The Implication of the Divorce of Unregistered Marriages for Divorcees’ in Bali: Assessing Status, Right and Duty

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Abstract

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This paper analyzes the settlement of palas marabian or divorce cases in Bali. This study focuses on the implication of the settlement of divorce cases settled by the Balinese Customary Law and the National Marriage Law, especially for those whose marriages have not been registered. By using the sociological jurisprudence study method, a method emphasizing the study of the law applied in a particular society, it could be explained that the divorce of the married couple whose marriage was not registered got difficulty in obtaining legal certainty from the authority of their village or Banjar. This was due to the disharmony on the rules of the Balinese customary law and state law of Indonesia. The Leaders of the traditional villages in Bali who carried out the awig-awig (the customary law of the traditional village) could not make any settlement process since there was no decision from the court of permanent legal force (state law). On the other hand, state law implemented by court judges would not be able to accept the divorce claim if the marriage of the couple was not registered, even though the marriage was carried out and proved according to custom and religion process. As a result, the justice seekers could not get legal certainty. This condition brought implications for the divorcees’ social lives.

A. Introduction

The island of Bali, known as the Island of the Gods as an international tourist destination, cannot be separated from the influence of foreign cultures that are so widespread in almost all sectors of life, including marital relations.
This happens in line with the massive influence of advances in digital information technology, which not only dominates the interaction between local and national residents, but has also penetrated the territorial boundaries of a country. This fact shows that there is a positive influence and it is also inevitable that there will be a negative influence. From the positive influence, it will be very easy for everyone to make human relations with one another in interacting, including the problem of meeting their biological needs in the association between men and women regardless of where they come from, what caste, what ethnicity, religion and nation. It is unavoidable that the existence of a relationship that is greatly facilitated also touches the relationship in marriage.

Since the enactment of Law Number 1 of 1974 concerning Marriage, which was then followed up by Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, and also its amendments, namely Law Number 16 of 2019 concerning Marriage, hereinafter abbreviated as In the Marriage Law, the Indonesian people have changed the paradigm that the biological relationship between a woman and a man must be legalized in a marriage bond. Article 1 provides the definition that:

"Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead."

This definition is given by the legislators who are expected to standardize the notion of marriage so that people will understand what the core meaning of a marriage is. However, as expressed by Isnaeni, although the one who conveys the definition is a legislator, it does not mean that the nature of marriage is fully summarized in that sentence. In social life, there have been many men who have physical and spiritual ties with more than one woman. There have been also marriages in which the brides and the grooms are from different religion and agree to follow the same religion. However, after the marriage it turns out that one of denies the agreement and returns to her original religion so that this couple will inevitably separate or divorce. In Balinese customary law this is called palas marabian. In the Balinese customary law community, which is influenced by the teachings of Hindu religious law, the legal act of palas marabian is actually something that is very taboo, it is no exaggeration for some people to call it a disgrace to the families of women and men's families. This is the same as marriage which is very

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3 *Palas marabian* in this paper is the term used to distinguish it from the term divorce in Law Number 1 of 1974; in this paper it will be examined in depth the implication of the legal act of *palas marabian* or divorce and its resolution in the perspective of Balinese Customary Law which is identical to Hindu Religious Law.
dominant with religious elements so that the act of *palas merabian* or divorce by the Balinese people is considered a family disgrace.

Something disgracing is taboo to be discussed, but from a scientific point of view it must be analyzed. Divorce cases like *palas merabian* cannot be resolved only by the husband and wife. Families from both sides, the *purusa* family (the family from the husband and the *predana* family⁴ (the family from the wife) must be involved. Even, the effort for the settlement of the cases must be known by the people of the traditional villages of both sides. From this it can be seen that the settlement of the legal act of *palas merabian* is very complex, it cannot be solved through a court decision only. The settlement of this case will be even more complicated since each traditional village in Bali regulates *palas marabian* differently. This can be seen from several provisions on *awig-awig* of Banjar Adat and *awig-awig* of Traditional Village in Bali. Even, they are often counterproductive to the provisions of state law so that in practice the application of *awig-awig* of Banjar Adat or *awig-awig* of Traditional Village in carrying out the settlement of the divorce whose marriage is not registered or does not have a marriage certificate, each has different view often is often against the state law.

