

SMUGGLING OF INTERFAITH MARRIAGE LAW UNDER THE INTERNATIONAL CIVIL LAW FRAMEWORK

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Article History

Received: 21.09.2024

Accepted: 10.10.2024

Published: 26.11.2024

Abstract: Upon the legalization of Law Number 1 of 1974 on Marriage, interfaith marriage is no longer applicable in Indonesia since marriage validity shall based on religious law. Most of those who are not able to perform an interfaith marriage in Indonesia get married overseas, despite it may be categorized as a form of legal smuggling as avoiding laws that supposedly apply to them. This study used conceptual, statutory, comparative, and philosophical approaches. Legal materials composed of normative primary, secondary, and tertiary legal materials were used in this study in such a way as observation, collection, and literature review as well as document, whether conventionally or via the internet. The results of this study suggested that interfaith marriage performed overseas by Indonesian Citizens is included as legal smuggling, and the legal certainty of law smuggling for interfaith marriage between Indonesian Citizens performed abroad only meets formal requirements which shall be valid under the law of the state where it is performed and does not meet material requirements namely Indonesian marriage laws in virtue of religious law.

Keywords: law smuggling, interfaith marriage.

Cite this article:

Romli, M., (2024). SMUGGLING OF INTERFAITH MARRIAGE LAW UNDER THE INTERNATIONAL CIVIL LAW FRAMEWORK. *ISAR Journal of Arts, Humanities and Social Sciences*, 2(11), 127-133.

Introduction

Since the Proclamation of Independence of the Republic of Indonesia on 17 August 1945 until before the enactment of Law Number 1 of 1974 concerning Marriage, Indonesia still did not have its own Marriage Law, and marriage regulations in Indonesia still used the Dutch-made Marriage Law.¹ Law Number 1 of 1974 concerning Marriage is a great work of the Indonesian people regarding the laws and regulations that regulate marriage legally, uniform and for all groups of society in Indonesia. However, this does not mean that this Law is perfect in regulating all aspects related to marriage. One example of an issue that is still crucial in this Marriage Law is interfaith marriages.²

Before the enactment of the Marriage Law, interfaith marriages were classified as mixed marriages only because of differences in legal order as a consequence of class division.³ Definition of Mixed Marriage Article 1 Gemengde Huwelijken Regeling (GHR) marriage between people who in Indonesia are subject to different laws, is called mixed marriage "Huwelijken

tusschen personen, die in Indenesie aan een verschillend rech onderworpen zijn, worden gemengde huwelijken genoemd".⁴

At least in general there are two opinions regarding interfaith marriages, the first opinion states that interfaith marriages are permitted in Indonesia. This is based on the absence of regulations governing interfaith marriages, giving rise to a legal vacuum that results in legal uncertainty. With this legal vacuum, interfaith marriages can be carried out in Indonesia on a legal basis in the form of jurisprudence in the Supreme Court Decision Number 1400K/Pdt/1989 which granted the marriage request of a man with a woman whose religion is of a different religion.⁵

The second opinion is that in Indonesia the absolute validity of marriage is based on religious law and this is reflected in Article 1 and Article 2 paragraph (1) of the Marriage Law. The general interpretation in Article 2 paragraph (1) of the Marriage Law is that it is not permissible for Indonesian citizens to marry outside of their religious law. It can also be understood from this provision

⁴ Adji, Sution Usman, "Kawin Lari Dan Kawin Antar Agama", (Liberty, Yogyakarta, 1989). 118.

⁵ Sindy Cantonia dan Ilyas Abdul Majid, "Tinjauan Yuridis Terhadap Perkawinan Beda Agama Di Indonesia Dalam Perspektif Undang-Undang Perkawinan dan Hak Asasi Manusia", *Jurnal Hukum Lex Generalis*. Vol. 2, No. 6 (2021). 515. <https://ojs.rewangrencang.com>

¹ Soemiyati, "Islamic Marriage Law and Marriage Law", (Liberty, etc.Ke-4, Yogyakarta, 1999). 2-3.

² Rusli & R. Tama, "Perkawinan Antara Agama Dan Masalahnya", (Pionir jaya, Bandung, 1986). 11.

