

Legal Norm Protection for Inter-Faith Marriage of In Indonesia In The Framework of Legal Pluralism

Kadek Wiwik Indrayanti*

* Faculty of Law, University of Merdeka Malang, East Java, Indonesia

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Abstract- The existence of legal void in marriage law for Indonesian citizens who engage in inter-religion marriages raises legal uncertainty. Meanwhile, perhaps due to the fact that Indonesia has plural society, the number of potential couples who engage to inter-religion marriages increases. The purpose of this study is to formulate the concept of legal norms protection for inter-religion marriages in Indonesia. The material of legal components consists of primary and secondary legal which obtained from literature study. We found that the state should provide a space which is recognized by every citizen to exercise his or her rights including the right to raise a family and the right to have freedom related to religion and belief. The basis of the recognition is that inter-religion marriage is philosophically justified because of human rights and it is legally required to provide legal certainty. Meanwhile, sociologically it is increasing in society. The construction of the concept of legal protection norms that have been formulated for the Indonesian citizens who engage to inter-religion marriages are as follows: Inter-religion marriages is a marriage performed by a man and a woman of Indonesian citizens who have different religions. Prospective couples of inter-religion marriages can apply the establishment of marriage to the District Court. The form of state recognition for the citizens, especially pre-married couple with different religion, must register their marriage to Civil Registrar Office.

Index Terms- Legal protection, inter-religion marriages, and pluralism of law

I. INTRODUCTION AND REVIEWS

The void of legal norms for inter-religion marriages in Indonesian Law No. 1 Year 1974 on Marriage (Law on Marriage) raises legal uncertainty and unfairness for spouses. During this time, several ways have been done by prospective couples to be able to legalize the marriage, namely: a) by performing the marriage abroad, b) the marriage is done according to their respective religious law and belief, c) by applying for marriage to court, and 4) by temporarily submitting to spouse religion, [1]. The last one is the common one.

The right to raise a family and the right of freedom related to religion and belief for every potential couples with different religions is impeded by the provision of Article 2 Paragraph (1) of the Marriage Law which states that "the marriage is valid if it is done according to the law of their respective religions and

beliefs". Meanwhile, the fact is that the number of inter-religion marriages in Indonesian society is increasing. In the special region of Yogyakarta, for example, in 1980, there were at least 15 couples of inter-religion marriages out of 1000 recorded marriages. In 1990, it increased up to 18 couples, [2]. Harmony Family Counseling and Advocacy Program held by the ICRP (Indonesia Conference on Religion and Peace) noted that since 2005-2007, out of a hundred couples wishing to engage inter-religion marriages, sixty of them managed to marry and the number grew in the following year. Since 2004-2012, it has been recorded that the number of inter-religion marriages has reached 1109 couples and it is still counting. Meanwhile, there was also rejection of the petition for determination of the case No. 527/Pdt/P/2009/PN.Bgr dated July 16, 2009 because the judge gives consideration based on only the religious values of one spouse. Furthermore, the Decision of the Constitutional Court through Decision No. 68/PUU-XII /2014, dated June 18, 2015, rejected the Material Test against Article 2 paragraph (1) of Law Number 1 Year 1974 regarding marriage. With the rejection of the request, inter-religion marriage still leaves a problem for the prospective couple.

Another problem is the existence of a conflict of norms between the provisions of Article 35 Number 24 Year 2013 on Civil Registrar with Law Number 39 Year 1999 on Human Rights. In the elucidation of Article 35 of the Law on Civil Registrar, the marriage set by a court is the inter-religion marriages. But, the Civil Registrar Office uses to refuse registering register it. Article 10 paragraph (2) of the Law on Human Rights mentions "... in accordance with the provisions of legislation". The phrase raises the interpretation that the validity of a marriage refers to Article 2 paragraph (1) of Marriage Law. Problem arising with the provisions of Article 2 paragraph (1) of Marriage Law is a philosophical problem that the essence of marriage according to Marriage Law does not provide space for inter-religion marriages. It means that the theoretical problem is legal uncertainty, and the sociological problem is the increase number of potential couples of inter-religion marriages.

Today, it is necessary to understand how the state can give space in the form of recognition of citizens who engage to inter-religion marriages considering that the marriage is a fundamental human right. Based on the problems faced by potential couples of inter-religion marriages, this paper examines: how is the concept of protection of legal norms for inter-religion marriages to ensure legal and justice in the framework of legal pluralism? The purpose of this paper is to offer the concept of protection of

legal norms for inter-religion marriages so that legal certainty is guaranteed.

