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Urgency Supreme Court Circular Letter Number 2 of 2023 in the Judicial Process of Interfaith Marriage Registration

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Abstract

The Supreme Court of the Republic of Indonesia has issued Circular Letter Number 2 of 2023, stipulating that courts are not permitted to approve requests for the registration of interfaith marriages. However, it is crucial to highlight the principle that Indonesian judges must exercise their duties independently, devoid of external interference. Judges are expected to uphold qualities of independence, impartiality, fairness, and responsibility, refraining from influencing the provision of material to litigants to prevent moral distortion. This article aims to

elucidate the role of the aforementioned circular letter concerning the judge's independence within the judicial process in Indonesia. The research methodology employed involves normative legal methods, coupled with a structured analysis of legal norms and principles. The findings of the research underscore two key points. Firstly, the urgency of regulating the determination of marriages involving different religions and beliefs in the judicial process is rooted in the objective of aligning court resolutions with the philosophical underpinnings of the Indonesian nation. Secondly, it is emphasized that the Circular Letter in question does not hold binding authority for judges in the adjudication of cases, particularly those involving interfaith marriages. The autonomy of judicial power, as enshrined in the 1945 Constitution of the Republic of Indonesia and further detailed in Law Number 48 of 2009 concerning Judicial Power, affords judges the freedom to independently decide on cases brought before them. This regulatory framework underscores the imperative of preserving the unfettered discretion of judges in their adjudicative functions.

Keywords
Marriage, Interfaith, Circular Letter, Authority

Introduction

The Latin maxim "*Ubi societas ibi ius*" posits that every human society is governed by law. However, it is crucial to recognize that the concept of law may vary across different societies, and its level of reverence is not uniformly observed in every State.[1] Indonesia follows the concept of a Rule of Law State, emphasizing in its Constitution that the State operates under legal governance (*rechtsstaat*) rather than power (*machstaat*). This entails conducting activities based on legal principles rather than sheer authority. Consequently, law enforcement must be

[1] Małgorzata Gersdorf dan Mateusz Pilich, "Judges and Representatives of the People: A Polish Perspective," *European Constitutional Law Review* 16, no. 3 (2020): 345–78.

transparent to avoid uncertainties and controversies in its execution.[2] In countries that adhere to the Continental legal system, the sequence pattern of regulations in Indonesia is hierarchical.[3] Following the hierarchical structure inherent in the national legal system,[4] all statutory enactments are systematically organized in descending order of precedence. At the zenith of this hierarchy stands the Constitution, serving as the *grundnorm* and paramount legal foundation. Subsequent legislative regulations, positioned at lower tiers, are mandated to maintain conformity with those situated at higher echelons, adhering to the fundamental tenet that superordinate legal provisions supersede their subordinate counterparts. This theory regarding the hierarchical arrangement of legislation was pioneered by the eminent legal philosopher, Hans Kelsen.

> " *Legal norms are tiered and layered in a hierarchy (structure), in the sense that a lower norm applies, is sourced and based on a higher norm, a higher norm applies, is sourced and based on an even higher norm, and so on. arrive at a norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (Grundnorm).*"[5]

Limitation of power serves as a fundamental foundation in establishing a State based on law, to prevent potential abuse of power and arbitrary behaviour on the part of those in power. Every form of power, even legitimate authority and power, when unchecked, has a tendency to regress into authoritarian arbitrariness. As expressed by Jimly Asshiddiqie, referring to the famous statement from Lord Acton:

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[2] Suparto dan Zulkifli, "Position of Circular Letter of the Supreme Court As a Follow-Up From the Decision of the Constitutional Court Number 37/Puu-Ix/2011," *Awang Long Law Review* 5, no. 1 (2022): 225–34.

[3] Erlan Wijatmoko, Armaidy Armawi, dan Teuku Faisal Fathani, "Legal effectiveness in promoting development policies: A case study of North Aceh Indonesia," *Heliyon* 9, no. 11 (2023): e21280.

[4] Ija Suntana et al., "Ideological distrust: re-understanding the debate on state ideology, normalization of state-religion relationship, and legal system in Indonesia," *Heliyon* 9, no. 3 (2023): e14676.

[5] Hans Kelsen, *General Theory of Law and State* (New York, 1945).

Power tends to corrupt, and absolute power corrupts absolutely, and also additionally, the exploitation of delegated authority for personal benefit. [6]

Power always needs to be maintained and the field of public relations is expanding in tandem with the progress of democratization. This is acknowledged as an essential component of the democratic process and to ensure the misuse of legitimate authority necessary for governance, the power of the State is divided by the doctrine of 'separation of powers' into branches that have a mechanism of checks and balances, with an equal position, mutually controlling, balancing and supervising one another.[7]

In systems characterized by the separation of powers, the legislature is expected to engage actively in deliberations for making the law, the executive to implement the law and the judiciary to interpret the law.[8] Amendment 4 of the Constitution of the Republic of Indonesia, 1945 firmly applies the principle of separation of powers and develops a more effective mechanism of checks and balances. This change resulted in a State institutional structure that has an equal position. The theory of *trias politica* in the State administration system divides three branches of power, namely the executive, legislative and judiciary, which are governed by the principle of checks and balances which provide opportunities for the three branches of power to supervise each other, therefore, to attain equality, sustainable development, peace, and democracy.[9] The creation of mutual checks and balances among the three different branches of the Government aims to prevent potential arbitrary actions or abuse of power by any one branch.

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6 Gil Avnimelech Yaron Zelekha, "Cultural and personal channels between religion, religiosity, and corruption," *Heliyon* 9 (2023): 1.

7 Rachmat Kriyantono et al., "Not just about representative: When democracy needs females and their competency to run Indonesian government public relations to management level," *Heliyon* 8, no. 1 (2022).

8 Fradhana Putra Disantara, "The Legitimacy of Circular Letter in Handling COVID-19 Pandemic," *Encyclopedia of Quaternary Science: Second Edition*, 2020, 531–36.

9 Mary Awusi, David Addae, dan Olivia Adwoa Tiwaa Frimpong Kwapong, "Tackling the legislative underrepresentation of women in Ghana: Empowerment strategies for broader gender parity," *Social Sciences and Humanities Open* 8, no. 1 (2023): 100717.

For legal practice to genuinely ensure fairness, the existence of a judiciary is imperative.[10] Judicial power bears the responsibility and mandate to administer the legal justice system, upholding the principles of justice. As per Article 24, paragraph (2) of the Constitution of the Republic of Indonesia, 1945, this judicial authority is vested in two distinct State institutions, each possessing autonomy: the Supreme Court (MA) and its subordinate judicial bodies, as well as the Constitutional Court (MK). These two entities enjoy equal status within the legal framework. Judicial power adopts a bifurcated model, comprising the courts for general legal matters, falling under the jurisdiction of the Supreme Court (MA), and the court for special Constitutional matters, overseen by the Constitutional Court (MK).

Furthermore, the Supreme Court (MA) is vested with an additional authority, which is the supervision of judicial processes occurring throughout the judiciary. The legal basis for this function is articulated in Article 32, paragraph (1) of Law Number 3 of 2009 concerning the Supreme Court. In line with this responsibility, the law grants the Supreme Court the prerogative to issue regulations, as explicitly stipulated in Article 79 of Law Number 14 of 1985, in conjunction with Law Number 5 of 2004, subsequently refined by Law Number 3 of 2009 concerning the Supreme Court. It is stipulated that

> "*The Supreme Court is bestowed with the authority to establish rules necessary for the seamless administration of justice in cases where aspects have not been adequately addressed in this law.*"

Founded on this rationale, the Supreme Court has the right to formulate Supreme Court Regulations (PERMA) to address gaps or insufficiencies in the law. In practical terms, these legal gaps and insufficiencies, when identified are addressed by directing the subordinate judiciary to undertake remediation measures, through the issuing of Supreme Court Circular Letters (SEMA) by the Supreme

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[10] Salahudin Pakaya, "Political Law Regulation of Judicial Institutions in Exercising the Powers of an Independent Judgment: Before and After Amendments to the 1945 Constitution," *International Journal Papier Public Review* 1, no. 2 (2020): 119–28.

