



**DECISION**  
**Number 46/PUU-VIII/2010**

**IN THE NAME OF JUSTICE UNDER ALMIGHTY GOD**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

**[1.1]** [Hereinafter the Court], hearing constitutional cases at the first and final instance, has handed down a decision in the case of Judicial Review of Law No. 1/1974 on Marriage against the 1945 Constitution of the Republic of Indonesia [hereinafter the Constitution] filed by:

**[1.2]** 1. Name : **Hj. Aisyah Mochtar aka Machica binti H. Mochtar Ibrahim**

Born : 20 March 1970 in Ujung Padang

Address : Jalan Camar VI Blok BL 12A, RT/RW 002/008,  
Desa/Kelurahan Pondok Betung, Kecamatan  
Pondok Aren, Kabupaten Tangerang, Banten

2. Name : **Muhammad Iqbal Ramadhan bin Moerdiono**

Born : 5 February, 1996 in Jakarta

Address : Jalan Camar VI Blok BL 12A, RT/RW 002/008,  
Desa/Kelurahan Pondok Betung, Kecamatan  
Pondok Aren, Kabupaten Tangerang, Banten

Who, in accordance with Power of Attorney No. 58/KH.M&M/K/VIII/2010 dated 5 August, 2010, authorise i) Rusdianto Matulatuwa; ii) Oktryan Makta; and iii) Miftachul I.A.A., advocates at the Law Offices of Matulatuwa & Makta, domiciled at Wisma Nugra Santana 14th Floor, Suite 1416, Jalan Jenderal Sudirman Kav. 7-8 Jakarta 10220, whether individually or jointly to act for and on behalf of the authorising parties;

Hereinafter referred to as -----**the Petitioners;**

**[1.3]** Having read the petition from the Petitioners;

Having heard the statements of the Petitioners;

Having examined the evidence from the Petitioners;

Having heard the expert statement for the Petitioners;

Having heard and read written statements from the Government;

Having heard and read written statements from the House of Representatives;

Having read written conclusions from the Petitioners;

## **2. FACT OF THE CASES**

**[2.1]** Considering, whereas the Petitioners filed the petition dated 14 June, 2010, received by the Registrar of the Constitutional Court [hereinafter Registrar of the Court] on Monday, 14 June, 2010 in accordance with the Deed of Receipt of Petition No. 211/PAN.MK/2010 and registered on Wednesday, 23 June, 2010 as No. 46/PUU-VIII/2010, which was then corrected and received by the Registrar of the Court on 9 August, 2010, outlining the following matters:

### **A. Legal Standing**

1. Whereas the Petitioner is an Indonesian citizen;
2. Whereas Article 51 Paragraph (1) of the Constitutional Court Law states:  
A petition can be filed by a party who considers his/her constitutional rights and/or authorities to be impaired by the coming into effect of a law and who is:
  - a. an Indonesian citizen;
  - b. a group under customary law provided that the group is still extant and in accordance with the development of society and the principles of the Republic of Indonesia as regulated by Law;
  - c. a public or private legal entity; or
  - d. a state institution

Article 51 paragraph (1) of the Constitutional Court Law further states:

Constitutional Rights are those rights stipulated in the 1945 Constitution of the Republic of Indonesia;

Accordingly, the Petitioners are individuals of Indonesian nationality whose constitutional rights have been impaired through their being treated unequally before the law with regard to the legal status of marriage;

3. Whereas based on these provisions, there are two conditions that must be fulfilled to assess whether the Applicant has legal standing to petition for review of the law in question. The first requirement is to meet the requirements described in Article 51 paragraph (1) of the Constitutional Court Law. The second condition is that the Petitioner's constitutional rights and/or authority have been impaired by the coming into effect of a law;
4. Whereas, as previously explained, the Petitioner is an "Individual Indonesian Citizen", which is in accordance with Article 51 paragraph (1) of the Constitutional Court Law. Therefore, the Petitioner qualifies as a petitioner in this petition for material review;
5. Whereas, in accordance with the provisions of Article 2 paragraph (1) of the Marriage Law, which states:

"Marriage is valid, if it is carried out in accordance with the laws of the religion and faith of the marrying parties", the Petitioner's marriage is valid, and this has also been reinforced through a Decision of the Court, which has permanent legal force (*inkracht van gewijsde*) as recorded in Decision of Case No. 46/Pdt.P/2008/PA.Tgrs., dated June 18, 2008, page 5, paragraph 5 which states:

"... Whereas on December 20, 1993, was the marriage of the Petitioner (Hj. Aisyah Mochtar aka Machica bint H. Mochtar Ibrahim) to the man, Dr. Moerdiono, with the marriage guardian (*wali nikah*), the late H. Moctar Ibrahim, and two witnesses, namely the late KH M. Yusuf Usman and Risman, with a dowry in the form of a set of prayer apparatus, 2,000 Riyal (Saudi Arabian currency) paid in cash, a set of gold jewellery, and with permission (*ijab*) granted by the aforementioned guardian and accepted (*qabul*) by Dr. Moerdino

6. Whereas Article (2) paragraph (2) of the Marriage Law states:

“Each marriage shall be registered in accordance with the prevailing laws and regulations.”

