

Legal Consequences of Divorce in Mixed Marriage¹

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Abstract

Divorce in a mixed marriage is a reality, even though the purpose of a marriage is to form a happy and eternal household, however as each spouse carries his/her own different habits, culture and laws, it is surely very vulnerable for disputes and quarrels occur between them, so it can lead to divorce. The legal consequences of this divorce can be about the seizure of child custody issues, the issue of the rights of ex-wife or husband, even the problem of joint property seizure. This article is a study on a normative law applying legislation and case approach. The problems discussed are regarding: 1) what are the legal consequences of divorce to the children in a mixed marriage, 2) what are the legal consequences of divorce to ex-husband/wife in a mixed marriage, and 3) what are the legal consequences of divorce to the joint properties in a mixed marriage. Based on the study and analysis the author did, it can be concluded that the legal consequences of divorce in a mixed marriage to the children custody right is awarded to the mother/ex-wife by encumbering the former husband to provide maintenance costs of the children until they are able to live independently or until the age of 18 (eighteen) years. In addition, the ex-husband is also required to provide a living to the former wife. Regarding the division of joint property acquired during the marriage, if the marriage couple is not eligible for the position as a subject of proprietorship right holder of the land in Indonesia, within a year he/she have to release or transfer of ownership of the land to others having such qualification. If this is not done, the property right shall be removed under the law and it shall be returned back to be directly controlled by the State.

Keywords: Legal Consequences, Divorce, Mixed Marriage.

I. INTRODUCTION.

1.1. Background.

Bali Island is a small island as the world tourism destination. Bali island as a miniature of Indonesia has been known as a paradise island since Dutch colonial era, and this title is still firmly attached to the hearts of the world's travelers. The tourists consider that their life will not seem complete if they have never enjoyed the natural beauty of this small island known as the Island of Gods. As one of the world tourist destinations, this island has been visited by many foreign nationals with no exception by Japanese Citizens. As the result of their holiday visits, many of the tourists do not just fall in love with its natural attractions, cultures but also fall in love with the people who are known to be very friendly and unpretentious so finally love braiding occurs leading to wedlock.

The marriage solemnized by a married couple of different nationalities and one of them is Indonesian citizen pursuant to Article 57 of Law No. 1 of 1974 on marriage is called mixed marriage.³

The ideal purpose of a marriage under Marriage Law is to establish a happy and eternal family, as defined in Article 1 of Marriage Law containing the juridical notion of marriage, namely, "physical and mental bond between a man and a woman as husband and wife with the aim to establish a happy and everlasting family (household) under Almighty God." Thus, marriage is a "religious engagement", as the legal effect is to bind on men and women in a outwardly and inwardly bond as husband and wife with a holy and noble objective under Almighty God having close relationship with religion/ spirituality, so the marriage does not only have an element of external/physical, but also has mental elements.

The marriage couple solemnizing a mixed marriage are certainly part of the prospective husband/wife that will bring their law, customs and culture of each party, so it is very difficult to bring together different cultures into unidirectional to become a partner, for it is not seldom that the ideal objective of a marriage is very difficult to achieve, because many of these domestic life of different nationalities in the household are not happy even sometime disputes and quarrels, thus divorce is the best way. This is in line with the view of Abdul Ghofur Anshori that in the domestic life, it is often found people (husband and wife) complained and talk to another person, or to his/her family, due to the non-fulfillment of their rights that should be acquired or non-performance of an obligation by one of the parties, or for other reasons, which could result in the emergence of a dispute between the two (husband and wife). It is not impossible that from such dispute would entail to the termination

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³ Further the designation of Law Number 1 of 1974 on Marriage will be referred to Marriage Law

of wedlock (divorce)¹. The mixed marriage circumstance underlying the relationship of husband and wife in a marriage (family) is so bad therefore it is considered, from any points of views, that such relationship of the mixed marriage is better to be terminated than continued. This means that even though a marriage is a very powerful agreement binding both physically and mentally, if the husband and wife are desired to be terminated, then the marriage will be terminated pursuant to the legislation in force.

