

# Legal Protection for Children as a Result of Transnational Marriage Dissolution in Indonesian Marriage Law

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**Abstract:** Transnational marriages are common and prevalent in the community. There are legal consequences of transnational marriages, particularly for children born in such marriage. However, the Indonesian Marriage Law does not stipulate any further about the consequences to the children when transnational marriage dissolved or even annulled. This paper aims to elaborate one main issue about the legal protection for children aftermath a transnational marriage dissolution in accordance with Indonesian Law. Firstly, it discusses the problems that may arise from transnational marriage dissolution for the children. Secondly, this paper will scrutinize the legal protection for children regarding the alimony, custody, and child support when a transnational marriage is dissolved. The analysis is based on the Indonesian Marriage Law and other Laws related to child protection. This paper is a normative legal research using statute and conceptual approaches. This study argues that children have rights of protection and when a marriage is dissolved, then both parents shall be responsible for the protection and education of their children, solely on the basis of the children's own best interests.

## 1 INTRODUCTION

Every human being naturally cannot live alone and always wants to live side by side in a community. This is so natural that every person gets married and has a family life. As an important event and a precious moment in a human life, a marriage is framed in rule of marriage law. In Indonesia, the Act Number 1 Year 1974 on Marriage (hereinafter referred to as Marriage Act) is applied to replace previous Laws on marriage that were applicable in the colonialism era. This Marriage Act is issued by the government as an effort to form a unification on marriage law. Formerly, there was a pluralism in marriage law that different laws applied for different classification of people. The various laws were as follows (Sudarsono, 2010):

- a. *Adat* law and Islamic law applied to indigenous people of Indonesia;
- b. *Huwelijks Ordonantie Christen Indonesia* applied to Christian people of Indonesia;
- c. Book I of the *BW* with a slight change applied to foreign east Chinese and their descendants;
- d. For other foreign east people in Indonesia, their customary law applied;
- e. from Dutch law applied in Indonesia. Since this old Dutch law on marriage was considered no

longer appropriate to the culture and backgrounds of Indonesian people, then the Indonesian Marriage Act was set, influenced by culture and religions in Indonesia;

- f. Book I of the *BW* applied to Europeans in Indonesia and their descendants.

Marriage is defined as a physical and mental bond between a man and a woman as husband and wife with the purpose to form a happy, eternal and prosperous family based on belief in the Almighty God. Then Article 2 of the Marriage Act stipulates that the validity of a marriage is determined by the religious law of each party in marriage. A marriage shall be done based on the bride and groom religious law. Besides, every marriage also must be registered in the official institutions for marriage registration, namely Kantor Urusan Agama (KUA) or Religious Affairs Office and Kantor Catatan Sipil or Registry Office. As a legal action, a marriage has legal consequences, including those regarding children in a marriage, marital property, and certainly rights and obligations if the husband and wife.

Basically, the Marriage Act reflects basic principles that must be implemented. The principles are as follows (Isnaeni, 2016):

1. the aim of marriage;

2. the validity of marriage;
3. the monogamy principle;
4. the minimum age to enter into marriage;
5. the principle to complicate divorce;
6. equal rights and obligations of husband and wife.

Those basic principles are influenced by values in culture and religions in Indonesia. This also reflects the foundation of the state based on Pancasila.

A marriage can also be conducted by parties with different nationality. This is so called a transnational marriage, that Article 57 of the Marriage Act stipulates it as a "mixed marriage" which is defined as a marriage between people in Indonesia subject to different laws as a result of different citizenship and one of the parties is an Indonesian citizen. Such marriage must meet requirements as mentioned in Article 60 that the substantive requirements of marriage should follow the national law applicable to each person entering the marriage. The national law of each of the party in the marriage that should be noticed are regarding the requirements of validity of marriage, namely marital age, consent requirements, as well as prohibited relationship. This "mixed marriage" should also be registered by the official registration.

This transnational marriage or called as "mixed marriage" certainly have different legal consequences compared to marriages carried out by those of the same nationality. The legal consequences are regarding the child nationality, marital property, and so on. However, a marriage does not always run as smooth as expected. There are sometimes obstacles that might lead to conflicts between husband and wife. This persistent conflict may also result in a dissolution of the marriage, especially in a transnational marriage that each person in the marriage comes from different nationality, different culture, that have their own habits. Thus, it is difficult to unify their differences, then divorce may happen.

Dissolution of a transnational marriage or "mixed marriage" might result in complex consequences; moreover, if there are children in the marriage. The questions regarding who will have the custody, who will have the obligations as parents toward the child, and so on. Thus, this article firstly tries to find the answers to that questions by discussing the problems that may arise from transnational marriage dissolution for the children. Secondly, this paper will scrutinize the legal protection for children regarding the alimony, custody, and child support when a transnational marriage is dissolved.

