



## The Validity of Marriage Agreement Regarding Properties in Unregistered Marriages

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### Abstract

*The purpose of this study is to analyze the married couples engaged in an unregistered marriage and the position of the marriage agreement regarding the property as well as the concept of equal treatment of couples before and after isbat based on the theory of equality. This is important due to the legal gap observed in the norms, especially in relation to the unregistered legal marriages, despite the recognition of religious and registered marriages in Indonesian laws. This is legal research conducted using a conceptual and regulatory approach and the results defined an unregistered marriage as a legal marriage which fulfills the requirements determined by religion. Therefore, the failure to register a marriage does not invalidate its legality but there is a need for the record to be available with the state charged with such responsibility. Moreover, the agreements made concerning properties in unregistered marriages are valid as long as the parties conducted the process voluntarily and fulfill all the elements required. These agreements can also be recognized through the submission of isbat (marriage authorization) which recognizes and stipulates all activities conducted in the marriage before the isbat.*

### A. Introduction

Nature is made up of different sexes including males and females which are mostly attracted to each other and also tend to live together in order to produce offspring through

intercourse ([Wirjono Projodikoro, 1991: 7](#)). The desire to live together is very important in society and this means there is a need for rules to guide the process starting from the commencement, implementation, continuation to the cessation of living together. Moreover, the mutual attraction associated with the human nature of sexes leads to the tendency for unity through the bond of marriage which has been confirmed to be a legal act by Indonesian law. This is observed in the preservation of the right of every member of society to engage in marriage in the 1945 Constitution of the Republic of Indonesia as expressly stipulated in Article 28B, Paragraph (1) that “Every person shall have the right to establish a family and to procreate based upon lawful marriage.”

The civil law perspective showed that marriage is only valid after it has been registered at the civil registry office and this means unregistered marriages are not considered valid according to legal provisions. Article 100 of the Civil Code (BW) and Article 34 of HOCI (Huwelijk Ordonante Crhisten Indonesia) also state the need for immediate registration of marriage after the joining. Therefore, these provisions showed that a marriage can only be proven with a certificate even after fulfilling all the procedures according to religious provisions. Meanwhile, marriage is considered a religious act while the registration is only to satisfy administrative procedures and does not determine its validity.

One of the sources of controversies in marriage in Indonesia is the definition in Article 2, Paragraph (1) of Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law) that “A marriage is legal if it is done according to the laws of the respective religions and beliefs of the parties concerned”. This, therefore, means any marriage conducted according to the religions and beliefs of the respective parties is valid according to the 1945 Constitution. It is shown that a marriage that is not based on religious laws is against the constitution ([Neng Djubaidah, 2012: 95](#)) and Hazairin added that Muslims engaged in marriage activities have no possibility of violating their religious rules.

According to Article 2, Paragraph (2) of the Marriage Law shows the registration of birth, death, and marriage is important thing but not legal events ([Neng Djubaidah, 2012: 158](#)). This means marriage registration is not a legal requirement since the marriage was conducted and authorized by religion. Therefore, some marriages in Indonesia are not registered and no sanctions are given to those that hold a wedding and invite several people. This is, however, different from a situation where a couple hides their marriage and the husband abandons the wife and children due to non-registration ([Neng Djubaidah, 2012: 147](#)). It is also important to note that the marriage is considered valid because the provisions required were fulfilled by conducting the process based on religious laws.

It was discovered that there is a large number of unregistered marriages in both the countryside and large cities of the country as well as some terms of marriage which are also not registered. Meanwhile, an unregistered marriage is defined as a marriage conducted in line with the elements of harmony and conditions based on Islamic law (shari’ah) but not registered with the state ([Neng Djubaidah, 2012: 148](#)). However, the Compilation of Islamic Law (hereinafter abbreviated as KHI) stipulates that the Islamic

community is required to register their marriages for the sake of order. The KHI also makes provisions for marriage opportunity in a situation the union is not proven by a certificate (Art. 2, Islamic Law Compilation).

