

## **Juridical Analysis of the Comparison of Different Religious Marriage Laws Based on the Adminduk Law Article 35 with SEMA No 2 Years 2023 Concerning Marriage Registration**

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### **ABSTRACT**

Interfaith marriage is an issue that has not been resolved to date. In current practice in Indonesian society, interfaith marriage processions are generally carried out by carrying out the marriage with a religious procession each of which is followed by the prospective husband and wife or in the sense that there are two religious processes being carried out or only carrying out one religious procession or what generally happens is not carrying out religious processions at all so that it does not comply with Article 2 paragraph (1) of the Marriage Law regarding valid marriages. The legal research method used in this research is normative juridical research which is research carried out or aimed only at written regulations with the nature of descriptive analysis research which is a method that functions to describe or provide an overview of the object being studied. The data source used is secondary data with quantitative data analysis. The results of this research are the Hierarchy of Legislation in Indonesia. If it is related to the Civil Admin Law Article 35 with SEMA Number 2 of 2023, the legal force of SEMA has a lower hierarchy than the law. Therefore, it can be concluded that the provisions contained in the Administer Law cannot be changed by SEMA Number 2 of 2023. However, this SEMA still influences the direction for judges not to grant requests for inter-religious marriages.

### **Keywords:**

Marriage, Different Religions, SEMA

### **INTRODUCTION**

Legally, marriage in Indonesia is regulated in Law Number 1 of 1974 concerning Marriage which states that marriage is a religious event as implied in Article 2 paragraph (1) The Marriage Law states that marriage is valid if it is carried out according to the laws of each respective religion and belief. From these arrangements it can be seen that it is a marriage is a religious event because marriage is considered valid if it is carried out in accordance with a religious procession. Indonesia as a multicultural country guarantees every citizen the freedom to embrace their respective religions and worship according to their respective religions, one form of worship of which is marriage. Freedom of religion in Indonesia is guaranteed in the constitution, namely Article 29 paragraph (2) of the 1945 Constitution. which states "The state guarantees the freedom of each resident to embrace their own religion and to worship according to their religion and beliefs." The religions recognized in Indonesia include Islam, Protestant Christianity, Catholic Christianity, Buddhism, Hinduism and Confucianism. They are guaranteed to carry out their respective rituals, one of which is marriage.

The freedom of religion guaranteed by the constitution becomes problematic, especially in the case of marriage when a marriage involves two different religions or in socio-legal terms it is often called an interfaith marriage. Interfaith marriage is an issue that has not been resolved to date. In current practice in Indonesian society, generally the implementation of interfaith marriage processions is carried out by carrying out the marriage with a religious procession each of which is followed by the

prospective husband and wife or in the sense that there are two religious processes carried out or only one religious procession is carried out or what generally occurs is not completely carrying out a religious procession so that it does not comply with Article 2 paragraph (1) of the Marriage Law regarding valid marriages.

In the practice of Indonesian society so far, in dealing with interfaith marriages, husband and wife will submit a request for marriage determination to the district court so that the marriage carried out between different religions is legalized as a marriage. This is done in connection with the legal consequences of the husband and wife's civil law if the marriage is not recognized. by country.

The process of requesting the legalization of an interfaith marriage in the state court is a process so that an interfaith marriage can be recognized by the state as a valid marriage, where the legal loophole for the legalization of interfaith marriages is based on Article 35 Letter a of the Law of the Republic of Indonesia Number 23 of 2006 concerning Administration which specifically explicitly, this article opens the way for the legalization of interfaith marriages through registration which is preceded by ratification from the district court. Confusion and uncertainty about the legality of interfaith marriages makes it difficult for interfaith couples to obtain legal recognition of the validity of their marriages from the state.

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The difficulty of interfaith couples in getting married does not prevent the couple from obtaining legal validity. In practice, there is Supreme Court jurisprudence in Decision Number 1400 K/Pdt/1986. The content of the decision states that husbands and wives of different religions can carry out marriages at the Civil Registry Office. This decision has become jurisprudence and a legal umbrella for the implementation of interfaith marriages, which is often used as a basis for district court judges in granting requests for interfaith marriages.

