



# Co-existence of Bali Customary Law and State Law in Case of Divorce

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**Abstract.** The purpose of this research is to find the concept of a combination of the application of customary law and state law in the event of divorce in order to obtain a clear legal status in society. Meanwhile, based on observations, many people think that the divorce has been completed at the customary village level without going through a court process. The problems studied are (1) the nature of divorce according to Balinese customary law and (2) divorce arrangements in *awig-awig* (Balinese customary law). This research is an empirical legal research, because there is a gap between norms and their application in society. The approach used in this research is the approach to legislation and legal anthropology. There are two types of data used in this study, namely primary data and secondary data. The primary data was collected by interview, while the secondary data was collected by document study using the recording technique. After the data has been collected, it will be analyzed using qualitative techniques and presented in an analytical descriptive manner. Based on the results of the study, that the essence of *nyapihan* (divorce) according to Balinese customary law is the ending of a person's marriage bond, either by sincere means or because of a lawsuit so that they no longer have the status of husband and wife. The divorce process as specified in the *awig-awig* must comply with the provisions of the law (state law), namely through a court process, after a court decision, an announcement process is carried out in the village, as well as rituals according to customary law so that between husband and wife who are divorced have a clear legal status in public life.

**Keywords:** Divorce · *awig-awig* · state law · legal status

## 1 Introduction

Normative marriage is an inner and outer bond between a man and a woman to form a happy and eternal household (family) based on the One Godhead. Marriage for the people of Bali (Hinduism), known as *pawiwahan*, is essentially a witnessing ceremony before God Almighty that has bound themselves as husband and wife. Marriage is a sacred and sacred relationship between a man and a woman in carrying out their *dharma bhakti* as whole human beings (Adnyani, 2016: 775). Marriage is not only an important event for those who are still alive, but also very important for the ancestors (Utomo. L, 2017: 101).

Marriage according to customary law is essentially not only a bond between the bride and groom but also involves a wider relationship, which is also related to parents, family, relatives, and society. Even in the pattern of marriage in indigenous peoples in Bali, it is obligatory to go through the customary ratification ritual, namely the existence of tri upa saksi, namely dewasaksi, bhutasaksi and manusasaksi so that in accordance with the mandate of Article 2 paragraph (1) of Law Number: 1 of 1974 concerning jungto marriages, the Act Number: 16 of 2019 concerning Amendments to Law Number: 1 of 1974 concerning Marriage.

Marriage when examined more deeply is an event that is sacred in nature and is an obligation of Hindus, as contained in the Book of Manawa Dharmasastra IX.<sup>96</sup> that to become a mother, women were created and to become fathers, men were created. Likewise, the sacred Vedic literature determines that the purpose of marriage includes dharماسampatti (together, husband and wife realize the implementation of dharma, praja (giving birth to offspring), and rati (enjoying sexual life or other sense gratification). dharma (Titib, 1996: 394).

Marriage has a very ideal goal, namely to form an eternal and happy family as regulated in laws and regulations and scriptures. However, the eternal goal of a marriage bond cannot last forever, because many families initially live harmoniously and happily but on their way meet domestic storms, and end in separation. It is not uncommon for a marriage to break up for various reasons and eventually lead to divorce.

Divorce will bring legal consequences for both parties, even for the family, one of which will lead to a new status as a widow for the woman (wife) and widower status for the man (husband). According to the laws and regulations in the field of marriage, it is determined that the termination of a marriage due to divorce is only based on a court decision as stipulated in Article 39 of Law Number: 1 of 1974 concerning Marriage.

In fact, in people's lives, divorce methods can be found which are only carried out according to customary law. In addition, there is also a traditional village that regulates divorce with other patterns and with a certain process, namely regulating this divorce issue in the *awig-awig* of its traditional village in a special sargah (chapter) entitled *nyapihan*.

If the divorce is only through customary institutions without going to court, it means that the divorce is only legal according to customary law, not yet legal according to state law (Marriage Law). As a result, various problems can arise in the future, which even though they can be solved will require costs and a long process (Windia P, 2017:438). The aims reseach are To kno what is the nature of divorce according to Balinese customary law and how are divorce arrangements in Balinese customary law.

