

The Principles of Marriage Recording in Indonesia

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Abstract

This research was generally aimed at finding the *ratio legis* of marriage recording; this is a legal research which used normative legal analysis. The results of the research showed that with the implementation of marriage recording, proven with a marriage certificate, the principle of marriage recording is upheld; according to this principle, marriage is conducted according to religious laws and then recorded by the state who then will issue a marriage evidence namely a marriage certificate excerpt--with this evidence both husband and wife have a legal relationship that must be recognized and protected by law. Marriage recording is compulsory as it benefits all parties, such as the children, parents, husband and wife, as well as the assets obtained by the couple; all the parties will obtain legal protection against any consequences of marriage, as well as legal certainties and status.

Keywords: *Principles, Recording, Marriage.*

Introduction

1. Background

The birth of Marriage Law was a real manifestation of national law development as a realization of Indonesian legal policy based on *Pancasila* (The Five Pillars) and the 1945 Constitution, although this law caused a controversy due to two opposing views. The first view was influenced by secular thoughts proposing that a marriage law should not contain any religious elements while the the second view, held by the majority of Muslim population, proposed that the law should include religious regulations. Eventually, the second view was accepted because it was deemed in line with *Pancasila* and the 1945 Constitution; from then on, Indonesia has had a unified Marriage Law.

Marriage Law, Article 2 Section 1 states: Marriage is valid if conducted according to one own religion. The explanatory notes of this article states that: With the formulation of Article 2 Section 1, there is no marriage outside of religions' regulations; included in "one's religion's regulations" all laws applied to the person's religious group.

Muslims are not allowed to marry by violating their religious regulations. Neither are people of Christianity, Hindu, Buddha, Confucianism, allowed to violate their respective religious regulations.¹

Next, Article 2 Section 2 states that marriage should be recorded. Marriage recording is necessary because it aims to provide legal certainty and legal protection for both parties (husband and wife), including legal certainty and protection against consequences of the marriage.

Hence, the focus of this study was to find the *ratio legis* of marriage recording in Indonesia because marriage recording as outlined in Article 2 Section 2 of Marriage Law is one of the administrative validations of a lawful act carried out by two parties namely marriage. If the administrative validation is done, then the lawful act has a evidence namely a marriage certificate.

Marriage recording is stipulated in the following laws: Article 2 Section 2 of Marriage Law, Law No. 22 Year 1946, Law No. 24 Year 2013, and Islamic Laws Compilation. However, some people do not obey the stipulation on the ground that the validity of a marriage is determined by adherence to one's religious regulations rather than an act of recording the marriage as required by Article 2 Section 2, while the registration according to the Article is simply an administrative requirement. This conflict of religious regulations and state laws has created legal uncertainties in applying the Article.

2. Research Problem

Based on the above description, this paper discusses the *ratio legis* of marriage recording.

3. Objectives and Benefits of the Research

The objective of this study is: to find the *ratio legis* of marriage recording

The benefits of this research are:

- a. Theoretically, this research will benefit the development of legal theories, especially marriage law in terms of the *ratio legis* of marriage recording.
- b. Practically, this research is expected to contribute to the discourses on the principles of marriage recording as a legal instrument for the society and the state in its responsibility to solve problems arising from marriage.

¹Wantjik, K. Saleh, *Hukum Perkawinan Indonesia*, Ghalia Indonesia, Jakarta 1976, p. 16.

4. Research Methods

Based on the legal issue studied, this study was aimed at the distinct nature of legal studies, which is its normative nature.¹ Thus, the type of this research is that of normative legal research using a statutory laws approach.

5. Results and Discussion

5.1. Principles of Marriage According to Marriage Law

Principles of marriage are the general basis or norms, the basics that should be embraced and applied by a couple in their marriage life. Many experts provide limitations of marriage principles both according to Islamic laws and Marriage Law which essentially said that those principles should be embraced by a husband and wife as family partners, even should be embraced and practiced by all family members, including the children, in order to achieve the purposes of marriage.

Marriage principles as outlined in religious laws and statutory regulations must be followed so that the marriage can bring benefits for all concerning parties, because following religious laws means the religious laws have been adhered to, but they also must follow the state's regulations so that the marriage is valid and legally protected.