For example, a relationship of a married man with an affair in which the woman is pregnant and wants to be married immediately but the wife of the man does not permit him to do so, the marriage will be done secretly and legalized only by traditional and religious ceremony. This marriage is without registration. This marriage has complied with the provisions of Article 2 Paragraph (1) of the Marriage Law. The second wife who was originally an affair will find it very difficult to obtain her status as a legal wife under state law if the first wife does not give her consent. Religiously, based on customary and religious law, a marriage carried out and approved by a religious leader is considered legal. However, if they want to divorce, they cannot do that since their marriage is not registered. In that case the customary and religious law are contrary to state law.

The contradiction between Customary Law and State Law in resolving this problem can be found in the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018 concerning the Enforcement of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties for the Court, in II

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⁴ See Istri Agung, 2016, *Makan Purusa dan Predana Dalam Putusan Hakim Mengenai Sengketa Waris Adat Bali*, Udayana University Press, page 105 explains that the meaning of Purusa and Predana is associated with the process of origin of the creation of the universe and its contents, which in Hindu teachings are stated as follows: 1). From that origin, he who is real, eternal and unreal he created *purusa* known in the world with the title "Brahma" as written in Manawa Dharma Sastra I:11); 2). By dividing himself into partly male and part female (*ardhanari*), he creates *wiraja* from that woman” (as written in manawa Dharma Sastra I.32).
concerning the Legal Formulation of the Civil Chamber letter A. Regarding General Civil Code number 5 (hereinafter abbreviated as SEMA of the Republic of Indonesia No. 3 of 2018) it is stated that:

*Divorce whose marriage is not registered in the civil registry.* The divorce lawsuit filed in the Court can be accepted and granted as long as the marriage was carried out in a religious/custom way before Law Number 1 of 1974 in conjunction with Government Regulation Number 9 of 1975 came into effect.

Learning the SEMA of the Republic of Indonesia Number 3 of 2018, it can be understood that the divorce of married couples since the enactment of Law No. 1 of 1974, but their marriage has not been registered, the settlement through the courts would be unacceptable.

Factually, in Bali society, even though Law no. 1 of 1974 has been promulgated for almost half a century, there are still many marriages carried out according to custom and religion and have complied with the provisions of Article 2 Paragraph (1) of Law Number 1 of 1974 have not been registered. For some reasons, their marriage broke up. With respect to these legal facts, settlement through the courts will not be able to be carried out since the SEMA of the Republic of Indonesia Number 3 of 2018, as well as settlements under Balinese Customary Law cannot take place before there is evidence of the dissolution of the marriage according to state law. In this case, it seems that there is disharmony in the settlement of the dissolution of marriage according to national marriage law and Balinese Customary Law. A husband and wife who divorce, in order to be accepted to be back to their parents’ home, to be agreed by the traditional village leaders, they still have to show evidence of the dissolution of their marriage based on state law. as long as they cannot show the evidence, the traditional village leaders cannot carry out the "broadcasting process" in front of the community meeting of the traditional village stating that the couple divorce.

Since in this world nothing lasts forever, a divorce cannot be neglected. This is due to the influence of the globalization with all digitalized information so that the relationship between husband and wife is often disturbed or tempted. Considering this condition, a research on the implications of resolving the dissolution of marriages that are not registered from the perspective of Balinese customary law with the perspective of national marriage law is very important to be conducted. It is hoped that the result of this research can help the people getting divorce solve the their problem.