Court. A circular letter of the Supreme Court is a form of discretionary policy employed as a means of legitimation for the remedy of a deficiency in law.[11]

Marriage is identified as a pivotal element contributing to the formulation of the concept of family and contributing to the stability of society.[12] It is in this regard that family law acquires seminal importance for the State. Apropos this importance of family law, the Supreme Court issued Circular Letter Number 2 in July 2023, offering guidance to prevent courts from approving interfaith and interreligious marriage registrations. In the realm of exercising their judicial responsibilities, judges must maintain their independence, ensuring that their decisions remain free from external influences or interference. Preserving the autonomy and impartiality of judges when adjudicating cases in court is of paramount significance for maintaining the legitimacy of the legal judicial system and the authority of the State. Judges bear the duty of upholding legal principles and justice, not solely focusing on economic or pragmatic considerations. Prioritizing these principles serves to avert moral lapses, uphold ethical integrity, and prevent deviations from the legal logic grounded in the principles of formal legality.[13]

The latitude and discretionary authority afforded to judges for rendering decisions in individual cases stems from the basic concept of independence of judicial power, as outlined in the Constitution of the Republic of Indonesia, 1945. This principle is subsequently elucidated in Law Number 48 of 2009 concerning Judicial Power. Judges possess sole discretion to make legal determinations and assessments in each case they preside over. Based on the exposition above, this research poses two crucial inquiries: Firstly, what is the significance of Supreme Court Circular Letter Number 2 of 2023 for the judicial process in Indonesia? Secondly, what is the role and position of Supreme Court Circular Letter Number 2 of 2023 in the context of the judicial process in Indonesia?

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[11] Disantara, "The Legitimacy of Circular Letter in Handling COVID-19 Pandemic."

[12] Fatma Kurttekin, "Religious education of children in interfaith marriages," *Journal of Beliefs and Values* 41, no. 3 (2020): 272–83.

[13] Guilherme Lambais dan Henrik Sigstad, "Judicial subversion: The effects of political power on court outcomes," *Journal of Public Economics* 217 (2023): 104788.

Similar research has been conducted by five previous researchers. The initial study was undertaken by Abdul Rahman Razak, Qadir Gassing, and Kurniati, "Effectiveness of SEMA No. 2 of 2023 concerning Interfaith Marriage in Indonesia," This research emphasizes the significance of friendship and evaluates the effectiveness of the emergence of Perma.[14] The second study was conducted by Muhammad Afdhol Kusuma Ningrat and colleagues, "Review of MA Circular Letter Number 2 of 2023: The Impact of Interfaith Marriages in the *Maqashid Syariah* Perspective," examines SEMA No. 2 from the perspective of Islamic law.[15] A research conducted by Alfaro Julio Antonio Sepang and colleagues, "Interfaith Marriages Seen from Positive Law and Canon Law in Indonesia," explores the perspectives of positive law and Canon law in Indonesia regarding interfaith marriages.[16]

The fourth research, written by Maulana Ridho, "The Position of the Supreme Court Circular Letter (SEMA) in an Academic Perspective: Legal Strength, Determination, and Consistency, Influence on Legal Decisions," delves into the position of the Supreme Court circular.[17] The fifth research, conducted by Aurora Vania Crisdi Gonadi and Gunawan Djajaputra, "Analysis of the Pros and Cons of Community Perspectives on the Implementation of Sema No. 2 of 2023," explores the objective of the publication of SEMA, aiming to provide a comprehensive picture of the controversy over the publication of Sema No. 2 of 2023 in Indonesia. Despite these five previous studies, researchers did not find any similarities. This paper significantly differs from the aforementioned

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[14] Abd Rahman Razak dan Qadir Gassing, "Multidisipline Effectiveness of SEMA No . 2 of 2023 Regarding Interfaith Marriage in Indonesia 2024", *Madani: Jurnal Ilmiah Multidisipline* 2, no. 1 (2024): 417–23.

[15] Muhammad Afdhol Kusuma Ningrat, et al. "Exploring Supreme Court Circular No. 2 of 2023's Impact on Interfaith Marriages: A Maqashid Syariah Perspective." *ALFIQH Islamic Law Review Journal* 3, no.1 (2024): 26-40.

[16] Alfaro Julio dan Antonio Sepang, "Perkawinan Beda Agama Ditinjau Dari Hukum Positif dan Hukum Kanonik di Indonesia," no. 2 (2024). *See also* Dani Setiawan, "Inter-religious marriage: A controversial issue in Indonesia." *Contemporary Issues on Interfaith Law and Society* 1, no.1 (2022): 23-38.

[17] Maulana Rihdo et al., "Kedudukan Surat Edaran Mahkamah Agung (Sema) dalam Perspektif Akademisi: Kekuatan Hukum , Ketetapan Dan Konsistensi , Pengaruh Terhadap Putusan Hukum." *USRAH: Jurnal Hukum Keluarga Islam* 4, no. 2 (2023): 230–40.

research.[18] Despite these five previous studies, researchers did not find any similarities. This paper significantly differs from the aforementioned research.

The method employed is normative legal research, to determine the legal status and validity of Supreme Court Circular Number 2 of 2023 in the interfaith marriage registration adjudication process. The identification of essential legal sources includes Law Number 12 of 2011 regarding the creation of statutory legislation, Supreme Court Circulars (SE), relevant court verdicts, and court records or minutes. Primary and secondary legal sources are content analysed to comprehend their details, including guidelines, procedures, and provisions contained within them.

The analysis was grounded in the hierarchical theory of legislation proposed by Hans Kelsen and Hans Nawiasky. The examination of the aforementioned legal sources aimed to assess the impact of the Supreme Court Circular (SE) on court decisions. The analysis of various legal sources is also conducted to assess the extent to which the Supreme Court Circular influences the judicial process and court decisions by identifying changes or differences that occurred before and after the issuance of the Circular.

Urgency of Supreme Court Circular Letter Number 2 of 2023

The jurisdiction and functions of the Supreme Court were initially delineated in Law Number 1 of 1950, which pertains to the Organizational Structure, Authorities, and Judicial Procedures in Indonesia. This legislation established the Supreme Court's role as the ultimate overseer of the federal judicial system. In the discharge of its responsibilities, the Supreme Court is endowed with the authority to issue what is known as a Supreme Court Circular Letter (SEMA), as

[18] Aurora Vania Crisdi Gonadi dan Gunawan Djajaputra, "Analisis Perspektif Pro Kontra Masyarakat Terhadap Penerapan Sema No. 2 Tahun 2023," *UNES Law Review* 6, no. 1 (2023): 2974–88. *See also* Atha Difa Saputri, and Ricky Julianto. "Comparative Justice Accountability of Samen Leven Actors in Indonesia and Malaysia." *Contemporary Issues on Interfaith Law and Society* 2, no. 2 (2023): 131-160.

stipulated in Article 12, paragraph (3) of Law Number 1 of 1950. This particular article mandates that:

> "*The Supreme Court exercises vigilant oversight over the conduct and performance of the various courts and the judges presiding therein. To facilitate the smooth operation of this institution, the Supreme Court possesses the prerogative to issue warnings, reprimands, and guidance deemed essential and beneficial for these courts and judges, whether through written correspondences or circular directives.*"[19]

The legal foundation governing the implementation of SEMA can be traced to the Supreme Court Law, as it serves as the primary legal basis for the issuance of SEMA. Specifically, the pertinent law is Law Number 3 of 2009, which pertains to the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court. This is elucidated in Article 32, which prescribes the following mandates:

(1) Supreme Court judges hold significant authority as prominent officials of the government, possessing the jurisdiction to scrutinize not only the rulings of subordinate courts but also the legislation enacted by State legislatures.[20] The Supreme Court conducts the highest level of oversight over the administration of justice within all subordinate judicial bodies, as they exercise judicial authority.
(2) In addition to the oversight mentioned in paragraph 1, the Supreme Court exercises the utmost supervision over the execution of administrative and financial responsibilities.
(3) The Supreme Court possesses the authority to request information concerning matters related to judicial technicalities from all subordinate judicial bodies.

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[19] Mahkamah Agung, "Surat Edaran Mahkamah Agung No 2 Tahun 2023" (2023).

[20] Elliott Ash dan W. Bentley MacLeod, "Reducing partisanship in judicial elections can improve judge quality: Evidence from U.S. state supreme courts," *Journal of Public Economics* 201 (2021): 104478.

(4) The Supreme Court is vested with the authority to issue instructions, admonitions, or warnings to the courts within all subordinate judicial bodies.
(5) The supervision and authority as delineated in paragraphs 1, 2, 3, and 4 must not encroach upon the judge's autonomy in scrutinizing and adjudicating cases. This article reaffirms the central role of the Supreme Court in overseeing all legal processes across various court levels. Within this framework, the Supreme Court is empowered, as described in paragraph (4), to provide guidance, cautions, or directives to the courts operating within its jurisdictional purview.

