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# THE LEGAL FORCE OF IMPLEMENTING SEMA NUMBER 2 OF 2023 REGARDING INTERFAITH MARRIAGES BASED ON THE PERSPECTIVE OF LEGAL CERTAINTY

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***Abstract***

*In general, everyone wishes to marry someone of the same faith so they can build and nurture a family with the same religion. However, in reality, interfaith marriages often occur in society due to unlimited human interactions and socialization, especially because Indonesia is a diverse country with many religious followers. The fact is, all religions in Indonesia prohibit interfaith marriages. In Law Number 1 of 1974 concerning marriage, Article 2 paragraph (1) states that "marriage is legitimate if carried out according to the laws of each respective religion and belief." This implies that a legitimate marriage must be conducted according to the same religion and belief, not different ones. However, there are still instances where some district courts grant applications for interfaith marriages. In Constitutional Court Decision Number 68/PUU/XII/2014, the Constitutional Court firmly rejected interfaith marriages, and the Supreme Court also issued SEMA Number 2 of 2023 regarding Guidelines for judges in adjudicating cases of applications for registration of marriages between people of different religions. Despite the clear prohibition, interfaith marriages continue to occur.*

***Keywords: Interfaith Marriage, SEMA, Legal Certainy***

## INTRODUCTION

Indonesia is a country based on the ideology of Pancasila. Pancasila serves as the fundamental state ideology of Indonesia, embodying the nation's identity and character (Mukaromah, Gusmawan, and Munandar 2022). Pancasila upholds the belief in One Almighty God as its first principle, signifying the moral foundation of religion in governing state affairs, which is encompassed within the other four principles. In this context, Pancasila highly values and strives to protect the pluralism present in Indonesia, especially the diversity of religious beliefs and views. This is evident in the equal treatment of all religions and beliefs in Indonesia, regardless of their number of followers, and the guarantee of religious freedom and belief for every citizen.

Pancasila also protects individual interpretations of each religion or belief, as it does not interfere with personal morality (beliefs) since Indonesia is not a religious state that imposes the implementation of a particular religion. In the reality of Indonesian society, there are various sects, perspectives, or interpretations held by individuals regarding each religion and belief. This further leads to the community not always following the majority interpretation of a religion and belief – including interpretations issued officially by religious and belief institutions. This aspect should indeed be protected by Pancasila, which does not interfere with personal morality but rather has a place in public morality.

Interfaith and belief marriages are one concrete example of differing interpretations of religion and belief from the majority view, which sees that marriages should not be conducted between individuals of different religions and beliefs. In the constellation of the Pancasila state, this should be protected as it is part of the personal morality of each citizen that cannot be coerced.

In Law Number 1 of 1974 concerning Marriage, Article 1 states: "*Marriage is the physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and everlasting family (household) based on the belief in One Almighty God*". Article 28B paragraph (1) of the Constitution of the Republic of Indonesia 1945 states:

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"Every person has the right to form a family and to procreate through a legitimate marriage." Regarding the phrase "legitimate marriage" according to Law Number 16 of 2019, which amended Law Number 1 of 1974 concerning Marriage, Article 2 paragraph (1) states: "Marriage is legitimate if carried out according to the laws of each respective religion and belief."

From this article, it can be concluded that marriage conducted by couples of the same religion and belief is considered legitimate. However, with the diversity of religions and various belief systems in Indonesia that coexist and interact, unrestricted relationships within a society inevitably lead to more serious implications towards marriage, resulting in interfaith marriages. The multicultural Indonesian society has long embraced interfaith marriages, and this is not a new phenomenon (Mahasin, 2022). However, the emergence of interfaith marriages does not mean it is without problems. On the contrary, it causes unrest and debate in society regarding the status of interfaith marriages according to religious norms and positive Indonesian law (Wahyujati, 2022).

