



DOI: <https://doi.org/10.38035/jlph.v4i4>

Received: 12 May 2024, Revised: 20 May 2024, Publish: 27 May 2024

<https://creativecommons.org/licenses/by/4.0/>

## Juridical Analysis of Divorce of Different Citizens Reviewed From Indonesian Positive Law (Study Decision Number 46/Pdt.G/2020/PN Tim)

Muhammad Shidqi Mubarak<sup>1</sup>, Sartika Dewi<sup>2</sup>, Muhamad Abas<sup>3</sup>

<sup>1</sup>Universitas Buana Perjuangan Karawang, Indonesia, [Hk20.muhammadsm@mhs.ubpkarawang.ac.id](mailto:Hk20.muhammadsm@mhs.ubpkarawang.ac.id)

<sup>2</sup>Universitas Buana Perjuangan Karawang, Indonesia, [Sartikadewi@ubpkarawang.ac.id](mailto:Sartikadewi@ubpkarawang.ac.id)

<sup>3</sup>Universitas Buana Perjuangan Karawang, Indonesia, [Muhammad.abas@ubpkarawang.ac.id](mailto:Muhammad.abas@ubpkarawang.ac.id)

Corresponding Author: [Muhammad.abas@ubpkarawang.ac.id](mailto:Muhammad.abas@ubpkarawang.ac.id)

**Abstract :** Divorce is the dissolution of a marriage by a judge at the will of one of the two parties. The definition of divorce between different citizens can be interpreted as a separation between two individuals from different countries. This study aims to determine the authority of the Panel of Judges of the District Court of Timika City Papua in deciding divorce between different citizens, and to find out the considerations of the Panel of Judges of the Timika City District Court deciding in Number: 46/ Pdt.G/2020/PN.Tim. The results of this study explain that the authority of the Panel of Judges of the Timkia City District Court to hear and decide cases of divorce of foreign nationals is seen to be based on the habitual residence or residence of the parties. The determination of the considerations of the Panel of Judges of the Timika City Court in deciding the case, refers to Law Number 1 of 1974 concerning Marriage, Article 207 of the Civil Code, the International Convention at The Hague in 1968, Article 831 of the Civil Procedure Law, and refers to judicial practices that have tried foreign divorces in Indonesia.

**Keywords:** Different Nationality, Spouse, Divorce

### INTRODUCTION

All individuals can't live separately from their group, it has become a requirement for every human being to live together and try to continue their offspring through marriage. Marriage can be interpreted as an official bond between a man and a woman for a short period of time.<sup>1</sup> Family relationships, especially marriage, are influenced by Indonesia's openness to international activities and relations, so that marriage between individuals with different nationalities is no longer a problem. This type of marriage is defined as a mixed marriage.<sup>2</sup> The term mixed marriage has been regulated in Indonesian positive law which

<sup>1</sup>Subekti, *Principles of Civil Law*, Intermasa, Jakarta, 1984, p. 23.

<sup>2</sup>Susilo, et al. *Aspects of the Principle of Reciprocity in Recognizing the Validity of Mixed Marriages Between Indonesian Citizens and Foreign Citizens*, Ponegoro Law Journal 6, No. 1, 2017, p 15.

states that mixed marriage is a marriage between two people who in Indonesia are subject to different laws, due to differences in nationality and one party is a foreign citizen and the other party is an Indonesian citizen.<sup>3</sup>

Staying for a long time in Indonesia for foreign citizens (hereinafter referred to as foreigners) has become commonplace. In general, they work in Indonesia so they have a KITAS (Temporary Stay Permit Card) and some of them also bring their partners or family members. Marriages do not always go according to plan and are full of happiness. Sometimes, a marriage relationship has to end through divorce midway. The term legal divorce usually only refers to the separation of lives between partners. Divorce is included in the realm of personal status, where when couples from the same country divorce, it is considered uncomplicated. However, the situation becomes a little more complex when the husband and wife have different nationalities. Divorce can be interpreted as the settlement of a marriage by a judge at the request of one of the two parties.<sup>4</sup> So a divorce between citizens of different countries is the settlement and separation of a marriage between two individuals from different countries by a judge at the request of one of the parties.

