

**LAPORAN PENELITIAN INTERNAL KELOMPOK MONODISIPLIN**



**THE FUNDAMENTAL PROBLEMS OF IMPLEMENTING RELIGIOUS-  
MARRIAGE LAW IN INDONESIA AND A PROPOSAL TO REFORM BASED ON  
THE PURE OF LAW THEORY**

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ADAPTIVE TO 'PURE OF LAW LEGAL THEORY**

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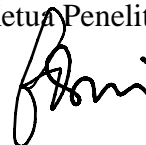
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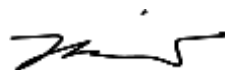
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## **ABSTRACT**

Indonesian marriage law puts religion as the basis for the validity of marriage, while on the other hand it does not use religion as the basis for the validity of divorce. It raises theoretically a fundamental problem called human rights violation. With an empirical and normative approach, this research purposively sampled 10 former wives and 10 former husbands after Catholic divorce in Yogyakarta City and Sleman Regency in 2023, to show what fundamental problems arise when going to or already remarried. Furthermore, based on the existing problems, the research explores argument for proposing a 'neutral' marriage law based on pure of law theory as a solution to prevent or eliminate fundamental post-divorce problems. The result shows that Catholic ex wives and husbands as the respondents experienced handicaps to remarry through Catholic way, since the church refuses on the consideration that their previous marriage can not be divorced. They finally force to remarry through the other religion way that indeed does not accord to their own religion. Based on Pure of law theory, it may propose a neutral marriage law from religion basis, that accommodating everyone to marry or divorce freely together to adhere the religion freely. By replacing religion term into the other 'universal value' that relevan for marriage, i.e, based on love of each other and agreement. Or,

Keywords: 'neutral' law, religious law, marriage, reform, pure of law

## BAB I INTRODUCTION

Indonesian marriage law is based on religious law. Article 2 of Law Number 1 of 1974 - as amended by Law Number 16 of 2019 shows the basis by stating that marriage is valid if it is carried out according to the laws of each religion and belief of the prospective bride and groom. This religious legal basis is expected to support the purpose of marriage formulated in Article 1 of Law No. 1 of 1974 as forming a happy and lasting family (household) based on the Almighty God. Here the Indonesian government claims that the best state law to be able to create a happy marriage is marriage law, which is based on religious law.

Despite religious law being the basis for the validity of marriage with the aim of building a happy and eternal family, practice shows that the divorce rate remains high, even the highest among other civil cases such as PMH, default, inheritance, land, banking, and so on. This can be seen in table 1 below.

Table 1

Comparison of civil and divorce cases in Sleman and Yogyakarta City District Courts and Religious Courts in 2022-2023

Courts	Amount of Cases (including divorce)		Amount of divorce	
	2022	2023	2022	2023
PN Sleman	310	284	179 (57%)	118 (41%)
PA Sleman	2494	1784	1672 (67%)	1755 (98%)
PN Kota Yogyakarta	164	153	88 (53%)	57 (37%)
PA Kota Yogyakarta	710	983	618 (87%)	670 (68%)

Analyzed from sources [http://pn-sleman.go.id/sipp/list\\_perkara/](http://pn-sleman.go.id/sipp/list_perkara/) , [https://sipp.pa-slemankab.go.id/list\\_perkara/](https://sipp.pa-slemankab.go.id/list_perkara/) , [https://www.sipp.pn-yogyakarta.go.id/list\\_perkara/](https://www.sipp.pn-yogyakarta.go.id/list_perkara/) , [https://sipp.pa-yogyakarta.go.id/list\\_perkara/](https://sipp.pa-yogyakarta.go.id/list_perkara/)

The high divorce rate in Indonesia proves that religious law is the best law to create a happy and lasting marriage as formulated in Article 1 of Law Number 1 Year 1974, is erroneous because many divorces show the unhappy marriages.

Several reasons raise for claiming divorce before the court. Shellie R. Warren in her studied found ten most common reasons for divorce,<sup>1</sup> such as:

1. Infidelity or an extramarital affair
2. Trouble with finances
3. Lack of communication
4. Constant arguing
5. Weight gain
7. Lack of intimacy
8. Lack of equality
9. Not being prepared for marriage
10. Physical and emotional abuse

Warren's study shows that religion is also not one of the grounds for divorce. This means that the religious basis for the validity of marriage has nothing to do with divorce, because none of the reasons for divorce are based on religious issues.

The high divorce rate in Catholic religion-based marriages in the two District Courts in table 1 above, shows that although according to Catholic religious law does not allow divorce, but because state law allows divorce - including Catholic marriages - then any religion-based marriage divorce is allowed. This can be seen in the provisions of Article 39 of Law Number 1 Year 1974, that:

- (1) Divorce may only be granted before a Court session after the Court concerned has tried and failed to reconcile the two parties.
- (2) In order to obtain a divorce, there must be sufficient grounds that the husband and wife will not be able to live together as husband and wife.

The provisions on divorce do not require that divorce is valid if it is carried out according to the laws of the religion and beliefs of the spouses. Meanwhile, for the validity of marriage, Article 2 of Law Number 1 of 1974 determines that marriage is valid if it is carried out according to the laws of religion and belief of the couple. In practice, as Sundari et al (1994) found, the difference in including religious elements as a requirement in Indonesian marriage law has a serious negative impact on certain religious groups, especially religions that do not recognize divorce in Indonesia, as follows.

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<sup>1</sup> Shellie R. Warren, Reasons For Divorce: Top 10 Reason Why Marriages Fail. Marriage.Com. Updated 7 August 2023.

1. Bride and groom who are of different religions are 'forced' to change religions, in order to make the marriage valid. This is a violation of the right to freedom of religion as stipulated in Article 29 of the 1945 Constitution of the Republic of Indonesia (UUD 1945).
2. Divorce provisions are not based on religious law, making it 'easier' for 'undivorced' marriage partners to divorce, but when they remarry after the divorce, they are 'forced' to choose another religion in order to make the second marriage valid. This is also a violation of human rights.
3. The legalization of marriage, whether first or second, will lead to the gradual extermination of minorities, in this case non-Muslim-Catholics. This is a violation of the right of vulnerable groups of people to obtain more treatment and protection in relation to their specificities as stipulated in Article 5(3) of Law 39 of 1999.

With the serious problems that arise in practice, this research aims to examine how these problems are seen from the theory of human rights. Furthermore, it offers the application of Hans Kelsen's pure legal theory in the form of neutral law from the elements of religious interests, as a counter-feith to the problems that arise with the application of religious law.

## BAB II

### LITERATURE REVIEWS

Marriage is one of the human rights. This is not only universally recognized, as can be seen in Article 16 of the 1948 Universal Declaration of Human Rights (UDHR), but also in Indonesia, which can be seen from the provisions of Article 28B of the 1945 Constitution as well as Article 10 of Law Number 39 of 1999. Article 16 UDHR provides that [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]. Under this provision, the right to marry cannot be restricted, including on the basis of religious restrictions. Based on Article 18 of the UDHR, which stipulates that [Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance], the right to marry as a human right must also not conflict with the right to freedom of religion, including free conversion.

