**Custody Disputes in Mixed Marriages: A Comparative Legal Analysis**

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**ABSTRACT:** *This study examines the dissolution of mixed marriages and its implications for child custody from the perspective of international civil law. It focuses on the legal protection of the rights of underage children in cases where the marriage is dissolved due to divorce, death, or court rulings. The research highlights the legal uncertainties faced by children of mixed marriages when their parents are subject to different legal systems, particularly in the absence of a prenuptial agreement. The study is grounded in international civil law principles, emphasizing legal pluralism and the conflict of laws in family law matters. It explores the intersection of national legal frameworks governing child custody and the protection of children's rights in alignment with international human rights instruments. This research employs a statutory, case, and legal comparative approach to analyze child custody disputes arising from the dissolution of mixed marriages. The study examines legal inconsistencies across jurisdictions and their impact on the rights and well-being of underage children. Findings reveal that legal uncertainty regarding child custody is a significant challenge in mixed marriage dissolutions. Variations in national legal systems create conflicts in determining custodial rights, often leaving children vulnerable to inconsistent legal interpretations. This uncertainty affects children's right to parental love and support, which is essential for their growth and development. The study underscores the need for harmonization of international civil law to ensure legal certainty in child custody matters. Strengthening cross-border legal cooperation and adopting international legal standards can enhance the protection of children's rights in mixed marriages. This research contributes to the discourse on family law in the context of international civil law by highlighting the legal complexities of child custody in mixed marriage dissolutions. It offers insights for policymakers and legal practitioners to develop more consistent and child-centered legal frameworks.*

**Keywords:** *Children's Rights, Mixed Marriage, Legal Protection, HPI*

1. **INTRODUCTION**

The digital technological era, beginning in the 1980s and continues to this day, has brought fundamental changes to interactions between humans and other humans. The digital era is a time when information is easily and quickly obtained and disseminated using digital technology(Yang & Li, 2016). Interaction between humans and other humans has changed from a conventional system to a digital system. This change has a positive influence on human relations, which is not only facilitated at the regional level of a country but can also go beyond a country's territorial boundaries. This easy interaction has also made it easier for people to have romantic relationships, despite different religions, ethnicities, regions or different nationalities, thus opening up opportunities for couples of different nationalities to enter mixed marriages.

Mixed marriages in the provisions of Article 57 of Law No.1 of 1974 concerning Marriage, it is stated that: "It is meant by a mixed marriage in this Law is a marriage between two people who in Indonesia are subject to different laws, because of differences in nationality and one of the parties is an Indonesian citizen."

Moving on from these provisions, in this digital era, the millennial generation's view of obtaining offspring from mixed marriage relationships is considered as a matter of pride, because it will be possible to change local descendants into mixed descendants. Apart from having a positive influence, mixed marriages are also inseparable from events causing quite complicated problems, especially for children born from mixed marriages, in the event that their parents' marriage is dissolved. This is because there is no special regulation regarding the legality of mixed marriages, therefore, in practice, it often happens and to make it easier for couples to get married is based on the religion of one of the parties, but then after the marriage is legalized, they return to their respective beliefs(Musta’in, 2022). Apart from that, there are also couples who get married overseas and then register it in Indonesia. Thus, if the parents' marriage is dissolved, it will have implications for children who are still underage, who often become objects of struggle for custody rights from their parents, one of whom is a foreign citizen.

The fight over child custody rights has become a contest, because regulations on the legality of mixed marriages in Indonesia do not currently exist, resulting in a legal vacuum. Therefore, it will have implications for the rights of underage children who actually deserve legal protection so that they can grow and develop as members of the nation. Children who are not yet 18 years old and have not previously been married are under the authority of their parents, thus, parents will represent the child in carrying out legal actions both inside and outside the court. As stipulated in Article 47 of the Marriage Law. Based on this provision, it can also be seen that a child who is not yet 18 years old and is not yet married, because he is considered not yet an adult, is determined to be not yet competent to carry out legal actions, therefore, he needs a representative, namely his parents.

In case of dissolution of mixed marriages, children still reserve the right to receive legal protection. In article 1 number 2 of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection, it is stated that “Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity, as well as obtain protection from violence and discrimination;

In the event of the dissolution of a mixed marriage, there will be a dilemma to determine which law applies in order to provide legal protection for the rights of underage children, since the parties (parents) entering into a mixed marriage are subject to different legal systems. Some those adhere to the principle of nationality, territorial principle and some adhere to the principle of choice of law. Differences in the legal systems adopted, in addition to creating disputes over child custody, they have also created legal uncertainty that must be enforced, moreover, this couple did not make a marriage agreement, therefore, the dissolution of this mixed marriage resulted in the custody of underage children being neglected.