³ Mudiarti trisnangsih, "Relevansi Kepastian Hukum Dalam mengatur Perkawinan Beda Agama Di Indonesia", (Utomo, Bandung, 2007). 4.

that the parties must have the same religion or belief so that the marriage becomes valid according to their religion and only then can they register the marriage at the Religious Affairs Office or the Civil Registry Office. It is also understood that the validity of marriage if it is carried out by the laws of each religion and belief, shows that Indonesian family law is by the philosophical values of a mono pluralist human ontology which recognizes absolute religious values.⁶

Regulations like this occur because Law Number 16 of 2019 Amendments to Marriage Law Number 1 of 1974 concerning Marriage does not merely regulate marriage as a civil matter, but also as a religious matter. The consequence of this arrangement and the interpretation that is generally applied is that marriage is not possible for parties with different religions or beliefs. Those who think like this are the majority opinion.

This hinders the desires of lovers who still wish to maintain their religious differences and formalize their relationship into marriage. Generally, the parties, if they have the economic capacity, will go abroad and get married in that country. The countries they choose are generally countries whose marriage laws only regulate marriage as a civil relationship and do not regulate it as a religious matter. In these countries, religious differences are not a requirement, let alone a barrier to marriage. Therefore, parties of different religions or beliefs will be able to register their marriage in that country, and when they return to Indonesia they will be legally husband and wife according to foreign law, namely the law of the country where the marriage took place. Having a civil marriage abroad, returning to Indonesia, and registering the marriage at the Civil Registry Office in Indonesia, is a form of legal smuggling.⁷

In Dutch, legal smuggling is called "Wetsontduiking", in French "fraud a la loi", while in German it is "Gesetzesumgehung". Almost every country has a term relating to legal smuggling, but almost all of them have the same meaning in that legal smuggling is an action or legal deed of a person based on and using the words of the law, but against the spirit and purpose, deceptively committing an act. - actions that are carried out to circumvent written or unwritten legal rules.⁸

As one example: a pair of lovers with the status of fellow Indonesian citizens have been in love for a long time, but they have different religious beliefs, so their romantic relationship has not been able to continue to the level of marriage due to regulations that do not yet explicitly regulate marriages across religious beliefs. , this is what makes the KUA and DISPENDUKCAPIL agencies almost reject every application from prospective bride and groom couples who have different religions. There are at least two ways that the couple can take, firstly by legal means, namely requesting a District Court decision to allow the marriage to take place, and secondly by going abroad and having a wedding abroad in a country that allows interfaith marriages. In an interfaith marriage carried out abroad, the legal act already contains foreign elements because it has crossed national borders or is often called

cross-border. For legal acts that contain foreign elements, we will talk about Private International Law.⁹

The practice of smuggling laws in the field of marriage as above by going abroad is often carried out by those who cannot legally carry out their marriage in Indonesia. After arriving in Indonesia they are required to register their overseas marriage with the marriage registry where they live. With the registration of foreign marriages, whether the problem of legal smuggling in the field of marriage, especially interfaith marriages, becomes legally valid or vice versa, until now there has been no legal certainty regarding this problem.

Based on the explanation above, researchers are interested in studying in more depth how legal certainty is regarding legal smuggling in interfaith marriages within the framework of international private law. This research aims to find out and explain the smuggling of interfaith marriage laws within the framework of international private law.

The type of research used in this research is normative legal research which is also known as doctrinal research.¹⁰ This research uses a conceptual approach and a statutory approach.¹¹ Soerjono Soekanto called this legal research legal research or legal research instruction.¹² The legal materials used in this research were obtained through library research,¹³ consisting of primary legal materials, secondary legal materials, and tertiary legal materials of a normative nature carried out by searching, collecting, and studying literature and documents, both conventionally and using the internet.

Arrangements for Interfaith Marriages in Indonesia

In the era of Dutch East Indies rule, the position of Europeans (Dutch) who were considered superior could be seen from the time of the Company until 1848. Religion was used as a guide in matters of mixed marriages, namely by the structure of society at that time. The religion embraced by the ruler, namely Christianity, was used as the basis. Christianity was used to protect the Dutch.¹⁴

Since the era of independence until the birth of Law Number 1 of 1974 concerning Marriage, interfaith marriages have been possible through the Mixed Marriage Regulations (GHR) and HOCI, namely by providing a broad understanding, so in Law Number 16 of 2019 Amendments to the Law. Marriage Law Number 1 of 1974 concerning Marriage, it is no longer possible to expand the meaning of Mixed Marriage to include marriages of different religions.

