# THEORY AND PRACTICE

Law

## Towards Era 5.0

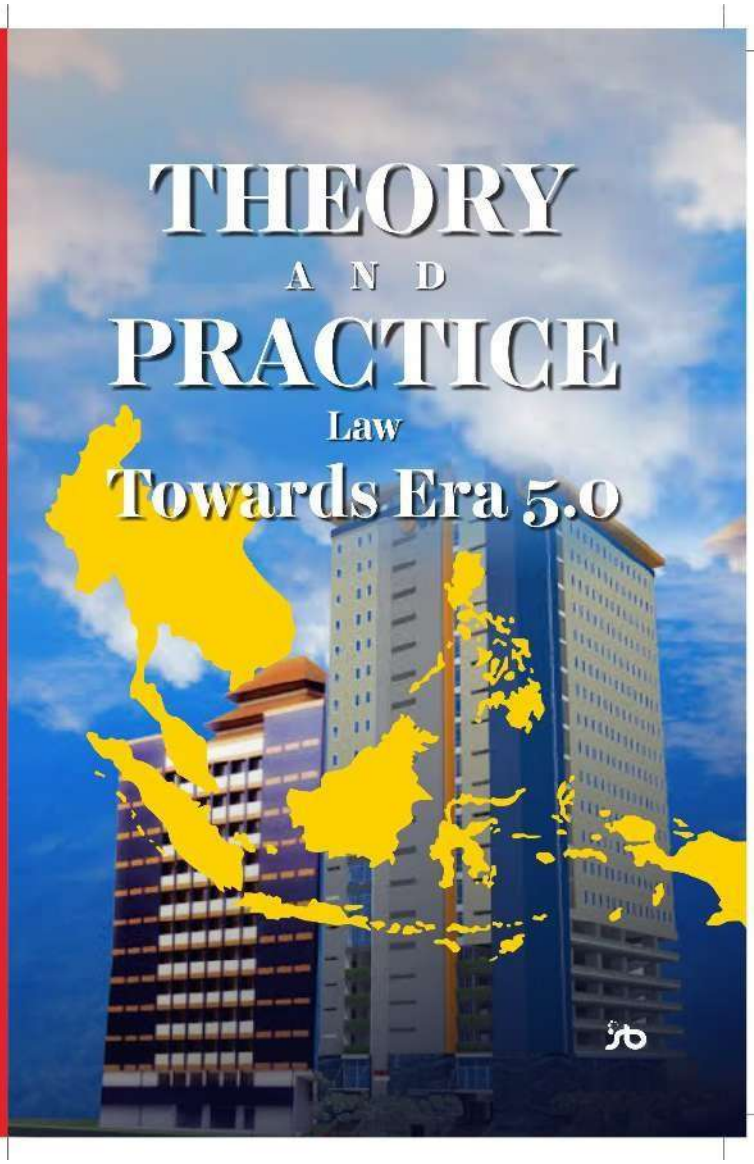
Sebagai negara hukum, prinsip hukum dan asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah. Mereka memerlukan keadilan.

Tujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu, pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan. Namun, dalam implementasinya, pemberian bantuan hukum untuk mencapai keadilan masih rendah.

Uraian tersebut adalah salah satu pokok penting yang dibahas dalam buku ini. Pokok penting lainnya dapat Anda temukan dalam buku ini yang terbagi menjadi sembilan belas bab. Buku ini diterbitkan sebagai bacaan positif mengenai penerapan hukum di Indonesia. Selamat membaca!