Marriage Law follows several principles, namely:

1. The purpose of marriage is to create a happy and lasting family. Article 1 of Marriage Law states that: Marriage is a psychological and physical bond between a man and a woman as husband and wife with the intention of forming a happy and lasting family based on divinity.
Therefore, a husband and wife should help and complement each other so that each can develop his and her personality to achieve spiritual and material welfare.
2. Marriage is valid if pursuant to Article 2 Section 2 of Marriage Law:
A frequent phenomenon is that a lot of people conduct marriage without registering it with a marriage registry office (i.e. Religious Affairs Office for Muslims and Civil Registry Office for non-Muslims). On this kind of marriage, some scholars and legal experts argue that this marriage is valid because it is pursuant to Article 2 Section 1 of Marriage Law. These people argue that marriage recording is simply an administration action which does not affect marriage validity. Other scholars, however, considered an unregistered marriage invalid and *fasid* (flawed), so that someone feeling disadvantaged by the marriage may propose its annulment to a Religious Court because the stipulation of Article 2 Section 2 of the Marriage Law is an integral part that should be implemented cumulatively rather than separately, alternatively or independently.² Whereas, according to Soerjono Soekanto and Purnadi Purbacaraka, the stipulation is imperative, meaning that the Article compulsory.³
3. Article 3 Sections 1 and 2 of Marriage Law follow the principle of monogamy.
Yet, if the religious law allows it, a husband may have more than one wife. Nevertheless, even if a marriage to more than one wife is allowed by all concerning parties, this can only be performed if all the requirements are met and the permission is given by the court.
4. The principle that the bride and groom should be mature psychologically and biologically. This stipulation is specified in Article 6 Section 1 and Article 7 Section 1 of Marriage Law.
This principle is to ensure that the spouses can achieve the purposes of marriage without thinking about divorce and can produce good and healthy offspring. This principle is also to prevent early marriage and to reduce population growth as well as to protect mother's and children's health. This was explained by Yusuf Hanafi⁴ who stated that under-age marriage may harm the couple and may shatter social harmony because this marriage can bring in domestic violence, deprive of children's rights, cause child trafficking and paedophilia.
5. The principle of impeding divorce. Because the purpose of marriage is to form a happy and lasting family, this Law follows the principle of impeding divorce--to do it requires certain reasons and must be convened and decided before the court of justice, according to Article 39 Section 2.
6. The principle of equal rights and position of wife, which is in line with Article 31 Sections 1, 2 and 3, of Marriage Law.
A wife's rights and position are equal to those of her husband both in family life and social interaction, thus all family issues should be discussed and decided together by both.

¹Philipus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, Gajah Mada, Universitas Press, Yogyakarta, 2005, p. 1.

²Abdul Manan, *Aneka Masalah Hukum Materiel Dalam Praktek Pengadilan Agama*, Pustaka Bangsa Press, Jakarta, 2002, p. 50.

³Soerjono Soekanto dan Purwadi purbacaraka, *Aneka Cara Pembedaan Hukum*, Citra Aditya Bandung, 1989, p. 21.

⁴Yusuf Hanafi, *Kontroversi Perkawinan Anak Di Bawah Umur (Child Marriage) Prespektif Fikih Islam, HAM Internasional, dan UU Nasional*, Mandar Maju, Bandung, 2011, p. 10.

Based on the principles contained in the Marriage Law, it can be concluded that the basic principles contained in this law require marriage be in accordance with religious laws and state laws so that all parties will have the rights and duties as stipulated in the state laws.

Based on those views, it is clear what principles should be followed in marriage; the principles of marriage delineate how to properly engage in personal relationships, how to treat the partner in fulfilling marital rights and obligations, and how to develop personal relationship with community members in order to achieve the meaning of marriage.

5.2. Marriage Recording according to Marriage Law

Marriage recording is an administrative requirement which, if not done, will affect concerning parties and elicit sanctions stipulated in several statutory laws.

Therefore, for marriage registration stipulation to be obeyed, it should be amended because the overlapping (inharmonious and unsynchronized) marriage regulations between state laws and religious laws contained in a single article will cause uncertainty in its application.