According to Hazairin, Article 57 of the Marriage Law limits the meaning of mixed marriages between a citizen of the Republic of Indonesia and a citizen of the Republic of Indonesia so that it

⁶ Soetiksno, "Filsafat Hukum" Bagian 1, (Pradnya Paramita, Jakarta, 2003). 459.

⁷ Zulfa Djoko Basuki dkk, "Hukum Perdata Internasional", (Tangerang: Universitas Terbuka, 2018). 5.29.-5.30.

⁸ Sudargo Gautama (e), "Pengantar Hukum Perdata Internasional Indonesia", cetakan kelima, (Jakarta: Binacipta, 1987). 166.

⁹ Derita Prapti Rahayu, "Hukum Perdata Internasional Indonesia Bidang Hukum Keluarga (Family Law) Dalam Menjawab Kebutuhan Global", Jurnal Hukum Progresif: Vol. XII/No.1/ (Juni 2018).1989. <https://doi.org/10.33019/progresif.v12i1.958>

¹⁰ Peter Mahmud Marzuki, "Penelitian Hukum", (Prenada Media, Jakarta, 2005). 32. Lihat juga Johny Ibrahim, Teori & Metodologi Penelitian Hukum Normatif, (Bayu Media Publishing, Malang, 2006). 45.

¹¹ Peter Mahmud Marzuki, "Penelitian Hukum", cetakan ke-6, (Kencana Prenada Media Group, Jakarta, 2010). 133.

¹² Soerjono Soekanto dan Sri Mamudji, "Penelitian Hukum", (Prenada Media, Jakarta, 2005). 32-33.

¹³ Bambang Sunggono, "Metode Penelitian Hukum", (PT RajaGrafindo Persada, Jakarta, 1997). 194.

¹⁴ T.Jafizham. "Persentuhan Hukum di Indonesia dengan Hukum Perkawinan Islam", (Mestika, Medan, 1977). 56.

does not include marriages between citizens of the Republic of Indonesia with different laws and between persons who are not citizens of the Republic of Indonesia.¹⁵

This was also stated by Masfjuk Zuhdi, that based on Article 7 of Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage, interfaith marriages in Indonesia are not mixed marriages. So applications for interfaith marriages at the Religious Affairs Office (KUA) and the Population and Civil Registry Service should be rejected.¹⁶

According to Purwoto S. Gandasubrata, mixed marriages or marriages of different religions have not been regulated in law completely and firmly. Due to this, there is a Population and Civil Registry Service that does not want to register interfaith marriages because the marriage is contrary to Article 2 of Law Number 16 of 2019, Amendment to Marriage Law Number 1 of 1974 concerning Marriage. There is also the Population and Civil Registry Service which wants to register based on the *Gemengde Huwelijken Regeling*, that the marriage was carried out according to the husband's law, so that the wife follows the husband's legal status.¹⁷

If you pay serious attention to Law Number 16 of 2019, Amendment to Marriage Law Number 1 of 1974 concerning Marriage, regarding interfaith marriages there are several opinions, including the following.¹⁸

The first opinion says that marriage between people of different religions can be carried out as an implementation of human rights and a person's freedom to choose their partner. According to this opinion, such marriages can use Stb. 1898 No. 158 concerning Mixed Marriages inherited from the Netherlands as a basis and registering it at the Civil Registry Office where the marriage was carried out. Religious differences, in this opinion, should not be an obstacle to carrying out the marriage. Civil Registry Office employees cannot refuse to take notes, and must even "marry" people of different religions whose flames of love are burning. According to them, marriage is a matter of life in society in this world, not a problem in the afterlife. This secular view was formulated in Article 11 paragraph (2) of the Draft Marriage Law (1973) which stated: "Differences due to nation, country of origin, religion or belief and descent do not constitute a barrier to marriage", which was rejected by the DPR and excluded from the law. -The Marriage Law (1974) because "it is not by the philosophical foundations of Pancasila and the 1945 Constitution of the Republic of Indonesia".¹⁹