Article 2 paragraph (1) of the Marriage Law states that "Marriage is legitimate if carried out according to the laws of each respective religion and belief." In other words, there is no marriage outside the laws of each respective religion and belief. Thus, even if a marriage has been conducted legitimately according to religious laws, the state will not recognize it as legitimate if it is not recorded with the competent authority, either the Office of Religious Affairs for Muslims or the Civil Registry Office for non-Muslims. Indonesian Positive Law does not clearly regulate interfaith marriages. Even Law Number 1 of 1974 (hereinafter referred to as UUP) does not clearly regulate interfaith marriages. As a result, interfaith marriages can still find loopholes to be carried out. Furthermore, the reasons for judges in District Courts to grant applications for interfaith marriages lie in Law Number 23 of 2006 concerning Population Administration, which states in Article 38 letter (a) that "Marriages determined by the court are marriages conducted between people of different religions or those conducted by believers."

SEMA Number 2 of 2023 concerning Guidelines for Judges in Adjudicating Cases of Applications for Registration of Marriages between People of Different Religions and Beliefs stipulates that judges must adhere to the 1945 Constitution, Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, and the Compilation of Islamic Law (KHI) when adjudicating applications for the registration of marriages between people of different religions and beliefs. Additionally, Constitutional Court Decision Number 68/PUU/XII/2014 explicitly rejects interfaith marriages and asserts that the happiness and longevity of a household depend on the physical and spiritual relationship between men and women in forming a family based on their belief in One Almighty God.

Although SEMA Number 2 of 2023 was issued on July 17, 2023, decisions of District Courts regarding interfaith marriages still occur. As evidenced by the ruling of the North Jakarta District Court Number 423/Pdt.P/2023/Pn Jkt.Utr concerning the Implementation of Interfaith Marriages, which was delivered on August 8, 2023, one month after the issuance of SEMA Number 2 of 2023. The substance of SEMA Number 2 of 2023 contradicts Law Number 23 of 2006 concerning Population Administration. The author argues that there are issues indicating that SEMA Number 2 of 2023 is experiencing legal regression. The purpose of this research is to determine the legal force of implementing SEMA Number 2 of 2023 regarding interfaith marriages based on the perspective of legal certainty.

## METHODS

The author chose the normative legal research method focusing on the study of a norm within legislation, whether the norm is empty, conflicting, or ambiguous (Vermeule 2006). The approach used is the "legislative" or statue approach. This approach focuses on examining rules related to the issue of interfaith marriages. The

legal materials used consist of primary legal materials, where the author refers to regulations as references. Additionally, secondary legal materials are utilized, such as legal literature including books, journals, and other scholarly works intersecting with the author's discussion (Zaini Zulfi Diane, 2013).

## RESULTS AND DISCUSSION

According to Article 1 Paragraph 3 of the 1945 Constitution, Indonesia is a state based on the rule of law, which declares that no authority is exempt from accountability and the state upholds truth and justice. Good law is law that corresponds to the living law within society and reflects its prevailing values (Winardi, 2020). The implementation of law aims to provide certainty and a clear legal position, so that the purpose of law itself can bring benefits, goodness, and justice (Akmal, 2021).

The right of citizens to form a family and procreate is protected by the 1945 Constitution of the Unitary State of the Republic of Indonesia through legitimate marriage, the right of children to survival, growth, and development, and the right to protection from discrimination and violence. Marriage is a bond between two men and women that is an integral part of a valuable life of worship (Amri, 2020). Therefore, it is crucial for individuals who are physically and spiritually mature to create tranquility, peace, and prosperity in their married lives. However, due to Indonesia's pluralistic and diverse society, it is not impossible for unrestricted human interaction to occur, thus allowing for the creation of serious relationships leading to marital bonds through interfaith and belief marriages. Therefore, interfaith marriages are common in Indonesia.