Similar provisions are also applied in Indonesia. This can be seen in the provisions of Article 28B of the 1945 Constitution and Article 10 of Law No.39 of 1999 which basically stipulates that everyone has the right to form a family and continue offspring through legal marriage. When a person for any reason cannot enter into a legal marriage, it will violate his or her human rights. These two provisions are unlike Article 16 of the UDHR, which includes a clause that the right to marry cannot be restricted by religion. However, just like the UDHR, based on the provisions of Article 22 of Law 39/1999 which provides for freedom of religion, the implementation of the right to marry in Indonesia also has to take into account the right to freedom of religion. It should also be noted that Indonesia does not regulate the transfer of religion as a human right as regulated by the UDHR.

Regarding the position of human rights, Article 1 of Law No. 39/1999 stipulates that Human Rights are a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law, government, and every person for the sake of honor and protection of human dignity. Thus, the state must respect and protect human rights, including the right to marry and the right to freedom of religion.



Until now, there are still many countries that apply religious law as part of state law. Indonesia is one of those that applies religious law, in addition to India,<sup>2</sup> Chile,<sup>3</sup> China, Japan, South Korea, and Taiwan with the common origin of the Confucian,<sup>4</sup> as well as other countries. In multi-religious or multi-race societies, the application of religious law and racial law often causes problems related to human rights violations, including in marriage law. Such as the results of Sundari,<sup>5</sup> and Nisa's research in Indonesia,<sup>6</sup> the results of Joffe's study in North America,<sup>7</sup> the conclusions of Sonkar's findings in India,<sup>8</sup> and McClain's research in Virginia in the United States.<sup>9</sup>

In the debate about the choice to apply religious or secular law, Hans Kelsen's pure of law theory offers a pure application of law in a free state from two directions: (1) statements derived from a sociological perspective that uses the methods of causal science to assume law as part of nature; and (2) from statements of natural law theory that incorporate the science of law into the realm of political ethical postulates.<sup>10</sup> The “new” legal theory should be able to purify law from foreign elements, such as sociological perspectives and political ethics, have caused legal science to become involved with “alien” elements that misleads. One of the Kelsen thesis is the idea of normativity without the thesis of morality. As Wardiono

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<sup>2</sup> Sonkar, Sumit. (2022). Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance. *Journal of Law and Religion*, 37(3), 432-445. doi:10.1017/jlr.2022.37

<sup>3</sup> Rubio, Jorge del Picó. 2009. Religious Marriage In The Chilean Juridical Régime: The Marriage System Under The Article 20 Of The Law N° 19.947. *Ius et Praxis*. Vol.15(2): 51-77. [https://www.researchgate.net/publication/294407750\\_Religious\\_marriage\\_in\\_the\\_chilean\\_judicial\\_regime\\_The\\_marriage\\_system\\_under\\_the\\_article\\_20\\_of\\_the\\_law\\_N\\_19947](https://www.researchgate.net/publication/294407750_Religious_marriage_in_the_chilean_judicial_regime_The_marriage_system_under_the_article_20_of_the_law_N_19947)

<sup>4</sup> Raymo, James M., Hyunjoon Park, Yu Xie, and Wei-jun Jean Yeung. Marriage and Family in East Asia: Continuity and Change. *Annu Rev Sociol.* 2015 Aug; 41: 471–492. doi: [10.1146/annurev-soc-073014-112428](https://doi.org/10.1146/annurev-soc-073014-112428)

<sup>5</sup> E.Sundari, 1994, *Pertimbangan Hukum dalam Mengadili Gugatan Perceraian Katholik di Pengadilan Negeri Se-DIY*.

<sup>6</sup> Nisa, E. (2018). THE BUREAUCRATIZATION OF MUSLIM MARRIAGE IN INDONESIA. *Journal of Law and Religion*, 33(2), 291-309. doi:10.1017/jlr.2018.28.

<sup>7</sup> Joffe, L. (2016). WHAT'S THE HARM IN POLYGAMY? MULTICULTURAL TOLERATION AND WOMEN'S EXPERIENCE OF PLURAL MARRIAGE. *Journal of Law and Religion*, 31(3), 336-353. doi:10.1017/jlr.2016.36.

<sup>8</sup> Sonkar, Sumit. (2022). Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance. *Journal of Law and Religion*, 37(3), 432-445. doi:10.1017/jlr.2022.37

<sup>9</sup> Dyer, J. (2021). BIGOTRY, TIME, AND MORAL PROGRESS - Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain. *Journal of Law and Religion*, 36(2), 328-333. doi:10.1017/jlr.2021.30.

<sup>10</sup> Stanley L. Paulson, “The Neo-Kantian Dimension of Kelsen's Pure Theory of Law”, *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, p. 313.

interpretes, it means legal should be separated from moral.<sup>11</sup> Hans Kelsen argues that the object of legal science is norms with certain characteristics: without the thesis of morality,<sup>12</sup> and as the meaning of the act of will.<sup>13</sup>

Kelsen, in his pure theory of law, seeks to overcome the problem of antinomy jurisprudence that may be occurred in the field of moral, by proposing a norms that have objective validity as not the result of mental actions of individual or group. Law will only be meaningful if it contains general moral values, that allow for the enactment of all moral systems, which (may) exist in society.<sup>14</sup> :Legal norms are not intended to realize moral values, but they embody legal values, which then must be seen as moral (relative) values. Therefore, the rationality/validity of a positive legal order does not depend on an absolutely valid moral order, nor to conform to certain moral systems.<sup>15</sup>

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<sup>11</sup> *Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman*. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. Journal Of Law. Vol. **5(3)**. DOI: <https://doi.org/10.22304/pjih.v5n3.a8>.

<sup>12</sup> *Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman*. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. Journal Of Law. Vol. **5(3)**. P.545. DOI: <https://doi.org/10.22304/pjih.v5n3.a8>.

<sup>13</sup> *Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman*. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. Journal Of Law. Vol. **5(3)**. P.548. DOI: <https://doi.org/10.22304/pjih.v5n3.a8>

<sup>14</sup> *Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman*. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. Journal Of Law. Vol. **5(3)**. P.547. DOI: <https://doi.org/10.22304/pjih.v5n3.a8>

<sup>15</sup> *Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman*. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. Journal Of Law. Vol. **5(3)**. P.547. DOI: <https://doi.org/10.22304/pjih.v5n3.a8>

### **BAB III**

### **METHODS**

This study encompasses an empirical and a normative or doctrinal legal research by compiling primary and secondary data.<sup>16</sup> Primary data include respondents of 10 ex-wives and 10 ex-husbands to be interviewed. Secondary data consist of Primary legal materials, including Indonesian Constitution, Law No.1 of 1974 on Marriage Law, Law No.39 of 1999 on The Protection of Human Rights, The Universal Declaration of Human Rights 1948. Secondary legal materials consist of pure theory of Law, related legal opinions as well as pre-existing contemporary research and news reports.

