

## The Position of Legal Customary Rules in the Divorce System of the Hindu Community in Bali

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**Abstract:** *Marriage is a legal act that is recognized by the Indonesian state. However, divorce in a marriage is expected today and is no exception in Indonesia. Divorce is determined in Act Number 1 of 1974 concerning Marriage. This research wants to contribute to family law in the divorce system for the Hindu community in Bali, seeing that there is no position against legal customary rules and Hinduism, which in Article 39 determines the validity of a divorce. This research focuses on library research with a descriptive-analytical way and statute approach. The result of this study is that in Balinese legal customary divorce process, there should be strong reasons, as contained in the Vedic Scriptures, such as the Garuda Purana, to take divorce steps. The divorce system that indigenous people in Bali can carry out is the palas perabian system and continues with the mapegat sot sacred ceremony. The legal consequences of divorce in the Hindu community in Bali do not affect the status and position of the child because the Hindu community in Bali adheres to a patrilineal family system (purusa). The legal consequences related join property (gunakaya), whether inherited property from the husband or inherited property of the wife from the parental gift (tetatadan), will return to each party in the event of a divorce.*

**Key Words:** *Family Law; Marriage Law; Marriage; Divorce; Balinese Legal Customary Rules; Bali; Indonesia.*

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### Introduction

Indonesia is a legal state as stipulated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.<sup>1</sup> This provision automatically explains that the actions of each citizen are determined by a system

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<sup>1</sup> *Constitution of the Republic of Indonesia* [1945].

called law. Where the law is embodied in law in the implementation related to realizing social order in the lives of citizens. Related to social order in a society's life, one of the things determined by the state in the life of the state is a legal act called marriage. Marriage in a hierarchical manner is stipulated in Article 28 B Paragraph (1), which stipulates that everyone has the right to continue their offspring through a legal marriage. In general, marriage is part of civil law as stipulated in the Civil Code (from now on KUHP), specifically in the first book, chapter 4, part 1.<sup>2</sup> Subsequently, in 1974, provisions regarding marriage were promulgated specifically in Act Number 1 of 1974 Marriage (hereinafter referred to as the "Marriage Law"), where the law determines how the marriage rules must be carried out to be legal before the state and also legal by the religious rules and beliefs of every community.

Marriage in terms of Balinese legal customary rules has the terms *kerab*, *nganten*, *wiwaha* or *pawiwahan*, *ngerangat*, and *matemu tangan*. The validity of a marriage under Balinese legal customary rules is if the marriage has gone through a ceremony called *byakaon pasaapan*, where the implementation of this ceremony is led by a Hindu priest (*Pinandita*) and *Prajuru Adat* (traditional administrators) as witnesses and does not forget where the marriage has fulfilled all the requirements – specified in the marriage law.

Indonesian positive law in determining marriage is determined in the Marriage Law where in its provisions there is automatically a definition of marriage specified in Article 1, which stipulates that marriage is an inner and outer bond between a woman and a man as husband and wife to form a happy and healthy family, eternal based on God Almighty. Balinese legal customary rules define marriage as a bond between *sekala* (real) and *niskala* (belief). More specifically, marriage in the Hindu law is specified in the Rg Veda in Skanda 10 Chapter 8 Verse 47, namely "*samanjantu vissve devah samapo hrdayani nau sammatarisva sandhata samudestri dadhatu nau.*" Where this verse says that "May God give strength in this marriage, where this marriage is carried out with joy and sincerity, as clear as water. May Lord Matarisvan, Dhata, Destri grant protection in this marriage." In addition, Philippe Rivault and Luc Sordon explained *wiwaha*, namely "to maintain, to uplift (*dharma*). The *vivahamskara*, by its purifying influence, helps one to understand the goal of marriage, which should enable husband and wife to live peacefully and

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<sup>2</sup> Act No. 23 of 1847 on the Civil Code [Republic of Indonesia].

purify themselves, as well free their children from ignorance and all misidentifications of the soul with the body.”<sup>3</sup> It can be underlined that the meaning of the word peacefully and purify in the Hindu marriages, which have magical religious elements, aims to get pure peace in forming an eternal and holy household based on the One Godhead. This is in line with the definition of marriage in the Marriage Law.

Marriage, as described above, must have been determined in the past. This can be seen from the explanation of marriage in the Rg Veda, the Holy Book of Hinduism, the oldest religion. Thus, of course, today’s marriage has experienced dynamics both from fulfilling biological needs in sexual relations and the purpose of marriage which aims to establish good relations. However, in its development in this era of globalization, society often ignores the meaning of marriage, namely forming an eternal family based on the One Godhead. It can be interpreted simply that society puts aside the religious element in marital relations, marked by divorce, which always occurs yearly. This divorce phenomenon is increasing with the Covid-19 outbreak that hit the community, especially in Bali, Indonesia. Based on data from the Central Statistics Agency, the divorce rate in Indonesia continued to increase from 2015 to 2020, which initially increased to 5.89 % or 3.9 million people, then increased to 6.4 %. Or 4.7 million people. Especially in the Java-Bali area, what was initially at 4.6 % rose to 9.1 %.<sup>4</sup> If we look at the data on the owners of divorce certificates in Denpasar, in 2020, there will be 5,063 people. In addition, a study from Libertan Gonzales and Tarja K. Viitanen explained that in European countries that legalized divorce with a one-sided divorce system, there was an increase in the number of divorces which averaged two divorces per 1,000 people annually.<sup>5</sup>

The Marriage Law stipulates divorce in Articles 38 to 41. The provisions in Article 38 letter b stipulate that the decision is a marriage, one of which is divorce. Moreover, the validity of a divorce can only be done before the court, following the provisions of Article 39 of the Marriage Law.