1. **METHOD**

This article constitutes a normative study, analyzing the problems of “The Implication of the Divorce of Unregistered Marriages for Divorcees’ in Bali: Assessing Status, Right and Duty. "The focus of the study in this article is the juridical implications of the dissolution of a marriage on the rights and status." The normative characteristics of this paper are in line with what sujana stated that normative legal research or doctrinal legal research is often conceptualized as what is written in statutory regulations (law books) or law is conceptualized as rules or norms which are a benchmark of human behavior considered appropriate(N. Sujana, 2023). This paper applies a statutory approach, a conceptual approach, an analytical approach and a comparative legal approach. The sources of legal materials used in this paper are primary, secondary, and tertiary legal materials. The legal material collection technique used is library study technique. In addition, the analysis of the legal issues being studied is also supported by conducting direct interviews with informants and through searching of literature, for example understanding and studying in more depth the literature and laws and regulations correlated with discussions both directly and indirectly regarding the existence of underage children at which custody is contested as a result of the dissolution of parents’ marriage of different nationalities(Emery, Otto, & O’Donohue, 2005).

Mixed marriages, as defined in various legal systems, are unions between individuals of different nationalities. In Indonesia, the definition is provided by Article 57 of Law No.1 of 1974 concerning Marriage, which states that a mixed marriage occurs when individuals are subject to different laws due to nationality differences.

With the advent of the digital era, particularly starting in the 1980s, human interaction has transformed. The facilitation of cross-border communication has increased the frequency of mixed marriages. While these marriages bring cultural richness, they also lead to complex legal challenges, especially concerning the rights of children born from these unions. In particular, when these marriages dissolve, determining child custody rights becomes challenging, as each party may be subject to different legal systems.

The focus of this research stems from these complications, exploring the legal implications of the dissolution of mixed marriages and its effects on the custodial rights of underage children.In the event of a dissolution of mixed marriages—whether due to divorce, death, or court judgment—several legal complexities arise. The primary concern addressed in this research revolves around the rights of children born from these unions, who often suffer legal uncertainty.

When parents belonging to different nationalities dissolve their marriage, the question arises regarding which legal system governs the child’s rights. Some legal systems follow the nationality principle, while others may adhere to territorial jurisdiction or the law of the place where the marriage occurred (lex loci celebrationis). This divergence in legal frameworks makes it difficult to determine who has custody over underage children, as each legal system may have different views on custody and parental responsibilities.

This research seeks to address two key legal issues:

1. What are the legal implications of the dissolution of mixed marriages on the rights of minor children, considering each parent may be subject to a different legal system?
2. How is dispute resolution over child custody rights in mixed marriages implemented in the context of international civil law?

The research adopts a normative legal research methodology, utilizing statutory, conceptual, analytical, and comparative approaches. By analyzing legal materials and interviewing key informants, the study aims to explore the legal uncertainties and offer potential solutions to the dilemmas faced by children caught between conflicting legal systems when their parents’ marriage is dissolved.

**III. RESULT AND DISCUSSION**

1. Juridical Implications of the Dissolution of Mixed Marriages on the Rights of Minor Children

The dissolution of mixed marriages referred to in this article is the dissolution of the spiritual and physical bond between a man and a woman of different nationalities in forming a family (household) as intended by the provisions of Article 57 of the Marriage Law. According to the Indonesian Dictionary, the word dissolution is defined as: 1. scattered, scattered here and there; 2. Finished; 3. Tasks completed; 4. The dissolution of mixed marriages can occur due to death, divorce or a court judgment. Article 38 of the Marriage Law reads that: “A marriage can break up due to: a. death; b. divorce; and c. court judgment.”

From a juridical perspective, the dissolution of a mixed marriage refers to the termination of a marital relationship between spouses of different nationalities, thereby ending their legal duties and obligations as husband and wife. The Marriage Law itself does not explicitly use the term dissolution of marriage, but rather employs the phrase breakup of marriage. The applicable positive legal provisions regarding marital dissolution indicate:

1. A legal action may be initiated by either the husband or the wife to terminate the marital relationship between them.
2. The termination of the marital relationship due to the death of either the husband or the wife constitutes a definitive and direct event, understood as occurring by the will of God Almighty.
3. A legal decision declared by a court having legal effect of breaking up the marital relationship between husband and wife.

