

Legal Aspects of the Division of Joint Property After Divorce in Mixed Marriages: Analysis of Indonesian Positive Law, Islamic Law Perspectives, and Implications According to International Law

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ARTICLE INFO

Keywords: Joint Property, Mixed Marriage, Divorce, Positive Law, Islamic Law

Received : 08, November

Revised : 29, November

Accepted: 28, December

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ABSTRACT

This study aims to analyze the status and mechanism of the distribution of joint assets after divorce in mixed marriages according to three perspectives, namely Indonesian positive law, Islamic law, and international law. This study uses a documentation method with a normative juridical approach, namely reviewing laws and regulations, legal literature, jurisprudence, and relevant international legal instruments such as the Convention on the Legal Capacity of Married Women (1958) and the Hague Conference on Private International Law (HCCH) regarding cross-border family law. The results of the analysis show that Indonesian positive law places joint assets as objects that are divided proportionally and fairly, however, in mixed marriages there are often obstacles regarding jurisdiction, court competence, and the status of the citizenship of the assets, especially if the assets are located abroad. In Islamic law, the division of joint assets is not explicitly recognized, but modern scholars through *ijtihad* have agreed on the concept of *musytarakah* assets which are analogous to joint property, so that they can still be divided fairly based on contribution and benefit. Meanwhile, international law emphasizes the principle of protecting the civil rights of couples, recognizing status, cross-border assets, and determining the appropriate dispute resolution forum.

INTRODUCTION

Mixed marriages, marriages between couples with different religious beliefs, give rise to complex legal issues when they end in divorce. In addition to facing the issue of the validity of the marriage from a religious perspective, there are also issues of division of joint assets (*gono-gini* (matrimonial property) which touch the realm of civil law, Islamic family law, and international law if there are cross-border elements or choice of law. In Indonesia, conflicting norms (positive law with Islamic law) and judicial decisions add layers of complexity in determining who is entitled to what after the household is dissolved. This study regulates the division of joint assets after divorce in mixed marriages, comparing the approaches of Indonesian positive law and Islamic law, and reviewing the relevance of international instruments in resolving the issue of the marital property regime.

Mixed marriages are a social phenomenon that is becoming increasingly common with increasing global mobility and interaction between citizens. In Indonesia, mixed marriages are specifically regulated by Law No. 1 of 1974 concerning Marriage and Government Regulation No. 103 of 2012 concerning Procedures for Mixed Marriages. However, despite being regulated normatively, the practice often gives rise to various legal issues, particularly when the marriages end in divorce.

One of the most complex issues that arises concerns the division of joint property (aka marital property). This complexity stems from differences in legal systems, citizenship status, and the legal jurisdictions applicable to the parties. In the context of national law, the division of joint property is governed by Indonesian law, while in the context of international law, the law of the foreign spouse's country of origin, which is governed by the principles of private international law, may be involved.

Marriage is a fundamental social and legal institution in human life. It not only unites two individuals physically and spiritually, but also has far-reaching legal consequences in the areas of civil law, inheritance, child status, and property ownership. In the context of increasingly rapid globalization and modernization, the phenomenon of mixed marriages, i.e., marriages involving two individuals of different nationalities, religions, or legal systems, is becoming increasingly common. This phenomenon not only reflects social openness but also raises complex legal issues when such marriages end in divorce.

One of the most common issues that arise after divorce is the division of joint property (aka *harta gono gini*). In the Indonesian legal system, joint property is regulated by Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage and Government Regulation Number 9 of 1975, as well as the Compilation of Islamic Law (KHI) for Muslim couples. However, these rules often create ambiguity when applied to mixed marriages. For example, when an Indonesian Muslim citizen marries a non-Muslim foreign citizen, questions arise about which legal system is used to determine ownership rights and the division of property after divorce.

This problem is further complicated because the Indonesian legal system adheres to the principle that a marriage is valid if it is carried out according to

the laws of each respective religion (Article 2 paragraph 1 of Law No. 1 of 1974 jo. Law No. 16 of 2019), meaning that if a marriage is carried out without fulfilling the provisions of the religion adhered to by one of the parties, then the marriage is considered invalid according to national law, which automatically impacts the validity of the legal status of joint property resulting from the marriage. On the other hand, international law and foreign civil law often have different principles, for example, recognizing interfaith marriages as valid civilly. This difference gives rise to a conflict of laws that requires careful legal interpretation.