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<sup>3</sup> RIVAULT, Ph. and L. SORDON. *The Book of Samskaras: Purificatory Rituals for Successful Life*. 1<sup>st</sup> ed. New Delhi: Bhaktivedanta Book Trust Internastional, 1997, p. 39.

<sup>4</sup> Divorce Data 2020. In: *BPS – Statistics Indonesia* [online]. 2024 [cit. 2024-03-28]. Available at: <https://www.bps.go.id/en>; and *Denpasar Regency Population and Civil Registration Service* [2020].

<sup>5</sup> GONZÁLEZ, L. and T. K. VIITANEN. The Effect of Divorce Laws on Divorce Rates in Europe. *European Economic Review* [online]. 2009, vol. 53, no. 2, pp. 127-138 [cit. 2024-03-28]. ISSN 1873-572X. Available at: <https://doi.org/10.1016/j.eurocorev.2008.05.005>.

This stipulation regarding divorce raises a legal problem, namely the vagueness or the obscurity of the norm, which is more precisely the incomplete norm. The incompleteness of the norm is because Articles 38 to 41 do not place the religious law and beliefs of the parties wishing to divorce. The provisions of this divorce article are inconsistent with Article 2 regarding the validity of a marriage based on each party's religious law and beliefs.

For this reason, this research is significant to provide legal certainty for the Hindu community in Bali regarding the procedures for implementing divorce and is also expected to prevent divorce. Based on the above provisions, the problem can be formulated: What is the form of the divorce process for the Hindu community in Bali? Furthermore, what are the legal consequences of implementing divorce in Balinese legal customary?

Marriage is an inner and outer bond between a man and a woman as husband and wife to form an eternal family. In addition, marriage also aims to establish good relations between communities. In the life of the Balinese indigenous people, marriage has a nostalgic purpose, namely carrying out traditional obligations by performing ceremonies for debts to ancestors. For this reason, it is essential to conduct this study to prevent divorce and also provide an understanding of the correct divorce process following the legal procedures of Hinduism and Balinese customs. In addition, it is hoped that this study can help the Hindu community in Bali understand the legal consequences of implementing divorce in Bali.

Marriage positively impacts human development by building family clan relations and giving offspring. However, having a positive impact, there is a negative impact in a marriage if the marriage is not based on an agreement between the parties, which results in a divorce between the husband and wife. Divorce in a marriage will have legal consequences, especially for women in Bali.

Divorce, in general, will result in legal consequences for the parties to the divorce. The consequences of divorce law within the scope of the Balinese legal customary community are very complex, especially when there are castes in society that make the Balinese traditional family system very complex, especially in a marriage and divorce. In a study conducted by I. Made Artana entitled Rights and Obligations of Women Who Have Descended Caste Due to Divorce, according to Balinese legal cus-

tomary rules, in the result of divorce from a husband and wife where the position of the wife has a higher *Wangsa* (caste) than her husband, the woman will not accept again in her original home because previously the woman had been declared *nyerod* (descended caste). This study uses empirical legal research methods to examine the legal reality that applies in society. The conclusion of this study focuses on the family's agreement in returning the caste of women after divorce, where the agreement of the woman's family is followed by the right to joint property and child custody.<sup>6</sup> The legal consequences of post-divorce effect not only women but also the children of the husband and wife. In the research of Putu Ayu Devi Kardila and colleagues entitled *The Position of the Mulih Daha Woman in the family and the Legal Consequences on Children in the Mengwitani Traditional Village*, where this study states that women who return to their original homes due to divorce, the status of these women are referred to as *mulih daha* (returning girl). This study uses empirical legal research methods where the results indicate that women who are *mulih daha* have no right to claim back their inheritance rights from their home of origin. Meanwhile, the legal consequences of children who are brought by women back to their original homes with *mulih daha* status are the same as other children based on Act Number 35 of 2014 on Amendments to Act Number 23 of 2002 concerning Legal Protection for Children.<sup>7</sup> Post-divorce produces legal consequences for the parties, but it is also necessary to pay attention to the causes of a divorce. Besides that, legal actions, namely marriage and divorce are universal legal acts, meaning each country has its own rules for marriage and divorce. In Martina Purna Nisa Jaliasyah's research entitled *Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Law in Indonesia, Malaysia, and the Maldives)*, it is stated that the phenomenon of domestic violence always increases every year, and this act is used as one of the reasons for divorce. This research, which uses a descriptive-analytical

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<sup>6</sup> ARTANA, I. M. Hak dan Kewajiban Perempuan Yang Sudah Turun Kasta Akibat Perceraian Menurut Hukum Adat Bali. *Yustitia* [online]. 2021, vol. 15, no. 1, pp. 105-112 [cit. 2024-03-28]. ISSN 2797-4170. Available at: <https://doi.org/10.62279/yustitia.v15i1.709>.

