

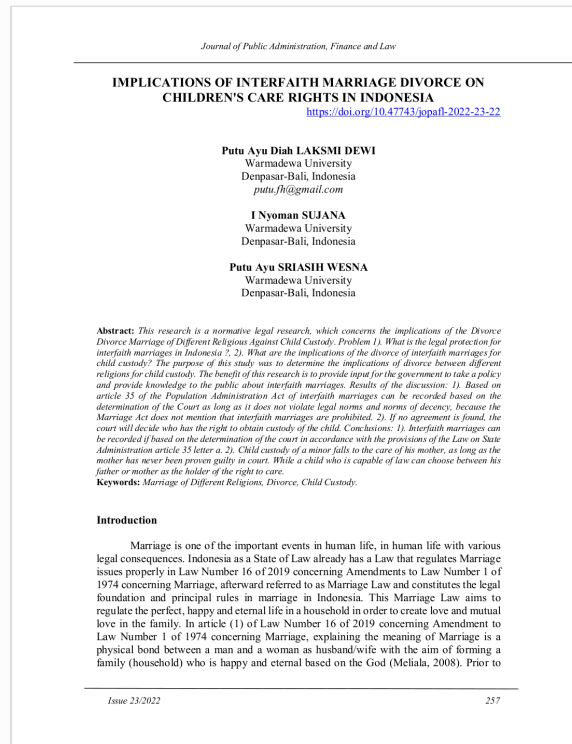


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# Implications of Interfaith Marriage Divorce on Children's Care Rights in Indonesia

*by Putu Ayu Sriasih Wesna*

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## IMPLICATIONS OF INTERFAITH MARRIAGE DIVORCE ON CHILDREN'S CARE RIGHTS IN INDONESIA

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**Abstract:** *This research is a normative legal research, which concerns the implications of the Divorce Marriage of Different Religious Against Child Custody. Problem 1). What is the legal protection for interfaith marriages in Indonesia ?, 2). What are the implications of the divorce of interfaith marriages for child custody? The purpose of this study was to determine the implications of divorce between different religions for child custody. The benefit of this research is to provide input for the government to take a policy and provide knowledge to the public about interfaith marriages. Results of the discussion: 1). Based on article 35 of the Population Administration Act of interfaith marriages can be recorded based on the determination of the Court as long as it does not violate legal norms and norms of decency, because the Marriage Act does not mention that interfaith marriages are prohibited. 2). If no agreement is found, the court will decide who has the right to obtain custody of the child. Conclusions: 1). Interfaith marriages can be recorded if based on the determination of the court in accordance with the provisions of the Law on State Administration article 35 letter a. 2). Child custody of a minor falls to the care of his mother, as long as the mother has never been proven guilty in court. While a child who is capable of law can choose between his father or mother as the holder of the right to care.*

**Keywords:** *Marriage of Different Religions, Divorce, Child Custody.*

### Introduction

Marriage is one of the important events in human life, in human life with various legal consequences. Indonesia as a State of Law already has a Law that regulates Marriage issues properly in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, afterward referred to as Marriage Law and constitutes the legal foundation and principal rules in marriage in Indonesia. This Marriage Law aims to regulate the perfect, happy and eternal life in a household in order to create love and mutual love in the family. In article (1) of Law Number 16 of 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage, explaining the meaning of Marriage is a physical bond between a man and a woman as husband/wife with the aim of forming family (household) who is happy and eternal based on the God (Meliala, 2008). Prior to

Law Number 16 of 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage, the regulations governing marriage were pluralistic because they were based on the differentiation of the Indonesian population, namely (Sujana, 2020):

1. For native Indonesians who are Moslems, religious law is accepted into traditional law. In general, native Indonesians who are Muslim carry out the Kabul consent, as stipulated in Islamic law.
2. For other Indonesian people customary law applies.
3. For native Indonesians who are Christians, Huwelik Ordonnantie Christen Indonesia (HOCl) S.1933 Number 74.
4. For Chinese Easterners and Chinese citizens of Chinese descent the provisions in the Civil Code.

Along with the times, the condition of pluralism of Marriage Law in Indonesia until now continues to affect the life of the Indonesian people, which can be seen in terms of interfaith marriages that occur in Indonesia, both between Moslems and Hindus, and other religions such as Catholic, Christian, Buddhist and Kong Hu Chu. Religious differences that are embraced, of course, will result in regulations that will regulate his marriage so that it can be declared valid. It is undeniable that marrying someone you love is the desire of everyone. Sometimes religion and regulations become a barrier between the couple. But not a few couples who will do marriages with different beliefs, it can be made possible because of the unlimited intercourse between humans. For this reason it cannot be denied that interfaith marriages are becoming increasingly common in the community.

