The Easta Law and Human Rights
Vol. 01, No. 02, February, pp. 64~71

Legalization of Interfaith Marriage in Indonesia (Between Universalism and Cultural Relativism)

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Article Info

Article history:

Received Feb, 2023
Revised Feb, 2023
Accepted Feb, 2023

Keywords:

Interfaith Marriage
Human Rights
Universalism
Cultural Relativism

ABSTRACT

In the context of positive law in Indonesia, interfaith marriage is not recognized, because according to Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage, it is explained that a valid marriage is based on the laws of each religion and belief. However, this is not enough to accommodate the development of marriage law in Indonesia, such as in the case of Judgement Number 508/Pdt.P/2022/PN JKT.SEL whose gives permission to applicants who are bound by marriage but of different religions to register their marriage at South Jakarta Department Population and Civil Registration Agency. So, based on this, this research aims to find out how the concept of universalism and cultural relativism is in the context of interfaith marriage and how is the legalization of interfaith marriage in Indonesia in the context of marriage as one of the non-derogable human rights. This research uses legal research methods. So that the results of this research found that, first, interfaith marriages in Indonesia still do not have clear and firm regulations, giving rise to legal uncertainty and legal vacuum, the principle of universalism is more relevant in the context of interfaith marriages in Indonesia than the cultural relativism concept. Second, the state can issue an Interfaith Marriage Book as a form of legalizing interfaith marriages in Indonesia and providing legal certainty.

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1. INTRODUCTION

Marriage is one of the human rights guaranteed in the Indonesian Constitution, the 1945 Constitution of the Republic of Indonesia. It is clearly stated in Article 28B paragraph (1), that everyone has the right to form a family and continue offspring through marriage that legitimate. This right is also closely intertwined with other human rights which culminate in the right to life, closely intersecting with the right to religion, the right to education and the right to express opinions [1].

Referring to Article 28B paragraph (1) there is the diction "legal marriage", according to Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage explains that marriage will be valid if it is carried out according to the laws in the respective religions and public trust, so that in the context of cultural relativism in Indonesia [2], the right to marriage depends on the laws of each religion, as is the positive law in

Indonesia[3]. However, as often happens in legal developments, das sein and das sollen always go hand in hand. Social reality is definitely ahead of applicable law[4]. The law seems to be left behind by existing social developments. In the context of marriage law in Indonesia, the legal facts that occur, there are so many interfaith marriages that occur, which in the legal context in Indonesia this is not regulated or prohibited[5]. The non-regulation related to interfaith marriages in Indonesia has made some people who marry within different religions carry out their marriages abroad[6].

Prior to the enactment of Law Number 1 of 1974, Indonesia recognized interfaith marriages, including mixed marriages which were regulated in the *Regeling op de gemengde Huwelijk* stbl. 1898 Number 158 (GHR), in its Article 1 explains that mixed marriages are marriages between people in Indonesia who are subject to different laws. Difference here includes differences in law in religion[7]. After the enactment of Law Number 1 of 1974, mixed marriages are no longer valid in Indonesia. Article 57 of the Marriage Law which regulates mixed marriages only because of differences in nationality, does not include differences in religion[8]. So that the Marriage Law as time goes by cannot accommodate the development of the times with the many interfaith marriages occurring[9]. So that there is a conflict with the fulfillment of human rights in Indonesia which guarantees the right to freedom of religion and marriage. So, it can be understood that the legal issues that occur are legal vacuum. Law Number 1 of 1974 underwent changes with Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, but not too significant, there was only one article change and one additional article.

The Marriage Law has undergone several Judicial Reviews at the Constitutional Court relating to interfaith marriages, namely through Judgement Number 68/PUU-XII/2014 concerning Review of Law Number 1 of 1974 concerning Marriage against the Constitution of the Republic of Indonesia of 1945, the principal of which was the verdict, stated that it rejected the petition of the petitioners in its entirety; and the second, namely on Judgement Number 24/PUU-XX/2022 concerning Review of Law Number 1 of 1974 concerning Marriage (Marriage Law) as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage against the 1945 Constitution of the Republic of Indonesia whose ruling is the same as the previous adjudication. This adjudication further strengthens that interfaith marriage is not in accordance with the constitution and is implicitly prohibited[10], Although in positive law, namely the Marriage Law, it does not explicitly and clearly regulate interfaith or interfaith marriages[11].

