

## INTERFAITH MARRIAGE IN THE CONSTITUTION AND THE ISLAMIC LAW DYNAMICS IN INDONESIA

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### Abstract

*Marriage between different religious believers in Indonesia is not a fabricated story. In fact, the data from various institutions which provide counseling, advocacy and facilitation for interfaith marriage, notes around 10 to 20 couples each month getting married officially or religiously. Yet, this fact is disregarded, and even covered as nothing happens. Those who do interfaith marriage are queer and even breaking religious teachings and conducting promiscuous sexual acts. This paper, then, will describe three important points about interfaith marriage in Indonesia. First, how is the constitution in Indonesia regulating this marriage? Is there any regulations clearly banning or allowing it? Second, how is the religious law, specifically Islamic law, provide foundation and legal arguments? Third, how is the practice of interfaith marriage in Indonesia? Why do some of them choose to go abroad for having their interfaith marriage? How is interfaith marriage technically held in Indonesia and possible to be acknowledged formally? Apart from those three main points above, this paper will also discuss the dynamics of interfaith family. In particular, the discussion on the living in diversity, respect and appreciation, and how children education is done, especially the religious one.*

**Keywords :** Marriage, Interfaith Marriage, Positive Law, Constitution, Islamic Law.

### ملخص البحث

أصبح الزواج بين معتقدي الديانات المختلفة في إندونيسيا اليوم واقعا، حيث تشير بيانات الهيئات التي تقدم خدمات الاستشارة والمحاماة والتسهيلات في هذا المجال إلى أن هناك ما بين عشرة إلى عشرين حالة من ذلك الزواج شهريا، سواء عن طريق رسمي أو تقليدي. ورغم هذا، لا تحظى هذه القضية بالاهتمام المطلوب، بل يتم تجاهلها كأنها لا توجد، بل يببالغ البعض معتبره عملا غريبا وشاذا وانحرافا عن التعاليم الدينية أو نوعا من تبرير الاتصال الجنسي بين الرجل والمرأة على أساس اتفاق متبادل. ويبين هذا البحث ثلاث نقاط مهمة حول الزواج بين معتققي الديانات المختلفة: الأولى وجود دستور الدولة الذي ينظم هذا الزواج والنظام الذي يقوم بمنعه أو تجويزه، والثانية القانون وبالخصوص القانون الإسلامي الذي يضمن ذلك الزواج والحجج المؤيدة لذلك، والثالثة كيف تسير عملية

الزواج تلك في إندونيسيا، ولماذا يختار البعض من ممارسيه إجراءه خارج البلاد؟ وهل هناك إمكان لاعتراف الحكومة به؟ وبالإضافة إلى النقاط الثلاث تلك، تتعرض المقالة إلى ديناميات الحياة الأسرية بين معتنقي الديانات المختلفة، وبالأخص الاحترام المتبادل وتربية الأولاد.

الكلمات الدالة : الزواج ، الزواج بين معتقدي الديانات، القانون الوضعي ، الدستور ، القانون الإسلامي .

## Introduction

Although interfaith marriage has been a social fact, but it generally still raises controversies. Religious leaders, from various religious traditions, generally forbid or at least do not recommend their people to marry with those having different religious convictions. According to them, religious teaching does not allow it and even views the dangers behind it. Islam, without exception, has this stand too, which is referred from the mainstream interpretation or understanding of *jumhur ulama* (majority of Islamic scholars).

This situation definitely impacts to most Muslims' position, that follows that mainstream interpretation. Muslim parents usually do not agree on this kind of marriage. The nonexistence of parents' consent, in fact, is the biggest challenge to prospective interfaith marriage couples.

Another big problem is that the State seemingly does not leave any space for interfaith marriage. It can be seen through complexities interfaith marriage couples are facing in administrative marriage process. Officers from the lowest level of government to highest one, often require complex documents to provide.

This challenge does not stop here. After parents' agreement is gotten and required documents are gathered, interfaith couples are confused on how they should hold marriage ceremony. Therefore, for those who have enough money, will choose to get married abroad. However, for those who are financially limited, they do not have much option.

This condition encourages the birth of several non-governmental organizations specializing in assisting interfaith couples in Indonesia. These institutions provide public education, counseling, advocacy and facilitation, following the increasing numbers of interfaith couples.<sup>1</sup>

<sup>1</sup> One of those institutions is Harmoni Mitra Madania which has an office in Tangerang, Banten. It was established by the author and some interfaith dialogue activists. Other institutions are ICRP in Jakarta, Yayasan Indonesia Bahagia in Jakarta, and Yayasan Percik in Salatiga, Jawa Tengah.

It is important, then, to explore more the fundamental issue of interfaith marriage phenomenon. This knowledge produced is essential to find the root problem, the state constitution or religious interpretation. Thus, we can see the phenomenon clearly and wisely, not just blind judgment without having legal arguments and ignoring plurality of religious interpretations.

