

The implication of the Indonesian Constitutional Court Decision No.68/PUU/XII/2014 on Evasion of Law of Interfaith Marriage Under Islamic Law

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Abstract. Indications of misunderstanding in interpreting Article 2 Paragraph (1) of the Marriage Law have raised an idea to legalize interfaith marriage due to many evasions of law happening. This is the legal basis for the decisions of Constitutional Court No.68/PUU/XII/2014. This study aims to analyze judge's legal consideration in the Constitutional Court decision No.68/PUU/XII/2014 in setting refusal to a petition for a judicial review of Article 2 Paragraph (1) of the Marriage Law and its juridical implications on the evasion of the law of interfaith marriage in Islamic law perspective. The study is a doctrinal one with the decision No.68/PUU/XII/2014 as the primary analysis. The approach employs juridical normative, and the sources of data consist of primary and secondary data. The research specification is descriptive analysis, and the data are analyzed qualitatively. The results show that the judge's legal consideration in refusing the petition for judicial review of Article 2 Paragraph (1) of the Marriage Law against the 1945 Republic Indonesia constitution because the petitioner's postulate contradicts the principles of Divinity, moral value, religion, and Islamic law marriage principles. The juridical implications of the decision have become the foundation that evasion of the law of interfaith marriage is unconstitutional. The decision has engaged in reformulating Islamic law in the form of strengthening obedience for every Muslim on teachings of The Deity.

Keyword: Constitutional Court Decision No. 68/PUU/XII/2014, Evasion of Law, Interfaith Marriage, Islamic Law

1. Introduction

The background of this study is originated from the decision of the Constitutional Court No. 68/PUU/XII/2014 that rejects the judicial review of Article 2 Paragraph (1) of the Marriage Law, about marriage validity associated with interfaith marriage. The issue is interesting to study because the decision is a judicial product in which the essential material is in the form of idea to legalize interfaith marriage due to many evasions of law happen.

This has led to an idea of separating the marriage law with religious law, because of differences in interpreting both reading and understanding Article 2 Paragraph (1) of the Marriage Law associated with the interfaith marriage.

The legal issue in this study is the gap between *das sein* and *das sollen* in terms of the validity of the interfaith marriage. *Das sollen* of this study is based on Article 2 Paragraph (1) of the Marriage Law, which explains that a marriage is considered valid if done according to the law of each religion and belief. The article 2 Paragraph (2) of the Marriage Law determines that every marriage must be recorded following the legislation in force, for the

sake of legal proof. So, a marriage is considered valid when it is complying with the law and receiving recognition from the state.

Meanwhile, the aim of this study is the petition requested by citizens who apply to the Constitutional Court to carry out the judicial review on Article 2 Paragraph (1) of the Marriage Law because it is considered contradictory to the 1945 Constitution of the Republic Indonesia and results in much evasion of law especially interfaith marriage.

An example of evasion of law is the case between Aisha (Islam) and Antonius (Catholic). They got married in Singapore for the legality of interfaith marriage. If they were to get married in Indonesia, they would be hindered by Article 2 Paragraph (1) of the Marriage Law [1]. Such action is categorized into evasion of the law because it uses a foreign law for the sake of the validity of their marriage instead of national law.

Based on the explanation above, this study is considered very important. It tries to address the legal considerations of the Constitutional Court decision No.68/PUU/XII/2014 in determining the rejection of judicial review of Article 2 Paragraph (1) of the Marriage Law and its juridical implications on the evasion of the law of interfaith marriage in Islamic law perspective.

2. Methodology

This study is doctrinal research; the principal analysis is the judges' consideration in the Constitutional Court decision No.98/PUU/XII/2014. Furthermore, the juridical impact on the evasion of the law of interfaith marriage in Islamic law perspective is dug up using a normative juridical approach. Juridical means are examining matters which concern with the law, either formally or informally[2]. For example; Marriage Law, PP 9/1975, Presidential Decree of Compilation of Islamic Law No. 1/1991, the Constitutional Court Law, and the Civil Code. The approach examines the decision of the Constitutional Court No.68/PUU/XII/2014 related to the legality of interfaith marriage.

The specification of this study is descriptive analysis, while the sources of data use primary and secondary data. The secondary data sources are divided into primary, secondary and tertiary legal materials, while the data collection methods are through documentation and open interviews with the chairman of Indonesian Ulama Council (MUI), Chairman of NU, and Regional Muhammadiyah of Central Java. The data are then analyzed qualitatively.

