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Potential for Trademark Rights Violation in the Context of Inclusive Law on Unregistered Marks

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Abstract
This research aims to analyze the legal construction of unregistered brands and the conflicts that arise from an inclusive legal perspective. The research method used is normative legal research with a dogmatic legal approach. The research results show that the Indonesian legal framework for trademarks, both registered and unregistered, has experienced significant developments to protect intellectual property in a dynamic market. In addition, Indonesia emphasizes an inclusive legal approach that considers the interests of all parties, including indigenous communities through consultation, customary agreements, mediation, education, and supervision. This approach aims to achieve a fair balance between trademark protection and cultural rights, promoting legal justice in the country. The country's commitment to inclusive brand protection, covers both registered and unregistered brands, with a focus on maintaining a balance between the interests of brand owners, consumers, and indigenous communities to ensure a fair and balanced legal environment in a dynamic market.

Keywords: Trademark Protection; Trademark Registration; Inclusive Law.

Abstrak
Penelitian ini bertujuan untuk menganalisis konstruksi hukum merek tidak terdaftar dan konflik yang muncul dalam perspektif hukum inklusif. Metode penelitian yang digunakan adalah penelitian hukum normatif dengan pendekatan hukum dogmatik. Hasil penelitian menunjukkan bahwa kerangka hukum Indonesia untuk merek dagang, baik yang terdaftar maupun yang tidak terdaftar, telah mengalami perkembangan signifikan untuk melindungi kekayaan intelektual dalam pasar yang dinamis. Selain itu, Indonesia menekankan pendekatan hukum inklusif yang mempertimbangkan kepentingan semua pihak, termasuk masyarakat adat dengan melalui konsultasi, perjanjian adat, mediasi, edukasi, dan pengawasan. Pendekatan ini bertujuan untuk mencapai keseimbangan yang adil antara perlindungan merek dagang dan hak budaya, mempromosikan keadilan hukum di negara ini. Komitmen negara terhadap perlindungan merek yang inklusif, mencakup baik merek yang terdaftar maupun yang tidak terdaftar, dengan fokus pada menjaga keseimbangan antara kepentingan pemilik merek, konsumen, dan komunitas adat untuk memastikan lingkungan hukum yang adil dan seimbang di pasar yang dinamis.

Kata kunci: *Perlindungan Merek, Pendaftaran Merek, Hukum Inklusif.*

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Introduction

A brand is not only a visual identity for a product or service but also reflects quality, reputation, and certain associations in the minds of consumers (Fauzan et

al., 2023). Legitimate and protected brand rights are valuable assets for owners, enabling them to build image, reputation and customer loyalty (Rizkia & Fardiansyah, 2022). Therefore, legal protection of marks is essential for brand owners to prevent potential rights violations and unauthorized use that can harm the brand owner. Registered marks have clear legal protection in accordance with laws and regulations governing trademark rights. In Indonesia, Law Number 20 of 2016 concerning Trademarks and Geographical Indications comprehensively regulates registered and unregistered marks. (Wirayuda et al., 2020).

The provisions in the Business Competition Law and related regulations also influence the dynamics of brand protection in the context of healthy business competition. Article 1 of this law defines a brand as a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, combination of these elements, and sound, which is used to differentiate goods and services in trading activities of goods and services. Meanwhile, this law also recognizes protection for brands officially registered with the Directorate General of Intellectual Property (Hage, 2021). However, the reality of practice shows that unregistered brands also frequently appear on the market. These marks can be a source of potential trademark infringement against the rightful trademark owner, causing complex legal conflicts. Unregistered marks can create complex situations where brand owners do not have the same strong protection as officially registered marks. Therefore, it is essential to understand the legal construction relating to unregistered marks in an inclusive legal context. Inclusive law refers to an approach that considers various aspects, including the rights of legal brand owners, consumer rights, public policy, and other social and economic factors.

Similar research has been carried out. The first is by (Prameswari et al., 2021),. The research used a normative legal research approach that focused on legal norms as its research focus. This research concluded that violations of trademark rights can be classified as unfair competition, especially when imitating a brand that includes the use of a logo similar to a well-known brand, which ultimately harms consumers and trademark owners. In a legal context, such actions can result in legal sanctions. According to Article 382 bis of the Criminal Code, businesses that market trademarks without permission can be subject to sanctions, including a maximum prison sentence of 1 year and a fine of up to IDR 900,000,000.00.