The development of marriage law in Indonesia can be seen from Judgment Number 508/Pdt.P/2022/PN JKT.SEL whose granted permission to applicant I, namely Devina Renata Sianipar who is a Christian and applicant II, namely Jaka Nugraha who is Muslim, to register their marriage at the South Jakarta Department Population and Civil Registration Agency and ordered the South Jakarta Department Population and Civil Registration Agency to register the interfaith marriages of the Petitioners on the Marriage Registration Register used for this purpose and immediately issue the Marriage Certificate. In positive law, of course this is against the Marriage Law, but this decision can be a solution related to problems in marriage law in Indonesia. The legal problems that often occur in the context of interfaith marriages are because they are not recognized by the state because they do not meet the formal administrative requirements related to the legal requirements of a marriage, so that there is no legal certainty and what happens is a legal vacuum[12].

In human rights, there are 2 (two) principles that intersect with each other related to the enforceability of human rights, namely universalism and cultural relativism. Universalism explains that human rights are rights that are inherent in humans from birth, so that they are recognized and applied in all parts of the world. However, cultural relativism explains that human rights have

their own diversity depending on the traditions, culture, religion and social of each country, so that human rights according to universalism cannot always be enforced in several countries[13].

However, if we look at it in the context of state responsibility and the generation of human rights, the right to marriage is included in the International Covenant on Civil and Political Rights which Indonesia has ratified by Law No. 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights. This is contained in Article 23 paragraph (2) and (3) which states that the right to marriage must be recognized by the state and with the free and full consent of the parties wishing to marry. The ICCPR is a first generation right that requires states to act passively negatively[14], meaning that the state only needs to not interfere with the privacy rights of the people, so that in the context of state responsibility, the government has fulfilled its obligations[15].

So based on the explanation of this background, the purpose of this research is to find out how the concept of universalism and cultural relativism is in the context of interfaith marriage and how is the legalization of interfaith marriage in Indonesia in the context of marriage as one of the non-derogable human rights.

2. LITERATURE REVIEW

2.1 Right to Marriage

One of the human rights guaranteed by the constitution in Indonesia is the right to marry as stipulated in Article 28B paragraph (1) with the diction "legal marriage" which when referring to Article 2 paragraph (1) of Law Number 1 of 1974 regarding marriage, a legal marriage is a marriage that is carried out according to the laws of each religion or belief in society, so that in the context of Indonesian law it does not recognize interfaith marriages.

In essence, marriage is one of human rights and is the prerogative of an adult couple and the state is obliged to protect, record and issue a marriage certificate.[16], because the limits of the state's authority should only go up to that stage, because the state's duty is to guarantee human rights, not to limit human rights especially in the context of the right to marry including the first generation of human rights, the state is required to be negatively passive, especially in the context of social dynamics with the multicultural and heterogeneous society in Indonesia demands that the state and law can go hand in hand with social development[17].

2.2 Universalism

One of the principles of human rights is universalism, which means that humans have basic rights that are inherent from birth into the world because of gifts from God Almighty, so that there is no reason whatsoever and by anyone these human rights are violated, limited, or reduced, even by the state though. In this context, there are two types of human rights, namely non-derogable rights (cannot be reduced) and derogable rights (can be reduced)[18].

The principle of universalism also states that all people, in all parts of the world, regardless of their religion, nationality, language, ethnicity, regardless of their political and anthropological identity and regardless of their disorder status, have the same and equal rights with humans. This is confirmed through Article 5 of the Vienna Declaration on the Program of Action, explaining that all human rights are universal, indivisible, interdependent and interrelated[15]. In the context of the right to marriage is a non-derogable right because it is closely related to the right to live and continue offspring, so it is a right that cannot be reduced, hindered or prohibited by anyone[14].

2.3 Cultural Relativism

The principle that is contrary to universalism, namely the principle of cultural relativism. This starts from the basis of traditionalist groups who reject human rights because they are afraid that

these rights will undermine their cultural practices. The collectivist left argues that individual human rights are too centred on individual rights at the expense of their societies and cultures in the Third World. So that the principle of cultural relativism is used by many communitarian groups to defend their ideal way of life against the threats of individualism and alienation that are considered contained in liberal human rights[2].

