



Volume 38 No 1, January 2023
DOI: 10.20473/ydk.v38i1.38099

Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan
Surabaya, 60286 Indonesia, +6231-5023151/5023252
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id

Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)
by <http://e-journal.unair.ac.id/index.php/YDK/index> under a Creative
Commons Attribution 4.0 International license.

FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 10 March 2022; Accepted 6 June 2022; Available Online 30 January 2023.

Interfaith Marriage in Indonesia: a Critique of Court Verdicts

M. Yakub Aiyub Kadir and Fachrian Rizki

Syiah Kuala University

m.yakub.akadir@unsyiah.ac.id

Abstract

This paper investigates the deviation of court decisions legalising interfaith marriage, as against Article 1 and Article 2 Paragraph (1) of Act Number 1 of 1974 concerning Marriage. Such a notion is discussed by the norms of six major religions in Indonesia. This paper utilises the doctrinal approach by analysing norms and their interpretation in practice. Doing so reconfirms the validity of marriage based on the One and Only God in which its performance ought to follow the rule of the respective religion and faith, which invalidates marriages between people of different religions. Interfaith marriage may be considered legal by one religion but unlawful by another. It simply means that the conformity between religious laws will render the status of legality of interfaith marriage. This paper found there is possibility that interfaith marriage may considered legal. Nevertheless, the judge and all concerned parties need to be aware of the laws of the respective religions and beliefs if one prohibits interfaith marriage. Even if the other permits it, the marriage will be considered unlawful by the prohibiting religion.

Keywords: Court Verdicts; Law of Respective Religion and Belief; Interfaith Marriage.

Introduction

Indonesia has different tribes, races and religions with diverse cultures, languages and customs.¹ This diversity has led to legal pluralism and the adoption of a civil law system that applies nationally and recognises the existence of the sharia law system and customary law. The resultant differentiation in marriage regulation in Indonesia² led to the establishment of Act Number 1 of 1974 concerning Marriage (the Marriage Act), which unified the disparate marriage

¹ 'Keragaman Indonesia' (*Indonesia.go.id*, 2018). <<https://www.indonesia.go.id/ragam/budaya/kebudayaan/keragaman-indonesia>> accessed 28 December 2019.

² Muhammad Ashsubli, 'Undang-Undang Perkawinan Dalam Pluralitas Hukum Agama (Judicial Review Pasal Perkawinan Beda Agama)' (2015) 2 Jurnal Cita Hukum.[40841].

provisions in Indonesia.³

Article 1 of the Marriage Act states that ‘marriage is an event that causes legal consequences in the form of the incipient of a bond, physically and mentally, to a man and a woman as a husband and a wife’.⁴ Thus, a concatenation of rights and obligations arises that must be fulfilled by a man and a woman.⁵ The Marriage Act is intended to make a happy and eternal family or household relying on the One and Only God.⁶

Marriage also constitutes a constitutional right in that ‘everyone has the right to create a family and continue the descent through a lawful marriage’, as stated in Article 28B Paragraph (1) of the 1945 Indonesian Constitution (the 1945 Constitution)⁷ in conjunction with Article 10 Paragraph (1) of Act Number 39 of 1999 concerning Human Rights (the Human Rights Act).⁸ Nevertheless, the element ‘through a lawful marriage’ means everyone must ensure their marriage is performed through a lawful marriage to obtain the right to create a family as guaranteed by the State in Article 28B. Furthermore, Article 2 Paragraph (1) of the Marriage Act confirms that the laws of the respective religion and belief in Indonesia determine the legality of a marriage.⁹ Hence, the laws of the respective religion and belief play an important role.¹⁰

According to *Merriam-Webster Dictionary*, the term ‘legality’ can be defined as ‘the state or quality of being in conformity with the law’.¹¹ In other

³ Explanation of Act Number 1 of 1974 concerning Marriage.

⁴ Act Number 1 of 1974 concerning Marriage states ‘Perkawinan adalah ikatan lahir batin antara seorang pria dan seorang wanita sebagai suami istri dengan tujuan membentuk keluarga atau rumah tangga yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa.

⁵ Anggreini Carolina Palandi, ‘Analisa Yuridis Perkawinan Beda Agama Di Indonesia’ (2013) 1 *Lex Privatum*.

⁶ ‘The Act Number 1 of 1974 Concerning Marriage’.

⁷ ‘The 1945 Constitution of the Republic of Indonesia’ provides, ‘Setiap orang berhak membentuk keluarga dan melanjutkan keturunan melalui perkawinan yang sah.

⁸ Act Number 39 of 1999 regarding Human Rights provides, ‘Setiap orang berhak membentuk suatu keluarga dan melanjutkan keturunan melalui perkawinan yang sah’.

⁹ ‘The Act Number 1 of 1974 Concerning Marriage’ (n 7) provides, ‘Marriage is valid if is carried out regarding to the laws of each religion and belief.

¹⁰ Ashsubli (n 3).[290].