In Indonesia, regulations or regulations regarding marriage and divorce have been contained in the form of laws and other regulations which include Law Number 1 of 1974 concerning Marriage, Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 and other regulations related to marriage at both national and international levels. (Susanti & Dyah Ochtorina, 2018: 1-30)

In Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law), there is nothing that regulates the situation where a foreign couple marries abroad and then resides in Indonesia. International legal problems often arise due to changes in civil status between countries related to marriage certificates, the couple's place of residence, and the jurisdiction of the court where the divorce lawsuit is filed. The lack of norms is a challenge for foreign couples, namely the absence of regulations governing whether or not they can file a divorce suit in Indonesia because their marriage did not take place in this country. Article 20 of the Marriage Law states that divorce can only be carried out officially before a court through filing a divorce lawsuit. Thus, divorce outside of court is not possible. The authority to handle divorce rests with the religious courts for marriages that are held in accordance with the teachings of the Islamic religion, while the district court handles marriages that are not carried out in accordance with the teachings of the Islamic religion.

Several cases or cases of divorce between two foreigners have been decided in various courts in Indonesia, including one case of divorce between a foreigner couple residing in Mimika, Central Papua, which has been resolved by the District Court (hereinafter referred to as PN) of Timika City, Papua. This foreign couple comes from Australia as the plaintiff and the Philippines as the defendant. They were married in the Philippines and their marriage record is registered at the Civil Registry Office of the Republic of the Philippines. After getting married, they decided to change their domicile and live in Mimika Regency using a Temporary Stay Permit Card (KITAS). In May 2018, they began experiencing domestic disputes, where the defendant was unwilling to maintain family harmony in accordance with the principles of belief in one and only God. So, they drafted a *Marital Settlement Agreement* (Divorce Agreement) in which the defendant agreed to hand over full custody of the child to the plaintiff. As a result of this agreement or agreement, it will be impossible for their family life to be maintained and they will no longer live in harmony as

---

<sup>3</sup> Article 57 of Law Number 1 of 1974 concerning Marriage

<sup>4</sup> P Simanjuntak, Partogi Natigor Hamonangan, *Principles of Indonesian Civil Law*, Djangkat, 2020, p. 53 .

husband and wife. So, the plaintiff decided to file a divorce suit with the Timika City District Court.

So, the formulation of the problem to be studied in this research is the authority of judges at the Timika City District Court in adjudicating divorces from foreigners in Indonesia; What are the considerations of the Panel of Judges at the Timika City District Court in deciding the divorce case Number: 46/Pdt.G/2020/PN.Tim.

## METHOD

This type of research is normative research using qualitative methods through a normative juridical approach which is carried out by examining and studying various rules, norms and legal policies related to the problems to be studied.<sup>5</sup> This research is descriptive analytical in nature because it examines the legal policies implemented and their relationship to legal theory and the practice of implementing positive law related problems.

The data sources used in this research were obtained by searching various legal materials or literature, such as court decisions, official documents and books. These secondary data sources include primary, secondary and tertiary legal materials.

1. Primary legal materials are legal materials that compile a country's legal policies in stages, including the 1945 Constitution, statutory policies, government regulations and other statutory regulations.
2. Secondary legal materials are legal sources that provide interpretation or explanation of primary legal sources, such as official documents, research results, books, legal experts and journals. (Soerjono Soekanto, 2021: 12)
3. Tertiary legal materials are legal documents that improve the shortcomings of primary and secondary documents and provide additional explanations.

Next, the data collected was analyzed qualitatively using systematic interpretation techniques. Systematic interpretation is an interpretation that links the relevant articles of the law.