The second research (Sanjaya & Rudy, 2018), which used a normative research method. The importance of protecting well-known trademarks is emphasized in this study. Well-known trademarks are protected through two approaches, namely legal prevention measures and legal enforcement measures. In Indonesia, legal protection for well-known trademarks is regulated by Law Number 20 of 2016 concerning Trademarks and Geographical Indications. The legal consequences for trademark infringement are that individuals can be prosecuted for violating the law

by using a trademark without permission or approval from the registered trademark owner. Then, the last one is research (Anggraeni & Listiawati, 2023) ; using a normative legal approach and qualitative analysis, this research validates previous findings that the mechanism of beneficial sharing has been an effort by the government to protect Genetic Resources and Traditional Knowledge (GR&TK) from misuse. However, this study identifies new developments that support the enhancement and refinement of this mechanism. Acknowledging that these steps are still insufficient to meet international best practice standards.

The research also reveals that there are still patents granted in Indonesia without involving benefit-sharing due to variations in the interpretation and application of the Patent Law that do not align with international practices. This research shares similarities and innovations with previous studies in law and trademarks. Similar to the study conducted by Prameswari et al. (2021), a normative legal research approach is used in both studies, focusing on legal norms as the core of the analysis. Both studies also examine trademark infringements, identifying unfair competition practices, including harmful trademark imitation that harms consumers and trademark owners. Additionally, they describe the legal consequences that can be applied to businesses that violate trademark rights.

However, this research also introduces significant innovations. Unlike previous research, this study explores legal issues in the context of inclusive trademark law for unregistered marks. The unregistered trademark issues suggests considering inclusive aspects in trademark protection under the law. Furthermore, this research highlights that the mechanism of beneficial sharing has become a step taken by the government to protect Genetic Resources and Traditional Knowledge (GR&TK). This novelty underscores the importance of enhancing and refining this mechanism to meet higher international best practice standards. The research also notes variations in the interpretation and application of patent law in Indonesia that do not align with international practices, proposing adding of disclosure requirements in the Patent Law regulations as a step towards harmonization and consistency in international practices and regulations.

This research will explore the legal problems regarding unregistered marks and potential violations of trademark rights from an inclusive legal perspective. Inclusive law here refers to a legal approach that considers various aspects, such as the rights of indigenous peoples, consumer rights, and public interests in the context of brands. This approach aligns with the spirit of law in Indonesia, which is increasingly leading to comprehensive and just protection. Concerning potential violations of trademark rights, laws and regulations such as the 2016 Trademark Law and Law Number 8 of 1999 concerning Consumer Protection (Consumer Law 1999) will be the focus of analysis.

Through this research, a deeper understanding of legal challenges to unregistered marks and potential brand rights violations in an inclusive legal context can be produced. It is hoped that the findings from this research can provide

a constructive contribution to developing a more inclusive and just brand legal system in Indonesia.

Research Problems

Based on the explanation of the background above, the questions in this study are: First, how can the construction of inclusive law affect the protection of unregistered marks and potential violations of trademark rights in Indonesia? Second, how can the conflict between the protection of unregistered marks and the rights of consumers and indigenous communities be resolved through an inclusive legal approach from an Indonesian legal perspective?

Research Methods

The research method used in this research is a normative legal research method. Normative legal research methods focus on analyse legal materials, such as laws, regulations, court decisions, and other legal documents (Muhaimin, 2020). The research approach that can be used is the dogmatic legal approach. This approach analyses legal regulations relating to unregistered marks and trademark rights infringement, and considers legal theories relating to these issues. Sources of research materials that can be used include laws and regulations related to marks and trademark rights, court decisions related to violations of trademark rights, and relevant legal literature such as books, journals and articles related to unregistered marks and trademark rights. Data collection techniques commonly used in normative legal research include literature studies, namely collecting research materials from relevant sources such as books, scientific journals, articles and relevant legal documents. A comparative approach can also be used to compare differences in trademark law in different countries or regions.

