

Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective

by Siti Kotijah

Submission date: 29-Dec-2020 09:13AM (UTC+0700)

Submission ID: 1481785297

File name: Proceeding_3nd_ICILI.docx (30.15K)

Word count: 3161

Character count: 16665

Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective

Dr. Rosmini¹, Christ Amarta Harludi², Karina Lizwary³, Dr. Siti Kotijah⁴

Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 conceptually gives meaning to the dogmatic changes of interfaith marriage especially to Indonesian Islam people. This verdict became a jurisprudence in the ratio decidendi that stated that interfaith marriage is not governed by the marriage law. In legal practice we recognize the *Non-Liquet* principle, which means that the court could not reject any cases given to them because of the obscureness or the absence of the law itself. This research is an empiric and normatic research, with legal approach and case approach. Ratio decidendi of the Supreme Court verdict number 1400/K/Pdt/1986 is not in accordance with the fact that Indonesia's law system is civil law system. The marriage law does not explicitly govern interfaith marriage, but in article 2 paragraph (1) of the marriage law stated that the legal requirement of a marriage is restored to religious norms of those who want to marry. On this Supreme Court Verdict, those who want to marry are Christian and Islam whose religious norms on those two religions prohibit interfaith marriage. In accordance with the *Res Judicata pro Veritate Habetur* principle that is universally valid, this Supreme Court Verdict remains true. Judges are advised to remain guided by the legal system adopted by Indonesia (civil law) and put the legislation as the primary legal sources, so that disparity of law verdict could be avoided.

Keyword: Islamic Family Law, Judge, Supreme Court Verdict

INTRODUCTION

A. Background

Purpose of a marriage is to form a happy and a lasting family (household) based on the Almighty God. This is the basic concept of the Marriage Law (Law Number 1 Year 1974 concerning Marriage) which places marriage not only in civil relations, but also relates to religious philosophy of Pancasila. If carried out properly, a marriage must be held considering the law of each party's religion/faith and after should be registered according to the national law and regulations.

In Islam, the word *nikah* literally means "to collect things". The word *nikah* is used to connote the piercing or absorbing of a thing into another thing. When the water of rainfall absorbs into the earth the Arabs say: *nakaha'l-matru'l-'ard*. Likewise when the trees are intermingled it is said: *tanakahat'il-ashjar*. Technically, the word *nikah* refers to cohabitation (*mubasharat*). In Shari`ah *nikah* refers to a contract. A contract means a knot or a tie. As a

¹ Lecturer of Mulawarman University Law Faculty

² Student of Mulawarman University Law Faculty. Email: m.harludi@gmail.com

³ Student of Mulawarman University Law Faculty.

⁴ Lecturer of Mulawarman University Law Faculty. Email: sitikotijah@fh.unmul.ac.id

woman and a man are tied together by a knot (of wedding called the wedlock), hence nikah is also called `aqd (a contract).⁵

Also in the Qur'an, there is a verse that talks about this interfaith marriage issue. It is absolutely the main verse that states a provision on marriage with a category of non-Muslims:

Allah says: "Do not marry idolatresses (al mushrikāt) till they believe; and certainly a believing maid is better than an idolatress even though she would please you; and do not marry idolaters (al Mushrikīn) till they believe (hata yūminū), and certainly a believing slave is better than an idolater, even though he would please you. These invite to the Fire, and Allah invites to the Garden and to forgiveness by His grace, and makes clear His revelations to mankind so that they may remember."⁶

The fact is marriage carried out by two different religions have been going on for a long time. This fact raises problems; social, religious, and legal problems. The marriage norms regulate that the religious norms are the formal norm that should be followed by the parties who want to marry. While each religion prohibits interfaith marriage, the interfaith marriage that has been happening had been done overseas to be granted the legal permission to be applied to the civil registration, thus making the marriage possible.

Non-Liquet principle, which means that the court could not reject any cases given to them because of the obscureness or the absence of the law itself is one of the main construction of the Judicial Power Law. This principle is connected with the laws that regulate cases that do not exist or do not clearly regulate them, the judges are given the authority to conduct legal interpretation to search for and find the law itself.

The Supreme Court Verdict Number 1400/K/Pdt/1986 gives a dogmatic change to interfaith marriages in Indonesia, in which jurisprudence states that the norms in the Marriage Law do not regulate interfaith marriages. Therefore, a study about *Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective* must be done to see the legal construction from the Judge's considerations.