¹¹ ‘Legality: Definition of Legality’ (*Merriam-Webster Dictionary*). <<https://www.dictionar.com/browse/legality?s=t>> accessed 23 September 2020.

words, ‘legality’ can be understood as the ‘fact that something is allowed by law’.¹² Regarding the legality of marriage, the marriage is only permitted to take place as long as the marriage conforms with the law. Such a legal norm, particularly in Article 2 Paragraph (1) of the Marriage Act, will bind individuals and command them to obey.

Marriage between people of different religions (interfaith marriage) is difficult to avoid, given that Indonesian society is diverse. The situation will be more complicated if the individuals choose to be married while the different religions stand as a barrier between them. Within the Decisions Directory of the Indonesian Supreme Court, in 2010–2018, forty-nine cases of interfaith marriage were granted by the District Courts throughout Indonesia.¹³

It is strongly believed that anyone who wants to have an interfaith marriage must face the following choices: (i) the marriage is not subject to the national law of Indonesia, or (ii) the marriage is based on the law of one religion.¹⁴ If the first option is taken, the marriage will automatically be performed in another state’s jurisdiction. The marriage will not receive legal protection because it is not registered under Indonesian law. However, if the second option is taken, the spouse must be willing to change their religion and belief, or, in this case, the spouse may seek justice before the District Court of the husband and wife’s domicile.

Many court decisions permitting the spouses to perform interfaith marriage will not solve the issues of interfaith marriage but will make the problem bigger. Such court decisions will form the individuals’ insubordination to the legal norms stipulated under Article 1 and Article 2 Paragraph (1) of the Marriage Act to subject themselves to their respective religious law. Consequently, there will be a certain violation of the legal norms of Article 1 and Article 2 of the Marriage Act and the

¹² ‘Legality Means in the Cambridge English Dictionary’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/legality>> accessed 1 May 2020.

¹³ ‘Direktori Putusan’ (*Direktori Putusan – Mahkamah Agung Republik Indonesia*) <https://putusan3.mahkamahagung.go.id/search.html?q=%22Beda+agama%22&jd=KABUL&obf=TANGGAL_PUTUS&obm=asc&cat=4d88fcc4f35395470bd80f19f776d242> accessed 1 November 2020.

¹⁴ Ashsubli (n 3).[294].

norms of the religious law. In addition, the court decision will be inconsistent with Article 1 and Article 2 Paragraph (1) of the Marriage Act regarding the religious law of the respective spouse.

The performance of interfaith marriage in Indonesia assuredly creates uncertainty about the legal status of the marriage.¹⁵ As mentioned by Palandi, an interfaith marriage may generate its own legal matters for the spouses or their offspring.¹⁶ Palandi explains that the respective rights and obligations of the spouses derive from the legality of their marriage, *inter alia*, the wife's right to receive a living and marital assets.¹⁷ Crucially, a valid marriage will render the legal status of a child born of the marriage as a legitimate child.¹⁸ Otherwise, a child born of an unlawful marriage would only have a civil relation status to their biological mother and her family.¹⁹ All the child's rights to their father will be lost and not recognised by the law.²⁰

Under such circumstances, questions have arisen about the legality of interfaith marriage in Indonesia, especially if a submission is carried out by one to the law of the other religion. Article 2 Paragraph (1) of the Marriage Act expressly states that 'marriage is legal, if conducted according to the laws of each religion and belief'.

This paper adopted a doctrinal approach to describe a body of law and how it applies. The normative legal research (by researching library materials) aimed to study the legislation and regulations relevant to the cases. It describes and explains the application of Article 2 Paragraph (1) of the Marriage Act to interfaith marriage and analyses the legality of interfaith marriage according to Indonesian court decisions and the law.

The qualitative analysis is derived from the data accumulated through library research or documentary data. Analysis of the data will deliver conclusions that answer

¹⁵ Palandi (n 6).[196].

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Explanation of Act Number 1 of 1974 concerning Marriage provides, 'Anak yang sah adalah anak yang dilahirkan dalam atau sebagai akibat perkawinan yang sah.'

¹⁹ *ibid* provides, 'Anak yang dilahirkan di luar perkawinan hanya mempunyai hubungan perdata dengan ibunya dan keluarga ibunya.'

²⁰ Palandi (n 6).[196].

the research problems. Hans Kelsen's pure theory of law, Thomas Aquinas' theory of the hierarchy of laws and Friedman's theory of natural law will be used to answer the research problems. In addition, this research will provide information on interfaith marriage according to Indonesian court decisions and its legality under the law.