The second opinion, said that article 57 of Law Number 16 of 2019 Amendment to the Marriage Law Number 1 of 1974 concerning Marriage implicitly regulates marriages between people of different religions, which is incorrectly referred to in Indonesian literature as "marriage between- religion". According to this second opinion, Article 57 of Law Number 16 of 2019 Amendments to the Marriage Law Number 1 of 1974 concerning Marriage as the author mentioned above, contains two explicit and implied meanings. The explicit meaning is formulated in Article 57, "what

is meant by Mixed Marriage in this Law is a marriage between two people who are in Indonesia, subject to different laws, because of differences in nationality and one of the parties is Indonesian citizens". The meaning is implied in a comma after different words. The word "different laws" in that article includes the marriage of people of different religions. Regarding the editorial and comma tucked into Article 57, a Professor of Indonesian Language from the Faculty of Letters, University of Indonesia, stated that Mixed Marriage as regulated in this article is Mixed Marriage between people of different nationalities, not marriage between different people. religion. With or without a comma tucked in there, the meaning is the same as it is written. In other words, it can be understood according to this second opinion, that interfaith marriages cannot be categorized as mixed marriages and can conclude that marriages cannot be carried out according to the Indonesian Marriage Law.²⁰

The second opinion says that Article 57 of Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage implicitly regulates marriage between people of different religions, which in Indonesian literature is incorrectly called "marriage between religions". According to this second opinion, Article 57 of Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage as the author alluded to above, contains two express and implied meanings. The explicit meaning is formulated in Article 57, "what is meant by Mixed Marriage in this Law is a marriage between two people who in Indonesia are subject to different laws, because of differences in nationality and one of the parties is an Indonesian citizen." The implied meaning lies in the comma after the word different. The words "different laws" in this article include marriages between people of different religions. Regarding the redactions and commas inserted in Article 57, a Professor of Indonesian from the Faculty of Letters, University of Indonesia, stated that the Mixed Marriage regulated in the article is a Mixed Marriage between people of different nationalities, not a marriage between people of different religions. With or without a comma inserted there, the meaning is the same as it is written. In other words, it can be understood according to this second opinion, that marriages between different religions cannot be categorized as mixed marriages and it can be concluded that the marriage cannot take place according to the Indonesian Marriage Law.

The third opinion says that marriage between people of different religions is not desired by the legislators, namely the Government and the DPR of the Republic of Indonesia. This desire, among other things, is expressly stated in Article 2 paragraph (1) of the Marriage Law Number 1 of 1974 regarding the validity of marriage based on religion as an embodiment of the principles of the Almighty God which is the basis of marriage in Indonesia as described above. Therefore, it is very logical that in Article 8 letter (f) of the Marriage Law it is formulated that, "marriage is prohibited between two people who are in a relationship whose religion and applicable regulations prohibit marriage". This means that Marriage Law Number 1 of 1974 prohibits the implementation or legalization of marriages that are

¹⁵ Hazairin, "Tinjauan Menegenai Undang-undang Perkawinan Nomor 1 Tahun 1974", (Jakarta: Tintamas, 1986). 23.

¹⁶ Masfjuk Zuhdi, "Masail Fiqhiyah". (Jakarta: Haji Masagung)

¹⁷ Soedharyo Sohimin, "Hukum Orang dan Keluarga", (Jakarta: Sinar Grafika, 2002). 95.

¹⁸ Mohamad Daud Ali, "Perkawinan Campuran Antara Orang-orang Berbeda Agama", dalam *mimbar Hukum* No. 8, (1993). 57- 59.

¹⁹ Mohamad Daud Ali, "Perkawinan Campuran Antara Orang-orang Berbeda Agama", dalam *mimbar Hukum* No. 8 tahun (1993). 57- 59.

