

## INTERFAITH MARRIAGE FROM A LEGAL JUSTICE PERSPECTIVE AFTER THE SUPREME COURT'S (SEMA) 2023 CIRCULAR LETTER

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### Abstract

Supreme Court Circular Letter No. 2 of 2023 aims to ensure unity and legal certainty in interfaith marriage. This study used normative methodology. The results showed that from a juridical standpoint, it holds legal recognition and binding force under Law 12/2011 and the Supreme Court Law. Sociologically, it aligns with prevailing social realities. Philosophically, its establishment seeks to foster legal unity and certainty. However, its implementation falls short of optimal due to incomplete fulfillment of legal justice aspects, particularly regarding legal certainty per Gustav Radbruch's perspective and requires evaluation through John Rawls' justice principles, particularly concerning equality.

*Keywords: Interfaith Marriage; Justice; Supreme Court's Circular Letter.*

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### Abstrak

Surat Edaran Mahkamah Agung No. 2 tahun 2023 bertujuan untuk menjamin kesatuan dan kepastian hukum dalam perkawinan beda agama. Penelitian ini menggunakan metodologi normatif. Hasil menunjukkan bahwa dari sudut pandang yuridis, ia memegang pengakuan hukum dan kekuatan yang mengikat berdasarkan Undang-Undang 12/2011 dan Undang-Undang Mahkamah Agung. Secara sosiologis, ini sejalan dengan realitas sosial yang berlaku. Secara filosofis, pendiriannya berupaya menumbuhkan kesatuan dan kepastian hukum. Namun implementasinya kurang optimal karena belum terpenuhinya aspek keadilan hukum, khususnya mengenai kepastian hukum menurut perspektif Gustav Radbruch dan memerlukan evaluasi melalui prinsip keadilan John Rawls, khususnya tentang kesetaraan.

*Kata Kunci: Perkawinan Beda Agama; Keadilan; Surat Edaran Mahkamah Agung..*

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## INTRODUCTION

Interfaith marriage is a legal issue that has not yet been resolved in the construction of existing marriage law in Indonesia. The issue of interfaith marriage is sensitive and attracts a lot of attention from various parties, especially academics or researchers. Various research titles with various approaches and perspectives have been conducted to answer the issue of interfaith marriage.<sup>1</sup> The starting point of the problem of interfaith marriage is none other than because there is a bias in the existing formal legal provisions namely the Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law). The Marriage Law is considered unable to answer the issue of the legality of interfaith marriages. Article 2 Paragraph 1 of the Marriage Law does not explicitly prohibit or allow interfaith marriages.<sup>2</sup>

The problem of the formal legal bias of interfaith marriages in Article 2 Paragraph 1 of the Marriage Law is exacerbated by the existence of other rules that open up opportunities for interfaith marriages, namely in Article 35 Letter a of Law of the Republic of Indonesia Number 23 of 2006 concerning Population Administration (hereinafter referred to as Adminduk Law).<sup>3</sup> The article explicitly paves the way for the legality of interfaith marriages through registration preceded by legalization from the district court. The confusion and uncertainty of the legality of interfaith marriages cause difficulties for interfaith couples to obtain legal recognition of marriage validity from the state.<sup>4</sup>

Despite the challenges faced by interfaith couples in entering into marriage, their legal validity is not hindered. This is underscored by the established Supreme Court jurisprudence as outlined in Decision Number 1400 K/Pdt/1986.<sup>5</sup> The essence of this decision affirms that individuals from different religious backgrounds can indeed solemnize their marriage at the Civil Registry Office. This landmark decision has not only set a legal precedent but also serves as a cornerstone for the execution of interfaith marriages, frequently cited by district court judges when adjudicating applications for such unions.<sup>6</sup>

The solution to the formal legal polemic of interfaith marriage can be obtained from the results of the judicial review conducted by the Constitutional Court in Case Number 24/PUU-XX/2022. The application for judicial review of Article 2 Paragraphs (1) and (2) and Article 8 letter f of the Marriage Law was rejected by the Panel of Judges of the Constitutional Court. This decision is in line with the previous decision in Case Number 68/PUU-XII/2014 which in its ruling rejected the judicial review of Article 2 Paragraph (1) of the Marriage Law. Based on the verdicts of the two decisions, it is confirmed

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<sup>1</sup> Ayub Mursalin, "Legalitas Perkawinan Beda Agama: Mengungkap Disparitas Putusan Pengadilan Di Indonesia," *Undang: Jurnal Hukum* 6, no. 1 (2023): 113–150, <https://doi.org/10.22437/ujh.6.1.113-150>.

<sup>2</sup> Bing Waluyo, Wiwin Muchtar Wiyono, and Aris Priyadi, "Tinjauan Yuridis Terhadap Perkawinan Beda Agama Berdasarkan Undang-Undang Nomor 1 Tahun 1974," *Collegium Studiosum Journal* 6, no. 1 (2023): 174–182, <https://doi.org/10.56301/cs.j.v6i1.763>.

<sup>3</sup> Putri Athaya Fidela and Imelda Martinelli, "Konsep Keabsahan Pasal 2 Ayat (1) Undang-Undang Perkawinan Terhadap Perkawinan Beda Agama Berdasarkan Izin Dari Penetapan Pengadilan," *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 7, no. 2 (2020): 408–420, <http://dx.doi.org/10.31604/jips.v10i6.2023.2936-2942>.

<sup>4</sup> Robiatun Hasanah and Abd. Hannan, "Perkawinan Beda Agama Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Undang-Undang Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan," *As-Sakinah: Jurnal Hukum Keluarga Islam* 1, no. 2 (2023): 69–80, [lp3mzh.id/index.php/jhki/article/view/325](http://lp3mzh.id/index.php/jhki/article/view/325).

