WOMEN'S RIGHTS UNDER THE MATRIMONIAL REAL PROPERTY LAW
(A COMPARATIVE STUDY BETWEEN AUSTRALIA AND INDONESIA)∗

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ABSTRACT

The research is based on the previous research done in Slamet, a region in Indonesia, about women’s rights and involvements under matrimonial land law which resulted in finding that although in theory women have already been given the same rights as men, in fact the women rights and involvements are still fewer than men including in the area of land ownership, land administration and land use. Based on that research, this research aims to explore women’s rights on the matrimonial real property (land) in Australia regarding the family law act as a comparative study.

The research is descriptive, and describes the similarities and differences between the two countries in the field of matrimonial real property laws.

The research is done, by the way of library research at the Australian National University in the academic year of 2002. The collective secondary data is analyzed qualitatively, which leads to the findings in the paper.

The research found that the differences between the two countries arise from many factors such as social norms and values, laws, religions, traditions and cultures, regime of matrimonial property assessment, as well as perspectives of gender role in the family.

The research also found similarities between two countries. As it touches the most private individual concern, the use of resources of matrimonial real property law in daily life depends on the commitment between the parties. In applying the regime, Australian matrimonial property law seems very similar to the first version of Islamic Marriage Law.

To eliminate the weaknesses of the women’s rights in relation to matrimonial real property in Indonesia, some steps of reform are required.

A. Introduction

Problems about women are always interesting to be studied, as there are still existing in many societies in the world, and most of them are related to the rights and equity between man and woman including in the field of law.

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The aim of the research is to explore gender relation regarding matrimonial real property rights, especially how much the women could access the matrimonial real property. As it is socially constructed, I would like to contrast it between Indonesia and Australia.

34

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In the field of land law, my previous research done in Sulawesi, a region in Indonesia, showed women’s rights and involvements under matrimonial land law resulted in finding that although in theory women have already been given the same rights as men, in fact the women’s rights and involvements are still fewer than men including in the area of land ownership, land administration and land use. Based on that research, I am interested to explore women’s rights on the matrimonial real property (land) in Australia regarding the family law act as a comparative study. As a modern country, Australia may have different land law and marriage law systems which influence the point of views due to gender role in the family life that encourage new to pursue different results for the similar topic of research.

The research is a descriptive research, which is aimed at finding out the women’s rights on the matrimonial real property law in Australia and compare to those in Indonesia, which bring me to find the similarities and differences between the two countries in the field of matrimonial real property laws.

The research is done by the way of library research. The collective secondary data is analyzed qualitatively, which results the findings. This writing consists of three sections. Section 1 describes matrimonial real property law in Australia consisting the concept of real property; the concept of matrimonial real property; relationships legislated by the law; women’s rights under the matrimonial real property law in Australia. Section II describes the concept of real property in Indonesia; the concept of matrimonial real property law in Indonesia; Marital Act; Islamic Marriage Law; Adat Marriage Law; women’s rights under the matrimonial real property law in Indonesia; judicial competence is preceding the matrimonial real property cases. Section III is the findings that consist of analysis and conclusion.

The findings of the research hopefully could benefit to the Indonesian law reform.

Section I: Matrimonial Real Property Law in Australia

A. The Concept of Real Property

It is difficult to find out the definite concept of the real property law as it is always developed from time to time. Its concepts can be difficult to grasp and new combinations are constantly worked out. Diane Chapelle points in her book that Land Law is the relationship between the land and the rights that can exist in or over it, and the relationship between the various persons who own or wish to defeat these competing interests.1

What is Land? According to the Oxford English Dictionary, land is a solid portion of the earth’s surface, as opposed to sea, water. This definition is not adequate for legal purposes. In law, land is not restricted to the earth’s surface, but extends below and above the surface.

Land includes land of any tenure, and mines and mineral buildings or any parts of buildings... and other incorporeal hereditaments, also a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over or derived from land, (Law of Property Act 1925, s 205(1)(a)).