From an Islamic legal perspective, marital property is divided into two categories: personal property (*al-mal al-khash*) and property acquired jointly during the marriage (*mal musytarak*). Although the concept of joint property is not explicitly explained in the texts, contemporary Islamic legal practice, particularly through the *ijtihad* of Islamic scholars and the jurisprudence of religious courts in Indonesia, has accepted the principle of equitable distribution of property between husband and wife after divorce. This principle of justice aligns with the *maqasid al-shari'ah* (objectives of sharia), namely safeguarding property (*hifz al-mal*) and providing protection for the vulnerable, particularly women and children. However, in the context of mixed marriages involving couples of different religions, the issue of the validity of the marriage contract under Islamic law arises, which directly impacts the ownership status and distribution of such property.

Meanwhile, from an international law perspective, the issue of dividing joint property in mixed marriages touches on fundamental principles of private international law, particularly regarding the determination of applicable law (choice of law) and jurisdiction (forum competence). In many legal systems, the principle of *lex loci celebrationis* (the law of the place where the marriage took place) or *lex domicile* (the law of the domicile of the parties) applies. In practice, this means that property acquired during the marriage can be regulated by the law of the country where the couple resides or is married. Several international instruments, such as the Hague Convention on the Law Applicable to Matrimonial Property Regimes (1978), provide guidance on how applicable law should be determined in cases involving foreign elements. Although Indonesia is not yet a party to the convention, its principles are relevant as an academic and practical reference for understanding how different legal systems interact in a global context.

Legal conflicts arising in mixed marriages are not only related to differences in legal regulations, but also touch on moral, religious, and social aspects. On the one hand, national law aims to create legal certainty and justice for all citizens without discrimination; on the other hand, religious law is based on the principles of faith and the absolute provisions of sharia. When these two legal systems interact in concrete cases, particularly regarding the division of assets after divorce, tensions often arise between formal legality and substantive justice.

In many cases decided by Indonesian courts, judges are faced with the dilemma of balancing two interests: 1) the application of positive law in accordance with applicable laws, and 2) respect for the religious and moral

principles held by the parties. Therefore, it is important to conduct an in-depth and comprehensive study of how Indonesian positive law, Islamic law, and international legal principles interact and influence each other in determining the distribution of joint assets after divorce in mixed marriages.

This study is relevant because it reflects an effort to understand the dynamics of family law in the context of legal pluralism in Indonesia. This country adheres to a pluralistic legal system where state law, religious law, and customary law interact with each other. A comprehensive analysis of the division of joint property in mixed marriages will provide a broader understanding of the direction of development of national family law, as well as serve as a basis for consideration in legal reform to be more responsive to social realities and the values of universal justice.

Based on the background and introduction that have been explained, two main problems can be formulated as follows:

1. How is the regulation and application of positive Indonesian law regarding the distribution of joint assets after divorce in mixed marriages, and how is this related to the principles of Islamic law?
2. How do the principles of international law influence the determination of applicable law and the resolution of the division of joint property in mixed marriages involving cross-border elements?

LITERATURE REVIEW

The Concept of Joint Property in Indonesian Positive Law

The legal basis governing joint property in marriage in Indonesia is contained in: 1). Law No. 1 of 1974 in conjunction with Law No. 16 of 2019 concerning Marriage, specifically Article 35 paragraph (1), which states that all property acquired during marriage becomes joint property unless otherwise stipulated; 2). Compilation of Islamic Law (KHI) Articles 85-97 which emphasize the concept of joint property for Muslim couples, especially Article 97 which determines the division of joint property after divorce; 3). Civil Code (KUHPerdara), which is still relevant, especially in mixed marriages or marriages that are not subject to KHI.

Several previous studies, such as by Nuruddin and Tarigan (2014), show that joint property disputes are increasingly complex, especially in mixed marriages, due to the intersection of different legal systems. Meanwhile, Marzuki (2016) emphasized the importance of a strong and consistent legal basis to ensure legal certainty in the division of joint property.