Based on the Art. 135 of Marriage Act, Marriage as a legal act has some legal consequences such as the rights and obligations required to be fulfilled by married couples and an example of this is the composition of marriage assets which is regulated in the Marriage Act. This means the declaration of assets is very important in marriage considering the fact that each party brings certain properties before the union and they both acquire some others jointly during the marriage. It is important to note that the failure to have an agreement related to properties before the marriage implies both the husband and wife concerned have joint ownership according to the law. According to the Art. 119 of the Civil Code, The joint ownership takes effect at the time the marriage was conducted and shall remain in force during the marriage and this means it cannot be canceled or changed by married couples.

The law also provides a means for prospective husband and wife unanimously willing to avoid joint ownership of properties in marriage through a special agreement known as the marriage agreement. This is usually made by the bride and groom to show that they are both willing to deviate from the provisions of the law which regulates the ownership of marriage assets. This agreement is normally ratified by the Registrar of Marriage (PPN) in Indonesia and the whole process is based on BW, Law No. 1 of 1974, Law No. 9 of 1975 concerning Implementation of Law No. 1 of 1974, and Compilation of Islamic Laws.

The marriage agreement based on BW and those defined in the Marriage Law are very different. The BW stresses specifically the husband and wife's personal assets while the Marriage Law is more open and does not emphasize material things. Moreover, the Marriage Law only regulates marital agreements for registered marriages while there are no regulations for unregistered ones. However, a subsequent development allows the recognition of marriages not registered as indicated by the decision of the Constitutional Court (the Constitutional Court Verdict Number 46 / PUU-VIII / 2010).

This is in the form of the submission of a request for marriage registration or marriage isbat which is a legal-order requirement as mandated in the Marriage Law. The process requires the recording of marital events, which according to KHI, provides opportunities for legal marriages according to religion but not registered to be recognized. Several previous studies ([Sarjiyati, S., & Purwati, Y. 2019](#)) such as Faizal showed that marriage registration is important for the validity of marriages and also serves as legal certainty and protection for husbands, wives, and children. It also provides guarantees and protection for certain rights arising from marriage such as the right to inherit, obtain a birth certificate, livelihood, and others ([Faizal, L. 2016](#)). Meanwhile, Nurlaelawati reported that unregistered marriage is under the Islamic family law of the Indonesian State as well as its practical and legal implications. The research criticized the rules on marriage registration and dissolution and also argued that the rules applied to both registered and isbat marriages are abused based on some cases of unregistered marriages

and some comments from relevant authorities ([Nurlaelawati, E. 2013: 261-277](#)). Some other studies also affirmed marriages conducted religiously to be legal but none has explicitly examined the agreement regarding property in unregistered marriages. This is, however, important to be researched in order to provide legal certainty on events arising after marriage isbat which is usually conducted by legally but unregistered married people to defined certain issues such as assets obtained during the marriage, children, and inheritance.

Living together without marital ties is common in developed countries such as the Netherlands where it is normally called *samen wonen* ([Kalmijn, M., Loeve, A., & Manting, D. 2007: 159-179](#)). This term means living together in the same house without being married. This led to the implementation of regulations to protect the agreements made by these couples in order to adapt to the situation and ensure respect for each other. It is, therefore, possible to compare the *samen wonen* arrangement in the Netherlands to the unregistered marriage in Indonesia, especially regarding marital property ([Uunk, W. 1999: 99-118](#)). However, those legally married without registration are actually already one step ahead due to the fact that an unregistered marriage is legal as long as it was based on religion. This means it also needs to be protected because it is in line with the terms of religion and society as well as the rights to guarantee the future as it relates to the children which are the products of marriage, as well as the marriage assets and inheritance.

This research, therefore, focuses on the position of the marriage agreement regarding the property as well as the concept of equal treatment of couples before and after isbat based on the theory of equality ([Sihombing, E. N, 2013: 83](#)). It was conducted as normative research through the use of a conceptual and legal approach to marriage.

## **B. Research Methods**

This is a legal research aimed to analyze on the position of the marriage agreement regarding the property as well as the concept of equal treatment of couples before and after isbat based on the theory of equality. The statutory and conceptual approaches were used to carry out this research. Meanwhile, the legal materials used were mainly acts and scientific papers such as books and journal articles. In addition, both soft-copy and hard-copy were systematically compiled and analyzed using the aforementioned approaches. The results were summarized, and the concluding aspect is the answer to this study's legal issue.