This paper is an empirical legal study that analyzes the implication of the settlement of divorce cases whose marriages were not registered. The

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5 The broadcasting process is an announcement made by the Banjar administrators or the traditional village administrators to explain a certain event or action carried out by the Banjar residents or the traditional village people so that all can know about it. The announcement is made in front of the people of the Banjar or traditional village in a formal community meeting.
settlement was done by applying customary law and Indonesian National Marriage Law. The empirical characteristic of this paper was in line with what was stated by Irwansyah (2021) stating that empirical legal research is a legal research method that seeks to see law in a real sense and examine how law works in society.\(^6\) This study applied statutory approach, conceptual approach, case approach, analytical approach, and sociological approach. There are two kinds of data used in this study: primary data and secondary data. The primary data of this research was in the form of direct information from the community, namely husbands and wives who got divorced but their marriages were not registered. The secondary data were taken from primary legal materials in the form of the marriage law, and other legislation related to marriage, and awig-awigs of some traditional villages in Bali; secondary legal materials in the form of scientific articles, journals, books on divorce cases; tertiary legal materials, law dictionaries, and encyclopedia.\(^7\) The technique of collecting legal materials used was a direct interview with the respondents. After the legal materials have been collected, the analysis was carried out to obtain the answer of the questions being studied.\(^8\)

The novelty of this research is to analyze the implications of resolving divorce cases whose marriages are not recorded for the divorced parties, especially in Balinese society based on customary law and state law. Based on SEMA-RI Number 3 of 2018 regulates that divorce cannot be carried out if it is not recorded, this becomes a problematic thing for a couple who marries using Balinese customs when getting married but does not register their marriage under state law.

**B. Discussion**

1. **Implications of Divorce from Unregistered Marriages for Divorcing Parties in Bali**

The main elements of traditional villages in Bali, as regulated in Regional Regulation Number 4 of 2019, involves Parahyangan (element in relation to religion), Pawongan (element in relation to human beings) and Palemahan (element in relation to environment). These three elements are as the embodiment of the *Tri Hita Karana* philosophy\(^9\) (a traditional philosophy for life on the island of Bali, Indonesia that involves harmonious relationship

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\(^6\) Irwansyah, 2021, Metode Penelitian Hukum Pilihan & Praktik Penulisan Artikel, Edisi Revisi, Cetakan ke-4, Mirra Buana Media, Yogyakarta, hal. 105.

\(^7\) Ibid, p.101.

\(^8\) I Made Pasek Diantha, 2016, Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum, Prenadamedia Group, Jakarta, p. 30.

\(^9\) *Tri Hita Karana* are the values of Balinese local wisdom, namely: 6 (six) main sources of prosperity and happiness in Balinese life (sad kerthi), which include: a. Purification of the soul (atma kerthi); b. Purification of the sea (segara kerthi); c. Purification of water sources (kerthi lake); d. Purification of plants (wana kerthi); e. Human purification (jana kerthi); f. The purification of the universe (jagat kerthi).
between people with God, people with other people, and people with nature or environment). The problem of marriage and divorce or *palas marabian* is part of the relationship among people which is regulated in the *pawongan* section. According to Balinese customary law and other regulations in Indonesia, marriage means not only a civil engagement, but also a customary engagement and a kinship bond between the male family (*purusa*) and the female family (*predana*).  

A married couple has consequences for civil relations, such as the rights and duty of husband and wife, joint property, children's status, rights and duty of parents. Being married also concerns with the relations of inheritance, kinship, and neighborhood as well as the duty to obey orders and prohibitions of religion, both the relation between human with God (worship) and relations among people in social life in order to be safe in this world and afterlife. Meanwhile, Ter Haar states that marriage is a matter of relatives, family affairs, community affairs, matters of dignity and personal matters. Article 1 of the Marriage Law states that marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty.

Based on the definition of marriage above, it is clear that the noble purpose of a marriage according to customary law, religious law and state law is none other than to form a happy and eternal family, and to continue offspring. However, in reality, the ideal goal of a marriage is very difficult to achieve because it is influenced by internal and external factors.