The dissolution of the marriage for the married couple of different nationalities obviously brought very complex consequences, not just a legal consequence to the children born from the marriage, but also resulted in the ex-husband/wife, and even to joint property owned. Pursuant to the provisions of Article 37 of Marriage Law, it is stipulated that *"if a marriage breaks up due to divorce, the joint property shall be governed by the law of each party."* This means that as the result of divorce, then the joint property may be governed under their respective religious law, their customary law, or any other laws. When it is observed the essence of the legal consequences of divorce in a mixed marriage, if seen from the Marriage Law is to acknowledge and protect the rights of children and ex-husband/wife as a human right. And since in a mixed marriage each party subject to a different legal system, then in the event of divorce, the consequences of the divorce will bring quite complex legal issues, both regarding the custody of the children, the cost of living for ex-husband/wife and also the rights to joint property.

For that reasons, in this article it will be discussed in depth is as defined as follows.

1.2. The formulation of problems.

- 1.2.1. What are the legal consequences of divorce to the children in a mixed marriage?
- 1.2.2. What are the legal consequences of divorce to ex-husband/wife in a mixed marriage?
- 1.2.3. What are the legal consequences of divorce to joint properties in a mixed marriage?

II. DISCUSSION.

2.1. Legal Consequences of Divorce to Children in a Mixed Marriage.

Every child has the pride and dignity that should be upheld; and every child born should receive their rights without the child's request. Such rights are the basic rights that are naturally inherent in human beings, they are universal and imperishable. Therefore, they should be protected, respected, maintained, and should not be ignored, reduced or taken away by anyone. This can be seen in the Constitution of the Republic of Indonesia of 1945 in Chapter X on Human Rights; Article 28 A determines:

"Everyone has the right to live and preserve his/her life and living".

Regarding the rights of the child, pursuant to the provisions of Convention on the Rights of Child approved by the UN General Assembly on 20th of November 1989 and valid as an International Law on 2nd of September 1990, and has been ratified by the Indonesian Government through Presidential Decree No. 36 of 1990 on 25th of August 1990; it is stated that this Convention has principles/general principles on children protection, namely (1) Active Protection, (2) non-discrimination, (3) the best interest of the child, (4) the right to life, survival and development and (5) respect for the views of the child.

The principles are also contained in the provisions of Law Number 23 of 2002 as amended under the Law Number 35 of 2014 on Child Protection set up by the government in order that children's rights can be implemented in Indonesia. From the life of the nation, children are the future of the nation and generations of successors of national ideas, so every child has the right to live, grow and develop, participate and reserves the right to protection from violence and discrimination as well as civil rights and freedoms. The concern of Indonesian government to the actual dignity of child has been seen since 1979 in the Law Number 4 of 1979 on Child Welfare. However until the Law on Child Protection is issued, the welfare of children and the fulfillment of children's rights are still far from expectation, especially to children as a result of divorce whose parents are mixed marriage. These children due to divorce are often the victims of the disputed parents, so the welfare of the children makes our hearts increasingly sad, as the children often did not get their rights as a child.

Pursuant to the provisions of Article 1 of Law on Child Welfare; a child since from the womb to the age of 18 (eighteen) years reserves the right to protection and welfare. This means, that since in the womb, both parents have to provide sufficient nutrition so the child can be born healthy and sufficient weight. Similarly, the children due to their parents of different nationalities divorce, they all deserve their rights as children of the nations. However, in reality, in a society, a child due to his/her parents divorced moreover a child born from a mixed marriage, he/she tends to be considered as a foreigner, in fact before the age exceeds 18 years, he reserves the right to have dual citizenship, but instead he/she is treated as a foreigner having no right to get the recognition as natural person who has the same rights and obligations to the Nation and the State as experienced by Gloria Natapradja Hamel as the red and white flag raising troop on the 71st anniversary of Independence of the Republic of Indonesia.

¹ Abdul Ghofur Anshori, Islamic Marriage Law (Fikih and Positive Law Perspective), UII Press, Yogyakarta, 2011, pag. 223

The law provides less protection for the child as a national child living and growing in the state based on law, in fact it is stated in the Indonesian National Constitution that every child reserves the right to live, grow and develop and is entitled to protection against the violence and discrimination. The notion of "every child" means all children with no exception of children born from the marriage of different nationalities. Where it can be obviously seen as stipulated in the Constitution of the Republic of Indonesia of 1945 in Article 28 B paragraph (1) and (2) as well as in Article 28 D paragraph (1), which reads as follows:

Article 28 B

- (1) *Everyone reserves the right to form a family and continue offspring through legal marriage.*
- (2) *Every child reserves the right to live, grow and develop and is entitled to protection against violence and discrimination.*

Article 28 D

- (1) *Everyone reserves the right to recognition, security, protection and equal legal certainty and treatment before the law.*

Therefore, the international community has recognized the rights of children through the Convention on the Rights of Child) approved by the UN General Assembly on 20th of November 1989 and applicable as an International Law on 2nd of September 1990, and has been ratified by the Government of Indonesian through Presidential Decree Number 36 of 1990 dated 25th of August 1990, there is no legal reason to abolish the legal protection of the child as the victims of their parents' divorce.