According to the doctrine articulated by Abdulkadir Muhammad, the dissolution of marriage due to death is termed a "death divorce". Meanwhile, the dissolution of marriage through divorce is categorized into two forms: (a) suit divorce (khulu) and (b) thalaq divorce. Additionally, the termination of marriage by court decision is referred to as a "cancel divorce". The use of these specific terms in describing the dissolution of marriage is grounded in the following considerations:

* + - 1. The terms "death divorce" and "cancel divorce" convey no implication of conflict or dispute between the husband and wife.
      2. The terms "suit divorce (khulu)" and "cancel divorce" imply the existence of a dispute between the husband and wife.
      3. The dissolution of a marriage, whether through divorce or by other means, must be legally established by a court decision."(Ma’u, Wagiyem, & Rahayu, 2023)

Likawunt Samuel Asfaw defines the dissolution of marriage as the termination of the husband-wife relationship, noting that its form varies depending on which party initiates the desire to end the marriage.(Asfaw & Alene, 2023). In this case there are 4 (four) possibilities, as follows:

1. The dissolution of a marriage by the death of either spouse is considered an act of divine will, resulting in the automatic termination of the marital relationship.
2. The dissolution of a marriage is based on the husband's will for certain reasons and his will is expressed in certain words. Divorce of this form is referred to as thalaq
3. The dissolution of marriage due to the wife's will because the wife saw something causing the marriage to break up, while the husband did not want the divorce. The wife's will to dissolve the marriage conveyed in a certain way is accepted by husband and continued with his statement to dissolve the marriage. The dissolution of a marriage through this way is referred to as “khulu'.

The dissolution of a marriage may also occur through the will of a judge, acting as a third party, upon identifying circumstances in the husband and/or wife that indicate the marriage can no longer be sustained. This form of dissolution is known as fasakh.(Bariah & Ferianto, 2024)

Silveira states that divorce is the termination of a marriage either through a judge’s decision or at the request of one of the parties to the marriage(Silveira, 2016). Meanwhile, Widanarti(Widanarti & Benuf, 2022) The dissolution of a marriage is referred to as the breakup of a marital union. Based on the provisions of Article 1 of the Marriage Law, which states: "Marriage is a spiritual and physical 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 belief in the Almighty God,"—and considering the various definitions, terms, and grounds for the dissolution of marriage as previously described—this article defines the dissolution of a mixed marriage as a legal event and/or legal action that terminates the physical and spiritual bond between a man and a woman of different nationalities, due to legal reasons, legal procedures, and specific legal consequences. Such dissolution must be explicitly declared through a court decision.

Regarding the focus of the study in this article and considering that Indonesia is a country of which citizens are predominantly Muslim, the author identifies this by referring to the provisions of the circular letter of the Directorate General of Religious Courts Number 1669/DJA/HK.00/5/2021 concerning Guarantees for the Fulfillment of Rights of Women and Children Post-Divorce, where the circular outlines several Rights of Women and Children Post-Divorce, namely:

1. Every child has the right to receive care, education, healthcare, and a home, along with a nurturing environment that supports both their spiritual and physical well-being, including the right to be loved.
2. All expenses related to the child’s upbringing and well-being are the shared responsibility of both the father and the mother..
3. Every child has the right to maintain contact and have access to both the father and the mother following their divorce. (Tolle & O’Donohue, 2012)

Referring to the provisions In the circular letter of the Directorate General of Religious Courts Number 1669/DJA/HK.00/5/2021, it can be seen that the right to care for children whose parents' marriage has dissolved lies on both parents. This is in accordance with the provisions of Article 41 of the Marriage Law which determines that the consequence of dissolution of a marriage due to divorce is either the mother or father remains obliged to care for and educate their children, solely based on the interests of the child. If there is a dispute regarding control of the children, the court makes its decision.

This is a very difficult dilemma to resolve, because in mixed marriages there are foreign elements involved, therefore, for the relationship they have, will raise a question which law will be applicable. If there is a legal relationship between two or more parties, and they are subject to different laws, this indicates that the legal relationship is linked to more than one legal system. From this point, a problem arises, for this legal relationship, which law will be applied, considering that in this event, it is not only controlled by one legal system, but is actually controlled by more than one legal system simultaneously.