The Supreme Court's supervisory role is further affirmed by Article 39 of Law Number 4 of 2004, which pertains to Judicial Power. This article delineates the following provisions

(1) The Supreme Court exercises the highest level of oversight over the administration of justice within all judicial bodies operating under its jurisdiction, as they execute judicial authority.
(2) In addition to the oversight outlined in paragraph (1), the Supreme Court carries out the utmost supervision over the execution of administrative and financial responsibilities.
(3) The internal supervision of judges' conduct is undertaken by the Supreme Court.
(4) The supervision and authority of the Supreme Court as described in paragraphs (1), (2), and (3) must not impinge upon the freedom of judges in scrutinizing and rendering decisions in cases.

This article underscores the Supreme Court's pivotal role in monitoring the entire spectrum of legal processes across all the judicial bodies under its purview and jurisdiction, while simultaneously safeguarding the judges' autonomy in the examination and adjudication of cases. The Supreme Court Circular Letter serves as a means for the Supreme Court to provide guidance and cautionary advice in response to specific prevailing conditions within society. Its primary purpose is not to issue legal declarations or determinations concerning matters of legal protection brought before the Supreme Court. Instead, it serves as an elucidation of policies to be observed in the administration of justice across all jurisdictional domains. The Supreme Court possesses the proactive legal capacity to offer directives, admonitions, or cautions to

courts lest they deviate from established procedural norms, without necessitating any external initiatives.

Within the Indonesian Constitutional system, the circular letters of the Supreme Court are regarded as a form of policy regulation stemming from the evolution of the legal concept of a modern Welfare State. The Welfare State concept underscores government involvement in various facets of public life. However, governmental authorities sometimes encounter challenges when they need to respond swiftly and flexibly to emerging societal issues. While mandated to act in accordance with the principle of legality, which requires support from legal regulations authorizing their actions, government authorities often find themselves constrained when confronted with demands for immediate issue resolution in the absence of pertinent legal frameworks. This context has given rise to the principle of discretion, known as " *freies ermessen* "

The etymology of the term "*freies ermessen*" originates from "*frei*", which signifies freedom, independence, detachment, and autonomy, and "*ermessen*", which denotes contemplation, evaluation, measurement, and deliberation. In the Official Indonesian Dictionary (KBBI), "discretion" is defined as the entitlement to independently make decisions in any given situation. However, this freedom is not absolute, as the authority to exercise discretion must be substantiated by compelling justifications to ensure that such actions are not carried out arbitrarily, but rather within specified legal conditions.

Ridwan HR posited that there are three justifiable situations or conditional circumstances in which the government is authorized to exercise discretion:[21] Firstly, no statutory regulations exist that delineate a specific course of action for addressing a problem, especially when the situation necessitates an immediate resolution. Secondly, the governing statutory provisions afford government officials absolute discretion. Thirdly, when there is legislative delegation, involving the conferral of self-regulatory authority upon the government, although this authority typically resides with higher-ranking officials.

The Marriage Law No. 1/1974 lacks specific regulations addressing inter-faith marriages. The law recognizes marriage as a valid contract only when conducted in accordance with the presumed

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[21] HR Ridwan, *Hukum Administrasi Negara* (Jakarta: Raja Grafindo Persada, 2008).

singular religion of the involved couple.[22] Therefore there existed a pressing need for the issuance of Supreme Court Circular Letter No. 2 of 2023, which provides guidelines to judges regarding the non-approval of inter-faith marriages. This urgency arises from the fact that inter-faith marriages, in certain instances, can lead to legal disputes that require resolution, particularly concerning matters related to child custody. When inter-faith couples have children, intricate issues surrounding child custody and the religious affiliation of the child may arise, potentially resulting in legal and social conflicts that demand resolution.

Regarding cultural and social aspects within society, it is worth considering how society perceives inter-faith marriages and the potential impact on social stability. In numerous Islamic communities in Indonesia, inter-faith marriage often carries the perception of contravening religious doctrines. Islam, as a religion, mandates that Muslim individuals marry fellow Muslims to uphold their religious identity and ensure the upbringing of their offspring in adherence to Islamic teachings. Although there are diverse viewpoints among Indonesian Muslims, a significant portion regard inter-faith marriage as incongruent with Islamic principles. Similarly, the minority religious communities of Christian, Catholic, Confucian, Hindu and Buddhist faiths of Indonesia also prefer intra-faith marriages rather than inter-faith marriages, since the religious identity of the persons getting married has specific and differential social, legal and religious implications for society. Furthermore, traditional beliefs and recognised customary law (*Hukum Adat*) in various regions across Indonesia yield differing legal perspectives on inter-faith unions. Certain indigenous communities view such marriages as a potential threat to the preservation of their cultural heritage, although some embrace them with the aspiration of fostering stronger inter-group relations.

The issuance of Supreme Court Circular (SEMA) Number 2 of 2023 regarding guidelines for judges handling cases of inter-faith and inter-religious marriage registrations has elicited negative reactions from the National Commission on Violence Against Women (*Komnas*

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[22] Mohamad Abdun Nasir, "Religion, Law, and Identity: Contending Authorities on Interfaith Marriage in Lombok, Indonesia," *Islam and Christian-Muslim Relations* 31, no. 2 (2020): 131–50.

Perempuan), has expressed its concern over this Sema. They explicitly urge the Supreme Court to promptly revoke the circular, deeming it a discriminatory measure. This incident has garnered attention due to Indonesia's rich diversity in ethnicity, culture, customs, and religious beliefs, reflecting the spirit of "*Bhinneka Tunggal Ika*" embodied in the Pancasila and emblazoned in the National Emblem of Garuda.[23]

The role of Supreme Court Circular Number 2 of 2023 in the Indonesian judicial process concerning inter-faith marriages

Supreme Court Circular Letter Number 2 of 2023 holds a pivotal position within the judicial proceedings in Indonesia. Issued by the Supreme Court, this circular serves as a comprehensive reference and directive for judges, prosecutors, attorneys, and other relevant stakeholders engaged in their roles within the judicial domain. The significance of Supreme Court Circular Letter Number 2 of 2023 in influencing the judicial process in Indonesia is multifaceted. Firstly, the SEMA acts as a guide to legal interpretation. Notably, this circular can function as a beacon for legal practitioners, administrative officers, and judicial officers and aid them in the interpretation of the law, offering guiding principles whereby the officers of the State and the pertinent parties can make judicious and equitable legal determinations, avoiding legal quandaries and complications. This serves as a crucial means to uphold consistency, reliability, and legal assurance within the legal and justice system. Secondly, the circular letter also provides pragmatic directives about various aspects of the judicial process, encompassing protocols for the submission of applications, the management of cases, and the conduct of trials. The aim is to enhance the efficiency and transparency of the judicial procedures. Thirdly, the Supreme Court Circular Letter Number 2 of 2023 has the potential to promote, enhance and catalyse augmenting of the quality of the judiciary. Furnishing directions and recommendations to judges and allied

[23] Dewoto Kusumo dan Rifki Afandi, "Religious Marriage in Indonesia in the Perspective of Islamic Law and Positive Law in Indonesia : Legal Comlexities and the Issuance of Supreme Court Circular Letter No. 2 of 2023," *Indonesian Journal of Innovation Studies* 13 (2020): 1–12.

stakeholders can inspire heightened professionalism, integrity, and legal acumen among those participating in the realm of justice.

Judicial Review in the judiciary involves the Supreme Court re-evaluating decisions made by lower court judges in applying the law. The highest court can examine the substantive application of the law, but its Judicial Review authority is limited to laws and regulations under current legislation.[24] It is imperative, however, to take into account that a Supreme Court Circular does not carry the binding force of a direct legal mandate. Rather, it assumes the secondary role of an auxiliary tool and a resource for legal interpretation, designed to facilitate the judicial process. The ultimate decision-making authority remains vested in judges, who base their judgments on the relevant and applicable legal provisions.

A system comprises a structured entity comprised of diverse elements or constituent parts that exert mutual influence on one another.[25] The legal system, by definition, constitutes a body of regulations designed to govern, facilitate, and advance the realization of State objectives. Within the legal system, three principal facets emerge: the legal framework, legal content, and legal ethos. The concept of legislative hierarchy, as stipulated in Law Number 12 of 2011, aligns with the theory forth by Hans Nawiasky, an extension of his mentor's theory concerning the hierarchy of legal norms. This theory elucidates that legal norms within a nation possess stratified levels and layers, stemming from subordinate norms originating from superior ones, culminating in the ultimate foundational norms. Furthermore, Hans Nawiasky contends that legal norms can also be categorized, in addition to their hierarchical arrangement. Nawiasky's norm groupings encompass *Staatsfundamentalnorm* (fundamental State norms), *Staatsgrundgezets* (basic State laws), *Formell Gesetz* (formal laws), *Verordnung* (implementing rules), and *Autonome Satzung* (autonomous regulations).