3. Theoretical Framework

In this study, the juridical implication of the Constitutional Court decision refers to the legal impact of the Constitutional Court decision against the phenomenon of interfaith marriages, especially those are conducted by law evasion in Indonesia. The licensed products of the Constitutional Court judges, in the form of verdict, are always inspired by the rules, values, morality, and culture which are reflected in the foundation of Pancasila and the 1945 Republic Indonesia constitution[3].

The Constitutional Court Judge's decision is the final decision on the existence of the constitution put to it. Such decision may include a decision to grant or reject the petition for judicial review against the 1945 Republic Indonesia Constitution[4].

The Article 24C Paragraph (1) and (2) of the 1945 Republic Indonesia Constitution explains that one of the tasks of the Constitutional Court is to examine laws against the 1945 Republic Indonesia Constitution. Any law conflicting with the constitution must be applied with petitions for judicial review, which is then proceeded with either material test or formal

test. The objective of examining law against the 1945 Republic Indonesia Constitution is to uphold the constitution set by the government following the spirit of Pancasila.

The judicial review of Article 2 Paragraph (1) of Marriage Law is petitioned by citizens who feel aggrieved with their constitutional rights, but the Court rejects the judicial review. The reason for the rejection is because legalizing interfaith marriages that are not by the religious law is unconstitutional.

In this study, interfaith marriage means marriage performed by a man and a woman, one of which is non-Islamic religion. The legal basis of Islamic marriage in Indonesia, namely Article 40 (c) and 44 of Compilation of Islamic Law, formulates that interfaith marriage is categorized as temporary prohibited marriage (mahram ghairu muabbad).

The Marriage Law Article 8 (f) formulates that interfaith marriage is prohibited because it is prohibited by religious law. All religions in Indonesia teach the people to marry with those of the same faith.

Thus the existence of a legal basis of interfaith marriage is derived from the religious law recognized in Indonesia. The existence of the religious law to gain recognition in Indonesia, because Indonesia is a state based on one supreme Divinity, as described in Pancasila's first principle and Article 29 paragraph (1) and (2) of the 1945 Republic Indonesia Constitution [4].

Recently, many citizens do evasion of law through interfaith marriage. This study explains that evasion of law with interfaith marriages is an attempt to ignore national laws, including the religious law to get the legality of interfaith marriages[5]. There are two ways of evasion of law with interfaith marriages, namely:[6].

- 1) Putting aside the national law, for example; to marry abroad or to marry customarily.
- 2) Putting aside the religious law, for example; to get married twice, firstly to marry in Muslim way and secondly to marry in a non-Muslim way; to get married by the religious convert, which means converting the religion temporarily before the marriage took place, and then return to the previous religion after the marriage took place.

The rampant evasion of law with interfaith marriage has made the Marriage Law losing its authority, due to many citizens who violate the Marriage Law.

4. Findings

Based on the decision of the Constitutional Court No. 68/PUU/XII/2014, the judges of the Constitutional Court arguing that the petitioners have legal standing to submit *a quo*[7]. However, after examining the petitioner's petition, the president's statement and the statements of the relevant parties, such as; Head of Indonesian Ulema Council (MUI), Head of Muhammadiyah, Islamic Defender Front (FPI), Executive Board of Nahdhatul Ulama, WALUBI, Presidium of the Council of High Religious Congress of Konghuchu Indonesia (MATAKIN), Parisada Hindu Dharma Indonesia, Advocacy Team for Diversity, Indonesian Church Communities (PGI) Indonesian bishops (KWI), the testimony of witnesses and experts of the petitioners; the judges of the Constitutional Court declare that the petitioners' petition is contradictory to Pancasila and the 1945 Republic Indonesia Constitution.

The Constitutional Court on behalf of the state continues to formulate clauses of Article 2 Paragraph (1) of the Marriage Law, namely "A Marriage is lawful if done according to the law of respective religion and belief." This means that the validity of the marriage, according to Indonesian Marriage Law, must be following the religious law and belief embraced by the couple. The basis of the judge's consideration in determining the rejection of the above petition is because the applicant uses the logic of contrary interpretation in interpreting Article

2 Paragraph (1) of the Marriage Law, i.e., allowing marriage without following the religious teachings. The applicant's point of view is incorrect because he or she considers that marriage is only seen as a civil law without correlating it with the religious law.