In practice, individuals who carry out interfaith marriages rely on or take advantage of legal loopholes by applying for legalization of interfaith marriages based on district court decisions so that the marriage becomes legal and can be registered at the local civil registry office, but the hope of validating or legalizing interfaith marriages disappears and creates disparities. law when on June 17 2023, the Supreme Court issued Circular Letter Number 2 of 2023 concerning Instructions for Judges in Adjudicating Applications for Registration of Marriages Between People of Different Religions and Beliefs (hereinafter referred to as SEMA No. 2 of 2023). The main provisions in the circular letter state that requests for registration of interfaith marriages cannot be granted by the court

The purpose of the publication of SEMA No. 2 of 2023 by the Supreme Court to provide legal certainty regarding the legality of interfaith marriages, in the form of a prohibition on judges not granting requests for interfaith marriages. Even though this regulation only applies to judges in district courts, its implications are clearly felt by

society at large. However, a further problem arose, namely regarding the position of SEMA No. 2 of 2023 judicially.

Materially, the rules contained in SEMA conflict with previously existing rules, such as Article 35 Letter a of Law of the Republic of Indonesia Number 23 of 2006 concerning Administration which has been a loophole in legalizing interfaith marriages. In the form of a circular also needs to be reviewed based on the hierarchy of applicable laws and regulations. Apart from judicial review of position, SEMA No. 2 of 2023 also needs to be reviewed based on the perspective of the principle of legal certainty. The principle of legal certainty was chosen because it returns to the three basic values of law, namely certainty, justice and usefulness. If there is an overlap between these three things, then what takes priority is legal certainty

### METHOD

This research uses normative juridical research and the nature of this thesis's research method is descriptive analysis, namely research that describes, examines, explains and analyzes a legal regulation, in this case related to comparison of the law on interfaith marriages based on Article 35 of the Civil Administration Law with SEMA No. 2 of 2023 concerning marriage registration, Source The legal materials used in this research are secondary data which is data obtained from official documents, books or any form of research related to research objects and research results in the form of reports, journals, theses, dissertations and statutory regulations. The data analysis technique used is qualitative data analysis, namely a research procedure that produces analytical descriptive data, namely by collecting materials and data as well as applicable regulations and legislation which are then analyzed using logical legal thinking.

### RESULTS AND DISCUSSION

#### Results

Supreme Court decision registration number 1400 K/Pdt/1986, which in its decision to settle legal cases related to interfaith marriages, it contributed to filling the legal vacuum that arose due to the absence of clear provisions in Law Number 1 of 1974 concerning the issue of interfaith marriages. This decision is used as jurisprudence for judges in resolving the issue of interfaith marriages, thereby providing clarity on the existing legal basis and providing guidelines for the application of the law in court. Because Law Number 1 of 1974 does not have specific provisions regarding interfaith marriages to fill the legal vacuum, the Supreme Court in its decision registration number 1400 K/Pdt/1986, proposed a legal solution that interfaith marriages could be submitted to the Civil Registry Office. The Supreme Court's considerations are based on the consideration that Article 27 of the 1945 Constitution emphasizes the equality of all citizens before the law, including the basic right to carry out marriages even though they have different religious beliefs. In addition, Article 29 of the 1945 Constitution guarantees freedom of religion for every citizen. The Supreme Court considered that the Petitioner had strong enough grounds and was in accordance with the law, so the petition was granted.

This confirms that the institution authorized to process marriage applications for prospective husbands and prospective wives as well as prospective wives who are not Muslim is the Civil Registry Office. Article 2 paragraph (1) of the Marriage

Law states that marriage is regulated as a process that can hinder the implementation of interfaith marriages, bearing in mind that the regulations emphasize that marriages are carried out in accordance with the religious beliefs of each prospective couple. However, currently there are new regulations that regulates the registration of marriages between followers of different religions, according to Law Number 23 of 2006 concerning Population Administration j.o Law Number 24 of 2013 concerning Population Administration. In article 35 letter (a) of the Law, there is an allowance for registering marriages of different religions through the authority of the Population and Civil Registry Service. As explained, the registration of marriages as intended in Article 34 also applies to marriages determined by the court. Article 35 letter (a) of the Administering Law defines a marriage determined by a court as a marriage between individuals of different religions.