Internally, the problem comes from the relationship between the husband and wife, for example the different clans or castes they are from. It can also be caused by the inequality of the income they get. Their disharmony communication with their father or mother-in-law often contributes to clouding the atmosphere of the couple’s harmony so that they often have quarrels. This condition becomes more fatal if there are external factors interfere with their household. Bad side effects of globalization and digitalization often worsen their domestic situation. The temptation of the third parties often disturbs the peace of their household. It can make disputes, quarrel and even domestic violence. This will cause a rift in the husband and

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10 For the Balinese Customary Law community, marriage is termed as pewiwahan or perwarangan or alakirabi where one party is located as purusa and the other is located as predana, which has a very noble purpose including Dharmasampati, namely the bride and groom (husband and wife) jointly carry out their Dharma. relating to religious activities and obligations, such as carrying out yadnya; besides that it also has the purpose of Praja, namely to give birth to offspring, and Prati can enjoy worldly satisfactions (artha and kama); See Anak Agung Wife Agung, 2016, "Op.Cit. p. 5.


wife relationship and eventually not a few of the married couples choose to separate or divorce. The divorce or dissolution of a marriage based on the intention of the husband or wife or both of them because of disharmony is called a divorce, which in this paper according to Balinese customary law is called palas marabian.

Palas marabian or divorce according to Balinese custom and most regions in Indonesia is a big problem, it is a social and juridical problem.\textsuperscript{13} Djojodiguno (1974) states that the divorce among the Javanese is something they do not like. The Javanese dream is to marry once for a lifetime, whenever possible until the husband becomes grandfather and the wife becomes grandmother having great-grandchildren. Based on the customary law in Indonesia, basically every family, relative and group wants a marriage to be preserved forever. In fact, a marriage is not only for the husband and wife only, but also for family interests of both parties. Seeing this condition, since the marriage involves whole relatives that may bring unhappiness to the couple, it often happens that a divorce cannot be avoided.

The customary law in Bali states that a divorce can be carried out as long as there are the following reasons:

\begin{enumerate}
    \item wife commits adultery;
    \item infertile wife;
    \item impotent husband;
    \item husband leaves his wife for a very long time or the wife behaves inappropriately;
    \item There is a mutual desire from both parties, there is an agreement between husband and wife to divorce.\textsuperscript{14}
\end{enumerate}

To settle a divorce of the marriage by state law is of course resolved through legal channels by filing a lawsuit to the court of the regency where the defendant is domiciled. With regard to the focus of the study of this paper, namely the implication of the settlement of divorce by Balinese customary law and state law, in particular the divorce of marriages that had met the provision of Article 2 paragraph (1) of the Marriage Law but had not met the provision of paragraph (2) before the marriage was dissolved, the analysis was done by using the theory of legal objectives which include certainty, expediency and justice.

It could be explained that even though the Marriage Law accompanied by PP No. 9 of 1975 has been in effect for almost half a century, there were still many cases of divorce of marriages which were based on custom and religion found in the community of Balinese traditional villages. In that case the marriages had not been registered. Based on the result of direct interviews

\textsuperscript{13} Soerojo Wignjodipoero, 1984, Introduction and Principles of Customary Law, PT. Gunung Agung, Jakarta, p. 143
\textsuperscript{14} Ibid, p. 144.
with some Balinese women who had problem with their husbands and wanted to file a divorce suit through state law, it could be explained that the attempt to obtain legal certainty through the court could not be accepted because the court was constrained by the existence of SEMA of the Republic of Indonesia Number 3 of 2018. Although there was the *ius curia novit* principle, the principle stating every case brought to the judge had to be solved.\(^{15}\) It could be seen that in practice those who wanted to file a divorce suit through the court route but their marriage had not registered could not obtain legal certainty due to the SEMA of the Republic of Indonesia Number 3 of 2018.