Furthermore, the empirical data and the normative data will be analysed qualitatively to show the problems of implementing religious-marriage law through human rights perspective, and to explore argumentation of proposing an alternative solution based on the empirical problem through the pure of law theory. It will conclude the result using a deductive way of thinking (Elo et al, 2014). The goals of the research include: (i) learning from the problems as a result in implementing religious law into a plural religious society such as Indonesia; (ii) developing a legal policy that embracing all religious values.

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<sup>16</sup> Ali, S.I., Yusoff, M. Z., Ayub, Z. A. *Legal research of doctrinal and non-doctrinal*. International Journal of Trend in Research and Development. Volume 4(1), January– February 2017. 493–495; Gawas, V. J. 2017. Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development, International Journal of Law, Vol.3 (5), September 2017, pp.128–130. <http://www.lawjournals.org/archives/2017/vol3/issue5/3-5-130>

BAB IV  
DISCUSSION

*Major problems after a Catholic divorce*

After the divorce of Catholic couples, there are several problems they face when they will remarry. From a total of 153 divorce cases decided in Sleman District Court in 2020, Ex-wife<sup>10</sup> ex-husband or ex-wive respondents who after divorce experienced fundamental problems when planning to remarry. Table 2 shows the results.

Table 2

Several problems in re-marrying after Catholic divorce in Sleman District court areas

Divorce judgement	Respondent	Forms of problems
224/Pdt.G/2020/PN. Slmn	Ex-wife	Already had a partner, wanted to get married, however, had to wait for the ecclesiastical annulment process, which had not come down for 1 year.
318/Pdt.G/2020/PN. Slmn	Ex-wife	The church rejected the Catholic marriage because the couple had been married before even though they were divorced. By the church it is considered still married because the Catholic church does not recognize divorce. Finally they got married in Islam and had to convert first.
320/Pdt.G/2020/PN. Slmn	Ex-wife	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic, because the process of canceling the marriage by the Catholic Church takes a long time.
316/Pdt.G/2020/PN. Slmn	Ex-husband	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic, because the process of canceling the marriage by the Catholic Church takes a long time.

314/Pdt.G/2020/PN. Slmn	Ex-husband	Marry in Islam, because the spouse is Muslim and the church refuses to marry in Catholicism because it does not recognize divorce, unless there is an annulment of canonical marriage for certain reasons that cannot be fulfilled by them.
308/Pdt.G/2020/PN. Slmn	Ex-wife	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic, because the process of canceling the marriage by the Catholic Church takes a long time.
307/Pdt.G/2020/PN. Slmn	Ex-wife	Remarried in a Christian way because her partner is a Christian.
305/Pdt.G/2020/PN. Slmn	Ex-wife	Marry in Islam, because the spouse is Muslim and the church refuses to marry in Catholicism because it does not recognize divorce, unless there is an annulment of canonical marriage for certain reasons that cannot be fulfilled by them.
302/Pdt.G/2020/PN. Slmn	Ex-husband	Marry in Islam, because the spouse is Muslim and the church refuses to marry in Catholicism because it does not recognize divorce, unless there is an annulment of canonical marriage for certain reasons that cannot be fulfilled by them.
278/Pdt.G/2020/PN. Slmn	ex-husband	Marry in Islam, because the spouse is Muslim and the church refuses to marry in Catholicism because it does not recognize divorce, unless there is an annulment of canonical marriage for certain reasons that cannot be fulfilled by them.

n case No.224/Pdt.G/2020/PN Slmn, the ex-wife had to wait for an ecclesiastical annulment process first if she wanted to remarry as a Catholic. In Catholic marriage, divorce is not recognized. However, the church recognizes the annulment of marriage for certain reasons. If the marriage is annulled, it means that the existing marriage is considered invalid and canceled. The husband and wife are considered unmarried. One of the conditions for annulment is if the couple has not had intercourse, which is proven by not having children. If they already have children, they are considered to have had intercourse (*Ratum et consumatum*) and this cannot be annulled.

The long wait for the annulment process and the uncertainty of the granting of the annulment petition delay the human right to remarry for a reasonable period of time, and may not even be fulfilled if the annulment petition is rejected. This is contrary to Article 16 of the UDHR, which states that [Men and women of legal age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They shall be entitled to equal rights in regard to marriage, during marriage and on its dissolution]. Under this provision, the right to marry cannot be restricted, including on the basis of religious restrictions. It is true that ex-wives and husbands can remarry afterwards and that is in accordance with their right to marry as part of their human rights. The problem is, when Catholics want to remarry, they cannot do so through Catholic law which does not grant the right to divorce.

The result of the rejection of marriage by the Catholic Church encourages couples to exercise their right to marry in other ways, as happened in case numbers 318/Pdt.G/2020/PN. Slmn, 320/Pdt.G/2020/PN. Slmn, 316/Pdt.G/2020/PN. Slmn, 314/Pdt.G/2020/PN. Slmn, 308/Pdt.G/2020/PN. Slmn, 307/Pdt.G/2020/PN. Slmn, 305/Pdt.G/2020/PN. Slmn, 302/Pdt.G/2020/PN. Slmn, 278/Pdt.G/2020/PN. Slmn, namely 'forced' to marry in another religion (Christianity, Islam), because the couple is Muslim and the church refuses to marry because it does not recognize divorce, unless there is a canonical marriage annulment for certain reasons that cannot be fulfilled.

What happens in most of these cases is a violation of human rights, especially the right to freedom of religion as stipulated in Article 22 of Law 39 of 1999. Just like the UDHR, based on the provisions of Article 22 of Law 39/1999 which provides for freedom of religion, the implementation of the right to marry in Indonesia also has to take into account the right to freedom of religion. The right to marry as stipulated in Article 16 of Law 39 of 1999 is fulfilled, but the right to freedom of religion is not fulfilled because they cannot practice their

own religion in marriage and are 'forced' to convert to a religion they do not belong to, so that the right to marry can be fulfilled. The right to marry as a human right must also not conflict with the right to freedom of religion. Conversion is part of the right to freedom of religion, as long as it is not done under 'duress', such as being 'forced' to convert to fulfill a marriage requirement, or a job requirement.

*A 'neutral' marriage law based on pure theory of law: a proposal*

In the situation of moral problems that arise due to the application of religion-based marriage law, namely violations of human rights, efforts need to be made so that the politics of law based on religious morals does not cause other moral problems, namely violations of human rights. One of them is to exclude religious elements in the law that result in moral human rights problems. The issue of removing law from moral aspects, including religious elements, is a teaching from the pure of law theory created by Hans Kelsen.

One of the Kelsen thesis is the idea of normativity without the thesis of morality, including religion-based morality. Meanwhile, Indonesian marriage law is based on the realm of political ethical postulates, especially religious postulates. Indonesian marriage law makers assume that based on religious postulates, marriages will last and be happy. In practice it turns out that the opposite happens, many marriages fail with the filing of divorce lawsuits as can be seen in Table 1.

