

## Dualism of Unregistered Marriage Law in Indonesia

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### Abstract

In Indonesia, there is a dualism of Islamic marriage law, namely a registered marriage (the valid marriage in accordance to the state law under the Religious Affair Office) and an unregistered marriage (not registered under the Religious Affair Office). Both marriages are valid in front of the religion as they fulfill the conditions and requirements in Islamic Marriage Law. They become different to one another because the Law No. 1 year 1974 concerning Marriage on article 2 subsection (2) stipulates that “each marriage shall be entered registered in a register conform to the ruling statutory provision”. For all the marriage were conducted prior to the Law No. 1 year 1974, the registration of the marriage can be done through “*itsbat marriage method*” in front of the Religious Court. Although the “*itsbat marriage*” intended to legitimize all marriages conducted prior the Law No. 1 year 1974, Judges in the Indonesian Religious Court applies it for all marriages conducted after the Law No. 1 year 1974 with various considerations.

**Keywords:** Unregistered Marriage Law, Decision of Judge

### 1. Introduction

The 1945 Indonesian Constitution (UUD 1945) clearly stipulates under article 28B subsection (1) that “every person shall have the right to establish a family and to procreate based upon lawful marriage” and under article 28D subsection (1) that “every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”.

The provision to the right to establish a family and to generate offspring through a lawful marriage is emphasized also in article 10 the Law No. 39 year 1999 concerning Human Right (UU HAM), which stipulates that “everyone has the right to marry legally, to found a family, and to bear children; and marriage shall be entered into only with the free and full consent of the intending spouses”. Article 71 UU HAM stipulates furthermore that “the government shall respect, protect, uphold and promote human rights as laid down in this Act, other legislation, and international law concerning human rights ratified by the Republic of Indonesia”.

Formulation of article 1 the Law No. 1 year 1974 concerning Marriage (UUP) stipulates that “marriage is a physical and spiritual bond between a man and a woman as a husband and a wife, having the purpose of establishing a happy and lasting family founded on the Belief in God Almighty”. Article 2 (1) then stipulates that “states marriage is valid only if it takes place in accordance with the religious laws and beliefs of the parties. Article 2 (2) further states that “each marriage shall be entered in a register conform to the statutory regulations”. The regulation in regards to marriage also formulated in the Indonesian Islamic Law through the enactment of the Presidential Instruction No. 1 year 1991 contained in Compilation of Islamic Law (KHI). The legal basis of KHI is determined based on the Presidential Instruction No. 1 year 1991 jo. the Minister of Religious Decree No. 154 year 1991.

In Indonesia, there is a dualism of legal status for Islamic people marriage, namely a registered marriage and an unregistered marriage. Unregistered marriage currently in Indonesia is the marriage conducted only to fulfill conditions and requirements that is made by the religion, but it is not conducted in front of the Registered Marriage Employees as an official government agent. The unregistered marriage also can be applied to the marriage that is not registered in the Religious Affairs Office for those who are Muslims or in the Civilian Records Office for other religion. Both are valid marriage religiously because they fulfill the conditions and requirements in the Islamic Marriage Law.

Both a registered marriage and an unregistered marriage become different to one another because UUP on article 2 subsection (2) stipulates that “each marriage shall be entered registered in a register conform to the ruling statutory provision”. On the general explanation of UUP point 4 b, it is explained “every marriage *must* be registered in accordance to the applied statutory provision.” The registration of the marriage is equal to the registration of every major event in the life of an individual such as birth and deaths are expressed in form of a certificate. An official act is also contained in the list of the registration.

Article 2 (2) is set generically to Article 2 (1), which stipulates that “states marriage is valid only if it takes place in accordance with the religious laws and beliefs of the parties; and “each marriage shall be entered in a register conform to the statutory regulations”. This article has become the polemic among legal scholars in which some of them argue that both articles are connected one another and cannot be separated from each other, and others argue that the articles are separated or are two different orders. The first opinion explains that marriage is not valid without registration meanwhile the second opinion believes that the validity of the marriage does not

have anything to do with the registration.