The opinion of Van Apeldoorn, which states that legal certainty has two sides, namely: First, the side of the determination of the concrete law used. This means that the parties seeking justice (*justiabellen*) want to know what law will be implemented (*inconcreto*) just before they go to court. Second, the legal security side. This means the protection for the parties against the arbitrariness of the judge. So legal certainty must mean that the rule of law must be clear and provide protection for litigants.\(^{16}\) In line with his opinion, Van Apeldoorn, Atmadja and Budiartha (1986) view the legal certainty from the juridical dimension. They state that the concept of legal certainty implies that the formulation of legal norms must be clear but not multi-interpreted, it should be in accordance with the *similia-similibus* principle (the rule of law is the same)\(^{17}\) and applied to the same cases.

Referring to this legal certainty theory, in the case a wife wanted to obtain legal certainty because her husband did not carry out his responsibility as the head of the household, the wife who wanted to get a divorce through filing a divorce lawsuit to the court failed to get legal certainty since their marriage had not been registered. That was due to the existence of SEMA of the Republic of Indonesia Number 3 of 2018 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2018 as a Guide to the Implementation of Duties for the Court, in II concerning the Legal Formulation of the Civil Chamber letter A. General Civil Law number 5 states that: a divorce lawsuit filed in court for those whose marriage has not been registered can be accepted and granted as long as the marriage carried out by custom and religion was held before the enactment of Law Number 1 of 1974 jo Government Regulation Number 9 of 1975.

Considering the phrase, “as long as the marriage carried out by custom and religion was held before the enactment of Law Number 1 of 1974 jo Government Regulation Number 9 of 1975” above, it could be understood that, based on the interpretation of the *argumentum a contrario*, the SEMA

\(^{15}\) Sudikno Mertokusumo, 2009, Hukum Acara Perdata Indonesia, Liberty, Yogyakarta, hal. 67


\(^{17}\) Atmadja I Dewa Gede, and Budiartha I Nyoman Putu, 2018, Legal Theories, Equivalent Press < poor, p. 206.
Number 3 of 2018 regulated that the settlement of divorce through the court could not be carried out for those whose marriage was carried out by custom and religion but their marriage had not been registered. This means the settlement through the court could not be accepted. The legal certainty the divorcees wanted could not be obtained because the marriage was not registered. The state law has never agreed that there was a marriage. In fact, the law must be carried out according to the *similia-similibus* principle (the same legal rules are applied to the same case). This also means that the couple could not dissolve their marriage. The divorce will never be resolved by the state law.

2. Legal Status, Rights And Obligations Of Parties Whose Marriage Is Not Registered For Divorcing Parties In Bali

Marriage registration is the most important part in the formation of a deed as a legality and guarantee of legal certainty for each person. Referring to the Constitutional Court Decision Number 46/PUU-VIII/2010, specifically Article 2 paragraph (2) of the Marriage Law explains that "every marriage is registered based on the applicable statutory regulations". The purpose of the existence of a defect in a marriage is so that the marriage creates valid legal consequences for the husband and wife and their children, so that there is guarantee and protection for the marriage by the state. When a marriage requirement has been fulfilled by the party wishing to carry out the marriage, it results in recognition by the state and is considered a legal act with legal consequences. So, in this context, marriage annulment functions as a requirement for the marriage to receive legal recognition and protection from the state and has binding force on third parties (other people).

In essence, marriage registration is carried out as an effort to protect the parties in the marriage from the state, and also to avoid the tendency of inconsistencies in the perfect/complete application of religious teachings and beliefs in marriages that are held according to that religion and belief. In its regulation, the Marriage Law not only legalizes marriages which need to be carried out based on religious law and belief law, but also requires them to be registered through the Marriage Registration Office. So that marriages where marriage registration is not carried out cannot be proven that there was a marriage.

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marriage if they are faced with legal issues. Apart from that, every marriage must be registered at the Civil Registry Office according to applicable regulations. The impact of marriages that are not registered, even though according to religion or belief they are considered valid, marriages carried out outside the knowledge and supervision of marriage registrar employees do not have permanent legal force and are not recognized in the eyes of State law.22 Referring to the regulations and the laws mentioned above, analyzing the divorce of unregistered marriage, it could be explained that the leaders of Balinese traditional villages who implemented purusa line (male line) in solving their people doing the completion of divorce could not carry out the divorce. The rulers of the traditional villages were bumped into by state law. Awig-awig as the regulation of the Balinese traditional village regulates that divorce must be preceded by the existence of a decision of divorce from the court. When there was no court decision, then the settlement of the palas marabian or divorce could not be continued with the broadcasting process in their traditional village.