### **Interfaith Marriage in The Constitution Analysis of Marriage Law No 1/1974**

Marriage in Indonesia is regulated by the Law number 1, 1974. This law consists of 14 chapters and 67 articles. For implementation, there is the Government Regulation number 9, 1975 which has been in effect since October 1<sup>st</sup>, 1975. The marriage law of 1974 is the first law that regulates marriage nationally. Previously, marriage affairs are regulated by various existing laws, ethnic law for indigenous groups, Islamic law for Muslims, Netherland Indie government ordonance for Christians in Java, Minahasa and Ambon, Book of Civil Code – Kitab Undang-undang Hukum Perdata (BW) for Indonesian citizens of European and Chinese descendants, and mixed marriage regulation for mixed marriage. It is clear that the marriage law of 1974 was to unify and uniform various laws of marriage.

Law is normative regulations that regulate human behavior. Law is not born in a vacuum space. It emerges as collective awareness of society that needs to regulate community. In fact, law always adopts values that come from and grow from society, including traditional and religious values. As a social and cultural product, and even political product that brings ideological elements, law is always contextual. In Islamic jurisprudence theory, it is mentioned *al-adah al-muhakkamah*, meaning that tradition and culture of a society can be set up as law. Therefore, any legal product should be viewed as a product of an era which cannot be separated from socio-cultural and political context.<sup>2</sup>

Ideally, as a legal product, the Marriage Law should be reviewed of its effectiveness regulating marriage. Unfortunately, after 41 years, there is no serious effort from government, particularly the Ministry of Religious Affairs, to evaluate the effectiveness of the Marriage Law as a legal source. It includes public response and a question on its relevancy. As a matter of fact, a sum of research -including theses and dissertations, conclude that there is a need to review the

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<sup>2</sup> Ahmad Nurcholish and Ahmad Baso (Ed.), *Pernikahan Beda Agama: Kesaksian, Argumen Keagamaan dan Analisis Kebijakan*, (Jakarta: ICRP – Komnas HAM, 2010), pp. 303-304.

law and even to revise it due to its exclusive content and being counterproductive toward building democratic, egalitarian and equal society.<sup>3</sup>

In terms of interfaith marriage, there are some referred articles in the Marriage Law of 1974. The article 2 verse 1 is the most frequently quoted part to emphasize religious characteristics of a marriage. The explanation of this part reasserts that "There is no marriage outside religious regulations, which is in line the 1945 Constitution."

Both the Marriage Law of 1974 and the Government Regulation of 1975 have human rights issues. The unification done has eliminated the diverse realities of marriage laws in Indonesia. Marriage institutions were also influenced by various forms and expressions that are sacred.

Since the adoption of the Marriage Law of 1974, there have been some problems emerged. Among them, they relate to interfaith marriage:

First, about the legality of a marriage. In article 2 verse 1, it is mentioned that the legality of a marriage is fulfilled if a marriage is conducted according the law of each religions and beliefs. This statement can be done if couple have same religion, If couple have different religions, one of persons temporarily change their religious identity and s/he may return to her/his religious belief after marriage process done. This situation is caused by the statement above that does not accommodate interfaith marriage.

Second, about marriage registration. In article 2 verse 2, it is stated that every marriage is registered according to the regulations. The government role is limited to registering marriage. It means the government only regulate the administrative aspect of a marriage. However, in practice, both verse 1 and 2 are implemented conjointly. It means those two verses should be met for legalizing a marriage. This may be a consequence of a legal system in which each component cannot be separated toward each other and every point is connected, forming a wholeness of a legal structure.<sup>4</sup>

As a consequence, although a marriage is already considered from a religious perspective, if the marriage is not registered to the authority (Office of Religious Affairs or Kantor Urusan Agama - KUA for Muslim and Population and Civil Registration Agency or Dinas Kependudukan dan Pencatatan Sipil -

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<sup>3</sup> The effort to amend the Marriage Law of 1974 can be seen from judicial review proposal in 2014. There are at least three important issues to change: interfaith marriage, the age of marriage and the rights of parents to permit under age children to marry.

<sup>4</sup> Ahmad Nurcholish and Ahmad Baso, *Pernikahan Beda Agama*, p. 305.

DKPS, previously known as Registry Office or Kantor Catatan Sipil - KCS for non-Muslim), thus the marriage is not acknowledged by the state. Several cases shows that legality of a marriage is proven through marriage certificates received from KUA or Excerpt of Marriage Certificate (Kutipan Akta Nikah) from DKPS. This definitely brings legal and social implications. For example, children may be considered not the legal descendant, and husband and wife will have difficulty to access civil rights they are supposed to get from the marriage. Women are the first victim. Women are not considered as the legal wives of their husband, nor the legal mother of children they have born. The birth certificate for children without registration to the authority, will be stated as being born from a woman, instead of a couple of husband and wife. This unclear status certainly gives disadvantage to women.

Under perspective of human rights, the law of marriage clearly violates the Universal Declaration of Human Rights, article 16 verse 1:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

And verse 2 - 3:

“Marriage shall be entered into only with the free and full consent of the intending spouses.”

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

This law is also contradictory against the Human Rights Law no 39 of 1999, article 10 verse 1, “Setiap orang berhak membentuk suatu keluarga dan melanjutkan keturunan melalui perkawinan yang sah”.

Furthermore, the Human Rights Law of 1999 article 10 verse 1 & 2 state that:

“Setiap orang berhak membentuk suatu keluarga dan melanjutkan keturunan melalui perkawinan yang sah”.

“Perkawinan yang sah hanya dapat berlangsung atas kehendak bebas calon suami dan calon istri yang bersangkutan, sesuai dengan ketentuan perundang-undangan”.