The different opinion of some scholars gives a significant influence in legal practice, especially after the Supreme Court (MA) in its decision in the year of 1991 and 1993 have made a verdict with a different interpretation on the same case. Those cases are an unregistered marriage case towards cassation upon the judgment made by the Bandung High Court (Pengadilan Tinggi Bandung) and the cassation upon the judgment made by the Banda Aceh High Court (Pengadilan Tinggi Banda Aceh). On the first case, the Bandung High Court believes that the validity of marriage in front of the law has something to do with the registration of the marriage. Therefore, the Bandung High Court revoked the judgment of the District Court of Bale Bandung (Pengadilan Negeri Bale Bandung) and argued that a marriage was conducted in accordance to Islamic rule but without registered marriage was not valid in front of the law. The Supreme Court then revoked the verdict made by the Bandung High Court and approved the legal consideration from judges of the District Court of Bale Bandung. According to District Court of Bale Bandung, the unregistered polygamy marriage was done by Supran Adiwiguna and Heni Zubaedah was valid according to Islamic Law despite the fact that it did not have any registration process and without the consent of the his first wife, Mulyaningsih. The validity of the marriage made by Supran Adiwiguna fulfilled the elements of Article 279 the Indonesian Criminal Codes (KUHP). It convinced and is able to be sanctioned into 5 in prison.

The second case, the Supreme Court decided to revoke the judgment made by the Banda Aceh High Court that provides consideration that a polygamy marriage relationship without registered marriage was considered to be valid but it was a crime of marriage. It was because there is a barrier to conduct the marriage, which is the first marriage conducted without the permission from the Religious Court. According to the Supreme Court, the marriage executor in UUP was a body that is officially appointed by either the state or the government. If the marriage was not conducted through the body appointed by the state or the government then, it could not be classified as a marriage because it did not fulfill the requirement of a valid marriage. Therefore, in terms of registered marriage, the Supreme Court has provided two opinions. First, an Islamic marriage ceremony without be supervised by a registered marriage official (PPN) is still valid, as long as the marriage fulfills the Islamic regulation. Second, If the marriage is not conducted through the body appointed by the state or the government, it can not be classified as a marriage because it does not fulfill the valid requirement of the marriage.

Due to the regulations as mentioned above, it is administratively implying towards the legality of a valid marriage conducted according to the Islamic marriage law. From the perspective of administrative law, the implication of those Islamic marriage laws can be seen as a problem that can be solved administratively with fulfilling administrative requirements. However, the implication of them as a procedural law of the Religious Court has caused a sustainable problem because the validity of a marriage is not legally recognized. It influences the status of the marriage itself, the status of the inheritors, and in other legal relationship that are connected with the marriage.

Therefore, the focus of this writing is to formulate the status of unregistered marriage (siri) within the Indonesian statutory provision and the urgency for the renewal of marital registration rules in Indonesia.

## **2. The Research's Method**

The type of this legal research was a normative legal research. The normative legal research includes (1) research in regards to the principle of the law; (2) research in regards to the system of the law; (3) research in regards to the vertical and horizontal synchronization process; (4) legal comparison; and (5) legal history.

The legal materials of this research were obtained from primary legal materials, secondary legal materials, and tertiary legal materials (supporting materials). The collection of the legal materials, both primary and secondary, will then be arranged into a comprehensive arrangement. They will be further made descriptively and be analyzed qualitatively with reference to the existing principles.

## **3. Legality of Unregistered Marriage Post the Implementation of UUP**

UUD 1945 stipulates that Indonesia is a legal state. In accordance with it, one of the most important principles of a legal state is the guarantee of having a free judicial power, free from the influence of other power to execute the trial process in order to enforce the law and justice. The judicial Power according to UUD 1945 is the state's power that is free to perform trial in order to enforce the law and justice conducted by the Supreme Court and other judicial body that is beneath the Supreme Court in the scope of general court, religious court, military court, administration court, and Constitutional Court.