## **C. Research Result and Discussion**

### **1. Equal Treatment regarding Marriage Agreement on Assets**

The provision of equal treatment for everybody is interpreted as a form of justice. Meanwhile, the access to justice focuses on two basic objectives of the legal system which include being available to all people from different circles and making provisions and decisions considered to be fair to all both as

individuals and in groups. Therefore, the basic idea prioritized in this section is the achievement of social justice for all citizens.

In theory, equality is a principle inherent in human nature as a creation of God Almighty. The term “equality” in English means uniformity ([Facio, A., & Morgan, M. I. 2008: 1133](#)). Moreover, the International Encyclopedia of the Social Sciences quoted by Ramly Hutabarat also stated that humans are the same but there are certain inequalities due to differences in human characteristics in reality. These are based on differences in sex, color, character traits, and several others as well as the variety of human concepts such as religion, social level, and others ([Beer, C. 2009: 84](#)). According to David L. Sill that edited the Encyclopedia ([Sihombing, 2013:84](#)):

*That men are equal means that men share some qualities; these must be specified. Men are evidently unequal in many characteristics. There are natural differences (sex, color, character traits, natural endowments, etc.) and institutional variations (citizenship, religion, social rank, etc.). Other properties are common to all but in varying amounts (age, strength, intelligence, possessions, power, etc.)*

**This means** humans are the same but only differ based on their characteristics as indicated by the International Encyclopedia of the Social Sciences. Moreover, the theory of “equality before the law” ([Parolin, G. P. 2014: 123](#)) can at least be divided into four parts which include the following:

- a. Natural equality is obtained from birth by virtue of being human and this means all humans are the same based on the fact that they are all God’s creation with similar features which distinguish them from animals.
- b. Civil equality (equality in civil rights) refers to the fact that every citizen has the same civil rights such as those associated with discrimination.
- c. Political equality refers to the fact that every citizen has the same political rights. This means everyone has the same opportunity to vote in elections, join political parties, and others.
- d. Economic equality is the equality of opportunity in improving the economic level of every citizen. The economic rights of citizens are the same and are protected by the applicable laws.

The theory of equality before the law was incorporated into the civil equality theory which concerns civil rights based on the aforementioned four classifications. These rights are guaranteed and protected by the constitution ([Eskridge Jr, W. N. 2014: 111](#)) and this means all people must be treated equally and indicates the law does not support selective or biased treatment of certain people as first-class citizens. This is what David L. Sill called “impartially”. Therefore, equality before the law is an antidote against legal discrimination. Moreover, there is a substantial similarity in the notion of equality as conveyed by several experts and this is observed from the definition that equality before the law is, in principle, a right for everyone to be treated equally by the law, even though they come from different social statuses.

Equal treatment is based on the concept that everyone is equal and has the same status in the state. It also indicates the same rights and obligations as citizens as well as the provision of the same opportunity in any matter. This means every human being is free to take any action as long as it does not conflict with legal norms, religious norms, and norms of decency. Moreover, humans, as individuals, have the highest consciousness of reality and are indivisible units considered to be different from others, thereby, making them a unique and autonomous subject. Every human being is free to occupy a position, think, take a stand, and take action on personal responsibility and these indicate they are autonomous. This means humans are subjects and should not be seen as objects. In this case, Theo Huijbers stated that “humans have the loneliness indicated by the word personal” ([Poespowardojo, S. dan Bertens, K. 1983](#)) while the concept is expressed by Iqbal in terms of individuality or conscience (Syaiyidain, K.G. 1954).

The willingness of an individual to get justice and equal treatment based on an agreement requires fulfilling the legal conditions of the agreement. Moreover, in a situation the agreement was made according to religious law, there is also the need to satisfy the legal conditions associated with such law. Therefore, this research examines some regulatory provisions applicable to the fulfillment of the validity of an agreement according to religious law.

The drafting process of a marriage agreement requires the willingness or voluntary agreement of both parties without coercion. It is important to note that a feeling of force, threat, or pressure to sign the agreement has the ability to make it null and void ([Gemala Dewi, 2018: 127](#)). The provisions of Article 29 of the Marriage Law are in line with the value of marriage freedom in the teachings of the Islamic religion which emphasizes voluntary agreement of the parties to be involved in the marriage. Moreover, even though the classical Islamic fiqh does not have an explicit interpretation of “marriage agreement” (, it is defined based on ijihad which focuses on the basic principle of muamalah that all actions are accepted as long as there is no forbidden proposition ([Indah Purbasari, 2017: 142](#)). This led to the general acceptance of the marriage agreement as long as its contents are not contrary to Shari’a.