This provision specifically regulates the procedure for registering marriages through the court first. This confirms that the Civil Registry Office cannot refuse to register interfaith marriages because there are already provisions governing this matter. However, Article 35 has significant differences from Article 2 paragraph (1) of the Marriage Law, which regulates the legal conditions for marriage. Differences occur in the application of these two regulations in court, which results in uncertainty in legal decisions in resolving cases of this kind

The Supreme Court then provided a solution to the polemic of granting permits for interfaith marriages by issuing Supreme Court Circular Letter No. 2 of 2023 concerning Instructions for Judges in Hearing Cases of Applications for Registration of Marriages Between People of Different Religions and Beliefs (hereinafter referred to as SEMA No. 2 of 2023) on 17 July 2023 by explaining: To provide certainty and unity in the application of the law in adjudicating applications for registration of marriages between people. people of different religions and beliefs, judges must be guided by the following provisions:

1. A valid marriage is a marriage carried out according to the laws of each religion and belief, in accordance with Article 2 paragraph (1) and Article 8 letter f of Law Number 1 of 1974 concerning Marriage
2. The court does not grant requests for registration of marriages between people of different religions and beliefs

After the publication of Supreme Court Circular Letter (SEMA) Number 2 of 2023 which instructed court judges not to grant requests for registration of marriages between people of different religions and beliefs, there were pros and cons in society.

SEMA Number 2 of 2023 is guided by Law Number 1 of 1974 concerning Marriage (Marriage Law) whose norms regulate the complete submission of the validity of a marriage to each religion and belief. This norm is not only stated in Article 2 paragraph 1, but also in Article 8 letter f of the Marriage Law. Article 2 paragraph 1 of the Marriage Law states that marriage is valid if it is carried out according to the laws of each religion and belief. Then in Article 8 letter it is stated that marriage is prohibited between two people who are in a relationship whose religion or other applicable regulations prohibit marriage. These norms are actually very clear and unequivocal that any marriage that is not in accordance with one's religion and beliefs is not permitted in Indonesia. So, according to the Marriage Law, marriages that do not comply with religious and belief laws are not only prohibited from being recorded in state administration, but are also prohibited from being



carried out. However, after the explanation of Article 35 letter a of Law Number 23 of 2006 concerning Population Administration (UU Adminduk), a number of district court judges "talkatively" granted the request for legalization of interfaith marriages. Worse yet, the consideration for granting the marriage is always based on the applicant's administrative needs. The judges easily set aside the Marriage Law which according to legal theory should be the Lex specialist for marriage provisions in Indonesia and apply generally to all citizens. However, even though the Constitutional Court has twice rejected the lawsuit for judicial review of Article 2 paragraph (1) of the Marriage Law, there are still parties who feel dissatisfied and try to hide behind the district court's decision which granted the request for interfaith marriage based on Article 35 letter a Administering Law.

From the perspective of hierarchy and legal force, the Supreme Court Circular Letter (SEMA) has no binding force on judges. This is due to the nature of SEMA which is only a direction or guideline. SEMA is not a regulation that binds judges to comply with it and will not cause any legal consequences for judges who do not implement it. For example, when a judge does not comply with SEMA, no sanctions are given to that judge. This is because SEMA is not included in the category of legal product which is given the authority to impose criminal sanctions, as is the case with the Law (UU) and Regional Regulations (Perda). This principle is also related to the principle of no punishment without representation which emphasizes that the formation of criminal sanctions must be through the approval of the people or representatives in the DPR

In the context of the concept of positive law, the hierarchy of legal regulations in the Supreme Court Circular Letter (SEMA) in Law Number 14 of 1985 concerning the Supreme Court does not provide an explanation of its legal position. However, Article 79 of the Supreme Court Law emphasizes the importance of SEMA in regulating aspects that are not sufficient in the regulations of the Supreme Court Law to ensure the smooth running of the judicial process. Therefore, Article 79 becomes the legal basis for the application of SEMA in resolving a case when there are no relevant provisions in the laws and regulations in force in Indonesia. This function is in line with the concept of regulatory function (*regelende function*) possessed by the Supreme Court (MA), in accordance with the rule making power authority mandated by the Supreme Court. The formation of SEMA was carried out because of a legal vacuum, based on Article 10 of Law Number 48 of 2009 concerning Judicial Power which requires judges not to reject a case solely because there is no law that regulates it. However, even though it has binding legal force, SEMA only applies within the internal court environment and is not universally binding on the public. Therefore, even though it holds significant legal powers, SEMA does not meet the requirements to be considered statutory regulations in accordance with the provisions contained in Law number 12 of 2011 concerning the Establishment of Legislative Regulations.