## 2 Method

Normative marriage is an inner and outer bond between a man and a woman to form a happy and eternal household (family) based on the One Godhead. Marriage for the people of Bali (Hinduism), known as *pawiwahan*, is essentially a witnessing ceremony before God Almighty that has bound themselves as husband and wife. Marriage is a sacred and sacred relationship between a man and a woman in carrying out their dharma bhakti as whole human beings (Adnyani, 2016: 775). Marriage is not only an important

event for those who are still alive, but also very important for the ancestors (Utomo. L, 2017: 101).

### 3 Result and Discussion

#### 3.1 Recognition of the Existence of Customary Law in Marriage

Indonesian society is known as a society that adheres to religious customs and culture. In the sociocultural concept, Indonesian society cannot be separated from religious elements, and religion contains elements of shared beliefs or values that intersect with the belief in the power of something supernatural. This natural power is considered directly the course of a society or at least the social life of the Indonesian people (Ahmad Tholabi Kharlie, 2013: 95). Seen from the point of view of customary law, a marriage is not only an important event for the couple, but more broadly, even involving the spirits of their ancestors. The ancestral spirits will ask for the blessing and guidance of the bride and groom so that after marriage they can live in harmony and happiness as husband and wife until “kaken-kaken ninen-ninen”, meaning until the husband becomes grandparents and grandparents with great-grandchildren (Soerojo Wignjodipoero, 1984: 122).

The plurality of society in Indonesia is followed by the plurality of its civil law. Marriage law is one part of civil law that develops very thickly in Indonesian society, because marriage law cannot be separated from the order of people's lives. A marriage is seen as something sacred, that sacredness can be seen from the provisions of Article 2 paragraph (1) which determines that marriage is legal if it is carried out according to the laws of each religion and belief.

Based on the provisions of Article 2 of Law Number 1 of 1974 concerning Marriage, it can be said that the element of religion/belief is very dominant in its influence. The matter of marriage is essentially a private sphere for everyone, but because it is so important, especially in relation to public order, the state can be involved in it, among others, when recording. According to Hazairin as quoted by Soerojo Wignjodipoero stated that the marriage event was a series of three magical actions aimed at ensuring tranquility, happiness, and fertility (Soerojo Wignjodipoero, 1984: 122).

Marriage which is seen as something sacred has the goal of achieving domestic happiness forever. Normatively, there should be no end time for a marriage bond, just as among the general public there is a term contract marriage. The Marriage Law stipulates that there are only three causes for the dissolution of a marriage, namely: death, divorce, and court decisions.

Talking about divorce means also talking about rights and obligations and of course that is regulated by law. The concept of law is not single, therefore there are different concepts of law. Lawrence M. Friedman suggests that law as a system consists of a legal structure, legal substance, and legal culture (Lawrence M. Friedman, 1977: 7). A legal structure is an enduring chart framework, a chart that gives some form and boundaries to the whole. The legal substance is the rules, real patterns of human behavior that are in the system, including the products produced, decisions made and new rules drawn up. Meanwhile, legal culture includes a description of attitudes and behavior towards the law and the factors that determine the acceptance of certain legal systems in society.

John Stuart Mill stated that there is no theory of justice that can be separated from the claim of expediency. Justice is a term given to rules that protect claims that are considered essential for the welfare of society, claims to keep promises are treated equally, and so on (Karen Labacqs, 2011: 23). Meanwhile, Hans Kelsen argues that law as a social order will be judged fair if it can regulate human actions in a satisfactory way so that they can find happiness in it. A general rule will be fair if it is actually applied, while a general rule is unfair if it is applied to a case and is not applied to other similar cases (Hans Kelsen, 2008; 16).

Research conducted by Alit Bayu Chrisna Widetya, et al. (2014) entitled: “The Legal Consequences of Divorce Against Women from Nyerod Marriages of Different Castes According to Balinese Traditional Kinship Law”, from the Faculty of Law, Universitas Brawijaya, Malang, from his research it is said that there has been a dynamic position of divorced women. In the past, caste women who were divorced would find it difficult to return to their original homes. But now that has changed because divorced women are allowed to return to their original homes according to the 2010 MUDP Bali decision.