According to M. Shahrur, marriage agreement (*mitsaq az-zaujiyah*) in at-Tanzil al-Hakim is found in the Word of Allah SWT, sura An-Nisa verses 20-21 which states that there is a strong agreement between wives and their husbands in marriage. There are also a minimum of two words related to an agreement in the Al-Qur’an and these include contract (*al-aqdu*) which etymologically has the same meaning as agreement and engagement (*al-ittifaq*) which is also used in the sense of agreement ([Ngadimah, M., Noviana, L., & Rusdiana, I. 2017: 94](#)).

QS. Al-Maidah 1 states that “ O you who have believed, fulfill [all] contracts. Lawful for you are the animals of grazing livestock except for that which is recited to you [in this Qur’an] - hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends.”

The word “ahd” (al ahdu) etymologically means time, message, consummation, promise, or agreement as indicated in Al-Quran surah An-Nahl verse 91 and Al-Isra verse 34 as follows:

“And keep the covenant with Allah SWT if you promise, and do not cancel your vows after confirming them and making Allah your witness. Allah knows what you are doing.” Qs.AN-Nahl verse 91

According to Ibn Araby ([Ngadimah, M., Noviana, L., & Rusdiana, I. 2017: 94](#)), there are five things included in this agreement and these include:

- a. General agreement
- b. Oath
- c. Obligations imposed by Allah on His servants
- d. Marriage contract, partnership (syirkah), buying and selling, oaths and promises to GOD
- e. Engagement based on mutual trust.

The terms of an agreement in Islam are as follows:

- a. Not violating the Shari’a law as indicated by Rasulullah SAW that “all the conditions that are not in the Book of Allah are false, even though they consist of one hundred conditions”
- b. Needs to be based on the mutual agreement because there is no appreciation of a contract that denies someone’s freedom.
- c. Needs to be clear and not cryptic to avoid misinterpretations at the time of application.

In addition to these conditions, an agreement in Islamic law is also required to be in accordance with the applicable principles such as those related to the status of the contract to avoid nullity or invalidity. Some of these principles are as follows:

- a. The principle of *ibahah* (mabda ‘al ibahah)
- b. The principle of free will (mabda ‘Hurriyyah at-Ta’aqud)
- c. The principle of consensualism (Mabda ‘ar-Radha’iyyah)
- d. The principle of promise is binding
- e. The principle of balance (Mabda ‘at-Tawazun fi al-Mu’awadhah)
- f. The principle of not being burdensome (benefit)
- g. The principle of justice
- h. The principle of honesty and truth (Ash-shidq)
- i. The written principle (Al-Kitabah)

There is, however, no specific mention of marriage agreement in classical fiqh literature ([Amir syarifuddin, 2014: 145](#)). Most of the discussions associated with marriage are based on validity rather than the requirements which are focused on the conditions. Meanwhile, the agreement is related to the conditions by stating

those to be fulfilled by the parties entering into a marriage. It is important to note that there should not be conditions imposing the continuity of a marriage in the agreement. In fact, Jumhur reported that an agreement with certain conditions such as a requirement to divorce the wife after the marriage has lasted for three months is illegal. Moreover, a marriage agreement is separate from the marriage and this means there is no legal relationship between a legally valid marriage and the implementation of the conditions specified in an agreement. Therefore, the failure to fulfill the agreement does not lead to the cancellation of a legal marriage.

It is also important to reiterate that there is free will to engage in an agreement in a legal marriage ([Amir syarifuddin, 2014: 146](#)). Scholars have, therefore, debated the position of the law regarding the conditions contained in a marriage agreement. Jumhur ulama opined that the fulfillment of the conditions stated in an agreement is obligatory since it is legal. This led to the division of these conditions into three by the scholars:

- a. Those directly related to the implementation of the obligations of the husband and wife and demanded by the marriage. For example, the need to get along well, provision for children and wife by the husband, the need for the wife to serve the sexual needs of the husband, the responsibility of both the husband and wife to take care of their children.
- b. Those contrary to the nature of marriage, specifically prohibited, or have the ability to provide harm to a party. For example, a wife giving condition that she will not have a child, a wife requiring the husband to divorce previous wives, and a husband not willing to pay the bride price.
- c. Those that do not violate marital demands without specific restrictions nor demands. For example, a wife requiring non-interference of the husband in certain issues.