<sup>5</sup> Zulfadhli and Muksalmina, "Legalitas Hukum Perkawinan Beda Agama Di Indonesia," *JIP: Jurnal Inovasi Penelitian* 2, no. 6 (2021): 1851–1862, <https://doi.org/10.47492/jip.v2i6.1014>.

<sup>6</sup> Muhammad Ridho, Muhammad Amin Qodri, and Ageng Triganda Sayuti, "Perkawinan Beda Agama Berdasarkan Yurisprudensi Putusan Mahkamah Agung," *Zaaken: Journal of Civil dan Bussiness Law* 4, no. 1 (2023): 1–17, <https://mail.online-journal.unja.ac.id/Zaaken/article/view/21632>.

that interfaith marriages cannot be legalized according to the law even though there are dissenting opinions by several panel judges.<sup>7</sup>

The two decisions of the Constitutional Court, which are expected to be a way out for the certainty of the legality of interfaith marriages in Indonesia, are not in line with existing practices in the field. Surabaya District Court Decision Number 916/Pdt.P/2022/PN.Sby on April 26, 2022, negated the Constitutional Court's decision by granting the petitioners' request to enter into an interfaith marriage before the Official of the Population and Civil Registry Office of Surabaya Municipality.<sup>8</sup> In addition, the Central Jakarta District Court also issued a decision with Number 155/Pdt.P/2023/PN.Jkt.Pst on June 12, 2023, whose ruling was similar to the Surabaya District Court's decision.<sup>9</sup>

The series of decisions, starting from the Supreme Court Decision in 1986, the Constitutional Court Decisions in 2014 and 2022, the Surabaya District Court Decision in 2022, and the Central Jakarta District Decision in 2023 show how inconsistent the legality of interfaith marriage is in this country. This has confused the community.<sup>10</sup> To unravel the existing legal disparity of interfaith marriages, on June 17, 2023, the Supreme Court issued Circular Letter No. 2 of 2023 on Guidance for Judges in Adjudicating Cases of Application for Registration of Interfaith Marriages (hereinafter referred to as SEMA No. 2 of 2023). The main provision of the circular letter states that the application for registration of inter-religious marriages cannot be granted by the court.<sup>11</sup>

The purpose of the issuance of SEMA No. 2 of 2023 by the Supreme Court is to provide legal certainty about the legality of interfaith marriages, in the form of a prohibition for judges not to grant applications for interfaith marriages. Although this regulation only applies to judges in the district courts, its implications are felt by the community at large.<sup>12</sup> However, the next problem arises, namely regarding the juridical position of SEMA No. 2 of 2023. Materially, the rules contained in the SEMA contradict pre-existing rules, such as Supreme Court Jurisprudence No. 1400 K/Pdt/1986, the Civil Registration Law, Surabaya District Court Decision No. 916/Pdt.P/2022/PN.Sby, and Central Jakarta District Court Decision No. 155/Pdt.P/2023/PN.Jkt.Pst. In addition, the form of rules in the form of circular letters also needs to be reviewed based on the hierarchy of applicable laws and regulations.

There are previous studies that discuss SEMA No. 2 of 2023. First, research conducted by Gugu (2023) with a discussion of legal certainty in interfaith marriages after the birth of Supreme Court

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<sup>7</sup> Aidil Aulya and Ahmad Irfan, "Koeksistensi Hukum Perkawinan Islam Di Indonesia: Interpretasi Mahkamah Konstitusi Terhadap Pernikahan Beda Agama Di Indonesia," *Al-Adalah: Jurnal Hukum dan Politik Islam* 8, no. 1 (2023): 109–127, doi.org/10.30863/ajmpi.v8i1.4149.

<sup>8</sup> Patricia Karlina Dimiyati and Rosalinda Elsina Latumahina, "Akibat Hukum Terhadap Perkawinan Beda Agama Di Indonesia (Studi Terhadap Putusan PN Surabaya Nomor 916/Pdt.P/2022/PN Sby)," *Bureaucracy Journal : Indonesia Journal of Law and Social-Political Governance* 3, no. 1 (2023): 138–153, https://doi.org/10.53363/bureau.v3i1.170.

<sup>9</sup> Siti Sugianti, Padimun Lumban Tobing, and Rahmat Dwi Putranto, "Analysis of Interfaith Marriage Legalized by the Central Jakarta District Court (Determination Number 155/Pdt.P/2023/PN.Jkt.Pst)," *International Socio-Cultural Scientific Journal* 5, no. 2 (2023): 289–304, https://doi.org/10.37010/lit.v5i2.1388.

<sup>10</sup> Gina Hanifah et al., "Inkonsistensi Peraturan Perundang-Undangan Dalam Memandang Keabsahan Perkawinan Beda Agama," *Cross-Border* 5, no. 2 (2022): 1133–1147, http://www.journal.iainsambas.ac.id/index.php/Cross-Border/article/view/1246.

<sup>11</sup> Muharrir Muharrir, Jefrie Maulana, and Muhammad Nahyan Zulfikar, "Kekuatan Hukum Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan," *Jurnal Ius Civile (Refleksi Penegakan Hukum dan Keadilan)* 7, no. 2 (2023): 70–81, https://doi.org/10.35308/jic.v7i1.8462.

<sup>12</sup> Muhammad Hasbi Ashshiddiqi et al., "Dinamika Keabsahan Perkawinan Beda Agama Dalam Perspektif Hukum Perdata Di Indonesia," in *Proceeding of Conference on Law and Social Studies*, 2023, 1–12, http://prosiding.unipma.ac.id/index.php/COLaS/article/view/5162.