The enactment of the Marriage Law has been relatively able to respond to the laws and regulations that govern marriages uniformly and for all masses of people in Indonesia. However, this does not mean that this Law has regulated all aspects related to marriage. Examples of issues that are not regulated by the Marriage Law are interfaith marriages, namely marriages between a male and a woman of different religions (Rusli & Tama, 1986). Although interfaith marriages are not clearly regulated in the Marriage Law, the phenomenon of such marriages continues to occur in Indonesian society. It can be seen from both the mass media and electronic media, there are many who do marriages with unreligious couples. For example, for example from a married couple, Jamal Mirdad, a Moslem, married Christian Lydia Kandou based on the South Jakarta District Court No. 238/Pdt/P/1986/PN.Jkt.Sel dated May 29, 1986, a marriage between Andi Vonny Gani P is a Moslem woman married to Hendrik Nelwan who is a Christian based on the Supreme Court Jurisprudence Register Number 1400/K/Pdt/1986 and Marriage between Roy Candra Lesmana a Moslem with Rina Ayuningsih Nareswari who is Christian based on the Establishment of the District Court Number 21/Pdt/P/2001/Semarang Regency PN. Of course there are still many events like this that are not detected by the media.

Running a family life is not as easy and smooth as everyone wants and expects. Many small things and trivial problems to the serious things that are considered unable to be resolved or there is no way out. Divorce is not the will of humans, divorce is not a way out either. No one wants it because marriage is a very sacred thing and takes place once in a lifetime for humans to build a household peace and tranquility. Divorce is done between husband and wife who have religion and the same belief there is no problem in filing a petition/lawsuit to the court, because it is clear if the divorce is carried out by those who have Islam then the religious court will decide it, but if the divorce is carried out by those who adhere to a religion outside of Islam then the State court will decide because it is in

accordance with the absolute authority of a court. This is a dilemma if the divorce is carried out by those who engage in interfaith marriages that are held abroad and also most of the divorce settlement takes place in the District Court. Here the question arises whether the District Court has the authority to terminate divorce of different religions. Wherein it is known that the Indonesian State itself does not recognize interfaith marriages in Indonesia. Here there is an uncertainty in the Indonesian legal system, because the Marriage Law does not explicitly prohibit interfaith marriages, so that many parties who want interfaith marriages, using certain methods to carry out their marriages by utilizing existing legal loopholes in This Marriage Law. And what about the legal consequences on Child Custody in the event of divorce between religions.

## **Methods**

The research method used to compile this journal is to use <sup>7</sup>normative legal research. Normative legal research is research aimed at obtaining objective law (legal norms), namely by conducting research on legal issues and obtaining subjective law (rights and obligations) (Rusli, 2006). Normative legal research in this paper is to study document studies, namely using various secondary legal materials such as legislation, legal theory, and can be in the form of scholars' opinions relating to the subject matter. In other words, this research emphasizes research on existing legal materials in order to answer the problem of the implications of divorce of interfaith marriages for child custody.

## **Results and discussion**

### *Legal Protection Of Different Marriage In Indonesia*

Regarding legal protection, before the entry into force of the Marriage Law, in Indonesia there had been a legal arrangement for interfaith marriages. The regulation in question is a regulation made by the Dutch colonial named *Regeling Op De Gemengde Huwelijken* (GHR) or Marriage regulations contained in *Staatblad 1898 Number 158* (Purwaharsanto, 1992). After the entry into force of the <sup>22</sup>Marriage Law, interfaith marriages tend to be impeded. This is based on the history of the marriage law of 1974 article 11 paragraph 1 which states, "differences due to nationality of ethnicity, country of origin, place of origin, religion, beliefs and descent are not barriers to marriage" and then get amended, then interfaith <sup>5</sup>arriages not possible (prohibited) in Indonesia. <sup>15</sup>the Marriage Law does not explicitly state that interfaith marriages are prohibited, the Human Rights Law <sup>23</sup>state that everyone has the right to form a family a <sup>9</sup> continue their descent without coercion in accordance with the provisions of article 10 paragraph (1) and paragraph (2). Based on Law Number 24 of 2013 concerning Amendment to Law Number 23 of 2006 concerning Population Administration Article 35 letter a states "Marriage Registration also applies to marriages determined by the Court". What is meant by Marriage determined by the Court is a Marriage conducted between people of different religions. Regarding the determination of the Court, in 1986 in a Supreme Court Consultative Meeting it was decided that the petition for Cassation of the <sup>11</sup>plicant was granted in part by Number: 1400/K/Pdt/1986. Based on the determination of the Supreme Court No. 1400/K/Pdt/1986 was made into jurisprudence by other judges to decide cases on Interfaith Marriage, one of