Starting from the essential consideration of the Constitutional Court judges in rejecting the judicial review of Article 2 Paragraph (1), below is the analysis of consideration of Constitutional Court Judge decision No. 68/PUU/XII/2014 in determining the rejection of the petition for judicial review of Article 2 Paragraph (1) of the Marriage Law and its juridical implications for the evasion of the law of interfaith marriage in the perspective of Islamic law.

4.1 Analysis of Legal Consideration Basis of Constitutional Court Judge's Decision No. 68/PUU/XII/2014 Related to Interfaith Marriages From the Perspective of Islamic Law

In analyzing the Constitutional Court judges' considerations in determining the decision No. 68/PUU/XII/2014 in Islamic law perspective [8], the researcher uses the concept of legal discovery through the interpretation of Article 2 Paragraph (1) of Marriage Law. This is caused by the misunderstanding associated with the implementation of interfaith marriage, where the legal basis has not been explained textually according to marriage law in Indonesia [9].

Fitzgerald, as cited by Sudikno,[10] argues that there are two kinds of interpretation of the law in general, namely: literal and functional interpretation. Understanding Article 2 Paragraph (1) of the Marriage Law can be made through literal and functional interpretation. The literal interpretation explains that the validity of a marriage depends on the living and recognized law of faith and belief in Indonesia, such as; Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. The absence of marriage outside the law of those respective religions and beliefs means that there is no legitimate marriage [11].

The functional interpretation explains that interfaith marriage is not explained textually in the Marriage Law. However, when understood, it has been implied in Article 8 letter (f) of the Marriage Law, and the formula is "marriage is prohibited between two persons having a relationship which by their religion or prevailing regulations is prohibited from mating." Based on the provision of religious law living in Indonesia, interfaith marriage is considered a temporary prohibited marriage (muaqqad).

Article 2 Paragraph (1) and Article 8 letter (f) of the Marriage Law provides an understanding that the articles are complementary in explaining that religious law is also necessary for the development of marriage law in Indonesia, especially interfaith marriage. The struggle and the building of the nation of Indonesia are established based on the theological, political, and sociological aspects, as stated in paragraph III of the 1945 Republic Indonesia Constitution. This means that the sovereignty of Indonesia is based on noble intentions and values taught by God the Almighty.

The birth of the Marriage Law has made the religious law recognized by the state. Meanwhile, the Marriage Law is made through procedures or means that have been established by the constitution or state law, namely through legislative and executive (President) [12].The enactment of the religious law in the above marriage, when reviewed following the principle of legality, is something that is deemed to a legal action since there is a law that regulates it [13].

The validity of the marriage is based on religious law (Islam) which is also found in Compilation of Islamic Law Article 40 (c) and 44, Article 8 letter (f) of Marriage Law, and Article 118. The rule explains that religion limits the validity of the marriage, including

interfaith marriage. This is because marriage is an essential thing in life, then every religion, especially Islam, has set in detail everything that must be obeyed and implemented by its people. Consequently, every citizen, as a religious person, must jointly uphold the laws and rules established by the government with no exception. This is following Article 27 Paragraph (1) of the 1945 Republic Indonesia Constitution.

Every marriage is declared valid if the mechanisms, procedures, and rules are by the norms and rules of the religion that every citizen believes in[14]. Article 2 Paragraph (1) of the Marriage Law is a form of the constitutional guarantee of Article 29 Paragraph (2) of the 1945 Republic Indonesia Constitution, including the guarantee of independence in embracing religion and performing its worship by the religion and belief chosen [4].

The enforcement concept of interfaith marriage prohibition is also by Pancasila, which is the highest legal aspect (Rechtsidee). This is consistent with Stufenbau Han Kelsen's theory on the highest level of law called grundnorm (peremptory norm) or basic norm [15]. The theory explains that all rules of law should not conflict with the soul and philosophy of Pancasila because Pancasila has the highest position in the composition of the legislation of the Republic of Indonesia.

The judges of the Constitutional Court rejected the petition for the unlawful reason. It has been by the ground norm of the Pancasila values, namely the first principle of One Supreme Divinity. Besides, the rejection also appropriately matches with the mandate of the Fourth paragraph of the Preamble of the 1945 Republic Indonesia Constitution and Article 29 Paragraph (1) explaining that the composition of people's sovereignty in the Republic of Indonesia is based on the One Supreme Divinity.