Legality of Marriage Under Religious Laws

Knowing how the laws of six major religions and beliefs in Indonesia regulate marriage, particularly interfaith marriage, will help understand and determine the legality of marriage. Therefore, this paper reviews Islamic law, Christian law, Catholic law, Hindu law, Buddhist law and Confucian beliefs to find out how the laws of respective religions and beliefs in Indonesia consider the legality of interfaith marriage.

a. Legality of Marriage under Islamic Law

Two sources of Islamic law form the basis for determining the legality of marriage: (i) the Holy Quran (*Al-Quran Al-Kareem*) and (ii) the 1991 Indonesian Compilation of Islamic Law (KHI). Under the Indonesian legal system, the KHI is a material law that judges of the Religious Court apply in cases brought before them.²¹ The KHI is intended to formulate concretely and systematically the Islamic law in Indonesia. Therefore, the KHI and the Holy Quran (*Al-Quran Al-Kareem*) form the basis of Islamic law.

In relation to the definition of marriage, we apply the definition from Article 2 of the KHI, which states that marriage is a very strong agreement to keep Allah's commandments, and its performance is a worship. Furthermore, as stipulated in Article 3 of the KHI, marriage is intended to actualise a household that is *sakinah* (harmonious, peaceful and prosperous), *mawaddah* (full of love) and *rahmah* (compassionate).²²

²¹ The Explanation of the 1991 Indonesian Compilation of Islamic Law.

²² Nikmat Islam, 'Konsultasi, 'Apa Sih Arti Dan Makna Sakinah, Mawaddah Dan Warahmah?' (*Nikmatislam.com*, 2019) <<https://nikmatislam.com/apa-sih-arti-dan-makna-sakinah-mawaddah-warahmah/>> accessed 1 November 2020.

Regarding the legality of marriage under Islamic law, Article 4 of the KHI clearly states that marriage is lawful if it is taken place according to Islamic law. This norm is in accordance with the legal norm stipulated in Article 2 Section (1) of the Marriage Act, which affirms that marriage is lawful when performed based on the laws of the respective religion and belief. Thus, the KHI expressly prohibits interfaith marriage between a Muslim man and a non-Muslim woman²³ or vice versa.²⁴ The rules set forth in the KHI are in accordance with Allah's commandment as mentioned in the Holy Quran Surah *Al-Baqarah* 2:221.²⁵

In connection, Article 14 of the KHI has specified conditions to be fulfilled to achieve the legal status according to Islamic law, whereby there should be: (i) a prospective husband, (ii) a prospective wife, (iii) a marriage guardian, (iv) two witnesses and (v) *ijab* and *kabul*. By fulfilling these conditions, the marriage automatically will be considered lawful under Islamic law. Furthermore, according to Article 99 of the KHI, the children born of an unlawful marriage will be regarded as illegitimate;²⁶ they will only have a civil relationship with their biological mother and her family. Accordingly, the illegitimate children will not have a civil relationship with their biological father nor be his heirs.²⁷

On this basis, we can conclude that Islam does not recognise interfaith marriage. Such practice is prohibited and considered unlawful because the marriage is not subject to Islamic law. In other words, if a Muslim man is married to a non-Muslim woman or vice versa, their marriage automatically will not be recognised under Islamic law. Consequently, the marriage will be unlawful because it is not performed under Islamic law.

²³ The 1991 Indonesian Compilation of Islamic Law provides, 'Its Prohibited to to perpetuate marriage between men and women due to certain circumstances:

- a. because the women still married to someone else
- b. women in iddah
- c. women ain't muslim'

²⁴ *ibid.* provides, 'A muslim women is prohibited from marrying a men who is not muslim.

²⁵ Ashsubli (n 3).[296].

²⁶ The 1991 Indonesian Compilation of Islamic Law 'Anak yang lahir di luar perkawinan hanya mempunyai hubungan nasab dengan ibunya dan keluarga ibunya'.

²⁷ Palandi (n 6).[196].

b. Legality of Marriage under Christian Law

According to the testimony of the Association of Churches in Indonesia (PGI) representative found in Constitutional Court Decision No 68/PUU-XII/2014, Christianity views marriage as having a social nature and a nature of holiness. Thus, marriage is a physical and spiritual consortium between a man and a woman to form a family to achieve happiness.

In principle, every Christian is obliged to glorify God with their body. In 1 Corinthians 6:19-20 of the Holy Bible, it is stated, 'Or do you not know that your body is the temple of the Holy Spirit who is in you, whom you have from God, and you are not your own? For you were bought at a price. Therefore, glorify God with your body'.

Thus, every deed performed by Christians must glorify God and avoid things prohibited by God. Glorifying God can be done by performing worship as it should be. In this case, marriage is considered a worship in Christianity because it has the nature of holiness.²⁸ Therefore, Joshua 24:15 becomes the basis of the necessity to worship the same God: 'If you have no desire to worship the Lord, choose today whom you will worship, whether it be the Gods whom your ancestors worshipped beyond the Euphrates, or the Gods of the Amorites in whose land you are living. But I and my family will worship the Lord!'

There are different views among the Christian churches as to interfaith marriage. Some Christian churches prohibit such practice, and some allow it. The Christian churches that prohibit interfaith marriage base their view on 2 Corinthians 6:14, which provides, 'Do not become partners with those who do not believe, for what partnership is there between righteousness and lawlessness, or what fellowship does light have with darkness?'. This verse from the Holy Bible provides the basis for several Christian churches prohibiting interfaith marriage. So, if it is discovered that a member of a Church's congregation, which prohibits the practice, enters into an interfaith marriage, the Church may remove the member as a punishment.²⁹

²⁸ Ashsubli (n 3).[297].