This unregistered marriage occurred because the marriage was hidden or carried out secretly. Why it was done so because generally the marriage was between a man who already had wife and a woman who was his fair. It had to be done so since the future wife was already pregnant. On the other hand, this kind of marriage was difficult to get the approval of the first wife. If they were not to be married, a child would be born with no legal father. Such kind of child is considered to have made the traditional village cuntaka 'religiously not holy'23. Unregistered marriages also occurred among bachelors. This usually happened when the bride and groom were bound by the official commitment to work for the government so that they were not allowed to marry for a certain time during the time committed. It was because the woman was already pregnant that the marriage had to be carried out secretly.

As result, this brought bad implication for both husband and wife who needed legal divorce. It brought implication for the social lives of both parties. First, their status was still marriage. The wives who wished to remarry another man would not get legal permission from the state law since her status under customary law was still married. The wives could not return home to their original family too. Second, the right and duty of the couple were still on the husband’s side. In that case, if the wife died, the husband would be responsible for the ceremony of the funeral. All rights and duty inherent in the husband and wife relationship were still the responsibility of the husband. This was due to the Balinese customary law which adhered to the patrilinial kinship line


Third, it could be seen that there was disharmony in the settlement of divorce cases through Balinese customary law and state law. Even though they insisted on divorce, they (the husband or wife or the family) could not get protection from their village. It was then the family’s responsibility to accept them to be back to their original family with the status of being married.

If a marriage is not registered, it will impact the position and status of the child born as stated in Article 42 of the Marriage Law which states that "A legitimate child is a child born as a result of a valid marriage." A valid marriage according to this law is a marriage that takes place according to the rules of one's religion. If you are Muslim then it is registered at the Office of Religious Affairs, but if you are non-Muslim then it is registered in the civil registry. A marriage certificate is one of the legalities for the continuation of a marriage. So, if a child is born from an unregistered marriage, the status of that child is the same as that of an illegitimate child. The impact is that only the mother's name is included in the child's birth certificate and this can certainly affect the child psychologically, because he feels that there is something different from other children in his status on the birth certificate. Article 43 of the Marriage Law also explains that "Children born outside of marriage only have a civil relationship with their mother and their mother's family." So, children only have the rights of their mother and their mother's family to inherit. Children cannot obtain inheritance rights from their father and in a civil relationship there is no relationship with their father's family.

C. Conclusion

The settlement of divorce in Bali is unique, especially whose marriage is not registered. Although a marriage is considered legal according to the Balinese customary law, since the marriage was not registered there would be implications in the settlement for their divorce. This means the divorcees could not get the legal certainty either from the customary law or state law. There has been a disharmony between the Balinese customary law and the state law. The traditional village leaders who carried out the awig-awig (the customary law of the traditional village in Bali) could not make any settlement process since there was no decision from the court which has permanent legal force (state law). Meanwhile, state law could not make legal certainty for the divorcees since they were not registered for their marriage. It means that the justice seekers could not get the legality for their divorce.

3 of 2018 state law stipulates that a divorce could not be carried out if they did not register their marriage.

Supposing the divorcee (the wife) passes away, the responsibility for the ceremony of the death will be on the husband since Balinese follow the purusa kinship line of male lineage. In addition, this will have implication for the ex-wives (Balinese women) who are in the purusa kinship line that according to the Balinese customs they are not permitted to go back to their original family in their traditional village as long as there is no court decision proving that they have a legal divorce. Seeing this condition, there must be legal rules solving such kind of problem. It is necessary that both customary law and state law be made harmony in solving marriage and divorce cases, namely the divorce for those whose marriage is not registered.

References


