

# Division of joint assets according to Dayak Kenyah customary law after a divorce occurs in terms of law number 1 of 1974

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## ABSTRACT

In this research, the author tries to explore how the division of common property is carried out according to Dayak Kenyah Customary Law due to one of the causes of marriage breakdown, namely divorce caused by the death of one of the parties or divorce love; caused by the wishes of both parties; caused by one of the parties having an affair or divorce cek cok and how the implementation of decisions that have been determined by the Customary Institution. The research method used is anthropological juridical by examining the realities that exist and apply in the Dayak Kenyah customary society related to the division of joint property after divorce and literature study of data from previous research and Law No. 1 of 1974. The result of this research related to the issue of division of joint property according to Dayak Kenyah Customary Law after divorce is that joint property absolutely belongs to the party declared innocent by the Customary Institution if the cause of the divorce is one of the parties having an affair or divorce caused by the death of one of the parties. As for divorce caused by the wishes of both parties, then the joint property is divided in half. The implementation of the decision stipulated by the Customary Institution is mandatory but there are still some of the Dayak Kenyah indigenous people who do not want to implement the decision and this is related to the beliefs or religion adopted by the Dayak Kenyah indigenous people so that pros and cons arise in the indigenous community itself.

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## 1. INTRODUCTION

It is a custom that has developed in the Dayak Kenyah Indigenous community that assets acquired during the marriage stage are joint property between husband and wife regardless of who will get the property, so that the property automatically becomes joint property. As stipulated in article 35 paragraphs 1 and 2 of the Marriage Law No. 1 of 1974 which reads:

Paragraph 1: Assets acquired during marriage become joint property.

Paragraph 2: The inherited assets of each husband and wife and the assets each receives as a gift or inheritance are under the control of each as long as the parties do not specify otherwise.

Problems regarding joint assets acquired during the marriage stage will arise if there is a breakup of the marriage due to divorce, which in this case is of course both related to the distribution of joint assets and who will be authorized to determine the distribution of these assets.

Decision of the Customary Institution considered legitimate by indigenous peoples, sometimes it is not obeyed by one of the parties, thus causing the legal decision to become weak and ultimately unable to be used as a basis for resolving the problems faced. Likewise, it is often the case in Dayak Kenyah Customary Law, that what is stipulated in decisions is sometimes not implemented, so that the conclusion is that decisions made by customary institutions do not have binding legal force. Because each of them can avoid these customary decisions, which are felt to have very light customary sanctions, they even consider customary institutions to be fragile institutions and no longer functioning optimally.

Reviewing the problems mentioned above, it is interesting for the author to study and analyze the causes of the lack of adherence to decisions made by the Customary Institution, as well as to what extent the level of compliance of the disputing parties to the decisions decided by the Customary Institution .

Besides the things mentioned above, the author also wants to dig back into the Dayak Kenyah Civil Customary Law which the writer feels is now fading due to the influence of foreign cultural values that are contrary to the original culture of the Indonesian nation, especially the problem of sharing joint property which is carried out according to Dayak Kenyah Customary Law. itself, then in this case the author feels interested in raising it in the form of writing a thesis.

## 2. METHOD

The location chosen by the authors for this research is Ritan Baru Village, Tabang District, Kutai Kartanegara Regency, Samarinda, East Kalimantan with the consideration that Ritan Baru Village is a village with a population of 90% and is the largest indigenous Dayak Kenyah Lepoq Tukung community in East Kalimantan and has an Institution Adat that still carries out the Dayak Kenyah Customary Law as a whole. The primary data in this study is the main data which includes statements in the Dayak Kenyah Indigenous community regarding how joint property is distributed outside of an agreement between the husband and wife and how the customary law decisions are implemented. The analytical method used in this study is a qualitative descriptive method which has its starting point on the prevailing Dayak Kenyah Customary Law system relating to the data found in the field in research in Ritan Baru Village, Kutai Kertanegara which is then described and analyzed qualitatively to draw conclusions.

## 3. RESULTS AND DISCUSSION

### 3.1 The division of joint property that is carried out outside the agreement of the husband and wife through the Dayak Kenyah customary institution in terms of Law No. 1 of 1974.