²⁹ Constitutional Court Decision No 68/PUU-XII/2014.

Meanwhile, other Christian churches permit interfaith marriages if the following steps are taken: (i) recommending the spouses carry out a civil marriage while maintaining their respective religions and beliefs and (ii) giving a special grazing to the spouses. The latter means the concerned Church will not bless their marriage. However, some Christian churches will bless the marriage on the condition that the spouse who is not Christian is willing to follow Christian law; it is mentioned that following Christian law does not mean the non-Christian spouse automatically becomes a Christian.³⁰

According to the testimony of the PGI representative, found in Constitutional Court Decision No 68/PUU-XII/2014, Christianity prohibits interfaith marriage, as mentioned in the Holy Bible. However, some Christian churches argue that interfaith marriage is acceptable. This circumstance, we believe, leads to the enhancement of the cases of interfaith marriage held in various Christian churches in which the performance is based on Christian law, not the religious laws of the respective spouse. At the time of such obedience, we strongly believe there will be a certain violation of one's religious law. For instance, in Islam, it is stated that a Muslim man is forbidden to marry a non-Muslim woman³¹ and vice versa.³² So, if a Muslim man marries a non-Muslim woman or vice versa, the Muslim spouse has expressly opposed and set aside the law of their religion. Consequently, there will be a contradiction of one's deed to Article 2 Section (1) of the Marriage Act.

c. Legality of Marriage under Catholic Law

In principle, the marriage provision of Catholic law and Christian law is similar. Fundamentally, the Holy Bible guides these two religions. However, Catholicism adheres to the 1983 Code of Canon Law, which is a source of Catholic law worldwide. The 1983 Code of Canon Law is the Catholic Church's interpretation

³⁰ *ibid.*

³¹ The 1991 Indonesian Compilation of Islamic Law provides, 'Its Prohibited to to perpetuate marriage between men and women due to certain circumstances:

- a. because the women still married to someone else
- b. women in iddah
- c. women ain't muslim.'

³² *ibid.* 'A muslim women is prohibited from marrying a men who is not muslim'.

of the Holy Bible, which they believe is a more modern impression.³³ In Christianity, the Holy Bible is the only source of Christian law, including marriage. Nevertheless, Christian churches have various interpretations of the Holy Bible, which leads to different ways of governing marriage, particularly its procedures.

Catholic law considers marriage an agreement between a man and a woman to form a whole life partnership intended for the welfare of the spouses and the birth and education of children, as raised by God for the dignity of those baptised.³⁴ Such a principle can be found in Can. 1055 Section 1 of the 1983 Code of Canon Law, which expresses that:

The matrimonial covenant – by which a man and a woman established between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring – has been raised by Christ the Lord to the dignity of a sacrament between the baptised. When looking at the teaching of Catholicism, a legal marriage between two persons who have been baptised is a sacrament or a sign and means of salvation of God.³⁵ Thus, a marriage will only be considered legal if the two persons are baptised or accepted to the Catholic Church. Therefore, if one person has been baptised and the other has not, the marriage will be considered unlawful. Can. 1086 Section A states that ‘A marriage between two persons, one of whom has been baptised in the Catholic Church or receive into it and has not defected from it by a formal act and the other whom is not baptised, is invalid’.

Even so, Catholic law provides an exception to performing a marriage between people of different religions, as referenced in Can. 1086 Section 2 in conjunction with Can. 1125 and Can. 1126. Can. 1086 Section 2 mentions that ‘A person is not to be dispensed from this impediment unless the conditions mentioned in can.

³³ ‘Pernikahan Campur Beda Agama (Dalam Pandangan Katolik)’. Paroki Cilandak – Keuskupan Agung Jakarta’ (*Gereja Katolik Santo Stefanus*) <<http://www.st-stefanus.or.id/berita/detail/pernikahan-campur--beda--agama-dalam-pandangan-katolik>> accessed 1 November 2020.

³⁴ *ibid.*

³⁵ ‘Paroki Blok B – Keuskupan Agung Jakarta. ‘Perkawinan Katolik: Hakekat Dan Tujuannya’ (*Paroki-blokb.org*) <http://paroki-blokb.org/index.php?option=com_content> accessed 26 October 2020.

1125 and 1126 have been fulfilled.’ Moreover, Can. 1125 mentions that: The local ordinary can grant a permission of this kind if there is a just and reasonable cause. He is not to grant it unless the following conditions have been fulfilled:

- 1) The Catholic party is to declare that he or she is prepared to remove dangers of defecting from the faith and is to make a sincere promise to do all in his or her power so that all offspring are baptised and brought up in the Catholic Church;
- 2) The other party is to be informed at an appropriate time on the promises which the Catholic party is to make, in such a way that it is certain that he or she is truly aware of the promise and obligation of the Catholic party;
- 3) Both parties are to be instructed on the purposes and essential properties of marriage which neither of the contracting parties is to exclude.