<sup>7</sup> KARDILA, P. A. D., I. N. P. BUDIARTHA and I. W. RIDENG. Kedudukan Perempuan Mulih Daha dalam Keluarga dan Akibat Hukum Terhadap Anak di Desa Adat Mengwitani. *Jurnal Konstruksi Hukum* [online]. 2021, vol. 2, no. 3, pp. 605-609 [cit. 2024-03-28]. ISSN 2809-9648. Available at: <https://doi.org/10.22225/jkh.2.3.3665.603-607>; and MURTIAWAN, I. W. E. P., I. N. P. BUDIARTHA and D. G. SUDIBYA. Hak Memelihara Anak setelah Putusnya Perkawinan karena Perceraian Menurut Hukum Adat Bali. *Jurnal Analogi Hukum* [online]. 2020, vol. 2, no. 1, pp. 93-97 [cit. 2024-03-28]. ISSN 2716-2680. Available at: <https://doi.org/10.22225/ah.2.1.1630.93-97>.

library research method with a normative juridical approach, results in the finding that domestic violence is accommodated as a reason for divorce in family law in Indonesia, Malaysia, and the Maldives. However, there is a difference in the right to file for divorce.<sup>8</sup>

Based on the above study, it can be concluded that divorce has a cause and produces a legal effect. However, all the research above focuses on the material and formal legal point of view of positive law in Indonesia and other countries. Therefore, it is inevitable that this study is different from the research above. This research will focus on divorce from the legal customary perspective and the nature of the legal customary, namely religious magic related to the divorce process and the legal consequences of divorce for the Hindu community in Bali.

## **Methods**

This study will focus on the library research method using a descriptive analysis method with a statute approach. The primary legal sources of this study consist of the 1945 Constitution of the Republic of Indonesia, the Marriage Law, and Government Regulation Number 9 of 1975 concerning the Implementation of Act Number 1 of 1974 concerning Marriage. In addition, secondary legal sources of this study consist of books, magazines, scientific journals, and scientific articles. The tertiary legal sources in this study include dictionaries and websites. The above legal materials will be compiled systematically, researched, and processed in a descriptive analysis.

## **Discussion and results**

### ***Dissolution of marriage in Indonesian positive law***

*Ontbinding des huwelijks* is a term for the dissolution of marriage in the Civil Code (BW), which is specified in Chapter X where this chapter is divided into three parts, namely Article 199 of the dissolution of marriage in general, Articles 200 – 206 b of the dissolution of marriage after separating the table and bed, and Articles 207 – 232 a provide for marital divorce. Furthermore, it is determined in the Civil Code that the cause of the dissolution of a marriage is due to death, the husband or wife has not

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<sup>8</sup> NISA, M. P. Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives). *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* [online]. 2021, vol. 16, no. 1, pp. 1-23 [cit. 2024-03-28]. ISSN 2442-3084. Available at: <https://doi.org/10.19105/al-lhkam.v16i1.4292>.

been present in domestic life for ten years, there is a judge's decision after the table and bed are separated.

Hilman Hadikusuma explained that general fundamental problems could lead to divorce in the household, such as adultery, leaving the residence together in bad faith, being subject to imprisonment for five years or a heavier sentence, and severe injury or abuse by a husband. Wife or the wife to the husband where this act can endanger the safety of his soul and body.<sup>9</sup> Not only with the above grounds a husband or wife can file a divorce suit, but acts that exceed reasonable limits such as rude insults that are consistently carried out. Article 38 of the Marriage Law determines three reasons for the termination of a marriage, including death, divorce, and court decisions. In the case of the dissolution of the marriage due to divorce, the plaintiff should have sufficient reasons to separate or not be able to live together in harmony as a semi-wife. The elucidation of Article 39, Paragraph 2 of the Marriage Law concretely explains the reasons that can be used as a basis for divorce, such as adultery, being a gambler, or things that are difficult to carry out in rehabilitation, one party leaves the other for two consecutive years, speaks without the permission of the other party or leaves without reason, one of the parties is imprisoned for five years or the law is heavier, there is severe abuse, there is an illness or disability of one of the spouses which causes the obligation as husband or wife to fail. These ongoing disputes make no hope of living in harmony in the household.

The reasons used in divorce have various types. The reasons specified in the marriage law outline the general reasons for a plaintiff who wishes to file for divorce. However, it can be seen that the essence of breaking up or dissolving a marriage using a divorce process has an essential characteristic, namely an unkind attitude to each other which causes no harmony in the scope of the married couple's household, as explained by Martina Purna Nisa that "destructive behavior in a domestic circle is believed to cause the breakdown of a household."<sup>10</sup>

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<sup>9</sup> HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundangan, Hukum Adat, Hukum Agama*. 3<sup>rd</sup> ed. Bandung: Mandar Maju, 2007, p. 150. ISBN 979-538-239-X.