The principle of cultural relativism says that local cultural traditions (local and regional) in the fields of religion, politics, economics, and law determine the presence and scope of civil and political rights that individuals have in each society. Ethical and moral standards vary according to place and time. This cultural background is one of the indicators that determines the amount of attention given to human rights. Even Rhoda E. Howard said that the principle of cultural relativism as an ideological tool to guarantee the interests of certain groups that have just emerged and are very powerful. In a different point of view, Donelly argues that cultural relativism is an important source of validity of a moral truth or moral rule, so that it can be a means of filtering the excesses of universalism that might occur[19].

3. METHODS

The method in this research uses the method legal research (legal research), which is analyzing a legal issue by looking at literature studies or seeing how normative or positive law applies. The approach method used is the statute approach, which is the approach used to study and analyze related laws and regulations, and the conceptual approach, which is moving from the views and doctrines that developed in the science of law[20].

4. RESULTS AND DISCUSSION

4.1. Universalism and Cultural Relativism in Interfaith Marriage in Indonesia

Interfaith marriage is a phenomenon or social development that cannot be denied[21], so that it is not only about the phenomenon of different nationality marriages[22], because these two things seem to overlap, because cross-country couples are usually interfaith couples or marriages of different beliefs between the two parties[23]. In the context of positive law in Indonesia there is still no regulation, so there is a legal vacuum and legal uncertainty, because as we know, positive law in Indonesia does not regulate and does not recognize interfaith marriage, because according to Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage explains that a valid marriage is according to religious laws and beliefs that exist in society. The heterogeneity of ethnicity, nation and culture in Indonesia is one of the causes of social development related to this interfaith marriage[24].

History before the existence of the Marriage Law, Indonesia recognized interfaith marriages, namely mixed marriages regulated in Article 1 *Regeling op de gemengde Huwelijk* stbl. 1898 Number 158 (GHR). In GHR, if two people of different religions wish to enter a marriage, the Civil Registry Office will register the marriage. This confirms that in the legal context in Indonesia prior to the existence of the Marriage Law, mixed marriages were not considered due to differences in citizenship, position, domicile, or religion, but were only seen as due to differences in legal order as a juridical consequence of class division[25]. However, since the promulgation of Article 57 of the Marriage Law, mixed marriages are only in the context of differences in nationality[26].

As a case study, Judgement Number 508/Pdt.P/2022/PN JKT.SEL is one of the concrete proofs that social developments or social phenomena related to interfaith marriages must be considered deeper and more seriously by the state in this context the government and the legislature as executor and forming institution of laws and regulations as a state responsibility to ensure to fulfill, to protect and to respect human rights, as we know that the right to marry is wrong one of the first generation human

rights that is regulated in the ICCPR, and the role of the state in the first generation of human rights is passive negative, meaning that the state in carrying out its obligations by not interfering with the community or citizens in exercising their human rights.

The principal of the ruling from Judgement Number 508/Pdt.P/2022/PN JKT.SEL is to grant permission to applicant I, namely Devina Renata Sianipar who is Christian and applicant II, namely Jaka Nugraha who is Muslim, to register their marriage at the South Jakarta Department Population and Civil Registration Agency and ordered the South Jakarta Department Population and Civil Registration Agency to register the Petitioners' interfaith marriages at the Marriage Registration Register used for this purpose and immediately issue the Marriage Certificate. This is certainly a change in law in the context of legal discovery in Indonesia, so that a progressive law is created, it can be seen from the decision that there is a will or desire to be progressive so that law in Indonesia can respond to developments or social phenomena in this context interfaith marriage in Indonesia[27].

Legal consequences of the absence of arrangements related to interfaith marriages and the existence of a Constitutional Court Judgement confirming that this causes legal uncertainty and a legal vacuum for people whose marriages are based on religious differences, because when people want to register their marriage so that it is recognized by the state it becomes hampered because one of the formal requirements for administrative registration of the marriage are closely related to the legal requirements for a marriage according to Article 2 paragraph (1) of the Marriage Law. Communities who carry out interfaith marriages have taken various ways to obtain legal certainty from the state, such as requesting a determination from the court, temporary religious conversion, carrying out marriages abroad and/or carrying out a marriage contract twice, namely first according to the candidate's religious law. husband and the second according to the religious law of the prospective wife [28]. This is certainly detrimental to the human rights of citizens to obtain legal certainty for those who want to exercise their rights, namely, to marry, without being limited by ethnicity, nation, culture, citizenship, or religion, because it returns to the private affairs of each human being and the state. not entitled to limit it[29].