Under this theory, the governing principle stipulates that regulations promulgated by governmental bodies must align with

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[24] Suparto Suparto, and Zulkifli Zulkifli. "Position of Circular Letter of the Supreme Court as a Follow up from the Decision of the Constitutional Court Number 37/PUU-IX/2011." *Jurnal Awang Long Law Review* 5, no. 1 (2022): 225-234.

[25] Wahidudin Adams, *Penguatan Integrasi Perda dalam Kesatuan Sistem Hukum Nasional* (Jakarta: Badan Pembinaan Hukum Nasional, 2010).

superior tiers of regulations. For instance, regulations at the regional level should not conflict with national laws, and local-level regulations should not contravene regional regulations. However, it's imperative to underscore that both the Constitution of Indonesia, 1945 and Regional Government Law Number 23 of 2014, lack an exhaustive delineation of the categories of regional regulations. Article 18, paragraph (6) of the Constitution of Indonesia, 1945 bestows the regional authorities with the competence to enact regional regulations and other regulations to fulfil their autonomous and delegated tasks (*medebewind*).

Legislation is a legal instrument that has general legal force and authority. In practice, there are often policy rules and regulations (*beleidregel*) that have different characteristics from statutory regulations. These policy regulations are inseparable from the concept of " *freies ermessen* " whereby officials or State administrative institutions are authorized to formulate policies and can describe these policies in the form of "*juridische regels*", such as guidelines, announcements, circulars, and the like.[26] The recognition of the principles of " *freies ermessen* " constitutes a mechanism affording administrative bodies or officials a degree of discretion in their actions or decisions, without being unduly constrained by statutory laws and regulations.[27] The execution of "*freies ermessen* " predominantly emerges as a consequence of embracing the concept of the welfare State.[28] The elements of *freies ermessen* in the conception of a rule of law State, such as (1) *Freies ermessen* is intended to carry out public service tasks, (2) *Freies ermessen* is an attitude of active action by State administration officials, (3) *Freies ermessen* is an attitude of action taken on own initiative, (4) *Freies ermessen* as an attitude of action aimed at solving important problems that arise suddenly, this attitude of action can be accountable to God Almighty as well as to the law.[29]

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[26] Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia* (Gadjah mada University Pers, 2005).

[27] Marcus Lukman, *Eksistensi Peraturan Kebijaksanaan dalam Bidang Perencanaan dan Pelaksanaan Rencana Pembangunan di daerah serta Dampaknya terhadap Pembangunan Materi Hukum Tertulis Nasional* (Universitas Padjajaran, 1996).

[28] Ridwan HR, *Hukum Administrasi Negara* (Yogyakarta: UII Press, 2002).

[29] Sjachran Basah, *Eksistensi dan tolak Ukur Badan Peradilan Administrasi Negara di Indonesia* (Bandung, 1985).

In the execution of governmental functions, various policies are routinely promulgated by the government, encompassing regulations, directives, guidelines, notifications, and circulars. These circular letters are situated within a regulatory framework (*beleidsregel*) and must adhere to the principles enshrined in applicable laws and regulations. Furthermore, the government is obligated to observe the principles of proper policy formulation (*beginselen van behoorlijke regelgeving*). Some of the key attributes of policy regulations encompass the following: (1) their foundation in formal statutory provisions, (2) their direct or indirect origination, (3) issuance by the government based on their authority in the execution of governmental duties, and (4) provision of general instructions.[30]

As per Bagir Manan's perspective, policy regulations fall outside the realm of statutory regulations and consequently do not fall under the purview of limitations and assessments applied to legislative enactments. Regarding the philosophical applicability, Bagir Manan also asserts that every society possesses a "*Rechtsidee*", signifying the societal expectations from the law. These expectations typically involve the assurance of justice, expediency, and the establishment of order or welfare. [31]

Evaluations of policy regulations are primarily focused on their effectiveness and appropriateness (*doelmatigheid*). Bagir Manan identified several distinctive attributes of policy regulations, which encompass the following: (1) Policy regulations do not constitute formal statutory regulations, (2) The principles governing the restriction and examination of statutory regulations do not extend to policy regulations, (3) Policy regulations are not subject to formal legality assessments (legislative touchstone), (4) The formulation of policy regulations is grounded in the principle of discretionary judgment (*freies ermessen*), (5) The assessment of policy regulations places greater emphasis on efficiency criteria (AAUPB touchstone), (6) In practice, policy regulations manifest in the form of directives, decrees, circulars, announcements, and similar instruments.[32]

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[30] J.H. van Kreveld, *Beleidsregel in het Recht*, n.d.

[31] Ibnu Subarkah, et al. "The Obscurity of Judicial Independence towards Regulations with Legal Certainty in Indonesia." *International Journal of Multicultural and Multireligious Understanding* 8, no. 11 (2021): 472-485.

[32] Bagir Manan, *Peraturan Kebijaksanaan* (Jakarta, 1994).

Indroharto believes that in the process of formulating policy regulations, it is necessary to consider elements, namely (1) policy regulations must not conflict with the basic regulations outlined, (2) policy regulations must not conflict with common sense, (3) policy regulations must be made and prepared carefully, (4) the content of the policy regulation must provide clarity regarding the obligations and rights of the citizens who are its object, (5) the basis for considerations and objectives must be clear, (6) they must meet the requirements of legal certainty.[33]

Freedom of action in government is realized through the issuance of policy regulations in various formats, according to the previous explanation. The process of forming policy regulations is routine in governance. Policy regulations can still be recognized as laws and regulations as long as they comply with the conditions, namely (1) are written regulations in a certain form and format, which are determined or made by authorized officials, both at the central and regional government levels, based on the authority of laws and regulations invitations, both attribution and delegation. (2) Contains generally binding legal norms, meaning that these legal norms apply to many people, not just certain individuals, and are binding on anyone within the scope of the regulation. (3) The formation of regional regulations has been previously regulated in the applicable legislation.[34]

Within the framework of the normative system, the execution of law enforcement must be grounded in the inherent moral principles of the law, which constitute a fundamental component of the legal system. In essence, legal morality serves as the cornerstone or bedrock for the enforcement of the law.[35] The absence of morality in law enforcement results in a breakdown in the execution of law itself. Lon L Fuller meticulously delineates eight shortcomings in the establishment of the rule of law. [36]

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[33] Indroharto, *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara* (Jakarta: Pustaka Sinar Harapan, 2003).

[34] Hotma P. Sibuea, *Asas-asas Negara Hukum, Peraturan Kebijakan dan Asas-asas Umum Pemerintahan yang Baik* (Jakarta: Erlangga, 2010).

[35] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Prenada Media, 2009).

[36] Ahmad Redi, *Hukum Pembentukan Peraturan Perundang-Undangan* (Sinar Grafika, 2021).

> "*The morality of law, eight ways to fail to make law is (1) Failure to make rules public to those required to observe them, (2) Failure to establish rules at all, leading to absolute uncertainty, (3) Improper use of retroactive lawmaking, (4) Failure to make comprehensible rules, (5) making rules which contradict each other; (6) making rules which impose requirements with which compliance is impossible, (7) Changing rules so frequently that the required conduct becomes wholly unclear; (8) Discontinuity between the State content of rules and their administration in practice*".

Lon L. Fuller contends that a misalignment between the legal provisions (statutory content) and their administrative execution can lead to the ineffectiveness of a legal regulation[37]. Legal theory, serving as the foundation for the rationale behind governing a State, must possess the capacity to delineate constraints and position legal norms in alignment with their intended purpose. The objectives of law encompass three primary facets: justice, certainty, and expediency. Justice encompasses equilibrium, equality, and proportionality. Legal certainty pertains to the establishment of order and tranquillity, while expediency in law ensures that all these values contribute harmoniously to the promotion of peaceful coexistence.

The authority to issue a Supreme Court Circular Letter (SEMA) is vested in the Chief Justice and the Deputy Chief Justice of the Supreme Court. Nevertheless, during the process of formulating SEMA, the Chief Justice of the Supreme Court retains the prerogative to seek legal insights from the puisne Justices who possess specialized knowledge in specific contexts. For instance, when the SEMA under consideration pertains to issues like safeguarding whistleblowers and enhancing cooperation in the legal process (justice collaborator), the Chief Justice seeks legal opinions from the puisne Judge who presides over the Criminal Chambers or has with expertise in relevant criminal domains. Subsequently, after obtaining these legal perspectives, the Chief Justice of the Supreme Court makes the determination regarding the progression of regulation/SEMA establishment. Consequently, the

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[37] Fikri Hadi, and Farina Gandryani. "Kegagalan Peraturan Penanganan Covid-19 di Indonesia." *Jurnal Konstitusi* 19, no. 1 (2022): 23-46.

ultimate decision rests with the Chief Justice, contingent upon the consultative input provided by the pertinent puisne Justices.[38]

Divergences in beliefs can manifest at various stages within the context of marriage. Religious disparities prior to marriage that persist throughout the marital union may raise queries about the marriage's validity. Conversely, if religious distinctions emerge after marriage and during conjugal life, this can engender debates concerning the possibility of annulment. The Marriage Law unequivocally rejects the prospect of unions between individuals with differing religious beliefs, unless both adhere to their respective religious tenets in a manner that does not impede inter-faith marriages. However, this provision leaves room for multiple interpretations.