<sup>10</sup> NISA, M. P. Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives). *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* [online]. 2021, vol. 16, no. 1, pp. 1-23 [cit. 2024-03-28]. ISSN 2442-3084. Available at: <https://doi.org/10.19105/al-lhkam.v16i1.4292>.

### ***The term of divorce in Balinese legal customary rules***

Divorce is part of the marriage law, where marriage generally adheres to each party's religious and legal customary. A thought arises about divorce, which has only been regulated concretely in the marriage law. However, in the legal customary order, it is still widespread regarding divorce, especially in the social life of the Hindu community in Bali. As explained by Hilman Hadikusuma, the rules regarding marriage and divorce in customary law are strongly influenced by the religion adopted by the orthodox community concerned.<sup>11</sup> Maybe people with Islamic religious beliefs have KHI (Islamic Law compilation) in the regulation of family law, especially related to divorce. However, it differs from the Hindu community in Bali, which adheres to a patrilineal culture that does not recognize divorce in their understanding of domestic life. However, when referring to the theory described by Ter Haar, namely the *Beslissingenleer* theory, where the formation of customary is the decisions of customary functionaries such as kings, and village heads (*Bendesa adat*),<sup>12</sup> then, of course, the term and meaning of divorce in the Hindu community in Bali can be seen from Balinese legal customary, which until now is lived and believed by the Balinese indigenous people.

Divorce under Balinese legal customary rules is generally known in *awig-awig*, namely *nyapian*, but more commonly called *palas*. In other terms, the dissolution of a marriage because the spouse of a wife dies, the woman has the status of a *balu*, or, in common parlance, a widow. Another term in Wayan P. Windia's book states that in Balinese legal customary, divorce can be termed as *palas makurenan*, *pegat mekurenan*, where the term has the meaning that the breakup of the marital relationship between husband and wife.<sup>13</sup>

### ***Forms of the traditional divorce process in the Hindu society in Bali***

Divorce is part of the marriage law, where the divorce will occur if there is a marriage. Although actually, divorce is not something that is expected in a marriage. To understand the form of the divorce process in indigenous peoples in Bali, it is necessary to understand the purpose of mar-

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<sup>11</sup> HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundangan, Hukum Adat, Hukum Agama*. 3<sup>rd</sup> ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

<sup>12</sup> BZN, B. T. H., F. TENGER and B. D. NUGROHO. *Asas-Asas & Tatacara Hukum Adat*. 1<sup>st</sup> ed. Bandung: Mandar Maju, 2011. 211 p. ISBN 978-979-538-371-0.

<sup>13</sup> WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. 2<sup>nd</sup> ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.



riage in Balinese legal customary. Marriage under Balinese legal customary rules has a purpose for *sekala* (real) and *niskala* (belief).<sup>14</sup> The purpose of traditional Balinese marriage is to fulfill the biological needs of the husband and wife, to continue the responsibility (*swadarma*) of parents and ancestors, to the family and society (village/*banjar*/traditional village), and to give birth to children. The purpose of marriage based on *niskala* (belief) is closely related to magical religious elements where marriage. Balinese indigenous people believe that marriage is a sacred ceremony to pay debts to their ancestors called *tri rna*. *Tri rna* consists of *Dewa rna* (debt to God Almighty), *Pitra rna* (living debt to parents and ancestors), and *Rsi rna* (debt of knowledge to spiritual teachers or school teachers).<sup>15</sup>

For this reason, the three debts must be carried out through a formal process (*upakara*), which is carried out following the rules of the Hindu religious philosophy (*tatwa*) and also with good ethics (*susila*). The explanation above can explain that marriage is a solemn act and has a religious element in its implementation. As explained by I. Made Arta in his research that marriage has a profound philosophical meaning in the life of the Balinese indigenous people. There are three essential aspects, namely *dharma sampati* (carrying out obligations correctly), *praja* (giving birth to offspring), and *rati* (fulfilling biological needs).

*Tatwa*, morals, and ceremonies outline the implementation of marriage in Bali. From the three aspects above, the divorce process in Balinese customary law should follow the above aspects, which of course, start from the philosophy of Hinduism (*tatwa*) regarding divorce. From a philosophical perspective, Hinduism does not recognize divorce in a marriage. However, in some of the Vedanta (Hindu religious scriptures) reviews, there are several reviews about the reasons for breaking up a marriage. The Garuda Purana explains that “*aṣṭe mr̥te pravrajite klībe vā patite patau, pañcasvāpatsu nārīṇāṃ patiranyo vidhīyate*”. The verse in the Puranas above means that if a husband does not leave without a cause and his whereabouts cannot be traced, dies, is sick, which causes he cannot produce offspring (impotence) or has a trait that is detrimental to his wife, in these five essential matters, a wife can leave her husband

<sup>14</sup> WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. 2<sup>nd</sup> ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.

