

## **NO MATTER THE RELIGION IS, THE MARRIAGE SHOULD BE VALID AND OFFICIALLY REGISTERED**

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### **Abstract**

*Religiosity and authenticity principles are the basis of marriage in Indonesia as both are interrelated or indispensable. It is simply because marriage is considered a strong agreement between human beings and their God. Marriage that is validated by merely the religion without legal acknowledgement will cause a huge weakness in term of legal position for the parties involved and arosed later on. The identity of a person determines his or her legal position which determines the law that will apply to him and the basis of rights and obligations that he or she possesses. Religious and state law are a unity that must be obeyed (Q. 4:59) since there is no dichotomy between them. Building a family with authorized and official recognition is a strong capital base of a state because the family is the smallest unit of the state-building.*

**Keywords** : *Legal Marriage, Religious, State Law*

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### **INTRODUCTION**

**M**arital Act Article 1 Number 1 Year 1974 has told that the marriage is a physical as well as inmost relationship between a man and a woman as husband-and-wife in order to create well-established family on the right track paved by God. This provision means that the ties of marriage is extremely sacred and tied by spiritual values.

Moreover, it can be understood that fulfilling religious requirements are necessary and considered valid. However, if it is examined through the objectives of marriage, in which to create a happy family and to have ancestries, the phenomenon of marriage will produce certain civil rights and obligations. Hence, to ensure those civil rights and obligations, every single marriage should be officially recorded.

From Islamic perspective, Act No. 1 Year 1974 on marriage is very much helpful to explain how it has been made especially in a sense of its legal certainty for the rights of husband, wife, and children. As it is explained in Article 2 Act (2) that “every single marriage is recorded in accordance to valid regulations”. In addition, it is completed by the implementation of government regulation No.9 Year 1975 and Ministry of religious affairs’ regulation that are addressed for public goods and interests. Hereinafter, those provisions are also created on the basis of *ummah* and human beings’ interests that are considered substantial for the next generation and women’s degree.<sup>1</sup>

The record, nevertheless, is not created to limit human rights but to protect citizens to build harmonious family instead. In other words, the rights of husband, wife, as well as their children are

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<sup>1</sup>Mohd.IdrisRamulyo, HukumPerkawinan, HukumKewarisan, HukumAcaraPeradilan Agama dan Zakat MenurutHukum Islam, (Jakarta: SinarGrafika 1995) , hlm. 14.

also ensured with the existence of such record as the event of marriage will produce certain legal consequences. Therefore, administration's official record is made to provide valid evidence that could be needed in the future so the protection and service of state could be possibly done appropriately.

According to K. WantjikSaleh, marital record is destined to clarify the marriage, for whether its actors or people around them, in form of written official letter contained in the specific list that could be used anytime especially for a written-authentic evidence. Through this file, in the same time, any action regarding marriage can be justified or prevented on a clear ground.<sup>2</sup>

### ***Religious Base of Marriage***

Common people's understanding on the matter of recorder marriage is still narrowly appreciated by which uncomprehensive cognition of religious teaching is pretty low. In public opinion, the validity of marriage could be assessed through the fulfilment of its requisites and principles only that are explained in Marital Act Article 2 (1) mentioning that the validity of a marriage is based on religion. Yet, this point cannot be understood independently since the next act further explains that a marriage shall be recorded. In sum, religious recognition and state's official recording are two main elements of an authentic marriage.

Validity and official recognition are the main features of marital comprehensiveness that lead to a legal influence. The parties involved in marriage are the object of legal protection and recognition, as the consequence of marital record. Moreover, religion is the basis of marriage's validity because basically the relation between human beings and their religion is built in very natural way. It can be observed from the big part of religion within themselves either to serve their God and to socialize with their surroundings. As a result, their attachment to God and religion leads them to believe the existence of God and to do kindness to their counterparts.

Basically, a marriage is built in a holy tie. It does not unify not only two different beings, but also two different big families and cultures. Even Allah considers it as *mitsaqongholizo* (the highest agreement).

How could you take it back, after you have been intimate with each other, and they had taken from you a solemn pledge? (AnNisa 21)

Permitted for you is sexual intercourse with your wives during the nights of fasting. They are the keepers of your secrets, and you are the keepers of their secrets. **GOD** knew that you used to betray your souls, and He has redeemed you, and has pardoned you. Henceforth, you may have intercourse with them, seeking what **GOD** has permitted for you. You may eat and drink until the white thread of light becomes distinguishable from the dark thread of night at dawn. Then, you shall fast until sunset. Sexual intercourse is prohibited if you decide to retreat to the masjid (during the last ten days of Ramadan). These are **GOD**'s laws; you shall not transgress them. **GOD** thus clarifies His revelations for the people, that they may attain salvation. (Al Baqarah 187)

Both verses are the reflection of the close connection between two different parties. They will feel tranquility and cover each other's back from haram things. Thereupon, a marriage has a honored objectives to build a state as a whole. Those objectives are contained of; The fulfilment of humans' basic needs. Marriage is human natural so in order to achieve it legally, marital covenant is necessarily; The protection of moral and dignity of human beings. Marriage is a channel to subjugate sight, to prevent terrible behavior, and to protect the society from disorder.