With the entry into force of Article 2 paragraph (2) of the Law on Marriage, the Petitioners’ constitutional rights as Indonesian citizens, as guaranteed by Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution, were impaired;

Article 28B paragraph (1) of the 1945 Constitution states:

"Everyone has the right to form families and to extend their lineage through legitimate marriage.”

This provision of the 1945 Constitution gives rise to the constitutional norm that the Petitioners as Indonesian citizens have the right, equally with all other Indonesian citizens, to form a family and to engage in marriage indiscriminately and to be treated equally before the law;

While Article 28B paragraph (2) of the 1945 Constitution states:

"Every child has the right to life, growth, and development and is entitled to protection from violence and discrimination.”

This provision of the 1945 Constitution clearly gives rise to the constitutional norm that the Petitioner’s child also has the right to legal status and to be treated equally before the law.

That is, the 1945 Constitution emphasises the legal norm of equality before the law. However, the Law on Marriage states otherwise, thus resulting in a violation of the Petitioners’ constitutional rights. Constitutionally, everyone has the right to marry in accordance with his or her religion and beliefs. As such, the Petitioner married in accordance with Islamic norms, observing the rules of marriage as taught by Islam. It should not be possible for religious norms to be overruled by legal norms in this way, such that previously legitimate marriages become invalidated. As a result of the diminishment of religious norms by legal norms, not only does the status of Petitioner's marriage become unclear, but the status of the child before the law also is invalidated;

7. Whereas Article 43 paragraph (1) of the Marriage Law states:

"Any child born outside of marriage has a legal relationship only with the mother and the mother's family."

Based on Article 43 paragraph (1) of the Marriage Law, the Petitioner's child only has a legal relationship to his mother, and this same principle can be found in Islam. This is not true, however, should the legal norms of the Marriage Law stating that a child born outside of wedlock only has a civil relationship with his mother and his mother's family rest on the legitimacy of a marriage as determined by legal norms, whereas in Islam, the legitimacy of a marriage is based on the provisions that have been set forth in the Koran and Sunnah. From this perspective, the Petitioner's marriage is legitimate in accordance with the principles of marriage and religious norms as taught by Islam. The Petitioner's marriage was not due to an adulterous relationship. Likewise, the child is also a legitimate child. On the Islamic view, which is consistent with the law, in the case of a woman who is pregnant and is not bound in marriage, the fate of the child lies with the mother and her family. So, the question is, how can marriage be legitimate according to religious norms, but be considered illegal through the reduction of religious norms by legal norms?

With the coming into effect of Article 43 paragraph (1) of the Marriage Law, the Petitioners' constitutional rights as mother and child to be legitimised both with respect to the marriage of the parents and to the legal status of their child, as guaranteed by Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution, have been violated;

8. Whereas Article 28D paragraph (1) of the 1945 Constitution states:

"Every person shall have the right to recognition, guarantee, protection and certainty before a just law, and to equal treatment before the law"

Referring to these provisions of the 1945 Constitution, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are inconsistent, such that the Petitioner's constitutional rights, as well as the rights of her child, are impaired. Basing judgement on the importance of legal norms clearly undermines the importance of religious norms, given that something that has already been determined by religious norms legitimate and proper is then

conversely determined illegitimate based on the forced approach from legal norms. As a result of the coercive nature born by legal norms within the Marriage Law, the legal status of the Petitioner's marriage and of her son's legitimacy is undermined. In other words, legal norms have violated religious norms;

9. Whereas, meanwhile, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law impair the constitutional rights of the Petitioner and his child arising under Article 28B paragraphs (1) and (2) of the 1945 Constitution as well as Article 28D paragraph (1), namely the rights to verification of the legitimacy of a marriage as well as to the legitimate status of the Petitioner's child. As a rule of law, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law have binding power and must be obeyed by all people, even though these provisions actually contain fundamental errors because of their inconsistency with the constitutional rights stipulated in Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution, such that they cause constitutional harm to the Petitioners as previously described. This will be described more specifically in the following elucidation, which *mutatis mutandis* should please be considered a single argument;
10. Whereas based on the above, it has clearly be shown that the Petitioners have legal standing in this petition for judicial review of the law;