The dissolution or break up of a mixed marriage will have implications for the rights and obligations of parents towards their children. The dissolution of a marriage due to divorce attracts more attention and has more lasting impacts on the family members concerned, moreover they are subject to a different legal system, even taking longer time. As stated by Thea Brown, Renata Alexander, in an article about Child Abuse and Family Law, Understanding the Issues Facing Human Services and Legal Professionals, it is described that:

"Furthermore, separation and divorce should not be viewed as a singular event, as the description may suggest, but rather as a series of events unfolding over several years, each carrying its own emotional impact that compounds with subsequent experiences. As such, what is often described as the most distressing emotional experience in a lifetime actually consists of multiple, prolonged occurrences over time."(Brown & Alexander, 2020).

Mixed marriages give rise to issues within the scope of Private International Law, as they involve the intersection of two distinct national legal systems. In relation to parent-child relationships, children born from such mixed marriages are considered legal subjects who lack the competence to independently engage in legal actions. As minors, they are deemed legally incapacitated and must be represented by their parents or legal guardians in the execution of any legal matters.

Children born from mixed marriages have the possibility that their fathers and mothers have different nationalities, therefore, they are subject to two different legal jurisdictions(Ni Putu Sayuri Dewi, M. Sofyan Pulungan, & Meliyana Yustikarini, 2025). Pursuant to the Law No. 12 of 2006 concerning Citizenship, children will have dual citizenship, with this citizenship, the child will be subject to two legal jurisdictions. This law of citizenship actually provides because it is not impossible that after the divorce, their parents will separate and return to their country of origin while the mother and her children will still live in Indonesia. Children will become victims of mixed marriages when the child has the status of a foreign citizen because he follows his father's citizenship, even though he was born in his own country and has never lived in his father's hometown abroad and he cannot even speak his father's language at all.

From the perspective of private international law, dual citizenship also presents potential legal challenges. For instance, in determining personal status based on the principle of nationality, a child holding dual citizenship may be subject to the legal provisions of both countries to which they belong, potentially leading to conflicts or inconsistencies in legal interpretation and application(Spiro, 2011). If the legal provisions of one country do not conflict with those of another, no legal issue arises. However, when a conflict exists between the laws of two countries, the question becomes which country's legal rules should prevail. For instance, in the context of marriage, Indonesian law requires both material and formal conditions to be fulfilled. When a minor under the age of 18 wishes to marry, both conditions must be met. Material requirements typically follow the law of the place where the marriage is conducted. For example, if a child intends to marry a biological uncle—a relationship in the direct bloodline—Indonesian law expressly prohibits such a union, as stipulated in Article 8 of Law No. 1 of 1974. However, if the laws of another country granting the child citizenship allow such a marriage, a legal conflict arises. This raises the critical question of which legal framework should be applied in resolving the matter.

Based on the Principles of International Private Law, regarding the implementation of a marriage, the material validity of the marriage is according to the law of their respective nationalities, or nationalities. Meanwhile, its formal validity is based on the law where the marriage is carried out (HPI principle: Pursuant to the Law No. 12 of 2006 concerning Citizenship, children born in mixed marriages follow the citizenship of their father and mother. The child's legal status is dual citizenship. Based on the Principles of International Private Law, regarding the implementation of a marriage, the material validity of the marriage is according to the law of their respective nationalities, or citizenship. Meanwhile, its formal validity is based on the law where the marriage is solemnized (Lex Loci Celebrationis)(Arianto, 2017).

The purpose of marriage is actually very noble, both national marriages and international marriages due to differences in nationality, is to create a happy and eternal family. Basically, this noble goal will always be intended by every couple entering into a marriage, even with the support of prayers from both families and the surrounding community(Connolly, 2019). It is natural, nothing in this mortal world is eternal, including marriage. At a certain time, every marriage will inevitably dissolve or break up. This is confirmed by Article 38 of the Marriage Law which reads:

A marriage can break up due to:

1. Death
2. Divorce
3. By court judgment.

Divorce is an event that is consciously and deliberately carried out by a husband and wife to end or dissolve their marriage. The goal of forming a happy and eternal family has failed. The dissolution of a marriage due to divorce attracts more attention and has long lasting impacts on the family members concerned, moreover, even taking longer time.