<sup>15</sup> ARTATIK, I. G. A. K. Konversi Agama dalam Kajian Hukum Hindu. *Hukum dan Kebudayaan* [online]. 2020, vol. 1, no. 1, pp. 16-25 [cit. 2024-03-28]. ISSN 2722-3817. Available at: <https://ejournal.unhi.ac.id/index.php/hkb/article/view/676>.

and remarry.<sup>16</sup> It can be seen from the meaning of the verse above that the verse determines the reasons for a woman to break up the marriage. These reasons also follow the reasons for filing a divorce in the explanation of Article 39 of the Marriage Law. Another reason in the Vedic scriptures for divorce can be seen from the provisions contained in the Sarasamuscaya Scriptures in Verse 429. It is determined that “*anathivan-manusyana bhayā paribhavāt tathā maryādāyāmamaryādāh striyas-tistanti bhartsu.*” This means that women sometimes look obedient to their husbands because they are afraid of being tortured by their husbands or afraid of being hurt, for a husband should not hurt him with torture.<sup>17</sup> A woman can also apply for the dissolution of marriage or divorce for reasons in domestic relations that are consistently inconsistent with the treatment of her husband, who consistently uses verbal abuse that can disturb the wife’s psychology, as explained in the elucidation of Article 39 d which stipulates that the husband’s partner, the wife, can file for divorce on the grounds of cruel treatment. This provision is also stipulated in the book Manawa Dharmasastra in Article 58, namely “*jamayo yani gehani capantya patri Pujitah, tani krtyahatanewa winasyanti samtarah.*” The article above explains that where in the household a woman is not respected correctly, there is an insult in the form of cursed words, and the family will be destroyed as if supernatural powers destroyed it. Another reason for divorce, as stipulated in the Marriage Law, is committing adultery. The philosophical provisions for adultery in Hinduism are stipulated in Article 353 of the Manawa Dharmasastra, which determines “*tatsamuttho hi lokasya jayate wansamkarah, yena mulaharo dharmah sarwanasaya kalpate.*” Where the meaning of this article is that adultery will cause the birth of mixed colors between humans, then it will cause sin that spreads to the roots of life and causes destruction in human life.<sup>18</sup>

Based on the explanation of the Vedanta holy book above, in the case of divorce, the parties can use strong reasons to avoid sin and create harmony in their lives. However, it should be noted that the reasons

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<sup>16</sup> DUTT, M. N. *The Garuda Mahapurānam: Text with English Translation & Notes: Volume I.* 1<sup>st</sup> ed. New Delhi: New Bharatiya Book Corporation, 2007. 602 p. ISBN 978-81-8315-073-6.

<sup>17</sup> KAJENG, I. N. *Sarasamuccaya: Dengan Teks Bahasa Sansekerta dan Jawa Kuna.* 1<sup>st</sup> ed. Surabaya: Paramita, 1994. 380 p. ISBN 979-9044-16-2.

<sup>18</sup> KAJENG, I. N. *Sarasamuccaya: Dengan Teks Bahasa Sansekerta dan Jawa Kuna.* 1<sup>st</sup> ed. Surabaya: Paramita, 1994. 380 p. ISBN 979-9044-16-2; and SUDHARTA, T. R. and G. PUDJA. *Manawa Dharmasastra (Manu Dharmasastra): Atau Weda Smrti: Compendium Hukum Hindu.* 1<sup>st</sup> ed. Denpasar: Upada Sastra, 1995. 288 p. ISBN 979-8325-99-0.

based on religious law should not be used to seek personal gain in which the marriage can be maintained, only to satisfy the personal desires of sacred marriage, which results in the marriage being seen as having no magical religious element. For this reason, it is necessary to have ethics (morals) in Balinese customary law for the Hindu community to implement divorce. Where the ethics in the divorce process will control and monitor the divorce filing process whether it is necessary to divorce or the marriage can still be maintained.

Ethics (*susila*) is an essential part of the implementation of a process of traditional and religious activities in the life of indigenous peoples, as in the theory of effectiveness from Soerjono Soekanto, who explains that one of the factors for the law to be effective is how the role of law enforcers in carrying out legal orders optimally and well, where law enforcers must have a mentality or personality as an essential role to maximize the function of the law.<sup>19</sup> This study where ethics, in this case, is how the role of law enforcement in carrying out the search process properly and correctly, where the law enforcers referred to in this study are traditional village administrators (*prajuru adat*) in Bali who should understand *tatwa* or legal rules religion and also legally positive in Indonesia in resolving the divorce issue. By understanding the *tatwa* of the marriage law in Hinduism, the customary administrators should be able to carry out the divorce process properly. Divorce in Indonesian positive law has indeed been stipulated in Articles 38 to 41 of the Marriage Law, where the validity of a divorce is contained in Article 39 and the stage of the divorce process, it is continued in Government Regulation Number 9 of 1975 concerning the Implementation of Act Number 1 of 1974 concerning Marriage. Article 39 explicitly stipulates that divorce is carried out before the court, and the stage of its implementation has been explicitly determined in government regulations. However, the provisions in the implementation of divorce above do not give a position to religious law and people's beliefs. This is a problem for traditional administrators in resolving divorce cases within the scope of *adat* (legal customary), especially in Bali.