### 3.2 The Nature of Divorce According to Balinese Customary Law

Customary law is a living law, because it was born and grew up in the supporting community, and is always a living law in the midst of the lives of its users (Astiti, 2005: 4). The customary law community in Bali applies *awig-awig* and *pararem* as living law.

*Awig-awig* in its function as a basic guideline in behavior for members of the indigenous village community so that there is order and peace. If there is a deviation, a reaction will be held as a form of correction for the deviation so that the imbalance can be recovered. So within the scope of indigenous peoples, *awig-awig* functions as a tool to regulate behavior patterns or social control, because *awig-awig* is a system in society.

Society itself is characterized by several characteristics, including interaction, bonding behavior patterns, a sense of identity to the group in which the individual concerned is a member. As a form of customary law in Bali that grows, develops and changes according to the community's sense of justice.

As a form of customary law, generally *awig-awig* is obeyed by the community. Therefore, *awig-awig* is a living law, which is flexible and dynamic in accordance with the nature of customary law in general. The flexible nature is related to its application which can be adapted to the needs of the community through a *pararem*, and the dynamic nature is related to the content of the provisions that can be changed according to the needs of the times.

The flexibility and dynamic nature of *awig-awig* is reflected in the *nguwah-nguwuhin* (change) *awig-awig* clause at the end of each *awig-awig*. The provisions for *nguwah-nguwuhin awig-awig* are carried out through the traditional village community based on deliberation for consensus and are approved by the majority plus one member of the community. Therefore, an *awig-awig* is actually not taboo to be changed, as long as it is desired and is in accordance with the predetermined mechanism.

The traditional village *awig-awig* regulates various aspects of the lives of the indigenous peoples concerned. One aspect that is regulated is the matter of divorce which in the language of *awig-awig* is termed *nyapihan*. The definition of divorce according to Balinese customary law can be found in every traditional village *awig-awig*.

Tanjung Benoa *awig-awig* in pawos 53 points (3) determines:

*Palas merabian sangkaning lila utawi mawiwit wicara precihna tan tumus sukacitaning panunggalan idep sang alaki rabi, taler kewastanin nyapian.*

The essence of the pawos provisions is to give meaning to divorce, namely the end of a marriage which can be caused because it is mutually sincere to separate. Another cause is that it starts from a dispute that causes disharmony in domestic life.

Likewise, the Sibangkaja Traditional Village, regarding the meaning of *nyapihan* (divorce) is not regulated. There are only provisions regarding the circumstances that lead to the termination of the husband and wife relationship, as regulated in pawos 51 number (1), which determines:

*Merabian prasida pasah mejalaran antuk:*

*a. pawos silih tunggil lampus sane kebawos balu;*

*na. sangkaning pada lila, utawi mawiwit wicara, kebawos nyapian.*

The meaning of the pawos provisions is that a marriage can be interrupted due to the death of one of the parties so that there are parties who become widows or widowers. Another cause is because of sincerity, or starting from a fight and eventually divorce. So basically divorce is interpreted as the end of a marriage due to death or divorce.

The provisions for pawos 54 points (3) *awig-awig* of Apuan Traditional Village, determine as follows: “*Palas perabian wenten kalih, inggih punika sangkaning pada lila miwah mawiwit wicara*”.

The purpose of the provisions of the pawos is that the end of a marriage is caused by two things, namely because of *iklas* or because there is a dispute.

The definition of divorce according to the concept of Balinese customary law, is also contained in the *awig-awig* of the Sengkidu Traditional Village, in 46 paragraph (1) determines:

*Sane kebawos nyapian, pinaka sang palas merabi, palas makurenan mawiwit wicara macihna tan tumus suka cittaning panunggalang idep sang alaki rabi sane sampun katiwakan pamutus antuk guru wisesa saha kadamyakang ring sangkepan desa.*

The provisions of the pawos state that divorce is a person whose marriage relationship as husband and wife is broken, which begins with the existence of a certain event so that their household life is not harmonious. Another important thing is that it has received a decision from the competent authority in this case the court.