Divorce as a cause of dissolution of marriage is regulated in detail as possible under the law. What reasons that can be used for divorce, with divorce when a marriage is considered to be dissolved, how the divorce procedure must be regulated, what are its legal consequences as the continuation, all of this is attempted to be regulated in as much detail as possible. Based on the results of research regarding the impact of the dissolution of mixed marriages, it was found that there was a struggle for rights for minor children which was very difficult to resolve(Parisot, 2021).

For this reason, the ins and outs of divorce become a long and very tiring discussion, in fact almost a divorce is never free from worrying tensions for the parties concerned, especially the husband and wife themselves, which often burst into disputes. Thus, children who are still minor are often the object of fighting over custody rights from ex-husbands and ex-wives. Due to the potential of disputes to arise, among other things, the law feels it is very necessary to regulate it carefully. It is also important why divorce needs to be regulated in detail, because divorce will change the legal position, not only of the husband and wife concerned, but also minor children born will immediately receive a different pattern of protection.

Children born and not yet adults, with the dissolution of their parents' marriage due to divorce, means that the children are no longer under the control of their parents, therefore they will be placed under guardianship. For example, if there is a divorce case in court, it is often determined who has custody, and generally the party determined by the judge to be entrusted to have the custody is the one who will assume the power as guardian to represent the minor child, to carry out legal actions both within and outside the court. The same thing mutatis mutandis also applies when the marriage is broken up due to death, the party having lived the longest will hold the power as guardian for children who are not yet adults.

Mixed marriages as the starting point for the formation of families of different nationalities are believed to be a basic component of social life, if they are broken up due to divorce, the impact will definitely be felt in aspects of social life with different legal jurisdictions adopted. Article 39 of the Marriage Law confirms in one of its clauses that divorce can only be carried out before a court hearing, after the judge has failed to reconcile the parties. Based on this provision, it is clearly illustrated that a divorce cannot be carried out illegally outside the supervision of the state. This is reasonable considering that the existence of the marriage itself, the state intervened intensively from the start while deploying government officials who were specifically appointed to handle the procedures for its implementation. If at the beginning of a mixed marriage, the state determines its corridors as a condition for its validity, then it is very reasonable that if what has been bound is to be terminated, the state feels being obliged to continue to play a role, namely through the corridors of justice, so that what is valid will be terminated, it shall be obliged to follow the procedural rules in order that the dissolution is legitimate.

The authorities will not allow the termination of through divorce wildly beyond control, on the contrary, the government, through the judiciary, will set out procedures to be followed(Cherian, 2021). In Article 39 of the Marriage Law, it is stated, among other things, that divorce only occurs before a court hearing. This provision only mentions the term court, as there are several types of courts. To understand which court having the authority to handle divorce, Article 39 of the Marriage Law must be linked to Article 63 of the Marriage Law, which essentially confirms that what is meant by court in this law is the Religious Court for those who are Muslim, and the General Court for people of other religions. Once again it has been proven that unification is not something that is easy to achieve, especially in marriages due to differences in nationality. For divorce issues to be taken place before a court, the exact court depends on the religion of the married couple in question. If the husband and wife are Muslims, the Religious Court has the authority to process it. If the couple concerned is not Muslim, it has to be handled by the general court. For the umpteenth time, religion has become a determinant of the emergence of differences in the regulation of marriage aspects which cannot be possibly made uniform.

Religion almost dominantly determines which procedures or institutions have the authority to handle them, sometimes it can raise complicated problems requiring accurate analysis. Likewise, when it involves divorce handled by which court institution, it turns out that it is more determined by the religion of the husband and wife concerned, so what is the solution if the married couple, when they are still in marriage, abandons the religion embraced at the time of marriage and then changes to another religion, and later divorces. Which court has the authority to process a divorce, will it be based on the new religion they embrace, or the original religion that was used as the basis for binding the couple's marriage.