#### **B. Reasons for Petition**

11. Whereas the Petitioners are individuals who have directly experienced impairment to their constitutional rights by the coming into effect of the Marriage Law, in particular Article 2 paragraph (2) and Article 43 paragraph (1). These articles gave rise to legal uncertainty resulting in harm to the Petitioners' rights relating to marital status and the legal status of the child resulting from the marriage;
12. Whereas the Petitioners' impaired constitutional rights are rights guaranteed in Article 28B paragraph (1) and Article 28B paragraph (2) of the 1945 Constitution. Based on the provisions of Article 28B paragraph (1) and (2) of the 1945 Constitution, the Petitioner has the constitutional right to verification

of her marriage, and her son has the right to legal status. The constitutional rights of the Petitioners have been violated by legal norms in the Marriage Law. These legal norms are clearly unfair and harmful given that the Petitioner's marriage is legitimate and in accordance with the principles of marriage in Islam. With reference to the constitutional norms contained in Article 28B paragraph (1) of the 1945 Constitution, the Petitioner's marriage is valid, having been conducted in accordance with Islamic principles; however provisions set forth in Article 2 paragraph (2) of the Marriage Law obstruct this. The legal norm requiring a marriage to be registered in accordance with the prevailing laws and regulations has rendered a marriage conducted in observance of religious norms, namely the principles of marriage in Islam, illegitimate. This has in turn affected the status of the child born of this marriage, rendering him also illegitimate according to the legal norms in the Marriage Law. Thus, there has clearly been a violation by the legal norms in the Marriage Law of the Petitioner's marriage based on religious norms. Van Kan stated in essence the same opinion: "If the implementation of legal norms is not possible, then the rule of law will impose otherwise, which shall as closely as possible approach the intention of said legal norms or else nullify the consequences of violations of said legal norms. "(Van Kan, *Pengantar Ilmu Hukum* (translation of *Inleiding tot de Rechtswetenschap* by Mr. Moh. O. Masduki), PT. Pembangunan, Jkt, cet. III, 1960, pp. 9-11.)

13. Whereas the consequences of the provisions of Article 28B Paragraph (1) and Paragraph (2) and Article 28D Paragraph (1) of the 1945 Constitution are that each person has the same position and rights including the right to verification of marriage and the legal status of his or her child, the constitutional norm arising from Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) is equality before the law. There is no discrimination in the application of legal norms to each person because different marriage procedures and the children born of those marriages are legitimate before the law and may not be subject to different treatment by the law. However, in practice, the relevant religious norms have been ignored by the coercive force of legal norms. The Petitioner's marriage, which is legitimate based on the norms and principles of marriage under Islam, according to legal norms

becomes illegitimate because it has not been registered in accordance with Article 2 paragraph (2) of the Marriage Law. Furthermore, the application of this legal norm has had an impact on the legal status of the child born of the marriage, namely that the child is born out of wedlock in accordance with the legal norms arising from Article 43 paragraph (1) of the Marriage Law. On the other hand, this discrimination certainly raises a problem as the child is rendered illegitimate and his status before the law unclear. Moreover, the 1945 Constitution states that neglected children, whose parents' statuses are unclear, shall be maintained by the state. The Constitution of the Republic of Indonesia does not will that that which is in accordance with religious norms be in violation the law based on legal norms. Does this not constitute a violation of religious norms by legal norms?

14. Whereas it has been proven that there is a causal relationship between the enactment of the Law on Marriage—in particular Article 2 Paragraph (2) and Article 43 Paragraph (1), which are related to the recording of marriages and the legal relationship of a child born of an unregistered marriage—and impairment of the Petitioners' constitutional rights. There has been a violation of the constitutional rights of the Petitioner as a citizen of the Republic of Indonesia, since Article 2 Paragraph (2) and Article 43 Paragraph (1) of the Marriage Law are contrary to Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution. This resulted in the Petitioner's marriage, which had been conducted in accordance with the principles of the Petitioner's religion, to not possess legal certainty, such that the Petitioner's son was also bereft of legal certainty;

Clearly, the constitutional rights of the child have been regulated and recognised in Article 28B paragraph (2) of the 1945 Constitution. In fact, since birth, the Petitioner's child has been discriminated against through the removal of the origin of the Petitioner's child by having only the Petitioner's name on his Birth Certificate, such that the country has deprived the child of his right to survive, grow and develop, given that with no legal relationship between the child and the Petitioner's husband, there is no legal obligation for the husband to raise, nurture or financially support the Petitioner's child. There is no child born into this world that is blamed and discriminated against



because of a disagreement between his parents concerning the status of their marriage despite its being legitimate according to religious norms;

In reality, the intent of the Marriage Law with relation to marriage registration, is that any child born of an unregistered marriage is considered born out of wedlock and possesses a legal relationship with the mother only. This fact has created legal uncertainty and disturbed the sense of justice that grows and lives in the community, thus harming the Petitioners;

The birth of the Petitioner's child into this world was not without cause, but came as a result of a loving relationship between his parents (the Petitioner and her husband), but as a result of the provisions set forth in Article 43 paragraph (1) of the Marriage Law, there has arisen legal uncertainty regarding the relationship between the child and his father. This has violated the child's constitutional right to know his roots. It also causes a psychological burden on the child that his father offers no recognition of his presence in the world. Of course this will cause anxiety, fear and discomfort in the child as he makes his way in the community;

15. Whereas the Petitioner objectively suffered material or financial losses, in particular through having to bear the costs of raising the Petitioner and providing financial support in the framework of care and maintenance, since provisions in the Marriage Law led to a lack of legal certainty regarding the marriage of the Petitioner and thus the status of the child resulting from that marriage. As a result, the Petitioner has no claim to the obligation of the husband to provide for the child.