Studies on inter-religion marriages have been conducted in Indonesia but they are limited to describe the issue of inter-religion marriages. Office of Civil Registry has not provided space for inter-religion marriages. The common way is that, in order for the marriage to be registered, the prospective couple must submit to one of the couple's religions even though most of the time, the office refuses it. Comparisons of marriage laws in various countries by government institutions (National Legal Assessment Bodies) are not comprehensive, [3]. Further study on religions' point of view to inter-religion marriages have only highlighted from a single religion that generally does not agree to the existence of inter-religion marriages. Almost all studies provide illustrations and facts but have not yet offered a comprehensive solution to the treatment for the inter-religion marriages. This is understandable because most community groups refer to the views of religious values in Article 2 paragraph (1) of the Marriage Law. While comparative studies of marriage law in various countries showed a significant development towards the formal recognition of the existence of inter-religion marriages. This study continues in a more concrete

The provision of Article 2 paragraph (1) of Marriage Law does not explicitly prohibit inter-religion marriages. There are 3 opinions regarding the inter-religion marriages in the community: 1) First opinion; It is said that inter-religion marriage is illegitimate as in accordance with Article 2 paragraph (1) and the provisions of Article 8 letter *f* of the Marriage Law, where the respective religion also prohibits the marriage, 2) Second opinion; a religious marriage is legal, and therefore can be done, because the marriage falls into the category of mixed marriage. The emphasis of Article 57 of the Marriage Law on mixed marriages lies in "two persons in Indonesia subject to different laws", and 3) Third opinion; It is stated that the Marriage Law does not regulate inter-religion marriages at all. Based on these opinions, and with reference to Article 66 of the Marriage Law, the old rules may apply. However, the definition of mixed marriages is deemed unenforceable because the Marriage Law already regulates mixed marriages, but in limited area. Consequently, following the entry into force of the Marriage Law under the terms of mixed marriages set forth in Article 57 of the Marriage Law in the presence of various opinions, the implementation of inter-religion marriages is likely to be impeded.

Other impacts arise with various interpretations among the public, especially law enforcement in interpreting the substance of Article 2 paragraph (1) of Marriage Law that the prospective couples who will do the marriage must be in the same religion. The state should be obliged to serve and protect every citizen's interests without discrimination, especially those related to fundamental rights. The right to freedom of religion and belief is regulated in the provision of Article 29 of the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution).

Indonesia is a country with plural society, which includes religion, custom, tribal, and law. The state should present to provide protection and assurance to every citizen without discrimination. The State should guarantee the rights of citizens including the right to marry. It is necessary to establish the

direction by arguing the importance of the state to give recognition to the legal protection so that legal certainty is created.

II. RESEARCH METHODOLOGY

For general legal research such as this research, the method of collecting legal materials has been conducted by literature studies. There are two types of legal materials in this research which are primary and secondary. The primary legal materials were derived from the Laws and judge's decisions, while the secondary legal materials were derived from legal textbooks including theses, legal dissertations, journals, legal dictionaries, and official records or treatises in the development of the Law No. 1 Year 1974 on Marriage and comments on court decisions related to inter-religion marriages. The approach of the study is comparison between law and case studies. The legal theory of pluralism, the principles of human rights, and the theory of legislation are used as the basis for formulating a draft concept of legal protection.

III. RESULT AND DISCUSSION

concept of protection for potential couples who engage inter-religion marriages into a shelter of the rule of law norms in order to create a certainty of law and justice.

The study of legal pluralism is based on critical thinking on the dominant flow of centralist thought and legal positivism in studying the relationship between law and society. Centralism according to [4] is the idea that the concept of law merely includes the notion of the law of state products and applies uniformly to all citizens, [5]. Furthermore, the concept of legal pluralism (legal pluralism) proposed by [4] is basically intended to show the existence and interaction between legal system applicable in society. Thus substantively, legal pluralism is generally defined as a situation in which two or more legal systems work side by side in a similar field of social life, or to explain the existence of two or more social control systems in one area of social life. The multiplicity of marriage law applicable in Indonesia consists of marriage law according to the western civil code, customary law, religious law and beliefs as well as human rights values. It is to provide protection with legal certainty and justice for potential couples of inter-religion marriages. The efforts should be pursued is by understanding the concept of Griffith's legal pluralism, because pluralism occurs not only limited to the aspects of the rule but also to the mechanical mechanism (procedural or procedure) of their own.