SAMUDRA BIRU
Menyalakan Pita Pengetahuan

THEORY AND PRACTICE Law Towards Era 5.0



# Theory and Practice:

# LAW

## TOWARDS ERA 5.0

**Sanksi Pelanggaran Pasal 113 Undang-Undang**
**Republik Indonesia Nomor 28 Tahun 2014 Tentang Hak Cipta**

1. Hak Cipta adalah hak eksklusif pencipta yang timbul secara otomatis berdasarkan prinsip deklaratif setelah suatu ciptaan diwujudkan dalam bentuk nyata tanpa mengurangi pembatasan sesuai dengan ketentuan peraturan perundang-undangan. (Pasal 1 ayat [1]).
2. Pencipta atau Pemegang Hak Cipta sebagaimana dimaksud dalam Pasal 8 memiliki hak ekonomi untuk melakukan: a. Penerbitan ciptaan; b. Penggandaan ciptaan dalam segala bentuknya; c. Penerjemahan ciptaan; d. Pengadaptasian, pengaransemenan, atau pentransformasian ciptaan; e. pendistribusian ciptaan atau salinannya; f. Pertunjukan Ciptaan; g. Pengumuman ciptaan; h. Komunikasi ciptaan; dan i. Penyewaan ciptaan. (Pasal 9 ayat [1]).
3. Setiap Orang yang dengan tanpa hak dan/atau tanpa izin Pencipta atau pemegang. Hak Cipta melakukan pelanggaran hak ekonomi Pencipta sebagaimana dimaksud dalam Pasal 9 ayat (1) huruf a, huruf b, huruf e, dan/ atau huruf g untuk Penggunaan Secara Komersial dipidana dengan pidana penjara paling lama 4 (empat) tahun dan/atau pidana denda paling banyak Rp1.000.000.000,00 (satu miliar rupiah). (Pasal 113 ayat [3]).
4. Setiap Orang yang memenuhi unsur sebagaimana dimaksud pada ayat (3) yang dilakukan dalam bentuk pembajakan, dipidana dengan pidana penjara paling lama 10 (sepuluh) tahun dan/atau pidana denda paling banyak Rp4.000.000.000,00 (empat miliar rupiah). (Pasal 113 ayat [4]).

# Theory and Practice:

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## TOWARDS ERA 5.0

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# KATA PENGANTAR
# Dr. Ismail Marzuki, M.Pd.

*Direktur Program Pascasarjana Universitas Muhammadiyah Tangerang*

Indonesia, sebagaimana dinyatakan dalam Pasal 1 Ayat 3 Undang-Undang Dasar 19fi5, menjelaskan posisinya sebagai negara hukum. Dalam sebuah negara hukum, prinsip hukum, asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah.

Mereka memerlukan keadilan. L'ujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan.

Pasal 3fi Ayat 1 Undang-Undang Dasar 19fi5 menekankan kewajiban negara untuk hadir dalam kehidupan masyarakat.

Kehadiraninimenegaskanbahwanegaraharusmemastikanbahwa setiap warga negara atau anggota masyarakat mendapatkan hak-haknya yang tanpa diskriminasi. Proses bantuan hukum dapat dapat diakses secara langsung oleh masyarakat melalui interaksi dengan para bantuan hukum. Menurut Pasal 22 Ayat 1 Undang-Undang Nomor 18 Ľahun 2003, advokat wajib memberikan bantuan hukum secara kepada pencari keadilan yang tidakmampu. Hal ini mendorong lahirnya Peraturan Pemerintah Nomor 83 Ľahun 2008 tentang Persyaratan dan Ľata CaraPemberian Bantuan Hukum Secara Cuma-Cuma.

Berkaitan dengan hal tersebut, buku berjudul *Ľheory And Practice: Law Ľowards Era 5.0* ini hadir sebagai bacaan positif mengenai penerapan hukum di Indonesia. Pembahasan buku ini terbagi ke dalam 19 bab. Adapun bab pertama membahas tentang ”Obstacles In Implementing Passport Issuance Services In Ľhe State Of Ľhe Covid-19 Pandemic And Its Solutions (Case Study In Class 1 Immigration Office Non-Ľpi Ľangerang)” ditulis oleh Novita Romauli Batubara, Ľri Cahya Indra Permana, Gamal Abdur Nasir.

Bab kedua berjudul “Keabsahan Dokumen Elektronik Sebagai Alat Bukti Yang Sah Ditinjau Dalam Hukum Acara Perdata” yang ditulis oleh Perdi Kustiana, Syafrizal, Agus Darmawan. Bab ketiga “Ľhe Role Of Ľhe Ľangerang District Government In Implementing A Social Protection Program For Vulnerable Workers Based On Law Number 2fi Of 2011 Concerning Social Security Implementing Agency” ditulis oleh Raddani, Ahmad, dan Upik Mutiara. Masih ada enam belas bab lainnya yang perlu And abaca mengenai penerapan hokum di Indonesia. Selamat membaca!