Several viewpoints exist regarding the interpretation of this provision. First, there is the perspective that interfaith marriages contravene Law No. 1/1974, Article 2, paragraph 1, in conjunction with Article 8(f). This article underscores the validity of a marriage if it aligns with the religious laws and beliefs of each party. In the elucidation of the law, it is explicated that Article 2, paragraph 1 implies that marriages outside the bounds of individual religious laws and beliefs are not recognized. Second, there is the viewpoint that contends interfaith marriages are legally permissible, as they fall within the category of mixed marriages. This pertains to Article 57 of Law No. 1/1974, which governs mixed marriages and underscores unions between individuals subject to distinct laws in Indonesia, encompassing inter-faith marriages. Third, there is the stance that asserts Law No. 1/1974 does not specifically regulate inter-faith marriages at all. Therefore, following Article 66 of Law No. 1/1974, the matter of inter-faith marriages can be referred to as mixed marriage regulations, as they have not been explicitly addressed in the marriage law.

Within the Compilation of Islamic Law (KHI), interfaith marriages are normatively categorized into three distinct groups[39]. Firstly, religious disparities between the intending bride and groom, are regarded as non-compliance with the prerequisites for marriage.

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[38] Irwan Adi C, *Perlindungan Hukum Dalam SEMA Nomor 4 Tahun 2011 Tentang Perlakuan Terhadap Pelapor Tindak Pidana (Whistle Blower) dan Saksi Pelaku Yang Bekerjasama (Justice Collaborator) di Dalam Perkara Tindak Pidana Tertentu* (Malang, 2013).

[39] M Karsayuda, *Perkawinan Beda Agama* (Yogyakarta: Total Media, 2006).

Religious distinctions that arise, and are known prior to the marital agreement, are governed by Chapter VI, which addresses marriage prohibitions (Articles 40 and 44), as well as Chapter X, which delves into the prevention of marriage (Article 61). In this chapter, it is expounded that a Muslim man is prohibited from marrying a non-Muslim woman (Article 40(c)), and similarly, a woman who follows Islam is prohibited from marrying a non-Muslim man (Article 44). Despite its seemingly independent placement from the regulations pertaining to the fundamental elements and conditions of marriage, Article 18 elucidates that Chapter VI is inherently connected to the second section of Chapter IV, which pertains to the prospective bride and groom.

Secondly, disparities in religious beliefs can serve as grounds for the prevention of legal marital relationships[40]. These preventive measures do not impact the validity of the marriage as they are undertaken prior to the formation of the marital contract (Article 61). To initiate the preventive measures, the authorized party must submit an application to the Religious Court in the jurisdiction where the marriage is intended to take place, while also notifying the local Marriage Registrar (PPN) of the place where they intend to register their marriage (Article 65). Those authorized to submit preventive measures include family members within the hereditary lineage, relatives, marriage guardians, or guardians of the prospective spouses (Article 62). Furthermore, a husband or wife who is still married to a potential bride or groom also holds the right to submit a marriage prevention measure (Article 63). In fact, officials responsible for overseeing marriages are obliged to prevent marital unions if the fundamental elements and requirements of marriage are not met (Article 64).

Thirdly, differences in religion can serve as grounds for the annulment of a marriage. Article 75 is a component of the regulations governing marriage annulment, where one of the causes for annulment is stated as "*apostasy of one of the spouses*". A decision to nullify a marriage based on the fact that one of the spouses has apostatized cannot be reversed or rescinded.

The administrative judiciary assumes a constructive role in the formulation of legal norms, extending beyond the mere application of

[40] Karsayuda.

existing laws.[41] Judges possess the authority to either approve or reject applications and lawsuits presented to them. The judge's decision to decline or grant the application or lawsuit must be founded on considerations that influence the judge's judgment. These considerations encompass the judge's thoughts or perspectives in formulating the decision while taking into account factors that could either exacerbate or mitigate the alleged perpetrator's culpability.

The significance of justice within the judicial process underscores that if the judge's deliberations lack precision, fairness, and accuracy, the judge's ruling can be overturned by the High Court or Supreme Court. The judge's deliberation forms the legal foundation that guides the judge in determining whether to grant permission to the applicant and appoint personnel from the Population and Civil Registration Service office to facilitate the marriage and document it in the relevant official registry.[42]

Judges consider twenty factors as part of their judicial authority, in accordance with the provisions outlined in Law Number 1 of 1974. This legislation serves as the basis for judges to determine the validity of a marriage while upholding the State's principles of safeguarding the Constitutional right to freedom of religion and worship, as articulated in Article 29(2) of the Constitution of Indonesia, 1945. Furthermore, this law enshrines individuals' rights to establish a family and have offspring through lawful marriage, aligning with the stipulations of Article 28B of the Constitution of Indonesia, 1945 and Article 35 of Law Number 23 of 2006.[43]

The judge also takes into consideration Presidential Decree Number 6 of 2000 in conjunction with the Decree of the Minister of Religion of the Republic of Indonesia Number MA/12/2006, which formally recognizes religions such as Islam, Confucianism, Christianity,

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41 Ash dan MacLeod, "Reducing partisanship in judicial elections can improve judge quality: Evidence from U.S. state supreme courts."

42 Erwin Ubwarin Amdi Pune, Elsa Rina Maya, "Kebebasan Hakim Dalam Penjatuhan Pidana Korupsi Dikaitkan Dengan Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018," *Tatohi Jurnal Ilmu Hukum* 1 (2021): 694.

43 Fadhila Restyana Larasati dan Mochammad Bakri, "Implementasi Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 pada Putusan Hakim dalam Pemberian Perlindungan Hukum bagi Pembeli Beritikad Baik," *Jurnal Konstitusi* 15, no. 4 (2019), https://doi.org/https://doi.org/10.31078/jk15410.

Catholicism, Hinduism, and Buddhism. Additionally, the judge considers the complex dynamics of inter-tribal, inter-racial, and inter-group relationships within Indonesian society, characterized by its rich array of customs, religions, and cultures. The phenomenon of interfaith marriage serves as one facet reflecting the realities confronting these diverse communities.

While the arena of religious legality has undergone notable growth in recent years, characterized by an expanding scope and a concentration on the changing spatial dynamics of various religious beliefs in contemporary society, comparatively limited emphasis has been placed on historical aspects.[44] It is imperative that principles derived from statutory regulations exhibit consistency in their formal structure, with the primary aim of aiding users in discerning whether a regulation falls into the category of statutory regulations, policy regulations, or decision products (judicial rulings or determinations). Nevertheless, it is crucial to acknowledge that this approach may not always provide clear-cut distinctions, as in practice, the demarcation between statutory regulations and policy regulations (*beleidsregel*) can often appear blurred when solely based on formal attributes. Therefore, a substance-based approach represents a more objective alternative for differentiating whether a legal norm aligns with the category of regulations or directives.

Within the realm of law, legal professionals are tasked with clerical duties necessitating precision and efficiency.[45] Determining the placement of a Supreme Court Circular Letter within our statutory hierarchy presents a theoretical challenge due to the absence of explicit guidelines. To assess its position within the hierarchy of laws and regulations, it is essential to first comprehend its role within the framework of the Supreme Court itself. In terms of both formal structure and content, a Supreme Court Circular Letter is technically situated beneath a Supreme Court Regulation (PERMA) because a PERMA possesses a more comprehensive formal structure as a specific type of regulation. Through meticulous comparison, a Supreme Court

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[44] Ash dan MacLeod, "Reducing partisanship in judicial elections can improve judge quality: Evidence from U.S. state supreme courts."

[45] Ria Ambrocio Sagum et al., "ScienceDirect ScienceDirect Philippine Court Case Summarizer using Latent Semantic Philippine Court Case Summarizer Analysis using Latent Semantic Analysis," *Procedia Computer Science* 227 (2023): 474–81.

Circular (SEMA) can be considered a reference to the Supreme Court Regulation, and the existence of a Perma can render a Supreme Court Circular null and void, as exemplified by the revocation of SEMA No. 6 of 1967 by PERMA No. 1 of 1969.