Strictly speaking, the Marriage Law does not reflect a sense of justice in the community and has empirically restricted the Petitioners' constitutional rights to obtain legal certainty and to be free from anxiety, fear, and discrimination related to the legal status of marriage and of their children. Van Apeldoorn, in his book *Inleiding tot de Rechtswetenschap in Nederland*, states that the purpose of the law is to regulate a peaceful society. The law wills peace. Peace amongst the people is maintained by the law the the protection of certain human interests, namely honour, independence, soul, property and so on from harm. The interests of individuals frequently conflict with the interests

of groups. These conflicts of interests may give rise to disputes and chaos if not regulated by law with a view to creating peace through the balancing of protected interests, where everyone must as much as possible receive that which is his right (Van Apeldoorn, *Inleiding tot de Studie van Het Nederlandse Recht*, translation by Mr. Oetarid Sadino, Noordhoff-kalff NV Jkt. Cet IV, 1958, p. 13).

The constitutional norms contained in the 1945 Constitution consist of, amongst others, legal objectives. Legal objectives can be viewed through ethical theory, which states that the law aims solely to realise justice. One weakness is that regulations cannot be made to regulate each person in every case, but rather are made general, which is to say abstract and hypothetical. Another weakness is that the law does not always bring about justice. On the other hand, according to utilitarian theory, the law aims to realise only that which provides maximum happiness for the maximum number of people. The disadvantage of this philosophy is that it focuses on generalities and fails satisfaction to the feeling of law. The following theory combines the previous two. Bellefroid states that the contents of the law must be determined according to two principles, namely justice and utility. Utrecht states that the law has the duty to guarantee legal certainty (*rechtszekerheid*) in human relations. This duty contains within it two subsequent duties, namely to maintain the utility of justice and the law. From these, a third duty can be inferred, namely that the law the duty of the police. Thus, the law maintains that there is no vigilantism in the community. Meanwhile, Wirjono Prodjodikoro argued that the purpose of the law was to provide happy and orderly life in the community (Riduan Syahrani, *Summary of the Essence of Legal Sciences*, Kartini Library, Cet. First, 1991, pp. 23–26). Based on this explanation, the legal norms contained in the Marriage Law violate the constitutional rights that should be possessed by the Petitioner;

16. Based on all that has been presented, the Constitutional Court has the authority to adjudicate and decide the case of the Petition for Material Review of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law against Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) the 1945 Constitution;

Based on all the matters that have been described and the evidence attached, the Petitioner hereby pleads that the Constitutional Court give the following Decision:

1. Accept and grant the Petitioners' Petition for Material Review in full;
2. Declare Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law, contradictory to Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;
3. Declare Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law to possess no binding legal force;

Or, should the Justices be of a different opinion, to provide the best and fairest decision (*ex aequo et bono*);

**[2.2]** Considering, whereas in support of their arguments, the Petitioners have submitted written evidence, which have been listed Exhibit P-1 through Exhibit P-6, as follows:

1. Exhibit P-1 : Photocopy of Law No. 1/1974 on Marriage
2. Exhibit P-2 : Photocopy of Stipulation of Religious Court of Tangerang No. 46/Pdt.P/2008/PA.Tgrs
3. Exhibit P-3 : Photocopy of Recommendation from Indonesian Child Protection Commission No. 230/KPAI/VII/2007
4. Exhibit P-4 : Photocopy of Proof of Receipt of Complaint to Indonesian Child Protection Commission No. 07/KPAI/VII/2007
5. Exhibit P-5 : Photocopy of Letter No. 173/KH.M&M/K/X/2006 Re: *Somasi* dated 16 October, 2006
6. Exhibit P-6 : Photocopy of Letter No. 03/KH.M&M/I/2007 Re: *Undangan dan Klarifikasi* dated 12 January, 2007

Additionally, the Petitioner also called the expert, Dr. H.M. Nurul Irfan M.Ag., who gave his statement under oath and submitted a written statement in the hearing on 4 May, 2011, summarised below:

1. Article 2 paragraph (1) of the Marriage Law clearly states that a marriage is legitimate if it is conducted in accordance with the relevant religion or faith;
2. However, the existence of Article 2 paragraph (2) of the Marriage Law, which states that marriages shall be registered in accordance with the prevailing regulations, gives rise to different interpretations. On the one hand, a marriage is legitimate if it is conducted in accordance with the relevant religion or faith, while, on the other hand, it can be read that a marriage lacks legal force if it is not registered.
3. According to Islamic norms, a marriage is declared legitimate as long as the following five elements are present: *ijab qabul*, a bride, a groom, two witnesses and the bride's guardian;
4. Article 2 paragraph (2) of the Marriage Law is unclear, vague and contradictory to Article 2 paragraph (1) of the Marriage Law, and it has the affect that the marriage of someone who has fulfilled the requirements for marriage according to Islam but has not registered the marriage is not legitimate;
5. Because the marriage is considered illegitimate, Article 43 paragraph (1) of the Marriage Law stipulates that any child born of the marriage shall have kinship only with the mother. Such a child's birth certificate shall have recorded on it only the name of the mother without that of the father;
6. Any such child will certainly experience psychological harm, will be ostracised by society, will struggle to fund an education, healthcare and other conveniences;
7. The requirement to register marriages with its implications for the status of children born out of wedlock, such that they only have civil relationships with their mothers and mothers' families, is contrary to Article 28B paragraph (2) of the 1945 Constitution, because children, who should be protected from various forms of violence and discrimination, are ultimately not optimally protected as a result of his parents' unregistered marriage;
8. In Islamic law, children are born clean and do not bear the burden of the sins of their parents. Islam does not recognise the concept of sin derivation or the transfer of sin from one party to another;

9. Criminal accountability in Islamic law is individual. A person cannot bear the burden of the sins of others, let alone be responsible for the sins of others, as stated in Al Quran Surat al-Isra ' / 17: 15; Surat al-An'am / 6: 164; Fatir Letter / 35: 18; Letter az-Zumar / 39: 7; and Surat an-Najm / 53: 38;
10. Islam has a concept of an illegitimate child who only has a relationship to the biological mother, but this does not refer to children from legitimate marriages that have met the requirements and harmony). Children born from legitimate marriages in Islam, even if they are not registered with the relevant agencies, have relationships with both their fathers and mothers;
11. Moreover, Islam prohibits child adoption should the adoption break the relationship between the child and its father. If the origin of the child and the identity of the biological father is not known, then the child must be recognised as a Muslim brother or an adoptee and not considered a biological child;
12. In *Fiqh*, it is never mentioned that marriage must be registered, though there is an order in Al Quran Surat an-Nisa 'to obey ulil amri ("those in Authority"; in this case the Law);
13. Thus, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are discriminatory and therefore contrary to Article 27, Article 28B paragraph (2), and Article 28I paragraph (2) of the 1945 Constitution;
14. Should Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law contain a harm (*mudarat*) but abolishing them would also cause a harm, then under Islamic norms, the least harm must be chosen;

**[2.3]** Considering whereas, with regard to the petition, the Government submitted its statement verbally during the trial on February 9, 2011, and submitted a written statement dated February 18, 2011, which was received by the Registrar's Office on March 30, 2011, and which stated as follows:

#### **I. Principal Matters of the Petition**

Whereas the Petitioners, who are domiciled as Indonesian citizens, petitioned to review the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law, which essentially stated as follows:

- a. Whereas, according to the Petitioners, the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law give rise to legal uncertainty that results in harm to the Petitioners, especially those relating to marital status and the legal status of children resulting from the marriage of Petitioner I;
- b. Whereas the constitutional rights of the Petitioners have been violated by legal norms in the Marriage Law. The aforementioned legal norms are clearly unfair and detrimental, given that the marriage of Petitioner I is legitimate in accordance with the principles of marriage in Islam. Referring to the constitutional norms contained in Article 28B paragraph (1) of the 1945 Constitution, the marriage of Petitioner I, which was carried out in accordance with marriage norms, was legitimate but was obstructed by Article 2 of the Marriage Law, resulting in the child being illegitimate according to legal norms. As a result, the application of this legal norm negatively impacts on the legal status of the child (Petitioner II) born from the marriage of Petitioner I, who was consequently determined to have been born out of wedlock, based on the provisions of legal norms in Article 34 paragraph (1) of the Marriage Law. Of course, this discriminatory treatment causes the status of a child before the law to be unclear and illegitimate.
- c. In short, according to the Petitioner, the *a quo* provision has caused unequal treatment before the law and discrimination, therefore, according to the Petitioners, the *a quo* provisions are contrary to the provisions of Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) the 1945 Constitution.

## **II. Concerning Legal Standing of the Petitioners**

In order to demonstrate the legal standing required to petition for Review of the Law against the 1945 Constitution, then he or she must first explain and prove:

- a. The qualifications in the *a quo* petition as stated in Article 51 paragraph (1) of the Constitutional Court Law.
- b. The constitutional rights and/or authorities in the said qualification are deemed to have been impaired by the coming into effect of the Law being tested;
- c. The impairment of the constitutional rights and/or authorities of the Petitioner are a result of the coming into effect of the Law petitioned for review.

With consideration to the above, the Petitioners qualify, acting as individual Indonesian citizens who consider their constitutional rights and/or authorities to have been impaired by the coming into effect or as a result of the coming into effect of the Law petitioned for review.