Land is far more than merely the physical soil. It is also the “incorpooreal hereditaments” - the intangible rights over the land, such as an easement.4

1 Hery Lusawati, Profil Ketelitian Pemupukan dalam Kepemilikan, Pemanfaatan, dan Pengadministrasi Pokok Agar Gahar Harsa Berzama menurut UUPK dalam Praktek 44 Profile of Human involvement in Land Ownership. Land Use, and Land Administration of the Matrimonial Land Property Rights under the Basic Agrarian Law 1960 (UU No.2/1960), a research report, Gunadah Mada University, Jogjakarta, 2000
5 ibid., p 21
According to Peter Butt, the owner of the land right has the right over the land extending upwards indefinitely and downwards to the earth’s centre. The meaning of the right over the land does not mean that when an aircraft or a balloon flits over someone’s property it is considered to be a trespass. This is considered to be a trespass when the incursion into the airspace is of a nature of such at a height that may interfere with the occupier’s ordinary uses of the land. If the trespasses cause damage, and the trespasser should undertake the adequate remedy. Where an injunction is refused, the plaintiff can seek compensatory damages for loss caused by the trespass. (As assumed over the Bernstein’s case).5

There are some limitations on the physical extent of ownership below the surface, analogous to that applied in Bernstein’s case. At common law, the surface owner’s right extend downwards sufficiently to prevent trespass by tunnelling under surface land to give rights over minerals. However, gold and silver and coal are “royal” minerals; they are the property of the Crown, despite grant of the land is which they lie.6

According to Australian law, land includes fixture. “Quoiquid plantatum solo, solo credit,”—whatever is affixed to the soil becomes part of the soil. Fixtures are items that have been attached to land in such a way to become part of the land. If an item was affixed with the intent in position permanently or for an indefinite period and firmly annexed, it is considered to be a fixture, such as a house, trees, and so on.7

5 Bernstein v. Leigh (Queens v. Skyviews and General Ltd [1978] Q.B. 479
6 Peter Butt, Land Law, Lawbook Co., 2001, p. 11-15
7 ibid., p.36

B. The Concept of Marital Real Property
The marital real property is the land (real property) that belongs to a married couple. This structure is dealing with the real property rights of parties within marriage. As there are two kinds of regimes in the marital property law, community property regime and the other is separate property regime, Australian Law, like most other common law countries, uses a separate property regime. In separate property regime, the husband and wife retain separate ownership during the marriage. However it is common to have bank accounts jointly, have the marital real property jointly. It means that no co-ownership arises by the fact of marriage as well as cohabitation outside of marriage but the parties still have a chance to decide which property to become the co-ownership property. Whereas other civil law countries generally use the community property law, in which the husband and wife have joint ownership of the property acquired after the marriage.8

In the Australian Law, the marital real property has been governed under the Family Law Act. The term “property” is partially defined in FLA section 4(1) as follows:

“property”, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, at the case may be, entitled, whether in possession or reversion.”
Kindersley VC said in the context of the terms of matrimonial settlement in the case of Archer v Kelly, 'entitled' may mean in possession as well as in reversion or remainder.

The court has broad power to alter property rights in the exercise of its discretion, in making determination of property rights under FLA, s 79.

C. Relationships Regulated by the Law

In relation to the concept of marriage, there are two kinds of laws regulate relationships in the Australian family law. They are: laws regulate legal marriage/relationship, and the other ones are laws regulate de facto relationship.

(a) Legal Marriage

The term "marriage" signifies three notions, they are: the ceremony by which two people become wife and husband; the personal relationship which is created by the ceremony; the institution which gives rise to this relationship. To be the legal marriage or de facto marriage, a marriage must be solemnised by or in the presence of an authorised celebrant (section 41 of the Marriage Act). The authorised celebrant should be a part of the ceremonial group or be in reasonable proximity to it. The celebrant has the responsibility to ensure the marriage is carried out in accordance with the law, and entitled to receive a fee for conducting the marriage. Under s 42(1), the celebrant should also be registered by the officers of a state or territory (registry office marriages).

(b) De Facto Relationship

Other domestic relationship besides marriage is a de facto relationship. It is a kind of relationship between a man and a woman who live together like a husband and a wife without marriage legalities. It seems that marriage and de facto relationship are almost the same, but to some extent, there are some different things, especially in terms of legal implications.