Based on the description above, it can be emphasized that the essence of divorce according to Balinese customary law is the separation/termination of a person's relationship with the status of husband and wife, which is based on a sincere will, or due to a dispute. There are also those who interpret the nature of divorce as a severance of the relationship as husband and wife based on the sincere will of the parties, or caused by a lawsuit/dispute and must be proven by the decision of the authorities, namely the court.

### 3.3 Divorce Arrangements in *awig-awig* in Bali

In general, what is considered the main source of Balinese customary law is that which is regulated in *awig-awig* in every traditional village in Bali. The *awig-awig* of all traditional villages are basically the same, there are only differences in certain substances according to the needs of the indigenous peoples concerned, so it can be said that what is regulated in *awig-awig* is directly Balinese customary law.

In this regard, the regulation regarding divorce in *awig-awig* customary village in Bali is a reflection of divorce that applies in accordance with Balinese customary law. Therefore, in this paper, the process and mechanism of divorce which is regulated in several *awig-awig* will be presented.

The *awig-awig* of the traditional village of Tanjung Benoa in pawos 53 points (4) determines:

*Sang ayat palas merabian patut atur repaksa pailekita ring sang rumawos utawi Pengadilan Negeri, wastu tinas pamutus kebawos palas. Prajuru banjar/desa patut nyiarang ring desa.*

Based on the provisions of this *awig-awig*, it can be said that if you want a divorce, it must be done according to the provisions of customary law, the person concerned is obliged to take care of the divorce process until there is a court decision. On the basis of the court's decision, the customary leader then informs the community members. This customary law provision seems to be in accordance with the mandate of state law (UU. No. 1/1974) which stipulates that divorce must be by court decision.

The provisions of the *awig-awig* of the Bongkasa Traditional Village, pawos 60 points (4) determine as follows:

*sang ayat palas merabian patut atur supeksa ring sang rumawos (pengadilan negeri), wastu tinas apadang pamutuse kabaos nyapian, wau dulu desa nyiarang kawentenannya ring desa, saha keni pamelin kulkul manut pararem.*

Based on the quote from the contents of the *awig-awig*, it can be interpreted that according to applicable customary law, anyone who wants a divorce must go through a process to the competent authority (district court) so that there is legal certainty and the divorce is said to be valid. After there is a court decision, the next step is announced in the community by the customary leader, and a fine is imposed according to customary provisions. The announcement to the public is intended so that the community members clearly know the status of the person concerned has been divorced. This means that the provisions of this customary law are in accordance with the provisions of state law (Law Number: 1 of 1974 concerning Marriage, in particular Article 39).

The provisions for the *awig-awig* of the Yeh Kuning Traditional Village in pawos 65 stipulate as follows: (1) *yening wenten palas merabian patut kaputusing antuk pasadok saking sang lanang utawi sane istri manut tata cara, manut Undang-Undang Nomer 1 Tahun 1974 miwah Peraturan pemerintah Nomer 9 Tahun 1975:*

a. *silih sinunggil anasar laku;*

- b. *silih sinunggil wirasaning laku;*
- c. *silih sinunggil cedangga, padem, miwah keni hukuman langkung ring limang warsa;*
- d. *silih sinunggil matilar tanpa sadok ngantos awarsa miwah stata wak purusa utawi tan prasida adung malih miwah sane sios-siosan.*

(2) *Palas marabian sane sampun pamutuse pastika katibakang antuk sang rumawos (pengadilan negeri) patut kesadokang ring prajuru adat (desa/banjar).*

Based on the above provisions, it can be emphasized that if you are going to get a divorce, whether it is proposed by the husband or wife, you must meet the requirements according to the provisions of Law Number: 1 of 1974 and Government Regulation Number: 9 of 1975:

- a. one of the parties commits abuse;
- b. one of the parties commits an affair;
- c. one of the parties is disabled, dies, sentenced to imprisonment of more than five years;
- d. one of the parties left the other party more than one year, or always fighting and there is no compatibility, or other reasons.

