

# 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/)

<sup>1</sup> Departement of Law, Faculty of Law Universitas Atma Jaya Yogyakarta, Address: Jl.Mrican Baru, 28, Sleman, Yogyakarta Province, Indonesia. E-mail: [sundari20@uajy.ac.id](mailto:sundari20@uajy.ac.id)

<sup>2</sup> Departement of Law, Faculty of Law Universitas Atma Jaya Yogyakarta. Address: Jl.Mrican Baru, 28, Sleman, Yogyakarta Province, Indonesia. E-mail: [anny.retnowati@uajy.ac.id](mailto:anny.retnowati@uajy.ac.id)

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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