The juridical and philosophical foundation of judicial power as an institution are free and independent from any form of external intervention is governed in Article 1 the Law No. 48 year 2009 concerning the Judicial Power. The article states that judicial power is the power of the state freedom to administer justice for enforcing law and justice based on Pancasila and the Constitution of the Republic of Indonesia year 1945, for the implementation of the State Law Republic of Indonesia. The judicial power is one of the independent actions from all existing court sectors. Therefore, it is truly expected that in terms of the court's performance, everything

could be executed well and fair.<sup>1</sup>

The court plays an integral role in becoming the promoter towards the protection of fundamental human rights among the society either as individual or in general understanding. The *condition sine qua non* in a country based on law is that the court must be an independent, neutral, competent and commanding to enforce the law, accommodate the law, and provide a legal certainty and justice. Only the court that has all the criteria above that can ensure the fulfillment of fundamental of human rights. The position and the role of the judges as the main actor of judicial body become very important, especially with all of their authority. Through their verdicts, a judge can transfer the right of ownership of someone, revoke the nationality of an individual, declare invalidity of an arbitrary action conducted by the government to the people, or order the eradication of an individual's right to live.

All of the authorities owned by the judge must be executed in the interest of upholding the law, truth, and justice without any discriminating the people as have been previously regulated in the oath of a judge, in which every person are equal in front of the law. This huge authority of a judge demands a high responsibility. The verdict read with preamble "*For the sake of justice in accordance to the one divinity god*" has the meaning that their obligation in upholding the law, truth, and justice, must be held accountable *horizontally* towards all mankind and *vertically* to God. Therefore, a judge is an essential core in human resources that is executing judicial power in Indonesia. In doing their primary task and judicial function, a judge must keep their independency through integrity of the judge's freedom in analyzing and judging a case. Judges independency becomes an important requirement for the protection of human rights.

The task of a judge is truly heavy. A judge is expected to be able to act as a shield or the last resort for those who seek for justice. In this situation, a judge is required to have professional skills along with morality and integrity, which reflects the sense of justice, provides benefits and ensures legal certainty. The weight of a judge's responsibility is because a judge is doing their duty, he/she must also be held accountable to God, him/his self, the dispute parties, the people, the higher court, and the legal science itself. Considering the weight of it, then the existence of professionalism and private integrity is not enough to guarantee the judge decision to be fair. Therefore, the judge must also have faith, a good communication, and keeping their role, dignity, and status in front of the society.

Pancasila and UUD 1945 are textually mentioned as the foundation of the judicial power in enforcing the law. The explanation regarding the freedom of a judge as a material object must be viewed and considered from the philosophical perspective of Pancasila as the dream of the state and UUD 1945 as a juridical basis of the constitutionality. Therefore, the freedom of a judge is a freedom controlled by the Pancasila and UUD 1945.

The freedom of a judge is a form of a freedom in terms of exercising their duty. The judge is free in exercising their operational duty professionally. The freedom of a judge in doing their duty is a freedom to exercise their authority in a court and trial process. The judge is also free to exercise their duty in accordance to their knowledge and faith. The judge is free in terms of finding the sources of law and free from him or herself. The freedom of a judge must also be viewed as the freedom from any form of oppression, pressure, directives of other parties, including the influence of those who runs the country such as executive, legislative, and judicial power. The judge is free to look for legal facts so that they could provide a better verdict. The judge is free to do anything subjectively without any limitations from the law. The judge must be free from the judicial system to achieve the truth and shall be free from the existing legal system if the said legal system could ruin or damages the freedom of a judge in a trial.

There are two opinions in regards to a judge's freedom. First, it is the construction and founding of the law conducted by judges in their implementation. It refers to the existing statutory provisions. It means that the judge is merely looking, constructing and re-interpreting the statutory provisions and adjust them with the case at hand. Second, the implementation of a judge's freedom in interpreting, constructing, and finding the law is not limited by the law. The legal findings are required to create a new law may be done by a judge if in the trial process they are unable to find a legal basis in accordance with the case at hand. The legal finding not only must be in accordance with the knowledge owned by the judge, but also it must be in accordance with the considerations of the principle of justice that lives among the society in order to create justice and benefit among the people based on the legal culture.

Regarding to judge's freedom, I believe that a judge must have freedom to construct, find, and interpret law and the law itself should be bound by the existing regulation. It means that a judge is able to find the law in order to provide enough sense of justice, certainty, and benefit. The judge implements a judge's freedom during the formulation of the legal consideration. However, several the religious court judges in some references explain that the freedom of a judge in constructing a legal consideration must suit to the facts and evidence presented during trials. It shall focus more on the case systematically, logically, rationally, and proportionately. The implementation of a judge's freedom in constructing legal consideration must be in accordance to their

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<sup>1</sup> See Mukhtaruddin Bahrum, 2010, *Legalisasi Nikah Siri Melalui Isbat Nikah*, UIN, Makassar.

knowledge, faith, and conscience of themselves.