## RESULTS AND DISCUSSION

### **Timika City District Court's Authority to Adjudicate Divorce of Foreigners in Indonesia in Decision Number: 46/Pdt.G/2020/PN.Tim**

The court's authority to hear cases or court competence is the court's right to examine and resolve cases submitted to it. The court may not reject a case submitted to the District Court on the grounds that the law is unclear, but is obliged to accept, examine and try it. Therefore, judges are bound by the responsibility to determine the application of the law (*lex cause*) in divorce cases, even though the Marriage Law does not provide sufficient explanation regarding divorce between foreigners who married abroad. Thus, judges are expected to actively seek and apply existing legal principles in situations where the law does not stipulate rules or provisions that apply to a case.

In the case studied, the panel of judges used similarities between regulations on foreigners and mixed marriages which have elements between foreigners and Indonesian citizens (WNI). The panel of judges also combined the rules of Indonesian Civil Law with the actual conditions experienced in society. The panel of judges considered that divorce between foreigners who filed claims in court could not always be resolved simply by interpreting the regulations. In this case, the panel of judges combined these rules with the enforcement of civil law that applies in society.

There is not a single article in the Marriage Law that regulates marriage or divorce between foreigners. This regulation focuses more on regulating mixed marriages, where one

---

<sup>5</sup>Muhammad Abdulkadir, *Law and Legal Research*, Citra Aditya, Bandung, 2004, p. 87.

party is an Indonesian citizen and the other party is a foreign citizen, regardless of the location of the marriage, whether within or abroad. However, the explanation of the Marriage Law shows recognition of the existence of marriage between foreigners, as stated in the General Explanation at Point 2 which states that various marriage laws apply to various regions and groups of citizens. The Civil Code (hereinafter referred to as the Civil Code) also applies to European citizens and Indonesian citizens of European descent as well as those who are equal.

In carrying out a divorce, one of the parties must submit the lawsuit to the District Court where the husband actually resides in Indonesia, if at the time of filing the lawsuit the husband does not have a real domicile, so the divorce lawsuit needs to be submitted to the District Court where the wife's actual residence is, this is has been stated in article 207 of the Civil Code.

In a quote from Sudargo Gautama's statement in his book, he explains that unlike in the Netherlands, in BW ( *Burgerlijk Wetboek* ) Indonesia does not differentiate between the size of citizenship and citizenship is not explained by the parties. As is understood, the measure of citizenship is not used in the Indonesian BW system, but what is used is the classification of people.<sup>6</sup> Furthermore, what was stated by Sudargo Gautama is in accordance with the contents of the first book which discusses people in the first chapter which discusses enjoying and losing citizenship rights. This is in accordance with Article 1 of the Civil Code which explains that enjoying civil rights does not depend on state rights.

Judging from Private International Law, there are three main principles that regulate the rights and obligations of legal subjects, namely *the Lex Rei Sitae Principle*, *the Lex Domicili Principle*, and *the Lex Loci Contractus Principle*. *The Lex Domicili principle* is the main focus in determining the applicable law in resolving divorce between foreigners. This principle explains that an individual's obligations and rights must be determined by the law where he lives. (Yulia, 2016: 38)

The Hague Convention of 1968, which establishes private international law, is closely related to the principles of *forum rei* and *forum actoris*. This convention emphasizes the principles of *forum rei* and *forum actoris* in matters of divorce between Indonesian citizens (WNI) and foreigners. These principles are the basis of international private law which serves as the basis for divorce settlements between countries. In this case, *the rei forum principle* states that all parties involved in a divorce, including foreigners and foreigners, must be considered and given the opportunity to make decisions. Meanwhile, the principle of *forum actoris* states that each party deserves to be given the opportunity to actively contribute to the divorce stages, including in the court process. This convention also recognizes and complies with the principles of international civil law which are the basis for resolving divorce between foreigners in Indonesia, namely the principles of *forum rei* and *forum actoris*. One of the agreements in the Convention confirms that in divorce cases, the requirement that must be met is that the defendant has "*habitual residence*" in the country where the divorce is proposed.<sup>7</sup> *Habitual residence* is a term that is considered a more refined equivalent of the word "*domicile*", which implies staying in a country for a stable period of time. This means that when a person (either the defendant or the plaintiff) has lived in a country for a period that is considered long enough, such as between 1 to 3 years, it is considered *habitual residence*.