Bagir Manan states that a legitimate lawful act implies that the legal relationship and the legal consequences of the action are valid as well¹ A legitimate lawful act with respect to doing a legal marriage between a man and a woman indicates that the couple is legitimate, as are other legal consequences, such as the consequential family relationships that cause a ban on marriage and concerning the assets accumulated as well as children born from the marriage.²

Based on these explanations, marriage recording is an important action, but the state put it as a complementary action needed to complete the legal event that already exists in religious laws, namely marriage; this causes cases where a couple only follows the religious laws' validity, and another case where the couple strengthens the same validity with registering the marriage. According to the state, to be recognized by the state, a marriage should be recorded. Therefore, every citizen should obey the marriage recording stipulation; the stipulation should be written in a separate article from the article about marriage validity according to religious laws; if the stipulation is violated, firm sanctions should be given and the article should be accompanied with implementing rules in case of violation. In Indonesia, the authority to record marriage is given to two institutions, namely: Civil Registry Office (CRO) and Religious Affairs Office (RAO). It can be said the two offices have similarities and differences regarding marriage recording, as can be seen in the following table:

Table 1 Similarities and Differences in Marriage Recording in Civil Registry Office (CRO) and Religious Affairs Office (RAO)

Description	RAO	CRO
Similarities	Marriage recording institution	Marriage recording institution
	Legal basis for marriage recording is Government Regulation No. 9 Year 1975	Legal basis for marriage recording is Government Regulation No. 9 Year 1975
	Recording is done after marriage is performed religiously	Recording is done after marriage is performed religiously
Differences	Recording for Muslims	Recording for followers of Christianity, Hindu, Buddhism, and Confucianism

The government's regulating marriage recording is consistent with the Islamic epistemology of *al-maslahat al-mursalah*. Or *istislah* is known as a result of *ijtihad* (innovation) through *ar ra'yu* (thinking) of human minds,³ and thus marriage recording is necessary as it has legal implications from several aspects; therefore, to be lawfully recognized, the marriage should be recorded according to statutory laws because the recording has a strong basis namely *al-mashlahat al-mursalah*.

Marriage recording is essentially aimed to give legal certainty and protection to both husband and wife, including legal certainty and protection against the consequences of the marriage, namely the reciprocal rights and obligations of each party, the children born, and the children's rights over future inheritance. A marriage cannot be proven other than with a marriage certificate written in civil records lists.

¹Bagir Manan, *Keabsahan dan Syarat-Syarat Perkawinan Antar Orang Islam Menurut Undang-undang no 1 Tahun 1974* [The Validity and Requirements of Marriage between Muslims According to Law No. 1 Year 1974], Paper presented in national seminar themed *Hukum Keluarga dalam Sistem Hukum Nasional antara Realitas dan Kepastian Hukum*, [Family Laws in National Legal System between Reality and Legal Certainty] conducted by Supreme Court of Republic of Indonesia in Redtop Hotel, 1 August 2009, p. 2.

²*Ibid*, p. 2.

³ Muhammad Tahir Azhary, *Negara Hukum, Studi Tentang Prinsip-prinsipnya Dilihat Dari Segi Hukum Islam (Implementasinya Pada Periode Negara Madinah Dan Masa Kini)*, Kencana Prenada Media Group, Jakarta, 2010, p. 9.

5.3. Excerpts of Marriage Certificate as Evidence

Marriage recording as set out in the Marriage Act have caused many problems, thus efforts to promulgate this legislation should be done continuously. Lack of adherence to this rule is because most Muslims understand that the marriage has been duly conducted if the Islamic requirements have been met even without registering the marriage. This is practised by some people by entering into covert marriage (*nikah sirri*) without involving a Marriage Registration Officer (MRO) as an authorized officer entrusted with the task.

According to Ahmad Rofiq¹, "covert marriage, apart from ignoring an MRO, is also used by certain people for personal gains without considering the value of justice which is the primary mission of a marriage, such as illegal polygamy without permission of first wife, or unauthorized by a religious court, this reality is a major obstacle to successful implementation of Marriage Law."

Marriage recording is simply an administrative requirement, meaning that a marriage is valid regardless of the recording because the validity is determined by religious norms of the bride and groom; but if marriage is unrecorded, it has no legal strength and no legal protection.

If formal requirements have been met and there are no religious and state legal obstacles for the bride and groom to marry, once the couple is married, both parties sign a marriage certificate prepared by the officer, and then the marriage is officially recorded and each party receives the excerpts of the certificate (or popularly called "marriage book") as an authentic evidence of the marriage. This evidence indicates that both parties have performed a lawful act, thus if a party feels harmed as a result of this action, he or she may go to court of justice to seek legal protection.

A certificate is a signed written evidence which contains events underlying rights with a provision that the certificate is created with an intention to be used as evidence.² According to The Big Dictionary of Indonesian, a certificate is a letter of evidence containing statements (explanation, admission, decision, and so on) about legal events which is created according to existing regulations, which is witnessed, created, and validated by an official functionary.³

Based on the definition, a certificate is a validation on a lawful act by an official functionary; a certificate is considered authentic if it meets the following requirements: it is produced in the form predetermined by laws, created by official functionary or public official, and this official functionary or public official should have authority to create the certificate. If the certificate is made by an official or public functionary, the authentic certificate has a perfect evidential strength.