Pure theory of law, as restated by Paulson,<sup>17</sup> wants to take law out of the realm of political ethical postulates. As Wardiono interpretes, it means legal should be separated from moral,<sup>18</sup> including religious morality. Does the exclusion of the moral element in the law make the law bad? If the definition of a good law is one that does not cause fundamental problems for the community, the fact shows that in multi-religious or multi-race societies, the application of religious law and racial law often causes problems related to human rights violations, including in marriage law. Such as the results of Sundari,<sup>19</sup> and Nisa's research in Indonesia,<sup>20</sup> the results of Joffe's study in North America,<sup>21</sup> the conclusions of Sonkar's

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<sup>17</sup> Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, p. 313.

<sup>18</sup> Kelik Wardiono, *Khudzaifah Dimiyati, Saepul Rochman*. 2018. *The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'*. *Journal Of Law*. Vol. 5(3). DOI: <https://doi.org/10.22304/Pjih.V5n3.A8>.

<sup>19</sup> Sundari, et al, 1994,

<sup>20</sup> Nisa, E. (2018). THE BUREAUCRATIZATION OF MUSLIM MARRIAGE IN INDONESIA. *Journal of Law and Religion*, 33(2), 291-309. doi:10.1017/jlr.2018.28.

findings in India,<sup>22</sup> and McClain's research in Virginia in the United States.<sup>23</sup> This means that the application of religious law does not guarantee that its laws create good for the people. Supriyo, Gunarto, and Khisni,<sup>24</sup> even criticized by stating that regulations on interfaith marriage has not been based on the value of justice because of the many rejections for marriages with different religions. Thus, laws that are not morally based are not necessarily bad laws. Many countries provide examples of how they have created marriage laws that are not linked to religious morals, including Canada, Singapore, the United Kingdom, and the Netherlands.<sup>25</sup> Without linking marriage law to religion, it provides opportunities for citizens to marry even with people of different religions. Laws outside of family law are generally applied without incorporating affgama law, such as, constitutional law, state administration, binding law, property law, environmental law, maritime law, and international law.

Pure theory of law does not want to remove law from morals at all, but proposing a norms that have objective validity as not the result of mental actions of individual or group. So the validity alone must be objective, not as the result of mental actions of individual or group, rather, as Wardiono states, contains general moral values, that allow for the enactment of all moral systems, which (may) exist in society.<sup>26</sup> Based on the previous preposition, then based on the pure theory of law, Indonesian marriage law can be designed in two ways, (1) still based on religious law, but must cover general religious values; (2) removing religious moral elements based on universal life values that can be accepted by all groups in society.

To reformulate Indonesian marriage law based on general religious values is not easy, because religious values in Indonesia are plural. For example, Islamic marriage recognizes

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<sup>21</sup> Joffe, L. (2016). WHAT'S THE HARM IN POLYGAMY? MULTICULTURAL TOLERATION AND WOMEN'S EXPERIENCE OF PLURAL MARRIAGE. *Journal of Law and Religion*, 31(3), 336-353. doi:10.1017/jlr.2016.36.

<sup>22</sup> Sonkar, Sumit. (2022). Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance. *Journal of Law and Religion*, 37(3), 432-445. doi:10.1017/jlr.2022.37

<sup>23</sup> Dyer, J. (2021). BIGOTRY, TIME, AND MORAL PROGRESS - Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain. *Journal of Law and Religion*, 36(2), 328-333. doi:10.1017/jlr.2021.30.

<sup>24</sup> Doni Adi Supriyo, Gunarto, Achmad Khisni. 2020. Reconstruction of law on inter-religion marriage in Indonesia based on justice value. *International Journal of Law*. Vol.6(5): 411-416.

<sup>25</sup> Tomi Hidayatullah, Oemar Moechthar, and Dimipta Aprilia, 2023. Inter-Religious Marriage: A Comparison Analysis of Indonesian Law With Other Countries. *Notaire*. Vo; 6(3): 291-306. <http://dx.doi.org/10.20473/ntr.v6i2.45871>.

<sup>26</sup> Kelik Wardiono, Khudzaifah Dimiyati, Saepul Rochman. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. *Journal Of Law*. Vol. 5(3). P.547. DOI: <https://doi.org/10.22304/Pjih.V5n3.A8>



divorce and polygamy, while Catholicism does not. General religious values, for example, can be applied by accommodating all religious values that exist in society. If the validity of marriage must be according to religious law, then divorce and polygamy must also consider the religious laws that exist in the community. If Catholic law does not recognize divorce, but rather annulment of marriage, then this must be accommodated by prohibiting divorce and instead providing an opportunity for annulment of marriage. This method has provided objective validity, but can still cause problems, because the annulment of Catholic marriage has a limit, which can only be done if there has not been *ratum et consumatum*, or intercourse, which is proven by the birth of a child.

The second way to develop Indonesian marriage law is to remove the moral elements of religion based on universal life values that can be accepted by all groups in society. For example, for the validity of a marriage, it is not necessary to require religious law, but simply the conditions that are universally and objectively necessary for the validity of an agreement, in this case a marriage agreement. For example, an agreement to build a family, by parties who have met the age considered mature for marriage, and registered. The formulation does not offend religion at all, so it can be accepted by all religions and does not cause problems with the validity of religion-based marriages. Likewise, polygamy and divorce can be based on conditions that are not based on religious law. For example, for polygamy there must be permission from the spouse, be able to provide for the wives, and be fair. For divorce, it is based on objective reasons that make it worth divorcing. For example, divorce must be based on an agreement, or a situation that causes suffering, threat, or safety to the spouse.

## BAB V

### CONCLUSION

The difference in including religious elements as a requirement in Indonesian marriage law has a serious negative impact on certain religious groups. Bride and groom who are of different religions are 'forced' to change religions, in order to make the marriage valid. This is a violation of the right to freedom of religion. Divorce provision that does not base on religious law, makes it 'easier' for 'undivorced' marriage partners to divorce, but when they remarry after the divorce, they are 'forced' to choose another religion in order to make the second marriage valid. The legalization of marriage, whether first or second, will lead to the gradual extermination of minorities, in this case non-Muslim-Catholics. This is a violation of the right of vulnerable groups of people to obtain more treatment and protection in relation to their specificities.

In the midst of a plural society with religious values, pure theory of law can be used as a basis for building Indonesian marriage law that is 'neutral' from religious postulates, based on universal values in marriage that can be accepted by all religious groups in society.