### The Legal Force of the Implementation of SEMA Number 2 of 2023 on Interfaith Marriages Based on the Perspective of Legal Certainty

One type of regulation established by the Supreme Court is SEMA. SEMA regulations are created with the aim of monitoring and overseeing the judiciary. SEMA covers warnings, reprimands, and guidance for courts under the Supreme Court. According to the book "Perihal Undang-Undang" by Jimmly Asshidiqie, Circulars or SEMA fall into the category of policy regulations or quasi-legislation. Therefore, Supreme Court Circulars can be considered as policy regulations. In this case, the norm object of the Supreme Court Circular is judges, court chairpersons, court clerks, and officials within the judicial environment, interpreted as administrative bodies or officials. Thus, Supreme Court Circulars (SEMA) can be considered as policy regulations.

According to Law Number 12 of 2011 concerning the Formation of Legislation, Supreme Court Circulars (SEMA) are included in the category of forms of legislation made based on the authority of the institution. Articles 7 and 8 of Law Number 12 of 2011 discuss the types and hierarchy of legislation, consisting of the 1945 Constitution of the Republic of Indonesia, Decisions of the People's Consultative Assembly, Laws/Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, Provincial Regional Regulations, and District/City Regional Regulations. The following hierarchy governs the legal force of legislation. According to Article 8 of Law Number 12 of 2011, it is as follows:

1. Regulations other than those mentioned in Article 7 paragraph (1) include regulations made by the People's Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Supreme Audit Board, Judicial Commission, Bank Indonesia, Ministers, bodies, institutions, or commissions at the same level established by Law or by the Government under the mandate of the Law, Provincial Regional People's Representative Councils, Governors, District/City Regional People's Representative Councils, Regent/Mayor, village heads.

2. Legislative regulations mentioned in paragraph (1) have legally binding force and are recognized by higher legislation or made based on authority.

Article 79 of Law No. 14 of 1985 concerning the Supreme Court provides the legal basis for the validity of SEMA. The Supreme Court has the authority to settle issues not specifically regulated in legislation. However, SEMA does not have the authority to create rules. Supreme Court Circulars (SEMA) that regulate procedural law Based on Article 79 of Law No. 14 of 1985 concerning the Supreme Court, SEMA has legally binding force. Furthermore, based on Article 8 of Law No. 12 of 2011, SEMA can be categorized as legislation.

However, in accordance with the function and purpose of SEMA and Law No. 48 of 2009 concerning the Judiciary, judges are prohibited from rejecting cases on the grounds of unclear legal regulations and are required to examine and adjudicate cases. Moreover, when performing their duties, judges must understand the public's feelings towards law and justice. Judges are also responsible for finding (Rechtsvending) and forming (Rechtvorming) law to meet the needs of society if there is a legal vacuum because legal science and Indonesian positive law reject the concept of legal vacuum.

The Decision of the North Jakarta District Court Number 423/Pdt.P/2023/Pn Jkt.Utr Regarding Interfaith Marriages, read on August 8, 2023, after the issuance of SEMA Number 2 of 2023 on July 17, 2023, in this case, the author believes that there is a problematic issue indicating a legal regression in SEMA Number 2 of 2023 because this can also be seen from the material aspect of SEMA which contradicts Law Number 23 of 2006 concerning Population Administration. The author argues that this ultimately becomes one of the considerations for judges when the District Court grants interfaith marriage applications.

Law Number 23 of 2006 concerning Population Administration makes it easier for interfaith couples to apply for interfaith marriages in district courts. After the judge grants the application, the district court orders the Civil Registry Office staff to register the interfaith marriage authorized by the judge's decision.

The judge grants permission for the determination of interfaith marriages based on several reasons, namely, the Marriage Law, which does not clearly explain the prohibition of interfaith marriages. Therefore, the application is accepted to avoid legal vacuum. Because the District Court has the authority to examine and determine as well as make decisions regarding interfaith marriages. Clearly, in Law Number 23 of 2006 concerning Population Administration, Article 35 letter a states that the registration of marriage as referred to in Article 34 also applies to marriages determined by the court. Furthermore, the explanation in Article 36 states that in the event of a marriage cannot be proven by a Marriage Certificate, the marriage registration is done after a court decision (Nurwati et al., 2020).