Apart from that, there is a principle that foreigners who have married abroad have the right to divorce in Indonesia as long as they obey Indonesian law. In this case, The Plaintiff and Defendant indicated that they had chosen Indonesian law to judge their case by choosing

---

<sup>6</sup>Sudargo Gautama, *Private International Law*, Volume III Part 2 eighth book, Alumni, Bandung, 1987, p 218.

<sup>7</sup>Sudargo Gautama, *ibid*, p. 224.

the Timika City District Court to decide their divorce case. This matter is also supported in accordance with the principle of freedom of contract as stated in Article 1338 of the Civil Code where in the Divorce Agreement / Marital Settlement Agreement made by them they state that they have determined legal alternatives using Indonesian law. Apart from that, because the Plaintiff works at PT. Freeport Indonesia, Plaintiffs will use this decision to meet their needs in Indonesia. In addition, because of the profit basis, it will be very difficult for both parties to file for divorce in the Philippines.

Thus, the panel of judges at the Timika City District Court has the authority to decide, try and examine divorce cases for foreigners based on the residence of the parties to the dispute.

### **Considerations by the Panel of Judges at the Timika City District Court in Deciding Divorce Cases for Foreigners in Number: 46/Pdt.G/2020/PN.Tim**

The judge's considerations in divorce are used as reasons to provide a basis for legal considerations before the judge makes a decision. Considering that the consideration of the panel of judges is one of the most important factors in determining the value of a court decision in terms of legal certainty and justice, the consideration of the panel of judges must be treated carefully, wisely and well.<sup>8</sup> Therefore, if these considerations are not addressed, the decision resulting from the judge's review will then be rejected and annulled by the Supreme Court or High Court. (Mukti Arto, 2004: 140) The purpose of the panel of judges' considerations in a case in court is to determine a fair decision based on the facts found in the trial and the applicable laws.

Divorce cases between foreign couples in Indonesia can be carried out in Indonesian courts. If you look at the decision of the Timika City District Court Panel of Judges when deciding on divorce case Number: 46/Pdt.G/2020/PN. The team covers the provisions, theoretical basis and legal basis that can be used for considerations when deciding on divorce cases, because Indonesia believes in the principle of citizenship. The couple filed a divorce suit at the Timika City District Court, who has been domiciled in Indonesia since 2018 and has a Temporary Permit Card (KITAS) and has a residence permit issued by the Head of the Environment in the area where the foreigner resides in Indonesia. Therefore, the couple has left their country a long time ago, so they cannot return to file for divorce at the place of their marriage or where they come from. (Hayuningtyas, et al, 2016: 1-18)

In the consideration of the Timika City District Court Judge who decided on the case, the judge said that the parties were a foreign couple who had their marriage in the Philippines. In Marriage there is no regulation of marriage and divorce of foreign nationals abroad, it only regulates mixed marriages, but the general explanation regarding marriage law states that civil law applies to Europeans or equivalent, therefore the Assembly refers to civil law when deciding this case. The judge also said that in the Marriage Law there is no article that regulates the divorce of foreign couples whose marriages are outside Indonesia or within Indonesia, however, in the Marriage Law its existence is recognized in point 2 letter F, and it applies in the Civil Code. Therefore, the Panel of Judges can use the Civil Code in adjudicating foreigner divorce cases.