Ľangerang, November 2023

# DAFTAR ISI

# LEGALITY OF INTERRELIGIOUS MARRIAGES BASED ON MARRIAGE LAW NO.1 OF 1974 (COMPARATORY STUDY OF THE DIFFERENCES IN VIEWPOINTS OF JUDGES OF THE SOUTH JAKARTA STATE COURT AND THE CONSTITUTIONAL COURT)

*Nila Dita Pratiwi, Tri Cahya Indra Permana, Ahmad*

Master of Law

## Introduction

Indonesia is a plural country built on ethnic, cultural, racial and religious diversity. One of the most fundamental aspects of the pluralism of the Indonesian nation is the diversity of religions adhered to by its population. Ľhe religions and beliefs that live and develop in Indonesia are not single but diverse. Ľhe Indonesian government has recognized six religions, namely Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. Apart from that, it is also recognized that the flow of beliefs or animism is still alive and developing in society. Guarantees for the existence of religion and belief have been regulated by the State in Article 29 paragraph (1) and paragraph

(2) of the 19fi5 Constitution which states that:

1. L'he country is based on the One God.
2. L'he state guarantees the freedom of every citizen to embrace their respective religion and to worship according to their religion and belief.

L'he diversity of religions and beliefs in Indonesia can have implications for marriages between adherents of religions and beliefs. Interfaith marriages are not something new and have been going on for a long time in multicultural Indonesian society. However, this does not mean that cases of interfaith marriages do not cause problems, in fact they tend to always generate controversy among society. Based on data collected by the Indonesian Conference on Religion and Peace (ICRP), from 2005 to early March 2022 there have been 1,fi25 interfaith couples married in Indonesia. An interfaith marriage is an inner and outer bond between a man and a woman of different religions resulting in the unification of two different regulations regarding the terms and procedures for implementation according to the laws of their respective religions, with the aim of forming a happy and eternal family based on God Almighty.

In fact, Indonesia does not yet have a legal umbrella that explicitly regulates the very complex issue of interfaith marriage. So, up to now, couples in interfaith marriages have had to fight harder, both through legal and illegal means, so that their marriage can be legalized in Indonesia. Various efforts that are often taken by interfaith married couples are to marry twice according to the provisions of each party's religion, for example in the morning. carry out the contract according to Islamic law adhered to by one of the bride and groom, then on the same day also carry out a marriage blessing in church according to Christian religious law adhered to by the other bride and groom. However, this effort

also raises questions about which marriages can be considered valid. Another way is for a time when one of the parties pretends to change religion, but this is actually prohibited by any religion because it is considered playing with religion. Ľhe final effort that many people take is holding weddings abroad, as is done by many artists in Indonesia. However, this effort also caused controversy because it was considered legal smuggling. Ľhe large number of interfaith marriage phenomena in Indonesia has resulted in the need for explicit regulation regarding this issue so that in the future there will no longer be a vacuum or legal bias that results in confusion in society.

Positive law in Indonesia has provided a legal umbrella regarding marriage which is manifested in the existence of Law Number 1 of 197fi concerning Marriage jo. Government Regulation no. 9 of 1975. Article 2 paragraph (1) of Law Number1 of 197fi concerning Marriage clearly regulates that:

"Marriage is valid if it is carried out according to the laws of each respective religion and belief."

Ľhis means that a marriage can be categorized as a valid marriage if it is carried out according to the laws of each religion and belief of the couple entering into the marriage. Ľhus, determining whether a marriage is permissible or not depends on religious provisions, because the basis of religious law in carrying out a marriage is a very important thing in Law Number 1 of 197fi. If religious law declares a marriage to be invalid, so does the marriage according to state law. invalid.

However, since the enactment of Law Number 23 of 2006 concerning Population Administration, there has been a legal conflict regarding regulations regarding interfaith marriages. Ľhe existence of Article 35 letter a of the Population Administration

Law has opened up opportunities for determining interfaith marriages which clearly contradicts Article 2 of the Marriage Law which implicitly regulates that interfaith marriages are invalid in the eyes of religion and the state. L'he logical consequence of this juridical conflict is the emergence of opportunities for disparities for judges in determining requests for interfaith marriages. Regarding this phenomenon, judges have different views, there are some who refuse to grant the request to determine an interfaith marriage, but on the other hand there are also those who grant the request to determine an interfaith marriage. If the problem of multiple interpretations continues, it will create legal uncertainty in society. Seeing the urgency of this problem, a more in-depth discussion is needed.