Can. 1126 mentions that: ‘It is for the conference of bishops to establish the method in which these declarations and promises, which are always required, must be made and to define the manner in which they are to be established in the external forum and the non-Catholic party informed about them’.

Based on these provisions of the 1983 Code of Canon Law, we can conclude that marriage in Catholicism is a sacrament. All Catholics willing to have a marriage must be baptised or accepted to the Catholic Church. Otherwise, if the marriage has taken place, but one of the spouses is not baptised yet, the marriage is considered invalid. In contrast to Christian law, which has different views on interfaith marriage, Catholic law expressly provides an exception for the performance of interfaith marriage. The requirements are difficult for both parties to meet. A Catholic spouse should make a sincere promise, which must be relayed to the non-Catholic spouse, that they will, with all their power, ensure that their offspring are baptised and brought up in the Catholic Church.

d. Legality of Marriage under Hindu Law, Buddhist Law and Confucian Belief

The laws of each religion and belief governing marriage differ and have their specificity. In Hinduism, Buddhism and Confucianism, for instance, the marriage provision can be found in the scriptures of the concerned religions and beliefs. However, due to the difficulties in seeking the scriptures of the religions and

beliefs translated into Bahasa Indonesia or English, or any other written laws of the religions concerned, we refer to the testimony of the PGI representative as stipulated in Constitutional Court Decision No 68/PUU-XII/2014 to deliver the view of the concerned religions and beliefs on the practice of interfaith marriage.

Of the three religions discussed in this subsection, Hinduism is the only one that provides written religious law to describe the practice of interfaith marriage. The concerned written religious law – known as the Conclusion of Mahasabha XI of the Hindu Dharma Council of Indonesia No IV/TAP/MAHASABHAXI/2016 regarding Recommendation on Religious Field of Mahasabha XI of the Hindu Dharma Council of Indonesia (the Conclusion of Mahasabha XI) – deliberates on the compatibility of the present social facts to the teaching of Hinduism. Based on the Conclusion of Mahasabha XI, a marriage is considered lawful because the marriage has followed the *vivaha samskara* (Hinduism sacred matrimonial ceremony led by a monk). This sacred, matrimonial ceremony may only be performed if the spouses have met the conditions under Hindu religious law (*Vedas*) and State law (the Marriage Act). Otherwise, if the marriage has taken place but not pursuant to the conditions mentioned under Hindu law and the Marriage Act, the marriage will be considered unlawful. The spouses need to meet the following conditions:³⁶

- 1) The spouses have met the minimum age of marriage at 19 (nineteen) years old;³⁷
- 2) The spouses are qualified physically and mentally;
- 3) The spouses respectively agreed upon marriage;
- 4) Parental consent to the marriage;
- 5) The way of obtaining a bride has been appropriate to the Hindu teachings;
- 6) The spouses adhere to the same religion and belief;
- 7) The spouses have met the administrative conditions as governed by the State, in this regard the Marriage Act.

Meanwhile, according to Buddhist law, as stipulated in Constitutional Court Decision No 68/PUU-XII/2014, marriage is defined as a ‘sacred bond that must

³⁶ The Conclusion of Mahasabha XI of the Hindu Dharma Council of Indonesia No IV/TAP/MAHASABHAXI/2016 regarding Recommendation on Religious Field of Mahasabha XI of the Hindu Dharma Council of Indonesia.

³⁷ Act Number 16 of 2019 concerning the Amendment to Act Number 1 of 1974 concerning Marriage provides, ‘Marriage is only permitted if the man and women have reached the age of 19 (nineteen) years old’.

be lived lovingly and affectionately as Buddha taught'. Moreover, marriage is 'an inner and outer bond between a man and a woman, who live forever to collectively accomplish *Dharma Vinaya*, *id est* the Buddha's own name for the religion he founded,³⁸ to gain happiness in the present life and the future life'.

According to Sangha Agung Indonesia, interfaith marriage is permitted in the teaching of Buddhism. Buddhists and adherents of other religions can marry as long as the marriage is performed based on the procedures stipulated in Buddhism. In this regard, the non-Buddhist party is not obliged to change their religion; even so, in practice, both parties are obliged to pronounce 'in the name of the Buddha' and '*Dharma* and *Sangka*', which are gods of the Buddhists.³⁹

At the same time, Constitutional Court Decision No 68/PUU-XII/2014 specified that marriage, according to Confucian teaching, is an 'inner and outer bond between a man and a woman with the aim to form a happy household and to carry on offspring according to the One and Only God'. According to Confucian beliefs, no specific rules permit or prohibit interfaith marriage; however, Confucian beliefs constantly stipulate the conditions to be fulfilled to gain the legal status of a marriage. The legality of a marriage will be obtained as long as the parties have fulfilled the following conditions:⁴⁰ (i) performed by an adult male and female, (ii) no element of coercion, (iii) on the basis of the will of both parties, (iv) obtaining permission from parents of both parties, (v) being confirmed in a religious ceremony, in which such religious ceremony will not oblige the non-Confucian party to change their religion and belief.