The panel of judges also quoted Sudargo Gautama's statement in his book stating that in *Burgerlijk Wetboek* (BW) Indonesia does not differentiate between the size of citizenship and citizenship is not stated by the parties. As is already understood, the measure of citizenship is not used in the Indonesian BW system, but what is used by the Indonesian BW

---

<sup>8</sup>Barry Franky Siregar, Judge's Considerations in Handing Down Decisions on Recidivist Narcotics Dealers in the City of Yogyakarta, Journal of Atma Jaya University Yogyakarta, No.1, 2016, p. 3.



system is the classification of people. Then, based on Article 1 of the Civil Code, it is explained that enjoying civil rights does not depend on state rights.

Furthermore, the panel of judges' considerations referred to the agreement in the 1968 Hague International Convention, stating that when a divorce petition is submitted, one of the provisions of the agreement needs to be fulfilled, namely that one of the parties has a *Habitual Residence* (Residence) in the country where the divorce is taking place. In this case it is the plaintiff who has a *Habitual Residence*.

The panel of judges also applies jurisprudence in deciding and adjudicating divorce cases for foreigners residing in Indonesia. The decisions in question include Supreme Court Decision No.2640K/Pdt/2009 and South Jakarta District Court Decision No.47/Pdt.G/2008/PN.Jaksel. This decision is based on the principles of international law, namely the *Forum Rei principle* (where the defendant lives) and the *Forum Actaris principle* (where the plaintiff lives), which essentially means that the Indonesian judiciary will consider this divorce case within its jurisdiction and is authorized by using the Indonesian positive law system. In fact, the panel of judges also referred to the case law practice of the Denpasar District Court in adjudicating divorce cases between foreigners as stated in Decision No.172/Pdt.G/2014/PN.Dps.

In this case, the parties have registered their marriage with proof of Marriage Certificate Excerpt Number 2014-403 dated March 27, 2014 issued by the Civil Registry of the Philippines. This shows proof that the two of them are officially husband and wife and have carried out a marriage regulated by Philippine law. Because of this, the divorce between the parties was clear, so the Panel of Judges decided the case on the basis of divorce. The judge decided this divorce case because there was a relationship between the international legal system where the two parties lived in Indonesia and the laws in force in Indonesia. This condition was caused by the existence of elements of international civil law in this case where the parties were from outside Indonesia and carry out the marriage and register the marriage outside Indonesia.<sup>9</sup>

The judge also considered the Defendant's failure to appear in the courtroom. The panel of judges also believes that if the defendant does not attend the trial and does not send another party to attend as his proxy, then the defendant must be declared absent because the time and procedures for summoning him have been carried out legally and properly.

Next, the judge also considered the evidence and statements of witnesses from the Plaintiff who were presented in the courtroom. The testimony of the witnesses stated the following:

- a) The marriage took place based on proof of a marriage certificate.
- b) The parties are foreigners who live in Indonesia and are domiciled at Jalan Iwaka Number 51 Kuala Kencana, Mimika Regency, Papua Province;
- c) The plaintiff lives in the Mimika area, Papua and has a Limited Stay Permit Card (KITAS).

After considering all of the above, the Timika City District Court Panel of Judges decided that the Plaintiff's lawsuit was granted in part with *Verstek*, stating that the marriage held by the parties in the Philippines on March 27 2018 was valid and determined that the marriage between the parties had been dissolved due to divorce. Therefore, the divorce case of this foreign couple has been decided by the Timika City District Court and this divorce case has permanent legal force (*Inkracht van gewijsde*). This decision was made because the Timika City District Court Panel of Judges has the authority to examine, decide and

---

<sup>9</sup>Yastika, et al, *Legal Effects of Divorce in Mixed Marriages*, Journal of Legal Analogy 1, No. 3, 2019, pp. 390-395.

adjudicate divorce cases filed by foreign couples with Australian and Filipino citizenship which are linked to their residence based on KITAS, which remains the same in the Timika City District Court area.

## CONCLUSION

Based on the description in the discussion chapter, it can be concluded that divorce cases for foreigners held in Indonesia can be carried out in the district court where they reside as long as both parties agree to have chosen the legal option using Indonesian law ( *choice of law* ). The authority of the Timika City District Court Panel of Judges in divorce cases of foreign couples is seen based on the element of *habitual residence* or the place where the parties live.