The Interfaith marriage contradicts the objectives of Islamic law, namely the inability to maintain religion and ancestry and develop good faith in the family due to principles differences. This may lead to many conflicts, such as the conflict between spouses, children's education, and joint property between children-in-law and parents-in-law. When intolerance happens, it raises a marriage dispute that ends in a divorce. One religious marriage is often in conflicts, moreover the one in inter-religious marriage. This is by the jurisprudence principles which explain that "The damage must be eliminated" [16].

4.2 Implications of Constitutional Court Decisions No. 68/PUU/XII/2014 on Evasion of Law of Interfaith Marriage under Islamic Law

The Constitutional Court decision No. 68/PUU/XII/2014 has legal implications when such a decision has been established into legislation used to assist a judge's judicial consideration in solving the same case. The function of the Constitutional Court's decision is to strengthen the Marriage Law. The decision of Constitutional Court No. 68/PUU/XII/2014 is a final decision which cannot be seeking to appeal, because the decision made by the Constitutional Court is the first and final decision in determining the petition of judicial review Article 2 Paragraph (1) of the Marriage Law of the 1945 Republic Indonesia Constitution[17]. Thus the Constitutional Court's decision is firm since it cannot be canceled unless there is a petition for judicial review resolved through the procedural law of Judicial Review, namely the Constitutional Court Regulation no. 06/PMK/2005 concerning Guidelines for Procedures of Judicial Review. Therefore, it is appropriate that during the court process, the Constitutional Court hears the state officials; the related parties such as Heads of religious organizations such as Islam, Christian, Catholic, Hinduism, Buddhist and Confucianism; along with expert information and witness statements to gain information and opinions in order to produce fair and correct decisions[18].

The existence of the Constitutional Court decision No. 68/PUU/XII/2014 may be positioned as jurisprudence because it can be used as a legal source based on judges' legal considerations in solving interfaith marriage cases. It is because the Constitutional Court decision No. 68/PUU/XII/2014 can show the legal power of the interfaith marriage ban, as explained in the interpretation of Article 2 Paragraph (1) of Marriage Law.

The results of this study explain that the juridical implications of the Constitutional Court decision No. 68/PUU/XII/2014 are to strengthen the religious law to be a barometer in determining whether or not marriage is legal, including the illegality of interfaith marriages for violating the state constitution. Besides, the decision has directed and guided the interpretation of Article 1 Paragraph (2) of Marriage Law correctly, fairly and following the law of how to read, understand and interpret the articles and paragraphs in legislation.

Also, the decision No. 68/PUU/XII/2014 also affects to the ban of evasion of the law of interfaith marriage, because it is not by the constitution and is categorized violating Article 2 Paragraph (1) of Marriage Law and state constitution described in the 1945 Republic Indonesia Constitution. The state should prevent it because it is contrary to legislation. Based on the explanation above, it can be understood that the Constitutional Court decision No. 68/PUU/XII/2014 has played roles in upholding the marriage law in order to be obeyed by all Indonesian citizens.

Based on the above explanation, the existence of the decision of the Constitutional Court No. 68/PUU/XII/2014 can be understood as follows:

- a. It can be used as one of the necessary legal considerations of judges to solve cases of interfaith marriages.
- b. It can show the legal power of the interfaith marriage ban as described in the interpretation of Article 2 Paragraph (1) of the Marriage Law.
- c. It strengthens the religious law to be a barometer in determining the legality of marriage, including the illegality of interfaith for violating the state constitution
- d. It has directed and guided the interpretation of Article 1 Paragraph (2) of the Marriage Law correctly, relatively, and by the law. It is about how to read, understand, and interpret the articles and paragraphs in the legislation.
- e. The prohibition of evasion of the law of interfaith marriage is because it is unconstitutional or it violates Article 2 Paragraph (1) of the Marriage Law and the state constitution described in the 1945 Republic Indonesia Constitution.

The Decision of the Constitutional Court No.68/PUU/XII/2014 which rejects the petition for judicial review of Article 2 Paragraph (1) of the Marriage Law has juridical implications for the reform of Islamic law, namely the decisions of the Constitutional Court are [19];

- a. Able to reinforce the function of Islamic law which suffers from interpretation dysfunction of Article 2 Paragraph (1) of the incorrect Marriage Law.
- b. Able to create legal certainty and order; and provide a just legal protection and services based on interfaith marriage law.
- c. Able to prevent evasion of the law of interfaith marriage done by citizens so that the marriage law can be enforced as a whole.
- d. Able to correlate between religious law and harmonious state. The State of Indonesia is a country based the One Supreme Divinity, which means a state that recognizes and implements the teachings of God contained in recognized religions in Indonesia. Consequently, all laws established by the state should not be contrary to the principles of religious law [10].
- e. Able to strengthen the religious law (Islam) based on the basic principles of Islamic sharia. The judges use the basis of legal considerations that are fixed not only on the

doctrines and legal norms of the law but also the dynamics in order to maintain the essence of Islamic sharia and uphold justice. For judges, upholding justice is more important than the texts of law.