Today there are still many traditional administrators, especially customary heads in Bali (*Bendesa adat*), who are still confused in carrying out this divorce process, both in terms of customary administration and

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<sup>19</sup> SIMANJUNTAK, B. and FL Y. P. AMBORO. Efektivitas Hukum Tindakan Penagihan Kartu Kredit dalam Aktivitas Perbankan di Kota Batam. *Jurnal Komunitas Yustisia* [online]. 2021, vol. 4, no. 3, pp. 997-1015 [cit. 2024-03-28]. ISSN 2722-8312. Available at: <https://doi.org/10.23887/jatayu.v4i3.43739>.

especially in terms of divorce ceremonies which until now are rarely found in the divorce ceremony process. This study will help to contribute to the completion of Article 39 regarding the divorce process in adat, which begins with a philosophical (*tatwa*) and progresses to an ethical (*susila*) stage. Ethics interpreted here are the stages of a divorce settlement in Balinese customary law, there is a divorce settlement called *palas perabian*. This study will outline how the form of the process of resolving the dissolution of marriage due to divorce using the *palas perabian* method will be followed by the ceremonial stage (*upakara*).

*Palas parabian* is defined as a sincere and sincere divorce where the process of breaking up the marriage is carried out in front of the customary management (*adat*) and announced to the existing indigenous peoples. The parties will not dispute the use of assets (marital property). In addition, this process is also carried out openly and sincerely in terms of child custody, where the husband and wife agree that the child will continue to follow his biological father as the kinship system adopted is the patrilineal system known in Bali as *purusa*. The initial ethics in the *palas parabian* divorce process will begin with *repotan* (report) to the customary management by one of the parties who will divorce the husband or wife. The customary head (*Bendesa adat*) will explain the consequences faced after the divorce, where the effects are the social status in the family and society. This is where the role of the customary head is to provide an understanding of the nature of marriage and how the agreement's impact starts from religious law (*tatwa*) and is supported by applicable laws and regulations. The customary head will remind again that maintaining a marriage will be nobler than going through a divorce, for that the *adat* will decide to give the husband and wife an opportunity and their family to think again with a clear mind regarding the implementation of this divorce for three weeks.

After three weeks, if the husband and wife pair, the husband and wife agree to continue to divorce, the customary head will explain that the divorce process from the *Palas Parabian* must be carried out sincerely and sincerely without questioning the marital property and child custody which will fall directly to the husband and wife. The *purusa* (male), where this process will be closed with a *mapegat sot* ceremony and announced to the traditional village community. After that, the party submitting the *repotan* (report) is asked to put the substance of the above agreement in the form of a written statement on behalf of the divorced, married couple and approved by both parents of the divorced husband

and wife or their representative. Furthermore, the letter will be copied and recorded in the traditional village bookkeeping to assist the customary management (*adat*) regarding the administration of recording indigenous peoples. This statement letter is also legalized and signed by the customary head (*Bendesa adat*) to facilitate the husband and wife in the divorce process before the court. Furthermore, the customary administrator will direct the husband and wife to carry out the *mapegat sot* ceremony (*upakara*), which will be led by a Hindu priest (*Pinandita or Pemangku*).

*Mapegat sot* etymologically means that *mapegat*, *pegat*, or *megat* means breaking up family ties or love relationships. In addition, *mapegat* also means a ceremony to break family ties with deceased relatives or ancestors. *Sot* or *sotan* means ordinance. Based on the explanation above, it can be interpreted that *mapegat sot* means a formal process in breaking the inner and outer ties with the family, both real (*sekala*) and not real or belief (*niskala*). This *mapegat sot* procession will be led by a *pinandita* or stakeholder, held at the *mrajan* temple from the male side, and witnessed by both families. In practice, the woman will do *matur pi-uning* (pray) to apologize to the ancestors and inform them that the husband and wife will separate. The woman will leave the *purusa* (male) family, which means severing family ties with the man. After this ceremonial procession is complete, the traditional administrator will perform *kasobyahang* to the local indigenous community in a village meeting or *banjar*. With this process, the divorce between husband and wife is considered legally and legally. After going through this process, the customary administrator can provide a legal statement of divorce based on the customary village, which is used for the divorce process in litigation or before the court.<sup>20</sup>

It should be emphasized that the *palas parabian* divorce process is a development of the *palas pada lasia* divorce method, which Wayan P. Windia fully describes in his book entitled *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. Of course, the concept of *palas parabian* divorce is one method that can be an option in the divorce process under Balinese legal customary rules for the Hindu community. The *palas parabian* divorce process is expected to contribute to completing Article 39 regarding the validity of a divorce so that it can provide a position for the

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<sup>20</sup> PARTAMI, N. L., I. M. SUDIANA, I. N. SUKAYANA and I. A. M. PURWIATI. *Kamus Bali-Indonesia*. 3<sup>rd</sup> ed. Denpasar: Balai Bahasa Bali, 2016. 830 p. ISBN 978-979-685-550-6.

religious law and beliefs of every community in Indonesia, especially the Hindu community in Bali. *Palas parabian* divorce is not a concept that has no legal basis. This concept is based on Article 2 of the Marriage Law, which states the validity of a marriage based on the laws of each religion and belief. Departing from the article, it can be seen that the validity of a marriage is determined by the law of each religion and belief, and divorce should be determined based on the law of each religion and belief.