## REFERENCES

- Ali, S.I., Yusoff, M. Z., Ayub, Z. A. *Legal Research Of Doctrinal And Non-Doctrinal. International Journal Of Trend In Research And Development. Volume 4(1), January–February 2017. 493–495.*
- Dyer, J. (2021). BIGOTRY, TIME, AND MORAL PROGRESS - Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain. *Journal of Law and Religion, 36(2), 328-333.* doi:10.1017/jlr.2021.30.
- E. Sundari & Endang Sumiarni. 2015. *Politik Hukum dan tata Hukum Indonesia.* Yogyakarta: Cahaya Atma Pustaka.
- E.Sundari, 1994, *Pertimbangan Hukum dalam Mengadili Gugatan Perceraian Katholik di Pengadilan Negeri Se-DIY.*
- Gawas, V. J. 2017. Doctrinal Legal Research Method A Guiding Principle In Reforming The Law And Legal System Towards The Research Development, *International Journal Of Law, Vol.3 (5), September 2017, Pp.128–130.* [Http://www.lawjournals.org/archives/2017/vol3/issue5/3-5-130](http://www.lawjournals.org/archives/2017/vol3/issue5/3-5-130)
- Hidayatullah, Tomi, Oemar Moechthar, and Dimipta Aprilia, 2023. Inter-Religious Marriage: A Comparison Analysis of Indonesian Law With Other Countries. *Notaire. Vo; 6(3): 291-306.* <http://dx.doi.org/10.20473/ntr.v6i2.45871>.
- Joffe, L. (2016). WHAT'S THE HARM IN POLYGAMY? MULTICULTURAL TOLERATION AND WOMEN'S EXPERIENCE OF PLURAL MARRIAGE. *Journal of Law and Religion, 31(3), 336-353.* doi:10.1017/jlr.2016.36.
- Nisa, E. (2018). THE BUREAUCRATIZATION OF MUSLIM MARRIAGE IN INDONESIA. *Journal of Law and Religion, 33(2), 291-309.* doi:10.1017/jlr.2018.28.
- Raymo, James M., Hyunjoon Park, Yu Xie, and Wei-jun Jean Yeung. Marriage and Family in East Asia: Continuity and Change. *Annu Rev Sociol. 2015 Aug; 41: 471–492.* doi: [10.1146/annurev-soc-073014-112428](https://doi.org/10.1146/annurev-soc-073014-112428)
- Rubio, Jorge del Picó. 2009. Religious Marriage In The Chilean Juridical Régime: The Marriage System Under The Article 20 Of The Law N° 19.947. *Ius et Praxis. Vol.15(2): 51-77.* [https://www.researchgate.net/publication/294407750\\_Religious\\_marriage\\_in\\_the\\_chilean\\_juridical\\_regime](https://www.researchgate.net/publication/294407750_Religious_marriage_in_the_chilean_juridical_regime) The marriage system under the article 20 of the law N 1994

- Supriyo, Doni Adi, Gunarto, Achmad Khisni. 2020. Reconstruction of law on inter-religion marriage in Indonesia based on justice value. *International Journal of Law*. Vol.6(5): 411-416. <https://www.lawjournals.org/archives/2020/vol6/issue5>
- Sonkar, Sumit. (2022). Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance. *Journal of Law and Religion*, 37(3), 432-445. doi:10.1017/jlr.2022.37
- Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, p. 313.
- United Nations, n.d, Universal Declaration of Human Rights. Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights> at March 11, 2024.
- Warren, Shellie R. Reasons For Divorce: Top 10 Reason Why Marriages Fail. *Marriage.Com*. Updated 7 August 2023.
- Wardiono, Kelik, Khudzaifah Dimiyati, Saepul Rochman. 2018. The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law'. *Journal Of Law*. Vol. 5(3). P.547. DOI: <https://doi.org/10.22304/Pjih.V5n3.A8>



## LETTER OF ACCEPTANCE

Dated: May 24, 2024

Dear Author (S):


Elisabeth Sundari, Anny Retnowati, Greetings!

We are delighted to inform you that our scientific and review committee approved your article titled “THE FUNDAMENTAL PROBLEMS OF IMPLEMENTING LEGAL PLURALISM OF RELIGIOUS IN INDONESIAN MARRIAGE LAW AND A PROPOSAL TO REFORM BASED ON THE PURE OF LAW THEORY” (**Article no: IJOR-024-2579**) for publication in Volume 5 (2024) of the International Journal of Religion (IJOR).

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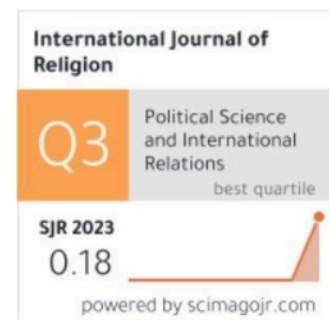
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# The Fundamental Problems of Implementing Legal Pluralism of Religious in Indonesian Marriage Law and A Proposal to Reform Based on The Pure of Law Theory

Elisabeth Sundari<sup>1</sup> and Anny Retnowati<sup>2</sup>

## Abstract

*Indonesian puts religion as the basis for the validity of marriage that raises a fundamental problem called human rights violation. With an empirical and normative approach, this research interviews ten ex-husbands and ex-wives as the respondents after Catholic divorce in Sleman Regency Indonesia in 2020 to show what fundamental problems arise. Furthermore, the research explores the argument for proposing a 'neutral' marriage law based on pure of-law theory to prevent or eliminate fundamental post-divorce problems. The result shows that the respondents experienced handicaps in remarrying the Catholic way since the Church refuses by considering that the previous marriage can't be divorced. The condition forces the ex-wives and husbands to finally remarry through the other religion way that violates their freedom of religious right. Based on the Pure of Law theory, it may propose a neutral marriage law with universal values that accommodating everyone to marry or divorce freely without violating their human rights*

**Keywords:** 'Neutral' Law, Religious Law, Marriage, Reform, Pure of Law

## INTRODUCTION

Indonesia with pluralism religious people develops religious legal system to provide marriage. Article 2 of Law Number 1 of 1974- as amended by Law Number 16 of 2019- shows the basis by stating that marriage is valid if carried out according to the laws of each religion and the beliefs of the prospective bride and groom. The Government expects religion as to support the marriage purpose formulated in Article 1 of Law No. 1 of 1974: to form a happy and lasting family based on the Almighty God. Here, the Indonesian Government claims that the best state law to create a happy marriage is marriage law with religion as the basis.

Despite religious Law being the basis for the validity of marriage to build a happy and eternal family, practice shows that the divorce rate remains high, even the highest among other civil cases such as unlawful, default, inheritance, land, banking. Table 1 shows the situation.

**Table 1 Comparison of civil and divorce cases in Sleman and Yogyakarta City District Courts and Religious Courts in 2022-2023**

Courts	Amounts of civil cases		Amount of divorce cases	
	2022	2023	2022	2023
Sleman District Court	310	284	179 (57%)	118 (41%)
Sleman District Court	2494	1784	1672 (67%)	1755 (98%)
Yogyakarta District Court	164	153	88 (53%)	57 (37%)
Yogyakarta District Court	710	983	618 (87%)	670 (68%)

Analyzed from sources [http://pn-sleman.go.id/sipp/list\\_perkara/](http://pn-sleman.go.id/sipp/list_perkara/), [https://sipp.pa-slemankab.go.id/list\\_perkara/](https://sipp.pa-slemankab.go.id/list_perkara/), [https://www.sipp.pn-yogyakarta.go.id/list\\_perkara/](https://www.sipp.pn-yogyakarta.go.id/list_perkara/), [https://sipp.pa-yogyakarta.go.id/list\\_perkara/](https://sipp.pa-yogyakarta.go.id/list_perkara/)

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The high divorce rate in Indonesia proves that religious Law as the best way to support a happy and lasting marriage is erroneous because many divorces show unhappy marriages. There are several reasons for claiming divorce before the Court. Shellie R. Warren (2023), in her study, found the ten most common reasons for divorce, such as:

Infidelity or an extramarital affair

Trouble with finances

Lack of communication

Constant arguing

Weight gain

Lack of intimacy

Lack of equality

Not being prepared for marriage

Physical and emotional abuse.