The Dayak Kenyah Indigenous People now adhere to the principle of monogamy in their marriages, which is influenced to some extent by the beliefs or religion held by most of the Dayak Kenyah Indigenous people. If we look back, the Dayak Kenyah customary community has been in effect since the past or the days of the Dayak Kenyah indigenous people's ancestors, the principle of monogamy, however, there is a difference between the monogamy principle adopted by the present and former Dayak Kenyah indigenous people, namely the monogamy principle adopted by indigenous peoples. Today's Dayak Kenyah are absolute while the monogamy principle adopted by the former Dayak Kenyah indigenous people is not absolute because a man is only allowed to have one wife and vice versa as long as they are bound in one marriage or as long as there is no divorce.

As is commonly known in the Dayak Kenyah Customary Law, that there are three kinds of factors due to the occurrence of divorce, namely: Because one of them died or divorced; Because of the will of both parties; Because one of the parties is having an affair or divorce check cok.

If there is a divorce or marriage breakup caused by one of the factors above, the Dayak Kenyah Customary Institution will resolve existing property problems or become a mediator for the divorced party or impose sanctions ("ukum") on the party found guilty of causing the divorce.

In inherited assets originating from this inheritance, in general, the transfer is determined by the family concerned, and to transfer there must be approval from all family parties who have an interest

in the inheritance, so that in the transfer there must be an agreement and it has a long process. So what is not included in joint assets is inherited property, whether it is a gift from parents or other people as well as the inheritance. And again, these assets may not be mixed with other assets, whether it's inherited assets that were acquired by themselves when they were still single/unmarried or shared assets that were obtained while there were still marital ties between husband and wife, because in these assets there is still interference (rights) of parties who still have a relationship with the inherited property even though the husband and wife had the obligation to maintain these assets and act on these assets. Because it is based on the norms/values contained in Customary Law decisions. Dayak Kenyah who emphasized that inherited assets should not be mixed with other assets as long as there is interference from parties who have rights over these inherited assets.

Willbut apart from that, assets that were acquired by themselves when they were single can also be included or mixed with joint assets even though there was no agreement between the husband and wife regarding the assets earlier, then the inherited assets automatically become joint assets. However, if either the husband or the wife uses the property for the common good of the family, then without the consent of the party owning the property, the property can be used. A big exception is that even though it has become joint property, in certain cases the property is still under the control of the person carrying the property.

As explained above, customary property is a legal sign of a marriage, besides that its function is as a contractual property or a sign of bond in a marriage that has been carried out according to custom, which means that if one of the parties, both husband and wife, commits a mistake or deviation from their marriage bond, then the person concerned will be prosecuted or fined twice the value/trates of said customary property by the innocent party along with the Dayak Kenyah traditional community leaders in the form of a fine ("ukum") such as: "tajeu" (jar) ; "ta'ing wei" (mat made of rattan); "ba'ing" (machete); "taweq" (gone big); "balun puteq" (white cloth).

Where the party who deviated earlier must give this customary property in full to the innocent party. Whereas the fines decided by the customary head can be demanded by the leaders of the Dayak Kenyah customary community against the guilty party. By being required to provide all the necessities for a banquet to the Customary Chief and the leaders of the Dayak Kenyah customary community for a period of one or two special days for the process of resolving the problem of sharing the joint property. In this case there is also a reconciliation process between the husband and wife so that there is no divorce. However, if the customary institution cannot reconcile the two parties or there is no hope of getting along in the household so that a divorce occurs,

In the Dayak Kenyah Indigenous community association, basically according to the provisions contained in the Dayak Kenyah Customary Law, the Customary Head who is assisted by community leaders has the function and authority to decide and give advice to husbands and wives in the divorce settlement process and distribution of joint assets. Which in the distribution of joint assets may be carried out without any agreement from the husband or wife. But in this case there must be one of the parties, both husband and wife who still have family relations to know and witness this,

### **3.2 Dissolution of Marriage Because One Party Dies or Divorces Kasi**

The above factors are one of the causes of the breakup of a marriage within the marriage bond which cannot be avoided by every human being, so in cases like this the settlement of the distribution of joint assets and customary assets acquired while living in a marriage bond can be carried out by the family relatives of both parties jointly. the same, because the divorce was not the will of the husband or wife. So the settlement of customary assets and joint assets owned in their marriage must absolutely be transferred to the husband ("amban" = widower) or wife ("balu" = widow) who is still alive. Whereas the payment of divorce fines is not demanded by the Customary Institution, because the consequences of the divorce are not the will of the husband and wife. So that in the process of solving the distribution of joint assets, customary institutions only have the authority to stipulate and decide, even though joint property and customary assets are absolute property for the husband ("amban") or wife ("balu") who is left behind. However, while the inheritance and inheritance are still being returned to the family who died earlier.