Based on the descriptions above, we can conclude there are different views governing marriage, particularly interfaith marriage, among Indonesia's six major religions and beliefs. Islam and Hinduism expressly prohibit interfaith marriage. Conversely, Christianity and Catholicism prohibit interfaith marriage

³⁸ 'Talks, Writings & Translation of Thanissaro Bhikkhu, 'Introduction – Dhamma-Vinaya' (*Dhammatalks.org*, 2019) <<https://www.dhammatalks.org/vinaya/bmc/Section0006.html>> accessed 1 November 2020.

³⁹ Constitutional Court Decision No 68/PUU-XII/2014.

⁴⁰ *ibid.*

but provide exceptions. However, Buddhism and Confucianism explicitly permit interfaith marriage.

Article 2 Section (1) of the Marriage Act specifies that a marriage is legal if conducted according to the laws of the respective religion and belief. Therefore, if it is connected to the laws of each religion and belief, we can conclude that as long as the religious laws of the man and woman do not expressly prohibit interfaith marriage, such marriage can be performed and later categorised as lawful. Nonetheless, if only one of the religious laws of the man and woman permit interfaith marriage while the other prohibits it, such marriage should be prevented because it will be considered unlawful by the prohibiting religion.

For example, a Muslim man and a Catholic women are willing to marry even though they adhere to different religions that are dissimilar in governing marriage, particularly interfaith marriage. According to the religious law of the man, which is Islam, interfaith marriage is prohibited. If the parties insist on performing the interfaith marriage, under Islamic law, the marriage will be considered unlawful. According to the religious law of the woman, which is Catholic, the marriage will be deemed legal if the parties fulfil the prescribed conditions.

With such circumstances, at first glance, it appears that interfaith marriage has been confirmed as legal under Catholic law because the exception to perform interfaith marriage has been fulfilled. Nevertheless, according to Islamic law, such marriage is invalid because the performance is not subject to Islamic law. We strongly believe these circumstances will lead to the non-fulfilment of the element ‘based on the laws of each religion and belief’ as stipulated in Article 2 Section (1) of the Marriage Act. To perform a marriage, the parties are obliged to fulfil the prescribed conditions and procedures given by the laws of each religion and belief. Therefore, if the conditions and procedures stipulated by the laws of each religion and belief have been fulfilled, the element ‘based on the laws of each religion and belief’, as stipulated in Article 2 Section (1) of the Marriage Act, will be fulfilled. As a result, the status of legality automatically will be given to the concerned marriage.

As a conclusion to the legality of marriage under religious law, it is necessary to consider Constitutional Court No 68/PUU-XII/2014, whereby the court decision may only determine the administrative validity of a marriage. Conversely, the legality of a marriage surely will be determined by the law of the respective religion and belief.

Fulfilment of the Right to Form a Family

Marriage is a fundamental right of all people; each individual has the right to form a family. Nevertheless, there is a certain limitation in actualising the right to form a family, namely, having a marriage, as stipulated under Article 28B Section (1) of the 1945 Constitution in conjunction with Article 10 Section (1) of the Human Rights Act and Article 2 Section (1) of the Marriage Act. Based on these legislations, we can conclude that: (i) the legality of marriage will be admitted by Indonesian national law as long as the marriage is based on the laws of the respective religion and belief, and (ii) the legality of marriage will be assessed by the laws of the respective religion and belief. Consequently, the right to form a family, for the spouses willing to have an interfaith marriage, will be limited and will not be a lawful marriage.

These legal norms raise questions on the legal certainty of interfaith marriage and generate arguments that the Marriage Act, specifically Article 2 Section (1), violates the right of certainty before a just law, as proscribed under Article 28D Section (1) of the 1945 Constitution.⁴¹

The Republic of Indonesia adheres to the ideology of the One and Only God, as mentioned under the Preamble of the 1945 Constitution,⁴² in conjunction with Article 29 Section (1) of the 1945 Constitution,⁴³ which forms the basis of religious recognition in Indonesia. This ideology later established an inseparable relationship

⁴¹ The 1945 Constitution of the Republic of Indonesia provides, 'everyone has the right to recognition guarantees protection and fair legal certainty and equal treatment before the law'.

⁴² *ibid.*, '... Sovereignty of the people based on belief on the single god, ...'.

⁴³ *ibid* provides, 'The state is based on belief in the one and only god'.

between religions and individual actions, particularly in the matter of marriage. For this reason, marriage is not merely a legal action but also a religious action.