Administrative recording by the state is meant that marriage is an important lawful act done by the parties; therefore, marriage recording is based on the principle of proving (*actori in cumbit probatio*). This principle can literally be interpreted that anyone who sues must prove it.⁴ This principle is set out in Article 1865 of Civil Law Code (*Burgerlijk Wetboek*) stating that the burden of prove lies in the the party who: claims that he has a right or wants establish his own right or denies the rights of others referring to an event. It means that in a civil court proceeding, the parties must prove something while the judge only distributes and imposes burden of proof on the parties to support the arguments they put forward. The judge will impose the burden of proof on people who deny or doubt the authenticity of a marriage certificate rather than on the certificate holder itself. Based on this principle, a judge should base his verdicts on evidence proposed by all parties of a marriage.

5.4. Marriage Record as Evidence of Legal Relationship

Law No. 24 Year 2013 on Demographic Administration states that demographic documents are official documents that have legal strength as evidence and released by state institutions. Owing demographic documents in the form of civil registry certificates is important not only for a resident but for our government. These documents are not only legally strong, but can also be used to get basic social services needed in daily life. Whereas for the government, demographic documents are useful in administering the population according to their legal rights and in strengthening demographic databases and public services.

A marriage certificate, which is a demographic document, indicates a legal relationship among the parties according to law, therefore this relationship has evidential strength as contained in certificate, specifically the identities of all parties, namely:

- a. A man named as a husband in the marriage certificate is essentially true that he is the husband.
- b. A woman named as a wife in the marriage certificate is essentially true that she is the wife.
- c. A man named as a wedding guardian in the marriage certificate is essentially true that he is the wedding guardian who married the couple mentioned in the certificate.
- d. It is essentially true that the wedding was conducted on the day, date and time mentioned in the certificate.

¹Ahmad Rofiq, *Hukum Perdata Islam Di Indonesia*, Raja Grafindo, Jakarta, 2013, p. 93.

²Ahmad Ali, *Menguak Tabir Hukum (suatu kajian filosofis dan sosiologis)*, Gunung Agung, Jakarta, 2002, p. 91.

³KBBI, *Edisi 11*, Balai Pustaka, Jakarta, 1995, p. 22.

⁴Eddy Hiariej, *Teori dan Hukum Pembuktian*, Erlangga, Jakarta, 2012, p. 42.

e. The prior status of bachelor/widower of the groom and maiden/widow of the bride before the wedding are essentially true as they are explained in the marriage certificate.

A marriage certificate is binding, especially on the man and woman mentioned in the certificate as husband and wife along with the legal implications in which they cannot escape: the rights and obligations as husband and wife. A marriage certificate is also binding on any third party as evidence when both or one of the couple enters into a lawful act involving a third party, for instance in relation to marital community property that the couple has accumulated as this is closely related with marriage evidence, unless otherwise stipulated in a prenuptial agreement. The binding evidence is "the date of the wedding" because any property earned after that, whether earned by one or both of the spouses, are joint assets as long as they are not inheritance or gifts.

5.5. Marriage Records as Legal Protection and Legal Certainty

Legal protection is a guaranteed protection of the government and / or community to the citizens in carrying out the functions, rights, obligations, and their roles in accordance with the provisions of the statutory laws. Legal protection in marriage is part of legal protection for the people, especially regarding marriage. The term protection according to Indonesian General Dictionary means shelter or an act of protecting, for example, provide protection to those who are weak. According to Fitzgerald, Salmond's Theory of Legal Protection, the law aims to integrate and coordinate various interests in society because in a traffic of interest, protection of certain interests can be done by limiting the various interests of the others.¹ The interests of law is taking care of the rights and interests of human beings, so that law has the ultimate authority to determine which human interests that need to be regulated and protected².

Legal protection should look at the stages of the legal protection, that is, it was born from law and regulations created by the people, which are essentially the people's agreement, to regulate the behaviour of society members and between individuals and the government which is supposed to represent the public interest. According to Satjipto Raharjo, legal protection's aim is to give shelter to the human rights violated by others and the protection is given to the public in order to enjoy all the rights granted by law³.

According to Philipus M. Hadjon legal protection for the people is the government's preventive and repressive measures.⁴ Preventive legal protection aims to prevent dispute, which directs the actions of the government to be cautious in making decisions based on discretion, while repressive protection aims to resolve the dispute, including its handling in the judiciary.