The study shows that religion is also not one of the grounds for divorce. The condition means that religious basis for the validity of marriage has nothing to do with divorce because none of the religious issues are the reason for divorce.

The high divorce rate in Catholic religion-based marriages in two District Courts as described in Table 1 shows that although Catholic religious Law does not allow divorce, because state law allows divorce - including Catholic marriages - then any religion-based marriage divorce is allowed. Article 39 of Law Number 1 Year 1974 provides divorce in marriage by stating that:

Divorce may only be granted before a Court session after the concerned Court has tried and failed to reconcile the parties.

To obtain a divorce, there must be sufficient grounds that the husband and wife cannot live together in a marriage.

The provisions on divorce do not require that divorce is valid if carried out according to the laws of the religion and beliefs of the spouses. Meanwhile, Article 2 of Law Number 1 of 1974 determines that marriage is valid according to the couple's laws of religion and belief. In practice, as Sundari et al. (1994) found, the difference in including religious elements as a requirement in Indonesian marriage law has a severe negative impact on specific religious groups, especially religions that do not recognize divorce in Indonesia, as follows.

Bride and groom with different religion are 'forced' to change religions in order to make the marriage valid. The condition violates the right to freedom of religion as stipulated in Article 29 of the 1945 Constitution of the Republic of Indonesia.

Divorce provisions are not based on religious Law. It makes 'easier' for 'non-divorce' marriage partners to divorce. However, when they remarry after the divorce, they are 'forced' to choose another religion in order to make the second marriage valid. This circumstance is also a violation of human rights.

With the severe problems arising in practice, this research aims to examine these problems from the perspective of human rights theory. Furthermore, it offers the application of Hans Kelsen's pure legal theory in the form of neutral Law from the elements of religious interests as a counter-faith to the problems that arise with the application of religious Law.



## LITERATURE REVIEWS

Marriage is one of the human rights. The world universally recognizes, as Article 16 of the 1948 Universal Declaration of Human Rights (UDHR) provides, including Indonesia, which provides Article 28B of the 1945 Constitution and Article 10 of Law Number 39 of 1999. Article 16 UDHR promulgates that [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]. Under this provision, the right to marry cannot be restricted, including based on religious restrictions. Article 18 of the UDHR stipulates that [Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance]. The right to marry as a human right must also not conflict with the right to freedom of religion, including free conversion.

Indonesia similarly applies the provisions of Article 28B of the 1945 Constitution and Article 10 of Law No.39 of 1999, that stipulates everyone has the right to form a family and continue offspring through legal marriage. When a person cannot enter a legal marriage, it will violate human rights. These two provisions are unlike Article 16 of the UDHR, which includes a clause that religion can't restrict the right to marry. However, just like the UDHR, based on the provisions of Article 22 of Law 39/1999, which provides for freedom of religion, implementing the right to marry in Indonesia also has to consider the right to freedom of religion. It also remarks that Indonesia does not regulate the transfer of religion as a human right as regulated by the UDHR.

Regarding the position of human rights, Article 1 of Law No. 39/1999 stipulates that Human Rights are a set of rights inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, Law, Government, and every person for the sake of honor and protection of human dignity. Thus, the state must respect and protect human rights, including the right to marry and freedom of religion.

Until now, many countries still apply religious Law as part of state law. Indonesia is one of those that applies religious Law, in addition to India (Sonkar, 2022), Chile (Rubio, 2009), China, Japan, South Korea, and Taiwan with the common origin of the Confucian (Raymo et al, 2015), as well as other countries. In multi-religious or multi-race societies, the application of religious Law and racial Law often causes problems related to human rights violations, including in marriage law. Such as the results of Sundari (1994), and Nisa's research in Indonesia (2018), the results of Joffe's study in North America (Joffe, 2016), the conclusions of Sonkar's findings in India (2022), and the research of McClain in Virginia and the United States (Dyer, 2021).

In the debate about the choice to apply religious or secular Law, Hans Kelsen's pure of law theory offers a pure application of Law that free from two directions: (1) from statements derived from a sociological perspective that uses the methods of causal science to assume Law as part of nature; and (2) from statements of natural law theory that incorporate the science of Law into the realm of political, ethical postulates (Stanley, 1992). The "new" legal theory should be able to purify Law from foreign elements, such as sociological perspectives and political ethics, which have caused legal science to become involved with "alien" elements that mislead. One of Kelsen's premise is the idea of normativity without the morality thesis. As Wardiono et al interprets it (2018), legal should be separate from moral. Hans Kelsen argues that the object of legal science is norms with specific characteristics: without the thesis of morality, and as the meaning of the act of will (Wardiono et al, 2018).

In his pure theory of Law, Kelsen seeks to overcome the problem of antinomy jurisprudence that may occur in morality by proposing norms that have objective validity and are not the result of the mental actions of individuals or groups. The Law will only be meaningful if it contains general moral values that allow for enacting all moral systems that (may) exist in society (Wardiono et al, 2018). Legal norms are not intended to realize moral values but embody legal values. Therefore, the rationality/validity of a positive legal order does not depend on a valid moral order nor to conform to specific moral systems.

## METHODS

This study encompasses empirical and normative or doctrinal legal research by compiling primary and secondary data (Ali et al, 2017; Gawas, 2017). Primary data includes respondents of 10 ex-wives and 10 ex-husbands through interviews with them. Secondary data consist of Primary legal materials, including the Indonesian Constitution, Law No.1 of 1974 on Marriage Law, Law No.39 of 1999 on The Protection of Human Rights, and The Universal Declaration of Human Rights 1948. Secondary legal materials consist of pure theory of Law, related legal opinions, and pre-existing contemporary research and news reports.

Furthermore, the empirical and normative data will be analyzed qualitatively to show the problems of implementing religious marriage Law from a human rights perspective and to explore the argumentation of proposing an alternative solution based on the empirical problem through the pure of law theory. The research will conclude using a deductive way of thinking (Elo et al, 2014). The goals of the research include (i) learning from the problems as a result of implementing religious Law into a plural religious society such as Indonesia and (ii) developing a legal policy that embraces all religious values.