Pursuant to Article 39 paragraph 2 of the Marriage Law, after the judge's efforts to reconcile fail, the divorce will only be processed, if there are sufficient reasons. Based on the principle of marriage law trying to make divorce difficult, the government has determined several reasons that can be used to claim for divorce. The reasons for divorce in question can be found in two places, namely in the elucidation of Article 39 paragraph 2 of the Marriage Law and Article 19 of Government Regulation No. 9/1975 which basically stipulates the same reasons for divorce. In principle, these reasons are:

1. One of the spouses commits adultery or engages in habitual behavior such as excessive drinking, drug addiction, or gambling, which is deemed incurable or difficult to rehabilitate
2. One spouse abandons the other for a continuous period of two years without the other party’s consent and without a legitimate reason, or due to circumstances beyond their control.
3. One of the spouses is sentenced to imprisonment for a term of five years or more following the commencement of the marriage.
4. One spouse commits acts of cruelty or severe and harmful abuse toward the other spouse.
5. One of the spouses suffers from a physical disability or illness that renders them incapable of fulfilling their marital obligations as a husband or wife.
6. There are continuous disputes and conflicts between the husband and wife, with no reasonable prospect of restoring harmony within the marriage.

Even though the marriage has been terminated due to divorce, the responsibility of the former husband and wife is still needed for the children born, in order to maintain their continuous welfare. Thus, when a mixed marriage breaks down, the children born are no longer within the scope of parental authority, therefore, the judge will appoint one of the parties, perhaps the father or mother, as guardian. Educating and raising children is the responsibility that cannot just end with divorce. The child's interests must still be considered for the sake of his period of growth so that it does not lead him in the wrong direction. It is generally regulated in Article 41 of the Marriage Law.

In the dissolution of a mixed marriage due to divorce between an Indonesian citizen and a foreign national, where both parties retain their respective citizenships, various legal consequences may arise—one of which concerns the citizenship status of children resulting from the marriage. In civil law, a person is recognized as a legal subject from the moment of birth. However, Article 2 of the Civil Code provides an exception, stating that a child still in the womb may be regarded as a legal subject if it is in their interest and the child is later born alive. As legal subjects, individuals possess rights and obligations within legal relations. Nevertheless, this recognition does not automatically confer legal capacity, as not all individuals are deemed competent to act independently within legal contexts.

Individuals who lack the legal capacity to perform legal actions must be represented by others. According to Article 1330 of the Civil Code, those deemed legally incompetent include minors, married women, and individuals placed under guardianship. Therefore, children are classified as legal subjects who are not capable of independently engaging in legal actions and must be represented by their parents or legal guardians.

In line with private international law theory, determining a child's legal status and their relationship with their parents requires an initial examination of the validity of the parents' marriage. If the marriage is lawful, the child is considered to have a legal relationship with both the father and the mother. Conversely, if the marriage is unlawful, the child is regarded as illegitimate and is recognized as having a civil relationship with the mother and the maternal family. However, the child may also be acknowledged as having a legal and civil relationship with the biological father and his family—provided that the biological link can be established through scientific and technological evidence and/or other legally recognized forms of proof(I. N. Sujana & Maruf, 2024).

1. The Implementation of Dispute Resolution Over Rights of Child Custody in Mixed Marriages

Differences in legal systems adopted do not actually relieve parents of their obligations towards children's rights, whether it concerns parenting rights or educational and care rights. However, in the case of dissolution of a mixed marriage that the author is currently researching, namely between a Muslim woman having an Indonesian citizen named Winny Qurnianty and a Buddhist man having a Malaysian citizen, as outlined in the District Court of Tabanan Judgment, it is clear that there is a dilemma in determining the law applicable to child custody rights as a result of the dissolution of their marriage. Pursuant to Malaysian law, the law applicable to rights of child custody as an implication of the dissolution of a marriage is the law of husband, which can be seen in Divorce Petition No. WA-33-154-04/2019 issued by the High Court of Malaya in Kuala Lumpur in the Federal Territory of Malaysia (Family Division) on 11 June 2019; and translation, namely Divorce Application Letter No. WA-33-154-04/2019 issued by the Malaya High Court in Kuala Lumpur, Federal Territory of Malaysia (Family Division) on 11 June 2019; This proves that the husband as the Plaintiff whose marriage was declared to have broken up due to divorce by the Court in Raja Malaysia was granted Custody Rights, Guardianship Rights and Controlling Rights. (“custody, guardianship and control”) for a child named KANO SATRIA CHAN MING-JYU as described in the Birth Certificate Number: DQ 01899. Pursuant to the Indonesian law, this evidence is an authentic deed that has perfect evidentiary power as intended by the provisions of article 165 HIR/285 Rbg.