Circular Letter Number 2 of 2023. The results of this study indicate that court decision number 155/Pdt.P/2023/PN. Jkt. Pst and similar decisions based on jurisprudence with the same legal method have provided legal solutions for those who want to marry in a different religion status to disappear and again provide a space in the implementation of the Marriage Law, especially those who marry in a different religion status as with the birth of Supreme Court Circular Letter (SEMA) Number 2 of 2023 concerning Guidelines for Judges in Adjudicating Cases of Application for Registration of Interfaith Marriages of Different Religions and Beliefs, which prohibits Judges at all judicial levels from granting civil registration applications for interfaith marriages.<sup>13</sup>

Second, research conducted by Kharisma (2023) with a discussion of the end of the polemic on interfaith marriage with the Supreme Court Circular Letter No. 2 of 2023. The results of this study show that SEMA No. 2 of 2023 is one way to end the polemics over interfaith marriages even though these interfaith marriages will continue to raise issues both in terms of population administration and in terms of human rights. However, with the existence of SEMA No. 2 of 2023, all judges are obliged to comply with the regulation and if they do not comply, judges can be sanctioned by the Supreme Court Supervisory Board with various sanctions from mild to severe sanctions.<sup>14</sup>

Third, research conducted by Muharrir, Maulana, and Zulfikar (2023) with a discussion of the legal force of Supreme Court Circular Letter No. 2 of 2023 concerning instructions for judges in adjudicating cases of applications for registration of marriages between people of different religions and beliefs. The results of this study indicate that SEMA Number 2 of 2023 is classified as a policy regulation (*beleidsregel*) which is under the law, cannot delete or revoke articles in Law Number 23 of 2006 concerning Population Administration, although this SEMA policy is not directly legally binding, but contains legal relevance aimed at the state administration itself so that the first to implement these provisions is the judicial body under the Supreme Court and this policy regulation cannot affect the general public.<sup>15</sup>

Fourth, research conducted by Abdullah, et al. (2023) discusses the analysis of interfaith marriages in Semarang city after the issuance of SEMA Number 2 of 2023. The results of this study show that although SEMA No. 2 of 2023 has been enacted, the practice of interfaith marriage in Semarang City still occurs based on an interview with the Head of the Marriage and Divorce Section of the Semarang City Dukcapil. This shows that although SEMA regulating the prohibition of interfaith marriage applications has been issued, there are still multiple interpretations regarding the validity of marriage. Therefore, it is necessary to revise the wording regarding the validity of marriage in Article 2 paragraph (1) of the Marriage Law.<sup>16</sup>

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<sup>13</sup> Steven S Gugu, "Mencari Kepastian Hukum Dalam Perkawinan Beda Agama Pasca Lahirnya Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023," *Journal Scientia De Lex* 11, no. 2 (2023): 15–25, <https://unpi.ac.id/ejournal/index.php/scientia/article/view/440>.

<sup>14</sup> Bintang Ulya Kharisma, "Surat Edaran Mahkamah Agung (SEMA) Nomor 2 Tahun 2023, Akhir Dari Polemik Perkawinan Beda Agama?," *Journal of Scientech Research and Development* 5, no. 1 (2023): 477–482, <https://doi.org/10.56670/jsrd.v5i1.164>.

<sup>15</sup> Muharrir, Maulana, and Zulfikar, "Kekuatan Hukum Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan."

<sup>16</sup> Mahadi Abdullah et al., "Analisis Perkawinan Beda Agama Di Kota Semarang: Sebuah Telaah Setelah Dikeluarkannya SEMA Nomor 2 Tahun 2023," *Causa: Jurnal Hukum dan Kewarganegaraan* 1, no. 4 (2023): 71–80, <https://doi.org/10.3783/causa.v1i4.817>.

This research aims to investigate the implementation of policies related to interfaith marriage after the enactment of Supreme Court Circular Letter No. 2 of 2023 from the perspective of legal justice. Specifically, this research will explore the extent to which SEMA No. 2 of 2023 has affected the legality of interfaith marriages. In addition, this study will use a legal justice perspective in the implementation of SEMA No. 2 of 2023, especially in terms of fair treatment of interfaith couples before the law. With these objectives, this research is expected to provide an in-depth understanding of interfaith marriage after the enactment of SEMA No. 2 of 2023, especially in the context of legal justice.

This research presents a new contribution to the understanding of interfaith marriage after the enactment of Supreme Court Circular Letter No. 2 Year 2023 from the perspective of legal justice. The results of the research are expected to serve as a foundation for the development or improvement of policies related to interfaith marriage, especially in integrating the principles of legal justice. The resulting recommendations can help formulate policies that are more inclusive and supportive of individual rights. This research can be an important contribution to the legal literature, filling the knowledge gap related to interfaith marriage after the enactment of SEMA No. 2 of 2023. It can provide a basis for further research in this area and enrich academic discussions.

## METHOD

This research is included in the type of normative legal research or doctrinal legal research. This research examines the law as something that is written in legislation or called law in a book.<sup>17</sup> The approaches used are the statute approach and the conceptual approach.<sup>18</sup> The statute approach is used to reveal the meaning and interpretation of SEMA No. 2 of 2023, using grammatical interpretation, interpretation based on the legal system, authentic interpretation, and various other interpretation methods. Meanwhile, the conceptual approach is used to understand SEMA No. 2 of 2023 from the perspective of legal justice.

This research uses primary legal material in the form of Supreme Court Circular Letter Number 2 of 2023 concerning Guidelines for Judges in Adjudicating Cases of Application for Registration of Marriages between People of Different Religions and Beliefs.<sup>19</sup> Secondary legal materials are books on legal science, legislation, interfaith marriage law, and legal philosophy, as well as related journals. The method of collecting legal materials is done by documentation, namely by collecting and documenting library materials or legal materials both primary legal materials, secondary legal materials, and tertiary legal materials.<sup>20</sup> The analysis of legal materials goes through three stages, namely data reduction, data presentation, and verification.