Thus, it should be understood that the Marriage Law of 1974 is not a

final product. Instead, it should be revised and perfected. During this reform era, following the principle that regulation is impossible to be complete and comprehensive, the Marriage Law should be reviewed to fit with changes. Of course, equality and gender should be considered.<sup>5</sup> This idea gives foundation to some people proposing judicial review toward the Marriage Law of 1974, specifically article 2 verse 1, to the Constitutional Court.

### **Analysing the Supreme Court Decree No. 1400 of 1986/1989**

The Marriage Law of 1974, does not declare clearly the ban against interfaith marriage. It is interesting, then to see another jurisprudence provided, the Supreme Court Decree (Keputusan MA) No. 1400 K/Pdt/1986, issued in January, 20<sup>th</sup> 1989. This decree opposes the use of article 60 the Marriage Law of 1974 by head of KUA and officials (Pegawai Pencatat Luar Biasa Pencatat Sipil) DKI Jakarta to reject interfaith marriage. According to the Supreme Court, the article 60 should be connected to the article 57, 58 and 59 of the Marriage Law which discusses about a marriage of two persons in Indonesia following different laws due to different citizenship (mixed marriage).

In detail, the Supreme Court Decree stated:

“The Marriage Law does not regulate anything that mentions a difference in religion can prohibit citizens to marry. This is in line with the 1945 Constitution Article 27, that every citizen is equal before law, including same rights to get married with other citizens who have different religions. This is also in line with the spirit of the 1945 Constitution Article 27 about a guarantee for freedom of religions.”<sup>6</sup>

This Supreme Court Decree also stated clearly that any regulations before the Marriage Law of 1974, such as the Mixed Marriage Regulation (Regeling op de gemengde Huwelijken S. 1898 No. 158 or GHR), and Marriage Ordinance for Indonesian Christians (Huwelijks Ordonantie Christen Indonesiaers, S. 1933 No. 74), “are impossible to use because there is huge gap in the principle and philosophy. This gap is the Marriage Law of 1974 believe that marriage is legal if being done according to respective religions or belief. This is a realization of Pancasila as the state foundation. Marriage is not seen from legal and civil

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<sup>5</sup> See Siti Musdah Mulia, *Muslimah Reformis: Perempuan Sebagai Pembaharu Keagamaan*, (Bandung: Mizan, 2005), pp. 52-83

<sup>6</sup> The description can be seen in Ahmad Nurcholish and Ahmad Baso, *Pernikahan Beda Agama*, pp. 312 - 313

connection only, as marriage has inseparable union with religion/spirituality. Thus, there is no marriage outside religious law." Meanwhile, marriage according to the two Dutch ordinances, is seen just from legal and civil perspective.

As the fact that interfaith marriage is not forbidden and there are many interfaith marriage cases occurred, the Supreme Court argues that any legal vacuum cannot be justified. Any legal vacuum will cause negative impacts for society. Thus, the Supreme Court can accept the rejection from KUA although it cannot justify the reason given, which is that any marriages registered in KUA should be same religion marriages (namely Islam). Thus, the only possible solution is to get marriage registered in KCS (DKCS). How can it be done?

The Supreme Court views that an application to register a marriage to KCS, shall be interpreted that applicant(s) wants to have non-Islamic marriage, and applicant(s) disregard her/his religion status (namely Islam). "Hence, the Marriage Law article 8 sub f is not a hindrance anymore for an interfaith marriage, and KCS/DKCS is the only authoritative institution that shall accept the application and register the marriage of non-Muslim couples."

This assumption mentioning "non-Muslim couples", means a couple such as Andi Vonny Gani P and Adrianus Petrus Hendrik Nelwan<sup>7</sup> shall follow "religious law outside Islam." This is not because of differences or conflicts that may be considered to disrupt legal system.

The next question is: Can this become jurisprudence, that can be implemented to other interfaith marriages? According to Prof. Zainal Asikin Atmaja, who was the Deputy Chief of the Supreme Court, this Supreme Court statement is a jurisprudence. Furthermore, he suggests to revise the Marriage Law of 1974, particularly relating to interfaith marriage.<sup>8</sup>

### **Interfaith Marriage in the Population Administration Law No. 24 of 2013 (previously Law No. 23 of 2006)**

After the reform era has started, demands for the State to respect and comply more with human rights values also influence the subject of population

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<sup>7</sup> They were Muslim-Christian couple, whose marriage registration was rejected by KUA, KCS, State Court and even High Court in 1986. Then they proposed cassation to the Supreme Court. The Supreme Court, then, issued that decree.

<sup>8</sup> See, Pdt. Weinata Sairin, "Perkawinan Beda Agama dalam Pandangan Kristen Protestan", in Maria Ulfah Ansor and Martin Lukito Sinaga (eds), *Tafsir Ulang Perkawinan Lintas Agama: Persepektif Perempuan dan Pluralisme*, (Jakarta: Kapal Perempuan & NZAID, 2004), p. 78.



administration and registration, in particular, civil cases, like marriage. It is proven by legalizing the Law No. 23 of 2006, which has been updated to the Law No. 24 of 2013 about population administration. The spirit, as mentioned in the points of consideration, is "The existing regulations about population administration is not suited to the demands of the population administration service which is orderly and non-discriminative. Besides, this law mentions another national instrument about human rights, the Law No. 39 of 1999 about Human Rights and International Convention On The Elimination of All Forms of Racial Discrimination 1965, which has been ratified to the Law No. 29 of 1999.