Whereas, in response to the foregoing description from the Petitioner, according to the Government, the impairment of constitutional rights and/or authorities perceived by the Petitioners was not in fact due to the coming into effect of the Law petitioned for review, because in fact, the harm experienced by Petitioner I in marrying a married man does not observe the procedures, processes and requirements stipulated in Article 3 paragraph (2), Article (2), Article (4), Article 5, Article 9, and Article 12 of the Marriage Law and PP No. 9 of 1975 on Implementation of the Marriage Law, such that the polygamous marriage conducted by the Petitioner cannot be registered.

If Petitioner I conducted the marriage in accordance with the legal provisions contained in the *a quo* Law, then Petitioner I would not have faced obstacles in registering the marriage, and Petitioner I would have been guaranteed legal marriage status, and the rights to legitimacy of the child born of that marriage.

Therefore, the Government, through the Justices of the Constitutional Court, pleaded that the Petitioners prove in advance whether it is true that their constitutional rights and/or authorities were indeed impaired by the coming into effect of the provisions petitioned for review, in particular by demonstrating that the loss of constitutional rights and/or authorities were impaired by the coming into effect of the provisions petitioned for review.

Based on the foregoing description, according to the Government the difficulties faced by the Petitioners were not related to the constitutionality of the norms of the Law *a quo* which is petitioned for review, but in fact were a result of a conscious non-compliance with the prevailing laws and regulations, the legal risks of which were clear and knowable.

Thus, according to the Government, it is appropriate for the Constitutional Court to wisely state that the petition cannot be accepted (niet ontvankelijk verklaard).

However, the Government submits fully to the Constitutional Court to consider and evaluate whether the Petitioners have legal standing or not in the Petition for Review of the Law *a quo*, as determined in Article 51 paragraph (1) of the Constitutional Court Law or based on the decisions of previous Constitutional Court rulings (*vide* Decision Number 006 / PUU-III / 2005 and Decision Number 11 / PUU-V / 2007).

### **III. Statement of the Government on the Petition for Review of Law Number 1/1974 on Marriage**

Before the Government provides a detailed explanation or argument towards the assumptions of the Petitioners described above, the following matters should be submitted:

#### **A. In general, the Marriage Law does not conflict with the 1945 Constitution.**

Marriage is an institution to validate the relationship of two people of different sexes as husband and wife. In general, marriage is intended to construct a family life that is eternal, complete, harmonious and happy both physically and mentally. Therefore, it is necessary to have compatibility between the two parties which will merge into one as the smallest unit in society, such that the background of both parties is important, and one facet of this background is religion.

Religion, according to sociologists, has great potential for integration, but on the other hand can very easily engender conflict. Therefore, if the Marriage Law adheres to monotheism, it is not solely because it follows the teachings of certain religions, which forbid interfaith marriages, but also because religious equality promises to create a family that is eternal, complete, harmonious and happy both physically and mentally, rather than adhering to heterotheism (interfaith relationships) which are very vulnerable to the discord, disagreement, unhappiness and hardship.

Marriage is one way of realising the constitutional rights of citizens and must be respected and protected by society, the nation and the state, as stated in the 1945 Constitution, expressly in Article 28B paragraph (1): "Every person has the right to form a family and continue his/her lineage through a legal marriage", and Article 28J paragraph (1): "Everyone is obliged to respect the human rights of others in society, nation and state". Therefore, it is necessary to realise that



within these constitutional rights is contained an obligation to respect the constitutional rights of others. Thus, it is not possible that the constitutional rights granted by the state can be carried out unreservedly by everyone, because it is possible that the implementation of one's constitutional rights will actually violate the constitutional rights of others. Therefore it is necessary to regulate the implementation of these constitutional rights. The regulation as stated in Article 28J paragraph (2) of the 1945 Constitution which states that "In exercising his/her rights and freedoms, every person must submit to the restrictions set forth in law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security and public order in a democratic society".

Although the regulations set forth in Article 28J paragraph (2) of the 1945 Constitution, in essence act to reduce freedom, they function in the interest of the nation or of the wider community, in order that the exercise of one individual's constitutional rights does not interfere with the constitutional rights of others. Furthermore, the regulation of the implementation of constitutional rights is a logical consequence of the state obligations mandated by the Preamble of the 1945 Constitution, "... to form a government of the state of Indonesia which shall protect all the people of Indonesia, to improve public welfare and to enrich Indonesian life".