## 2 MATERIAL AND METHODS

This study is conducted by analysing applicable regulation on marriage in Indonesia and several cases on transnational marriage. This research is a doctrinal research using statute and conceptual approach.

## 3 LEGAL CONSEQUENCES OF DISSOLUTION OF A TRANSNATIONAL MARRIAGE TOWARD THE CHILDREN

In accordance to Article 47 jo. 50 of the Marriage Act, children are those who are under 18 years old or who have never married before. The Marriage Act stipulates rights and obligations between parents and children. Article 45 paragraph (1) of the Marriage Act states that every parent has an obligation so called alimony to nurture and educate children as well as possible. This obligation shall continue even though the parents' marriage dissolved. Basically, the Marriage Act clearly stipulates that every child shall be protected by regulating in Article 45 paragraph (2) that the parents still have obligations to their children. This means that the relation between husband and wife can be dissolved, however relation between parents and children will never end.

Divorce may only happen for certain reasons stipulated in Article 19 of the Marriage Act, that are:

- a. one of the parties has left the other party without any permission nor reasonable matter;
- b. one of the parties has committed adultery, drunkenness, madness, gambling, and other incurable actions;
- c. one of the parties has been sentenced to 5 years or more in prison during the marriage;
- d. one of the parties has committed cruelty or persecution toward the other party;
- e. one of the parties has suffered from bodily disabilities or diseases that result in not being able to carry out obligations as husband or wife;
- f. between the husband and wife there is a continuous dispute and there is no hope of life in harmony.

Generally, the legal consequences of marriage dissolution are stipulated in Article 41 of the Marriage Act. Firstly, this Article 41 stipulates that both parents are still obliged to nurture and educate their children based on the interests of the children. When there is a conflict regarding this, the court shall determine through its decision. Secondly, the father shall be responsible for all of the childcare costs. In

case the father cannot fulfil this obligation, the court may determine that the obligation is borne by the mother. Thirdly, the court may also determine that the ex-husband is obliged to give living expenses to the ex-wife. In accordance to this stipulation, the legal consequences of a dissolved marriage, especially toward the children, should also apply in transnational marriage. Based on this stipulation, it can be seen that the Marriage Act stipulates that there is a joint custody between the parents. Yet, the implementation of this is more complicated since the parents are from two different countries. After the divorce, they may live separately and become far from each other. This lead to difficulties to communicate and even more to force to carry out its obligation. In case a party does not conduct his obligations, the children will be the injured party. To cope with this problem, the court may determine the custody of one party.

#### **4 PROVIDING LEGAL PROTECTION FOR CHILDREN IN DETERMINING RIGHT OF CUSTODY**

Every child has inherent basic rights that must be protected, respected, and maintained. UN Convention on the Rights of Child 1989 (UNCRC) that has been ratified by Indonesia through Presidential Decree Number 36 Year 1990 (hereinafter referred to as PD 36/1990), states basic principles of child are namely:

- 1) active protection,
- 2) non-discrimination,
- 3) the best interest of the child,
- 4) the right to life, survival and development,
- 5) respect for the views of the child.

Those principles are also reflected in the Act Number 23 Year 2003 that has been amended by the Act Number 35 Year 2014 on Child Protection (hereinafter referred to as The Act on Child Protection). However, problems still often arise when a child becomes the divorce victim. This problem relates to the protection of children's welfare, including physically and mentally protection to the children, since the dissolution of marriage put the children in a weak position. This protection to the children is surely also needed in case of dissolution of transnational marriage.

The dissolution of transnational marriage in Indonesia shall be done in the District Court for them who registered the marriage in Official Registration or in the Religious Court for them who registered the

marriage in Religious Affairs Office. This is in accordance with the Article 63 of the Marriage Act.

The Judge should consider which party that is more capable and shall be borne by the responsibility. Since children are still incapable to conduct legal actions by themselves. The guardian plays an important role to guard and be responsible for the child. Commonly in courts decisions, the mother is determined to have the custody, unless there are certain conditions that make it unlikely for the children to be with his or her mother. However, actually, based on Article 29 of the Child Protection Act, if a divorce happens in a transnational marriage, the child has a right to choose to be under whom custody or guardianship.

In order to give protection for the children, Article 48 *jo.* 52 of the Marriage Act stipulates that the parents nor the guardian is not allowed to transfer the rights of immovable properties of the child, unless this is for the interest of the child. Pursuant to the principle of for the best interest of the child, every child must be close to his or her mother. However, the responsible for the living expenses shall be on the father's side (Hadikusuma, 2007). In accordance to *Subekti*, the relation between the parents and children or so called parental authority (*ouderlijke macht*) ends after the divorce of the parents. Here, guardianship or custody (*voogdij*) emerges (Subekti, 1982). To deal with this, the court should determine regarding the guardianship or custody for the children's interest. The court decision is important and needs to consider the relatives opinion. The judges play an important role to decide the child custody by considering the best interest of the child principle.