## **Discussion**

The legal basis for marriage is contained in Article 28 B paragraph (1) of the 1945 Constitution which states "Every person has the right to form a family and continue their offspring through a valid marriage." Based on what has been described in the Preamble to the 1945 Constitution Article 28 B paragraph

(1) From the 1945 Constitution, it can be seen that the goals and ideals of the Indonesian state are to advance the welfare of its people by giving each of its people

the right to maintain their life, which means having the right to continue their offspring, and every person has the right to form a family and This is a human right that cannot be reduced Article 2 paragraph (1) of Law No. 1 of 1974 concerning Marriage regarding the conditions for the validity of a marriage which states that "Marriage is valid, if it is carried out according to the laws of each respective religion and belief" Apart from Law No. 1 1974 concerning Marriage, the legal basis for marriage is also contained in Articles 2 to 10 of the Compilation of Islamic Law. Article 2 of the Compilation of Islamic Law states that marriage according to Islamic law is a marriage, namely a very strong contract or mitsaqon gholidhan to obey Allah's commands and carrying them out is worship.

**Definition of Marriage According to Customary Law** Marriage is one of the most important events in the lives of traditional communities, because marriage not only concerns the bride and groom, but also the parents of both parties, their siblings, and even their respective families. In customary law, marriage is not only an important event for those who are still alive. But marriage is also a very meaningful event and one that is fully attended and attended by the spirits of the ancestors of both parties. A valid marriage according to Law No. 1 of 1974 and the Compilation of Islamic Law is a marriage whose implementation is in accordance with the laws of their respective religions, which means in Islam it is one that fulfills all the pillars and conditions of marriage. Then the purpose of marriage itself is to form a household that is sakidah (calm/serene), Mawaddah (love/hope), and Rahmah (affection).

With the enactment of Law Number 1 of 1974 concerning marriage (hereinafter referred to as UUP), fundamental changes occurred to the codification of western civil law. Because the UUP states: the marriage provisions regulated in Burgerlijk Wetboek no longer apply. This statement has an impact on book 1 Burgerlijk Wetboek, where some of the provisions in the articles of book 1 Burgerlijk Wetboek which regulate marriage are declared revoked and no longer apply. This will then be followed up in various implementing regulations. This means that the UUP will function as an "umbrella" and "main source" for the legal regulation of marriage, divorce and reconciliation that applies to all citizens in Indonesia.

For Indonesian citizens who are Muslim, marriage must comply with the provisions of sharia law, meaning that apart from fulfilling the requirements of the law, it must also fulfill the requirements of Islamic religious provisions. In this case, the status of the Indonesian Representative as an extraterritorial territory of Indonesia in a country implies that the law of the Republic of Indonesia, whose administrative affairs are resolved by the consular department Djoko Basuki stated that for a marriage to be valid, 2 (two) conditions are required, namely formal requirements and material requirements. The formal requirements are regulated in article 18 AB, namely subject to the law where the marriage takes place (loci celebration). If in a country where the marriage is civil, then the marriage is civil. For material requirements, for example regarding the consent of the bride and groom, parental permission, the marriage age limit for men is 19 (nineteen) years and 16 (sixteen) years, national law, namely civil law (in this case Indonesia) applies. Marriage Law Number 1 of 1974 states that marriages carried out abroad must still fulfill the requirements determined by the Marriage Law.

For administrative purposes, Law Number 1 of 1974 concerning Marriage divides the Indonesian population into residents who are Muslim and residents of religions other than Islam. All citizens who are Muslim, whether from any tribe, from

any group, as long as they comply with the marriage law before the enactment of the marriage law (European, Foreign Eastern, indigenous people) carry out marriages according to Islamic law, then their marriages are registered at the KUA. Meanwhile, residents of religions other than Islam carry out marriages according to the laws of their religion. According to customary law in general in Indonesia, marriage is not only a civil agreement, but also a customary agreement and at the same time a kinship relationship. So the occurrence of a marriage bond not only has consequences for civil relations, such as the rights and obligations of husband and wife, joint property, the position of children, the rights and obligations of parents, but also concerns relationships, customs of inheritance, kinship, kinship and neighborhood as well as regarding traditional and religious ceremonies.