the examples in Surakarta District Court Decision No.421/Pdt.P/2013/PN.SKa. the efforts made by the government related to the recognition of interfaith marriages are none other than in the context of realizing legal certainty and also legal protection for those who engage in interfaith marriages and also do not conflict with applicable laws and regulations, in this case the Law Number 16 of 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage. Theories used in this problem are Legal Protection Theory and Legal Certainty Theory. Based on the theory of legal protection, the obligation to register marriages can be placed as a preventive measure from the possibility of birth of violations of the law in the form of violence in marriage with an authentic juridical, evidenced by a marriage certificate. Efforts to obtain legal protection for interfaith marriage couples can be made by making a request to the Court as long as it does not violate the legal norms and the norms of decency. Whereas based on Legal Certainty Theory, requires the creation of general rules or general rules that apply generally in this case regarding interfaith marriages to achieve a legal goal that is legal certainty, justice, and effectiveness or usefulness.

#### *Implications Of Interfaith Marriage Divorce On Children's Care Rights*

The child that born cannot determine what religion he will follow, however, the teachings of each religion at the time of the child's birth are clear. For couples of different religions, it will certainly be difficult to make choices about which religious teachings will be followed at the birth of their child. It is possible for this couple to make a deal, for example a boy follows his father's religion and a girl follows his mother's religion, and a religious ritual is performed on the child according the accuracy. But whether the choice of religion for their children's religion can avoid problems in the child later in the day, for example, which is related to the problem of guardian marriage and so on.

The legal status of children born to interfaith marriages refers to the provisions of Article 42 of Law Number 16 Year 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage mention that a legitimate child is born in or as a result of a legal marriage. So a child born from a legal marriage is done both at the Office of Religious Affairs and at the Civil Registry Office, so the position of the child is a child which valid in the eyes of the law and has the rights and obligations of children and parents as stipulated in Article 45 through Article 49 of Law Number 16 Year 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage (Febriyanti, 2011). Children the results of a different religious marriage are legal according to the law because couples who do interfaith marriages marry in a legitimate manner based on a court decision and are recorded in accordance with the provisions of Article 35 letter a of Law Number 24 of 2013 concerning Amendment to Law Number 23 of 2006 concerning Population Administration.

Based on article 41 letter a of the Marriage Law, marriage does not eliminate the obligation of fathers and mothers to care for and educate their children, if there is a dispute regarding the control of children, the court will give a decision. The theory used in this problem is Justice Law theory. Child born from interfaith marriages must get justice because the child is a child born from a legal marriage if through a court ruling and recorded in accordance with the provisions of Article 35 letter a of the Population Administration Act. The implementation of interfaith marriages is also supported by the Supreme Court Jurisprudence No. 1400/K/Pdt.P/1986.

## Conclusion

Legal Protection of Interfaith Marriage, that is, based on the Marriage Law there is no article that states expressly that Interfaith Marriage is prohibited. Different Religious Marriage was born because of the pluralism of Indonesian people. Every person has the right to form a family and continue the descent through a legal marriage and based on the free will of the prospective husband and wife without coercion from any party, as stated in article 10 paragraph (1) and paragraph (2) of the Human Rights Law. Regarding the recording of interfaith marriages is regulated in article 35 letter a of the Population Administration Act. In his explanation interfaith marriages can be recorded based on the Decision of the Court as long as it does not violate the legal norms and the norms of decency. Implications of interfaith marital divorce to child custody namely child custody of minors falling into the care of their mothers, as long as the mother has never been proven guilty in court and the father shares the costs for the child both for education and for the care needed by the child. If the father is in fact unable to fulfill these obligations, the Court can determine that the mother will share the costs. Whereas a child who is legally competent can choose between his father or mother as the holder of the right to care.

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