For data analysis techniques, in this study, a deductive approach was used. This analysis method involves collecting relevant legal data and then analyzing the data using a theoretical framework or applicable legal concepts. Using normative legal research methods, relevant data collection techniques, and appropriate analytical techniques, research can contribute to understanding and overcoming legal problems related to unregistered marks and potential violations of trademark rights from an inclusive legal perspective.

Discussion

Inclusive Legal Construction of Unregistered Marks and Potential Trademark Rights Violations in Indonesia

The Trademark Law No. 20 of 2016 clearly establishes that protected trademarks have been officially registered. Nevertheless, in reality, many trademarks continue to operate without formal registration. This can be a

significant issue, especially in situations where these trademarks have the potential to confuse consumers or harm the owners of registered trademarks. Furthermore, the development of technology and modern business trends bring new challenges in trademark monitoring. The digital era provides broader access for trademarks to operate, through online platforms and social media without formal registration. This opens the door to potential trademark infringement that difficult to monitor and address.

Understanding and awareness of public law regarding brand rights in the business world is essential. One example of this case is a dispute between a Geprek business and a similar brand, namely "Geprek Bensu". Two business people with different ownership use the brand. Lack of understanding and awareness of the law is an important aspect, giving rise to brand similarities as in the "Geprek Bensu" case (Anggraeni & Listiawati, 2023). Problems related to brands, for example, "Geprek Bensu", result in legal processes that tend to be lengthy and disrupt business processes and climate.

One of the efforts to understand and protect the law regarding brands is based on The construction of inclusive law in the context of trademark protection which can have a significant impact on the protection of unregistered marks and the potential for violations of trademark rights in Indonesia (Syafira, 2021). The principle of inclusiveness in trademark law will provide broader protection for various types of brands, including unregistered marks, which previously may have lacked adequate protection under more traditional laws. (Mirfa, 2016). One of the relevant laws and regulations is Law Number 20 of 2016 concerning Trademarks and Geographical Indications (Trademark Law). The Trademark Law is a significant legal regulation in Indonesia's brand protection context. In this Trademark Law, a concept of unregistered trademark protection is recognized through the definition of a mark listed in Article 1 number 1. A *mark* in this law is defined as a sign that can be presented graphically, such as an image, logo, name, word, letter, number, colour arrangements, combinations of these elements, sounds, or a combination. This definition focuses on the concept of "differentiating power", which shows the ability of the sign to differentiate products or services from one business actor from those of other business actors in trading activities. (Rifai, 2017).

Thus, the Trademark Law brings about significant changes by expanding the scope of trademark protection, not only applicable to marks that have been registered at the mark registration office but also to marks that are not registered. The introduction of unregistered trademark protection in the Indonesian Trademark Law reflects an evolution in understanding the protection of intellectual property rights, in which aspects such as identification, recognition and use of differentiating power are the focus of attention. This law recognizes the critical role of brand signs in trade, which not only impacts business actors but also consumers who rely on brands as indicators of the quality and origin of products or services (Balqis, 2021).

In addition, Article 3 of the Trademark Law has been embodied as a legal basis governing the exclusive rights of registered trademark owners. However, not only registered trademark owners are protected under this law (Gunawan, 2022). Other essential aspects protect unregistered marks, provided that the owner of the mark can prove continuous, and actual use in the scope of trade. With this inclusive legal approach, there is an opportunity for unregistered brand owners still to obtain legal protection against all forms of brand infringement. This shows that the law guarantees fair and balanced protection, not only to registered trademark holders but also to those who have consistently used their trademarks in trading activities. Thus, the opportunity to obtain legal protection against trademark infringement is not missed as long as it can be firmly demonstrated that the use of the trademark has continuity and relevance in the commercial realm. An inclusive approach to trademark monitoring provides a stronger foundation for more rigorous and comprehensive monitoring of trademark violations. This is mainly reflected in Chapter V of the Trademark Law, where the prohibition imposed on using signs that are identical or similar to a registered mark for identical or similar goods or services requires explicit permission from the mark owner (Sudjana, 2021).