Meanwhile, under the Indonesian Law, what has been decided by the Court pursuant to Malaysian Law as outlined in the judgment of the Malaysian High Court in Kuala Lumpur in the Federal Territory of Malaysia (Family Division) Divorce Petition No. WA-33-154-04/2019, dated 11 June 2019 was completely overruled by the Indonesian judge. Indonesian judge through the Judgment of District Court of Tabanan in the case Number 375/Pdt.G/2019/PN.Tab., dated 26 December 2019, it turned out that the Plaintiff's intent as a foreign ex-husband to take part in raising their child together with the Defendant (his Indonesian citizen wife) was rejected on the grounds that marriages that were solemnized oversea based only on civil registration were deemed to have never existed. Thus, the child is the child of a mother. In this judgment, it is clearly indicated that the Indonesian judge who presided the divorce case of mixed marriage has set aside Article 28I Paragraph (4) of Constitution 1945 of the Republic of Indonesia which reads "the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the State, especially the Government" and Article 71 of Law No. 39 of 1999 concerning Human Rights essentially determines that it is the state's obligation to protect, respect, uphold and promote human rights.

The rejection by the Indonesian Judge to the marriage which was solemnized in the Malaysian civil registry violated the principles of International Private Law. Based on principles Lex Loci celebrationis" namely a principle adopted in International Civil Law (HPI) which reads that "the validity of a marriage solemnized overseas is determined by the law where the marriage is solemnized". Apart from that, when referring to the theory of legal certainty as proposed by Soedikno Mertokusumo, legal certainty is: "Justiciable protection against arbitrary actions, which means that a person will be able to obtain something that is expected under certain circumstances".

Since between Chan Kan Wah (the Plaintiff; Foreign Citizen) and Winny Qurnianty (the Defendant; Indonesian Citizen) whose marriage has been registered as described in the Marriage Register in the Marriage Ceremony Declaration of the Head of JPNM Putrajaya on the wedding, dated 29 October 2014 with Marriage Certificate Number 460864 in the presence of witnesses Chan Mun Leong and Chan Pik San as described in the Marriage Register No. Series KC05 0292543 and the marriage has been registered in register Number 08553, dated 15 March 2018 at the Indonesian Consulate in Kuala Lumpur, namely, the marriage between the Plaintiff and the Defendant is legitimate, therefore the child born from the relationship between the Plaintiff and the Defendant named Kano Satria Chan Ming-Jyu is the child of a legal mixed marriage. Thus, the right to maintain and take care for the child named Kano Satria Chan Ming-Jyu is a joint obligation between the Plaintiff and the Defendant. In this case, the author's opinion is in line with the view of Sudargo Gautama, who stated that foreign judgment which do not require execution of property located in the territory of the Republic of Indonesia, can be recognized providing that the foreign court does have the authority (jurisdiction) to grant the relevant judgment and that the judgment has indeed been legally pronounced. Considering that the divorce judgment in the case between Chan Kan Wah (the Plaintiff; Foreign citizen) and Winny Qurnianti (the Defendant; Indonesian Citizen) has been decided by the Court under the Malaysian Law in accordance with the jurisdiction of the Malaysian High Court, so its validity of Malaysian law should be recognized, however under Indonesian Law through the the District Court of Tabanan Judgment Number 375/Pdt.G/2019/PN.Tab. dated 26 December 2019, the marriage was considered not yet valid, because it did not comply with the provisions of Article 2 paragraph (1) of the Marriage Law, which stipulates that a marriage is valid if it has been carried out under the laws of each respective religion and belief. And in paragraph (2), it is stated that every marriage is recorded according to the applicable laws and regulations.

In cases of dissolution of mixed marriages due to divorce, death or due to court judgment, it has implications for law enforcement. Which law is applicable if a dispute arises over child custody rights? With regard to the simultaneous application of the laws of each country in mixed marriages, in order to create legal certainty, attention should be paid to the existence of foreign elements which are points of connection. In this mixed marriage, it is absolutely necessary to apply the principles of HPI, namely principles lex loci celebrationis which means that the applicable law is the law where the marriage was solemnized. And if a divorce occurs, the applicable law is the law where the divorce is decided by the court according to its jurisdiction. It constitutes a link point which cannot be avoided in order to achieve legal certainty.

1. Juridical Implications of the Dissolution of Mixed Marriages on Child Custody

The dissolution of a mixed marriage, whether through divorce, death, or court judgment, has profound implications for the rights of minor children. In such cases, children often find themselves caught between two legal systems, each following its own rules regarding custody, guardianship, and parental responsibilities.