This law wants to ensure that any civil events of citizens can be registered, including marriage, as asserted in article 2 of that law: "Every citizen has the rights to achieve:

1. Population document; b. equal treatment in Citizen and Civil Registration;
2. Protection toward personal data; d. legal certainty of document ownership.

The question, then, how about interfaith marriage? Do interfaith marriage couples automatically receive legal assurance toward their marriage status? There is article 35 of the law mentions:

"Registering marriage as meant in the article 34 applies also to: a. marriage declared by Court."

The explanation of the article 35 Letter a mentions, "'Marriage declared by court' means interfaith marriage".

The Law No. 23 of 2006 about population administration makes interfaith marriage possible to be registered officially, as long as there is a court approval. Before the adoption of this law, interfaith marriage couples usually proceed their marriage abroad, avoiding the Marriage Law of 1974 that may prohibit interfaith marriage. There are also some couples, who follow temporarily certain religious law, to solve the problem. For example, a couple can get married under the groom's religion in the morning, and under the bride's religion in the afternoon.

If interfaith marriage can be registered through a court approval, how about those who get married outside Indonesia? Ministry of Home Affairs' regulation No. 12 of 2010 about Guide to Marriage Registration and Reporting Foreign Certificate (*Pedoman Pencatatan Perkawinan dan Pelaporan Akta yang Diterbitkan oleh Negara Lain*), assures that marriage done abroad still can be registered through civil registration institution, like UPTD. A prove of marriage registration note from authority outside Indonesia or Indonesia representative, should be given.



However, there is no special mention about interfaith marriage abroad, which happens frequently to middle and upper class of Indonesia citizens.

This is absolutely a discrimination. Those who have interfaith marriage abroad can register without a court approval, whereas those who do it in Indonesia cannot.

### **The State Authority (KUA and DKPS) Over Interfaith Marriage**

KUA and DKPS have strategic role and position. These two institutions are the front line of the government policy to deal directly with interfaith marriage couples. Prior to the adoption of the law of Marriage of 1974, DKCS had broad authority to register interfaith marriages, including to legalize and to assist holding marriage, as regulated in HOCI and GHR.

After the adoption of the law of Marriage of 1974, the domain and function of DKCS were still maintained. ini masih tetap dipertahankan. Based on article 20 of the law, registration officer hold or assist to hold marriage. The article 21, registration officer can hold marriage under court order. Then, how about interfaith marriage under these articles?

In the Government Regulation no. 9 of 1975 about the Implementation of the Marriage Law article 47, and the Decree of Minister of Home Affairs no. 221a of 1975 about Marriage and Divorce Registration at Registry Office, declared that those registering marriage to DKCS are those whose marriage is done under, inter alia, Civil Registration Ordinance for Mixed Marriage (Staatsblad 1904-279). Mixed marriage could be done in DKCS.

However, the issue of the Presidential Decree No 12 of 1983 about *Penataan dan Peningkatan Pembinaan Penyelenggaraan Catatan Sipil*, mixed marriage problem started to emerge. If previously KCS had the authority to hold mixed marriage, now DKCS only has authority to register and issue the Excerpt of Marriage Certificate(article 5 verse 2). This decree, article 5 verse 2 mentions, "In fulfilling its responsibilities, Registry Office has function to:

1. Register and issue excerpt of Birth Certificate;
2. Register and issue excerpt of Marriage Certificate;
3. Register and issue Children Acknowledgment and Legalization Certificate;
4. Register and issue excerpt of Death Certificate;
5. Document and Maintain Birth Certificate, Marriage Certificate, Divorce Certificate, Children Acknowledgment and Legalization Certificate, and Death Certificate.
6. Supply resources for policy making in regards to population/citizenship".

From this point, there is a problem. The decree does not explicitly stated about holding and legalizing marriage. KCS (now DKCS) has their own interpretation to that decree, therefore creating different implementation. There are some following the Presidential Decree so they do not register interfaith marriage anymore. Some can accept and register interfaith marriage based on the authority given by the Marriage Law, article 20-21.<sup>9</sup>

### **Interfaith Marriage in Islamic Law**

#### **Islamic Law Compilation and Dynamics of Tafsir in Islam**

The Islamic Law Compilation - ILC (Kompilasi Hukum Islam - KHI) is composed based on joint decree of the Head of Supreme Court and Minister of Religious Affairs in March 21<sup>st</sup>,1985, and is done under the Project of Islamic Law Development through Jurisprudence (Project of the Islamic Law Compilation). This was being done for six years (1985-1991), in June 10<sup>th</sup>, 1991 according to Presidential Instruction No.1 of 1991, the ILC was set up as the formal guide for all judges of religious court in Indonesia. Its legal foundation is article 4 verse 1 of the 1945 Constitution, which is the authority of President in the State Governance and the Law No. 7 of 1989 about Religious Court.

At least there three main goals of the ILC, namely formulating systematically and concretely Islamic Law in Indonesia; building foundation for Islamic Law implementation in religious court which has national perspective; and establishing legal certainty that is more uniformed. Thus, the ICL functions as a guide for judges in religious court and Islamic law guide for people in general.