As we know, positive law in Indonesia in the context of fulfilling human rights is still thick with the principle of cultural relativism, this is evident in the Marriage Law which has not been able to answer the issue of a legal vacuum in resolving issues of interfaith marriage, because the arrangements are related to Interfaith marriages are not strictly regulated whether they exist or are prohibited[30]. Even though as we know, the state has an obligation to guarantee the fulfillment, protection, and respect of human rights, in this context it is interfaith marriage, because according to Article 23 paragraph (3) of the ICCPR explains that marriage must be based on the consent and free will of both parties. parties and according to paragraph (2) the state must recognize the right to marriage. Apart from the Constitutional Court's decision which confirms that interfaith marriage in Indonesia cannot be implemented because Law Number 1 of 1974 concerning Marriage is in accordance with the constitution, in the context of legal certainty as one of human rights it must still be a matter of consideration for the state because human rights although there are some rights that cannot be enforced because there is a stronghold of cultural relativism, the state must realize its position as a guarantor of human rights, not to limit it because human rights are universal.

The state in this context must see its position as the bearer of the obligation to fulfill, protect and respect human rights, not in a restrictive way because as we know that human rights are universal as Article 5 of the Vienna Declaration, the state only guarantees enough, related to how the law each religion and belief that exists in society, it becomes the realm of privacy of the community itself, because returning to the initial pretext that marriage must be based on the consent and

free will of both parties to marry, the state must not intervene regarding human rights restrictions in the marriage, including different religions. So, of course, legal uncertainty and legal vacuum in Indonesia's positive law in dealing with developments and social phenomena of interfaith marriage have harmed the human rights of the community in exercising their right to marry. Judgement Number 508/Pdt.P/2022/PN JKT.SEL can be a form of legal discovery for the government to provide legal certainty so that people can have their marriage recognized even though there are differences in religion, because the state only guarantees, not restricts.

4.2. Legalization of Interfaith Marriage in Indonesia from Human Rights Perspective

As previously explained, the right to marry is one of the first-generation human rights regulated in the ICCPR and the role of the state in fulfilling, protecting and respecting human rights is by not intervening and not limiting these rights, the state only needs to guarantee its implementation. so as not to be reduced, limited, or prohibited. This is of course not limited to marriages in accordance with positive law, social developments, especially related to interfaith marriages or religious differences, are also a type of right to marriage, because marriage must be based on agreement and the free will of both parties without any intervention, as described in Article 23 paragraph (3) of the ICCPR.

The non-regulation of interfaith marriages in Indonesia creates legal uncertainty and a legal vacuum that occurs in society, so of course this violates human rights to obtain legal certainty[31]. The right to marry is closely related to the right to life, the right to religion, the right to education and the right to express opinions. These rights intersect with each other, one of which is that to continue living, people must get married to continue their offspring, so that these rights are interrelated and intertwined as a whole.

Judgement Number 508/Pdt.P/2022/PN JKT.SEL is an example of a case of legalizing interfaith marriages to create legal certainty for the community so that their marriage can be recognized by the state. This is proven by grant permission the applicants to register their marriage at the South Jakarta Department Population and Civil Registration Agency and ordered the South Jakarta Department Population and Civil Registration Agency to register the Petitioners' interfaith marriages at the Marriage Registration Register used for this purpose and immediately issue the Marriage Certificate. Apart from positive law in Indonesia which still does not regulate interfaith marriages or mixed marriages based on differences in religion, this is a form of legal discovery made by judges because there is no positive law governing it, so this is a manifesto of one of the functions of justice, namely *rechtsvinding* or legal discovery because as we know, there is a principle in the judiciary that judges cannot reject cases on the grounds that there is no law because the nature and function of the judiciary is to provide legal certainty, in addition to other legal objectives, namely justice and legal benefits, and find the law if the positive law does not regulate clearly and firmly[32].

