

Legal certainty for native-faith follower regarding marriage registration after the issuance of constitutional court decision no. 97/PUU-XIV/2016

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Abstract

A marriage is legitimate if it has been performed according to the laws of the respective religions and beliefs of the parties concerned, and is registered. Marriage registration will result in legal consequences for the husband and wife. Unregistered marriage will not hold legal consequences. Marriage registration for Native-faith follower seems to be difficult due to the absence of Religion column in Identity Card (KTP) and Family Card (KK). The present study discussed the marriage registration for Native-faith follower before and after the issuance of Constitutional Court decree no. 97/PUU-XIV/2016. This study aimed to understand the marriage registration for Native-faith follower before and after the issuance of Constitutional Court decree no. 97/PUU-XIV/2016, as well as its legal certainty. This study was classified into normative legal study, the data that were collected were secondary data, gained from literature review. By Constitutional Court no. 97/PUU-XIV/2016, which is followed up by Government Regulation no. 40 of 2019, the Native-faith follower has gained their legal certainty on marriage registration. Before the issuance of Government Regulation no. 40 of 2019, the Native-faith follower's marriage cannot be registered due to the absence of religion column in KTP and KK. Accordingly, their marriage does not result in legal consequence and legally invalid. After the issuance of Government Regulation no. 40 of 2019, they could have their marriage registered so that the marriage is legally valid and may result in legal consequence.

Keywords: legal certainty, native-faith follower, marriage registration

1. Introduction

It is natural for every individual to have a family and offspring. To have a family is every individual's right, which should be protected by government and society. This is regulated in article 28B paragraph (1) of the 1945 Constitution. It reads: "Each person has the right to establish a family and to generate offspring through a lawful marriage."

There is no family unless there is a marriage that conforms with religion and prevailing regulation. Marriage legalizes the relationship between a man and a woman. Legitimate marriage results in a noble relationship between a man and a woman^[1].

Marriage is a glorious covenant made between a man and a woman to establish a happy and prosper family. Marriage is a holy agreement between a man and a woman^[2].

In Indonesia, positive law pertaining to marriage is Act no. 1 of 1974, for Muslim people, they also adhere to Islamic law compilation as the president instructs in Presidential Instruction no. 1 of 1991.

Article 1 of Act no. 1 of 1974 defines marriage as physical and psychological bond between a man and a woman as a husband and wife by the aim of establishing a prosperous and eternal family based on the one supreme god. Marriage holds a certain procedure and requirement, which may vary

in every region. This procedure and requirement should be met^[3].

Marriage should be performed under prevailing regulation. Article 2 paragraph (1) and paragraph (2) of Act no. 1 of 1974 reads:

1. A marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned;
2. Every marriage shall be registered according to the regulations of the legislation in force.

Elucidation of Article 2 paragraph (1) and paragraph (1) of Act no. 1 of 1974 states that

No marriage is performed outside the religious and belief law of each party, referring to the 1945 Constitution. Religious and belief law here includes the prevailing regulation for the follower of that religion and belief, as long as it is not stipulated otherwise in this law.

According to article 4 of Islamic Law Compilation, "Marriage is legitimate if it is performed according to Islamic law and article 2 paragraph (1) of Act no. 1 of 1974 on Marriage".

According to article 2 of Act no 1 of 1974 and article 4 of Islamic law compilation, the national legal foundation of marriage is as follow^[4].

1. It is performed according to religious law, and
2. It is registered according to prevailing regulation

¹ Ahmad Azhari Basyir, *Hukum Perkawinan Islam*, UII Press, Yogyakarta, 1999, pp. 1.

² R. Soetjo Prawirohamidjojo and Marthalena Pohan, *Hukum Orang dan Keluarga*, Airlangga University Press, Surabaya, 1996, pp. 30.

³ Mohd. Idris Ramulyo, *Hukum Perkawinan Indonesia*, Budi Aksara, Jakarta, 1996, pp. 5.

⁴ *Ibid.*

Besides following religious law and belief, marriage should be registered. Marriage registration aims to maintain marriage administration order. This registration acts as preventive attempts when a conflict occurs in marriage. Marriage registration is pivotal, particularly to gain rights for husband and wife when unexpected condition emerges. These rights include inheritance for the wife when the husband deceased, livelihood for children, and marital property, among others.