²⁰ Muhammad Romli. " legal consideration of legal conversion in different religious Marriage in indonesia".RJOAS : Russian Journal of agricultural and sosio-economic sciences, 12 (108) (Desember, 2020) : 89-98 <https://doi.org/10.31538/adlh.v2i3.425>

prohibited by religion and other regulations in force in the Republic of Indonesia.²¹

Interfaith marriages cannot be carried out in Indonesia it is implied that this can be done by carrying out marriages for couples of different religions abroad.²²

Based on Article 56 of Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage which regulates marriages abroad, they can be carried out by fellow Indonesian citizens, and marriages between couples of different religions are valid if carried out according to the applicable law where the marriage takes place. According to the provisions of Article 56 paragraph (2) of Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage, after the husband and wife return to Indonesian territory, within at least one year the proof of marriage can be registered at Marriage Registration Office where they live. However, the Marriage Law strictly speaking only regulates marriage registration, divorce, and reconciliation, which means it is only an event and not a legal matter. Marriages carried out abroad by Indonesian citizen couples of different religions are still an act of legal smuggling because both partners are trying to avoid national law. The marriage is indeed valid according to the law of the country where the marriage takes place but is not by the provisions of Law Number 16 of 2019, Amendment to Marriage Law Number 1 of 1974 concerning Marriage which applies in Indonesia. On the other hand, Law Number 16 of 2019 Amendment to Marriage Law Number 1 of 1974 concerning Marriage does not provide any prohibitions on marriages between couples of different religions. If interfaith marriages are not permitted, then this should be confirmed in law. Religious law is still a religious code that is included in national positive law. Therefore, religious rules cannot be applied indirectly in law because they concern the general public.

Legal Nature of Smuggling

All the incidents that have been described previously regarding legal smuggling have the same feature, namely that international private law has been used for a specific purpose, namely so that the relevant legal relations are treated with a different law than what would have been used if circumventive measures had not been taken. The purpose of the actions in question is to avoid an undesirable legal consequence or to bring about a desired legal consequence. So what we see is that there is always a subjective element, namely in the form of a will or intention to smuggle something. There are abnormal ways to achieve that goal. There must be an extraordinary method, a method that shows deceptive tactics. He carries out a certain legal act, but he wants other legal consequences to be realized.²³

The motivation of the parties determines whether legal action is a legal choice or legal trafficking. This motivation occurs because of the existence of a national legal regulation which, according to them, will hinder the achievement of certain goals that they desire. This may be because national law expressly prohibits or does not declare invalid a legal act for public order, or because

national legal politics seeks to regulate the achievement of certain goals. This is generally not formulated explicitly in positive legal regulations.²⁴

A well-known example of marriages that constitute legal smuggling are marriages which in international civil law literature are generally known as Gretna Green marriages. Gretna Green is a village located in Scotland. This village was once famous as a place of refuge for British people who wanted to marry without their parents' consent. To get married at Gretna Green, a British couple only needs to stay for twenty-one days before the wedding takes place. Even though England and Scotland are the same country, there are positive legal differences between the two. English law does not have the same territorial application as Scottish law. After the residence requirements are met, they can enter into a local legal marriage. Since the Marriage Act Scotland 1939 came into force, the conditions for marriage have been tightened so that it is no longer possible to marry legally.

The people who carry out legal smuggling have bad intentions. They want to circumvent certain legal rules and their consequences. For this, they created the defining anchor point of "fraudulent". These link points have been changed intentionally. What previously would have been a decisive link point, is avoided and other link points are used so that the law being treated also changes in line with the party created or changed by the person concerned. This is explained in the example above, where changes are made to the link points of citizenship and/or residence, solely to be able to get married or divorced easily.²⁵

Legal Certainty Regarding Smuggling of Interfaith Marriage Laws within the Framework of International Private Law

Indonesian citizen marriages carried out abroad are one of the objects of international civil law regulation. Where is international private law according to Sudargo Gautama is:

"The totality of legal regulations and decisions that indicate which legal system applies or what constitutes law, if the relationships or events between citizens (citizens) of a country at a certain time show points of connection with the legal systems and rules of two or over countries, differing in power spheres, places, persons, and issues. "So here what is emphasized is differences in the power environment of places and issues as well as differences in the systems of one country and another, meaning the presence of foreign elements."²⁶

The foreign element in a marriage is contained in Article 56 (1) and (2) of the Marriage Law which states that marriages between Indonesian citizens outside Indonesia are valid if they are carried out according to the laws in force in the country where the marriage takes place and for Indonesian citizens it is not violates the provisions of the Marriage Law and one year after the marriage a registration is required. The legal conditions for a marriage to be conducted abroad reflect the material and formal requirements that

²¹ Mohamad Daud Ali, "Perkawinan Campuran Antara Orang-orang Berbeda Agama", dalam *mimbar Hukum* No. 8 (1993). 57- 59.