Argument that potentially-married couples with different religions need to get protection in the form of legal certainty in the framework of legal pluralism are as follows: Firstly, the nation of Indonesia is a pluralistic nation ranging from religion, customs, tribes, traditions that cannot be denied. Secondly, the state of Indonesia is a state of law (*rechtstaat*). Article 1 paragraph (3) of the State Gazette of the Republic of Indonesia Year 1945 stated explicitly that the state of the Republic of Indonesia is the State of Law. And Thirdly, the perspective of human rights. The recognition and protection of human rights is one of the characteristics of the state of Indonesia as a state of law.

Attributed to a global era that touches all the lives of people in the world, there is no exception to the aspect of marriage. The law of marriage in various countries, both countries that adhere to common law and civil law systems require the validity of marriage that lies solely in the aspects of registration. In Indonesia, the legal requirement of a marriage is done based on the law of each religion and belief. Then, it must be registered. The substance of Article 2 paragraph (1) of Marriage Law is based on the values of Pancasila which is on the principle of Supreme Deity of God and to the Law of Human Rights. It leads to the fact that the validity of a marriage in Indonesia must go through ritual process according to religious law and belief of the prospective couple, and if only recorded, the marriage is still considered as invalid. On the basis of the above law to provide protection, this study provides solutions by considering aspects of legal pluralism in Indonesia, especially pluralism in the field of religion and belief. To respect the values held by each religion and belief, the arrangement of inter-religion marriages should be prioritized on the aspect of recording/registration (Article 2, paragraph (2)). While the religious ritual (legally valid Article 2 paragraph (1) shall be submitted to each prospective spouse. The state's obligation should be limited to the aspect of its registration. The state should recognize inter-religion marriages by requiring the Civil Registry Office to register their marriage. The model of marriage law in Singapore and the Western country, especially Turkey can be used as a consideration to provide solutions for potential couples in Indonesia, in terms of its registration aspect. The marriage model in Turkey is used because of its resemblance to Indonesia since the majority of the population embraces Islam. In Turkey, the marriage of different religions is not a problem because according to the rules; all marriages must be registered, which then continued to the ceremonial process according to the religion.

In establishing the concept of legal norms protection for inter-religion marriages, some fundamental aspects need to be given attention and considerations are as follows: Pancasila as a source of Indonesian law and human rights is the source of law to provide protection for the right to raise family and to freedom of religion for potential couples of inter-religion marriages.

Talking about the right to freedom of religion and belief to mankind is not easy because it is related to the complexity of the values involved in the context of cultural and historical differences. The existence of institutional governance in a given society is inevitable will vary greatly in many respects. But there are certain core values that will be protected and the forms that will appear if freedom of religion or belief is respected.

International protection on freedom of religion has undergone a tremendous historical transformation in the last five centuries. According to [6], international protection to freedom of religion needs to go through three stages and consist of three models, namely: (1) model *cuius regio, eius religio*, [7]; which means that an international peace treaty that determines the separation of territories for people of different religious beliefs, (2) Models of minority protection: international treaties (bilateral or multilateral) that provide protection for minority religions within the territory of the majority ethnic or religious majority dominating power, and (3) Human rights models: international treaties (global or regional) that codify international standards and provide international monitoring of the universal human

rights of religious individuals and communities or a view of life on freedom of religion or belief.

According to [7], from the three models of internationally determined freedom of religion, freedom that is satisfying to today's world is colored by a plurality of religions and worldviews. In other words, only universal human rights on freedom of religion or belief are capable of keeping the freedom of faith and belief. Thus it maintains peace among religions, ethnic groups and nations. It is thereby protecting what is demanded by the respect to human dignity. Therefore, Pancasila emerges as a solution to the disharmony of perception in the frame of freedom of religion in the debate on human rights, both universal and particular (cultural relatives). The disharmony is long and if both views are combined. The debates of both will not end because the used views have different starting points, especially in terms of ideology and socio-culture of different societal systems.

The view of the universality of human rights is based on an individual view (absolute universal ideology), especially the demands of individual freedom (citizens) arising from a liberal system of society. This view understands that as a basic right inherent in human since he was born in the world, freedom of religion has no limits and restrictions by anyone, [8]. While this particular cultural view (cultural relativism) understands that human rights and freedom of religion is absolutely in particular. Freedom of religion in one place cannot be applied elsewhere. Or in other words, there is no freedom of religion that is completely free and applies to every place, condition, and time.

Philosophically, belief in the Almighty is contained in the first principle of Pancasila which is based on the philosophy of the State of Indonesia. Therefore, the first precepts become the philosophical basis for the life of nationality and statehood in terms of state and religious relations. Indonesian legislation does not regulate the faith space of the adherents but organizes the public spaces of citizens in human relationships. Based on the above three paradigms, Indonesia is a country that uses a symbiotic paradigm.