Following article 2 paragraph (1) and (2) of Government Regulation no. 9 of 1975 on the Implementation of Act no. 1 of 1974,

1. Marriage registration for those who perform it according to Islamic law is done by the Officer as stated by Act no 32 of 1954 on Marriage, Divorce, and Reconciliation Recording;
2. Marriage registration for those who perform marriage according to religion and belief other than Islam, the marriage should be registered in civil registry office.

Once the registration is done, the spouse will get a marriage certificate. In article 7 paragraph (1) of Islamic Law Compilation, it is stated that: "Marriage can only be proven by marriage certificate issued by the officer.

Marriage registration is not a constitutive element that leads to marriage legality. It is an element of administrative declaration, evidence stating that the man and woman are truly a husband and wife^[5].

Marriage certificate, as a proof of marriage, will provide a clear status for the spouse and their children as well as its legal consequences.

Legitimate marriage results in legal consequences such as legitimate child, husband's obligation to provide a livelihood for his family, rights to inherit, rights to be marriage guardian, among others^[6].

Unregistered marriage brings no legal consequences since it is difficult to be proven, unless all parties concerning such marriage live forever^[7].

This kind of marriage occurs among Native-faith followers. Their marriage is not registered. Following the Indonesian dictionary, native-faith refers to a belief that believes to one supreme god, yet it is not categorized as one of the religions officially recognized by the government^[8].

One of these beliefs is people of Samin Sedulur Sikep in Kudus Regency, before the issuance of Constitutional Court Decision no.97/PUU-XIV/2016, the government does not officially recognize their existence. They experienced discrimination in terms of public service they supposed to receive, particularly marriage registration. Before the decision is issued, they found it difficult to register their marriage. They found it difficult to meet the stipulation of article 2 paragraph (1) and (2) of Act no. 1 of 1974. It supposes to be done based on Article 2 paragraph (2) of Government Regulation no. 9 of 1975, i.e. registered in

Civil Registry Office, however, the fact shows that it could not be done.

The absence of religion column in their ID card leads to problems, especially regarding public service in a government institution, such as marriage registration, among others. Native-faith follower found it difficult to register the marriage which they perform in accordance with their tradition. This difficult arises since the government had not facilitated marriage registration for them due to problem of religion column in their ID card and Family Card (KK).

For the Native-faith follower, religion column in their ID card was emptied or is filled using one of the officially recognized religion, which disturbs their conscience, of course. Since the government did not facilitate their right, the Native-faith followers, including people of Samin Sedulur Sikep, filed a claim regarding the empty space in religion column in ID card and Family Card in Act no. 23 of 2006. After the issuance of Constitutional Court Decision no. 97/ PUU-XIV/2016, their marriage finally can be registered.

2. Research Method

This legal study employed normative approach. Normative legal study focuses on studying the implementation of principles or norms of positive law^[9]. The data that were collected in the present study were categorized as secondary data. Secondary data refers to the data obtained from literature review. Literature review refers to study on written information regarding law that comes from various sources as required to conduct a normative legal study such as regulatory legislation, books, magazine, article, newspaper, bulleting that is relevant with the object of the study^[10].

3. Result and Discussion

3.1 Before the issuance of Constitutional Court Decision no. 97/ PUU-XIV/2016

Marriage performed by Indonesian citizens, including the Native-faith follower, is considered legitimate when it is performed according to religious law and belief. This condition is based on Article 2 paragraph (1) of Act no. 1 of 1974. This registration is carried out by the Marriage registrar.

Marriage registration is as the same as other registration such as birth and death, which is stated in a particular official certificate^[11].

This registration is done for the purpose of legal certainty. Accordingly, marriage and its concerning matters that happen before Act no. 1 of 1974 prevails, which is performed according to the prior regulation, is considered legitimate^[12].

Before the issuance of Constitutional Court Decision no. 97/ PUU-XIV/2016, the marriage performed by Native-faith followers cannot be registered.