*Ulama* agreed the first condition needs to be implemented in line with the hadith of the Prophet 'Uqbah ni' Amir which is stated by Jemaah hadith experts as follows:

*"The conditions considered to be most appropriate to be fulfilled are the requirements relating to marriage"*

The opinion of Imam Ahmad also allows conditions or agreements in marriage such as *taklik talak* and the existence of joint property as long as it is not specifically prohibited by the Prophet. Moreover, the custom allows the husband to take charge of marriage assets but does not specifically prohibit joint ownership of properties ([Khadduri, M., 1984](#)).

Justice is a mandatory direct order in the Islamic religion. Scholars also defined the word "Adl" as "placing something in its proper place" to ensure "equality" ([Arfin Hamid, 2011: 74](#)). This means an agreement made by a couple in an unregistered concerning their assets is legal and binding on both parties due to its fulfillment of the required elements. Moreover, the fulfillment of the



terms in Islamic agreements and subsequent submission of the agreement in marriage isbat allow its inclusion in the minutes of the isbat. Therefore, it is possible for a judge to progressively decide that the marriage agreement between married couples in an unregistered marriage is recognized to avoid an error. One of the judges at the District Court explained that everything that happened in the marriage before the prayer to grant a married couple a marriage license needs to be recognized and determined.

This means the treatment of marital agreements in both unregistered and registered marriages depends on the conditions to be fulfilled which act as the guide for the agreement.

## 2. Marriage should be treated the Same Before and After Isbat

Article 1 of the Marriage Law states that marriage is a physical and spiritual bond between a man and a woman to form a happy and eternal household (family) based on the belief in God Almighty. This was further explained as follows:

*As a state based on Pancasila, where the first precept is belief in God Almighty, marriage has a very close relationship with religion/spirituality, so it is not only related to the element of birth/body, but the element of heart/spirit also has an important role. Marriage is also related to nurturing and education, which are the obligations of parents (Arfin Hamid, 2011: 74).*

Neng Djubaedah also interpreted this article as follows (Neng djubaidah. 2010):

- a. The Republic of Indonesia shall not apply marriage law that is contrary to Islamic rules for Muslims, a marriage law that is contrary to Christian rules for Christians, a marriage law that is contrary to the norms of Hinduism for Hindus, a marriage law that is contrary to Buddhism for Buddhists, and a marriage law that conflicts with the teachings of Kong Hu Cu for Kong Hu Cu adherents.
- b. Indonesia is obliged to apply Islamic law (marriage) for Muslims, Christian law (marriage) for Christians, Hindu law (marriage) for Hindus, Buddhist law (marriage) for Buddhists, and Kong Hu Chu law (marriage) for Kong Hu Chu adherents.

This means marriage is not just a legal act with legal consequences but also an act related to religion due to the determination of its illegality through the religious laws and beliefs of each person getting married according to Law No. 1 of 1974. This is, however, in contrast to the Civil Code which defines marriage as mere civil liberty as stated in Article 26 BW that “the law considers marriages only in civil relations”.

As previously stated, Article 2, Paragraph (1) of Law No. 1 of 1974 states that “marriage is legal, if it is done according to the laws of each religion and its beliefs”. This means marriage needs to be conducted according to the religious laws and beliefs of each person getting married. This is also in accordance with the provisions of Article 29 of the 1945 Constitution which states that

- a. *“...a state based on God Almighty.”*
- b. *“The state guarantees the independence of each population to embrace their respective religions and worship according to their religion and beliefs”*

Prof. Dr. Hazairin reviewed Law No. 1 of 1974 and found that “for Muslims, there is no possibility to marry by violating the laws of their religion” and the same was observed to be applicable to Christians, Hindus, and Buddhists in Indonesia ([K.Wantjik Saleh, 1976](#)). Therefore, the application of Islamic marriage law before and after Isbat establishes the Islamic values stipulated in the Marriage Law, especially those concerned with fairness and how the members of the public are to be treated.