Marriage involves a formal relationship, and automatically involves as a matter of fact consisting domestic relationship, and the terms "marriage", "husband", and "wife" are ordinarily signify to the parties to such relationship. De facto relationship on the other hand, does not involve any formal (de jure) relationship, but it can involve as a matter of fact (de facto) a continuing relationship. So, the terms "marriage", "husband", and "wife" do not ordinarily include a de facto relationship and the parties to such relationship. Moreover, there are no legal criteria have been established at law for the existence of this relationship, the characteristic of this relationship are nonetheless reasonably clear. The important thing is the period time over which the two people are living together, though it could be different from one state to others, for instance, the duration of time in this relationship should be at least two years (s 17 (1) of the 1999 NSW Act), 12 months according to s 16 of Tasmania's Maintenance Act 1967. The equally important is the quality of their relationship. Although there are no legal criteria for the de facto relationship, it is still necessary to identify such relationship for legal purposes in terms of a will, a deed, or statute. In the Marriage Law, a husband agreed to pay his wife periodic maintenance until she died, remarried or entered into "a permanent de facto relationship with another man". The Full Court of the Family Court then put definition of this relationship connotes a connection between a man and a woman who live with each other as husband and wife but are not married to each other. In the case of

A Teigel Pte v Madden, Kirby P described this relationship as a relationship between two people who live together sharing domestic circumstances and who are bound by affection and, usually, sexual relations without legally being married. The relationship excludes from the statutory provision a person who lives with a member of the opposite sex simply as a friend or as a matter of convenience.

Statutory references to de facto relationship

A number of Australian statutes use the common expression of de facto relationship. They are: De Facto Relationships Act 1984 was amended in New South Wales, then it was renamed to be the Property Relationship Act 1984 by the Property Relationship Legislation Amendment Act 1999 which came into force on 28 June 1999. In this Act, the definition of de facto spouse includes cohabiting same-sex couples. Victoria amended the Property Law Act 1958 in 1987; then, De Facto Relationship Act 1991 was amended in The Northern Territory. In 1994, the Australian Capital Territory amended the Domestic Relationship Act 1994 which covered the same-sex relationship. South Australia passed the De Facto Relationship Act 1996, Queensland passed the Property Law Act 1974 in December 1999, including same-sex relationship in its first de facto scheme. The Tasmanian De Facto Relationship Act 2000 does not include same-sex relationship in its scheme.

D. Women’s Rights Upon the Matrimonial Real Property Law in Australia

The Doctrine of separation

The doctrine of the doctrine of unity was made by the Matrimonial Causes Act 1857 (Eng), and the Married Women's Property Act 1870 (Eng), that were enacted in New South Wales and Victoria, and followed by the Married Women's Property Act in 1882. Those acts made a wife the subject of a decree of judicial separation the right to acquire and dispose a property, and to a contract, sue and to be sued as if she were a single woman. Under the s 78 (1) and s 79 (1) of the Family Law Act 1975, Australia now uses the separation of property regime. Under this regime, each spouse on marriage is entitled to assume sole ownership of whatever he or she owned prior and during the marriage. In other words, the fact of marriage has nothing to do to the ownership of property. First, the court can make a declaration on existing the title or rights. Section 78(1) states:

78(1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title of the non-married of marriage, if any, that a party has in respect of the property.

Secondly, the court can make an order altering existing property interest. Section 79(1) states:

80(1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may alter the existing property interest.
79(1) If proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interest of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlements or transfers of property as the court determines.

Section II: Matrimonial Real Property Law in Indonesia

1. Land Law in Indonesia

The basic land law in Indonesia is the basic Agrarian Law (BAL) 1960 which is known as Undang-Undang PNB Agraria (UUAP) 1960. The enactment of BAL in 24th September 1960 revoked the existing colonial laws concerning land and abolished the dualistic system of land tenure, at the major objective of the BAL. Before that, the two systems of land tenure were forced together in the same time, they were: one based on Dutch (colonial) Law and the other based on adat law. All existing rights, whether based on Adat or Western Law, are converted into one of the new rights prescribed by the BAL. This new system is uniform nation one.