Interfaith Marriage according to the understanding of legal experts and practitioners in Law no. 1 of 1974, in general, three views can be found. First, interfaith marriages cannot be justified and are a violation of UUP Article 2 paragraph (1): Marriage is valid if it is carried out according to the laws of each religion and belief; and Article 8 letter (f): that marriage is prohibited between two people whose relationship is prohibited by their religion or other applicable regulations. So with this article, interfaith marriages are considered invalid and null and void by the marriage executing official. Even though this article states that it is legal according to the laws of each religion and belief, in Islam there is an opinion that allows marriage between different religions. Second, interfaith marriages are permitted, legal and can be carried out because they are included in mixed marriages, as written in Article 57 of the UUP, namely two people who in Indonesia are subject to different laws. According to this second view, the article not only regulates marriage between two people of different nationalities, but also regulates marriage between two people of different religions.

The Marriage Law does not regulate inter-religious marriages. Therefore, if we refer to Article 66 of the Marriage Law which emphasizes that other regulations governing marriage, as long as they have been regulated in this law, are declared to be no longer valid. However, because the Marriage Law does not yet regulate it, the old regulations can be re-enacted, so that the issue of interfaith marriages must be guided by the regulations on mixed marriages. Apart from these three opinions, there are groups who believe that the UUP needs to be refined, considering that there is a legal vacuum regarding interfaith marriages.

On the other hand, the majority of Muslim communities in Indonesia are of the view that the Marriage Law does not need to be refined by including the law on interfaith marriages in the law, because according to them, Law no. 1 of 1974 has regulated the law on interfaith marriages clearly and firmly. This expression is true, because Muslims as the majority population in Indonesia feel they have benefited from Article 2 paragraph (1) The Marriage Law, because this article closes the possibility of having a "secular" marriage, and also closes the possibility of a Muslim woman marrying a non-Muslim man, as well as the marriage of a Muslim man with a Muslim woman, because of this marriage. prohibited (considered invalid) according to Islamic law. In fact, the prohibition on holding interfaith marriages is an important problem for Muslims because of the Dutch legacy of marriage regulations.

The basis of religious law in carrying out marriages is a very important thing in Law No. 1 of 1974 so that determining whether marriage is permitted or not depends on religious provisions. This also means that religious law states that marriage is not

permissible, so it is not permissible according to state law. So, in interfaith marriages, whether it is permissible or not depends on the provisions of the religion. This is in line with the Compilation of Islamic Law which categorizes marriage between religious followers in the chapter on prohibitions on marriage. Article 40 letter (c) states that it is prohibited for a man to marry a woman who is not Muslim. As well as the authority to determine interfaith marriages by the court, Article 35 letter (a), if reviewed, this is contrary to Law Number 1 of 1974 concerning Marriage which does not explicitly prohibit interfaith marriages.

The juridical basis for marriage in Indonesia is contained in Law Number 1 of 1974 concerning marriage and Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. However, Law Number 1 of 1974 does not clearly and concretely regulate interfaith marriages in the sense that there are no phrases that explicitly regulate, legalize or prohibit interfaith marriages. Apart from that, Law No. 1 of 1974 adheres to a system of guiding norms in the laws of each religion and belief. Marriage as a legal act will of course also give rise to complex legal consequences so whether the legal act is valid or not must be considered carefully. In article 2, Law Number 1 of 1974 concerning marriage, the conditions for a valid marriage are stated, namely: Paragraph (1) A marriage is valid if it is carried out according to the laws of each respective religion and belief. Paragraph (2) Every marriage is recorded according to the applicable laws and regulations

### CONCLUSION

The positive legal view in Indonesia regarding interfaith marriages is that the Marriage Law does not regulate the issue of interfaith marriages. So that positive law in Indonesia does not recognize the existence of interfaith marriages, marriages are only considered valid or recognized by the marriage legal regime in Indonesia if they are carried out in accordance with the religious law adhered to as stated in Article 2 of Law No. 1 of 1974 concerning Marriage. However, so far this has not been the case. There are recognized religious laws in Indonesia that accommodate or permit interfaith marriages. The impact that interfaith marriages have on the law in Indonesia is that there is a clash of norms between Law No. 1 of 1974 and the legalization of marriages carried out by the court before the existence of SEMA No. 2 of 2023, which has an impact on individuals carrying out interfaith marriages, children who are born as illegitimate child. The Hierarchy of Legislation in Indonesia If it is related to the Administer Law Article 35 with SEMA Number 2 of 2023, the legal power of SEMA has a lower hierarchy than the law invite. Therefore, it can be concluded that the provisions contained in the Administer Law cannot be changed by SEMA Number 2 of 2023. However, this SEMA still influences the direction for judges not to grant requests for inter-religious marriages

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