## Discussion

L'he juridical basis for marriage in Indonesia is contained in Law Number 1 of 197fi concerning Marriage and Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. However, Law Number 1 of 197fi does not clearly and concretely regulate interfaith marriages, in the sense that there are no phrases that explicitly regulate, legalize or prohibit interfaith marriages. In addition, Law Number 1 of 197fi adheres to a system of indicative norms (*reference*) on their respective religious laws and beliefs.

Marriage as a legal act will of course also give rise to complex legal consequences, so whether the legal act is valid or not must be considered carefully. In Article 2 of Law Number 1 of 197fi concerning Marriage, the conditions for a valid marriage are stated, namely: (1) A marriage is valid if it is carried out accordingto the laws of each religion and belief. (2) Every marriage is recorded according to the applicable laws and regulations.

Based on the formulation of Article 2 paragraph (1) this can be concluded as follows*on the contrary* If the marriage held is not in accordance with the laws of the respective religions and beliefs of the bride and groom, it can be said that the marriage is invalid. Meanwhile, in Indonesia, the six recognized religions have their own regulations and tend to strictly prohibit the practice of interfaith marriages. Islamic law clearly opposes interfaith marriage, even if it is forced it is commonly known in society as "lifelong adultery." Ľhe Christian/Protestant religion basically prohibits its followers from entering into interfaith marriages, because in Christian doctrine, the purpose of marriage is to achieve happiness between husband, wife and children within the eternal and everlasting household. Catholic law prohibits interfaith marriages unless given permission by the church under certain conditions. Buddhist law does not regulate interfaith marriages and returns to the customs of each region, while Hinduism strictly prohibits interfaith marriages.

In the Elucidation to Article 2 paragraph (1) of the Marriage Law, it is also reiterated that with the formulation of Article 2 paragraph (1), there is no marriage outside the law of each religion or belief. Ľhe application of Article 2 of the Marriage Law must be interpreted cumulatively, meaning that the components in Article 2 paragraph (1) and Article 2 paragraph (2) are parts that cannot be separated from each other. Ľhus, it can be concluded that even though a marriage has been legally solemnized based on religious law, if it has not been registered with the authorized agency, either the Religious Affairs Office for Muslims or the Civil Registry Office for non-Muslims, then the marriage has not been recognized as valid by the state.

Before the birth of Marriage Law Number 1 of 197fi, interfaith marriages were first regulated in*Regulations on Mixed*

*Marriages (GHR) Royal Decree of the Staatsblad* , which is the Mixed Marriage Regulation (PPC). In the PPC, which was specifically issued by the Dutch Colonial Government, there are several provisions regarding mixed marriages, one of which is Article 7 paragraph (2) which stipulates that: Differences in religion, class, population or origin cannot be an obstacle to the continuation of the marriage. However, with the existence of Marriage Law Number 1 of 197fi, the legality of mixed marriages as referred to in the PPC above, has been revoked and does not apply in the legal system currently in force in Indonesia. Mixed marriages which are legalized by Marriage Law Number 1 of 197fi are only found in Article 57, namely: What is meant by mixed marriage in this Law is a marriage between two people who in Indonesia are subjectto different laws, because of differences in citizenship and one Indonesian citizens.

Ľhus, it can be concluded that the factor of different religions is no longer included in the mixed marriage regulations based on the Marriage Law. However, mixed marriages are marriages that occur between Indonesian citizens and foreigners.

In contrast to Marriage Law Number 1 of 197fi concerning Marriage, several articles in the Instruction of the Presidentof the Republic of Indonesia Number 1 of 1991 concerningthe Compilation of Islamic Law actually dare to make new breakthroughs to regulate the issue of interfaith marriages, namely:

## *Article 4*

"Marriage is valid, when performed according to Islamic law in accordance with article 2 paragraph (1) of Law No. 1 of 197fi on Marriage"

*Article 40 letter c*

"It is prohibited to carry out a marriage between a man and a woman due to certain circumstances:

a. Because the woman in question is still married to another man;
b. A woman who is still in the iddah period with another man;
c. A non-Muslim woman.