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<sup>17</sup> Yati Nurhayati, Ifrani Ifrani, and M. Yasir Said, "Metodologi Normatif Dan Empiris Dalam Perspektif Ilmu Hukum," *Jurnal Penegakan Hukum Indonesia* 2, no. 1 (2021): 1–20, <https://doi.org/10.51749/jphi.v2i1.14>.

<sup>18</sup> David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial* 8, no. 8 (2021): 2463–2478, <http://dx.doi.org/10.31604/jips.v8i8.2021.2463-2478>.

<sup>19</sup> Mahkamah Agung, *Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan*, 2023.

<sup>20</sup> Hari Sutra Disemadi, "Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies," *Journal of Judicial Review* 24, no. 2 (2022): 289–304, <https://doi.org/10.37253/jjr.v24i2.7280>.



## RESULT AND DISCUSSION

### 1. Juridical, Sociological, and Philosophical Position of SEMA No. 2 of 2023

Talking about carding crime is an internet technology crime that accesses a website unlawfully with the aim of obtaining data from credit card customers. The bank's activities as a manager of agreements between parties, both banks as investors/creditors and the public as debtors. So that part of the community felt it was fate that befell him.<sup>21</sup> Prior to the Law No. 11 of 2008 on information and electronic transactions used is Law No. 36 of 1999 on telecommunications contained in Article The formation of legislation as stated in the Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Legislation (hereinafter referred to as Law No. 12/2011), must be based on the principles of good legislation, including the principle of enforceability. The purpose of this principle is that the calculation of legal effectiveness in society must be considered in the formation of laws and regulations, both juristically, sociologically, and philosophically. So, in discussing SEMA No. 2 of 2023, it must be seen from these three aspects.<sup>22</sup>

Supreme Court Circular Letter (SEMA) is one of the legal products issued by the Supreme Court. When viewed from the concept of division of types of regulations in legislative science, SEMA falls into policy regulations (*beleidsregel*).<sup>23</sup> This can be seen for three reasons. First, the form of SEMA is not formal like most laws and regulations. In general, laws and regulations consist of constituent parts such as the name of the regulation, preamble, body, and conclusion. In SEMA, these parts are not found in full.<sup>24</sup> Second, in terms of naming, SEMA, which is a Circular Letter, is classified as a policy regulation or quasi-legislation.<sup>25</sup> Third, in terms of its object, the SEMA indicates that the regulation is only intended for the internal circle of the court. These three reasons indicate that SEMA is classified as a policy regulation (*beleidsregel*).<sup>26</sup>

Referring to the concept of dividing types of regulations by taking into account the existing reasons, SEMA No. 2 of 2023 is classified as a type of policy regulation (*beleidsregel*). In terms of its formal form, SEMA No. 2 of 2023 is unlike the complete form of other laws and regulations. In terms of naming the regulation, it is also called a Circular Letter. The object of the regulation is addressed to judges of the courts of first instance and appeal who are classified as internal courts. Policy regulations (*beleidsregel*) are general rules issued by government agencies relating to the exercise of government authority over citizens or other government agencies.<sup>27</sup> The basis for making these rules is not expressly regulated in the 1945 Constitution of the Republic of Indonesia and formal laws, either directly or

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<sup>21</sup> Hamsir, "Aspek-Aspek Tindak Pidana dalam Perbankan Syariah Dan Konvensional", Jurnal El-Iqtishady, Vol.2, No.2, (2020)h.81

<sup>22</sup> Pasal 5 huruf d Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan (Indonesia, 2011).

<sup>23</sup> S. Endang Prasetyawati, "Kedudukan Produk Hukum Dari Fungsi Peraturan Mahkamah Agung Dalam Sistem Perundang-Undangan Nasional," *Pranata Hukum* 14, no. 1 (2019): 15–24, <https://www.neliti.com/publications/522711/kedudukan-produk-hukum-dari-fungsi-pengaturan-mahkamah-agung-dalam-sistem-perund>.

<sup>24</sup> Maria Farida, *Ilmu Perundang-Undangan* (Yogyakarta: Kanisius, 1998), 157.

<sup>25</sup> Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Press, 2010), 393.

<sup>26</sup> Raihan Andhika Santoso, Elan Jaelani, and Utang Rosidin, "Kedudukan Dan Kekuatan Hukum Surat Edaran Mahkamah Agung (Sema) Dalam Hukum Positif Indonesia," *Depositi: Jurnal Publikasi Ilmu Hukum* 1, no. 4 (2023): 07–15, <https://doi.org/10.59581/deposisi.v1i4.1392>.

<sup>27</sup> Niketut Tri Srilaksmi, "Fungsi Kebijakan Dalam Negara Hukum," *Jurnal Pariksa* 6, no. 1 (2020): 30–38, <https://doi.org/10.55115/pariksa.v4i1.838>.

indirectly. In concept, policy regulations have a nature that is not legally binding but has legal relevance or relevance.<sup>28</sup>

The existence of policy regulations opens up opportunities for government agencies to exercise government authority (*beschikking bevoegheid*). The place for the authority of government agencies in establishing policy regulations is carried out on *descretionaire* or discretion. The meaning of discretion is the actions and/or decisions taken and/or determined by government officials to answer concrete problems encountered in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete, or unclear, and/or there is government stagnation.<sup>29</sup> SEMA No. 2 of 2023 was issued by the Supreme Court the country's highest judicial institution. The establishment of this regulation is based on discretion. In the preamble of the regulation, it is stated that the birth of this regulation is to provide certainty and unity in the application of law in adjudicating applications for marriage registration between people of different religions and beliefs. This rule answers concrete problems in terms of unclear legislation or legal bias in Article 2 paragraph (1) and Article 8 letter (f) of Law No. 1 of 1974 concerning Marriage.

