

## “SMUGGLING LAW” IN INTER-RELIGIOUS MARRIAGE IN INDONESIA

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### ABSTRACT

*Indonesia Act Number 1/1974 on Marriage ban Indonesia citizen marriage do by different religions couples. Article 2(1) states the marriage is considered legitimate if done according to the law of religion and faith of the parties concerned. The consequence of Article 2(1) is a marriage could not registered by registration institution if can not be done according to the rule of religion and faith and would be state as illegal marriage. But, there is no article in Marriage Law regulate inter-religious marriage, either prohibit or allow. This makes vague norm in Marriage Law, because of vacuum law existence on inter-religious marriage. There is one way for inter-religious couples to conduct marriage, so it can be registered at Civil Registry Office and should be recognized by state. They can do legal action and marry with permission of the court. Because complicated and long winded process, legal action is not popular. Couples of different religions prefer do “smuggling law” to cheat or deceive law and make their marriage legal and recognized by state. To avoid “smuggling law” by couples of different religions, Marriage Law must be amended to accommodate inter-religious marriage. Not only accommodate inter-religious marriage, amendment give education peoples not to cheat or deceive law.*

Key words: different religion couples, illegal marriage, smuggling law.

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### Introduction

Inter-religious marriage wasn't new case in Indonesia. Eventhough did by many couples, inter-religious marriage always cause polemic especially if did by artists. Support and resistance come from various parties who concern. Support come from human rights activists who claim that marriage is one of the most fundamental human rights, including in choosing his or her mate. Resistance come from many religious leaders, especially Moslem. They state inter-religious marriage is forbidden. Eventhough religious leaders state forbidden, inter-religious marriage was always do.

Law Number 1/1974 on Marriage (Marriage Law) in Article 2(1) explicitly stated that “a marriage is legitimate, if it has been performed according to the laws of the respective religions and faiths of the parties concerned”. This gives the consequence “the marriage ceremony shall be performed according to the laws of the respective religion and faith.” There is no chance for couples who have different religious or faith to get marry, because formally religious law doesn't allow someone to marry anyone who has different religion.

However, there is no single article in Marriage Law explicitly regulate inter-religious marriage, either prohibit or allow. This make polemic regarding its interpretation and application. Marriage Law only regulate mixed marriages conducted by Indonesian citizens and foreign national. Absence of inter-religious marriage regulation gives legal vacuum which allows the inter-religious marriage conducted by “smuggling law”. In fact, inter-religious marriage among the people still continues. The purpose of this research is to evaluate Article 2(1) that cause inter-religious couples do “smuggling law”.

### Method

The type of this study is a normative juridical research with conceptual approach and statute approach. Conceptual approach study legal views and doctrines that develop in a jurisprudence. This should give ideas match with issues faced. Statute approach is done by examining laws and regulations which suitable to legal issues. This approach was used to analyze in normative juridical to “smuggling law” phenomenon.

### Result And Discussion

#### 1. Inter-religious marriage in marriage law

Article 1 of the Marriage Law defines “marriage is a physically and mentally bond between a man and a woman as husband and wife with the intention of forming a happy and everlasting family (household) based on belief in the one and only God”. From this definition, marriage can only be held in religious and spiritual nature. This is described in more detail in Article 2 that states the validity of a marriage is determined by a religious ceremony.

Law Marriage made by Indonesian nation based on the needs a law as a national marriage law which applies to all citizen in Indonesia. In fact, the implementation of the law is problematic for some segments of society, including to the issue of inter-religious marriage and marriage conducted to people who have a religion or belief is not the same as government-recognized religions.

Under Law Number 1/PNPS/1965, there are six religions recognized by the government, namely Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. Marriages ceremonies performed in religious or faiths other than six religions recognized by the Government is rejected to registered by authority. Similarly, the marriage between a man and a

woman who have different religions can not be registered, eventhough held in one of the couple religious law. The Civil Registry Office refused the registration notices Article 2 of the Marriage Law which states a marriage is legitimate, if it has been performed according to the laws of the respective religions and faiths of the parties concerned. In other side, religious doctrines prohibit marriages performed by couples of different religions, so it is assumed the marriage between couples of different religious is not legal and can not be registered.

Article 2(2) also stated that the marriage must be registered in accordance with applicable legislation. Judging by this article, the terms legitimacy of marriage divided into two, besides performed according to religious law, it should also be registered in accordance with applicable legislation. Implementation of registration of marriage stipulated in Government Regulation Number 9 of 1975, namely that the registration of marriages that took place according to Islam carried out by employees of the Office of Religious Affairs (Act Number 32 of 1954), while registration of marriage for those who perform according to a religion other than Islam is done by employees of the marriage registrar at the Civil Registry Office.