Everyone expects legal protection and legal certainty, and the state must protect them. The principle of equality before the law for national life in the economic, political, social, cultural, and defense security fields, can be seen as not yet fully implemented as expected. In this case, Article 35 letter a of the Population Administration Law indicates a contradiction with Article 2 of the Marriage Law, which stipulates that marriage is considered valid if it is carried out in accordance with the laws of each religion and belief. It is also clarified, in the norms and laws of religion in Indonesia that, in fact, do not allow its adherents to marry between religions. According to Natural Law, religion is considered to have a role in regulating society, thus producing a law-abiding and orderly society. Therefore, it can be concluded that Article 35 letter a of the Population Administration Law and Article 2 of the Marriage Law have juridical contradictions, or legal conflicts, with the prevailing norms and laws of religion in Indonesia. However, the court still makes different decisions in understanding and analyzing the Marriage Law, including SEMA Number 2 of 2023 and Constitutional Court Decision Number 68/PUU-XII/2014.

The author believes that although the Indonesian judicial system uses the principle of Ius Curia Novit, which obliges judges to accept every case that enters the court, even though the legal rules regarding interfaith marriages are unclear in the Marriage Law. However, it is hoped that judges will not rush to make decisions sanctioning interfaith marriages solely based on Article 35 letter a of the Population Administration Law. At the very least, judges should also consider Constitutional Court Decision Number 68/PUU-XII/2014, which firmly rejects judicial review, including considering the provisions of SEMA Number 2 of 2023. Furthermore, judges should understand the meaning of the Marriage Law as stated in Article 1 of Law Number 1 of 1974: "The physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Almighty God."

The physical bond is a tangible formal bond that affects individuals, families, others, and society. Marriage, on the other hand, is a spiritual bond formed by the same sincere desire between a man and a woman to live together as husband and wife. Additionally, Pancasila and the 1945 Constitution are the basis of national and state life. Therefore, because marriage is based on the Almighty God, families must be founded under one God. Marriage should be viewed from both spiritual and social perspectives, not just formal ones. While the law gives administrative authority to the state to regulate marriage, religion determines the validity of marriage.

From this, the author finally argues that the judge's decision to sanction interfaith marriages should be overturned in order to uphold the constitution in Indonesia. Because, in essence, interfaith marriages are contrary to the Marriage Law, Compilation of Islamic Law, and even the 1945 Constitution of the Republic of Indonesia. The Indonesian Constitution explicitly opposes interfaith marriages. Considering that interfaith marriages have unresolved issues.

Furthermore, in an effort to resolve disputes arising from the regulation of interfaith marriages, it would be advisable for Article 35 and 36 of the Population Administration Law to be repealed because these articles provide room for judges to sanction interfaith marriages, which contradicts the Marriage Law that prohibits interfaith marriages but the Population Administration Law actually allows for interfaith marriages. Essentially, if the community has a high legal consciousness in implementing the provisions regulated by the law, and the community complies with it, then the law is effective. Conversely, if the community disregards these provisions, then the law is ineffective.

Legal certainty is needed to resolve the issues surrounding interfaith marriages and to put an end to societal debates. While regulations exist regarding this matter, their enforcement remains weak. Legal experts argue that interfaith marriages are still seen as filling legal voids, which will inevitably lead to the infiltration of social, religious, and positive law values in Indonesia.

Legal certainty holds a crucial position in the goals or ideals of a legal state. It ensures that the law is clear, predictable, and consistent so that individuals can regulate their actions according to the law. Legal certainty provides protection for the rights of citizens and fosters order in society. In the context of a legal state, the principle of legal certainty is fundamental in building public trust in the judicial system and governance, so that every policy and regulation made by the state must be reliable and guaranteed in its validity.