The absence of a rule of law or law that specifically explains SEMA, requires us to re-examine the law that regulates the formation of laws and regulations, namely Law 12/2011. In order, the types and hierarchy of laws and regulations as mentioned in Article 7 paragraph (1) of the law, namely the 1945 Constitution of the Republic of Indonesia, Decree of the People's Consultative Assembly, Law/Government Regulation instead of Law, Government Regulation, Presidential Regulation, Provincial Regional Regulation, and Regency/City Regional Regulation.<sup>30</sup> Based on this article, it is clear that SEMA is not listed in the type and hierarchy of laws and regulations. However, this does not mean that regulations other than those in Article 7 paragraph (1) are not recognized. Furthermore, it is explained in Article 8 paragraph (1), namely:

*“Types of Legislation other than as referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by Law or Government by order of Law, Provincial Regional House of Representatives, Governors, Regency/City Regional House of Representatives, Regents/Mayors, Village Heads or equivalent.”<sup>31</sup>*

The legality of the regulations mentioned in Article 8 paragraph (1) of Law No. 12/2011 is explained in Article 8 paragraph (2). These regulations are recognized and have binding legal force as long as they are ordered by higher laws and regulations or formed based on authority. SEMA No. 2 Year 2023 is a regulation stipulated by the Supreme Court. Therefore, this regulation is included in the regulations mentioned in Article 8 paragraph (1). SEMA No. 2 Year 2023 automatically follows the provisions in Article 8 paragraph (2), which is recognized and has binding legal force.<sup>32</sup>

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<sup>28</sup> Encik Muhammad Fauzan, *Dasar-Dasar Perundang-Undangan Di Indonesia* (Malang: Setara Press, 2020), 63.

<sup>29</sup> Victor Imanuel W. Nalle, “Kedudukan Peraturan Kebijakan Dalam Undang-Undang Administrasi Pemerintahan,” *Refleksi Hukum: Jurnal Ilmu Hukum* 10, no. 1 (2016): 1–16, <https://doi.org/10.24246/jrh.2016.v10.i1.p1-16>.

<sup>30</sup> Cholida Hanum, “Analisis Yuridis Kedudukan Surat Edaran Dalam Sistem Hukum Indonesia,” *Humani (Hukum dan Masyarakat Madani)* 10, no. 2 (2020): 138–153, <http://dx.doi.org/10.26623/humani.v10i2.2401>.

<sup>31</sup> *Pasal 8 Ayat (1) Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan.*

<sup>32</sup> Hanum, “Analisis Yuridis Kedudukan Surat Edaran Dalam Sistem Hukum Indonesia.”

The legal standing for the enactment of SEMA No. 2 Year 2023 is based on Article 79 of Law of the Republic of Indonesia No. 14 Year 1985 on the Supreme Court (hereinafter referred to as the Supreme Court Law). The article reads as follows: “The Supreme Court may further regulate matters necessary for the smooth administration of justice if there are matters that have not been sufficiently regulated in this Law.” The existence of Article 79 of the Supreme Court Law provides rule-making power to the Supreme Court to make further regulations on issues that have not been covered in the law. Furthermore, the elucidation of Article 79 of the Supreme Court Law explains that the Supreme Court has the authority to make supplementary regulations to fill the existing legal deficiencies and vacancies.<sup>33</sup> It can be understood from the explanation of the article that SEMA No. 2 Year 2023 is included in the regulations issued by the Supreme Court to fill the shortcomings and legal vacuum of interfaith marriage in Indonesia.

Referring to Article 8 paragraphs (1) and (2) of Law No. 12 of 2011 on the Formation of Legislation and Article 79 of Law No. 14 of 1985 on the Supreme Court, the position of SEMA No. 2 of 2023 is legally clear. This regulation is recognized for its existence has binding legal force and can be classified as legislation. The issuance of this regulation is also by the explanation of Article 79 of the Supreme Court Law relating to the authority of the Supreme Court to make supplementary regulations to fill legal deficiencies in the form of legal bias in Article 2 Paragraph (1) and Article 8 letter (f) of the Marriage Law and legal vacuum in the legal field of interfaith marriage. The position of SEMA No. 2 Year 2023 which is recognized and has binding legal force has several legal consequences. First, this regulation becomes the interpreter of Article 2 Paragraph (1) and Article 8 letter (f) of the Marriage Law on the issue of the validity of interfaith marriages. Second, this regulation replaces the jurisprudence of Supreme Court Decision No. 1400 K/Pdt/1986. Third, this regulation is the implementation of Constitutional Court Decisions Number 24/PUU-XX/2022 and Number 68/PUU-XII/2014.

The juridical basis for the enactment of SEMA No. 2 of 2023 means that judges at the courts of first instance and appeal are bound by this regulation and should implement the contents of the regulation. The problem is that there are no legal consequences if judges do not implement the rules set out in SEMA No. 2 of 2023.<sup>34</sup> This rule governs the judiciary internally, not generally. However, the application of this rule has implications for the general public.<sup>35</sup> The entrance to the legalization of interfaith marriages, which has been done through court decisions, is closed with the existence of SEMA No. 2 of 2023 which provides an interpretation of Article 2 paragraph (1) and Article 8 letter (f) of the Marriage Law. This regulation provides a bright spot for the legal certainty of legalizing interfaith marriages for the people of Indonesia.