In the mixed marriage, the legal consequences of divorce to the status and protection of children's rights under Indonesian Law can be observed from the provisions of Article 41 of Law Number 1 of 1974 specifying that:

- a. Both mother or father remains to have an obligation to maintain and educate their children, solely based on the interests of the child; shall there be any dispute regarding the children control, the court rendered its decision.
- b. The father shall be responsible for all maintenance and education costs required by the children, if the father in reality cannot meet these obligations, the court may determine that the mother may bear such costs.
- c. The court may require the former husband to provide cost of living and/or determine an obligation to ex-wife.

Based on the provisions, in the event of divorce in a mixed marriage, ideally the interests of the child shall remain to be implemented pursuant to the law. According to Soemiyati, if divorce occurs where offspring has been obtained in the marriage, then mother shall be entitled of parenting the child of the marriage, or grandmother onwards and upwards. However, the financing for the livelihoods of the child, including the cost of education shall be the responsibility of the father. The expiration of custody period is at the time when the child was able to be questioned to whom he would join. If the child chose his mother, then the mother remains eligible as the child custody, if the child opted his/her father, then the custody right shall move to his/her father.¹

Since in the divorce of a mixed marriage the complex constraint is the legal system adopted by each of the former husband or wife which is in different legal system, moreover the distance between the countries separating them is also so crucial, so it is very vulnerable that one of the parties would deny the court's ruling. In the event of default by either party, it is certainly the children who will become the victim, so that the child's needs cannot be fulfilled and as a result the child right is abandoned, because party given the right to take care the child is no longer able to afford to finance the child's need. Regarding this problem, a case can be proposed as a sample here, namely, one of the cases in the District Court of Denpasar-Bali, the divorce case of different citizenship were between Balinese girl named Nurjati and her ex-husband named NONHAKA. It is proved that all financing of the child born from a mixed marriage was encumbered to his mother, while her ex-husband had been somewhere. Communication is very difficult, so Nurjadi Balinese girl herself who has to work hard to raise her child to be able to be independent. In fact, pursuant to the Indonesian Law, as proposed by Hilman Hadikusuma, that the father should be responsible for all costs of maintenance and necessary education for the children after the breakup of marriage by divorce. If it turns out that father cannot carry out his obligations to finance the maintenance and education of the children, the court may determine that mother may participate to have the responsibility for financing the maintenance and education of the child.²

The author agreed with the idea of R. Subekti, stating that the legal consequences of divorce to the children in a mixed marriage is the authority of parents (*ouderlijke macht*) to finish and turns into custody (*voogdij*). Therefore, if a marriage is dissolved by the judge, it should also be arranged the guardianship of the children who are still minors (children under the age of 18 (eighteen)) years. The determination of guardian by

¹ Soemiyaitu, *Islamic Marriage Law and Marriage Law (Law Number 1 of 1974 on Marriage)*, Liberty, Yogyakarta, 1982, page 126.

² Hilman Hadikusuma, *Indonesian Marriage Law under Legislation, Customary Law, Religious Law, Mandar Maju*, Bandung 2007, page 176.

the judge shall be executed after hearing the family of the father of the mother having close relationship with the children. The judge is independent to assign a guardian to father or mother, depending on who is seen as the most capable or good considering the interests of children. The determination of guardian can also be reviewed by a judge at the request of the father or mother based on circumstance changes.¹

In court practice, the main responsibility for the position as guardian of the children who are still minors is generally awarded to the mother to continue providing the onus for maintenance of the children as the consequences of divorce to the former husband/father.