Indonesian law, particularly Article 57 of Law No. 1 of 1974, defines mixed marriages as those between individuals subject to different legal systems due to nationality differences. Upon dissolution of such a marriage, the issue of which legal system governs the custody of children becomes a critical point of contention. In some instances, custody rights follow the nationality of the parents, while in others, they may be governed by the laws of the country where the marriage was registered. This creates a scenario in which legal uncertainty prevails, leaving the welfare of underage children at risk.

For example, in the case discussed in the research, where an Indonesian woman and a foreign man dissolved their marriage, the Indonesian courts dismissed the foreign husband’s claim to joint custody, arguing that the marriage was not recognized under Indonesian law due to its registration overseas. This created a dilemma where the child, although legally the product of a legitimate marriage under the foreign law, was considered illegitimate under Indonesian law, complicating the custody rights further.

1. Challenges of Applying International Private Law in Child Custody Cases

The principles of International Private Law (IPL) come into play when determining the jurisdiction and applicable laws in mixed marriage cases. One of the key principles, lex loci celebrationis, dictates that the legal framework governing the marriage should be that of the country where the marriage took place. However, applying this principle in child custody cases has proven to be problematic, especially when the legal systems of the parents’ respective countries conflict.

In custody battles involving mixed marriages, the differences between legal systems can lead to conflicting decisions regarding parental (Carbone, 2020)responsibilities. For instance, one country may recognize the rights of a parent to have custody based on nationality, while the other may prioritize the territorial principle, leading to a legal impasse. In such cases, the child’s rights to education, care, and custody often fall into a grey area, exacerbating the problem of legal uncertainty.

In some cases, the law of the child’s nationality may prevail, but this can be detrimental when one parent, who resides in another jurisdiction, is cut off from exercising custody or visitation rights. Additionally, cases where the parents did not make pre-nuptial agreements governing custody further complicate the legal process. Courts often have to interpret conflicting laws, leaving the child’s best interest vulnerable to interpretation by different judicial bodies.

Given the complexity of determining which legal system should apply in mixed marriage custody disputes, one potential solution is the adoption of unified international conventions that address the rights of children in mixed marriages. International conventions, such as the Hague Convention on the Civil Aspects of International Child Abduction, provide frameworks for cross-border custody disputes(Martín, 2015). However, these conventions are not universally ratified or implemented uniformly across jurisdictions, limiting their effectiveness.

Additionally, establishing clear pre-nuptial agreements and child custody agreements before entering into a mixed marriage can mitigate some of the legal risks. These agreements, if recognized across jurisdictions, can provide a clear legal framework for resolving custody disputes upon the dissolution of the marriage.

Mediation offers another avenue for resolving custody disputes in mixed marriages, as it allows both parents to negotiate terms that are in the best interest of the child without relying entirely on conflicting legal systems. Cross-border cooperation between legal authorities in the respective countries of the parents can also play a critical role in ensuring that custody arrangements are enforced fairly and consistently, prioritizing the child’s welfare(Cherian, 2021).

Given the increasing prevalence of mixed marriages due to globalization, there is a pressing need for legal reform in the area of custody rights. National laws, particularly those in Indonesia and other countries with complex legal systems, must adapt to provide clearer guidelines on how to resolve custody disputes when mixed(Castiglione, 2022) marriages dissolve. Reforms could include mandatory recognition of foreign judgments in mixed marriage custody cases or the establishment of bilateral agreements between nations to enforce custody rights across borders.

1. **CONCLUSION**

The dissolution of mixed marriages, whether due to death, divorce, or due to a court judgment has implications to the lack of legal certainty regarding the determination of custody rights for minor children. This uncertainty regarding law enforcement is caused by differences in the legal systems adopted by the married couple in a mixed marriage. The dissolution of mixed marriages has implications for children who are still minors in terms of obtaining their rights as children because they have dual citizenship. In the event that the governing laws are compatible with each other, this will not cause any problems, but if the material laws of the governing country have different provisions, then these children will have difficulty in obtaining legal certainty regarding their rights as children, considering that in a mixed marriage, the principles of HPI must be applied, namely, the principle of lex loci celebrationis, which means that the applicable law is the law where the marriage was solemnized. It constitutes a link point which cannot be avoided in order to achieve legal certainty.

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