If marriage is not registered, the marriage is not legally valid and avoid legal consequences for wife and children. Legal consequences is the emergence of the rights and obligations of husband and wife, children who were born in the marriage be legitimate child, husband and wife are obliged to maintain and educate their children, are entitled to inherit each other between husband and wife, as well as children who are born in marriage is entitled to inherit each other with their parents.

Marriage Law also regulates marriages by couples who committed abroad. Registration of marriages is also mandatory for couples who married abroad is provided within one year after their arrival in Indonesia. In addition, the law also regulates mixed marriages between Indonesian citizens and foreigners and marriage conducted in Indonesia following Marriage Law.

The interpretation of Article 2 of Marriages Law states inter-religious marriage is prohibited pose an obstacle for couples with different religions to conduct the marriage, including in the registration. Inter-religious marriage to which one of the couples is Muslim, employee of Religious Affairs Office will refuse marriage registration and considers marriage was never implemented. Other agencies that are authorized to record the inter-religious marriage is Civil Registry Office. But, Civil Registry Office also refuse the marriage registration of inter-religious marriage eventhough the couples has obtained a certificate of marriage implementation from religious institutions.

## 2. "Smuggling Law" in inter-religious marriage

Base on Marriage law in Article 1, marriage can be conducted by people who belief in God. This provision gives the right to anyone, men and women who believe in God to marry. Marriage is also an area of private law which is recognized as one of human rights. Indonesia Law of Human Rights Article 10(1) states that every person has the right to establish a family and continue the descent through legitimate marriage, then Article 10(2) declared valid marriage can only take place on the free will of the prospective husband and wife, in accordance with the provisions of the legislation.

In the other side, Law of Human Rights states that establishing the family through marriage is the prerogative right of people. The state has obligation to protect, register, and publish a marriage certificate. The state is obliged to serve public needs of citizens in a fair and do not discriminate and must meet the human rights of citizens regardless of religion or faith. The state should not interfere and seize any private rights of citizens including the issue of determining the mate of people. In other words, the state only facilitate and register the marriage and not decisive mate in marriage.

Marriage Law does not regulate inter-religious marriage<sup>1</sup>. The absence of rules on inter-religious marriage in the Marriage Law caused a legal vacuum. This caused the differences in the interpretation of Article 2(1). There are two groups that give a different interpretation to the sentence of "a marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned". The first group declared the marriage valid only if it is conducted in accordance with religious law and the pair of bride have the same religion, because every religion forbids inter-religious marriage<sup>2</sup>. Another group interpreted the marriage valid if done according to the one of religious law of one of the couples. From this point of view, the possibility of inter-religious marriage occurrence. In fact, this verse is also interpreted legality of marriage for the faithful if performed according to the customary faiths, other than six religions officially recognized by the Government, namely Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism.

Those who refuse inter-religious marriage, generally come from religious institutions, request religious conversions so the couples have the same religion and are able to marry<sup>3</sup>. However, this is considered as coercive and contrary to the Constitution which ensures each citizen to embrace and worship according to their own religion. Marriage Law then becomes to a barrier for couples of different religions to perform marriages. From this point of view, Marriage Law is one of an example deviation of the Constitution.

Group that supports allow inter-religious marriage states the Marriage Law is already set inter-religious marriage implicitly in Article 2(1). Therefore, the perform of the marriage depends on the religious affiliation of the bride, because there are some interpretation and religion allow inter-religious marriage<sup>4</sup>. Nonetheless, inter-religious marriage can only be carried out and registered in Civil Registry Office because Religious Affairs Office only take care of Muslim couples marriage<sup>5</sup>.

<sup>1</sup> Abdurrahman, *Laporan Akhir Kompendium Bidang Hukum Perkawinan*. Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI, 2011, p. 5

<sup>2</sup> Ramulyo, M. I., *Hukum Perkawinan Islam*. Jakarta: Bumi Aksara, 2002, p. 194

<sup>3</sup> Soemiyati, *Hukum Perkawinan Islam dan Undang Undang Perkawinan*, Yogyakarta: Liberty, 1986, p. 63

<sup>4</sup> Meliala, D. S., *Hukum Perdata dalam Perspektif BW*, Bandung: Nuansa Aulia, 2014, p. 98

<sup>5</sup> Anonymous., *Indonesia: Inter-Religious Marriage*. The Law Library of Congress, Global Legal Research Center, 2010, p. 2

Other provisions in the inter-religious marriage is to take place with the permission of the court. There are many judges who decided ordering Civil Registry Office to marry and register inter-religious marriage. This decision is based on the jurisprudence of the Supreme Court Decision Number 1400K/Pdt/1986 grant requests Ani Vonny Gani P (female/Islam) with Hendrik Petrus Nelwan (male/Christian). Supreme Court stated that with the filing of the registration of marriages in Civil Registry Office, Vonny have ignored the rules of Islam on marriage and should therefore be considered that she wanted the marriage does not take place according to Islam. Because of their status as non-Muslims, then Civil Registry Office should hold the marriage. Using the same analogy, Religious Affairs Office should also accept inter-religious marriage between a Muslim man and non Muslim woman who want held in Islamic marriage. But in this later case, Religious Affairs Office still refused.