Thus, the provisions contained in the Marriage Law are a realisation of the implementation of constitutional rights granted by the 1945 Constitution, especially the right to form a family and continue one's lineage, but the *a quo* provision also limits the implementation of constitutional rights. solely aimed at protecting citizens to create a prosperous and just society, as envisioned in the Preamble of the 1945 Constitution. Therefore marriage is an institution that determines the formation of a happy and prosperous family, the family which is the smallest unit in it is the community that will shape the Indonesian people into a just and prosperous society. If the family that is formed is a family that is not harmonious, is unhappy and is not prosperous, it is impossible for Indonesia to become a prosperous society. Thus, the Marriage Law is in line with the mandate of the constitution and does not, therefore, contradict the 1945 Constitution,

because the Marriage Law does not contain content that reduces and obstructs a person's right to marry, but rather it regulates how a marriage should be carried out so that a person's constitutional rights are fulfilled without harming the constitutional rights of others.

**B. Explanation of Material Norms Requested To Be Tested By The Petitioners.**

In connection with the Petitioners' assumption that Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law, namely:

Article 2, which states:

Paragraph (2): "Each marriage shall be registered according to the prevailing laws and regulations"

Article 43 which states:

Paragraph (1): "Any child born outside of marriage shall have a civil relationship only with his mother and the mother's family"

The aforementioned provisions are considered by the Petitioners to be contradictory with the provisions of Article 28B Paragraphs (1) and (2), and Article 28D Paragraph (1) of the 1945 Constitution, which states as follows:

Article 28B Paragraph (1): "Everyone has the right to form a family and continue his or her lineage through a legal marriage "

Article 28B paragraph (2):

"Every child has the right to survival, growth and development and has the right to protection from violence and discrimination."

Article 28D paragraph (1):

"Everyone has the right to recognition, guarantee, protection, and fair legal certainty as well as equal treatment before the law ".

Regarding the assumption of the Petitioners as mentioned above, the Government submits the following explanations:

1. Regarding the provisions of Article 2 paragraph (2) of the Law *a quo*:

Whereas marriage, as referred to in Article 1 of the Marriage Law, is the physical and spiritual bond between a man and a woman as a husband and wife with the

aim of forming a happy and eternal family (household) based on the One God Almighty. To realise this, the husband and wife need to help and complement each other, developing their characters to ultimately achieve spiritual and material prosperity.

Article 2 paragraph (1) of the Law *a quo* states that "a marriage is valid if conducted in accordance with the laws of the respective religion and belief"; while Article 2 paragraph (2) states that "Every marriage shall be registered in accordance with the prevailing laws and regulations".

Whereas according to the Law *a quo*, the legality of a marriage is based on the respective religious law, however a marriage will not be acknowledged if it is not registered in accordance with the provisions of the legislation. Marriage registration as referred to in Article 2 paragraph (2) aims to:

- a. maintain orderly marital administration,
- b. provide certainty and protection of the legal status of husband, wife and children;
- c. guarantee and protect certain rights arising from marriage, such as inheritance rights, the right to obtain a birth certificate, etc.;

The government disagrees with the Petitioners' assumption that Article 2 paragraph (2) contradicts to Article 28B paragraph (1) and paragraph (2), and Article 28D paragraph (1) of the 1945 Constitution, because the requirement for marriage registration is not intended to limit the human rights of citizens but rather to protect citizens in building families and procreate, as well as to provide legal certainty to the rights of their husbands, wives and children.

Whereas Article 2 paragraph (2) of the Law *a quo* does not stand alone, because the phrase "registered according to the prevailing laws and regulations" has the understanding that a marriage cannot be registered immediately, but must follow the requirements and procedures stipulated in legislation. This is so that the rights of the husband, wife, and children can truly be guaranteed and protected by the state. These requirements and procedures include the provisions stipulated in Article 3 paragraph (2), Article 4, Article 5, Article 9, and Article 12 of

the Marriage Law, and Government Regulation Number 9/1975 on Implementation of the Marriage Law, especially Article 2 through Article 9.

Whereas, although it is true that the Marriage Law adheres to the principle of monogamy, that does not mean that this law prohibits a man from marrying more than one wife (polygamy). If desired, a husband can engage in polygamy with his second wife and so on, but this can only be done after the person has fulfilled the requirements and procedures set forth in the Law *a quo*, specifically as stipulated in Article 3 paragraph (2), Article 4 and Article 5 and PP No. 9 of 1975.

If a polygamous marriage does not comply with the provisions of the Marriage Law, then the marriage cannot be registered at the Office of Religious Affairs or the Civil Registry Office, with all legal consequences, including not having legal marital status, not having inheritance status for the husband, wife and children.

Whereas the provisions concerning the requirements and procedures for polygamous marriage regulated in the Marriage Law apply to every Indonesian citizen and do not provide discriminatory treatment against certain people or groups, including the Petitioners. In addition, these provisions are in line with the provisions of Article 28J paragraph (2) of the 1945 Constitution, which reads: "In exercising rights and freedoms, every person is obliged to submit to restrictions set forth in law with the sole purpose of guaranteeing recognition and respect for rights and the freedom of others and to fulfil just demands in accordance with moral considerations, religious values, security and public order in a democratic society".