Relating to interfaith marriage, there are two articles in the ICL. First, article 40 states that a man is forbidden to have a marriage with non-Muslim woman. Second, article 44 states "a women in Islam is forbidden to have a marriage with a man whose religion is not Islam".

Different religious belief is seen as a barrier to get married, according to the ICL. It means both man and woman cannot marry non-Muslim. This view is surely opposite to the basic principle of Islam itself, which is pluralism. Based on pluralism logics, it is not appropriate to make different religious beliefs (*ikhtilaf al-din*) as a barrier (*mani'*) for an interfaith marriage.

These problematic articles should be revised. A gender mainstreaming group propose revisions to the ILC as follows:

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<sup>9</sup> O.S. Eoh, *Perkawinan Antar Agama dalam Teori dan Praktek*, (Jakarta: Srigunting, 1996), pp. 127-128.

1. A marriage between Muslim and non-Muslim is allowed.
2. A marriage between Muslim and non-Muslim is done with the principles of mutual respect and appreciation, especially toward the rights to have and to do religious expressions.
3. Before a marriage is done, government is obliged to provide explanation to the couples about Muslim and non-Muslim marriage, so each is aware about the consequences resulted from the marriage.
4. In Muslim and non-Muslim marriage, child(ren) has the rights to choose and do a religion freely.
5. In the context of that child(ren) cannot decide by her/his own, parents build a consensus to decide their child(ren)'s religious beliefs.<sup>10</sup>

Those different perspectives, shows that there is plural understanding (tafsir) of interfaith marriage in Islam. If we further discussion, there are at least three opinions, namely: 1) Forbidden; 2) Allowed with prerequisites; and 3) Allowed without any conditions. Interestingly, those three opinion refer to three same verses of the same surah:

And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that perhaps they may remember. (Q.S. Al-Baqarah/2: 221)

O you who have believed, when the believing women come to you as emigrants, examine them. Allah is most knowing as to their faith. And if you know them to be believers, then do not return them to the disbelievers; they are not lawful [wives] for them, nor are they lawful [husbands] for them. But give the disbelievers what they have spent. And there is no blame upon you if you marry them when you have given them their due compensation. And hold not to marriage bonds with disbelieving women, but ask for what you have spent and let them ask for what they have spent. That is the judgement of Allah ; He judges between you. And Allah is Knowing and Wise. (Q.S. Al-Mumtahanah/60: 10)

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<sup>10</sup> See the paper Counter Legal Draft KHI by Tim Pengarusutamaan Gender, Jakarta, August 2004.

This day [all] good foods have been made lawful, and the food of those who were given the Scripture is lawful for you and your food is lawful for them. And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers. And whoever denies the faith - his work has become worthless, and he, in the Hereafter, will be among the losers. (Q.S. Al-Maidah/5: 5)

The interpretation of those three verses is given below to understand more the arguments of each perspective.

### **A Marriage between Muslim Man and Non-Muslim Woman**

In Islam, marriage is "sunnah," a tradition following the example of the Prophet Muhammad SAW. From the study of the text discussing marriage, it can be concluded that there are some principles as foundation of a marriage. First, monogamy principle; second, love and compassion principle (*mawaddah wa rahmah*); third, mutual completion and protection; fourth, prinsip respectful and courteous interaction (*mu'asyarah bil ma'ruf*); and fifth, principle of freedom to choose partner for both men and women as long as not violating shariah.<sup>11</sup>

Interfaith marriage in Islam is a marriage between a believer of Islam (Muslim or Muslimah) with non-believer or non-Muslim. There are several categories of "non-muslim," such as "musyrik", "kafir" and "ahlul kitab." Nevertheless, there is no single consensus about whom can be categorized as musyrik, kafir or ahlul kitab.

In general, the definiton of musyrik is put to those who idolize God or admit that there is god beside Allah Swt., like idol worshiper, fire worshiper etc. Meanwhile, kafir is those who are outside Islam, whose religions are not Islam. Kafir generally can be grouped into several parts. First, kafir dzimmi is kafir who still believes their old belief but is willing to follow and obey Islamic regulation by not making a war against Muslim. Second is kafirharbi, she or he who has enmityagainst Muslim. Third, kafir mustamin (who has been given protection assurance); and fourth, kafir mu'ahad (who is bound in the peace pact

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<sup>11</sup> Siti Musdah Mulia, *Muslimah Reformis*, p. 53-83 and Husein Muhammad, "Wali Dua Imam", *Syir'ah* magazine, February 2005 edition.

with Muslim). Then “ahlul kitab” covers those believers who have the holy text or are Abrahamic religion believers, such as Jewish and Christian.

The problem is that who is referred as musyrik, ahlul kitab and kafir in the context of al-Qur’an? What is the difference(s) of these three groups? Musyrik according to mufassirin or tafsir expert is those who idolize God with a thing, in the form of human, manusia, material, power, wealth and etc. Therefore, it is not impossible that Muslim can be musyrik too. Yet, the dominant understanding is the narrow one, worshipping idol, fire and so on. In sociological reality, people, including Muslim community itself, have worshipped power, wealth, position or God’s creature. Limiting the term musyrik only for those who are outside Islam is ambiguous and may result to decrease Muslim’s awareness in correcting themselves from the danger of syirik.