Legal actions requesting the determination of the Court to perform inter-religious marriage is not popular because of the complicated and long-winded process. It encourages inter-religious couples to "smuggling law" to facilitate the legalization of marriage. "Smuggling law" is an act to deceive the law to facilitate the process of inter-religious marriage legalization. Law smuggling is done by utilizing a legal vacuum as a result of that the exclusion of inter-religious marriage by the Marriage Law. Opposed by religionist, "smuggling law" is the most popular way to facilitate the registration of marriage so that marriages are considered legitimate by the state.

At least there are two ways of "smuggling law" that can be done by inter-religious couples. First, one of the pair of couple converted religiously as partner religion for a while, so the marriage can be implemented according to the law and registered without refused. After the marriage is registered, then the bride who converted back to religion before marriage. This action requires registration of religious change in administration and residence documents, but is simpler and cheaper than legal action for asking the court to order the authorities establish and registered the marriage.

Secondly, conduct marriage in other countries which do not prohibit inter-religious marriage. Marriages Law requires that couples who have a marriage abroad to register the marriage one year after arriving in Indonesia. There is no ban on registration of abroad marriage by the Indonesian couple, so the couples of different religions can perform marriages abroad without hindrance, and then register marriage to the Civil Registry Office in Indonesia<sup>6</sup>.

Complexity in the understanding of Article 2(1) of the Marriage Law caused by vague norm as a result of a legal vacuum presence in the regulation of inter-religious marriage. Supreme Court judges in decision Number 1400K/Pdt/1986 believe this legal vacuum can not be used as a pretext to prohibit inter-religious marriage. In an effort to find a law to regulate inter-religious marriage, the judges decided the marriage by inter-religious couples is allowed.

Marriage Law is 41 years old and it has never been amended, including to organize inter-religious marriage firmly so it does not cause vague norm. Amendments to the Marriage Law may be considered unimportant by the Government and the Legislator because it involves a private affair only, while economic, political, corruption and more urgent to be solved. Moreover, the discussion of the Marriage Law will be prolonged given the disagreement that occurred can not be mediated. This disagreement is difficult to mediate because it involves faith reconcilable. The politicians may find it better to leave the job to fill this legal vacuum to the trial judges.

Amendment is not just a matter of legal certainty should be a concern, to accommodate a growing need in the community is also important. Inter-religious marriage can not be avoided because of the Indonesian peoples with a different background in religious, customs, and cultures interact with each other. There are many possibility men and women with different backgrounds are in love and want to marry. Regulated or not, prohibited or not, inter-religious marriage will continue to take place and it is difficult to prevent.

The best way to parse this problem is to provide rules which provide opportunities for inter-religious couples to marry. Not only to avoiding vague norm, also educate people to not cheat or deceive the laws because their interests are accommodated, and provide legal certainty.

## Conclusion

"Smuggling law" in inter-religious marriage occurs because of the vague norm caused by a legal vacuum existence in the Marriage Law. Existence of legal vacuum in Marriage Law make different interpretation about Article 2(1). Eventhough inter-religious marriage did not regulate and banned by some religionist, couples of different religion still can conduct marriage with judge decision order to Civil Registry Office to marry them and registry their marriage. The judge decision based on Supreme Court judges in decision Number 1400K/Pdt/1986 as jurisprudence states legal vacuum can not be used as a pretext to prohibit inter-religious marriage. Because obtaining judge decision is complicated, inter-religious couples prefer do "smuggling law", cheat and deceive law like convert religion before marriage and then back to original religion after marriage registration. Another "smuggling law" did by inter-religious couples is marry abroad at country that allow inter-religious marriage. Marriage Law accept this marriage with no asking about couples religion or faith and Civil Registry Office should register. Two types of marriage are legal.

An amendment should be performed to the Article 2(1) of Marriage Law to accommodate the inter-religious couples who want to marry in order to obtain legal certainty, as well as educate the public to not to cheat the law. Inter-religious marriage should be

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<sup>6</sup> The favorite country to conduct inter-religious marriage are Singapore, Hongkong, and Australia. At Singapore, couples can apply to marry after 15 days stay. The couples must give their passport photocopy and witnesses passport photocopy or ID photocopy if witnesses are Singapore citizen. At Hongkong is more simple. Couples can apply after arrive. The rich couples choose Canada or England to conduct inter-religious marriage.

accommodated because the interaction between people with different backgrounds in religious, customs, and cultures, may progress into inter-religious marriage.

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