2.2. The legal consequences of divorce to ex-husband/wife in a mixed marriage

The husband and wife in a normal marriage or in a mixed marriage actually have equal rights and status, since the marriage is an agreement emerging binding. Husband and wife must be faithful to one another, help each other, stay together, each provides a living and jointly educate children. It is important to note that engagement in this marriage is binding agreement both physically and mentally between a man as a husband and a woman as the wife. In the event of divorce, the legal consequence is that the position of rights and obligations between husband and wife is also balanced.

Indonesia as a state of law has to ensure fairness to the citizens. In a mixed marriage, given the parties have entered into a mixed wedlock, they are subject to different legal systems, then in the event of divorce, common legal issues relating to the rights and obligations of ex-husband or ex-wife to claim each rights. For Indonesian citizens, subject to the provisions of Article 41 letter c of Marriage Law, which specifies that the court may oblige the former husband to provide cost of living and/or determine any obligations to the former wife.

According to Hilman Hadikusuma, in *patrilineal* social kinship who maintains men lineage, who generally do honest marriage, where wife after marriage will enter into the kinship of husband (*pratilokal*), then in the event of divorce because of fornication, consequently the wife is pleased to be away. This means the breaking up of marriage and up anyway kinship between the relatives, which means the destruction of honor of the relatives concerned. Likewise, in a matrilineal society maintaining the lineage of women and in general solemnizing *semenda* (relatives by marriage) marriage, where after marriage her husband becomes *urang sumando* or settled at the wife's residence (*matrilokal*). However, due to the position of husband in wife is weak, then in case of dissolution of marriage the husband does not have any rights.²

While in parental society (parenting), which can be said to be no longer maintain the lineage, and in general solemnizing marriage freely (independent), then the result of marriage breaking up due to divorce is that the wife cannot sue a living supports from the former husband.³

Given in this mixed marriage, each party is subject to different legal systems, then in case divorce occurs, court practice generally ordered that the former husband shall be obliged to provide living money (money as alimony) to the ex-wife, however after the decision has permanent legal power, it turned out that it is not implemented sincerely by the ex-husband who is a foreigner, because he has returned to his country, the former wife is very difficult to get her rights as a former wife, despite it has been ordered under a court ruling. In this position, it seems clear that the position of the wife after the divorce in a mixed marriage is very weak.

2.3. The legal consequences of divorce to the Joint Properties in a mixed marriage.

Joint properties reflect the objects that are shared or owned by more than one person.⁴ What is meant by joint property is the property acquired during the marriage, because the husband or wife works. This means that the joint property is the property acquired during the period between during the marriage until the marriage is dissolved, either because of death or divorce. While the dowry is the property brought by each husband and wife and their property acquired by each party as a gift or legacy under the control of each husband and wife as long as husband and wife do not specify otherwise.

The legal consequences of divorce, this joint property is very prone to disputes, as often each party between the husband and wife both feel that such assets are their efforts, each feels to reserve more rights. Seizing the joint property after divorce is very common, especially in the divorce of mixed marriages, because among the former husband or wife are subject to different legal systems.

Legally, the proprietorship of a joint property in an governed in the provisions of Article 35 Paragraph (1) and Paragraph (2) of Marriage Law, containing a provision categories that property acquired during the marriage become joint property; while the dowry of each husband and wife and property obtained by each party

¹ R. Subekti, The Principles of Civil Law, PT. Intermasa, Bandung, 1982, page 44

² Hilman Hadikusuma, OpCit. 2007, page 178

³ Soerojo Wignjodipoero, Introduction and Principles of Customary Law, Gunung Agung, Jakarta, 1995, page 148

⁴ Muhammad Syaifuddin, Sri Turatmiyah, Yahanan Analysis, Divorce Law, Sinar Grafika, Jakarta, 2013, page 408

as a gift or inheritance, is under control each party as long as the parties did not determine otherwise. Thus, the provisions of Article 35 of Marriage Law classifies marriage property into 2 (two) categories, namely joint property and dowry.

Based on the provisions of Article 35 of Marriage Law, in the case of mixed marriages, if the parties to the husband and wife do not make any nuptial agreement, then all properties acquired during the marriage shall become joint properties, while the properties acquired before the marriage takes place or property obtained as a gift or legacy shall be the rights of each party, unless otherwise specified. If the marriage couple divorced, the legal consequences of the properties acquired during the marriage until the marriage is terminated shall be partly the right ex-husband and partly the rights of ex-wife, although in reality wife did not come to make a living, but the wife has the same right to this joint properties.