Ideally, legal certainty should be achieved in all aspects of life in a legal state. However, in reality, this legal certainty has not yet been achieved, as seen in the issue of interfaith marriages. Indicators of the lack of legal certainty in interfaith marriages include disparities and inconsistencies in the law. These disparities and inconsistencies in the law regarding interfaith marriages are reflected in decisions issued by both first-instance and appellate courts. To achieve harmony, unity, and legal certainty, the Supreme Court, as the highest authority in the judicial field, issued a regulation in the form of Supreme Court Circular Number 2 of 2023, which provides guidance for judges

at the trial and appellate levels not to approve applications for the registration of interfaith marriages. This regulation needs to be analyzed from the perspective of the principle of legal certainty to test its validity. One of the figures who expressed the principle of legal certainty is Gustav Radbruch (1878-1949).

The principle of legal certainty from the perspective of Gustav Radbruch (1878-1949) is explained through four main issues closely related to the understanding of legal certainty itself. Firstly, law is a positive matter, meaning positive law consists of legislative regulations. Secondly, law is based on facts, implying that it is formulated based on reality. Thirdly, the facts contained in or mentioned by the law must be formulated clearly to avoid misinterpretation and can be easily enforced. Fourthly, positive law should not be easily changed. The concept of law being a positive matter refers to the concept of positive law, which is law formally established and enacted by state institutions. Positive law consists of legislative regulations established through the legislative process or executive decisions that have legally binding force on society. The term "positive" here does not imply moral goodness or advantage but rather refers to something official, written, and enforceable. Positive law encompasses all laws, regulations, policies, and other rules within a country's legal system.

From the perspective of the concept of positive law, Supreme Court Circular Number 2 of 2023 is a regulation formally established by one of the state institutions, namely the Supreme Court. The positive nature in the sense of being official, written, and enforceable is fulfilled in this regulation. However, in terms of its legal force, this regulation only binds within the internal domain of the judiciary and does not bind society at large. The binding nature of the rule regarding the prohibition of interfaith marriages indirectly applies to society, serving as a point of note in the concept of positive law. Upon further examination based on its legal norms, although Supreme Court Circular Number 2 of 2023 has legally binding force based on Article 8 of Law Number 12 of 2011 (hereinafter referred to as the Law on the Formation of Legislation), this regulation is not included in the hierarchy of legislation as stipulated in Article 7 paragraph (1) of Law Number 12 of 2011. Despite its position as an interpreter of Article 2 paragraph (1) of the Marriage Law, the legal force of Supreme Court Circular Number 2 of 2023 is not stronger than that of the law.

The issue arises when this regulation is confronted with other conflicting regulations such as Article 35 letter a of the Population Administration Law. Based on the principle of lex superior derogat legi inferior, the provision of Article 35 letter a of the Population Administration Law must take precedence over Supreme Court Circular Number 2 of 2023 because of its position in the hierarchy of legislation as a higher law than the Supreme Court Circular (Nurfaqih Irfani, 2020). The legal interpretation based on facts is that the formation and application of law must be based on empirical realities and the actual conditions of society. This means that the law created must reflect the actual social and cultural situations happening on the ground to be relevant and effective. It is essential to ensure that the law can be implemented fairly and logically, addressing the needs and issues existing within society (Zainuddin Ali, 2006).

The facts and social realities of interfaith marriages are the second aspect to consider in analyzing the provisions of Supreme Court Circular Number 2 of 2023. Although modern society offers more freedom in choosing partners, the pressure to select a partner from the same religious group remains strong, indicating that collective consciousness still influences marriage decisions. The religious requirements in valid marriages according to Indonesian law depict traditional values, and state policies can influence individual freedom in choosing life partners (Agustin Sukses Dakhi, 2019). Considering these realities, the content of Supreme Court Circular Number 2 of 2023 issued by the Supreme Court of the Republic of Indonesia on July 17, 2023, aligns with the existing social conditions in society. The intent of the statement that the facts contained or stated in the law must be formulated clearly pertains to the principle of

clarity in legislation. Every legal provision must be written in clear and unambiguous language to minimize misunderstandings or differing interpretations by those who read it. This also facilitates law enforcement in applying the law.