In the process of finalizing the distribution of joint assets and customary assets in this type of divorce, it takes as much as two days with the aim that the determination made avoids the possibility of unwanted actions from other parties, and does not seize and control assets that absolutely transfer to the husband or wife who is left behind. That. However, if there are no problems arising with joint assets and customary assets which are inherited, then the Customary Institution may not deal with

the issue of customary assets and joint assets because their absolute nature falls on the parties left behind either the wife ("balu") or the deceased. the husband ("amban") as well as the children left behind or the process of solving this problem is left to the family left behind.

### **3.3 Dissolution of Marriage Due to the Will of Both Parties.**

In this factor, the breakup of a marriage occurs because of the mutual will or will of the husband and wife. In this type of divorce, it is caused because between husband and wife there are continuous disputes and fights, or severe abuse which can lead to a feeling that there is no compatibility between the husband and wife anymore and both do not want to accept each other or because there are no offspring so they do not have children. there is hope again to reunite in their marriage bond. Which in this case the Customary Institution has made efforts to settle things to accept each other and be able to live in harmony again so that the divorce does not occur but the efforts made by the Customary Institution have failed to unite them.

So in divorce cases like this the Customary Institution interprets that the divorce is the will of the husband and wife. However, even though the divorce was based on their mutual will, it started from a sense of incompatibility between the husband and wife or because of the lack of offspring. As is contained in article 39 paragraph 2 of Law no. 1 of 1974 which states: "To carry out a divorce there must be sufficient reasons that the husband and wife will not live in harmony as husband and wife".

Because the divorce is based on their mutual will, the customary assets can be divided in half between the husband and wife, while the customary fine is imposed on the husband or wife who caused the discrepancy and the customary fine is handed over to the Customary Institution. While the second stage is the settlement of joint assets.

So that if the divorce is caused by the will of the husband and wife, with the reasons for the divorce not harming either party, then the joint assets and customary assets can be divided equally between the husband and wife, namely each gets half (1/2) of the share. always based on the reasons for the divorce while inheritance and inheritance cannot be divided. Thus, any property that is classified as their common property according to Dayak Kenyah Customary Law must be divided as fairly as possible.

### **3.4 Dissolution of Marriage Because One of the Parties Has an Affair or Divorce Check Cok.**

The third factor is the breakup of a marriage because one of the parties, the husband or wife, has cheated on their marriage bond. For example, one husband or wife commits adultery which causes and is the reason for divorce in their household. In divorce cases as in the third stage, what will be resolved first is the handing over of customary assets and determining the customary fines that must be paid by the party who has had an affair with one condition without any agreement between the husband and wife.

So for this reason, the settlement and transfer of joint assets can be carried out simultaneously with the surrender of customary assets owned by the husband and wife. So that based on the Dayak Kenyah Customary Law which applies from generation to generation and if one of the husband and wife divorces without the consent of one of the parties left behind, then by itself it can determine that joint property is already the personal property of the husband or wife who was innocent earlier and it is legal according to Dayak Kenyah Customary Law.

The process of settling joint assets as appropriate is stipulated in the Dayak Kenyah Customary Law, that whoever leaves his husband or wife first and to remarry while the husband or wife does not agree to the divorce, then the party that leaves the husband or wife is subject to payment of a fine. adat ("ukum") in the form of a number of customary property equipment for a husband or wife who did no wrong and the guilty party must hand over all joint assets acquired during the marriage stage to the innocent or disagreeing party.

So in this way all joint assets and customary assets will fall to the party that does not want the divorce. So that the decision made must be based on the customary regulations that apply in the Dayak Kenyah indigenous people and are imposed on anyone who does it among the Dayak Kenyah indigenous people.