For this reason, *Palas parabian* divorce offers a solution to the divorce process based on *tatwa*, decency, and the Hindu religious ceremonies. It should be emphasized that the *Palas parabian* divorce process is not a method that makes it easier for a husband and wife to divorce. Instead, this method aims to try to maintain the marriage of the Hindu community in Bali because Hinduism does not recognize divorce. In addition, it is hoped that the *palas parabian* divorce can help the day-to-day management (*adat*) determine the *swadarma* (obligations) of the customary village community after the divorce.

### ***The legal consequences of divorce for the Hindus in Bali***

Chapter 2.51 Bhagavad-gita explains the term *karma-jam buddhiyuktah*, which means there will be an outcome or reaction whenever there is an action. In another explanation, it is explained that if someone misbehaves, the result will be harmful, and vice versa.<sup>21</sup> Likewise, divorce is the breakup of a marriage where the act of divorce will produce a legal consequence of the divorce.

Soerjono Soekanto explained that a divorce is a legal event that results in or eliminates rights and obligations. It was further described that divorce is closely related to legal actions in the form of responsibility to other parties.<sup>22</sup> The other parties referred to are descendants or children and property. Regarding the legal consequences involving the child, it is more about determining how the child's custody status is related to property, and it is more about a joint marital property (not inheritance). The legal consequences of divorce have occurred since the pre-marital period. In the study of Alit Bayu, Chrisna Widetrya et al. explained that

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<sup>21</sup> BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Bhagavad-Gita Menurut Aslinya: Jawaban Segala Pertanyaan*. 1<sup>st</sup> ed. Denpasar: Hanuman Sakti, 2007. 128 p. ISBN 978-979-9384-23-2; and BHAKTIVEDANTA SWAMI PRABHUPADA, A. C. *Krsna: Sumber Kebahagiaan*. 1<sup>st</sup> ed. Denpasar: Hanuman Sakti, 2006. 34 p. ISBN 979-9384-13-3.

<sup>22</sup> SOEKANTO, S. *Hukum Adat Indonesia*. 15<sup>th</sup> ed. Jakarta: Rajawali Pers, 2016, p. 238. ISBN 979-421-058-7.

legal consequences had existed before the marriage was carried out, such as in the case of the application relationship, which is the relationship between the parents of the family of the prospective husband and wife (*rasan tuha*).<sup>23</sup> Juridically, the legal consequences of a divorce are determined in the Marriage Law, which also concerns children and property.

Regarding children, the Marriage Law stipulates that in the event of a divorce, both the father and mother are still obliged to maintain and educate their children. If there is a dispute in terms of control over the child, the court will decide on this. This provision is stipulated in Article 41, letters a, b, and c. According to Article 37, in terms of the distribution of joint property, the law gives power and authority to the divorced party regarding what rules will be used (religious law or other beliefs) in the distribution of joint property. If there is no agreement, the judge can take over regarding the distribution of joint assets due to the dissolution of the marriage due to divorce with consideration of a good sense of justice.<sup>24</sup>

The dissolution of a marriage due to divorce in customary law will generally determine the status of the husband and wife. Hilman Hadikusuma explained that divorce would have legal consequences for the husband and wife on the maintenance, education, and status of children to their families and relatives, as well as joint assets, inherited assets, gifts/gifts, inheritance/relics. It is further emphasized that everything in the consequences of divorce in customary law is based on legal customary rules that apply in each legal customary area. Most importantly, there is no uniformity between one legal customary community and another.<sup>25</sup> In the scope of Balinese customary law, the legal consequences of divorce for husband and wife are the status of being ex-husband and ex-wife or in Balinese customary law called *nyapian*. In their explanation, Wayan P. Windia and I. Ketut Sudantra explained that this *nyapian* status would impact their obligations in society as *krama banjar* (citizens of banjar) and *krama desa* (citizen of the village). In their obligations as village

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<sup>23</sup> WIDETYA, A. B. Ch., R. SULISTYARINI and R. D. PURU HT. Akibat Hukum Perceraian Terhadap Kedudukan Perempuan dari Perkawinan Nyerod Beda Kasta Menurut Hukum Kekebabatan Adat Bali. *Brawijaya Law Student Journal* [online]. 2015, pp. 1-18 [cit. 2024-03-28]. Available at: <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/871>.