## RESULT AND DISCUSSION

### Major Problems After a Catholic Divorce

After Catholic couples, there are several problems they face when they remarry from a total of 153 divorce cases decided in Sleman District Court in 2020, Ex-wife 10 ex-husband or ex-wife respondents who, after divorce, experienced fundamental problems when planning to remarry. Table 2 shows the results

**Table 2** Several problems in remarrying after Catholic divorce in Sleman District court areas

Divorce judgement	Respondent	Forms of problems
224/Pdt.G/2020/PN. Slmn	Ex-wife	They already had a partner and wanted to get married. However, they had to wait for the ecclesiastical annulment process, which had come down for a year.
318/Pdt.G/2020/PN. Slmn	Ex-wife	The Church rejected the Catholic marriage because the couple had been married before, even though they were divorced. The Church considers that the previous marriage still existed because the Catholic Church does not recognize divorce. Finally, they got married in Islam and had to convert first.
320/Pdt.G/2020/PN. Slmn	Ex-wife	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic because the process of canceling the marriage by the Catholic Church takes a long time.
316/Pdt.G/2020/PN. Slmn	Ex-husband	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic because the process of canceling the marriage by the Catholic Church takes a long time.
314/Pdt.G/2020/PN. Slmn	Ex-husband	Marry in Islamic way because the spouse is Muslim, and the Church refuses to marry in Catholicism because it does not recognize divorce unless there is an annulment of canonical marriage for specific reasons that they cannot fulfill.
308/Pdt.G/2020/PN. Slmn	Ex-wife	Remarry in a non-Catholic (Christian) even though the religion of the spouse is also Catholic because the process of canceling the marriage by the Catholic Church takes a long time.
307/Pdt.G/2020/PN. Slmn	Ex-wife	She remarried in a Christian way because her partner is a Christian.
305/Pdt.G/2020/PN. Slmn	Ex-wife	Marry in Islam because the spouse is Muslim, and the Church refuses to marry in Catholicism because it does not recognize divorce unless there is an annulment of canonical marriage for specific reasons that they cannot fulfill.
302/Pdt.G/2020/PN. Slmn	Ex-husband	Marry in Islam because the spouse is Muslim, and the Church refuses to marry in Catholicism because it does not recognize divorce unless there is an annulment of canonical marriage for certain reasons that they cannot fulfill.
278/Pdt.G/2020/PN. Slmn	ex-husband	Marry in Islam because the spouse is Muslim, and the Church refuses to marry in Catholicism because it does not recognize divorce unless there is an annulment of canonical marriage for specific reasons that they cannot fulfill.

Sources: [http://pn-sleman.go.id/sipp/list\\_perkara/](http://pn-sleman.go.id/sipp/list_perkara/); [https://sipp.pa-slemankab.go.id/list\\_perkara/](https://sipp.pa-slemankab.go.id/list_perkara/); [https://www.sipp.pn-yogyakarta.go.id/list\\_perkara/](https://www.sipp.pn-yogyakarta.go.id/list_perkara/);

[https://sipp.pa-yogyakarta.go.id/list\\_perkara/](https://sipp.pa-yogyakarta.go.id/list_perkara/)

In case No.224/Pdt.G/2020/PN Slmn, the ex-wife had to wait for an ecclesiastical annulment process first if she wanted to remarry as a Catholic. Catholic marriage does not recognize divorce. However, the Church recognizes the annulment of marriage for specific reasons. If the Church annuls the marriage, the existing marriage is considered invalid and canceled. The husband and wife are considered unmarried. One of the conditions for annulment is if the couple has not had intercourse, which is proven by not having children. If they already have children, it means they have had intercourse (*Ratum et consummatum*), and the Church can not grant for annulment.

The long wait for the annulment process and the uncertainty of granting the annulment petition delay the human right to remarry for a reasonable period. It contradicts with Article 16 of the UDHR, which states that [Men and women of legal age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They shall be entitled to equal rights regarding marriage, during and on its dissolution]. Under this provision, the right to marry cannot be restricted, including based on religious restrictions. Ex-wives and husbands can remarry afterward, which is in accordance with their right to marry as part of their human rights. The problem is that when Catholics want to remarry, they cannot do so through Catholic Law, which does not grant the right to divorce.

The result of the rejection of marriage by the Catholic Church encourages couples to exercise their right to marry in other ways, as happened in case numbers 318/Pdt.G/2020/PN. Slmn, 320/Pdt.G/2020/PN. Slmn, 316/Pdt.G/2020/PN. Slmn, 314/Pdt.G/2020/PN. Slmn, 308/Pdt.G/2020/PN. Slmn, 307/Pdt.G/2020/PN. Slmn, 305/Pdt.G/2020/PN. Slmn, 302/Pdt.G/2020/PN. Slmn, 278/Pdt.G/2020/PN. Slmn, namely 'forced' to marry in another religion (Christianity, Islam), because the couple is Muslim and the Church refuses to marry because it does not recognize divorce unless there is a canonical marriage annulment for specific reasons that they cannot fulfill.

Most of these cases violate human rights, especially the right to freedom of religion, as stipulated in Article 22 of Law 39 of 1999. Just like the UDHR, based on the provisions of Article 22 of Law 39/1999, which provides for freedom of religion, implementing the right to marry in Indonesia also has to consider the right to freedom of religion. It supports the right to marry as stipulated in Article 16 of Law 39 of 1999. On the other hand, it does not fulfill the right to freedom of religion because they cannot practice their religion in marriage and are 'forced' to convert to a religion they do not belong. The right to marry as a human right must also not conflict with the right to freedom of religion. Conversion is part of the right to freedom of religion, as long as they do not do it under 'duress,' such as being 'forced' to convert to fulfill a marriage requirement or a job requirement.

#### *A 'neutral' marriage law based on pure theory of Law: a proposal*

In the situation of moral problems that arise due to the application of religion-based marriage law, namely violations of human rights, the Government should make an effort that the politics of Law based on religious morals do not cause other moral problems, namely violations of human rights. One of them is to exclude religious elements from the Law, which results in human rights problems. The issue of removing Law from moral aspects, including religious elements, is a teaching from the pure of law theory created by Hans Kelsen.

One of Kelsen's schools is the idea of normativity without the thesis of morality, including religion-based morality. Meanwhile, Indonesia put the marriage law in political and ethical postulates, especially religious postulates. Indonesian marriage lawmakers assume that based on religious postulates, marriages will last and be happy. In practice, the opposite happens; many marriages fail by filing divorce lawsuits, as seen in Table 1.

Pure theory of Law, as restated by Paulson (Stanley, 1992), wants to take Law out of the realm of political ethical postulates. As Wardiono interpreted, it means legal should be separated from moral (Wardiono, 2018), including religious morality. Does excluding the moral element in the Law make the Law wrong? Suppose the definition of a good law does not cause fundamental problems for the community, the fact shows that in multi-religious or multi-race societies, the application of religious Law and racial Law often causes problems related to human rights violations, including in marriage law. Such as the results of Sundari (1994), and Nisa's research (2018) in Indonesia, the results of Joffe's study (2016) in North America, the conclusions of Sonkar's findings

(2022) in India, McClain's research that conducted in Virginia and the United States (Dyer, 2021). It means that applying religious Law does not guarantee that its laws create good for the people. Supriyo, Gunarto, and Khisni (2020), even criticizing by stating that regulations on interfaith marriage violated the value of justice because of the many rejections for marriages with different religions. Thus, laws that are not morally based are necessarily good. Many countries, including Canada, Singapore, the United Kingdom, and the Netherlands, provide examples of how they have created marriage laws unrelated to religious morals (Hidayatullah, 2023). Without linking marriage law to religion, citizens can marry even with people of different religions. Other Laws outside of family law do not generally incorporate religion, such as constitutional law, administration Law, property law, environmental Law, maritime Law, and International Law.