However, in the context of an inclusive approach, the scope of supervision is not only limited to brands that have been officially registered but also to brands that do not have formal registration. With an inclusive approach, the authorities will carefully monitor signs or brands that have not been officially registered but have potential rights to protection (Hediati, 2020). Although they have not yet received official status, these brands may have a legal basis for protection as they develop and are used in commerce (Zamrodah, 2016). Therefore, closer scrutiny of these marks will help prevent unauthorized use and infringing brand rights. In other words, an inclusive approach to brand oversight will include more variables and aspects that must be considered in assessing whether a sign or mark infringes existing brand rights. This creates a framework more responsive to market dynamics and evolving brand usage trends (Xu et al., 2021). In addition, an inclusive approach also allows brand owners to be more proactive in securing their brand rights, even before the mark is officially registered, encouraging more substantial innovation and protection of brands that may have significant economic value in the future.

Protecting unregistered trademark rights is acknowledged in relevant regulations, including in CHAPTER XVIII, relating to Criminal Actions related to Trademark Rights Violations. This chapter stipulates that actions such as importing, offering for sale, selling, or possessing goods or services intending to be sold, which use counterfeit marks or signs resembling registered marks, can be subject to criminal sanctions. (Gultom, 2018). Through this, inclusive law plays a role in strengthening the protection of trademark rights that have not been registered by threatening trademark rights violations through the consequences of criminal penalties (Sanjaya & Rudy, 2018). Thus, this regulation not only protects registered

marks but also protects owners of unregistered marks from the potential distribution of goods or services with imitation or misleading marks. By introducing criminal sanctions, this step is expected to reduce incentives for brand rights violations and encourage respect for the rights of registered and unregistered brand owners to maintain market integrity and consumer trust in the products and services offered.

From a civil law perspective, the inclusive legal framework regarding unregistered trademarks and the potential infringement of trademark rights in Indonesia has undergone significant developments. According to the Trademark Law No. 20 of 2016, registered trademarks enjoy strong legal protection. However, the law also provides limited protection for unregistered trademarks through the "common law" principle, which recognizes trademark rights that have been continuously used and are well-known among the public. There is also a provision in Article 1365 of the Civil Code (KUHPerdata) stating that any action contrary to the law may be considered unlawful and may lead to claims for damages. Therefore, even if a trademark is not registered, its owner can still protect their rights and pursue legal action against those who infringe upon them. However, it is crucial for trademark owners to demonstrate that the trademark has been used effectively and has a strong presence in the market to receive protection under the "common law" principle. Thus, this inclusive legal framework creates a balance between the protection of registered trademarks and unregistered trademark rights to prevent trademark infringement in Indonesia.

Implementing inclusive legal constructs in the Trademark Law provides significant benefits, especially for owners of unregistered trademarks. Previously, these trademark owners often faced difficulties obtaining legal protection against trademark infringement. In this context, inclusive legal constructs open the door for trademark owners who may have trademarks without official registration but are still entitled to adequate legal protection. Through this approach, the protection for unregistered trademarks becomes stronger. This means that trademark owners who previously felt they lacked legal tools to safeguard their trademarks can now face potential trademark infringements with greater confidence. In this way, the inclusive legal constructs in the Trademark Law provide a more solid legal foundation for trademark owners.

However, the success of these legal constructs also heavily depends on proper implementation and monitoring. It is essential to continuously monitor legal developments and practices in the field to ensure these inclusive legal constructs are genuinely effective in safeguarding the rights of trademark owners. This means that the government, legal institutions, and stakeholders must work together to ensure that these regulations are applied consistently and fairly. By maintaining scrutiny of the effectiveness of these inclusive legal constructs, Indonesia can ensure that trademark owners, especially those with unregistered trademarks, can obtain legal

protection comparable to registered trademark owners. This will help create a more equitable and just legal environment for all trademark owners in the country.

The Inclusive Legal Approach in Indonesian Legal Perspective: Protection of Unregistered Marks

The conflict between unregistered brand protection and the rights of consumers and indigenous communities in Indonesia can be resolved through an inclusive legal approach that considers the interests of all parties involved. There are several relevant laws and regulations to address this conflict:

1. Trademark Law (Law No. 20 of 2016)

   Trademark Law (UU) no. 20 of 2016 provides a legal framework that regulates protection for registered trademark owners in Indonesia (Gunawan, 2022). However, in this context, this law also reflects an inclusive attitude by considering the rights of indigenous peoples. Article 61 of the Trademark Law is a concrete example of the inclusive approach adopted in this law. This article acknowledges that trademarks known in Indonesia based on their use are also entitled to legal protection. This means that owners of trademarks that are not officially registered can still obtain legal protection if they have become an integral part of society and are widely recognized. This approach opens the door for trademark owners who may come from indigenous communities or small groups that do not have the resources to register their trademarks formally. It supports inclusivity and fairness in trademark protection.