When rules in legislation are formulated clearly, the law can be enforced consistently and provide legal certainty for all parties involved (Jeane Neltje and Indrawieny Panjiyoga, 2023). The sentences written in Supreme Court Circular Number 2 of 2023 clearly and explicitly regulate that the court does not approve applications for registration of marriages between individuals of different religions and beliefs. There is no ambiguity that leads to multiple interpretations in the content of this rule. The aspect that positive law should not be easily changed means that legislative regulations that have been established should have stability and continuity. Changes to positive law should undergo a mature process, considering the possible social, economic, and political impacts. This is to maintain legal certainty and ensure that the law can be an effective tool for social regulation and not a source of uncertainty or instability due to frequent changes. Stability in positive law is an important foundation in building public trust in the legal system and governance.

In the case of Supreme Court Circular Number 2 of 2023, it shows inconsistency with the principle of stable positive law. The form of the Supreme Court Circular, which is a circular letter and not a formal law, has the potential to disrupt legal certainty due to its more flexible nature and susceptibility to change. When legally binding rules can easily change through circular letters, it can create legal uncertainty and increase the risk of ambiguity in law enforcement, which is inconsistent with the principle of stability in positive law (Kharisma, 2023). When analyzing Supreme Court Circular Number 2 of 2023 from the perspective of the principle of legal certainty by Gustav Radbruch (1878-1949), it shows that this rule has not fulfilled all the aspects required to be considered as a rule that provides legal certainty. First, in terms of its concept of positive law, this rule meets the positive criteria. However, its binding nature is not like laws that apply to the general public but only to the judiciary's internal affairs. Second, the aspect based on factual law is fulfilled in Supreme Court Circular Number 2 of 2023. This rule considers the reality and legal facts occurring in society. Third, the aspect of clear formulation is also fulfilled in Supreme Court Circular Number 2 of 2023. This rule explicitly prohibits interfaith marriages by including the phrase "does not approve" in its content. Fourth, the aspect of not easily changed is not fulfilled in Supreme Court Circular Number 2 of 2023. The form of a circular letter is not like a law that undergoes a legislative process. The mechanism in the formation of this rule is vulnerable to change and can cause legal instability.

The legality of interfaith marriages in Indonesia, based on Article 2 paragraph (1) which is considered still biased, obtains clarity of interpretation with the existence of Supreme Court Regulation Number 2 of 2023. However, when viewed from the aspects of legal certainty that must be fulfilled in a regulation, as expressed by Gustav Radbruch (1878-1949), then Supreme Court Regulation Number 2 of 2023 still needs correction and improvement. To achieve optimal legal certainty, regulations in the form of laws that regulate the legality of interfaith marriages in Indonesia are needed. These regulations could be in the form of amendments to the Marriage Law or new laws containing rules regarding the permissibility of interfaith marriages.

## CONCLUSION

Regarding the legal certainty of the implementation of Supreme Court Circular No. 2 of 2023 concerning interfaith marriages, it is assessed that the enactment of Circular No. 2 of 2023 is considered not maximal and optimal because it does not fulfill all aspects of legal certainty principles from the perspective of Gustav Radbruch (1878-1949). The aspects of legal certainty fulfilled in Circular No. 2 of 2023 are the aspect of law formulated based on facts and the aspect of clarity in legal formulation. The facts and

social realities of interfaith marriages in society are in line with the norms regulated in Circular No. 2 of 2023.

This regulation is also formulated clearly and there is no ambiguity in its provisions. The aspect of legal certainty that is only partially fulfilled is that law is a positive matter. Circular No. 2 of 2023 is a written and official regulation that can be enforced. However, there is a conflict of norms in the enforcement of this regulation. Meanwhile, the aspect of legal certainty that is not fulfilled is the aspect of not easily changed. The form of Circular No. 2 of 2023, which is a circular, creates the potential for instability and easy alteration.

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