Art. 16 as well as art.51 provide rights of land in the private land ownership. It consists of:
- right of ownership (hak milik);
- right to cultivate (hak guna warah);
- right to build (hak guna bangunan);
- right to use (hak pakai);
- right to lease in farmland (hak sewa tanah pertanian);
- right to clear land (hak membuka sawah).

- right to harvest forest products (hak memunggak hasil hutan);
- right to avoid (hak gadaa);
- right of sharecropping (hak usaha bagi hasil);
- right of lodging (hak memunggak).

Art.16 also provides that additional land rights may be prescribed by subsequent statute, for example, right to water (hak guna air), right to breed and to catch fish (hak pemeliharaan dan penggunaan air), right to do things with air space (hak guna ruang angkasa). Besides those land rights upon the private land, art.3 of BAL also provides adat community's traditional "right of disposal" (hak ulayat). This right is recognized by the government and may be exercised by the adat community as long as the government plans does not itself dispose land. If the government plans to dispose the land, the adat right of disposal must yield to the national interest.

2. The Concept of Real Property in Indonesia

Under the Civil Law system, Indonesian land law is stated in the BAL (Basic Agrarian Law) and other regulations below this act. There are two concepts of Agrarian Law, the wide and the narrow concept. It is accordance to the wide concept, agrarian law regulate all natural resources, including land; water; air; forest; and mines. Whereas in accordance with the narrow concept, agrarian law only regulates land, in fact, most articles of the BAL regulate actually land or real property. So, the real property law is known as agrarian law or land law. Because of the major role of government in regulating land, the land law becomes a branch of Public Administrative Law. The land law merely regulate land in both state and private land, whereas buildings on land are regulated by private law.

The concept of land according to art.1 of the BAL is the surface of earth, included beneath the earth and under the water. Therefore, land rights give the holder to do certain things on the
surface of the land included beneath and above the earth as well as water and space as long as connected to the use of land, and not contrary to BAL and other regulation (art. 42) of the BAL.

B. The Concept of Matrimonial Real Property in Indonesia

The concept of matrimonial real property is all real property (land) acquired jointly by the couple during their marriage. Under the civil law, Indonesia uses the regime of community property law. It means that the act of marriage becomes the starting point of property union of a man and a woman. However, the law regulating the matrimonial property is different depending on the type of acquisition involved. There are four types of marital property acquisition:

1. Property inherited by one of the parties;
2. Personal property acquired by one of the parties exclusively for her or himself, before the marriage;
3. Property acquired jointly by the couple during their marriage;
4. Gifts. Only the property acquired jointly by the couple during the marriage is remitted to be the matrimonial property and so as the land, while others are remitted to be exclusively the matrimonial property. The matrimonial property does not merely acquired from a joint effort. The income of a husband’s job is a joint property by the fact that his wife remains at home caring for the children and looking after the household. The Supreme Court said, “All property obtained during a marriage is joint property even though it may be a payment for the husband’s activities alone.”

C. Married Act

The Indonesian Married Act was commenced in 1974, and known as Undang-Undang Perkawinan No.1 tahun 1974. This act regulates the legal marriage that consists of basic of marriage, requirements of marriage, termination and void of marriage, contract of marriage, rights between husband and wife, property in marriage, dissolution of marriage and its consequences, status of children, parental rights and responsibilities, guardianship and other considerations. Therefore cohabitation or de facto relationship is considered to be illegal and against other laws and social norms.

The concept of marriage, according to art. 1 of the marriage act, is a knot between a man and a woman as a husband and a wife to establish a long life happy family on the name of the Supreme God. Whereas the principles of marriage according to this act are:

a. The objective of marriage is to establish a long life happy marriage;

b. A marriage is legal if it is done through religious ceremony;

c. A marriage should be officially registered;

d. The principal of open monogamy;

e. A husband and a wife should be physically and mentally mature;

f. A husband should be at least 19, and a wife should be at least 16 years old;

g. Dissolution is not simple and should be done through proceeding;

h. Rights and responsibilities between a husband and a wife are equal.