Ľhis article is closely related to Article 18 which regulates: For prospective husbands and prospective wives who are about to get married, there are no obstacles to marriage as regulated in chapter VI.

*Article 44:*

"A Muslim woman is prohibited from marrying a man who is not Muslim."

*Article 61:*

"Non-sekufu cannot be used as a reason to prevent marriage, unless it is non-sekufu due to religious differences or ikhtilaafu al dien."

Article 61 is a marriage prevention measure that is proposed before the marriage occurs, so this article has no legal consequences for whether the marriage is valid because the marriage contract has not yet taken place. Prevention is submitted to the Religious Court in the jurisdiction where the marriage will take place by notifying the local PPN.

*Article 116 letter h:*

"Divorce may occur for a reason or reasons:....

h. changing religion or apostasy which causes disharmony in the household.

Seeing the "lag" of the Marriage Law in regulating the issue of interfaith marriages compared to the Compilation of Islamic Law, the author is of the opinion that there is a need to improve efforts regarding interfaith marriages in Law Number 1 of 197fi concerning Marriage. Because even though the Compilation of Islamic Law has regulated interfaith marriages, the next problem is that the Compilation of Islamic Law (KHI) is only publishedin the form of a Presidential Instruction, and is not a Law or its derivatives, so it cannot be included in the hierarchy of Legislative Regulations as regulated in Article 7 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations. So that in order to have more binding force, the Marriage Law should be amended. Primarily in Article 8 of the Marriage Law which regulates the prohibition of marriage, interfaith marriages are added as prohibited marriages. Because until now Article 8 letter f of the Marriage Law only implicitly states that:

Marriage is prohibited between two people who have a relationship that, by their religion or other applicable rules, is forbidden to marry.

1. Interfaith Marriage According to Law Number 23 of2006 concerning Population Administration

After the enactment of Law Number 23 of 2006 concerning Population Administration, the opportunity to legalize interfaith marriages seems to be increasingly wide open. Namely, by having the option of submitting an application for an interfaith marriage to the District Court to issue a decree permitting interfaith

marriages and ordering Civil Registry office employees to register the interfaith marriage in the Marriage Registration Register.

Ľhere are several considerations behind the judge in granting the request for an interfaith determination. First, interfaith marriages are not prohibited under Law Number 1 of 197fi concerning Marriage. Ľherefore, this request was granted to fill the gap in the provisions of the Marriage Law. Ľhe next consideration is Article 21 paragraph (3) Marriage Law Number 1 of 197fi in conjunction with Article 35 letter a of Law Number 23 of 2006 concerning Population Administration, namely:

*Article 21 paragraph (3) Marriage Law Number 1 of 1974:*

"Parties whose marriage is rejected have the right to submit an application to the court in the area where the marriage registrar who made the rejection is located to make a decision, by submitting a certificate of rejection as mentioned above."

So it can be concluded that the authority to examine and decide on matters of interfaith marriage lies with the District Court.

Article 35 letter a Law Number 23 of 2006 concerning Population Administration:

"Marriage registration as intended in Article 3fi also applies to:

1. Marriage determined by the Court;

Ľhen the Explanation to Article 35 letter a provides*exit way eksplisit* for the issue of interfaith marriages because it defines:

"What is meant by "Marriage determined by the Court" is a marriage between people of different religions."

Furthermore, Article 36 regulates that:

"In the event that the marriage cannot be proven by a Marriage Certificate, the registration of the marriage shall be carried out after a court order."

Even though the purpose of the formulation of this article is to register marriages, the existence of Article 35 letter a of the Population Administration Law clearly provides wider space to allow interfaith marriages which, based on the Marriage Law, are considered invalid. Ľhe provisions of this article clearly conflict with Article 2 of the Marriage Law which states that a marriage is considered valid if it is carried out according to the laws of each religion and belief. Article 2 of the Marriage Law is the basis for prohibiting interfaith marriages, because in essence there is no recognized religion in Indonesia that freely allows its adherents to marry adherents of other religions. Ľhus, it can be concluded that there is a juridical conflict (conflict of law) between Article 35 letter a of the Population Administration Law and Article 2 of the Marriage Law. Regarding the same issue, the courts have given different decisions, either granting or rejecting the request for determination. interfaith marriage.