Joint Property from an Islamic Legal Perspective

The term "joint property" is not found in classical Islamic legal literature, but this concept developed through social practice and needs. According to Wahbah az-Zuhaili (1998), property acquired by a husband and wife during marriage can be considered the result of joint cooperation, so its distribution is carried out through deliberation for the sake of justice.

Contemporary jurists argue that the division of property must take into account the contributions of both parties, both economic and non-economic. This

principle aligns with the vision of Islamic law, which prioritizes justice, the common good, and the protection of women's rights within marriage.

In the context of mixed marriages, issues arise because Islamic law requires a shared faith as a prerequisite for the validity of the marriage. Therefore, in mixed interfaith marriages, the Islamic Law (KHI) and Islamic jurisprudence (fiqh) state that there is no valid marital relationship, and therefore no legal consequences, including joint property, arise. However, in national legal practice, there is room for judicial interpretation to consider justice even if the religious aspect is not met.

Mixed Marriages in Indonesian Positive Law

Mixed marriages are regulated in Articles 57-62 of the Marriage Law, which emphasize that marriages between two individuals of different nationalities must still comply with the religious laws of each party, as well as administrative procedures established by the state. Research by Ashri (2020) shows that mixed marriages often involve conflicts over citizenship, jurisdiction, and recognition issues during divorce and the division of joint property.

Regulations regarding postnuptial agreements are increasingly relevant in this context. Constitutional Court Decision No. 69/PUU-XIII/2015 expanded the opportunity for couples to enter into prenuptial agreements at any time, not just before marriage. This provides a way for mixed-race couples to manage their assets more flexibly.

Mixed Marriages in the Perspective of International Law

In international law, the division of assets in mixed marriages is influenced by the concept of Private International Law (PIL) which includes: Lex loci celebrationis (the law of the place where the marriage took place), Lex domicilii (the law of the spouse's domicile), Lex situs (the law where the object is located), Lex patriae (the law of origin of citizenship). According to Starke (1994), when a conflict between laws occurs, the judge must choose the most relevant connecting factor to ensure substantive justice. In several European countries, the division of assets in mixed marriages follows (The Hague Convention 1978 on Matrimonial Property Regimes, which provides room for choice of law. Indonesia has not ratified the convention so that the mechanism for resolving cross-border disputes still depends on the general principles of IPR and the judge's discretion.

METHODOLOGY

This study uses a normative legal approach with a comprehensive analysis of various legal sources. This approach was chosen because the study aims to understand the norms, principles, and legal principles governing the division of joint property in mixed marriages from various perspectives. This study is a doctrinal/normative legal study. The focus is on the study of legal doctrine, legislation, court decisions, legal theory, and scientific literature. There are several approaches in this study, namely the statute approach/legislation approach, which examines various regulations on mixed marriages, joint

property and divorce; the conceptual approach/conceptual approach, which examines the concept of joint property, mixed marriages and the principles of international law; the case approach/case approach, which reviews court decisions in Indonesia and other countries related to property disputes in mixed marriages; and the comparative approach/comparative approach, which compares Indonesian provisions with several other countries.

This research uses secondary data consisting of: primary legal materials through various existing regulations, such as; Law No. 1 of 1974 in conjunction with Law No. 16 of 2019 concerning Marriage, Civil Code, Compilation of Islamic Law (KHI), Constitutional Court Decision No. 69/PUU-XIII/2015, District Court and Court decisions regarding the division of joint assets in mixed marriages and international instruments such as CEDAW, CRC, and The Hague Convention 1978. Secondary legal materials consist of; books on Islamic law, family law, and international law, journal articles, etc., as well as expert opinions (doctrine). Tertiary legal materials consist of legal dictionaries, encyclopedias, court decision indexes, and glossaries of legal terms.

Analysis of legal materials uses steps such as; inventory of norms, to identify rules related to mixed marriages and joint property, legal interpretation, including grammatical, systematic, teleological, and historical interpretation, comparative analysis, namely comparing regulations between national law, Islamic law and international law, legal reconstruction, namely, providing academic arguments against the gaps, inconsistencies, or conflicts of law and drawing conclusions based on legal logic and the principles of justice.