In relation to matrimonial property, art. 15(1) of the marriage act states that properties acquired by the couple or one of

Judgement of Nov 7, 1986, Samarto Pradjoatmodjo, The Supreme Court (Mekanah Aping)
Hilman Wiradidiasya, Hukum Perkawinan Indonesia, Lampung 1990, p.4-6. (Indonesian Marriage Law).
A deed in the matrimonial property with the spouse's permission (art. 36(1)). When the marriage is dissolved, the matrimonial property is divided according to each system of law (art. 17(1)).

In line with the Indonesian Marriage Act, it can be concluded that all property acquired jointly by both parties during the marriage life is considered to be the matrimonial property, and the division of the matrimonial property is in accord with each system of law enforced in the field of marriage in Indonesia, such as Customary Law, Islamic Law, and Civil Law.

D. Islamic Marriage Law

According to Islamic Marriage Law, there are two versions in line with matrimonial property.

The first version states that there is no matrimonial property, unless there is a syirikah (contract that provides a matrimonial property). Indonesian Jurisprudence of the East Jakarta Islamic Court 17 February 1978 No.21/C/1978 and 28 April 1975 No.54/C/1975 motivates this version. In the legal consideration it is stated that:

"If there is a syirikah, and dissolution took place, then the matrimonial property is divided into two. If there is no syirikah, a husband has his own property from his own acquisition, and so does a wife. So, there should be a syirikah to establish a matrimonial property."

The second version states that there is a matrimonial property without any special deed like syirikah, because marriage itself is a contract, and if all solemn religious requirements has already fulfilled, it means that these are considered to be syirikah. This argument has been presented by Hazzaia, a professor of Islamic Law, and due to the Marriage Act 1974.

Other religious marriage laws enforced in Indonesia state the same as the second version of the Islamic marriage law, that the property acquired by the couple during the marriage life by working or doing a job for living is considered to be the matrimonial property, and if that they use it to buy property, the property automatically becomes jointly.

E. Adat Marriage Law

According to Adat law, matrimonial property consists of personal acquired property that is property acquired by one spouse prior to marriage, a joint property that is property acquired by both spouses during the marriage, inherited property that a property obtains from one spouse by way of inheritance, and gift property. The right of woman to the matrimonial property depends on the kind of the social system of the marriage life, such as, patrilineal, matrilineal, or carnal.

In patrilineal society, a wife enters into her husband's kinship, and there is no distinction between personal acquired properties, joint property, inherited property, and gift property. All properties are considered to be the matrimonial property, which is under the husband's authority as the chief of the family. If the marriage is dissolved, the wife has no right to get her personal acquired property, if she insisted to gain her acquired property, the bride price is returned to the husband and the wife should pay for all wedding costs, then she re-enters her original kinship.

In matrimonial society, a husband enters into his wife's kinship. In this society there is a distinction between the joint property and the individual property. Only the joint property is under the authority of both parties. If the marriage is dissolved, there is no problem with the matrimonial property, except for the joint property. If the social status of the wife and the husband is not the same, there is no joint property.

In parental system, the right of the wife is equal to the husband's. So, there is a joint property and personal/provided property. In old marriage sometimes it is difficult to divide the personal acquired property or the joint property. They have mixed together into the matrimonial property. When the marriage is dissolved and there is a problem in dividing the matrimonial property, the parties could go to the court to make a proceeding.

F. Women's Rights Under the Matrimonial Real Property in Indonesia

Under art. 9 (2) of the BAP, both men and women have the same rights and opportunity to obtain land rights and use them for her or his own benefit or for the family. And according to art.4 (1), land rights can be granted to people, either individual or group of people as well as corporations. It means that according to the BAP, women have already got the same rights and opportunity as men, and the land rights can be granted to a couple in terms of the matrimonial real property. So, certificate of land rights of matrimonial property can state both wife and husband's name for joint property.

In fact, it is still quite a view for Indonesian people to state both name (wife and husband) on the land rights certificates of their joint property. Most of them are under the husband's name. This phenomenon may bring negative impacts to wife's rights to control over the land. Most cases of matrimonial real property in courts are dealing with a problem of women to obtain inappropriate distribution of matrimonial property after the marriage is dissolved. This happens because of some reasons:

1) In the patrilineal system of society, women have no rights to access the matrimonial property;

2) In the parental system of the family, women still have small chance to access the matrimonial real property because of different gender in the family life is still strong, and men still have superior position in the family as well as in the matter of land rights. So, in Java, for instance, where the social system is parental, in term of the marital real property, the patriarchal system is still influenced.