Drawing on a classical theory, Foster once referred to Justice Traynor's consideration that there should not be any kind of prohibition over marriage except for important social objectives and by reasonable means.⁴⁴ It is understood that religion and marriage matters cannot be separated; thus, we argue that one of the reasonable means to prohibit the performance of marriage, in this regard interfaith marriage, is the existence of a circumstance in which the marriage takes place but not in accordance with the religious law of the respective spouses. Furthermore, because the reasonable means to prohibit the performance of marriage exist, we believe the right to form a family might be limited. It can be concluded that the right to form a family may only be obtained if the marriage takes place pursuant to the religious law of each individual (i.e. the marriage conditions and procedures of respective religious laws).⁴⁵

Even though Indonesian legislation guarantees the right to form a family, if deviations over marriage exist, the marriage performance should not be allowed. It seems to be a limitation on the fundamental right of individuals to form a family, but if understood, marriage is not only a civil action but also a religious action. Marriage is a sacred promise whose implementation aims to worship the One and Only God. As specified by the religious laws, the performance of marriage is to fulfil the commandments of God, and its performance is a worship. Therefore, if the worship is not carried out properly or in a wrong way, the meaning of marriage as a worship cannot be fulfilled because its performance does not meet the criteria of a worship as in the laws of the respective religion and belief.

As in the cases previously explained in this chapter, interfaith marriage takes place though religious laws expressly prohibit it. Consequently, marriage may no longer be classified as a worship of the One and Only God because the worship is done pursuant to the procedures of the other religion, not the

⁴⁴ Henry H Foster Jr, 'Marriage: A Basic Civil Right of Man' (1968) 37 Fordham L. Rev.[51].

⁴⁵ Ashsubli (n 3).

laws of the respective religions and beliefs of the spouses. The performance is later allowed and even obtains permission with the permanent legal force of a court decision, whereby such marriage performance will be guaranteed to be registered with the local Residence and Civil Registration Office. This situation is, according to Friedman, an inconsistency of the positive law (i.e. the court decision) to the religious law.⁴⁶ Friedman adds that if there is an inconsistency between the positive law and the religious law, the inconsistent positive law should be invalidated because it is contrary to the higher law (i.e. the religious law).⁴⁷ This theory is in line with the idea that we keep in mind, whereby the inconsistent positive law should be invalidated. However, in this case, the concerned positive laws are court decisions⁴⁸ and cannot be validated because they have permanent legal force.

According to Justice Traynor, there should be no prohibition of marriage except for important social objectives and by reasonable means.⁴⁹ In this regard, we consider that the important social objectives are the ideals of conformity between religious law and the positive law that become a social order. It means that to create a social order,⁵⁰ there must be certainty that the positive law, which governs the marriage's matters, must be in accordance with the laws of each religion and belief. While the reasonable means to limit individuals' right to form a family is the existence of the positive law, in this regard the court decision, which is inconsistent with the religious law.⁵¹ Marriage, which should be the adherents' way to worship the One and Only God, is merely considered a civil action, so it does not matter to be taken place according to other religious laws. We strongly believe that these reasons are strong enough to be the basis for a judge to prohibit interfaith marriage. If interfaith marriage is still allowed and its registration is permitted by the judge,

⁴⁶ MR Zafer, *Jurisprudence: An Outline* (International Law Book Services 1994).[58].

⁴⁷ *ibid.*

⁴⁸ Puput Purwanti, 'Apa Itu Hukum Positif Beserta Sumber Hukumnya' (*Hukamnas.com*, 2018) <<https://hukamnas.com/apa-itu-hukum-positif>> accessed 3 May 2020.

⁴⁹ Foster Jr (n 45).

⁵⁰ *ibid.*

⁵¹ Zafer (n 47).[58].

the judge implicitly has allowed the marriage to be performed unlawfully because it is not pursuant to the laws of each religion and belief.

One method to avoid the inconsistency between positive law and religious law is enriching the judges' understanding of (i) whether the religious laws permit or prohibit interfaith marriage and (ii) the conditions and procedures of marriage according to the laws of the respective religions and beliefs. If religious law prohibits the practice of interfaith marriage, certainly the judges, who are appointed to examine, adjudicate and decide the cases submitted, must reject applications to perform interfaith marriage and register it afterward, if it is found that the religious law of one or both of the parties prohibit such practice. Even though the court decision does not render the status of legality of interfaith marriage, the court decision may render the status of administrative validity of the marriage, which we believe seemed to permit couples of different religions to contravene their respective religious laws.

If the fulfilment of the right to form a family is questioned, we can conclude that the right to form a family will be fulfilled if the parties who are willing to marry are subject to their respective religious laws. Thus, the fulfilment of this right depends on the individuals themselves.⁵² If the individuals are imposing their rights by violating religious law, there will certainly be violations of the religious law. Therefore, if there is restriction over interfaith marriage, the reasons above can be used to fulfil the conditions mentioned by Justice Traynor, namely important social objectives and by reasonable means.⁵³

Conclusion

The laws of the six major religions and belief in Indonesia play an important role in determining the legality of interfaith marriage. Whether the legality of interfaith marriage is awarded or not awarded depends on the laws of the respective religions and beliefs, not on court decisions. Interfaith marriage may be considered

⁵² Foster Jr (n 45).[54].