B. Problem Formulation

C.

⁵ Dr Shahzad Iqbal Sham. Some Aspects of Marriage and Divorce in Muslim Family Law. Accessed on: https://scholar.google.co.id/scholar?cluster=2394363467623808307&hl=en&as_sdt=0.5&sciodt=0.5, 26 September 2018 13:27

⁶ Qur'an 2:221

From the background, it can be formulated that there is a problem on the Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective.

D. Research Purpose

The Purpose of this research is to find out and examine the legal implications of the The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective and to know the implications of this verdict to the Interfaith Marriage in the Perspective of Indonesian Legal System.

METHOD

This research is a normative research which examines the Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective. The method used is normative juridical method with statute and conceptual approach. Primary, secondary, and tertiary legal materials obtained by the authors are analyzed using grammatical interpretation techniques and legal tracing. Grammatical interpretation as the source of the legal material was obtained and then analyzed through understanding the language or wording used.

RESULT AND DISCUSSION

A. Ratio Decidendi Theory in Supreme Court Verdict

Theoretically, Ratio Decidendi is a decision of the legal counsel based on material facts⁷. Material facts became the focus because the judge and the parties will look for the right legal basis to be applied to the facts of the case⁸. In finding Ratio Decidendi in a decision usually found in certain parts. To get a certainty at one of the decisions the judge must write down the reasons, namely the Ratio Decidendi. In Indonesian law which adheres to civil law systems, the decedendi ratio can be found on the "consideration" part on The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage.

In general, the function of Ratio Decedendi or legal reasoning is as a mean of presenting the main points of thinking about the problems of legal conflict between someone and other people, or between the community and the government on cases that are controversial or

⁷ I.P.M Ranuhandoko, 2003, Terminologi Hukum Inggris-Indonesia, (Jakarta: Sinar Grafika), Cetakan Ketiga, hlm. 475.

⁸ Peter Mahmud Marzuki, 2000, Penemuan Hukum oleh Hakim, (Jakarta: Graha Ekpress), hlm 119.

counterproductive to become replicates and duplicates, especially concerning the good and bad of the implementation and law enforcement system, the attitude of the legal apparatus and the judiciary.

The Judge's action to provide reasons that lead to the decision is an action that requires an instinct to interpret a law creatively. Ratio Decidendi means choices made of various possibilities that exists. Ratio can be found by paying an attention to material facts and decisions based on the factual data. Thus, from a material fact there can be 2 (two) contradictory decisions which determine the Ratio Decidendi of the decision⁹.

Ratio Decedendi must be based on a fundamental philosophical foundation, which considers all aspects related to the subject matter of the dispute, including in interfaith marriages. Then looking for legislation that is relevant to the subject matter of the dispute as a legal basis for the imposition of decisions, as well as judges' consideration must be based on clear motivation to enforce the law and provide justice for litigant parties, in this case people do interfaith marriages.

The foundation of philosophy is part of a judge's judgment in making a decision, because the philosophy is usually related to the conscience and sense of justice contained in the judge, so that the decision can provide a sense of justice that does not only depend on formal (procedural) justice, but also substantive justice, while still considering all aspects related to the subject matter of the case disputed by the parties, such as aspects of education, humanity aspects, or aspects of benefit, law enforcement, legal certainty, and other legal aspects. Aspects proposed by the parties to conduct different marriages, on aspects of human rights, as basic rights as human beings to conduct marriage without being obstructed by a rule of law, including Islamic law.

Islamic law is part of the construction of national law formation, including in the Marriage Law. Marriage law as a statutory regulation is the basis for a judge to determine the verdict he passed, even though as explained earlier, the judge is not just a mere legal applicant (*la bouche de la loi*), but the legislation is a guideline for a judge in determining a decision.

The judge's decision in a case contains a cursory consideration which is sometimes irrelevant, which is not directly related to the subject matter of the case, which is referred to as *obiter dictum*, and there is also a judge's decision which contains a consideration of the subject matter directly, called with a *ratio decedendi*, a consideration or reason which directly concerns

⁹Ibid, hlm 123.

the subject matter, namely the rule of law which is the basis of this decision which binds the parties to the dispute¹⁰.

Basically, in the ratio decidendie the judge is guided by the laws and regulations, which contains the rules for the *a quo* case considering that the judge cannot only originate from the previous decision or jurisprudence. The judge has the freedom to decide related to cases that have not been regulated, it does not have to be bound by prior jurisdiction, and this is because Indonesia adheres to the civil law system. Then again, the Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage must be examined.