3) Art. 31 (3) of marriage act states that a husband is a head of a family, whereas a wife is a housewife. As a housewife, many people think that a wife should take care of the household like caring for the children and husband, preparing meals for the family and all domestic matters excluded the real property.

4) Most of Indonesian people are Muslim, and the first version of the Islamic marriage law states that there is no matrimonial joint property in the Islamic marriage life except there is a syirikah (a contract that provide matrimonial property, and usually is done before marriage), whereas syirikah is not popular to be done. So, a wife is difficult to access the Matrimonial Property.

G. Judicial Competence in Preceding the Matrimonial Real Property Cases

Although many different marriage laws are enforced in Indonesia, if there is a
problem in distributing matrimonial property after a marriage is dissolved, according to Government Regulation No.9 1975, as well as Supreme Court Circular dated 20 August 1975, K.A.Pemb. 08007/75, will be proceeded by the District Court after the marriage is officially null by the Islamic Court for Moslem and by the District Court for non Moslem. 31

Section III: The findings

A. Analysis

Australian law is different from Indonesian law, but not totally so. Australian law uses the custom law system, which has been applied since the first white settlement in 1788; as the traditions of the colonial power were imported, both its understanding of law and social organization. 32 By contrast, Indonesia uses the civil law system, reflecting the impact of the Dutch colonialism. In terms of matrimonial real property, in some extent there are some similarities and differences between two countries.

The differences

The differences between the two countries arise from many factors, such as social norms and values, laws, religions, traditions and cultures, as well as perspectives of gender role in the family.

In Indonesia there are many laws involved in the matters of the matrimonial real property law. Customary law and Islamic Law affect so much in it, reflecting the social norms and values of the society as well as traditions and cultures. Rights of women toward matrimonial real property depend upon customary law (adat law) of the society, reflecting the kinship system of the society. By contrast Australian customary law, which is known as the

43

aboriginal law, does not.Though it still exists, it is applied only toward the isolated aboriginal society.

Indonesia is a conservative country in term of men and women relationship and gender roles. So, based on its social norms and values as well as religions, it is considered to be a shameful deed to make the de facto relationship between them. Therefore Indonesia does not regulate it. This may cause no rights for women to claim or control their property during the time of de facto relationship. By contrast, marriage as a legal status is declining in Australia; many jurisdictions do not distinguish significantly between married couples and cohabiters because this deed is a permission manner according to the social norm and values that make it important to enact such regulation. By this regulation, then, women have rights upon their property during the relationship.

In terms of the perspective of gender roles, most Indonesian society still concern that a man is considered to be the leader of the family. A woman, then, has a small chance to access the matrimonial real property because of gender inequality in the family life is still strong, and men still have the superior position in the family as well as in the matter of land rights. So, in Java, for instance, where the social system is parental, in term of matrimonial real property, parentalisystem is still influenced.

Although in theory, Indonesian Agrarian Law has a very broad concept of Agraria, because it includes all natural resources such as, mining, water resources, space resources and land resources (art 1 of BAL), in fact in the field of real property law/land law it merely regulates land, and thing above the land excluded chateau and house leasing, whereas

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31 N. Idris Ramluis, Tugaswoman beberapaa pasal Undang-Undang No.1 Tahun 1974, Dari uang hukum Perkawinan Islam, Jakarta, 1986, p.221 (The evaluation of some articles of Indonesian Marriage Law No.1/1974 from Islamic Marriage Law's perspective)

32 Patrick Parkinson, Tradition and Change in Australian Law, LBC Information Services, NSW2001, Second edition, p.3
Australian law uses the broader concept that
consists of land and things above the land
including houses and chattel. The consequence
is that it also regulates contract of house
leasing, which is in Indonesia, apart from private
law. Therefore, in relation to the matrimonial
real property law, Australian women have more
rights upon the matrimonial land joint property
than Indonesian women.