*Rasullullahshalallahu 'alaihiwasallam* said;

يَا مَعْشَرَ الشَّبَابِ مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصَرِ وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ

“O young people! If anyone of you is able to get married, do it. Because it is for subjugating sight and looking after farj. And those who are unable to do so, so shaum is better for him or her to protect

<sup>2</sup>K. WantjikSaleh, *Hukum Perkawinan Indonesia* (Jakarta: Penerbit Ghalia Indonesia, 1976), hlm. 17.

him/herself" (Ahmad, Bukhari, Muslim, Tirmidzi, Nasa'i, Ad Darimi, Al Baihaqi, from Abdullah bin Mas'ud RA)

The Islamic household. *Talaq* (divorce) is for those who are no longer able to maintain Allah's rule in marriage.

الطَّلَاقُ مَرَّتَانٍ فَمَسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا يَجِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۗ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ

Divorce may be retracted twice. The divorced woman shall be allowed to live in the same home amicably, or leave it amicably. It is not lawful for the husband to take back anything he had given her. However, the couple may fear that they may transgress **GOD's** law. If there is fear that they may transgress **GOD's** law, they commit no error if the wife willingly gives back whatever she chooses. These are **GOD's** laws; do not transgress them. Those who transgress **GOD's** laws are the unjust. (Al Baqarah 229)

It means that both of involving parties (husband and wife) are unable to uphold *sharia* any longer, and re-marriage is permissible for them if they are able to regain their ability to carry on the responsibility within marriage. Allah says in the Quran;

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدِ حَتَّىٰ تَنْكِحَ زَوْجًا غَيْرَهُ ۗ فَإِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يَتَرَاجَعَا إِنْ ظَنَّا أَنْ يُقِيمَا حُدُودَ اللَّهِ ۗ وَتِلْكَ حُدُودُ اللَّهِ يُبَيِّنُهَا لِقَوْمٍ يَعْلَمُونَ

If he divorces her (for the third time), it is unlawful for him to remarry her, unless she marries another man, then he divorces her. The first husband can then remarry her, so long as they observe **GOD's** laws. These are **GOD's** laws; He explains them for people who know. (Al Baqarah 230)

Hence, the establishment of family is intended to be a means to perform obedience upon God, and in the same time the legal dimension of marriage that is in line with *shariah* is considered an obligation as well.

In Protestant point of view, marriage refers to life-partnership that is in complete trust, exclusive, and continuous between a man and a woman that is purified and blessed by Crist. It is a religious matter and God's provision that should be accordance with God's ways. The requirements in Protestant teaching are; 1. Both involving parties are not bound with other ties of marriage; 2. They are Protestant; 3. They are matured; 3. There are two witnesses; 5. Witnessed by public.

On the other hand, in Catholic's eyes, marriage is a couple of man and woman who intend to have long-life marriage throughout unifying soul and physics, according to Soekoto Leo from the great bishop in Jakarta. Therefore, Catholic accepts sacrament. Husband and wife are willing to live together under God's blessing and regulation.

Moreover, Hinduism defines marriage as *Pawiwahan* which is taken from *wiwaha*. It is believed that marriage is taken very significant by Balinese society since it is included within *GrenhasthaAsrama*. Besides, it is appreciated as something that is greatly sacred as it is explained in *Manawa Dharmasastrabook* in which normal persons should perform once in their life time.

In addition, marriage in Buddhism is sensed as holy bond that should be gone through with love and affection as what was taught by Buddha. It is a bond between two persons with different sex living together forever to perform *Dharma Vinaya* from which happy live will be achieved in the world and hereafter.

Lastly, Kong Hu Chu takes marriage as mental and physical bound between a man and a woman in order to live a happy life, trough building a sound household and creating ancestry, along God's

provisions. Afterwards, it is addressed to develop *Thian's* (God) seeds residing in Him and to guide humans' children. Kong Hu Chu's belief on marriage can be found in the book of *Li Ji* XI: 1 & 3 on *Hun Yi* (the truth of wedding) saying that wedding is meant to unify goodness and love between two persons from different family; upwards to obey God as well as ancestors (*zongmiao*), and downwards to proceed offspring.<sup>3</sup>

### ***Marriage Certificate as an Authentic Evidence***

In HIR Article 165, it is mentioned that "authentic certificate is a certificate that is made by or before an authorized personnel, as a complete evidence for the parties involved, the heirs, and those whose rights from about what is mentioned in it as a merely notification; but the latter is valid as long as the notification is related to the certificate".

Furthermore it is defined by Article 1868 BW/KUH-Per: An authentic certificate is a certificate that is made in line with laws by or before the authorized personnel where the certificate is made.