Nevertheless, when determining the hierarchy of laws and regulations pertaining to Supreme Court Circular Letters (SEMA), several unique factors must be taken into account. First, only SEMA that adheres to the provisions outlined in Article 79 of the Supreme Court Law can be integrated into the hierarchy of laws and regulations. Second, due to its nationwide applicability across Indonesia, SEMA holds a superior status compared to Regional Regulations (PERDA), while SEMA does not serve as guidance or direction for PERDA. Third, in terms of content, some SEMA have been utilized by the Supreme Court as instruments for executing regulations and decisions of the Minister of Law and Human Rights, especially when the Supreme Court previously operated under the two-roof system. However, it would be inaccurate to conclude that SEMA is subordinate to Ministerial Regulations, as certain SEMA are structured as instrumental means for implementing Government Regulations. Therefore, to ascertain the positioning of SEMA within the hierarchy of statutory regulations, a thorough analysis of each SEMA's substance is imperative.

The present hierarchy of legal instruments is structured as follows, in descending order of authority: (i) The Constitution of Indonesia, 1945 as amended; (ii) Decrees of the People's Consultative Assembly (*Ketetapan MPR*); (iii) Statutory Laws (*Undang-Undang*) (or Government Ordinances and Regulations in lieu of Statutory Laws); (iv) Government Regulations (*Peraturan Pemerintah*); (v) Presidential Regulations (*Peraturan Presiden*); (vi) Provincial Regulations; and (vii) District/Municipal Regulations.[46]

The judiciary's independence is crucial for a legal state, emphasizing its pivotal role. This requires non-interference from legislative and executive authorities, urging the allocation of distinct Constitutional authority to the judiciary, separate from other branches

[46] Petra Mahy, "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments," *Asian Journal of Comparative Law* 17, no. 1 (2022): 51–75.

of government.[47] The manifestation of judicial authority is bifurcated into two categories: firstly, the autonomy of judges as State civil servants, and secondly, the status of civil servants falling under the jurisdiction of the Indonesian Civil Service Agency.[48] The theoretical foundation for the independence of judges in their roles within the State judicial system is grounded in the principles and concepts of the division and separation of powers. This theory of judicial power has its origins in historical developments and is rooted in the teachings of prominent figures like John Locke and Montesquieu. In his work titled "Two Treatises of Government," John Locke emphasizes the significance of dispersing governmental authority across various branches to prevent the concentration of power in a single organ. This division of power serves as a safeguard against the potential for abuses of power that may arise if authority is concentrated in a singular entity. John Locke's framework divides power into three primary branches: (1) Legislative Power, (2) Executive Power, and (3) Federative Power.

The crude endeavours constitute direct interventions with specific judges in particular cases and matters.[49] In the system of power-sharing among these three branches, judicial power falls under the purview of executive power. This is because the execution of the law, a responsibility of the executive branch, encompasses the role of the courts as an essential component in carrying out legal mandates. According to the perspective presented by La Ode Husen, this approach was a response to the practice of absolutism by monarchs during the 14th and 15th centuries in Western Europe, where governmental authority was highly centralized under the monarchy. The concept and notion of transferring the authority to legislate from monarchs to independent State entities began to take shape in the 17th century. Initially, in the late Middle Ages, the judiciary was separated from the monarchy, and

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[47] Majid. N. Idan dan Mohammed. S. Saber, "Role of the Federal Supreme Court In Maintaining the Independence of the Judiciary'Mustal'," *Journal of College of Law for Legal and Political Sciences* 8, no. issue 30 part 1 (2022): 264–97.

[48] Endriyani Lestari, "Kualifikasi Negarawan sebagai Independensi Hakim Mahkamah Konstitusi di Indonesia," *Jurnal Rechten: Riset Hukum dan Hak Asasi Manusia* 5 (2023).

[49] Lestari.

this progression continued with the delegation of legislative authority to the judiciary.[50]

The division of powers within an independent State depicts a condition that, when examined chronologically, unfolds its own narrative, much like the distribution of power in Indonesia. The discussion of the *Trias Politica* is based on the concepts proposed by John Locke and Montesquieu.[51] John Locke's theory underscores that the amalgamation of judicial and executive powers initially occurred due to the dominance of absolute authority exercised by the monarchy. Historically, it was not uncommon for judicial authority to be subordinated to the executive power vested in the monarch, but subsequently, it was relinquished and entrusted to the judiciary as the executor of judicial functions. In a theoretical context, the separation of judicial power from the monarch's authority took place before the division of powers in the realm of legislating laws and regulations (legislature). This division aligns with the perspective put forth by Baron de Montesquieu in his work "*L'esprit des lois*", wherein he proposed the concept of segregating state power into three distinct branches: legislative, executive, and judicial powers, forming the bedrock of a democratic legal state system.

The Reform Movement is thought to have instigated significant alterations in Indonesia's Constitutional system.[52] The legislative branch is responsible for crafting laws and regulations, the executive branch oversees the execution of laws, and the judicial branch encompasses the judicial process and the oversight of law enforcement. The separation of these three domains of power is known as the "*Trias Politica*", a term introduced by Immanuel Kant, a disciple of Montesquieu. "*Tri*" denotes three, "ace" signifies the center or axis, and "*Politica*" pertains to power.

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[50] La Ode Husen, *Negara Hukum, Demokrasi dan Pemisahan Kekuasaan* (Makassar: PT. Umitoha Ukhuwah Grafika, 2009).

[51] Ruhenda Ruhenda et al., "Tinjauan Trias Politika Terhadap Terbentuknya Sistem Politik dan Pemerintahan di Indonesia," *Journal of Governance and Social Policy* 1, no. 2 (2020): 58–69.

[52] Riris Ardhanariswari et al., "Upholding Judicial Independence through the Practice of Judicial Activism in Constitutional Review: A Study by Constitutional Judges," *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 6, no. 2 (2023): 183–207.

Nonetheless, upon closer examination, the theories of power division propounded by John Locke (Division of Powers) and the concept of power separation introduced by Montesquieu, later refined by Immanuel Kant with the term "*Trias Politica*", have laid the foundation for the understanding of judicial and executive powers. Within the framework of *Trias Politica*, judicial authority is wielded by judges from various State judicial entities, serving as implementing bodies in the realm of law. Theoretically, it is underscored that this authority must remain independent and immune from external interference or influence. The validation and justification of this power separation are rooted in the *Trias Politica* theory advanced by Montesquieu and Immanuel Kant.

However, as time has passed, it has become evident that the *Trias Politica* theory cannot always be impeccably executed in the governance context. The implementation of this theory encounters challenges due to situations in which a State organ or institution may possess not just a single function but multiple roles. For instance, in some countries, the executive branch is also engaged in the formulation of laws and regulations. The United States, often cited as a successful example of power separation, actually employs a system of checks and balances between state powers (Check and Balance System). "Check" involves the authority of each organ to supervise the activities of others, while "balance" relates to each organ's ability to manage its authority and prevent excessive power in others.[53] The assertion that the separation of powers corresponds to checks and balances, and that this relationship exerts a substantial influence on corruption, is also disseminated by prominent figures within the anti-corruption domain.[54] The presence of the U.S. President's veto authority over bills proposed by Congress is an illustration of the mitigation of the separation of powers aspect in

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[53] Bakht Munir, Zaheer Iqbal Cheema, dan Jawwad Riaz, "Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan," *Global Political Review* V, no. III (2020): 11–23.

[54] Luciano Da Ros dan Matthew M. Taylor, "Checks and balances: The concept and its implications for corruption," *Revista Direito GV* 17, no. 2 (2021): 1–30.

this context, as it restricts the legislative (Congress) authority to craft laws.[55]

According to Ronald S. Lumbuun, one of the fundamental prerequisites for the establishment of a legal state is the incorporation of the principle of separation of powers or division of powers. This principle encompasses legislative power, responsible for crafting legislation; executive power, charged with governing in adherence to laws drafted by the legislative body; and judicial power, which serves as a judicial institution tasked with addressing law violations and administrative affairs.[56]

The autonomy, sovereignty, and immunity of judicial judges from any external influence or intervention by other branches of government hold significant importance in the discharge of their duties and responsibilities within the judicial realm. This governmental body functions as a State Court committed to upholding law enforcement and the principles of justice, with a primary focus on the belief in One Almighty God. According to Zubaedi, while not all nations rigidly adhere to the *Trias Politica* doctrine, it remains crucial to acknowledge and preserve the impartiality of judges as agents of judicial authority within the sphere of State justice. Therefore, the fundamental tenet regarding judges' independence in fulfilling their roles within the framework of State justice can be linked to the concept of the *Trias Politica* theory.[57]

The initial formulation of the rule of law concept was initially articulated by Plato when he introduced the notion of "*Nomoi*" in his third work, composed during the latter stage of his life. It is noteworthy that in his earlier two works, "*Politeia*" and "*Politicos*" the term "rule of law" does not make an appearance. Within "*Nomoi*" Plato asserts that the well-being of a nation hinges upon effective governance, which finds its embodiment in the form of law. Plato's ideas regarding the rule of law gained further prominence when they were endorsed by his student,

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[55] Dahlan Thaib, *Implementasi Sistem Ketatanegaraan Menurut UUD 1945* (Yogyakarta: Liberty, 1988).