<sup>24</sup> HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundangan, Hukum Adat, Hukum Agama*. 3<sup>rd</sup> ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

<sup>25</sup> HADIKUSUMA, H. *Hukum Perkawinan Indonesia: Menurut: Perundangan, Hukum Adat, Hukum Agama*. 3<sup>rd</sup> ed. Bandung: Mandar Maju, 2007. 203 p. ISBN 979-538-239-X.

manners, the Balinese customary law community carries out a ritual or activity to keep the environment clean to prepare a place for the gods and the ancestors/families who have died. This is what is called *ngayah desa*. V. E. Korn explained that during the religious rituals performed by *krama desa* or *krama banjar*, they arrange offerings to *Batara* and honor, dance, and sing to the gods and ancestors.<sup>26</sup> The ritual activity above is called *swadarma*, which is still carried out by the divorced man or ex-husband in the *banjar*/custom village. For the ex-wife, in general, they will return to their parent's house and have recovered status (go back/return to being a girl). With the status of *mulih daha*, the rights and obligations of the woman's parents will automatically return.<sup>27</sup> It should be underlined that a woman to return to her parent's house and have *mulih daha* status must be with the agreement of the woman's family and be well received by her family.

The legal consequences of divorce based on Balinese legal customary rules do not affect the status and position of the child. This is because the Balinese legal customary community adheres to a patrilineal kinship system, or in Balinese legal customary, it is called the *purusa* system. Balinese legal customary rules adhere to a patrilineal system or fatherhood system, where the fatherhood system in Bali sees a woman who will become the wife enter the husband's family. Likewise, his children will be related to his father's family and have no direct relationship with his mother's family. This is also emphasized if a husband and wife divorce based on *the palas pada lasia*, where both parties between husband and wife divorce sincerely without questioning child custody, where child custody will automatically fall to the male family.<sup>28</sup>

The position of marital property in Balinese customary law is seen from the intrinsic property of each party. Be it the inheritance from the husband or the wife's intrinsic property due to the rules (given by parents), and it will return to each party in the event of a divorce. *Harta Gunakaya* (joint property) experiences dynamics in its distribution related to justice between husband and wife. In the past, in the case of the dis-

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<sup>26</sup> KORN, V. E. *Hukum Adat Bali (Het Adatrecht Van Bali)*. 1<sup>st</sup> ed. Denpasar: Udayana University Press, 2017, p. 143. ISBN 978-602-294-229-0.

<sup>27</sup> WINDIA, W. P. and I. K. SUDANTRA. *Pengantar Hukum Adat Bali*. 1<sup>st</sup> ed. Denpasar: Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, 2006. 194 p. ISBN 979-99485-1-7.

<sup>28</sup> WINDIA, W. P. *Mapadik: Orang Biasa Kawin Biasa Cara Biasa di Bali*. 2<sup>nd</sup> ed. Denpasar: Udayana University Press, 2015. 275 p. ISBN 978-602-294-079-1.



tribution of *Gunakaya* assets due to divorce, the judge *Raad Kertha* (customary court) would examine the truth in settlement of the divorce between the husband and wife. Right and wrong are very concerned in settlement of this distribution of *Gunakaya* property. In the *Poerwa Agama* manuscript, it is determined that if the husband is guilty of a divorce, the assets of *Gunakaya* will be divided into three parts, two parts for the husband, and one part for the wife.<sup>29</sup> However, nowadays, customary judges no longer see right or wrong in the settlement of the distribution of *Gunakaya* property. Still, as long as it can be proven that the joint property is indeed common property (*gunakaya*), the property will be divided equally.

### Conclusions

The termination of a marriage in positive law in Indonesia is determined in the Civil Code in Chapter X and also in the Marriage Law in Article 38. As for the dissolution of a marriage due to divorce, it should be based on solid reasons as specified in the explanation of Article 39, Paragraph 2. The term divorce under Balinese legal customary rules is known as *nyapian*, *pegat mekurenan*, or *palas mekurenan*. Philosophically, Hinduism (*tatwa*) generally does not recognize divorce in the Hindu marriage law. However, suppose the dissolution of the marriage is indeed required. In that case, it can use the rules in the Vedic Scriptures which determine the reasons for the separation of a husband and wife, such as in the Garuda Purana, Sarasamuscaya, and the Manawa Dharmasastra, where in essence, there are solid reasons for the separation of husband and wife relationships. Namely, there is no good faith from one of the partners and the presence of very severe disease. Ethically (*susila*), the divorce process of the Hindu community in Bali carries out a divorce process with the *palas parabian* system, where this process will be continued with the function of the *mapegat sot* ceremony (*upakara*). The legal consequences of divorce based on Balinese legal customary rules do not affect the status and position of the child. This is because the Balinese legal customary community adheres to a patrilineal kinship system, or in Balinese legal customary, it is called the *purusa* system. Other legal consequences in a joint property (*gunakaya*), be it inheritance from the hus-

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<sup>29</sup> WINDIA, W. P. and I. K. SUDANTRA. *Pengantar Hukum Adat Bali*. 1<sup>st</sup> ed. Denpasar: Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, 2006, p. 144. ISBN 979-99485-1-7.

band or the wife's intrinsic property due to the arrangement (given by parents), will return to each party in the event of a divorce.

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