The moral fundamentals in the principle of God Almighty are solid, because they contain the "creed ontology" of the nation, the country, and the Indonesian people. The existence of the country, the nation, and the Indonesian people are related to *Alkhalik* or God which is believed to be the source of all noble-holy-good-fair.

There are four clusters of Indonesian problems that must be managed with the noble spirit of the Godhead (doing everything right, fair, and good) namely: the problem of humanity, nationality, state, and society. Principle on the Almighty serves as the fundamental value/moral. It is not presented as a divine concept according to certain religious and philosophical claims burdened with orthodoxy (exclusive doctrines and beliefs of religion).

Belief in the Almighty is no longer just respectful of their respective religions but also becomes the basis that leads to the path of truth of justice, goodness, honesty, brotherhood and others. Doctrine and dogma are the heart of religion. A religious belief is a very personal matter between a man and the Creator. It is a private space for a person with the Creator he believes in. The belief of each religion is a matter related to the private space. While Almighty, in the context of Pancasila, is a matter related to

public space. It does not refer to any particular religion/belief, instead, it is a joint vessel of persons who praise God. The common space must be governed by laws and authorities of the country where justice and welfare for all citizens are defended and protected. It should not be left to the private roles of a particular religion or belief.

Furthermore, in Second Precept of Pancasila, Indonesia's legal duty is to take care of humanity. It is a doctrine of human quality. That is, human with humanity on the one side and human who are being capable of doing fair and civilized on the other side. In humanity itself, there are implicitly civilization and justice. There is no justice and civilization without awareness of the value of humanity. Likewise, there is no respect for humanity without a commitment of justice and civilization.

Every human being has the right to humanity. The meaning of humanity for Indonesian law carries two implications. First, humanity becomes the guiding norm for the world of law (legislation, judicial, execution, and or substance, structure, and legal culture) because humanity is a moral substance of God. Then, it becomes an ideal benchmark as well as the normative character which always guiding. Any instruments used to regulate human beings, should not deny humanity and human dignity. Commitment and idealism to respect humanity and human dignity are fundamental to law as a dignified order. The second implication is that the law must manage and care for the humanity. This means that the law must help human beings develop according to their nature, uphold their dignity, being fair, guarantee equality and freedom, and develop the interests and welfare of human, [9].

It is supposed to be in the formation of the concept of legal norms protection for potential couples of inter-religion marriages in order to provide legal certainty in Indonesia. Legal protection for inter-religion marriages should be aimed at bringing benefits to potential couples. If there is a change to the Marriage Law, it will be included in one of the articles concerning the aspect of the formality of the registration if the aspect of ritual by the religion and belief in Article 2 (1) temporarily cannot be interpreted differently.

In the right to freedom of religion, there are at least five juridical characters that cover, [10]. First, the right to freedom of religion is the constitutional right of citizens; second; the right to freedom of religion is based on the principle of Godhead of the Almighty; third, the right to freedom of religion is based on the principle of tolerance; fourth, the right to freedom of religion consists of aspects of the internal (internum) forum and aspects of the external (externum) forum; and fifth, the right to freedom of religion has the legal protection to the religion. Assurance to the right to freedom of religion in Indonesia covers the protection of aspects of the internum and externum forum. The aspects can be known from the provisions of Article 28E paragraphs (1) and (2) and the provision of Article 29 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Protection of the internum forum is indicated by the phrase of "embracing religion" in Article 28E paragraph (1), the phrase "believes in faith" in Article 28E paragraph (2), and the phrase "to embrace his religion" in Article 29 paragraph (2). While the protection of the externum forum can be understood from the phrases: "worship according to his religion" in Article 28E paragraph (1), and the phrase "expressing thoughts and attitudes" in Article 28E

paragraph (2), as well as the phrase "worship according to his religion and belief" in Article 29 paragraph (2).

Under the provisions of Article 28I Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the fulfillment of the right to freedom of religion cannot be reduced in any circumstances. The freedom that cannot be reduced under any circumstances is specific to the aspect of the internum forum only. This means that the internum forum is constitutionally guaranteed to be protected by its fulfillment under any circumstances. While the guarantee against externum forums, of course, can be restricted by the state with legislation to maintain public order and the rights of others.

In line with the above statement, [11] said that the internum forum signifies the private territory of an internal right where the state cannot interfere in any way. The embracement of a person to his or her religion and beliefs is not possible to be regulated in legislation, because it is personal matter.