The pure theory of Law does not want to remove Law from morals. It proposes norms that have objective validity and are not the result of the mental actions of individuals or groups. Furthermore, the validity alone must be objective, not as the result of the mental actions of an individual or group, but rather, as Wardiono et al states (2018), contains general moral values that allow for the enactment of all moral systems, which (may) exist in society. Based on the previous preposition, based on the pure theory of Law, Indonesian marriage law further can be designed in two ways: (1) still based on religious Law but must cover general religious values; (2) removing religious moral elements based on universal life values that all groups in society can accept.

Reformulating Indonesian marriage law based on general religious values is not easy because religious values in Indonesia are plural. For example, Islamic marriage recognizes divorce and polygamy, while Catholicism does not. General religious values, for example, can be applied by accommodating all religious values in society. If the validity of marriage is according to religious Law, then divorce and polygamy must also consider the religious laws in the community. If Catholic Law does not recognize divorce but rather annulment of marriage, then this must be accommodated by prohibiting divorce and instead providing an opportunity for annulment of marriage. This method has provided objective validity but can still cause problems because the annulment of Catholic marriage has a limit, which can only be done if there has not been *ratum et consumatum* or intercourse, which is proven by the birth of a child.

The second way to develop Indonesian marriage law is to remove the moral elements of religion based on universal life values that all groups in society can accept. For instance, for the validity of a marriage, it is not necessary to require religious Law but simply the universally and objectively necessary conditions for the validity of a civil agreement, in this case, a marriage agreement. It may formulate such as an agreement to build a family by parties who have met the age considered mature for marriage and registered. The formulation does not offend religion at all, so all religions can accept it, and it does not cause problems with the validity of religion-based marriages. Likewise, polygamy and divorce may be based on conditions without considering religious Law. For example, for polygamy, there must be permission from the spouse, be able to provide for the wives and be fair. Divorce is based on objective reasons that make it worth divorcing. For example, divorce must be based on an agreement or a situation that causes suffering, threat, or safety to the spouse.

## **CONCLUSION**

The difference in including religious elements as a requirement in Indonesian marriage law has a severe negative impact on specific religious groups. Bride and groom who are of different religions are 'forced' to change religions in order to make the marriage valid. It is a violation of the right to freedom of religion. Divorce provision that is not based on religious Law makes it 'easier' for 'non-divorce' marriage partners to divorce. However, when they remarry after the divorce, they are 'forced' to choose another religion in order to make the second marriage valid. The legalization of marriage, whether first or second, will lead to the gradual extermination of minorities, in this case, non-Muslim-Catholics. It violates the right of vulnerable groups of people to obtain more treatment and protection for their specificities.

Amid a plural society with religious values, a pure theory of Law can be used to build Indonesian marriage law that is 'neutral' from religious postulates and based on universal values in marriage that all religious groups can accept.

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## REFERENCES

- Ali, S.I., Yusoff, M. Z., Ayub, Z. A. (2017). Legal Research of Doctrinal And Non-Doctrinal. *International Journal of Trend In Research And Development*, 4(1), 493–495.
- Dyer, J. (2021). Bigotry, Time, And Moral Progress - Who is the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain. *Journal of Law and Religion*, 36(2), 328–333. doi:10.1017/jlr.2021.30.
- Elo, S., Kääriäinen, M., Kanste, O., Pölkki, T., Utriainen, K., & Kynäsaari, H. (2014). Qualitative content analysis: a focus on trustworthiness. *Sage Open Journal*, Vol.4:1, pp.1-10. <https://journals.sagepub.com/doi/10.1177/2158244014522633>
- Gawas, V. J. (2017). Doctrinal Legal Research Method A Guiding Principle In Reforming The Law And Legal System Towards The Research Development, *International Journal of Law*, 3(5), 128–130. <http://www.lawjournals.org/archives/2017/vol3/issue5/3-5-130>
- Hidayatullah, T., Moechthar, O., Aprilia, D. (2023). Inter-Religious Marriage: A Comparison Analysis of Indonesian Law with Other Countries. *Notaire*, 6(3), 291-306. <http://dx.doi.org/10.20473/ntr.v6i2.45871>.
- Joffe, L. (2016). What Is the Harm In Polygamy? Multicultural Toleration and Women's Experience Of Plural Marriage. *Journal of Law and Religion*, 31(3), 336–353. doi:10.1017/jlr.2016.36.
- Jam, F. A., Rauf, A. S., Husnain, I., Bilal, H. Z., Yasir, A., & Mashood, M. (2014). Identify factors affecting the management of political behavior among bank staff. *African Journal of Business Management*, 5(23), 9896-9904.
- Nisa, E. (2018). The Bureaucratization Of Muslim Marriage In Indonesia. *Journal of Law and Religion*, 33(2), 291–309. doi:10.1017/jlr.2018.28.
- Raymo, J.M., Park, H., Xie, Y., Yeung, W.J. (2015). Marriage and Family in East Asia: Continuity and Change. *Annual Review of Sociology*, 41, 471–492. doi: 10.1146/annurev-soc-073014-112428
- Rubio, J.P. (2009). Religious Marriage In The Chilean Juridical Régime: The Marriage System Under Article 20 Of The Law No. 19.947. *Ius et Praxis*, 15(2), 51-77. [https://www.researchgate.net/publication/294407750\\_Religious\\_marriage\\_in\\_the\\_chilean\\_juridical\\_regime\\_The\\_marriage\\_system\\_under\\_the\\_article\\_20\\_of\\_the\\_law\\_N\\_19947](https://www.researchgate.net/publication/294407750_Religious_marriage_in_the_chilean_juridical_regime_The_marriage_system_under_the_article_20_of_the_law_N_19947)
- Sonkar, S. (2022). Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance. *Journal of Law and Religion*, 37(3), 432–445. doi:10.1017/jlr.2022.37
- Stanley L. Paulson, S.L. (1992). The Neo-Kantian Dimension of Kelsen's Pure Theory of Law. *Oxford Journal of Legal Studies*, 12(3), 313.
- Sundari, E. (1994). *Pertimbangan Hukum dalam Mengadili Gugatan Perceraian Katholik di Pengadilan Negeri Se-DIY*. Yogyakarta: Universitas Atma Jaya Yogyakarta.
- Supriyo, D.Ad., Gunarto, A.K. (2020). The reconstruction of the Law on inter-religious marriage in Indonesia is based on the value of justice. *International Journal of Law*, 6(5), 411-416. <https://www.lawjournals.org/archives/2020/vol6/issue5>
- United Nations. (n.d). Universal Declaration of Human Rights. Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, March 18 2024.
- Warren, S.R. Reasons For Divorce: Top 10 Reason Why Marriages Fail. *Marriage.Com*. Updated August 7 2023.
- Wardiono, K., Dimiyati, K., Rochman, S. (2018). The Ontology Of Legal Science: Hans Kelsen's Proposal Of The 'Pure Theory Of Law.' *Journal Of Law*, 5(3), 547. <https://doi.org/10.22304/Pjih.V5n3.A8>

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