⁵³ *ibid.*

legal by one religion but unlawful by another. It simply means that the conformity between religious laws will render the status of legality of interfaith marriage.

This paper found there is possibility that interfaith marriage may considered legal. Nevertheless, the judge and all concerned parties need to be aware of the laws of the respective religions and beliefs if one prohibits interfaith marriage. Even if the other permits it, the marriage will be considered unlawful by the prohibiting religion.

The fulfilment of the right to form a family, in practice of court decisions, deemed necessarily to be fulfilled, in which there should be no prohibition over marriage. Nonetheless, with the existence of important social objectives and by reasonable means, the right to form a family might be limited or, in this case, be prohibited. In this regard, the fulfilment of the right to form a family depends on the individuals themselves. We strongly believe that the fulfilment of the right to form a family depends on the individuals themselves so that they may perform marriage as long as such marriage is not prohibited by the laws of their respective religions and beliefs. Hence, it is suggested that individuals who are willing to have a marriage fulfil the conditions and procedures of their respective religions and faiths to obtain the right to form a family.

Bibliography

Ashsubli M, 'Undang-Undang Perkawinan Dalam Pluralitas Hukum Agama (Judicial Review Pasal Perkawinan Beda Agama)' (2015) 2 Jurnal Cita Hukum.

'Direktori Putusan' (*Direktori Putusan – Mahkamah Agung Republik Indonesia*) <https://putusan3.mahkamahagung.go.id/search.html?q=%22Beda+agama%22&jd=KABUL&obf=TANGGAL_PUTUS&obm=asc&cat=4d88fcc4f35395470bd80f19f776d242> accessed 1 November 2020.

Foster Jr HH, 'Marriage: A Basic Civil Right of Man' (1968) 37 Fordham L. Rev.

'Keragaman Indonesia' (*Indonesia.go.id*, 2018) <<https://www.indonesia.go.id/ragam/budaya/kebudayaan/keragaman-indonesia>> accessed 28 December 2019.

‘Legality: Definition of Legality’ (*Merriam-Webster Dictionary*) <<https://www.dictionary.com/browse/legality?s=t>> accessed 23 September 2020.

‘Legality Means in the Cambridge English Dictionary’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/legality>> accessed 1 May 2020.

Nikmat Islam, ‘Konsultasi, ’Apa Sih Arti Dan Makna Sakinah, Mawaddah Dan Warahmah?’ (*Nikmatislam.com*, 2019) <<https://nikmatislam.com/apa-sih-arti-dan-makna-sakinah-mawaddah-warahmah/>> accessed 1 November 2020.

Palandi AC, ‘Analisa Yuridis Perkawinan Beda Agama Di Indonesia’ (2013) 1 *Lex Privatum*.

‘Paroki Blok B – Keuskupan Agung Jakarta. ’Perkawinan Katolik: Hakekat Dan Tujuannya’ (*Paroki-blokb.org*) <http://paroki-blokb.org/index.php?option=com_content> accessed 26 October 2020.

‘Pernikahan Campur Beda Agama (Dalam Pandangan Katolik)’. Paroki Cilandak – Keuskupan Agung Jakarta’ (*Gereja Katolik Santo Stefanus*) <<http://www.st-stefanus.or.id/berita/detail/pernikahan-campur--beda--agama-dalam-pandangan-katolik>> accessed 1 November 2020.

Purwanti P, ‘Apa Itu Hukum Positif Beserta Sumber Hukumnya’ (*Hukamnas.com*, 2018) <<https://hukamnas.com/apa-itu-hukum-positif>> accessed 3 May 2020.

‘Talks, Writings & Translation of Thanissaro Bhikkhu, ’Introduction – Dhamma-Vinaya’ (*Dhammatalks.org*, 2019) <<https://www.dhammatalks.org/vinaya/bmc/Section0006.html>> accessed 1 November 2020.

‘The 1945 Constitution of the Republic of Indonesia’.

‘The Act Number 1 of 1974 Concerning Marriage’

Zafer MR, *Jurisprudence: An Outline* (International Law Book Services 1994).

Act Number 1 of 1974 concerning Marriage states.

Act Number 16 of 2019 concerning the Amendment to Act Number 1 of 1974.

Act Number 39 of 1999 regarding Human Rights.

Constitutional Court Decision No 68/PUU-XII/2014.

Explanation of Act Number 1 of 1974 concerning Marriage.

The 1945 Constitution of the Republic of Indonesia.

The 1991 Indonesian Compilation of Islamic Law.

The Conclusion of Mahasabha XI of the Hindu Dharma Council of Indonesia No IV/TAP/MAHASABHAXI/2016.

The Explanation of the 1991 Indonesian Compilation of Islamic Law.

HOW TO CITE: M. Yakub Aiyub Kadir and Fachrian Rizki, 'Interfaith Marriage in Indonesia: a Critique of Court Verdicts' (2023) 38 *Yuridika*.