RESEARCH RESULTS AND DISCUSSION

Regulation and Implementation of Indonesian Positive Law on the Division of Joint Assets After Divorce in Mixed Marriages and Its Relation to Islamic Law

The Indonesian national legal system regulates, interprets, and applies the distribution of joint assets after divorce in the context of mixed marriages, as well as how these provisions interact with the principles of Islamic law that exist and develop in Indonesia. Normatively, the legal basis for joint assets is regulated in Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage, specifically Article 35 paragraph (1), which states that assets acquired during a marriage become joint assets. This article provides a basis for the concept of "economic collectivity" between husband and wife in a marriage. However, the law does not provide a detailed explanation of how the distribution is carried out in cases of divorce, especially if the marriage is a mixed marriage between two individuals of different nationalities or religions.

In national legal practice, further provisions can be found in the Compilation of Islamic Law (KHI), which applies to Muslims. Article 97 of the KHI states that in the event of divorce, each party is entitled to half of the joint property, unless otherwise stipulated in the marriage agreement. However, the application of this article is problematic in cases of mixed marriages, as one party may not be Muslim or the marriage may not be registered with the Religious Court. Consequently, there is a difference in jurisdiction between the Religious Court and the District Court in handling similar disputes.

In addition, in the context of interfaith mixed marriages, Article 2 paragraph (1) of the Marriage Law states that a marriage is valid if it is carried out according to the religious laws of each party. This means that if a marriage is carried out without fulfilling certain religious requirements (for example, one party is Muslim while the other is non-Muslim and has not converted), then under state law, the marriage is invalid, which automatically impacts the validity of joint property status. This raises serious problems, especially for women and children who may lose economic rights due to the formal invalidity of the marriage.

From an Islamic legal perspective, the concept of joint property is known as *al-mal al-musyarak*, or property acquired through domestic cooperation during marriage. Although the term joint property is not explicitly mentioned in the Qur'an or Hadith, the *ijtihad* of scholars and contemporary Islamic jurisprudence (*fiqh*) practices recognize that all property acquired during marriage is the result of the husband and wife's cooperation and is therefore divided fairly upon divorce. The principles of justice (*al-'adl*) and the common good (*al-maslahah al-'ammah*) are the primary basis for determining the distribution of such property.

In many cases, Indonesian positive law attempts to accommodate these principles of Islamic justice. For example, in a number of religious court decisions, judges often consider the economic and non-economic contributions of each party. This demonstrates the synchronization between positive law and Islamic legal values. However, in mixed marriages, a dilemma arises because Islamic law may not be applicable to non-Muslim parties, forcing judges to seek alternative legal bases to ensure substantive justice for both parties.

In mixed marriages, one of the biggest challenges is determining the forum for resolution in the event of divorce. If a couple is Muslim but one is a foreigner, the case is resolved in the Religious Court as long as the foreigner agrees to undergo the religious court process. If they do not agree, the District Court can take over. This uncertainty often results in overlapping authority between the Religious Court and the District Court, differing rulings regarding joint property, and multiple interpretations of property status between religious and national law. This problem arises because the Marriage Law does not specifically regulate the mechanism for resolving normative conflicts in mixed marriage divorces. Judges must interpret the matter creatively to fill the legal gap.

The practice of mixed marriages is increasing in tourist areas such as Bali, Lombok, Yogyakarta, and Jakarta. Many couples marry under the laws of one country but then seek recognition in Indonesia. This affects the status of assets acquired in Indonesia, assets acquired abroad, and assets acquired before the re-registration of the marriage. From a community property perspective, a major issue arises: can assets acquired before marriage in Indonesia be considered community property? Court decisions vary, as the law does not provide an explicit definition.

Islamic law views fairness in the distribution of assets not only through a 50:50 split, but also through the measurement of contribution and ability. In

Indonesian Religious Court practice, non-economic contributions (e.g., taking care of the house, children, and supporting the husband's career) are considered equally important. Judges often consider moral aspects, such as whether one party has left the household or committed a Sharia violation that could lead to divorce. This demonstrates that Islamic values are incorporated into decisions even when the marriage involves foreign elements.

Problems that frequently arise include: differences in the principles of citizenship (*ius soli* vs. *ius sanguinis*), differences in legal systems (Indonesian civil law vs. the common law of the partner's country), differences in views on joint ownership of property (for example, certain countries adhere to the separation of property). Indonesian positive law still needs to accommodate these realities to prevent injustice for the weaker party.