²² Mohamad Daud Ali, "Perkawinan Campuran Antara Orang-orang Berbeda Agama", dalam *mimbar Hukum* No. 8 (1993) 57- 59.

²³ Sudargo Gautama, "Hukum Perdata Internasional Indonesia", jilid II, Bagian 3, Buku ke 4, (Bandung: P.T Alumni, 2007). 287.

²⁴ Zulfa Djoko Basuki dkk, "Hukum Perdata Internasional", (Tangerang: Universitas Terbuka, 2018). 5.28.

²⁵ Sudargo Gautama, "Hukum Perdata Internasional Indonesia", jilid II, Bagian 3, Buku ke 4, (Bandung: P.T Alumni, 2007). 287.

²⁶ Sudargo Gautama, "Hukum Perdata Internasional Indonesia", jilid II, Bagian 3, Buku ke 4, (Bandung: P.T Alumni, 2007). 21.

can determine the validation of a marriage based on the principles of international civil law.²⁷

Material requirements are based on *lex loci celebrations*, personality status, and the principle that states that material law is based on the legal system of the place where the marriage took place (*locus celebration*) without ignoring the marriage conditions that apply in the legal system of the parties. Thus, the implementation of the law still refers to the two legal systems inherent in the parties. Meanwhile, the formal requirements for marriage are determined by the principle of *locus regit actum*, namely based on the law of the place where the marriage took place (*lex loci celebration*). Article 56 of the Marriage Law states "if it is carried out according to the laws in force in the country where the marriage takes place".

The implementation of marriages abroad by Indonesian citizens of different religions is a form of effort to seek the validity of their marriages, whereas, in international civil law, the principle of vested rights or the principle of acquired rights applies. The term *vested rights* is often referred to as rights and obligations created abroad or legal rights and obligations issued under foreign law. This principle is closely related to the recognition of what is owned by or has a right to, or is legally attached to a legal subject.

The legal rights and obligations that a person has obtained based on a legal rule must be respected by anyone, including the *lex fori* (law of the judge) unless recognition of such rights would give rise to consequences that are contrary to the public order of the forum community. This view or principle developed during the height of the individualistic outlook on life which considered that a person's "property rights" had absolute legal force and therefore required absolute protection wherever and for anything.

In line with the development of "property rights that have a social function", the insight regarding the doctrine of vested rights has also shifted and people tend to adhere to this teaching in a limited (qualified) manner. The definition of vested rights in a limited sense is that the rights a person has based on foreign legal rules can be recognized as long as the recognition does not conflict with the public order of the *lex fori*.

Based on the concept of international private law, legal smuggling is an act carried out in a foreign country and recognized as legal in that foreign country. This act can be canceled by the forum or not recognized by the forum if the act is carried out in a foreign country to circumvent the *lex fori* law which prohibits such acts from being carried out in the territory of the forum.

The purpose of this action is to avoid legal consequences that are not desired by the parties or to realize a legal consequence that they desire.

According to scholars, there are two points of view regarding the problem of legal smuggling, namely objectively based and subjectively based. For those who look at it from an objective point of view, it is required that the action in question, which is by the letter rather than the law, is contrary to its spirit and purpose. According to this position, it is not important what the goals of the person concerned are. He can also assume in good faith that what he does does not violate the law in question. The subjective intentions of the person concerned do not always need to be

considered as a determining factor. Isn't it true that in this case, on the one hand, by deception the person concerned wants to smuggle one law, but on the other hand, at the same time, he wants to subjugate himself under another law? The only person who can feel himself being disadvantaged is the legislator.