There is a need to uphold legal certainty due to the fact that everyone expects the law to be clear enough to avoid uncertainty in case of a major event ([Kaharuddin, 2015: 146](#)). Therefore, the legal certainty value in the case of marriage according to the Marriage Law provides direction and understanding that marriage needs to be conducted according to the provisions of the law. This further intensifies the opinion that it is legal when conducted in accordance with the terms and procedures determined by the law. The law on marriage regulates matters related to the terms, registration, agreements, approvals, and prohibitions associated with marriages.

Marriage is an important aspect of human life and this means it requires rules to ensure its validity due to its inseparability from the law. This validity allows men and women to bind themselves to the institution by avoiding promiscuity. Moreover, marriage is an important aspect of Islamic teachings ([Kaharuddin, 2015: 3](#)) which is considered to be very sacred and substantive. There are no less than 80 verses in the Koran which provide guidance and ethics on marriage activities to establish a cohesive and harmonious relationship in domestic life.

The sanctity of marriage leads to the establishment of some requirements to be fulfilled by parties willing to engage in the process. These were further categorized as material and formal with the material aspect concerned with personal requirements of the prospective bride and groom while the formal aspect focuses on the formalities or procedures required to be met before and during the marriage.

The material requirements are as follows:

- a. An agreement between the bride and groom made voluntarily to live together for life without coercion from any party.
- b. The prospective groom should be at least 19 years old while the prospective bride should be at least 16 years old (Art. 7 (1) of Marriage Law). A dispensation from the court or another official appointed by the parents of the prospective bride and groom is required when they have not reached the minimum age of marriage as long as the law does not specify otherwise ([Lili Rasidi, 2002: 75](#));
- c. There should be no marital ties with other parties, except in the case of polygamy which is permitted by Article 3, Paragraph (1) and Article 4.

- d. There is a waiting period for women that leave their marriages (Art. 11 and Art. 39 of Government Regulation Number 9 of 1975).
- e. The provisions on marriage as stipulated in Articles 8, 9, and 10 regarding the prohibition of marriages between two people because of blood relationship, marriage, and religion should not be violated.
- f. Not being divorced for the second time with a husband or wife to be married
- g. The permission of parents is needed for those that have not reached the age of 21 years as long as the law of each religion does not specify otherwise.

The formal requirements are as follows:

- a. Notification of the marriage registrar on the intention to get married.
- b. Announcement by the marriage registrar.
- c. The implementation of marriage according to the respective religious laws and beliefs of the concerned parties.
- d. Marriage registration by the marriage registrar.

Marriage in Indonesia is influenced by several regulations including Law No. 1 of 1974 concerning Marriage, Civil Code, Islamic law, and customary law ([Ahmadi Miru, 2014](#)). Religion also plays an important role in the social life of the people and this is expressly stated in the ideology of the Indonesian nation, Pancasila. The 1945 Constitution also states that “each citizen is given the freedom to choose and carry out their beliefs and the freedom of worship is also guaranteed according to religion and beliefs.” The freedom to practice a religion is also supported by the Presidential Decree No. 1 of 1965 concerning the Prevention of Abuse and/or Blasphemy of Religion. However, only six religions are officially recognized in the country and these include Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.

The validity of marriage according to Law Number 1 of 1974 is, therefore, measured by the provisions of the laws made by these religions as well as the beliefs of each person partaking in the marriage. This means marriage is legal as long as it fulfills all the requirements and pillars of religious laws and beliefs. Therefore, experts agreed that marriage registration is only an administrative act and not a valid determinant of marriage.

Marriage registration arrangements have, however, been stated in Law No. 22 of 1946 concerning Marriage Registration and Divorce Referral which applies to Muslims. This law was announced on November 21, 1946 and Article 1 Paragraph (1) states that “marriages carried out according to Islam, hereinafter referred to as marriages, are supervised by Marriage Registrar Employees appointed by the Minister of Religion or by designated employees”. Moreover, Paragraph (2) determines the right person to exercise supervision over marriage and receive notification of divorce and referral to include only employees appointed by the Minister of Religion or other designated employees ([Neng Djubaidah, 2012: 210](#)). Meanwhile, the responsibilities of the Registrar is determined in Article 2 Paragraph (1) as follows:

*“The marriage registrar and person referred to in Paragraph (3) of Article 1 takes record of all marriages performed under his supervision and divorce and reconciliation notifications sent to him. The records intended in Article 1 are kept in their respective registration books, which are deliberately held for matters that may arise, and their examples are each determined by the Minister of Religion”.*

It is important to reiterate that the marriage conducted according to the law of each religion based on Article 2 Paragraph (1) of the Marriage Law is legal and it is impossible for an “important event” to annul a legal event as further specified in Paragraph (2) that “Each marriage shall be registered according to the laws and regulations in force”.