Sociologically, interfaith marriages in Indonesia are very likely to occur. Although the majority of the Indonesian population adheres to Islam, there are other religions recognized by the state such as Christianity, Catholicism, Hindu, Buddhism, and Confucianism, as well as sects of belief. The religious pluralism that has become a social reality has resulted in the opportunity for relationships between men

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<sup>33</sup> Prasetyawati, “Kedudukan Produk Hukum Dari Fungsi Peraturan Mahkamah Agung Dalam Sistem Perundang-Undangan Nasional.”

<sup>34</sup> Aurora Vania Crisdi Gonadi and Gunawan Djajaputra, “Analisis Perspektif Pro Kontra Masyarakat Terhadap Penerapan Sema No. 2 Tahun 2023,” *UNES Law Review* 6, no. 1 (2023): 2974–2988, <https://doi.org/10.31933/unesrev.v6i1.1072>.

<sup>35</sup> Fernando Situmorang, Ramlani Lina, and Sinaulan Mohamad, “Kajian Hukum Tentang Kedudukan SEMA No. 2 Tahun 2022 Atas Undang-Undang Kepailitan Nomor 37 Tahun 2004,” *Jurnal Studi Interdisipliner Perspektif* 22, no. 2 (2022): 117–127, <https://doi.org/10.31933/unesrev.v6i1.1072>.



as prospective husbands and women as prospective wives with different religions or beliefs.<sup>36</sup> A clear example is reflected in the Surabaya District Court Decision Number 916/Pdt.P/2022/PN.Sby on April 26, 2022, and the Central Jakarta District Court Decision Number 155/Pdt.P/2023/PN.Jkt.Pst on June 12, 2023.

The validity of marriage as stated in Article 2 paragraph (1) of the Marriage Law is returned to the law of each religion or belief. Thus, the position of religion and belief in determining the validity of a marriage is important. Each religion recognized in Indonesia has its law in determining the validity of interfaith marriages.<sup>37</sup> The diversity of religious laws is an empirical fact that must be considered in analyzing SEMA No. 2 Year 2023 from its sociological aspects. Islam as a religion with the largest number of adherents in Indonesia determines the law of interfaith marriage in the field of fiqh. The fiqh scholars explain that interfaith marriages are invalid when performed either by a Muslim with a non-Muslim woman, or a Muslim woman with a non-Muslim man, even though in ancient times, a Muslim could marry a woman of the book. However, the definition of a woman in the book at that time cannot be equated with a non-Muslim woman today.<sup>38</sup> Moreover, the Indonesian Ulema Council, as a forum for religious organizations of Muslims, has issued a fatwa that the law of marriage between Muslims and non-Muslims is haram and the marriage is invalid.

Protestant Christianity in the law of interfaith marriage is more flexible by returning it to the policy of each church, some approve on the condition that they must convert and some approve without having to convert.<sup>39</sup> However, the common thread is that each marriage must be held in church. Unlike Protestant Christianity, Catholic law does not legalize interfaith marriages. Marriages between Catholic and non-Catholic couples are seen as not ideal. If forced, it must be with the permission or dispensation of the bishop.<sup>40</sup> Hinduism and Confucianism have the same law on the issue of interfaith marriage. Both religions do not legalize marriages that occur between two followers of different religions in their teachings.<sup>41</sup> Buddhism, on the other hand, makes concessions to the law of interfaith marriage. Buddhism explains that there is no compulsion in marriage so Buddhists can freely choose to marry whomever they choose. All recognized religions in Indonesia prohibit interfaith marriages, except Buddhism and some Protestant Christianity. Seeing this empirical reality, the content of SEMA No. 2 of 2023 issued by the Supreme Court of the Republic of Indonesia on July 17, 2023, is in line with the existing social conditions in the community. Thus, it can be concluded that the establishment of SEMA No. 2 Year 2023 has taken into account the sociological aspects as referred to in the principle of enforceability.

In addition to juridical and sociological aspects, the formation of laws and regulations must also pay attention to philosophical aspects. Consideration of the view of life, awareness, and ideals of law which includes the spiritual atmosphere and philosophy of the Indonesian nation must be the reason reflected in the formation of legislation. SEMA No. 2 of 2023 was formed to provide certainty and unity

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<sup>36</sup> Syaqui Futaqi, "Kawin Beda Agama: Perspektif Pluralisme-Multikulturalisme," *Kalam: Jurnal Agama dan Sosial Humaniora* 5, no. 2 (2017): 1–17, <http://journal.lsamaaceh.com/index.php/kalam/article/view/30>.

<sup>37</sup> *Pasal 2 Ayat (1) Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan* (Indonesia, 1974).

<sup>38</sup> Wahbah Zuhaili, *Al-Fiqh Al-Islam Wa Adillatuhu*, Jilid 7. (Damaskus: Dar Al-Fikr, 1984), 74.

<sup>39</sup> Candra Refan Daus and Ismail Marzuki, "Perkawinan Beda Agama Di Indonesia; Perspektif Yuridis, Agama-Agama Dan Hak Asasi Manusia," *Al-'Adalah: Jurnal Syariah dan Hukum Islam* 8, no. 1 (2023): 40–64.

<sup>40</sup> Jane Malen Makalew, "Akibat Hukum Dari Perkawinan Beda Agama Di Indonesia," *Lex Privatum* 1, no. 2 (2013): 131–144, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/viewFile/1710/1352>.

<sup>41</sup> Ni Nyoman Rahmawati, "Pengesahan Perkawinan Beda Agama Dalam Perspektif Hukum Hindu," *Belom Bahadat* 9, no. 1 (2019): 1–15, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/viewFile/1710/1352>.

in the application of law in adjudicating applications for inter-religious marriage registration.<sup>42</sup> The ideals, objectives, or basic values in the rule of law, one of which is the existence of legal certainty, in addition to justice and expediency.<sup>43</sup> Indonesia as a country that in the formation of its national law has been influenced by the school of legal positivism, causing legal certainty to be the main aspect.<sup>44</sup> Thus, the establishment of SEMA No. 2 of 2023 is philosophically in line with the goals and ideals of the rule of law, namely the achievement of legal certainty.