Divorce must go through a district court trial process until there is a decision, and based on that decision it is submitted to the customary leader (village/banjar) to be announced to the community. Furthermore, pawos 52 points (2) and pawos 52 points (3) *awig-awig* Sibangkaja Traditional Village, determine:

*Yening wicarane katumusang antuk lanange, patut macihne sane istri:*

- a. *paradara budi utawi nyolong semara;*

*na. maambul-ambulan jantos 42 rahina, langkung ring 42 rahina prajuru banjar patut nitenin, nureksa mastikayang parindikane punika, yen jantos langkung ring 6 sasih, pastika sampun palas.*

*Yening wicarane katumusang antuk wadon, macihne:*

- a. *dratikrama;*
- na. *wandu;*
- ca. *tan nyanggamin;*
- da. *Tan prasida ngwehin pangupajiwa.*

The meaning of the *awig-awig* provisions above is that if the lawsuit is filed by the husband, it is obligatory to fulfill the conditions that the wife has had an affair and has been separated for up to 42 days. If 42 days have passed, then the customary leader is obliged to remind and ask for clarification regarding the case, if after 6 months it is considered divorced. If the lawsuit is filed by the wife, then the husband must meet the requirements that the husband has had an affair, has experienced impotence, has never provided a living, and is unable to provide a living.

In the *awig-awig* of the Sibangkaja Traditional Village, the 52 number (5) pawos is stated:

*Yen wenten palas marabian malarapan pada lila, katepas antuk sang romawos, wenang sang palas punika mesamsam beras kuning, ngelung jinah bolong ring bale agung, kasaksinin antuk prajuru banjar lan prajuru desa, prasida ipun mewali dados daa-truna.*

The meaning of this pawos provision is that in the event of a divorce, whether based on sincerity or through a court process, the couple is obliged to perform the mesamsam ritual, breaking the kepeng money in Bale Agung, witnessed by the traditional prajuru (banjar/village leader), then the person concerned returns to the status of a teenager.

Based on the quotations from various *awig-awig* above, the process for divorce in *awig-awig* has already been arranged. First of all, if the couple has agreed to divorce, then the person concerned must proceed to the court to obtain a decision that has permanent legal force.

After the court's decision, an announcement was made in the banjar so that all krama (customers) knew that the couple had divorced. Another action is that the divorced party is recorded by the prajuru adat as krama balu (widow or widower) to determine the status of the father (obligation) in the banjar. In addition, divorced couples are also required to perform the mesamsam ritual. The mesamsam ritual is a special ceremony aimed at restoring balance and maintaining the sanctity of the traditional village area. This mesamsam ritual can be interpreted as customary manners as a form of sanctions for couples who divorce.

## 4 Conclusion

- 1) The essence of divorce according to Balinese customary law is the end of a marriage which can be caused by mutual sincerity and because of a lawsuit based on a dispute between husband and wife. If they are divorced, their status in the customary community is referred to as krama balu (balu luh/balu muani), and a mesamsam ritual is carried out, to maintain the sanctity of the village.
- 2) The regulation regarding divorce in Balinese customary law as contained in the *awig-awig* of each traditional village shows the existence of synergy, in the sense that what is regulated in *awig-awig* is very much in line with the mandate of state law as regulated in Law Number: 1 of 1974 concerning Marriage and its implementing regulations. There are two principles that can be observed from the divorce arrangement according to Balinese customary law, namely: (1) the divorce process is mandatory with a court decision; and (2) the terms of divorce are determined in a limited manner as regulated in Government Regulation Number: 9 of 1975.

Awig-Awig Desa Adat Sibangkaja  
 Awig-Awig Desa Adat Kubu, Bangli  
 Awig-Awig Desa Adat Sengkidu  
 Awig-Awig Desa Adat Yeh Kuning  
 Awig-Awig Desa Adat Bongkasa  
 Awig-Awig Desa Adat Tanjung Benoa



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