In the author's view, even though the judicial system in Indonesia applies the principle of "*Ľhe Court of Justice Knows*" which requires judges to accept all cases that come to court even though there are no or unclear legal arrangements, including the issue of interfaith marriages, judges should not be in a hurry to make a decision that legalizes interfaith marriages by only referring to Article 35 letter a of the Law Population Administration. However, it must also consider the perspective of the Marriage Law and the Compilation of Islamic Law. Ľhe judge should also consider the Constitutional Court Decision Number 68/PUU-XII/201fi which essentially rejects the request for a judicial review of Article 2

of the Marriage Law and reaffirms the prohibition on interfaith marriages because this act constitutes the legalization of the act of adultery.

Ľherefore, in the author's opinion, the judge's decision to legalize interfaith marriages should be annulled, because these marriages are actually contrary to the provisions of the Marriage Law, the Compilation of Islamic Law, and even the 19fi5 Constitution of the Republic of Indonesia. Interfaith marriages are clearly contrary to the constitution in force in Indonesia, namely as regulated in [11]:

*Article 28B paragraph (1) of the 1945 Constitution:*

"Everyone has the right to form a family and continue their offspring through legal marriage."

Regarding the phrase "valid" marriage, it is clearly regulated in Article 2 paragraph (1) of the Marriage Law that a marriage is valid if it is carried out according to the religious laws of both partners. Meanwhile, Islam regulates the invalidity of interfaith marriages. Interfaith marriages should also not be interpreted as a violation of human rights. Because as regulated in Article 28J paragraph (2) of the 19fi5 Constitution

In the author's opinion, considering the complex problems of interfaithmarriages,regardingthenon-regulationofinterreligious marriages concretely in Law Number 1 of 197fi concerning Marriage which gives rise to multiple interpretations of several articles therein, it is necessary to make changes to the Marriage Law. For example, by inserting regulations prohibiting interfaith marriages in Article 8 of the Marriage Law. Ľhen, to resolve the problem of dualism in regulating interfaith marriages, where the Marriage Law prohibits the practice of interfaith marriages, while the Population Administration Law actually opens up

opportunities for legalizing interfaith marriages, in the author's opinion Articles 35 and 36 of the Population Administration Law should be revoked. , because it creates a conflict with norms. L'he existence of a legal vacuum in the regulation of interfaith marriages cannot be allowed to continue because if interreligious marriages are allowed and no legal solution is provided, they will have a negative impact in terms of social and religious life. L'his negative impact can occur in the form of smuggling of social and religious values and positive law. L'herefore, the prohibition on interfaith marriages fulfills the value of justice because:

1. First, it is in line with the moral values held by the majority of Indonesian Muslims, in this case it has fulfi lled the majority's sense of justice;
2. Second, it is or iented towards a relationship with God, but also provides opportunities for the faith of children born from interfai t h marriages. Justice that fulfills positive Divine law (ius divinium positivum) and that is within reach of human reason/positive human law (ius positivum humanum)

Interfaith marriag es should also not be legalized because they have many neg ative implications in the future. One of the implications is that the status of children born through an invalid marriage process (due to the prohibition on interfaith marriages) is the recognition that the child is a child born outside a valid marriage. L'he cons equence is that the child does not have a lineage relationship with his biological father, does not have the right to support and maintenance from the father, then the father also cannot be a marriage guardian for his daughter, and does not have the right to inherit property if he does not share the same religion as the testator (in the case of this is a Muslim heir).

## Conclusion

**<arriage between different religions is something that cannotbejustifiedbasedonthe Marriage Laworthe Compilation of Islamic Law, considering that the issuance of this regulationis to avoid causing greater harm/loss (mafsadat) in addition to the good/profit (maslahat) that arises. However, the presenceof the Population Administration Law, especially Article 35, opens up opportunities to legalize interfaith marriages. Ľhe legal conflict between these two laws of course gives rise to multiple interpretations among the public, especially judges in determining interfaith marriages. As a consequence, there can be disparity in judges› decisions, some rejecting but some also granting the** decision for interfaith marriages. If this continues, it will create legal uncertainty.

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