**Table 1. Position of Supreme Court Circular Letter No. 2 of 2023**

Positions	Arguments
Juridical	Has legal force based on Article 8 of Law 12/2011 and Article 79 of the Supreme Court Law
Sociological	Corresponds to Islam, Catholicism, Hinduism, Confucianism, and some Protestant Christianity
Philosophical	Following one of the basic values of the rule of law, namely legal certainty

## 2. The Application of SEMA No. 2 of 2023 in the Perspective of Legal Justice

Based on Gustav Radbruch's theory, law has to have three basic values, namely, legal certainty which discusses from a juridical angle, legal justice which discusses the philosophical angle, and legal benefits which discusses the use value of the law itself. The principle of legal certainty, which is closely related to legal justice, in Radbruch's view, has an important position in the legal goals or ideals of a legal state.<sup>45</sup> This principle ensures that the law must be clear, predictable, and consistent so that people can regulate their actions by the applicable law. Legal certainty protects the rights of citizens and creates order in society. If legal certainty has been achieved, then legal justice can also be realized.<sup>46</sup>

The principle of legal certainty from the perspective of Gustav Radbruch (1878-1949) is explained in four main issues that are closely related to the notion of legal certainty itself. First, law is a positive thing, meaning that positive law is legislation. Second, the law is based on facts, meaning that the law is made based on reality. Third, the facts contained or listed in the law must be formulated clearly to avoid errors of meaning or interpretation and can be easily enforced. Fourth, positive law should not be easily changed.<sup>47</sup>

The notion of law as a positive thing refers to the concept of positive law, which is a law that is officially made and determined by state institutions. This positive law consists of laws and regulations established through the legislative process or executive decisions that have binding legal force for the

<sup>42</sup> Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan, 2023.

<sup>43</sup> Siti Halilah and Fakhurrahman Arif, "Asas Kepastian Hukum Menurut Para Ahli," *Jurnal Hukum Tata Negara* 4, no. Desember (2021): 56–65, <http://www.ejournal.an-nadwah.ac.id/index.php/Siyasah/article/view/334/275>.

<sup>44</sup> Mappatunru Andi Munafri D., "The Pure Theory of Law & Pengaruhnya Terhadap Pembentukan Hukum Indonesia," *Indonesia Journal of Criminal Law* 2, no. 2 (2020): 150, 10.31960/ijocl.v2i2.541.

<sup>45</sup> Maysarah, "Tinjauan Terhadap Asas Keadilan Atas Kebijakan Mantan Narapidana Korupsi Dalam Pencilonan Legislatif," *Journal of Comprehensive Science* 2, no. 11 (2023): 1890–1897.

<sup>46</sup> Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Crepido* 1, no. 1 (2019): 13–22, <https://doi.org/10.14710/crepido.1.1.13-22>.

<sup>47</sup> Gustav Radbruch, *Legal Philosophy*, ed. So Woong Kim, Seoul. (Sam Young Sa, 2022).

community.<sup>48</sup> In terms of the concept of positive law, SEMA No. 2 of 2022 is a regulation made officially by one of the state institutions, namely the Supreme Court. Positive characteristics in the sense of official, written, and enforceable are fulfilled in this regulation. However, in terms of its legal force, this rule is only binding on the internal court, not binding on the community at large. The bindingness of the rules regarding the prohibition of interfaith marriage applies indirectly to the community, which is a point of note in the concept of positive law.<sup>49</sup>

The meaning of law based on facts is that the formation of law and its application must be based on empirical reality and the real conditions of society. This means that the law must reflect the social and cultural situation that occurs in the field to be relevant and effective.<sup>50</sup> The facts and social reality of interfaith marriage is the second aspect that must be considered in analyzing the rules of SEMA No. 2 Year 2023. The religious requirement in a valid marriage under Indonesian law illustrates how traditional values and state policies can affect an individual's freedom to choose a life partner. All recognized religions in Indonesia prohibit interfaith marriage, except Buddhism and some Protestant Christianity. Given this empirical reality, the content of SEMA No. 2 Year 2023 issued by the Supreme Court of the Republic of Indonesia on July 17, 2023, is in line with the existing social conditions in society.<sup>51</sup>

The meaning of the statement that the facts contained or listed in the law must be formulated clearly is about the principle of clarity in legislation. Every legal provision must be written in unambiguous language, to minimize misunderstandings or different interpretations by people who read it.<sup>52</sup> The sentence written in SEMA No. 2 of 2023 clearly and explicitly regulates that the court does not grant the application for marriage registration between people of different religions and beliefs. No ambiguity causes multi-interpretation in the content of the regulation.<sup>53</sup>

The aspect that positive law should not be easily changed means that the laws and regulations that have been established should have stability and continuity.<sup>54</sup> In the case of SEMA No. 2 Year 2023, it shows inconsistency with the principle of stable positive law. The form of the SEMA rule which is a circular letter, 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 are changed easily through circular letters, this can create legal uncertainty and increase the risk of uncertainty in law enforcement, which is incompatible with the principle of positive legal stability.<sup>55</sup>

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<sup>48</sup> Slamet Suhartono, "Hukum Positif Problematik Penerapan Dan Solusi Teoritiknya," *DIH: Jurnal Ilmu Hukum* 15, no. 2 (2020): 201–211.

<sup>49</sup> Mahkamah Agung, *Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan*.

<sup>50</sup> Nurfaqih Irfani, "Asas Lex Superior, Lex Specialis, Dan Lex Posterior: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum," *Jurnal Legislasi Indonesia* 16, no. 3 (2020): 305–325.