On the other hand, a subjective stance emphasizes the bad intentions concerned. Apart from requiring that the act in question must be contrary to the spirit and meaning of the law, it is also required that he must have the intention of a deceptive strategy to, based on the letter of the law, escape from the bonds of this law by carrying out the acts in question.

The intentions of the parties concerned are important to determine whether legal smuggling has occurred or not. Only after it turns out that the intention was not good can we determine whether the series of facts that are the material of this constitutes legal smuggling or not. Once we can ascertain the intentions of the person concerned from the facts, we can look at something clearly, then it will appear that what has been done is truly a form of legal smuggling. Without an illustration, the facts provided are less clear. We cannot yet determine with certainty whether what is happening is a legal smuggling incident or not.

The motivation of the parties determines whether a legal action becomes a legal choice or becomes legal trafficking. This motivation occurs because of the existence of a national legal regulation which, according to them, will prevent them from achieving certain goals that they desire. As an example, we can look at the issue of interfaith marriages. The marriage law regulates that a marriage is valid according to the religion and beliefs of the parties. The general interpretation of this provision is that the parties do not enter into a marriage outside the laws of their religion and belief, and almost all religions require marriages of the same religion.

After the marriage of the parties is valid according to their religion and beliefs, only then can the parties register the marriage at the Religious Affairs Office for Muslims and the Civil Registry Office for those who are not Muslim. Arrangements like this occur because the Marriage Law does not merely regulate marriage as a civil matter, but also as a religious matter. As a result of these arrangements and the general interpretation applied, marriages can't occur for parties of different religions. This will hinder the wishes of parties who want to get married but have different religions. Generally, parties who have better economic conditions will prefer to go abroad to carry out interfaith marriages. And in general, the parties will choose a country whose marriage law only regulates marriage as a civil relationship and does not regulate it as a religious matter.²⁸

Returning to Article 16 AB, about personal status (including marriage) wherever a person with the status of an Indonesian citizen travels, Indonesian national law (marriage law) still applies to them. Having a civil marriage abroad, returning to Indonesia, and registering the marriage at the Civil Registry Office in Indonesia, is a form of legal smuggling.

Cases like the one above do not only occur in Indonesia but occur in almost many countries. Some of these countries include Argentina, France, Canada, Switzerland, Egypt and socialist countries.

²⁷ Bayu Seto Hardjowiyono, "Dasar-Dasar Hukum Perdata Internasional", (Bandung: Citra Aditya Bakti, 2013). 275.

²⁸ Zulfa Djoko Basuki dkk, "Hukum Perdata Internasional", (Tangerang: Universitas Terbuka, 2018). 3.19.

In Indonesia, up to now, each HPI uses the Dutch inheritance article, namely that an international marriage must fulfill two requirements, namely material requirements based on the national law of the prospective bride and groom (the legal basis is Article 16 AB) and formal requirements based on the law where the marriage took place/*lex loci celebrations* (legal basis of Article 18 AB). Currently, the law that regulates issues in the field of HPI, more precisely in the field of marriage, still uses special products inherited from the Dutch East Indies era, namely articles 16 and 18 AB.²⁹

Article 16 AB regulates a person's status and authority. For residents of the Dutch East Indies, legal regulations regarding a person's legal status and authority still apply to them, if they are abroad. Meanwhile, Article 18 AB regulates the law that should be applied in determining the status of legal acts or relationships (which contain foreign elements). The HPI principle used in the formal form of a legal act is *locus regit actum*. One derivative of the principle of *locus regit actum* is the principle of *lex loci actus*, meaning that the form of a legal act or legal relationship will be determined based on the law of the place where the legal act was carried out or the legal relationship was created. This principle can be applied to determine the law that applies to matters of engagement law in contract law as well as in legal acts due to law, whether by the law or against the law.