### **3.5 Implementation of Customary Law Decisions Stipulated in Relation to the Distribution of Joint Assets.**

In principle, every divorce case that the problem is to be resolved, of course, uses the channel, namely an institution that is considered to be able to guarantee and has the task of resolving the problem in its jurisdiction. Usually, each region or village has an institution called the Customary Institution which has the smallest jurisdiction and has full authority to regulate indigenous peoples in

that area/village. However, in managing indigenous peoples in the area, this Customary Institution has its own rules even though the regulations contained in the Dayak Kenyah Customary Law are generally unwritten and apply from generation to generation to the next generation. With the value of customary law norms that apply, then for anyone who violates the rules will be dealt with in accordance with the applicable customary law regulations. Likewise, if there are problems in the community in jurisdictions controlled by customary law, they can be resolved in these customary institutions.

This means that with the existence of customary law in an area it is able to regulate and resolve a problem of unlawful acts experienced by local indigenous peoples. This is because customary law is generally a rule that is never fragile and has a dynamic nature, so that it can follow the development of society and is able to adapt to the situation of society so that customary law can apply from generation to generation. Likewise in the area of the Dayak Kenyah Indigenous people, because for so long that Customary Law has grown and developed in society, thus the Dayak Kenyah indigenous people have more control over Adat Law than other laws (formal law) that apply in this beloved country of Indonesia.

In the decision made by the Customary Institution, that what is decided is still carried out by the community. This relates to the belief and trust of the community that decisions have been made and legally determined by the customary chief and traditional community leaders, so if any of the local indigenous people violates them they will receive punishment in the form of prolonged suffering and be subject to fines commensurate with negligence. With such firmness, the decision made by the Customary Institution is considered as an absolute decision and has permanent legal force.

So that in the process of sharing joint assets determined by the Customary Institution, the husband and wife must comply with the regulations that apply in the local Dayak Kenyah customary community. As has been said that the Customary Institution is the smallest institution in the region as a forum for the indigenous Dayak Kenyah community. So that with the existence of the duties and authority of the Customary Institution entrusted by these indigenous peoples, whatever decision results from this Customary Institution will not come out of the Adat Law justice procedure that is upheld and applied to the indigenous peoples in the Dayak Kenyah customary community alliance.

By using customary law as the foundation or basis for deciding in solving the problem, so that what is decided has binding legal force and is valid. So in that way there is no reason not to be able to solve a problem experienced by indigenous peoples, especially in the matter of sharing joint assets owned by husband and wife while in a legal marriage bond. However, it is ironic because in the development regarding the implementation of the customary decision itself there was a deviation where the party being punished did not carry out the decision or there was a shift in customary values decided by the Customary Institution due to the influence of the belief or religion adhered to by some indigenous peoples who concerned that is felt to be inappropriate (*receptio in complexu* theory). The existence of pros and cons in indigenous peoples regarding the implementation of decisions of Customary Institutions causes the dissolving of customary values that have grown and developed and run in these indigenous peoples for generations.

#### 4. CONCLUSION

According to Dayak Kenyah Customary Law, if the cause of the breakup of a marriage is divorce due to the death of one of the parties or a divorce, then the joint property and inherited assets can be owned by the wife/husband and the children left behind while the inheritance is returned to the heir's family. In this case, the settlement can be through customary institutions or resolved amicably and not subject to customary fines ("ukum"). Whereas if the cause of the breakup of the marriage is due to the wishes of both parties, then the joint property is divided into 2 fairly while the inherited assets and inheritance are not divided and customary fines ("ukum") are paid by the party who is found guilty by the Customary Institution. For the cause of the breakup of a marriage due to divorce caused by one of the parties having an affair, then all inheritance, inheritance and joint assets are owned by the innocent party and the customary fine ("ukum") is paid by the guilty party. The Dayak Kenyah Customary Institution has the ability to carry out its duties and authorities regarding the distribution of joint assets, but there are still indigenous people who dare to violate the rules set by the Customary Institution. This is more or less influenced by the religion or beliefs held by the Dayak Kenyah indigenous people so that the pros and cons arise within the indigenous peoples themselves.

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