For Samin people, marriage acts as one of the matters to extend their brotherhood. The marriage procedure of Samin people is different from general Javanese marriage

⁵ Sulaikin Lubis *et al.*, *Hukum Acara Perdata Peradilan Agama Di Indonesia*, Kencana, Jakarta, 2005, pp. 14.

⁶ Mohd. Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis Undang-Undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*, Bumi Aksara, Jakarta, 1999, pp. 248.

⁷ Mohd. Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Per-adilan Agama dan Zakat Menurut Hukum Islam*, Cetakan Keempat, Sinar Grafika, Jakarta, 2006, pp. 23.

⁸ Djaja S. Meliala, *Perkawinan Beda Agama dan Penghayat Kepercayaan Di Indonesia Pasca Putusan Mahkamah Konstitusi*, Cetakan Pertama, Nuansa Aulia, Bandung, 2015, pp. 8.

⁹ Jhonny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia, Malang, 2011, pp. 295.

¹⁰ Sanapiah Faisal, *Penelitian Kualitatif: Dasar-Dasar dan Aplikasi*, YA3, Malang, 1990, pp. 39.

¹¹ Sajuti Thalib, *Hukum Kekeluargaan Indonesia*, UI Press, Jakarta, 1974, pp. 75.

¹² Hazairin, *Tinjauan Undang-Undang Perkawinan Nomor 1 Tahun 1974*, Tintamas, Jakarta, 1975, pp. 38.

procedure. Samin people are married before their parents and are witnessed by Samin elders. They do not need to be legitimized by The Religious Affairs Office (KUA). In general, the marriage procedure of Samin people are as follows^[13].

- A. If a man intends to marry a Samin woman, the man's parent should come to the woman's parents' house and explicitly state their intention (*nembung*). In this *nembung*, the man's parents ask the woman's parents if their daughter is still *legan* (single). If their daughter is still single, the man's parents will state that they intend to propose their daughter. In this phase, there is a discussion, or known as *gunem*.
- B. After the man's and woman's parents agree, the man is allowed to *nyuwita* in the woman's house. In this *nyuwita* process, the man helps his parents-in-law's work. Besides, according to Samin culture, the man and woman are allowed to live together as a husband and wife. In this *nyuwita* process, when the man and woman find harmony, the man says to the woman's parents "*turun sampeyan asli wedok lan wis ngerti gawene*" (your daughter is truly a woman, and I have married her). Otherwise, if they cannot find harmony and do not have a husband-wife relationship, the marriage is annulled. Thus, when the man and the woman have found harmony, the marriage proceeds and discussed.
- C. The next phase is called *diseksekna*, this is a marriage ceremony witnessed by man's and woman's family, and the invited guest, i.e. Samin people. This ceremony is usually performed modestly.

To date, Samin people still adhere to this marriage tradition. However, Samin marriage procedure is not finished in that ceremony. There is an attempt made by the government (in this case is Village Chief or *Kamituwa*) to legitimize Samin marriage before the marriage registrar. Thus, the marriage of Samin people is begun with traditional marriage process^[14].

This attempt is made because, without registration, a marriage will not hold legal strength. The consequence that will emerge is that when one of the spouses fails to perform his/her obligation, his/her spouse cannot make any legal attempt due to the absence of legitimate and authentic marriage evidence. This condition, of course, contradicts the mission and purpose of marriage.

Marriage certificate acts as authentic evidence of a marriage. This certificate provides a legal guarantee when one of the spouses deviates. For instance, when a husband fails to provide his family where he actually is capable of doing it, or a husband violates the stipulation of *taklik talak* he has read, his wife may sue him to the court. Besides, marriage certificate also functions to prove the legitimacy of their children. Accordingly, legal attempts cannot be made without a marriage certificate^[15].

Marriage registration is pivotal. It acts as valid evidence of marriage. Article 34 of Act no. 23 of 2006 on Civil Administration, in conjunction with Act no. 24 of 2013 on amendment to Act no. 23 of 2006 on Civil Administration reads:

1. Marriage that is legitimate under regulation should be

reported by the citizen to the institution where the marriage occurs no more than 60 (sixty) days since the event occurs.