B. Implementation of the The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Indonesian Legal System

The legal system has 2 (two) understandings, namely, the legal system in the narrow sense as a legal entity that is limited only in the material or substance of the law, and the legal system in the broad sense as a legal entity consisting of various components. According Bellefroid, points out, the legal system is the overall rule of law drawn up in an integrated manner based on certain principles¹¹. Meanwhile, according to Sudikno Mertokusumo, the legal system is basically a law consisting of a number of elements / components or functions / variables that always influence and are bound to one another by one or several principles.

Regarding the legal system in Indonesia that follows the civil law system, the construction that is built is that the law has binding power, because it is realized in the legislation in the form of laws. In the The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage, the Marriage Law is the binding law. As explained, the marriage law does not recognize interfaith marriages even though that kind of marriage is done by someone based on Islam.

In the perspective of Islamic law, marriage is considered valid, if it is based on its religious law or their respective religious beliefs. Interfaith marriages, law construction can be seen in Al Baqorah verse (221), "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that

¹⁰ Sudikno Mertokusumo, 2006, Penemuan Hukum sebuah pengantar, (Sinar Grafika: Jakarta), hlm. 54.

¹¹ Maria Darus Badruzaman, 1983, Mencari Sistem Hukum Benda Nasional, (Bandung, Alumni, hlm, 15.

perhaps they may remember." The implementation of the Compilation of Islamic Law (KHI) with Presidential Instruction Number 1 of 1991 concerning the Spread of Compilation of Islamic Law, prohibits a Muslim from interfaith marriage. Prohibition for Muslim men is regulated in Article 40 letter c, the complete KHI as follows: "It is prohibited to hold a marriage between a man and a woman because of certain circumstances: (a) because the woman in question is still tied to one marriage with another man; (b) a woman who is still in the iddah period with another man; and (c) a Muslim who is not a Muslim.

In Indonesia, the prohibition between Muslim women or Muslim women with non-Muslim men was confirmed by the release of Fatma Indonesian Ulema Council (MUI), in 1980, which prohibited the marriage, did not even allow all interfaith marriages. This is in accordance with Article 44 of KHI, "an Islamic woman is prohibited from having a marriage with a man who is not Muslim."

In its development after the issuance of the Supreme Court Verdict Num.1400K / Pdt / 1986 about Interfaith Marriage, there were a number of domestic court decisions that legalized interfaith marriages in Indonesia. Several decisions of the District Courts put The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage as a basis for consideration, which can be seen in table 1 below:

Table 1: Court decisions about Interfaith Marriage

	Decision Number
1	District Court Decision Num.382/PDT/P/1986/PN.JKT.PST jo Putusan MA No.1400K/PDT/1986
2	District Court Verdict Num.4/Pdt.P/2012/PN MGL
3	District Court Verdict Num.27/Pdt.P/2015/PN.SGT
4	District Court Verdict Num.46/Pdt.p/2016/PN.SKa
5	District Court Verdict Num.46/Pdt.p/2016/PN.SKa

Data: Karina, thesis of Law Faculty - Mulawarman University 2017

Basically, the Ratio Decidendi in those Verdicts and decisions are invalid as the Indonesian Legal System still uses the civil law system which means a jurisprudence does not have a

binding source of law on judges. Even so, the absence of a Interfaith Marriage law itself made this problem arouse.

C. Analysis of **Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective**

In Ratio decidendie, Andy Vonny Gani said that according to his confession was a Muslim and his request to hold a marriage was rejected by the Head of the Jakarta Office of Religious Affairs with letter No. K2 / MJ-I / 834 / III / 1986 dated March 5, 1986. In addition to being rejected by the Office of Religious Affairs, Andy Vonny Gani's request to hold interfaith marriages was also rejected by the Jakarta Civil Registry Office with a letter No. 655 / 1.1755.4 / CS / 1986 dated March 5, 1986.

Then related to his refusal, the Head of the Office of Religious Affairs informs that if the interested parties object to the refusal, then they are invited to ask for a decision / decision to the Greater Jakarta Special Religious Court by appointing article 60 paragraph (3) jo article Article 63 paragraph (1) of the Marriage Law. Extraordinary Civil Servants of the Province of Jakarta Capital Special Region recommends the applicant to submit an application to the Central Jakarta District Court to obtain a certificate referred to in article 60 paragraph (1) of the Marriage Law.