This best interest of a child principle is regarding the child's rights developed from Article 3 of the UNCRC that states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". This means to measure and equalize all the factors that are necessary to decide in a certain situation for a specific individual child or group of children. This principle is recognized widely in child right protection. Notwithstanding its very partial jurisprudential origins, the principle of the best interest of the child is, represented in many national and legal systems and has essential similarities in varied cultural, religious and other customs (Alston, 1994). Though, this clear situation is complicated by various interpretations toward the principle under different backgrounds (Degol, Dinku, 2011). Related to this, the most general issue of the principle turns

into the struggle to recognize the standards that should be used to assess potential alternatives to perform in the child's best interests. Mnookin's then argued that (Alston, 1994):

"The choice of criteria is inherently value laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but they are especially acute in this context because children themselves can't speak for their own interests."

From the discussion above about this principle, then it can be said that to implement the principle, case by case has to be assessed to find the criteria and determine what is best for the child. In case of divorce, the judge should look into the child's views and aspirations, the child's identity, personal history and background, the family environment, relations, situations of vulnerability, and so on. The morality and character of the party can be a consideration besides the financial ability to determine to whom the right of custody will be given.

Furthermore, several principles or theories are considered important to determine the custody of a child, namely theory of justice, theory of certainty, and legal expediency (Alston, 1994). These theories are very essential but certainly it is not easy to apply them in balance. In practice, the judge will put the legal expediency at first to give legal protection for the child. This theory best fits the principle of best interest of the child. This theory relates to the growth and future of a child, therefore, a judge will consider the situation case by case to determine the custody of a child that will give benefit the child. The closeness of a child with his or her parents will be taken into consideration by the judges.

The Act on Child Protection mentions that children are an inseparable part of sustainability of human life and the continuity of a nation and state. Therefore, every child needs to get the widest opportunity to grow and develop optimally physically, mentally, and socially. It is necessary to carry out legal protection to provide children prosperity by guaranteeing the fulfilment of their rights without discriminatory treatment. Article 14 states that in case a separation must happen between a child and the parents, each child is entitled:

- a. to meet and have personal relationship permanently with the two parents;
- b. to get parenting, maintenance, education, and protection for the growth process from both parents according to ability, talent, and his or her interest;
- c. to obtain life funding from both parents;
- d. to obtain other children's rights.

As an example, in a Court Decision Number 312/Pdt.G/2014/PN.Mdn, the judge decided to give the right of custody to the mother. This case concerned the divorce of an Indonesian citizen with a Filipino citizen. Their marriage was held in the Philippines and has been registered in Indonesia so that it is valid under Indonesian law. The judge's consideration in this decision to give custody to his mother was based on the Marriage Act that, a divorce does not terminate the relationship of the child and his or her parents. Both father and mother are still obliged to educate and nurture their child that must be conducted for the best interest of the child. Regarding the problem that the parents were from different nations and had different citizenships, that consequently would live separately in different countries, and that their child still cannot decide herself with whom she or he would choose to live, the judges were in the opinion that for the best interest of the child who was still 1 year old and to get continuity of routine and regular care, the right of custody was given to one of the parents, namely the mother.

In this case, the financial ability was not the only factor considered by the judges. The judges argued that the child needed special child care both physically and mentally. The fact in general shows that a one year old child who is still in the baby category, is very close to his or her mother, who had recently given birth and even still breastfed him or her. For this reason, the judges decided to give the right of custody to the mother who was Filipino Citizen until the child is 18 years old. This is also pursuant to a Court Decision Number 126 K/Pdt/2001 on 28 August 2003 that stated that if there is a divorce, the underage child care should be left to people closest and familiar with the child, namely Mother. This Court Decision Number 312/Pdt.G/2014/PN.Mdn also determined the frequency of meetings between the child and the father to maintain the relationship between the child and the father.

## 5 CONCLUSION

As a conclusion, there are several legal consequences emerge as a result of transnational marriage dissolution. Firstly, both parents still have civil relation with the child and they are still obliged to nurture and educate the child as well as they can. The living expenses shall be borne by the father, but the mother also can be responsible for this also when the father cannot fulfil the obligation. Secondly, the principle of the best interest of the child is prioritized

in resolving disputes in courts regarding determination of custody. The Marriage Act applied in Indonesia determines that when a dissolution of a marriage occurs then stipulation in Article 41 and 45 must be the basis to provide legal protection for the children of such marriage. The court may give joint custody based on this stipulation, however if there is a dispute, the court must consider the best interest of the child to make a decision on the custody. The implementation of this court decision sometimes finds difficulties since the parents are from different countries and may live separately and far from the children. The implementation of this principle shall consider the case by case basis and backgrounds to find the criteria in determining the child custody. Besides this principle, the judge in practice also considers the legal expediency theory, legal certainty, and justice to give legal protection for the children in a transnational marriage dissolution.

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