Principles of International Law in Determining Applicable Law and Settling the Division of Joint Property in Cross-Border Mixed Marriages

Aspects of international law, particularly in the context of mixed marriages involving cross-border elements, for example, if one party is a foreign citizen or the marriage took place abroad but has legal consequences in Indonesia. In such situations, the primary issue that arises is determining which law applies to the division of joint property after a divorce.

In the theory of private international law (IPL), several main principles are recognized in determining the applicable law to a legal relationship containing foreign elements. First, the principle of *lex loci celebrationis*, which means the applicable law is the law of the place where the marriage took place. Second, the principle of *lex domicile*, which means the applicable law is the law of the country where the couple's permanent domicile after marriage. Third, the principle of *lex patriae*, which means the applicable law follows the nationality of the parties. These three principles serve as guidelines for determining the connecting point (connecting factor) that connects a legal event to a particular legal system.

In international practice, many countries have ratified The Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, which provides guidelines for married couples in choosing the law governing their joint property (choice of law). The convention allows parties to determine before marriage which law will be used to govern their property. However, Indonesia is not a party to this convention, so the resolution of such disputes in Indonesia still relies heavily on general principles of international private law and national public policy.

In the context of mixed marriages in Indonesia, in the event of divorce and division of joint assets, the judge must consider several factors: 1) the citizenship status of each party; 2) the place of marriage; 3) the permanent residence of the parties; and 4) the existence or absence of a prenuptial agreement. When assets are located in more than one country, issues of jurisdiction and cross-border enforcement arise. If not clearly regulated, this can lead to legal uncertainty and even the potential loss of economic rights for one of the parties.

International legal principles also emphasize the importance of protecting the weaker party, usually the wife or children, who in many cases are victims of inequality in divorce proceedings. The principles of non-discrimination and substantive justice as stipulated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are also relevant to ensuring that the division of joint property does not create structural injustice.

Mixed marriage is a multidimensional legal relationship, connecting two national legal systems, two social and religious cultures, two marriage registration systems, two inheritance and ownership systems, and two mechanisms for dissolution of marriage. Due to this transnational nature, the resolution of joint property disputes cannot solely be based on Indonesian law, but must also consider whether Indonesian court decisions can be recognized in other countries (recognition and enforcement), whether the laws of other countries recognize the concept of "marital property" as in Indonesia, and whether there is a conflict between the laws of the two countries.

The principles of international law provide several approaches: 1). *Lex loci celebrationis* (the law of the place where the marriage took place). If the marriage took place abroad, then the law of that country can be the basic reference; 2). *Lex domicili* (the law of the couple's permanent residence). If the couple lives in Indonesia, then Indonesian law can be fully applied; 3). *Lex situs* (the law of the place where the object of the property is located). For example, a house in Bali is subject to Indonesian law, while land in Australia is subject to Australian law. This practice makes the process of dividing assets across borders very complicated and requires international legal expertise.

Many countries do not readily recognize foreign court decisions. For example, if an Indonesian Religious Court decides on the division of joint assets, and some of the assets are located in the spouse's country, that country can: accept the decision, reject it on the grounds of public order, or request a judicial review. Without a mutual recognition mechanism, the weaker party, especially the wife, could potentially lose their economic rights.

Several international instruments, such as CEDAW, CRC, ICESCR, and UDHR, mandate that states ensure the protection of women and children, particularly in divorce. Therefore, states are obligated to ensure women's economic rights, non-discriminatory distribution of property, and the continued welfare of children even if one parent is a foreign citizen. This is often the basis for judges in Indonesia when deciding mixed marriage cases.

Because Indonesia has not ratified the 1978 Hague Convention, it lacks a single, solid basis for regulating the distribution of assets across borders. As a result, cases are often decided based on judge-made law, there are no national standards for handling assets held abroad, and Indonesia finds itself passively affected by foreign court decisions. Therefore, Indonesia needs to enact specific legislation regarding inter-marriage.