2. Based on the report meant in paragraph (1) Civil Registrar write it in Marriage Certificate Register and Issue a Marriage Certificate Excerpt;
3. Marriage Certificate Excerpt as meant in paragraph (2) is given to the husband and wife;
4. The report, as meant in paragraph (1) is done by the Religious Affairs Office (KUA) for Islam follower.
5. The data of registration as meant in paragraph (4) and Article 8 paragraph (2) should be reported by KUA to the concerning Institution no more than 10 (ten) days after the marriage registration is made;
6. The data of the recording as meant in paragraph (5) does not require the issuance of the excerpt of Civil Registry Certificate;
7. In district level, the record as meant in paragraph (1) is made by the local technical unit (UPTD).

However, the absence of religion column in their ID card complicates the Native-faith followers to access public service in government institutions, such as marriage registration.

3.2 Marriage Registration After the issuance of Constitutional Court Decision no. 97/ PUU-XIV/2016 and Its Legal Certainty

Unregistered marriage is different from *perkawinan siri* (secret wedding). Unregistered marriage refers to a marriage that satisfies the requirement of Islamic law, yet is not registered, or has not been registered in District Religious Affairs Office (for Islam people) and Civil Registry Office (for non-Islam people), as regulated by Act no. 23 of 2006 on Civil Administration^[16].

The term unregistered is different from unrecorded. Unregistered marriage means that the marriage has no intention not to register the marriage whereas unrecorded marriage means that there is an intention not to register the marriage. Neng Djubaidah distinguishes unregistered marriage from unrecorded marriage^[17].

Unregistered marriage is different from secret marriage (*perkawinan siri*) since it meets the requirement of Islamic law. According to Marriage law in Indonesia, A marriage is lawful if it meets the Islamic law. Unregistered marriage is legitimate according to the regulation since it is in accordance with Islamic Marriage law prevailing in Indonesia based on article 2 paragraph (1) of Act no. 1 of 1974^[18].

Unregistered marriage is different from secret wedding since it meets the requirement of Article 2 paragraph (1) of Act no. 1 of 1974, yet it has not been recorded according to article 2 paragraph (2) of Act no. 1 of 1974.

According to Bagir Manan, former chief of Supreme Court of the Republic of Indonesia, to understand the legal status of Islam people in Indonesia, one should understand the legality principle underlying the marriage law for Islam people in Indonesia. Legality principle means that every legal act should possess certain legal basis before the act is

¹³ Hari Bakti Mardikantoro, *Samín, Kajian Sosiolinguistik Bahasa Persaudaraan dan Perlawanan*, Forum, Yogyakarta, 2017, pp. 264-266.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, pp. 29.

¹⁶ Neng Djubaidah, *Pencatatan Perkawinan & Perkawinan Tidak Dicatat, Menurut Hukum Tertulis Di Indonesia dan Hukum Islam*, Edisi Kesatu, Cetakan Pertama, Sinar Grafika, Jakarta, 2010, pp. 153.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, pp. 153 and 154.

done^[19].

A lawful act, according to Bagir Manan, means that legal association and legal consequence becomes legitimate. With regard to marriage, a legitimate marriage between a man and woman results in legal consequences such as family relationship, marriage prohibition, marital property, and children who were born due to the marriage^[20].

Further, Bagir Manan state that lawful marriage is a marriage that is performed in accordance with article 2 paragraph (1) of Act no. 1 of 1974 i.e., conforms with religious law, which results in legitimate legal consequences. With regard to marriage recording, Article 2 paragraph 2 of Law no. 1 of 1974 does not exhibit a significant qualification on the legality of religious marriage. Accordingly, it can annul one another. Bagir Manan states differently. He argues that marriage that is performed under religious law is the one and only requirement of legitimate marriage. His opinion is based on the following reasons^[21].

- a. Article 2 paragraph (1) firmly stated that marriage is legitimate if it is performed under the religious law and belief of each party. This statement has a plain meaning that prevents interpretation, reduction, or addition.
- b. Elucidation of article 2 paragraph (2) states that: "Recording of each marriage is as the same as other recordings of important events such as birth and death."