The Religious Court is one of the judicial bodies in Indonesia. The Religious Court is a specialized judicial body intended for Muslims that lives with a special competent as well, in regards to either the disputes that they are handling or even those who seeks for justice. Special for the Religious Court authority in marriage sector, the explanation of Article 49 (2) the Law 7 year 1989 which has been amended with the Law No. 3 year 2006 and recently has been amended into the law No. 50 year 2009 concerning the Religious Court, is specified into 22 (twenty two) types of disputes. From those 22 disputes, there is contentious in nature and there is voluntary in nature. One of the voluntary disputes become the competence and authority of the religious court is that *itsbat marriage (itsbat nikah)*.

The authority in regards to *itsbat marriage* by the Religious Court is historically meant for those who conduct their marriage before enactment of the Law No. 1 year 1974 concerning Marriage jo. the Governmental Regulation No. 9 year 1975. The explanation of Article 49 (2) stipulates that “the Governmental Regulation is entry into force as the effective implementation of the Law No. 1 year 1974 and Article 64 the Law No. 1 year 1974. Article 64 states that “For marriages and all kinds of things related with marriage before the Law No. 1 year 1974 that was conducted based on the previous regulations are valid.”<sup>1</sup>

The authority as mentioned above then develops and extends with the utilization of KHI. Article 7 (2) mentions that “in the condition of marriage can not be proved by the certificate of marriage, *itsbat marriage* can be proposed by the couple husband and wife to the Religious Court”. Article 7 (3) stipulaes that *Itsbat marriage* proposed to the Religious Court is limited upon things that are related to: a). Marriage in the event of divorce; b). The loss of marriage certificate; c). Doubtfulness of the marriage validity; and d). Marriage conducted by those who does not have any marriage obstacle according to UUP.

Regarding to the explanation of Article 7 (2) and (3) KHI, KHI has given more authority than the statutory provision has given, either in the UUP or the Law No.7 year 1989. Article (1) and (2) the Law No. 14 year 1970 along with its explanation regulates that the existence of a court’s authority to adjudge a trial does not have voluntary element which is with the condition of an appointment by the statutory provision.

In regards to the *itsbat marriage*, the Minister of Religious Affairs Decree No. 3 year 1975 in Article 39 (4) stipulates that if the Religious Affair Office can not make the copy of the marriage certificate due to damages or lost or any other causes. Then, to establish the existence of the marriage, “*talak*” and divorce, it must be proven by a decision of Religious Court. Indeed, this is related with a marriage conducted prior to the establishment of UUP and not for marriages conducted afterwards. Application of the *itsbat marriage* is submitted to the Religious Court by the husband and wife who cannot prove their marriage with the certificate of marriage issued by the Marriage Registration Employee as they are not registre.

The *itsbat marriage* request proposed by the applicant, the Religious Court would then process it in accordance to the regulations of procedural law. In the Administrative and Technicalities of the Religious Court Trial Guide Book 2008 published by the Supreme Court of Indonesia, it indicates that “A Religious Court can only grant *itsbat marriage* request as long as the marriage conducted to fulfill the requirement and conditions of marriage according to Islamic laws and the marriage does not violate any marriage prohibition stipulated in Article 8 to article 10 of UUP jo. Article 39 to article 44 of KHI”.<sup>2</sup>

Based on the validation or stipulation of the *itsbat marriage* conducted by the Religious Court, the applicant will then use it as a basis to register their marriage to the Marriage Registration Employee of Religious Affair (KUA). The Marriage Registration Employee will then issue a marriage book or certificate. According to the explanation of Article 49 (2) point (22) the Law No. 7 year 1989 which has been amended with the Law No. 3 year 2003 and has recently been amended with the Law 50 year 2009 concerning the Religious Court. The Law stipulates that one of the authority or the absolute competence of the Religious Court in marriage field is the statement of marriage validity conducted before UUP and is performed in accordance to other laws.