CONCLUSION

From the discussion that has been outlined, several conclusions can be drawn as follows:

1. From the perspective of Indonesian positive law, the distribution of joint assets after divorce in mixed marriages is regulated by Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage, and is clarified in the Compilation of Islamic Law (KHI) for Muslims. Assets acquired during the marriage become joint assets and are divided equitably after divorce, unless a prenuptial agreement stipulates otherwise. However, in mixed marriages, issues of jurisdiction and the validity of the marriage arise if one party has a different religion or citizenship. In this context, courts often face a dilemma in applying the law because they must reconcile religious norms, national law, and principles of justice. Therefore, the need for harmonization between religious law and state law is crucial to ensure certainty and justice for the parties.
2. From an Islamic legal perspective, the division of joint property is not explicitly regulated in the Quran, but is based on the principles of 'adl (justice) and deliberation between husband and wife. Islam recognizes women's economic rights, both in the form of dowry, maintenance, and assets obtained from joint ventures during marriage. In the event of divorce, the division is carried out proportionally according to the contributions of each party. In cases of interfaith marriages, Islamic law considers the marriage invalid, so it does not have legal consequences for the status of joint property. Therefore, Islamic law emphasizes the importance of shared faith in marriage to maintain clarity of lineage, economic rights, and post-divorce justice.

RECOMMENDATIONS

1. Harmonization of Legal Frameworks
The government should formulate clearer and more integrated regulations that harmonize Indonesian positive law, Islamic law, and private international law in the context of mixed marriages, particularly regarding the distribution of joint property. This harmonization is crucial to eliminate overlapping norms, conflicting interpretations, and inconsistencies between the Religious Court and the District Court.
2. Special Legislation for Mixed Marriages
Indonesia needs to develop specific legislation governing mixed marriages and cross-border property regimes. This regulation should include standardized rules on choice of law, forum determination, recognition of foreign marriage and divorce documents, and mechanisms for enforcing Indonesian court decisions abroad.
3. Strengthening Prenuptial and Postnuptial Agreement Policies
The government, through civil registration and marriage offices, should encourage mixed-marriage couples to create prenuptial or postnuptial agreements that clearly regulate property regimes. Standardized templates and legal consultations should be provided to minimize future disputes.

4. **Improvement of Court Coordination and Jurisdiction Guidelines**
Clearer procedural guidelines are needed to determine the appropriate jurisdiction (Religious Court or District Court) in mixed-marriage property disputes, especially when the spouses have different religions. This will prevent contradictory rulings and ensure procedural certainty.
5. **Capacity Building for Judges and Legal Practitioners**
Judicial institutions should strengthen the competence of judges, mediators, and legal practitioners in handling cross-border family law cases, including training on international conventions, comparative legal systems, and mechanisms for recognizing foreign judgments.
6. **Protection of Vulnerable Parties (Women and Children)**
Courts must ensure that the principle of substantive justice prevails in mixed-marriage property disputes by considering economic and non-economic contributions of both spouses. Policies aligned with CEDAW and CRC should be applied to provide maximum protection for women and children, especially when legal validity issues arise due to religious differences.
7. **Academic Study on International Instruments**
Further academic and governmental evaluations are required to assess the relevance and feasibility of Indonesia adopting parts of The Hague Convention 1978 or developing bilateral agreements with countries that frequently have marital ties with Indonesian citizens.
8. **Development of a Cross-Border Asset Resolution Mechanism**
Indonesia should establish a standardized mechanism to handle claims over assets located abroad, including cooperation with foreign authorities and clearer procedures for asset tracing, valuation, and enforcement.

ADVANCED RESEARCH

Future research should focus on developing a cross-system harmonization model that integrates Indonesian positive law, Islamic legal principles, and private international law frameworks to resolve joint-property disputes in mixed marriages, particularly those involving cross-border assets and differing citizenship or religious status. Subsequent studies should formulate a more precise choice-of-law framework, including assessing the feasibility of partially adopting principles from the 1978 Hague Convention into the Indonesian legal context, supported by comparative jurisprudential analysis and simulated case studies in jurisdictions with similar legal pluralism. Further exploration is needed to map the socio-economic impacts on vulnerable parties—especially women and children—in transnational divorce and property disputes, and to design a new legislative model that establishes standardized mechanisms for recognizing and enforcing foreign court decisions while ensuring stronger economic protection for Indonesian citizens involved in mixed-marriage divorces.

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