The same as the term musyrik, the term ahl al-kitab has several different interpretations. Some ulama limit ahl al-kitab to Jewish and Christian groups during the Prophet era only. However, jumhur ulama argues that ahl al-kitab are Jewish and Christian, living from the Prophet era until today. Some ulama said that ahlul kitab is not only limited to Jewish and Christian groups, but also religious believers of Buddha and Hindu. Even, some ulama mention other religions, including Majusi, old Persia and the beliefs of Indian, Chinese and Japanese people.<sup>12</sup>

The term kafir also has various meanings. Generally ulama define it as rejecting against Allah swt, other rasul with the teachings they bring, and the end of the day.<sup>13</sup> Al-Qur’an itself uses kafir for various groups, namely kafir before the Prophet Muhammad saw.; kafir Mekkah who rejects Allah and is contemptuous toward the Prophet saw; kafir who forgets the blessings given by Allah swt; kafir who asks assistance and protection to other than Allah swt; kafir who does not want to take i’tibar and love earthly world; and kafir who is hypocrite and apostate.<sup>14</sup> These plural meanings of kafir, open possibilities that many Muslim may be mentioned as kafir, at least kafir toward the blessings of Allah swt.

Commenting on those three terms, Abu al-A’la al-Maududi, one of the Muslim thinkers and activists from Pakistan, explains, if we discuss the content of al-Qur’an, there are three terms that are different from each other, musyrik, ahl al-kitab, and ahl al-iman. Musyrik people are described in al-Qur’an, such as

<sup>12</sup> Rasyid Rida, *Tafsir al-Qur’an al-Hakim*, Juz VI, p. 155.

<sup>13</sup> M. Quraish Shihab (Ed.), *Ensiklopedi Al-Qur’an: Kajian Kosakata dan Tafsirnya*, (Jakarta: Bimantara, 1997), p. 189.

<sup>14</sup> M. Quraish Shihab (Ed.), *Ensiklopedi Al-Qur’an*, pp. 189-192.

al-Maidah, 5:17, 30 and 73, and al-Taubah, 9:30, basically those are ahl al-kitab who deviate from their original teaching. Nevertheless, al-Qur'an does not refer them as musyrik, but ahlul kitab.<sup>15</sup>

From these problematic terms, interfaith marriage also becomes a controversial issue in the history of Islam. It can be traced from the interpretation of Surah al-Ma'idah verse 5, "And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you." Does this cover ahl al-kitab in general without preconditions or with preconditions? Or, does the definition cover musyrik and kafir group as non-Muslim group?

Referring literally to this verse, marriage with ahl al-kitab women is clearly allowed – as al-Qur'an mentions it firmly (qathi'iy) and clearly (sharih) without any preconditions.

In al-Fiqh al-Islamy wa Adillatuh, Wahbah al-Zuhaili wrote, "ulama agreed on the permission of a marriage between Muslim man and 'ahli kitab' woman. The basis is surah Al-Maidah, verse 5. Some of the Prophet's friends married with ahl al-kitab women. For example, Utsman bin Affan married with Nailah binti al Farafishah who was Christian. Khudzaifah married a Jewish woman."<sup>16</sup>

There is a debate about it. Some state this permission is accepted before distortion (tahrif) of their holy texts. However Wahbah states: "The strongest is the majority of ulama's opinion that permit it without any preconditions, since the text of Al-Quran mentions so." In this context, there is always a question: Aren't Christians musyrik because they idolize Jesus?

About it, al-Juzairi has his own opinion, as described in his work, al-Fiqh ala al-Madzahib al-Arba'ah. According to him, "This verse shows that marriage between Muslim man and ahl al-kitab woman is halal, based on 'nash' (explicit text), although that woman still says, 'Al-Masih (Isa) is 'ilah (god)' or 'tsalitsu tsalatsah' (one of three personalities), which is musyrik, God permits it because they (women) follow heavenly religion and have a holy book."<sup>17</sup>

Rasyid Ridla has similar view, marriage between Muslim man and ahl al-kitab woman is legal. He said that God of Muslim and Ahlul Kitab is one. The holy text they believe is basically one, which contains teaching to have faith

<sup>15</sup> Abu al-A'la al-Maududi, *Al-Islam fi Mawajjah al-Tahaddiyah al-Muasharah*, (Kuwait: Dar al-Qalam, 1983), p. 12.

<sup>16</sup> Wahbah Al-Zuhaili, *al-Fiqh al-Islamy wa Adillatuh*, Juz III (Beirut: Dar Al-Fikr, 1989), p.