- f. Able to uphold the spirit of justice as the ideals of masha'Allah. In doing this, the judges use the basis of legal considerations that lives in society such as religious law so the decision made can realize justice by the feelings of society.

According to religious law (Islam), the evasion of the law of interfaith marriage means to make the legal loopholes so that the interfaith marriage gets legitimacy. Such action is prohibited because it will be complicated in some ways, including [8].

- a. Marriage Law in Indonesia is not valid; it will be a dead rule.
- b. It establishes a not law-abiding society that removes the order and peace of community members.
- c. It destructs Muslim mentality because of their inconsistency with the religious teachings.
- d. The society does not either accept or use Islamic law. This includes the act of perverting the teachings of monotheism principle.
- e. It influences the pattern of children education. When the evasion of the law of interfaith marriage happens, there will be three patterns of children's education, namely; children are educated based on the religion of Muslim couple; children are educated based on the religion of non-Muslim couple, and children are not educated with religious teachings. The primary obligation of the parents to the children is to educate and guide them in order not to associate with God and to be pious and godly children [20].
- f. It influences the inheritance law, especially between the heirs. When the evasion of the law of interfaith marriage happens, the inheritance law does not apply to both children and parent as heirs because they do not meet the requirements of Islamic inheritance law. The legal basis for religious differences between the heirs and non-Islamic heirs, which becomes the barrier to inherit each other is the Bukhari and Muslim Hadith narration which means "Muslims are not entitled to inherit the unbeliever's property, and unbelievers are not entitled to inherit Muslim's property" (Bukhari and Muslim) [2].
- g. It influences on Islamic marriage law, especially on the issue of the marriage guardian of the bride. The Guardian must marry off his daughter to the man she wants. One of the requirements of a guardian is a Muslim. If the daughter and her guardian are of different religion, it will be a barrier to the marriage[21]. It influences on the Marriage Law on children custody (hadhanah) when the parent's divorce. In the case of divorce with the child under 12 years old, the custody of the child belongs to the mother while the living allowance, education, and health belong to the father. All is done for the sake of the children. However, the mother will have no right to custody because of her disbelief since the rights of custody include child religious education.

5 Conclusion

Based on the explanation above, it can be concluded as follow:

- a. The judges of the Constitutional Court decided to reject the petition for a judicial review of Article 2 Paragraph (1) of the Marriage Law against the 1945 Republic Indonesia Constitution. The legal consideration is that the petitioners' arguments are

contradictory to the Divinity Principles as set forth in the Fourth Paragraph of the Preamble of the 1945 Republic Indonesia Constitution and Article 29 Paragraph (1) of the 1945 Republic Indonesia Constitution which explains that the Republic of Indonesia structure of the people's sovereignty is based on One Supreme Divinity. Also, the Petitioners' argument in interpreting Article 2 Paragraph (1) of the Marriage Law is contrary to the values of morality, religion, culture living in Indonesia, and the principles or foundations of Marriage Law.

- b. The decision of Constitutional Court No. 68/PUU/XII/2014 has juridical implications for the reform of Islamic law, namely strengthening the religious law (Islam) which is based on the basic principles of Islamic sharia. Also, it upholds justice as the ideals of law (Al-Magashid Al-Shari'ah), harmonizes the religious and state law, reinforces the function of the Islamic law that suffers from the improper interpretation of Article 2 Paragraph (1) of Marriage Law, and eliminates evasion of the law of Interfaith Marriage.

The recommendations of this study are as follows:

- a. For law enforcers, they should note that the issuance of Marriage Law in Indonesia is harmonized with the moral, religious, and cultural values that live in Indonesia and the principles or foundations of Marriage Law in order to conform to the original goals of the founders of the Republic of Indonesia and the state constitution.
- b. For Marriage Officers, they should be more careful in establishing cooperation with various parties to avoid the evasion of law, especially in cases of interfaith marriages.

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