Following the elucidation of article 2 paragraph 2 of Act no 1 of 1974, the recording of birth, death, and marriage is merely an important event, not a legal event. Eruption and Tsunami are important events, yet they are not a legal event. Wedding party is an important event, yet it is not a legal event. So as marriage registration according to Act no. 1 of 1974, marriage as legal event is determined by religion. Accordingly, marriage registration does not necessarily and will not result in a legal consequence, or even overrules the legitimacy of marriage that is performed in accordance with the religious law^[22].

Unregistered marriage, although it is legitimate, may result in many weaknesses and disadvantages. One of the disadvantages may be experienced by the daughter when her parents divorced. Whereas for the mother, she does not have any powerful legal evidence. Besides, the children who need ID card or other documents will find difficulties when their parents do not have legal documents. "Unregistered marriage results in negative effects for the husband, the wife, and their children, such as^[23].

- a. For the wife, unregistered marriage disadvantages the wife in general, both from legal and social perspective. From legal perspective, the wife is not considered a lawful wife. Accordingly she does not hold any right to husband's livelihood and inheritance. With regard to divorce, the wife does not hold any right on the property since marriage is considered never occurs. From social perspective, the wife will find it difficult to socialize since she often negatively viewed, she is often viewed as a kept woman.

- b. For men, unregistered marriage does not result in significant disadvantages. This marriage advantages him since he is free to remarry since his previous unregistered marriage is never considered legally exist. He is free to ignore his obligation.
- c. For their children, unregistered marriage adversely affects them.
 - i) Their status is not legitimate. Consequently, they only hold a civil relationship with their mother and the mother's family. In other words, the children do not have a legal relationship with their father (article 42 and 43 of Marriage law, Article 100 of Islamic Law Compilation). Regarding their birth certificate, only their mother's name is listed.
 - ii) Another adverse effect is the obscurity of their legal status, leading to weak father-child relationship. In the future, the father can deny that he is their father.
 - iii) This, of course, disadvantages the children, they do not have any right upon livelihood, education, and inheritance from their father. Thus, the legal status of unregistered marriage is unprotected.

Marriage registration is pivotal for the purpose of legal certainty of each party. Van Apeldoorn explains that legal certainty holds two sides, namely^[24].

- a) Ability to determine legal status of concrete matters. In other words, the justice seekers intend to find out the law before they litigate.
- b) From legal security perspective, it means a protection for the party against arbitrariness. Thus, legal certainty means that regulation should be clear and protect the litigating parties.

Hans Kelsen states that legal certainty lies on the principle of imputation, meaning that legal certainty due to legal norms that have been formulated in law determines the sanction for the violation^[25].

Jan Michael Otto lists legal certainty in material perspective. It covers^[26].

- a) The availability of clear, consistent, and accessible regulation, which is issued and recognized by state's authority.
- b) Government's institution implements the regulation consistently and adhere to it.
- c) In principle, the citizen adjusts their behavior to the regulation.
- d) The judges are independent, they consistently implement the law when settling a dispute, and
- e) the court ruling is concretely carried out.

Constitutional Court Decision no. 97/PUU-XIV/2016 states that article 61 paragraph (2) and Article 64 paragraph (1) of Act no. 23 of 2006 on Civil Administration, as amended to Act no. 24 of 2013 on the amendment to Act no. 23 of 2006 on Civil Administration contradicts the 1945 Constitution and does not hold binding legal force.

Based on the Constitutional Court Decision no. 97/PUU-XIV/ 2016, the act of ignoring the existence of Native-faith followers and not registering them in civil administration are discrimination. The right to follow a religion or belief on

¹⁹ *Ibid.*, pp. 157.

²⁰ *Ibid.*

²¹ *Ibid.*, pp. 157 and 158.

²² *Ibid.*

²³ Oyoh Bariah. December 2014-February 2015. *Rekonstruksi Pencatatan Perkawinan Dalam Hukum Islam*, Jurnal Ilmiah Solusi, Vol. 1 No. 4, pp. 27.

²⁴ I Dewa Gede Atmadja dan I Nyoman Putu Budiarta, *Teori-Teori Hukum*, Cetakan Pertama, Setara Press, Malang, 2018, pp. 205.

²⁵ *Ibid.*

²⁶ *Ibid.* pp. 206.