According to the judge, the appointment of the articles by the two officials was clearly wrong, because article 60 must be related to articles 57, 58, 59 of the Marriage Law which deals with marriage between two people who in Indonesia are subject to different laws due to differences in citizenship (mixed marriages), even though the a quo case is not about mixed marriages in the above sense, because both parties who are going to marry are Indonesian citizens, only different religions and therefore it should refer to article 21 paragraph (3) of the Marriage Law.

Basically, **the Supreme Court Verdict Num.1400 K/Pdt/1986** concerning the regulation of interfaith marriages refers to Article 8 letter (f) and Article 2 paragraph (1) of the Marriage Law which has different interpretations between the Central Jakarta District Court and the Supreme Court . The construction of law in Article 8 letter (f) of the Marriage Law does not explicitly state that interfaith marriages are prohibited to be carried out, but the interperatation of Article 8 letter f is unclear as to what kind of relationship is forbidden to marry. Whether religious differences between couples who are going to marry is a marriage prohibition referred to in

article 8 letter f or not still causes various interpretations. Another ratio decidendi is Article 2 paragraph (1) of the Marriage Law which determines the validity of a marriage. This article is blurred when every religion has different opinions about the validity of the interfaith marriage to the law of each religion. Even interpretations that exist not only between religions that have different opinions regarding interfaith marriages, in one religion there are also different interpretations of whether or not a religious interfaith marriage is conducted.

CONCLUSION

Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage does not correspond to the meaning of Article 2 paragraph (1) of the Marriage Law. The Marriage Law does not explicitly regulate interfaith marriages, but Article 2 paragraph (1) of the Marriage Law regulates if the legal requirements of marriage are returned to the religious norms of the parties who will carry out the marriage. In the Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage, it must still be considered true as the universally applicable principle is the *Habetur Res Judicata Pro Veritat*. Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage has changed the existing dogma, the construction of marriage law adopted is a religious norm. The judge is not bound to jurisprudence because jurisprudence is the persuasive force of precedent and in deciding cases; the judge has the nature of independence that is free from other powers intervention.

SUGGESTION

1. Judges in deciding cases must remain guided by the legal system adopted by Indonesia and put legislation as the main legal source so that disparity will not occur in the future.
2. Judges do not need to be guided by jurisprudence when there are laws and regulations that govern, so it is necessary to return the dogma about interfaith marriages between parties with Islamic and Christian backgrounds in accordance with religious norms in order to create legal certainty.

REFERENCE

Books

Badruzaman, Maria Darus. 1983. *Mencari Sistem Hukum Benda Nasional*. Bandung: Alumni.

Verstappen, Leon. 2012. *Hukum Tentang Orang, Hukum Keluarga dan Hukum Waris di Belanda dan Indonesia*. Bali: Pustaka Larasan.

I.P.M Ranuhandoko. 2003. *Terminologi Hukum Inggris-Indonesia*. Jakarta: Sinar Grafika. Cetakan Ketiga

Marzuki, Peter Mahmud. 2000. *Penemuan Hukum oleh Hakim*. Jakarta: Graha Ekpress.

Kotijah, Siti. 2017. *Buku Ajar Perbandingan Sistem Hukum*. Samarinda: Taka Pres Samarinda.

Mertokusumo, Sudikno. 2006. *Penemuan Hukum Sebuah Pengantar*. Jakarta: Sinar Grafika.

Soemiyati. 1982. *Hukum Perkawinan Islam dan Undang-Undang Perkawinan*. Yogyakarta: Liberty.

Soimin, Soedharyo. 2001. *Hukum Orang dan Keluarga*, Jakarta: Sinar Grafika.

Legislation

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan

Tambahan Lembaran Negara Republik Indonesia Nomor 3019

Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan

Ratio Decidendi of The Supreme Court Verdict Number 1400/K/Pdt/1986 about Interfaith Marriage in Islamic Law Perspective

ORIGINALITY REPORT

14%

SIMILARITY INDEX

15%

INTERNET SOURCES

8%

PUBLICATIONS

12%

STUDENT PAPERS

MATCH ALL SOURCES (ONLY SELECTED SOURCE PRINTED)

9%

★ Ikihi.law.ui.ac.id

Internet Source

Exclude quotes On

Exclude bibliography On

Exclude matches < 2%