   This inclusive approach encourages the possibility of a mediation or dialogue process between registered brand owners and brand owners who have not been registered. The aim is to reach joint solutions that accommodate the rights of consumers and indigenous communities. In this context, cultural sustainability and the interests of indigenous peoples can be respected while maintaining legal certainty for brand owners who have applied for registration.

   Article 88 is also an essential part of the inclusive approach in this Law. This article recognizes indigenous peoples' use of similar marks before this Law came into force (Chidede, 2022). This is a significant step in respecting the cultural and historical heritage of indigenous communities in the use of trademarks. This recognition can provide legal protection for indigenous communities using specific trademarks for a long time without the risk of intellectual property rights infringement. It is an essential step in honouring indigenous communities' cultural identity and history and avoiding the misuse of trademark law against them.

   Overall, the inclusive approach in Law No. 20 of 2016 on Trademarks reflects an awareness of cultural diversity and the rights of indigenous

communities in Indonesia. It is not just about protecting trademarks but also about preserving cultural sustainability and the interests of indigenous communities while ensuring legal certainty for trademark owners who seek registration. This approach can be seen as a positive step towards balancing trademark protection and cultural rights.

2. Indonesian Intellectual Property Law (UU No. 13 of 2016)

The Indonesian Intellectual Property Law, stipulated by number 13 of 2016, has a scope that covers the protection of various aspects of intellectual property in Indonesia. One of the aspects regulated in this Law is brand protection. Although this law focuses more on officially registered trademarks, there is an opportunity and potential to involve parties with traditional knowledge in registering trademarks. The importance of protecting registered trademarks in the Intellectual Property Law becomes clear to prevent counterfeiting and illegal use of brands, which can harm the brand owner financially and damage the brand's reputation. (Tim Penyusun DJKI, 2020). However, involving parties with traditional knowledge in the trademark registration process also has its ~~own~~ interests.

The Indonesian Copyright Law (UU KI) is a legal regulation that covers various aspects of intellectual property, including trademarks. Officially registered trademark protection is crucial in preventing counterfeiting and illegal use of trademarks, which can harm trademark owners financially and damage the brand's reputation. It secures the rights of trademark owners and encourages innovation. Registered trademark protection is critical within the scope of legal protection. Registered trademarks have exclusive rights to the brand, allowing them to take legal action against anyone who uses the trademark without permission. This ensures that trademark owners can maintain their brand's reputation and derive financial benefits from it.

Traditional knowledge is knowledge held by indigenous communities or local groups about various aspects of their culture and traditions. In the context of trademarks, traditional knowledge can relate to symbols, visual representations, or terms that hold special meaning within local culture. Involving parties with traditional knowledge in trademark registration has several significant benefits. First, it allows for recognition and respect for local wisdom and traditional culture, often closely tied to a community's identity. Second, by considering traditional knowledge in the trademark registration process, the law can help prevent intellectual property rights violations that may occur when parties register a trademark with cultural significance with no historical or cultural connection to the trademark. Lastly, involving parties with traditional rights to a trademark also allows them to participate in the registration process and protect their interests actively. (Labetubun et al., 2018).

Considering traditional knowledge in the trademark registration process, the law can help prevent intellectual property rights violations when parties register a mark with special meaning in a local cultural context with no historical or cultural connection to the mark. (Wijaya & Wairocana, 2018). This can also ensure that parties with traditional rights to a mark can participate in the registration process and protect their interests.

To resolve this conflict through an inclusive legal approach, several steps that can be taken are:

1. Consultation and Participation

   Consultation and active participation from various stakeholders, including producers, consumers and indigenous communities, is an essential step in formulating and evaluating brand and consumer rights policies. Engaging with these various parties not only creates a forum for sharing diverse insights and experiences but also ensures that different viewpoints and interests are fairly accommodated (Lubis et al., 2017).