One Supreme God is the constitutional right of every citizen. As a state of law that is based on democracy, the state is obliged to protect its 'citizen's right that leads to legal certainty and equity.

Based on the Constitutional Court Decision no. 97/PUU-XIV/2016, the Native-faith follower can write down their belief in their ID and Family Card, this becomes the basis for accessing public service, in this case, is marriage registration in Civil Registry Office.

As the follow up on Constitutional Court Decision no. 97/PUU-XIV/2016, the government issued Governmental Regulation no. 40 of 2019 concerning the Implementation of Act no. 24 of 2013 on the amendment of Act no.23 of 2006 on Civil Administration. Article 40 of Chapter VI of Government Regulation no. 40 of 2019 states that

1. The marriage registration for the believer of one supreme god should be performed in Civil Registry Office of Regency/City no more than 60 (sixty) days after the marriage is performed before the elder of the believer of one supreme god.
2. The marriage registration for the believer of one supreme god as meant in paragraph (1) is done under the following provision:
 - a) The official of Regency/ Municipal Civil Registry Office gives marriage registration form to the spouse.
 - b) The spouse should fill in the marriage registration form and submit the form to the Civil Registry Office by showing their ID card and attaching the required document:
 - i) Original Marriage Statement of believer of One Supreme God;
 - ii) Photograph of husband and wife;
 - iii) Birth Certificate; and
 - iv) Husband's and/or wife's passport for foreigners.
 - c) The Civil Registry Office verifies and validates the data stated in the form and the attached document;
 - d) Based on the validation and verification meant in point c, the civil registry office record the marriage in the marriage certificate register and issues excerpt of marriage certificate; and
 - e) Marriage Certificate Excerpt as meant in paragraph (2) is given to the husband and wife.

Thus, the issuance of Government Regulation no. 40 of 2019 facilitates the Native-faith follower to gain public services related to their traditional marriage.

Marriage registration is performed to provide an authentic certificate that acts as an absolute evidence. Accordingly, the state's protection and service, including the rights arising from marriage, can be organized effectively. In other words, by having authentic marriage evidence, the rights that arise as a consequence of marriage can be properly protected and served^[27].

The function and the standing of marriage registration, according to Bagir Manan, are to maintain legal order, which acts as the instrument of legal certainty, legal ease, in

²⁷ Erlina, *Access To Justice 'Anak Di Luar Perkawinan' (Analisis Putusan Mahkamah Konstitusi Nomor : 46/PUU-VIII/ 2010 Tentang Pengujian Pencatatan Perkawinan Dan Status Hukum Anak Yang Dilahirkan Dari Perkawinan Yang Tidak Tercatat Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan)* in Constitutional Court of the Republic of Indonesia, *Jurnal Konstitusi*, Vol. 1 No. 1, Pusat Studi Hukum dan Konstitusi Universitas Islam Indonesia dan Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, Jakarta, November 2012, pp. 42.

addition to marriage evidence^[28].

Constitutional Court Decision no. 97/PUU-XIV/2016 and Government Regulation no. 40 of 2019 have provided legal certainty for the Native-faith follower to access public services. These regulations also Bring legal consequence for the organizer of public service, particularly the Civil Registry Office.

Before the issuance of Government Regulation no. 40 of 2019, the Native-faith follower's marriage cannot be registered due to the absence of religion column in KTP and KK. Accordingly, their marriage does not result in legal consequence and legally invalid. After the issuance of Government Regulation no. 40 of 2019, they could have their marriage registered so that the marriage is legally valid and may result in legal consequence.

4. Conclusion

1. Before the issuance of Constitutional Court Decision no. Native-faith followers find it difficult to register their marriage due to the absence of religion column in their ID card, this complicates them to access public service in government institutions, such as marriage registration.
2. After the issuance of Constitutional Court Decision no. 97/PUU-XIV/2016, they can register their marriage by writing their belief in ID card and Family Card. As the follow up on Constitutional Court Decision no. 97/PUU-XIV/2016, the government issues Government Regulation no. 40 of 2019. This issuance acts as the form of legal certainty regarding marriage registration for Native-faith follower.

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²⁸ Neng Djubaidah, *op.cit.*, pp. 159.

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