[56] Ronald S Lumbuun, *PERMA RI (Peraturan Makamah Agung Republik Indonesia): Wujud Kerancuan antara Praktik Pembangian dan Pemisahaan Kekuasaan* (Jakarta: PT. Raja Grafindo Persada, 2011).

[57] Zubaedi, *Filsafat Barat: Dari Logika Baru rene Descartes Hingga Revolusi Sains Ala Thomas Khun*, ed. oleh Ilyya Muhsin (Yogyakarta: Ar-Ruzz Media, 2007).

Aristotle, who provided a more detailed exposition of the concept in his treatise titled "*Politica.*" According to Aristotle, a sound State is governed by a Constitution and operates within the framework of the rule of law. As Philipus M. Hadjon contends, the emergence of the "*rechtsstaat*" concept is primarily associated with the continental legal system recognized as "civil law" or "Modern Roman Law," while the concept of the "rule of law" is more closely linked to the legal framework known as "common law."

The rule of law is inherently intertwined with a nation's Constitution, particularly in its role of defining and enforcing constraints on governmental power to safeguard the fundamental freedoms and rights of its citizens. According to Sri Soemantri, nearly all countries across the globe have a Constitution as their legal foundation. The State and its Constitution are inseparable entities, with a Constitutional State fundamentally denoting a State governed by a Constitution, where the Constitution serves as the primary guiding framework for governmental affairs, State administration, and public life. To actualize the concept of the rule of law, it is imperative that all governmental processes adhere to the principles enshrined in the Constitution. The rule of law principle serves the purpose of averting arbitrary actions by the state or government.

Budiono Kusumohamidjojo observed that in the current historical context, it is challenging to envision a nation that does not identify as a rule-of-law state. Virtually every nation aspiring to maintain its international standing in the approach to the 21st century, at a minimum, proclaims itself to be a State governed by law. In the context of the rule of law, the law functions as a regulation that dictates the course of actions in achieving shared objectives arising from political agreements. Moreover, the law serves as a mechanism for resolving various conflicts, including political disputes that arise during the pursuit of political consensus. Consequently, the law is not subject to sectarian or primordial political interests; rather, it serves as a means to attain goals within the framework of the state. According to Bothling, the rule of law represents a governmental framework in which the freedom of action for government officials is delimited by legal constraints. This is actualized through two means: first, by ensuring that judges and the government adhere to legal provisions, and second, by circumscribing the legislator's authority in the creation of laws.

Soemantri Martosoewignjo posits that the concept of the rule of law underscores the government's obligation to adhere to laws and legal regulations in the execution of its duties and responsibilities. This concept also encompasses the safeguarding of citizens' human rights, the separation of powers within the State's governmental structure, and the establishment of a supervisory mechanism through the judiciary.

Hamda Zoelva elucidated that within the rule of law framework, the focal point lies in the governance of power within the justice sector of a nation. In this concept of the rule of law, it is of paramount importance to ensure the independence of judicial power, uphold human rights, and abide by the principles of due process of law. The fundamental tenet of the rule of law is to constrain governmental authority to prevent its misuse in oppressing or neglecting the people's interests. The rule of law concept further underscores equality before the law, the protection of citizens' fundamental rights, and the establishment of a just and equitable legal and judicial system. In essence, the primary objective of the rule of law is to establish a societal and governmental order based on the principles of justice, peace, and public welfare. In a legal state, the law serves as a tool for regulating various aspects of State, government, and societal life. To manage governmental and State responsibilities, a body of legal regulations is enshrined in the Constitution or State Constitutional law. However, to address technical issues, Constitutional law may not always suffice. In other words, there is a necessity for another, more specific body of law, namely administrative law.

Frans Magnes Suseno's perspective asserts that a rule of law founded on democratic principles can be denoted as a democratic rule of law State (democratic *rechtsstaat*). This can be viewed as an advancement of Constitutional democracy. The term "democratic rule of law State" is employed because, in such a State, the tenets of the rule of law and democratic principles are concurrently integrated and put into practice. Ten Berge outlines the principles of the rule of law as follows, encompassing the principle of legality as the first tenet. This legislative principle pertains to the notion that limitations imposed on citizens' freedoms by the government must find their basis in the law, which is a universally applicable regulation. This universally applicable law must furnish safeguards to citizens against arbitrary actions, collusion, and various forms of unlawful conduct that could jeopardize

citizens or society. The exercise of governmental authority must be predicated upon codified laws, referred to as formal laws. The second principle revolves around the safeguarding of human rights. Third, the government is beholden to the law. Fourth, a coercive monopoly by the government becomes a requisite measure to ensure effective law enforcement. The success of law enforcement hinges on the capacity to penalize violations of the law. Hence, the government bears the responsibility of guaranteeing the presence of efficient legal mechanisms in society for enforcing the law. The government is obligated to ensure that individuals who transgress the law are held accountable for their actions through the State's judicial process. This principle underscores that the government carries a central role in executing public law. Fifth, supervision conducted by judges who discharge their duties independently assumes paramount importance. The principle of legal supremacy would not be effectively realized if the implementation of legal regulations were solely entrusted to government institutions. Therefore, within the context of any rule of law State, it is imperative to establish a supervisory mechanism overseen by judicial judges who enjoy autonomy and independence.

Additionally, as articulated by Ten Berge and Van Wijk, the principles of the rule of law (*rechtsstaat*) can be formulated as, firstly in that the government is itself bound by law. The authority of the government is circumscribed by the Constitution or other legislative statutes that explicitly confer such authority. Secondly, protecting the inviolable rights recognised as Human Rights are the duty of the government. There exist fundamental human rights that the government is obliged to uphold and respect. Thirdly, the Separation of Powers to prevent authoritarianism. Government authority should not be concentrated within a single institution; instead, it should be distributed among various distinct bodies or organs. This distribution aims to establish an interconnected oversight system geared towards maintaining equilibrium. Fourthly, the oversight of all governmental and legislative actions by Judicial Institutions on the touchstone of the Constitution. The exercise of governmental authority must be subject to legal evaluation by independent judges. The autonomy of judges

serves to eliminate judicial regional favouritism, thereby augmenting the impartiality of the legal system.[58]

Barda Nawawi Arif aligns the concept of judicial power with a scope restricted solely to the functions within the judicial system. In the 1945 Amendment to the Constitution of Indonesia, 1945 there is a pronounced focus on defining judicial power in a more confined sense. Within the framework of state power, encompassing both its theoretical underpinnings and practical manifestations, judicial power assumes a distinct role. In the Indonesian constitutional framework, judicial power is vested in the Supreme Court, its subordinate judicial bodies, and the Constitutional Court. This judicial authority operates autonomously and is tasked with the responsibility of dispensing justice and upholding the principles of law and justice.[59]

One of the principles underlying the rule of law is the assurance of an independent judiciary with the objective of upholding the law and justice. This point is elucidated in Article 24, paragraph (1) of the Constitution of Indonesia, 1945 which states that the judicial authority is an independent authority to conduct judicial proceedings with the purpose of enforcing the law and ensuring justice.[60]. The Constitutional autonomy of the judiciary establishes the basis for the right to assess and scrutinize all actions, regulations, and legislation with reference to the Constitution (UUD). Authorities dealing with issues related to the determination and registration of inter-faith marriages should possess an understanding of diverse theories, legal principles, and expert opinions. Such comprehension is crucial for making decisions that prioritize human values and justice.[61]

The concept of an independent judicial authority is affirmed in Article 24, paragraphs (1), (2), and (3) of the Constitution of Indonesia, 1945 which encompass the following aspects namely, first, judicial

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[58] Senlin Miao et al., "The Independence of Judges and Corporate Social Responsibility," *Journal of Business Ethics*, no. 0123456789 (2023).

[59] Elisabeth Nurhaini Butarbutar, "Sistem Peradilan Satu Atap dan Perwujudan Negara Hukum RI Menurut UU No. 4 Tahun 2004." *Mimbar Hukum* 22, no. 1 (2010): 188-200.