In international private law, apart from articles 16 and 18 AB, there are still many principles of international private law that can be used as a basis for regulating international family or marriage law, including the following:

Based on the *principle of lex patriae*, a person's status is determined based on citizenship law or what is often called the principle of *lex nationality* of that person. This principle is also used in Article 16 AB which theoretically still applies in Indonesia. Citizenship implies that what regulates a person's status is determined and regulated by the laws of the country where he is a citizen. The existence of differences in citizenship or legal events in other countries will give rise to HPI relationships. Citizenship as a primary link is an important thing that must be considered when studying Indonesia's HPI because Indonesia adheres to the principle of citizenship to determine and regulate a person's status.³⁰

The reasons why the principle of nationality must be used include the following: (1) Best suited for one's legal feelings, (2) More permanent than domicile law, (3) The principle of nationality provides more certainty.³¹

The *Lex Domicile principle* is a principle that determines a person's status based on the law of that person's domicile. The principle of domicile referred to here should be interpreted by the concept that grows in common law legal systems and which is generally interpreted as a permanent home or a place where a person lives permanently. Based on this principle, a person's status

and authority are determined based on that person's domicile law (law of permanent residence).

The *principle of Vested Rights* (Rights That Have Been Acquired), according to Sudargo Gautama in his book, thinks that the principle of rights that have been acquired cannot be considered as a dogmatic rationale for the entire HPI building. He thinks by Niederer, that this principle can only be used as an assistant in using the law. This principle can only be used as "*Rechtsbehelf*".³²

In Indonesia, the legal form of smuggling of interfaith marriages is that there is no firmness (no legal certainty) regarding this act, on the one hand, interfaith marriages do not give validity to interfaith marriages, on the other hand, these marriages are recorded in the registration.

The main principles in marriages between Indonesian citizens taking place abroad in the HPI system must meet formal validity and material validity.

Formal Validity

Formal validity (form, methods of formality, the ceremony for a marriage to take place will be carried out by the law of the place where the marriage took place (*lex loci celebration*, place of celebration, *locus regit actum*., by Article 18 AB. Including formal requirements, in the legislation Indonesian invitation, regulated in PP Number 9 of 1975, Articles 10 and 11. Thus, if an interfaith marriage occurs by an Indonesian citizen abroad, the marriage is valid if it is carried out by local law.

Material validity

Material validity is also called substantive requirements, which are absolute requirements, which if not fulfilled can result in the marriage being invalid or being annulled. This is regulated in Article 16 AB. These material requirements in the Marriage Law are regulated in Article 2 paragraph (1), and Articles 6 to 11.

Based on the explanation above, there is legal certainty regarding the act of smuggling interfaith marriages within the framework of International Private Law, that interreligious marriages between Indonesian citizens abroad. When returning to Indonesia, the legal status of registration is not a marriage certificate, it is only limited to the existence of an event or legal act. marriages of Indonesian citizens that take place abroad when returning to Indonesia, must not only be registered but need to be registered and legalized.

In future regulations (Indonesia) it must be regulated whether acts carried out by smuggling the law carried out abroad are strictly accepted by the law as legal or not. Thus, if future regulations regulate marriages held abroad, they are subject to the *principle of lex loci celebrationis* while still upholding public order, so that it can provide solutions to current societal problems and not give rise to legal conflicts. In general, it can be understood that interfaith marriages between Indonesian citizens carried out abroad when returning to Indonesia are contrary to the public order that applies in Indonesia. If they violate public order, they can be categorized as a form of legal smuggling.

²⁹ Bayu Seto Hardjowiyono, *Dasar-Dasar Hukum Perdata Internasional*, (Citra Aditya Bakti, Bandung, 2013). 73.

³⁰ Lihat: Hindia Belanda, "Agelemene Bepalingen van Wetgeving voor Indonesie", Staatsblad 1847-23 tanggal 30 April 1874, Pasal 16.

³¹ Muhammad Romli. "Legal Status of Overseas Marriage Registration in the Perspective of Indonesian Marriage Law." *Technium Social Sciences Journal* Vol. 14, 260-265, (December, 2020) : 260-265, Vol. 14 (2020), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/techssj14&div=23&id=&page=>

³² Bayu Seto Hardjowiyono, "Dasar-Dasar Hukum Perdata Internasional", (Citra Aditya Bakti, Bandung, 2013.). 330.

Conclusions

Based on the description in the discussion of this research, a conclusion can be drawn, legal certainty regarding the legal smuggling of interfaith marriages between Indonesian citizens abroad only fulfills formal requirements, namely legal according to the law of the country where the marriage takes place, and does not fulfill the material requirements, namely Indonesian marriage law. based on religious law.

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