2. Custom Arrangements

   Special arrangements relating to the development of regulations aim to recognise and protect traditional knowledge owned by indigenous communities. In this context, recognising traditional knowledge is essential in ensuring that cultural heritage and local wisdom are maintained and respected. Apart from that, this regulation is also directed to establish the responsibility of producers to ensure that the products produced are following the quality standards that have been set. (Rohaini, 2016). The first aspect of this particular arrangement is the recognition of the traditional knowledge of indigenous peoples. This knowledge often covers various aspects of life, including agricultural practices, traditional medicine, arts, crafts, and so on. Regulations that consider traditional knowledge aim to prevent misuse, unauthorised use or improper profitmaking from that knowledge.

3. Mediation and Arbitration

   Mediation and arbitration are two alternative mechanisms that are very valuable in resolving disputes. In situations potential conflict between the parties involved, resorting to mediation or arbitration can be a more efficient and effective solution than taking a case to court. Mediation involves a neutral third party who acts as a mediator to assist the disputing parties in reaching a mutually beneficial agreement. Mediators help facilitate communication and negotiation between parties, with the ultimate goal of reaching a solution acceptable to all parties (Kurniati, 2016).

4. Education and Awareness

   Increasing understanding of consumer rights and traditional knowledge of indigenous peoples is a crucial step in efforts to reduce conflicts

that may arise. Through education and awareness raising, all parties involved can better understand the rights held by consumers and the values and practices upheld by indigenous peoples. Education will help break down false assumptions and prejudices that often trigger disagreements and disputes between consumers, business actors and indigenous communities.

5. Supervision and Law Enforcement

   Supervision and law enforcement are crucial in maintaining justice and balance in society. To ensure the maintaining of justice and balance in society, it is necessary to have institutions that have specific responsibilities in overseeing the application of laws and regulations related to various aspects, such as trademarks, consumer rights and the rights of indigenous peoples. These institutions play a role in supervising that all entities, both individuals and business entities, comply with the norms that have been established to maintain justice and protection for all parties (Destiani et al., 2023).

An inclusive approach to dispute resolution is a method that involves various parties interested in the problem. One way to apply this inclusive approach is to utilize alternative dispute-resolution institutions, such as the Indonesian National Arbitration Board (BANI) or through mediation arranged by the Ministry of Law and Human Rights. This dispute resolution process is designed to involve all relevant stakeholders, including brand owners, consumers, and representatives of indigenous communities related to the context of the dispute (Hariansah & Suganda, 2023). The main aim of this approach is to achieve a fair balance and respect the rights of all parties involved in the dispute. By involving various perspectives and interests, it is hoped that dispute resolution can achieve solutions that combine diverse values and produce decisions that respect the rights and interests of all parties involved, thereby realizing more inclusive and sustainable results.

In concrete cases where there is a conflict between brand protection and the rights of consumers and indigenous communities, this inclusive legal approach will lead to a more holistic and just solution. With this approach, it is hoped that the protection of unregistered marks can be in line with consumer rights and the rights of indigenous peoples, encouraging justice and balance in the application of law in Indonesia.

Conclusion

Indonesia's inclusive legal framework for unregistered trademarks and potential trademark rights violations has evolved significantly, recognizing the importance of protecting intellectual property in a dynamic market. While Trademark Law No. 20 of 2016 primarily focuses on registered trademarks, it also extends limited protection to unregistered marks through the "common law" principle. Additionally, the law introduces criminal sanctions for trademark rights

violations, safeguarding both registered and unregistered marks. However, the success of these legal constructs hinges on consistent implementation and monitoring by relevant authorities and stakeholders. By doing so, Indonesia can establish a more equitable and just legal environment, ensuring trademark owners, including those with unregistered marks, receive adequate protection in the ever-evolving marketplace.

The Indonesian legal perspective on protecting unregistered marks highlights the importance of an inclusive legal approach that considers the interests of all parties involved, including registered brand owners, consumers, and indigenous communities. To resolve conflicts in this context, steps like consultation, custom arrangements, mediation, education, and supervision can be taken to achieve a fair balance between trademark protection and cultural rights. Ultimately, this inclusive approach strives for a holistic and just solution where the protection of unregistered marks aligns with consumer rights and the rights of indigenous communities, promoting legal equity in Indonesia.

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