[60] DPR, "Undang - Undang Dasar 1945" (1945).

[61] Suparto dan Zulkifli, "Position of Circular Letter of the Supreme Court As a Follow-Up From the Decision of the Constitutional Court Number 37/Puu-Ix/2011."

power represents an autonomous authority tasked with dispensing justice and ensuring the enforcement of law and justice. second, judicial power is exercised by the Supreme Court and its subordinate judicial bodies across various judicial realms, including the general justice realm, religious court realm, military justice realm, and state administrative court realm, as well as by the Constitutional Court. Third, other entities whose functions are connected to judicial power are subject to regulation by law.

A more comprehensive examination of judicial independence, which entails its autonomy from external influences, can be substantiated by referring to specific legal provisions. These provisions can be found in Law Number 48 of 2009 on Judicial Power, as well as in Law Number 14 of 1985 on the Supreme Court, which has undergone modifications through subsequent legislation such as Law no. 5 of 2004 amending Law no. 14 of 1985 on the Supreme Court and Law no. 3 of 2009 on the Second Amendment to Law no. 14 of 1985 on the Supreme Court.

Article 1, Point 1 of Law no. 48 of 2009 concerning Judicial Power explicitly affirms that Judicial Power constitutes an autonomous state authority responsible for the execution of the judicial system. Its primary objective is the application of laws and principles of justice grounded in the Pancasila and the Constitution of Indonesia, 1945 with the overarching aim of upholding the rule of law within the Republic of Indonesia. The principle of Judicial Power's autonomy, as outlined in the legislation pertaining to its foundational tenets, encompasses immunity from external interference, as well as safeguarding against external influences, directives, or recommendations from entities beyond the judiciary unless such actions are sanctioned by law.

The official elucidation provided in Section I of Law No. 48 of 2009 underscores the paramount importance of judicial institutions' independence and autonomy. It firmly asserts that the Constitution of Indonesia, 1945 establishes the nation as a rule-of-law state. In line with this foundational principle, a crucial facet of a rule of law state is ensuring the existence of an autonomous judicial system, one that is not subject to the sway of other branches of power, so it can effectively discharge its role in upholding the law and justice. Aligning with this explanation, the principle of judicial independence is further affirmed in Article 3, subsections (1) and (2) of Law No. 48 of 2009, which

stipulate that (1) Judges and Constitutional justices are obligated to uphold judicial independence in the execution of their duties and functions. (2) Any interference in judicial matters by external parties not within the purview of judicial authority is prohibited, except in situations expressly regulated by the Constitution of Indonesia, 1945.

The hierarchical placement of Judicial Power, subject to the jurisdiction of the Supreme Court, finds its legal foundation in Article 2 of Law No. 14 of 1985 (comprising amendments under Law No. 5 of 2004 and Law No. 3 of 2009). This article expressly states:

> "*The Supreme Court is the highest judicial institution in Indonesia, exercising its authority independently and immune to external influences, including governmental interference.*"

In Supreme Court decision-making, it is not merely a mechanistic force dictating decisions, but rather an institutional construct shaped by justices with distinct political attitudes.[62]

The principle of Judicial Power's independence, constitutionally safeguarded by relevant laws and regulations, is concretely manifested in the roles undertaken by judges across various judicial bodies. This principles underscores Indonesia's commitment as a state governed by the rule of law. Through the contributions of judges within the judiciary, the fundamental tenets of the rule of law, legal continuity, and justice can be upheld, notwithstanding the practical challenges and conflicts that often arise due to endeavours to uphold the rule of law coming into conflict with various vested interests.

The delegation of judicial authority is assigned to various judicial institutions established by law, with their primary responsibility being to receive, scrutinize, adjudicate, and resolve every case presented before them. Oemar Seno Adji underscores that judges possess absolute autonomy in rendering decisions, free from interference by external parties. A genuinely independent judge functions as an impartial adjudicator and executor of the law, engaged in the task of adjudicating

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[62] Mark J Richards and Herbert M Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making," *American Political Science Review* 96, no. 2 (2002): 305–320.

cases within the courtroom. The judge's freedom constitutes a crucial prerogative inherent to each judge, where they bear the responsibility of applying legal provisions to specific circumstances, providing an accurate interpretation of the law to elucidate the legal matter in question. The judge retains the liberty to issue their judgment and interpretation of the law.

In line with its primary duties, and the principle of "*Ibi Jus Ubi Remedium*" the court carries the obligation not to decline the examination or adjudication of a case brought forward by an interested party, even in cases where the relevant law may be absent or unclear. This signifies that courts are mandated to actively assess, try, and render decisions concerning cases brought forth by those seeking justice, and the mere fact that the legislature has not made a law to cover that particular issue cannot exclude the judiciary from adjudicating. A judge must examine, tray and decide a case based on legal principles, if statutory law is absent, and such decisions made in accordance with established legal principles are considered legally valid (*Rechtschepping*).

This principle of *rechtschepping* is reflected in Article 10, paragraph (1) of Law No. 48 of 2009, which stipulates: "The court is prohibited from refusing to examine, try, or decide on a case on the pretext that the law does not exist or is unclear, but must examine and try it."[63] The execution of duties and responsibilities undertaken by judges across various echelons of the judiciary is envisioned to culminate in the independent and unfettered enforcement of law and justice, devoid of any external interference from other branches of government or influence from parties outside the realm of law and justice.

Under this principle, judges are mandated to actively explore and stay abreast of societal developments, as well as grasp the evolving legal values and concepts of justice within the community. This requirement is affirmed in Article 5 of Law No. 48 of 2009, which stipulates: (1) Judges and Constitutional justices are obliged to proactively seek, monitor, and comprehend the legal values and concepts of justice prevalent in society; (2) Judges and Constitutional justices are required to exhibit integrity and possess a character that is honourable, truthful, equitable, professional, and experienced within the legal domain; (3) Judges and Constitutional justices are obligated to adhere to the Code

[63] Republic of Indonesia, "Undang Undang Nomor 48 Tahun 2009" (2009).

of Ethics and Code of Conduct for judges. This mandate serves as a consequence of the law and underscores the professionalism of judges in executing their role in the judicial power's function of upholding law and justice through judicial bodies.

The Universal Declaration on the Independence of Justice, 1983 stipulates that a judge must adjudicate cases impartially, based on an objective assessment of the facts and a comprehensive understanding of the law. This process should occur without any direct or indirect imposition of "restrictions, influences, inducements, pressures, threats, or interferences." [64] The independence of judges, as they perform their functions within State judicial institutions, is designed to ensure that judges can operate with autonomy and liberty, and without any forms of interference that might impact their capacity to fulfil their duties in the examination, adjudication, and resolution of cases brought before them.

The perception of the judiciary is significantly shaped by the integrity of its judges. The equity of judicial decisions is also contingent on the calibre and impartiality of the judges beneath their judicial robes. As a result, it is expected that judicial judges will exercise their independence exclusively to realize the enforcement of law and the pursuit of justice, which are the primary objectives within a law-based state system. When judges conscientiously comprehend and fulfil their responsibilities regarding the essence of independence in the conscientious execution of their professional duties, thus avoiding any misinterpretation or misuse, it will enhance the judiciary's reputation and elevate the status of the state's judicial institutions to a position of leadership.

Conclusion

The Supreme Court plays a central role in overseeing Indonesia's judicial system, which includes the issuance of Supreme Court Circular Letters (SEMA) as guidance. This authority is grounded in Legal Codes

[64] Mahy, "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments."

No. 3 of 2009 and No. 4 of 2004.[65] It's worth noting that SEMA does not establish new laws but serves as a reference for the administration of justice. The issuance of Supreme Court Circular No. 2 of 2023, specifically addressing interfaith marriage, holds significance due to its potential to generate legal and societal conflicts, as well as impact social stability, particularly within the cultural and social framework of Indonesian society. Regarding judicial proceedings in Indonesia concerning interfaith marriage, it's important to clarify that Supreme Court Circular Letter Number 2 of 2023 doesn't hold a primary position within the legal hierarchy. Judicial determinations regarding interfaith marriages continue to rely on the judge's independent judgment as the executor of the law. The State has established a robust normative foundation for judges to carry out their responsibilities in adjudicating and rendering decisions in alignment with the principles of law and justice. This basis is enshrined in Article 24, paragraphs (1), (2), and (3) of the 1945 Constitution of the Republic of Indonesia, as well as in Article 1, Point 1, and Article 3, paragraphs (1) and (2) of Law No. 48 of 2009 concerning Judicial Power.[66]

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[66] "Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman" (2009).

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