease of providing services and permits to obtain land rights for a residence or residence for foreigners. The facilities provided are carried out while still adhering to the principles of land, including the principle of nationality. [15]

In the Constitutional Court Decision Number 69 / PUU-XIII / 2015, the Constitutional Court is currently carrying out two functions, enforcing the constitution by examining the constitutionality of Article 21 paragraph (1), paragraph (3) and Article 36 paragraph (1) of Law Number 5 of 1969 Concerning Agrarian Principles as well as Article 29 paragraph (1), paragraph (3), paragraph (4) and Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage and guarantees the protection of human rights and rights constitutional citizen. In the a quo decision, the Court granted some parts in relation to the marriage agreement.

The provisions of Article 21 paragraph (1) explicitly limit that ownership of land can only be obtained by those who are Indonesian citizens. In line with this, Article 36 paragraph (1) also limits building use rights. Even though it has been excluded for those who make a marriage agreement as stated in the letter issued by the Directorate General of Human Rights Number HAM2-HA.01.02-10, it cannot be a solution for those who on the basis of negligence do not make a marriage agreement at at or before marriage.

The main impact of the Constitutional Court Decision Number 69 / PUU-XIII / 2015 on mixed marriages is the possibility of partners, both Indonesian citizens and Indonesian citizens who “forget” or “don't know” to make a marriage agreement before or at the time of marriage. Determination of when the marriage agreement takes effect and when the property is separated has consequences, among others, relating to the ownership of land rights (certain) in mixed marriages between Indonesian citizens and foreigners.

V.CONCLUSION

Based on the results of the discussion related to the separation of assets in mixed marriages to avoid ownership of land owned by foreigners, it can be concluded that based on statutory regulations, namely Law Number 5 of 1960 concerning Basic Basic Agrarian Regulations, Law Number 1 1974 concerning Marriage, Government Regulation Number 103 of 2015 concerning Ownership of Residential or Occupancy by Foreigners Domiciled in Indonesia, and Constitutional Court Decision Number 69 / PUU-VIII / 2015, Letter of the Ministry of Home Affairs RI.Dukcapil Number 472.2 / 5876 / Dukcapil and Letter of the Ministry of Religion of the Republic of Indonesia 28 September 2017 Number B.2674 / DJ.III.KW.00 / 9/2017, that Indonesian citizens who carry out mixed marriages,can own land with the terms or conditions of making an agreement to separate the assets of the marriage before, during, or after the marriage takes place as evidenced by a notary deed and registered with the employee who registers the marriage.

REFERENCES

[1]. Jimly Asshiddiqie, Ideas of a Social Constitution: Institutionalization and Constitutionalization of the Social Life of Civil Society, Pustaka LP3ES, Jakarta, 2015, p. 353.
[2]. Harsono, Boedi, Indonesian Agrarian Law: History of the Formation of Basic Agrarian Laws, Content and Implementation, Jakarta: Djambat, 2008.
[3]. Ismaya, Samun, Introduction to Agrarian Law, Yogyakarta: Graha Ilmu, 2011.
[4]. Kolopaking, Anita DA, Land Ownership by Foreigners and Legal Entities Associated with the Use of Nominees for Legal Smuggling, Dissertation of UNPAD Bandung, 2009.
[5]. Notonagoro, Politics of Law and Agrarian Development in Indonesia, Jakarta: Bina Aksara, 1984.
[6]. Noor, Aslan, Concept of Land Ownership for the Indonesian Nation, Bandung: Mandar Maju, 2006.
[7]. Parlindungan, AP, Comments on the Basic Agrarian Law, Bandung: Mandar Maju, 1990.
[8]. Sodiki, Achmad., Agrarian Law Politics, Jakarta: Constitution Press, 2013.
[9]. Sumardjono, Maria SW, Alternative Policies for Regulating Land Rights and Buildings for Foreign Citizens and Foreign Legal Entities, Jakarta: Kompas Book, 2008.
[10]. Sumarja, FX., The Problems of Land Ownership for Foreigners, Bandar Lampung: Independent Publishing, 2012.
[11]. Herni Widanarti, The Result of Mixed Marriage Law on Marriage Assets (Denpasar District Court Decision No: 536 / Pdt.P / 2015 / Pn.Dps.) Diponegoro Private Law Review • Vol. 2 No. March 1, 2018, p. 164.
[12]. Eddy Nyoman Winarta, Usage Rights for Residential Homes of Foreign Citizens in Mixed Marriage Without a Marriage Agreement, Scientific Journal of Notary Master Study Program, 2016-2017, p. 44.
[13]. Paima Situmeang, Implications of Marriage Agreement on Assets in Mixed Marriage, Journal of Recital Review, Vol. 1 No.2 Year 2019. E-ISSN: 2623-2928, p. 118.
[14]. Dewi Mulyati, Implementation Of Separation Property Agreement Min Marriages Between Indonesian Citizen And Foreign Citizen, IuS Journal, Vol V, Number 2, August 2017, p, 264.
[15]. Justitia Henryanto Ghazaly, Ownership of Land Rights in Mixed Marriages, Jurnal Cendekia Hukum: Vol. 5, No 1, September 2019, p. 118.