One of the objectives of recorded marriage is to protect the marriage done by Muslims in order to give legal certainty for that marriage. This objective is explained by the explanation of Article 1 Law. No. 22 Year 1946 "the meaning of this article is to make sure marriage, divorce, and reconciliation are recorded according to Islam to ensure the certainty of law..". It should be done by the state because the role of giving legal certainty is only taken by the state as civil constitutional law according to Article 28D Act 1 Indonesia Constitution 1945 "every single citizen has rights over recognition, assurance, protection, and legal certainty that are just and fair before the law". In fact, giving legal certainty is the main feature of state's legal supremacy (*rechtsstaat*).

Legal certainty from marriage is taking place because marital record is done by public officials (*openbaarambtenar*) in the process of Islamic wedding. It is supervised by PPN, then it will release authentic certificate in form of marital certificate as an evidence of a marriage before the law. In the future, husband and wife will never dare to deny the marriage since marital record is an impeccable evidence (*volledigbewijskracht*).

The release of marital certificate as *formalitascausa* is not one of Islamic requirements for marriage because the validity of marriage is assessed throughout the procedures set by Islamic teachings. Nevertheless, marital certificate as *formalitascausa* becomes the only evidence of a marriage. In other words, inexistence of marital certificate will result the inexistence of legal certainty that only could be replaced by marital confirmation by religious court or district court for non-Muslims.

### ***Unofficial Marriage as a result of Law and Solution***

#### **Before MK Decision No 46/PUU-VIII/2010**

Children who were born from unrecorded marriage are considered as children outside the wedlock (illegal) by the state so the legal consequence of those children are related only to their mothers and mothers' family without any legal civil relations to their fathers (Article 42 and 43 UUP and Article 100 KHI). In Article No. 1 Year 1974 regulates legal position of outside wedlock children; Children born outside wedlock have only civil relations with their mothers and mothers' family, The position of act (1) will be regulated further within government regulations.

Another legal consequence is that those children are unable to register their names to birth certificate process in which parents marital certificate is required. Otherwise, their birth certificate will only mention their mother's name only without father's which could influence their social status and psychology.

After MK released its decision No 46/PUU-VIII/2010 in February 17 2012, the points are as follow; Article 43 Act (1) Law Number 1 Year 1974 on marriage saying that "children born outside the wedlock will only have civil relations with their mothers and mothers' family" is against the Indonesia constitution as long as there is medical and other knowledge evidence that could prove that someone is their father, Article 43 Act (1) Law Number 1 Year 1974 on marriage saying that "children

<sup>3</sup><https://www.scribd.com/doc/218347899/Perkawinan-Beda-Agama-Menurut-Pandangan-Hindu>

born outside the wedlock will only have civil relations with their mothers and mothers' family" has no legal bound as long as there is medical and other knowledge evidence that could prove that someone is their father. So the Article should be red "*children born outside the wedlock will have civil relations with their mothers, mother's family, and men who are proven to be their father after medical and other knowledge evidence or other evidences*".

The decision above is based on the phrase "born outside wedlock" that gives legal meaning. Hence, the problem of presenting wide meaning of the phrase should be answered.

There are two ways to legalize an illegal marriage; first, register the marriage through religious confirmation. Second, remarry accordance to legal procedure. For Muslims, unregistered marriage could be legalized throughout *itsbatnikah* according to Islamic Jurisprudence Compilation (*Kompilasi Hukum Islam, KHI*) Article 7. However, the *itsbat* is possibly done if it is about; a. divorce resolution; b. lose of marital certificate; c. doubtful marital validity; d. marriage before the establishment of Law No. 1 Year 1974 on marriage; e. otherwise the marriages besides those circumstances are hard to be processed under *itsbat* procedure unless there is marital certificate released by an authorized body. Sometimes, unregistered marriage is processed in *itsbat* once it comes in divorce request.

Even though there has been an official certificate, children in such situation will be considered illegitimate because remarriage will never be able to change their previous status.

### ***Simulation method***

Provides an understanding through socialization the importance of a comprehensive registration of marriage for the general public requires patience and a certain way. Socialization through simulation method is an easy and interesting way for all levels of society in order to raise awareness of law.

This method is in the form of a game using a set of equipment that played together so as to solve or conclude a considered problem. The charge is in it will be adjusted to the level of education and language used by local people without being patronizing.

Simulation about religiosity and authenticity principles are the basis of marriage gives a good impression and easy to remember and understood. Simulation method has been created by BPHN (National Law Development Agency) based on the Minister of Justice and Human Rights RINo: M.01-PR.08.10 Year 2006 about method of Legal Education.

## **CONCLUSION**

Registering marriage, besides its substance to materialize legal order, has preventive consequence not to let social disorder from happening in religious and legal perspective. It is also to avoid identity falsification in the future such fake admission of a man that he is single whereas he is married and has children. This preventive mission is put into legal ground of Article 6 PP No. 9 Year 1975 by employee registrar. Valid and official marriage is reflected in a marital certificate which leads to legal certainty either. In addition, parties involved in a marriage should follow legal and religious procedure to accomplish state's recognition and legal protection.

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