As previously explained, marriage is one of the human rights and the duty or responsibility of the state is to provide guarantees related to the fulfillment, protection, and respect for human rights. The state does not have the right to impose restrictions without a clear reason such as an emergency or other things that can threaten the life of the nation, such as the Covid-19 pandemic worldwide[33]. Unlike what happens with interfaith marriages, if the legal reasoning is because religious law regulates it, then the state is not allowed to intervene in the private affairs of its citizens, because the state is only required to carry out its responsibilities passively negatively, not actively positively as is the case This is the role of the state regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which has been ratified by Law Number 11 of 2005 concerning Ratification of International Covenant on Economic, Social and Cultural Rights[34].

It is a legal imperative that a country must be competent and able to answer social developments because law and social development must go hand in hand, not laws that keep lagging behind social developments. In the context of interfaith marriage here, the state must view society as human beings and it has become their rights since they were born into the world, because human rights are universal, cultural or cultural relativism will be relevant if applied as an indicator of whether a law is in accordance with laws that exist in society, of course, also relate to the relationship between those who govern and those who are governed, not in the context of the state limiting the human rights of citizens under the pretext of cultural or cultural relativism.

The state must judge that there must be a critical standard of an ideal law, meaning that the exercise of power based on law in society and as a state must be based on respect for humans and in accordance with the principles of justice. We can see this from the principle of a state based on rechtstaat law and the rule of law, whose substance also regulates the importance of guaranteeing human rights[35]. The state must create a law that is just for the community because based on the basis of das sein , law is often unfair, so the state must create a balanced das sein and das sollen, in order to create a law with the nuances of human rights.

Related to the issue of legal vacuum and legal uncertainty in interfaith marriages in Indonesia, the state must immediately regulate arrangements so that interfaith marriages in Indonesia can be recognized on the basis of universal human rights, the most basic limitation is that people who enter into interfaith marriages this can be recognized by the state in order to obtain legal certainty by the state, it can be done by publishing a different religious marriage book as in the concurring opinion of the Constitutional Court Judgement Number 24/PUU-XX/2022 concerning Review of Law Number 1 of 1974 concerning Marriage (Marriage Law) as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage against the 1945 Constitution of the Republic of Indonesia presented by Constitutional Justice Dr. Daniel Yasmic Pancasakti Foekh, S.H., M.Hum. The essence of the solution to the issue of legal vacuum and legal uncertainty of interfaith marriage is by providing legal certainty to the community because it has become a universal human right and with this the state does not intervene in terms of people exercising or using their human rights, the state has ensure the fulfillment, protection and respect for human rights as it has become the obligation of the state.

Interfaith marriage should be one of the main concerns of the state represented by the government in relation to how to resolve the issue of legal vacuum and legal uncertainty, because returning to the fundamental principles of human rights is one of the state's responsibilities in terms of fulfillment, protection, and respect for human rights, as this principle is written in all international and domestic human rights treaties and conventions. In the context of positive law in Indonesia, this is regulated in Articles 8 and 71 of Law Number 39 of 1999 concerning Human Rights. The Universal Declaration of Human Rights (UDHR) also includes this principle, that member states promise to achieve progress in the promotion and general respect for human rights and fundamental freedoms by cooperating with the United Nations. [15].

5. CONCLUSION

Interfaith marriage in Indonesia is still a social development that is legally positive has not been regulated clearly and unequivocally, giving rise to legal uncertainty and legal vacuum. This is of course because of the strong culture and Islamic Law contained in Law Number 1 of 1974 concerning Marriage which has been amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. From the point of view of the principles of universalism and cultural relativism, of course there are contradictions, because the right to marry and including interfaith marriage includes first-generation human rights that demand the state not to

intervene, so that the principle of cultural relativism is irrelevant for use in the context of relations between states and citizens. country.

The state must provide legal certainty so that there is no legal vacuum by legalizing interfaith marriages in Indonesia so that there is no legal uncertainty and legal vacuum, because the legal issues in the issue interfaith marriage in Indonesia is the absence of legal certainty provided by the state as it has become an obligation of the state. The state can issue an Interfaith Marriage Book as stated by Constitutional Justice Dr. Daniel Yasmic Pancasakti Foekh, S.H., M.Hum in a concurring opinion in the Constitutional Court Judgement 24/PUU-XX/2022

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