In handling this divorce case, the Timika City District Court Panel of Judges considered using the Marriage Law, Article 207 of the Civil Code, Article 831 of the Regulations on Civil Procedure Law, the 1968 International Convention in The Hague, and referring to the Supreme Court decision number: 2640K/Pdt/2009 , South Jakarta District Court Number: 47/Pdt.G/2008/PN.Jaksel, and Denpasar District Court Number; 172/Pdt.G/2014/PN.Dps.

## REFERENCE

- Hilman Hadikusuma, *Hukum Waris Adat*, PT. Citra Aditya Bakti. Bandung, 2003.
- Muhammad Abdulkhadir, *Hukum dan Penelitian Hukum*, Citra Aditya, Bandung, 2004.
- Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*, Cetakan 5, Pustaka Pelajar, Yogyakarta, 2004.
- Moh Askin, Masidin, *Penelitian hukum normatif analisis putusan hakim*, Edisi Pertama, Kencana, Jakarta, 2023.
- P Simanjuntak, Partogi Natigor Hamonangan, *Pokok-Pokok Hukum Perdata Indonesia*, Djambatan, 2020.
- Subekti, *Pokok-pokok Hukum Perdata*, Intermasa, Jakarta, 1984.
- Sudargo Gautama, *Hukum Perdata Internasional*, Jilid III Bagian 2 buku kedelapan, Alumni, Bandung, 1987.
- Soerjono Soekanto, *Pengantar Penelitian Hukum*, Cetakan 3, Universitas Indonesia, Jakarta, 2021.
- Yulia, *Hukum Perdata Internasional*, Sulawesi: Unimal Press, 2016.
- Undang-Undang Dasar Negara Republik Indonesia 1945.
- Kitab Undang-Undang Hukum Perdata.
- Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.
- Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman.
- Undang-undang Nomor 16 Tahun 2019 Tentang Perubahan atas Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan.
- Putusan Pengadilan Negeri Kota Timika Nomor: 46/Pdt.G/2020/PN.Tim.
- Barry Franky Siregar, *Pertimbangan Hakim Dalam Menjatuhkan Putusan Terhadap Residivis Pengedar Narkotika Di Kota Yogyakarta*, Jurnal Universitas Atma Jaya Yogyakarta, No.1, 2016.
- Hayuningtyas, dkk, *Tinjauan Yuridis Terhadap Perceraian Warga Negara Afrika Selatan Menggunakan Sistem Hukum Indonesia (Studi Kasus Putusan Nomor 172/Pdt. G/2014/PN. Dps)*, Diponegoro Law Journal 5, No. 3, 2016.
- Hotman Siahaan, *Perkawinan Antar Negara Di Indonesia Berdasarkan Hukum Perdata Internasional*, Jurnal Ilmiah Fakultas Hukum Universitas Udayana 33, No. 2, 2018.

- Susilo, dkk. *Aspek Asas Resiprositas Dalam Pengakuan Sahnya Perkawinan Campuran Antara Warga Negara Indonesia Dengan Warga Negara Asing*, Ponegoro Law Journal 6, No. 1, 2017.
- Susanti, Dyah Ochtorina. *Perjanjian Kawin Sebagai Bentuk Perlindungan Hukum Bagi Pasangan Suami Istri (Perspektif Maqashid Syari'ah)*, Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam 1, No. 2, 2018.
- Witaskara, Agus Teresna, *Pelaksanaan Perceraian Dalam Perkawinan Campuran (Studi Kasus Perceraian Di Pengadilan Negeri Singaraja)*. Jurnal Kertha Wicaksana 1, No. 5, 2016.
- Yastika, dkk, *Akibat Hukum Perceraian Pada Perkawinan Campuran*. Jurnal Analogi Hukum 1, No. 3, 2019.