<sup>51</sup> Agustin Sukses Dakhi, "Perkawinan Beda Agama (Suatu Tinjauan Sosiologi)," *Jurnal Education and Development Institut Tapanuli Selatan* 7, no. 3 (2019): 297–300.

<sup>52</sup> Jeane Neltje and Indrawieny Panjiyoga, "Nilai-Nilai Yang Tercakup Di Dalam Asas Kepastian Hukum," *Innovative: Journal of Social Science Research* 3, no. 5 (2023): 2034–2039.

<sup>53</sup> Mahkamah Agung, *Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan*.

<sup>54</sup> Julyano and Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum."

<sup>55</sup> Mahkamah Agung, *Surat Edaran Mahkamah Agung Nomor 2 Tahun 2023 Tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat Yang Berbeda Agama Dan Kepercayaan*.

Furthermore, based on John Rawls' opinion, the principle of justice consists of the basic structure of society as its main subject with justice in social institutions being the highest virtue and truth in the system of thought. This means that if it is not in accordance and not in harmony with justice, then the law must be changed or rejected because the law or institution is the governing part to achieve justice. Laws that deviate from justice will lead to arbitrariness and structured oppression. The principles of justice according to John Rawls are the fulfillment of equal rights to basic freedoms (equal liberties). Economic and social differences must be regulated so that positive conditions will occur, namely the creation of maximum reasonable benefits for everyone including the weak, thus creating what is called justice for everyone. John Rawls also developed the idea of the principles of justice by fully utilizing his invented concepts known as the original position and the veil of ignorance.<sup>56</sup>

There are three conceptions of justice according to John Rawls, namely: First, maximization of liberty. Freedom is only subject to restrictions that are intended to protect freedom itself. The conception of freedom recognizes the existence of basic rights, such as the right to free speech and organization, the right to elect and be elected to public office, the right to freedom of thought, the right to own private property, and freedom from arbitrary arrest/detention. These rights should not be sacrificed for the sake of society or the state. Second, equality for all. Freedom in social life and the distribution of social goods is subject only to the exception that inequality is permissible if it results in the greatest benefit to those least well-off in society. Third, equality of opportunity and the elimination of inequalities in opportunity based on wealth and birth.<sup>57</sup>

John Rawls' theory of justice recognizes humans as moral persons, who are rational, free, and equal. John Rawls' idea of the principles of justice is known as the original position. The original position principle emphasizes the importance of key principles of justice as a fundamental part of social cooperation. These principles are expected to support fair distribution of income and wealth, freedom and opportunity, and opportunities for protection. Legal protection is an action to protect or provide assistance to legal subjects, which in this case are consumers using legal instruments.

Rawls' conception of freedom demands the maximization of individual freedom, and basic rights should not be sacrificed for the sake of society or the state. SEMA No. 2/2023, which prohibits interfaith marriages, can be considered a restriction on the freedom of individuals to determine their life partners regardless of religious differences. In a justice analysis, it is necessary to consider whether this restriction can be justified from the perspective of justice. Prohibiting interfaith marriages is by Rawls' principles of justice, which prioritize the maximization of individual freedom.

Rawls' concept of equality emphasizes that inequality is permissible if it produces the greatest benefit for those who are least well off. In analyzing justice, it is important to assess whether this ban is by the principle of equality, especially whether restricting interfaith marriages can be considered as an action that produces the greatest benefit for those least prosperous in society. The concept of equality of opportunity proposes that differences in opportunity should be eliminated based on wealth and birth. In this regard, SEMA No. 2/2023 banning interfaith marriages needs to be assessed whether it contradicts the principle of eliminating inequality of opportunity. The fairness analysis needs to consider whether this prohibition ensures equality of opportunity for all individuals, regardless of their

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<sup>56</sup> Maysarah, "Tinjauan Terhadap Asas Keadilan Atas Kebijakan Mantan Narapidana Korupsi Dalam Pencalonan Legislatif."

<sup>57</sup> Ibid.

religious differences. In the overall analysis, it is important to assess the extent to which SEMA No. 2/2023 complies with the principles of justice proposed by John Rawls. Consideration of freedom maximization, equality for all, and equality of opportunity can provide a basis for evaluating the legal policy in the context of social justice.

## CONCLUSION

SEMA No. 2 Year 2023 is juridically recognized and has binding legal force based on Article 8 paragraph (1) of Law 12/2011 and Article 79 of the Supreme Court Law. However, the attachment of this regulation is not directly to the community, but through the internal court. Sociologically, SEMA No. 2 Year 2023 is in line with the facts and social realities that occur in society. The validation of a marriage, as stated in Article 2 paragraph (1) of the Marriage Law is returned to the provisions of religion and belief and most religions in Indonesia prohibit interfaith marriages. Philosophically, the establishment of SEMA No. 2 Year 2023 aims to create legal unity and certainty. This goal is one of the ideals and basic values of the rule of law.

The implementation of SEMA No. 2 Year 2023 is considered not optimal and optimal because it does not fulfill all aspects of legal justice, which is related to the principle of legal certainty in Gustav Radbruch's perspective. SEMA No. 2 Year 2023, which prohibits interfaith marriage, needs to be evaluated from the perspective of John Rawls' conception of justice. The principle of maximizing individual freedom is not by the basic rights and freedoms emphasized by Rawls. The concept of equality for all demands that the prohibition should provide maximum benefit to those who are least prosperous in society, while the concept of equality of opportunity states that this regulation contradicts the principle of eliminating inequality of opportunity. An evaluation from Rawls' justice perspective can provide insight into the extent to which SEMA No. 2/2023 achieves a balance between protecting religious values and individual rights recognized by the principles of social justice.

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