Article 7 (3) point (d) KHI stipulates that *itsbat marriage* may be proposed to the Religious Court just to be limited conducted before the enactment of UUP. According to the explanation of UUP and Article 7 (3) section (d) of KHI, it can be understood that *itsbat marriage* request may be proposed to the Religious Court basically limited only to marriage conducted before the enactment of UUP. Therefore, *a contrario (mahfum mukhalafah)*, all marriages conducted after the enactment of UUP, the Religious court has no jurisdiction to make them valid via *itsbat*.

There are still plenty of marriages in the society conducted after the enactment of UUP not to be registered to KUA with various reasons and causes. The result of the condition is most of them does not have the Marriage Registration Book, which then proposes the *itsbat marriage* to the Religious Court. It can be said that spouses could not access their rights to gain personal documents that are required. *Itsbat marriage* stipulation made by

<sup>1</sup>See Khusnul Yakin, 2015, *Ratio Decidendi Penetapan Pengesahan (itsbat) Nikah di Pengadilan Agama*. Universitas Airlangga, Surabaya (UNAIR).

<sup>2</sup>See Anshary MK, 2010, *Hukum Perkawinan di Indonesia (Masalah- Masalah Krusial)* Pustaka Pelajar, Yogyakarta.

the Religious Court is used or is become the foundation to register their marriages to the KUA in order to find out the Marriage Registration Book or Marriage Certificate. The main problem for the Religious Court to be able to perform their function optimally in terms of granting *itsbat marriage* is the absence of legal basis. The strong legal basis is to have a clear regulation regarding to *itsbat marriage* after the enactment of UUP without having any interpretation of the Law.

One of the absolute authority or competence of the Religious Court is to handle the issue of marriage and one of them is to determine the validity of a marriage conducted via *itsbat marriage*. The product resulted from the *itsbat marriage* is a stipulation and verdict of *itsbat marriage* as validity of marriage. The *itsbat marriage* is a product from the act of proposing *itsbat marriage* that does not have any element of charges and is proposed by spouses. The judgement of *itsbat marriage* is a product of *itsbat marriage* proposal upon all disputes of *itsbat marriage* that has the element of charges proposed by either the husband or the wife.

#### 4. The Urgency of Marriage Law Renewal in Indonesia

Some of the legal bases in regards to registered marriage are:<sup>1</sup>

a. Article 2 (2) UUP stipulates that “every marriage must be registered in accordance to the applied statutory provisions.”

b. Article 1 (1) the Law No.22 year 1946 concerning Marriage Registration, Marriages, and Divorce stipulates that “a marriage conducted in accordance to the Islamic law shall be supervised by Marriage Registration Employee appointed by the Minister of Religious Affair or the employees appointed by the Minister. Divorce and re-union conducted in accordance to Islamic law must be notified by Marriage Registration Employee”.

This article notifies that marriage, divorce, and re-union of the marriage must be registered in order to obtain legal certainty.

c. Article 2 and article 6 of the Governmental Decree No. 9 year 1975 concerning the Implementation of UUP. Article 2 (1) states that “marriage registration for those who conduct their marriage in accordance to Islamic law shall be done by Marriage Registration Employee as referred to the Law No 32 year 1954 concerning Marriage Registration and Divorce”. Article 2 (2) states that “marriage registration for those who conduct their marriage in accordance to other religions shall then be done by Marriage Registration Employee on the Civil Registration Office as referred to in various statutory provisions in regards to marriage registration”. Article 2 (3) states that “without prejudice to specific regulations applied to the procedures for marriage, the procedures shall be performed in accordance to Article 3 to Article 9 of the Governmental Decree.

Article 6 (1) further states that “registration Employee will receive notification in regards to a marriage ceremony. He/she shall look into whether or not the marriage requirements has been fulfilled and there is no any hitch upon the marriage

The stipulation of marriage registration as regulated in Article 2 (2) UUP and article 5 (2) KHI is addressed to guarantee an order of marriage for Muslim community and to ensure legal order not only as an instrument of legal certainty and ease of access, but also as an authentic evidence of marriage. The marriage registration is one form of government’s intervention to protect and to ensure the fulfillment of social rights of their people, especially spouses and the children who are born from the marriage.

The Religious Court in this context has been given an authority in doing their marriage validation that is known as *itsbat marriage*. *Itsbat marriage* has a definition of a stipulation in regards to the validity of a marriage, which is the validation of a marriage conducted in accordance to the Islamic law, but is not registered under KUA or PPN in charge. The Religious Court has been given the authority by the law to conduct *itsbat marriage* in order to deliver justice, certainty, and legal protection for the people.