<sup>17</sup> Al-Jazairi, *al-Fiqh ala al-Madzahib al-Arba'ah*, Juz IV (Kairo: Al-Maktab Al-Tsaqafi, 2000), p. 64.

and believe in one God. Through marriage, Ahlul Kitab may understand the similarities and differences among Islam, Jewish and Christian.<sup>18</sup>

### A Marriage between Muslim Woman and Non-Muslim Man

A marriage between Muslim woman and Ahli Kitab Man is also being debated by ulama fiqh until today. First, jumhur ulama argue that this kind of marriage is haram. This opinion, according to Abdul Moqsih Ghazali, is based several reasons. [a]. Unlike the permission of a marriage between Muslim man and Ahli Kitab woman, al-Qur'an surah al-Maidah verse 5 does not explain about the opposite situation. No existence of this explanation makes jumhur ulama, think that this kind of marriage is not legal. This view is supported (reputedly) by hadits of Jabir ibn Abdillah, natazawwaju nisa'a ahl al-kitab, wa la yatazawwajuhum nisa'una (we can marry with Ahli Kitab women, yet they cannot marry with our Muslim women).<sup>19</sup>

However, Moqsih said that some ulama doubt the reliability and validity of this hadits. What is considered as hadits actually is (similar to) the statement of Umar ibn Khattab. Umar said, al-muslim yatazawwaju al-nashraniyah wa la yatazawwaju al-nashrani al-muslimah (Muslim man may marry with Christian woman, not vice versa). History in fact, notes that Umar ibn Khattab is the caliphate who rejected strongly interfaith marriage, both Muslim man with Ahli Kitab woman, as well as Muslim woman and Ahli Kitab man.<sup>20</sup>

[b]. As her nature, they argue, woman is easily shaken and influenced, thus it is worried that the Muslim woman will convert to the husband's religion. Furthermore, this family will create kafir children. Abu Abdillah has ever said, "I do not like a Muslim man marry with Jewish or Christian woman atau Nashrani, because I am worried their children will be Jewish or Christian."<sup>21</sup> This exemplifies that a marriage has political goals, for example to attract partner (wife) into other partner's belief (husband). When Muslim is a minority, this political motive behind marriage is likely to happen.

Second, some ulama fiqh open possibility to do such marriage. The reasons: [a]. Referring to the al-iktifa' theory in Arabic language, Al-Ma'idah verse 5 that

<sup>18</sup> Rasyid Ridha, *Tafsir al-Qur'an al-Hakim*, Juz II, h. 286 dan Juz VI, pp. 158-159.

<sup>19</sup> Abdul Moqsih Ghazali, "Nikah Beda Agama dalam Islam", in Ahmad Nurcholish, *Menjawab 101 Masalah Nikah Beda Agama*, (Tangsel: Harmoni Mitra Media, 2010), p. 7.

<sup>20</sup> Abdul Moqsih Ghazali, "Nikah Beda Agama dalam Islam", p. 8.

<sup>21</sup> Muhammad Thabathaba'i, *al-Mizan fi Tafsir al-Qur'an*, volume V, p. 221.



permits a marriage between a Muslim man and Ahli Kitab woman, is considered to be enough (iktifa') to assert legality of a marriage between Muslim woman and Ahli Kitab man. To make it more explicit, that verse will say, "And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, as [lawful in marriage are] chaste men from among the believers and chaste men from among those who were given the Scripture before you." This style of language in Arabic language grammar is *min bab al-iktifa`*.

[b]. There is no clear (sharih) and firm (qathi) dalil in al-Qur`an that forbids a Muslim woman marries with Ahli Kitab man. Not similar to the treatment to musyrik and kafir, al-Qur`an does not mention the legal status of this kind of marriage. A fiqh discourse (that is still being debated) states, no dalil can be interpreted as dalil (adam al-dalil huwa al-dalil), so this marriage is permitted. It is important to note that the ban of a marriage between Muslim woman and Ahli Kitab man, exists in tafsir books and fiqh, not in al-Qur`an and hadits mutawatir.<sup>22</sup>

[c]. The reason that states woman is easily shaken and influenced, is not dalil al-Qur`an and hadits mutawatir. This statement is close to statement of some classic ulama, referring to social reality at that time. Nowadays, when woman is more independent due to vertical mobility and continuously improved quality of education, this reason is not satisfying anymore. As a matter of fact, at least in Indonesia context, there are many Muslim women who still strongly hold their belief despite of getting married with Ahli Kitab men. It is not few children who follow their mothers' belief. A historical fact is, after Zainab binti Muhammad SAW was separated from her husband (Ibn al-Ash) for six years (Zainab in Madinah, and Ibn al-Ash in Mekah), finally the husband converted to his wife's religion. Ibn al-Ash who was musyrik eventually became Muslim and moved to Madinah, living together with his wife and children.

### Interfaith Marriage Practice in Society

Amidst pro and con of interfaith marriage and lack of certain legal protection, practice of interfaith marriage is still common. My institution, for example,<sup>23</sup> almost every day receive inquiries either through direct visit, email, website or social media. In average, there are two unrelated persons to have consultation. It means there are at least 60 couples a month, looking for solution

<sup>22</sup> Abdul Moqsith Ghazali, "Nikah Beda Agama dalam Islam", p. 9

<sup>23</sup> Harmoni Mitra Madania, Tangerang, Banten.

for their marriage. Out of that number, there are averagely 6 to 10 couples who succeed to get married, religiously and officially. Until May 2015, Harmoni Mitra Madania has facilitated interfaith marriage as many as 635 couples from all over Indonesia, since 2005.

From that number, the highest percentage is Muslim-Christian (48%), Muslim-Catholic (42%), and the rest 10 % Muslim-Hindu, Muslim-Buddha, Muslim-Confucianism, Christian-Buddha, Christian-Hindu, and Christian-Confucianism. From geographical distribution, the highest is Jabodetabek (20%), Jawa Tengah (19%), DI Yogyakarta (15%), Jawa Timur (14%), Bali (14%), Sulawesi Selatan (10%), Kalimantan Timur (6%), Sumatra (1%), and Nusa Tenggara Timur (1%). Then, how did these couple get married?