In matrimonial property law, Australian
law uses separate regime that brings
consequences: each party of marriage couple
has its own property, but there is a possibility
for the couple to make a joint property.
Moreover there is an obligation to a husband
to fulfill household and his wife’s need, and in
the Marriage Law, a husband agreed to pay
his wife until she died remarried or entered
into “a permanent de facto relationship with
another man”. For some people, there is also
a possibility for the wife to take benefit the
husband’s property through “trust”. Other
consequence of the regime is that the wife
has less control of the matrimonial real property if
the husband does not make it as a joint property.

Though recently it become more often to
make it a joint property rather than a separate
property, for example in legal ownership of the
matrimonial home, in a significant majority of
cases (70%) the matrimonial home was jointly
owned by the couple. However, there one or
other of the parties was the sole title holder;
homes were in the husband’s name (15%) more
than twice as frequently as they were registered
in the wife’s name (6%). In the 1983 cases the
matrimonial home was in the joint names of
husband and wife in 69% of fully contested
cases with the husband as sole-owner in 23% of
cases and 9% of cases where the wife was the
sole title holder.13

Under the civil law, Indonesia uses
the regime of community property law. It
means that the act of marriage becomes the
starting point of property union of a man and a
wife. However, the law regulating matrimonial
property is different, depending on the type of
acquaintances involved, the kinds of law they
choose (Adat law, Islamic Law, Private Law),
and the social system they have (matrilocal,
patrilineal, and parental). Although normatively
Indonesian Marriage Act uses community
regime, practically the doctrine is not absolute.

The similarities

The similarities between the two
countries are as it touch the most private
individual concerns, the use of regimes of
matrimonial property law in daily life depends
on the commitment between the parties, and
regimes are consistence used only when it
comes to proceeding. In applying the regimes,
Australian matrimonial property law seems very
similar to the first version of Islamic Marriage
Law regime.

B. Conclusion

From the previous description it can be
concluded that compared to the Indonesian
Law, Australian Law gives more rights to
women in term with matrimonial real property
because:

1. According to Australian Law, women
has right to control, take advance, and
distribution the joint property both
in marriage life as well as in de facto
relationship, whereas Indonesian Law
does not regulate de facto relationship.
Because de facto relationship is considered to be
a very bad deed and against the social
values as well as religious. Therefore in de
facto relationship, women have no right to
claim and control over the joint property.
There is no legal reason to claim anything
in the de facto relationship that makes
position of women is very weak.

13 Sapby Bordow & Margaret Harrison, “Outcomes of Matrimonial Property Litigation: An Analysis of
Family Court Cases”, Australian Journal of Family Law 10 August 1994 Volume 8

MIMBAR IKUM
2. Although Australian Family Law uses the separate regime in terms of matrimonial property, the husband has an obligation to fulfill the family needs even after the marriage has dissolved. Furthermore, practically people like to make joint property in the matrimonial property like joint bank accounts and joint land holdings or ownership. On the contrary, although Indonesian Law uses the regime of unity in matters of matrimonial property especially real property, the property right is under the husband's name and his wife has a limited access and control over it.

3. Separation of property regime in Australia is not absolutely enforced in the reality of marriage life as well as in the de facto relationship. So, besides having her own property, a wife can still have the joint property, and her husband supports her life as well.

To eliminate the weakness of women's rights in relation to matrimonial real property in Indonesia, some steps of reform are required:

1. Encourage women to understand their right in relation to the matrimonial property through legal advice, dissemination of EEC (Information Education Centre) at school, TV program, and other printed and electronic media.

2. Encourage husbands to pay attention to the quality of gender roles in family through the same way of women do.

3. Establish new regulations that require women's involvement in dealing with matrimonial real property contacts. Nowadays the regulations merely regulate women's involvement in selling and mortgaging matrimonial real property.

4. Establish regulations that regulate de facto relationship. Although this relationship is considered to be a very bad deed as it against the social norms and values as well as religion, it still happens in Indonesia. Therefore to give women's legal protection, it is better to regulate de facto relationship in any kinds of regulation: in national law or what law. To regulate does not mean to legalize, just to give protection to women.

5. Because of many differences between the two countries, it is not possible to transfer the matrimonial real property law of Australia into Indonesian law, but the idea of making women have more rights can be made a part of the Indonesian law reforms process.

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