The provision of Paragraph 2 was used by Neng Djubaidah to emphasize the legality of the marriage performed according to Islamic law for Muslims and the fact that registration is only a mere administrative obligation. Bagir Manan also stated that the principle of legality underlying the enactment of the Marriage Law in Indonesia needs to be prioritized in discussing the issues of marriage among Muslims. This scholar argued that a legal act implies the legal relationship and legal consequences are valid and this means the properties owned and children born by legally married husband and wife are valid. Furthermore, Bagir Manan stressed that a legal marriage is a marriage that meets the provisions of Article 2, Paragraph (1) of Law Number 1 of 1974 while the registration mandated in Paragraph is not an equal qualification, and this means a legal marriage cannot be annulled by non-registration.

Kaharuddin provided another perspective that the legality of marriage should not be merely understood based on the administrative context but focus needs to be placed on its binding normative legal value ([Kaharuddin, 2015: 147](#)). This affects Article 2, Paragraph (2) by indicating that the strength of legal evidence is formal and binding on the authorities. Therefore, a marriage without legal force cannot get the appropriate legal protection and services as well as recognition from authorized agencies. It is impossible for the couple to be listed in the population register, obtain a birth certificate, and others. This means unregistered marriages have disadvantages and this led to the formulation of provisions in the law to conduct the joining activities in the presence of officials and register the marriage for the purpose of legal certainty and other benefits.

Neng Djubaidah clearly explained the two possibilities associated with unregistered marriage. The first is the absence of deliberate intention not to register while the second is a calculated attempt not to register due to the bad intentions of those involved which is known as siri marriages. Siri marriage refers to when a man marries a woman without a guardian and witnesses and keeps it a secret. This type is conducted without satisfying all the elements of the legality of marriage, thereby, leading to the decision not to regist.

Marriage registration has caused great controversy in Indonesia with the implementation observed to have caused complex problems associated with inadequate facilities and infrastructure needed for the process ([Riduan syahrani](#)).

[2006: 83](#)). Moreover, marriage registration institutions do not exist outside Java Island, especially in remote areas. Therefore, it is unfair to use the process to determine the validity of a marriage.

Unregistered marriage is one of the legal acts not favored by the law due to the fact that it was tagged illegal according to the history of marriage law ([Jaih Mubarok, 2015: 63](#)). However, Article 5, Paragraph 1 of KHI implicitly shows that marriage registration is not a legal condition but rather a tool to create marital order and this led to the proposition of isbat for unregistered marriages. This simply shows that unregistered marriages are legal but imperfect and the imperfection is presented in the provisions of Article 7, Paragraph 3 of KHI.

It is, therefore, recommended that the state registers unregistered marriages conducted after meeting the requirements of Islamic religion and confirming that the non-registration is unintentional. Moreover, the decisions of religious court judges on marriage isbat which is considered to have been conducted according to Islamic law also validates the marriage. According to Judge Thamrin, marriage isbat indicates all the consequences of marriage before being registered are valid due to the fact that this system was basically implemented to strengthen a marriage conducted in the past.

This means registering unregistered marriages is a solution to achieve justice in accordance with the principles stated by Aristotle. Justice for all also has implications in marriages, therefore, the state needs to provide a sense of justice for unregistered marriages. Moreover, the validity of unregistered marriages has become a consideration in the decision to get married and this means judges need to grant marriage isbat on the basis of justice to serve as a progressive step towards validating the previous benefits of the marriage before the isbat.

#### **D. Conclusion**

An unregistered marriage is a legal marriage which fulfills the requirements determined by religion. The registration process is, however, required to ensure legal order and certainty by the state as stated in the constitution. Moreover, an agreement on properties made in unregistered marriage is valid as long as it is made voluntarily by the parties involved and fulfills the required elements. These agreements can be recognized through the submission of isbat (marriage authorization) which recognizes and stipulates all activities conducted in the marriage before the isbat.

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