Before holding a marriage, they usually have a consultation with others or interfaith marriage counselors at various institutions.<sup>24</sup> The consultation process has three important point to discuss: how the theological foundation for interfaith marriage is; how an interfaith marriage can be done; and how interfaith marriage can be registered officially by the government and receive a registration certificate. This formal certificate is important to protect husband and wife's rights and duties, as well as children's rights.

In practice, interfaith marriage couples usually have two different religious marriage rituals. For instance, is they are Muslim-Christian, there will be akad nikah according to Islam led by a penghulu and a marriage blessing according to Christian led by a pastor. Afterward, there will direct civil registration by government officials from . This type of marriage does not oblige one of them to convert. There is no process of beingmuallaf (by saying syahadatain) and being baptized. Each still holds their own belief.

This method is considered fair for both parties because each has received legalization according to their religions which is regulated in the Marriage Law of 1974. This marriage is also registered officially by Dinas Kependudukan dan Pencatatan Sipil (DKPS). Why does this institution register an interfaith marriage? The reason is Kantor Urusan Agama (KUA) does not want to register any interfaith marriage, and DKPS is the only institution that may register it. Despite of not going through KUA, the marriage is still legal and valid, and receives a proof, a Marriage

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<sup>24</sup> Besides Harmoni Mitra Madania, there also a Yayasan Indonesia Bahagia domiciled in Jakarta and Yayasan Percik domiciled in Salatiga, Centra Java. Besides there Indonesian Conference on Religion and Peace which limits itself to counseling and advocacy services. For facilitating transfer to another body.

Certificate. With this Marriage Certificate, a couple can propose to receive Family Card (Kartu Keluarga - KK), Birth Certificate for children, etc.

### The Need for Clear Legal Basis

Although constitutionally interfaith marriage is highly possible, but due to lack of understanding toward existing legislation by the state officials, there are often some administrative blocks that can be solved only through establishment of fixed and clear legal basis. The marriage law, in fact, does not prohibit interfaith marriage. Nevertheless, in practice, not many bureaucrats – from RT, RW, Kelurahan, KUA, DKPS, bahkan hingga Pengadilan Negeri (PN), understand that there is no ban against interfaith marriage. On the contrary, most of them think that interfaith marriage cannot be conducted officialy. Only a few of them understand the law, and openly provide service to interfaith marriage couples.

It means there is lack of a clear legal basis. This situation encourages one student and four alumni of the Law Faculty of University of Indonesia, to propose judicial review toward the Marriage Law of 1974. Specificaly, they, Anbar Jayadi, Rangga Sujud, Varida Megawati, Damian Agata, dan Lutfi Sahputra requested the Constitutional Court a clear interpretation of article 2 verse 1, to remove administrative barrier of interfaith marriage. They view there is multi intepretation, that results unclear legal position.

Moreover, they also requested that interfaith marriage in Indonesia should be legalized. The article 2 verse 1 has been in contradictory with the rights of having religions or beliefs that is private, cannot be forced, and cannot be removed in any situations (non-derogable right).<sup>25</sup>

I also give full support for this judicial review effort. In addition, I have been involved assisting these five claimants. Even, I was asked to be a witness for a court session in the Constitutional Court from September to October 2014. Unfortunately, until today, there is still no decision from the Constitutional Court.

Some parties opposed this judicial review, such as Majelis Ulama Indonesia (MUI), Front Pembela Islam (FPI), PP. Muhammadiyah, PB-NU, and Parisada Hindu Dharma Indonesia (PHDI). Nevertheless, some organizations support fully the request, such as Indonesian Conference on Religion and Peace (ICRP), Human Rights Working Group (HRWG) Indonesia, Komnas Perempuan, Komnas HAM, Konferensi Wali-Gereja Indonesia (KWI), Perwakilan Umat

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<sup>25</sup> <http://www.hukumonline.com/berita/baca/lt53feb4141a5b9/mahasiswa-fh-ingin-kawin-beda-agama-dilegalkan>. Accessed in May, 20 2015.

Buddha Indonesia (Walubi), Majelis Tinggi Agama Khonghucu Indonesia (Matakin), and Persekutuan Gereja-gereja di Indonesia (PGI).

### Concluding Remarks

#### a. Conclusion

1. In theological perspective, there is plurality of tafsir or understanding about interfaith marriage. It is important then, to be open and provide space for people to choose suitable tafsir. A domination and hegemony over tafsir will restrict citizens.
2. Although constitutionally there is no ban against interfaith marriage, practically interfaith marriage is difficult to do.
3. Generally, interfaith marriage couples can do their marriage after being advocated by non-governmental institutions that facilitate them.
4. There is various understanding among state apparatus about interfaith marriage. Thus, there are some allowing it, some forbidding it. Some DKPS may register the marriage officially, but a lot of them reject it.

#### b. Recommendation

There is a need to have a massive effort to formulate a law or government regulation that allows clearly interfaith marriage. It should be done through a synergy among legislative, judicial and executive authorities, thus civil rights of citizens may be protected fully.

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