Marriage recording is a principle of proving to for the state to concerning parties protection for the offspring born and assets gained. The consequence of a lawful and appropriate marriage is that the state must provide protection to the parties involved in a marriage performed according to religious laws which is then registered, also known as valid marriage, by giving recognition, protection and certainty of concerning parties' civil rights.

Marriage registration is a proof of citizens' obedience to the state, therefore in author's opinion, the state is obliged to protect citizens involved in a valid marriage against threats from both within the marriage and outside. An example of a threat from within the marriage is one spouse has neglected the other; an example of a threat from outside of the marriage is some outsider wants to jeopardize the family. Therefore, if there is another party who feels disadvantaged as a result of this lawful act, the injured party can sue before the law and the law will provide legal recognition and protection to those who commit a lawful act provable by a marriage certificate.

One purpose of recording a marriage is to protect the institution of marriage done by the people by providing legal certainty (*rechtssicherheit*) to the marriage. This purpose is stated in the explanation of Article 1 of Law No. 22 Year 1946: "The purpose of this article is that marriage, divorce and reconciliation in line with Islam are recorded in order to get legal certainty".

Gustav Radbruch proposed basic things related with legal certainty, namely⁵:

"First, that the law is positive, it means that the positive law is statutory laws. Secondly, that the law is based on facts, meaning based on reality. Third, that facts should be formulated clearly so as to avoid errors in interpretation, and it should be easy to implement. Fourth, positive law should not be easily changed."

Gustav Radbruch's opinion is based on his view that legal certainty is the certainty of the law itself. According to Sudikno Mertokusumo⁶ legal certainty is a guarantee that the law is implemented, that the eligible under the law can obtain their rights and that the verdict could be executed.

¹ Satjipto Raharjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2000, p. 53.

² *Ibid*, p. 69.

³ *Ibid*, p. 54.

⁴ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia*, Bina Ilmu, Surabaya, p. 2.

⁵ Ahmad Zainal Fanani, *Teori Keadilan Dalam Perspektif Filsafat Hukum Dan Islam*, [http://www.Badilag.net/data/ARTIKEL/ diakses tanggal 13 Mei 2014](http://www.Badilag.net/data/ARTIKEL/diakses%20tanggal%2013%20Mei%202014)

⁶ Sudikno Mertokusumo, *Penemuan Hukum*, Universitas Atma Jaya, Yogyakarta, 2010, p. 117.

Marriage Law has regulated the legal certainty of marriage recording set by the state in regulating the citizens; Article 2 Section 1 of the Law has stipulated the validity of marriage and Article 2 Section 2 has established the rule about marriage recording, both of which must be obeyed, but both are not obeyed completely so the author is of opinion that in order achieve legal certainty, the positions of both articles should be changed and firm sanctions should be implemented if both articles are not obeyed.

Because if a marriage performed according to religious laws is followed with recording it, certainly the rules have been implemented and automatically it will ensure the legal certainty of the spouses as well as children born from the marriage. Marriage, divorce and polygamy should be regulated in order to prevent oppression.¹

6. Closing

6.1. Conclusion

A principle is the direction in forming law; the legal principles set forth in Marriage Law must be followed so that the marriage can bring goodness and benefits to the parties; therefore, marriage must be done according to religious laws followed by state laws in the form of recording. Marriage recording in Indonesia is based on Demographic Administration Law and Marriage Law. Agencies authorized to record marriages are the Religious Affairs Office for Muslims and Civil Registry Office for non-Muslims, according to Government Regulation No. 9 Year 1975. Marriage recording is compulsory, but in practice many do not comply with it because incompleteness and ambiguity of the statutory laws.

Marriage records certificate is an authentic evidence of marriage issued by Religious Affairs Office for Muslims and Civil Registry Office for non-Muslims. This certificate is authentic because it is produced by officials authorized to produce it so that this certificate is a perfect evidence that can be used in courts to determine a legal relationship in the form of marriage. By following the rule of marriage recording, all concerning parties will receive legal protection and recognition which in turns will lead to certainty of their rights and positions among society and the state.

6.2. Suggestions

There should be reorganization of marriage recording and administrative sanctions for violating parties and criminal sanction for marriage recording administrators, followed with the implementing regulations. Also, there should be cooperation between the government and academics in disseminating and explaining the importance of marriage recording to the public which, if this rule is obeyed, will lead to recognition, protection, and certainty of rights and obligations in law.

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