The provisions of Article 37 of Marriage Law has more comprehensive coverage that the legal consequences of divorce to the joint properties governed by the laws of each party, which includes religious law, customary law or any other laws. This means that the Marriage Law submits to the parties (ex-husband and ex-wife) who divorced to choose which law and what law will apply, and if there is no agreement, according to Hilman Hadikusuma, the judge of court can consider based on the justice perspective.

In the event of a mixed marriage divorce, to determine the applicable law on the division of joint property disputes, there are some principles of private international law can be applied, namely: *Lex Loci Contractus*; *Lex Loci solutionis*, *Proper Law of the Contract and the Most Characteristic Connections*.¹

According to Islamic Law as described by Moch. Idris Ramulyo, in the event of dissolution of marriage, either because of divorce or talaq upon the request of the husband or wife's lawsuit, then the joint properties acquired during the marriage shall be shared between husband and wife, under the same consideration.²

In customary law, as defined by Hilman Hadikusuma, generally in patrilineal societies, in case of divorce that cannot be resolved by relative consultation and wife has returned back her origin family elsewhere, she is not entitled to bring back her dowry, especially if the divorce occurred due to the wife's error (fornication). If the wife's relatives also demanded that all dowries should be returned, then it is the duty of the wife's relatives to return honest money and all costs incurred in organizing it. If an amicable settlement cannot be reached, the parties may submit a claim to the court.³

The division of joint properties between ex-wife and ex-husband as a result of divorce in a mixed marriage often faces constraints, particularly regarding the division of joint properties in the form of rights to land and buildings, because it is based on the provisions of article 21 paragraph (1) UUPA specifying that: "only Indonesian Citizens who may have freehold" and whenever it is related to the provisions of article 35 of Law Number. 1 of 1974, which specifies that all property acquired during the marriage shall become joint properties, as long as the parties do not specify otherwise.

Therefore, in a mixed marriage, the parties are subject to different legal systems, then when divorce occurs, the property in the form of freehold rights under the laws of Indonesia partially be the right of ex-husband and partly shall be the ex-wife. Especially for the part of husband who is a foreigner, is obviously not allowed to have freehold in Indonesia, so this division will be deemed to provide less sense of justice by the foreigner (ex-husband), even moreover the money used for the purchase of joint property are from husband.

The legal consequences of divorce to this mixed marriage, for the ex-husband who did not qualify for the position as subjects of rights holders in Indonesia, then within one year must release or transfer the ownership of the land to others who qualify. If this is not done, then remove the land because of the law and the land is returned back into the ground directly controlled by the State (Article 21 paragraph (3) and (4) BAL.)

III. CONCLUSION

Based on the elaboration in the discussion of the problems of the above, it can be concluded as follows:

- 3.1. The legal consequence of divorce to children in a mixed marriage is that the custody of the children is awarded to the ex-wife/mother by encumbering the main obligation to the former husband/father to provide maintenance costs for the children until they are able to live independently or until the age of 18 years, if the fact that the father is unable to perform his obligations to finance the maintenance and education of the children, the court may determine that the mother may share the responsibility.
- 3.2. The legal consequence of divorce to ex-husband/wife in a mixed marriage is that between the former husband and ex-wife has a balanced position, to carry out the rights and obligations towards the children. The court may require the former husband to provide cost of living and/or determine an obligation to ex-

¹ O.C. Kaligis, Theory and Practice of Business Contract, Volume 1, PT. Alumni, Bandung, 2013, page 20

² Moch. Indris Ramulyo, Islamic Marriage Law: An Analysis of Law Number 1 of 1974 and Islamic Law Compilation, PT. Bumi Aksara, Jakarta, page 232.

³ Hilman Hadikusuma, Op.Cit. 2007, Page 115-117

wife.

- 3.3. The husband and wife who get divorce in a mixed marriage do not make any nuptial agreement, then the legal consequence is that all properties acquired during the marriage will become joint properties. While the property acquired prior the marriage took place or property obtained as a gift or legacy shall be the rights of each party, unless otherwise specified. If the spouse is not eligible for the position as the subject of a right holder to a land in Indonesia, then within one year such person should release or transfer of the proprietorship of the land to other party having such qualification. If this is not done, then the land will be removed under the law and the land shall be back to be directly controlled by the State.

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