People who does not have family card certificate because they do not have Marriage Registration Books, after having the *itsbat marriage* by the Religious Court shall be able to easily access every administrative needs such as Family Card Certificate or Birth Certificate or even passport. *Itsbat marriage* is taken by spouses in order to gain recognition from the state country upon their marriage including the children that was born due to the marriage. If the marriage is valid according to the Islamic law, then of course the children are a legitimate child as well.

*Itsbat marriage* in the Religious Court is used by the applicant to register their marriage at sub-district of Marriage Registration Employees KUA to obtain a Marriage Certificate issued by the KUA as an authentic proof of the marriage that has been registered. The Marriage Certificate is going to be utilized by the relevant person to take care of their child’s Birth Certificate on the Civil Registration Office along with the *itsbat marriage* stipulation made by the Religious Court as an attachment.

There are so many disadvantages if wthe marriage does not register at all. Islam suggests that all disadvantages shall be avoided if possible, as expressed by a fiqh principle, which states “disadvantages must be

<sup>1</sup>See Neng Djubaedah, 2010, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat*, Jakarta, Sinar Grafika.

eradicated as an attempt to reduce misunderstanding in regards to the validity of a marriage according to the laws". The development of the foundation of marriage registration has 2 (two) reasons, called *qiyas* and *maslahat mursalah*. First is *Qiyas*. It means that any activity in a particular situation is ordered to be registered in accordance to God's order in Quran Surah Al- Baqarah (282). Second is *maslahat mursalah*. A benefit is not suggested but is not forbidden by the Islamic law. It is resulted from the need of the people. In this context, it can be said that it is one the principle commonly used in an Islamic law.

Article 7 (2) KHI stipulates "In the event that the marriage could not be proven by marriage certificate, they shall be able to request itsbat marriage for themselves in the Religious Court". This regulation then emphasizes the authority of the Religious Court towards any marriage disputes that does not have any marriage certificate. The solution of it is through itsbat marriage procedure. For further information, Article 7 (3) stipulates that Itsbat marriage proposed to the Religious Court is limited upon things that are related to: a). Marriage in the event of divorce; b). The loss of marriage certificate; c). Doubtfulness of the marriage validity; and d). Marriage conducted by those who does not have any marriage obstacle according to UUP. The Laws have already obliged the ownership of a marriage certificate as a prove of marriage, but in reality, there are many spouses does not have marriage certificate.

The possibility cause of the absence of Marriage Certificate may be due to several factors, as followings:

- 1) the negligence of the parties or family conducted the marriage without necessarily following the procedures made by government;
- 2) the costs need to be spend if they are following the proper procedures;
- 3) the negligence of Marriage Registration Employees in checking the legal documents required in a marriage;
- 4) the marriage conducted before the enactment of UUP; and
- 5) failure to fulfill one or more of the requirements to conduct a polygamous marriage especially the absence of permission from the previous wife.

d. Religious Scholars Opinion

There is a difference of opinion regarding unregistered marriage among the religious scholars in Indonesia. Some of them forbid it; some allow; and some of them are neutral. The differences in opinion are normally because each side argues with their own interpretation. Therefore, the most important thing is to avoid any attempt of monopolizing interpretation in accordance with their own interests. They could fulfill their own goal. Islamic interpretation is based on several arguments and references from either the Quran, hadiths, *ijam*, *qiyas*, or even *ijtihad*.

Some religious scholars believe that unregistered marriage is *halal* (allowed) as long as they fulfill the Islamic requirements. Historically, Islam does not oblige any form of marriage registration. However, Dadang Hawari disagrees with the reason. According to Dadang Hawari, unregistered marriage is not valid because there has been an attempt to manipulate the marriage from a sacred process into an event to simply fulfill their humanly desire.

## 5. Conclusion

It can be concluded that the foundation of the Religious Court decision to legalize unregistered marriage through itsbat marriage after the enactment of UUP. Its consideration is based on justice, legal certainty, and communal benefit. The urgency of marriage principle renewal in Indonesia is needed to avoid regulation that is overlapping each other in Indonesia.

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