The legal certainty (*Reschtssicherheit*) means that the law must be performed and be enforced, whereby everyone expects to apply the law in the event of a concrete event, [12]. Legal certainty refers to the concept of juridical acts because it meets the procedural requirements to be established as a law. Legal certainty is possible only if the predictability of its application is high. Every legal subject must have belief that if anything happen related to legal norms, then he or she can predict what conclusions or decisions it will be received, [13].

The theory of legal certainty has been applied to inter-religion marriages is the theory of legal certainty by Gustav Rudbruch because of the idea of the ideals of law and the three basic ideas of law that are in accordance with the purpose of law. So in order to fill the legal vacuum for inter-religion marriages, it is needed to construct of the concept of norms in order to create legal certainty characterized by legal protection. That substance is important to raise family and to freedom of religion for potential couples of inter-religion marriages and justice by taking into account the diversity of values that exist in Indonesian society.

The purpose of the formation of the law is no longer to create codification for the norms and values of life that have settled in the community. Instead, the main purpose is to create modifications or changes in community's lives, [14]. The change in the life of the community that gives happiness is the main purpose of legislation to be made, besides to provide security. The establishment of good legislation which is easy to implement in the community is one of the main pillars for a country, as Burkhardt Krems argued and quoted by [15].

The formulation of legislation includes activities related to content, methods of formation, as well as processes and procedures for the establishment of regulations. Such activities shall be carried out so that the product of such law may be applicable, jurisdictionally, politically, and sociologically. Therefore, the establishment of legislation is not merely juridical activity, but an interdisciplinary activity which means that any legislative formulation activities require the help of other sciences so that the resulting legal products can be accepted and receive recognition from the public, [16].

In addition, law makers are required to have holistic thinking constructs based on the ideals of Pancasila. The norms explicitly contained in every article of legislation are actually concrete

values and excavated in the life of a pluralistic Indonesian society, regardless of political interests, power, and party blocks. According to [17], there are several principles in the formation of legislation used as a consideration in drafting the concept of protection for inter-religion marriages, namely: a) Principle of a Clear Purpose, which means that every legislation must function to provide protection in order to create peace of society, b) The principle of humanity, which means that every material of the legislation should reflect the protection and assurance of human rights and the dignity of every citizen and people of Indonesia, and c) The Principle of Justice, which means that every component of the content of legislation should reflect proportional justice for every citizen without exception. In the case of the protection for inter-religion marriages, the state should pay attention to the right to raise family and to freedom of religion. Therefore, the material content of norms of inter-religion marriages should provide the same benefits to prospective couple of inter-religion marriages. Whereas the content of statutory regulations shall not contain any distinction based on the background, including religion, ethnicity, race, class, gender, or social status.

Regarding justice, its concept for the establishment of norms in Indonesia should be translated in relation to Pancasila, which then associated with the interests of the Indonesian nation. Therefore, in relation to the legal arrangement according to Pancasila, the arrangement is done through a law regulation that is nurturing the nation, i.e. protecting people passively by preventing arbitrary and active actions by creating a human society condition which allows the community process to take place fairly. So, in a fair way, every human being has a wide opportunity to develop all of his human potential as a whole. *Pengayoman* (protection) means that the sense of justice that exists in the human conscience in Indonesia must be fulfilled, [18].

IV. CONCLUSIONS

Recognizing the existence of Article 2 paragraph (1) is supremely interpreted that marriage should be performed in one religion. Therefore to provide protection for inter-religion marriages, the concept of protection of legal norms against changes in the Marriage Law needs to be facilitated as follows: a) Inter-religion marriage is philosophically justified because it is based on human rights, b) Inter-religion marriage is juridically required to provide protection for the right to marry or to raise a family and the right to freedom to embrace religion for the couple of inter-religion marriages, and c) Sociologically, the number of inter-religion marriages is increasing in society, which means that there is development of ways of thinking and behavior patterns in view of the value of a marriage. That will bring juridical impact on marriage and the status of his son in the future.

Meanwhile, the construction draft of the concept of norms are: a) Inter-religion marriage is a marriage performed by a man with an Indonesian citizen woman who has a different religion, b) Prospective couples of inter-religion marriages may apply for the establishment of the marriage to the district court, and c) The State recognition to inter-religion marriages is in form of requiring Civil Registry Office to register the marriage of inter-religion marriages couples.

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AUTHOR

First Author – Kadek Wiwik Indrayanti, PhD, Faculty of Law, University of Merdeka Malang, East Java, Indonesia .