From the description above, it is clearly illustrated that the registration of marriages in both the Office of Religious Affairs and the Civil Registry Office, according to the Government, is not related to the constitutionality of the validity of the material content of the norm petitioned for review by the Petitioners.

Therefore, the provisions of Article 2 paragraph (2) are not contradictory to Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution.

2. Regarding the provisions of Article 43 paragraph (1) of the Marriage Law can be explained as follows:

Whereas Article 43 paragraph (1) of the Marriage Law states: "Any child born out of wedlock has a civil relationship with only the mother and the mother's family", which, according to the Government, aims to provide legal protection and certainty for civil relations between children and their mothers and their mothers' families, because marriages that are not registered can mean that the marital event does not exist, so that children born out of wedlock are not registered according to the *a quo* Law. The provisions in this article are a logical consequence of the regulations on requirements and procedures of legitimate marriages, based on the *a quo* Law, such that it is not logical that the law should ensure a legal relationship between a child born to a woman and a man who is not bound in a legal marriage to the mother of the child.

Based on the explanation above, according to the Government, the provisions of Article 43 paragraph (1) of the *a quo* law actually aims to provide legal protection and certainty for civil relations between children and their mothers and their mothers' families.

Therefore, according to the Government, Article 43 paragraph (1) of the Marriage Law is not contrary to the provisions of Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution, because if the marriage is done legally, then the rights of the Petitioners, as referred to in Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution, can be fulfilled.

Furthermore, the Government also disagrees with the Petitioners' assumption that the above provisions have led to discriminatory treatment of and restrictions upon the Petitioner, because such restrictions are in line with the provisions of Article 28J paragraph (2) of the 1945 Constitution, which states that, "In exercising their rights and freedoms, everyone must submit to the restrictions set forth by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfil just demands in accordance with moral considerations, values, religion, security and public order in a democratic society".

Based on the above, the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are not contrary to the provisions of Article 28B

paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution.

#### **IV. Conclusion**

Based on the explanation above, the Government appealed to the Constitutional Court, in hearing the petition for judicial review of Law Number 1/1974 on Marriage against the 1945 Constitution, to provide the following decision:

1. To declare that the Petitioners have no legal standing;
2. To reject the petition for review entirely or at least to declare the petition inadmissible (niet ontvankelijk verklaard);
3. Accept the Government's Statement in its entirety;
4. Declare the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law consistent with Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;

However, should Constitutional Court be of another opinion, the Government asks that the decision be wise and fair (*ex aequo et bono*).

**[2.4]** Considering, whereas, with regard to the petition, the House of Representatives gave its testimony in the hearing on February 9, 2011 and delivered information received by the Registrar of the Constitutional Court on February 24, 2011, which outlines the following:

#### **Statement from the House of Representatives**

Regarding the Petitioners' arguments as described in the *a quo* Petition, the DPR in submitting its views first considers the legal standing as follows:

#### **Legal Standing of the Petitioners**

Qualifications that must be fulfilled by the Petitioner as Parties have been regulated in the provisions of Article 51 paragraph (1) of Act Number 24 of 2003 concerning the Constitutional Court (hereinafter abbreviated as MK Law), which states that "A petition can be filed by a party who considers his/her constitutional rights and/or authorities to be impaired by the coming into effect of a law and who is:

- a. an Indonesian citizen;

- b. a group under customary law provided that the group is still extant and in accordance with the development of society and the principles of the Republic of Indonesia as regulated by Law;
- c. a public or private legal entity; or
- d. a state institution.”

The constitutional rights and/or authority referred to in the provisions of Article 51 paragraph (1) are confirmed in its explanation that "what is meant by" constitutional rights "are the rights stipulated in the 1945 Constitution of the Republic of Indonesia." Article 51 paragraph (1) confirms that only rights explicitly regulated in the 1945 Constitution are included in "constitutional rights".

Therefore, according to the Constitutional Court Law, a person or party wishing to be accepted as a Petitioner with legal standing to petition for review of the Law against the 1945 Constitution must first explain and prove:

- a. that the Petitioner qualifies to submit the *a quo* petition as referred to in Article 51 paragraph (1) of the Constitutional Court Law;
- b. that the constitutional rights and/or authorities, as referred to in Explanation of Article 51 paragraph (1), are deemed to have been impaired by the coming into effect of a Law.

Regarding the parameters of constitutional loss, the Court has provided understanding and limitations on constitutional losses arising from the coming into effect of a Law, which must fulfil five conditions (*vide* Decision on Case Number 006 / PUU-III / 2005 and Case Number 011 / PUU-V / 2007) as follows:

- a. That the constitutional rights and/or authorities of the Petitioners have been granted by the 1945 Constitution;
- b. That the Petitioner’s constitutional rights and/or authorities are deemed by the Petitioners to have been impaired by the Law petitioned for review;
- c. That the aforementioned impairment of constitutional rights and/or authorities is specific and actual or at least potential in nature, which can be logically assumed to occur;

- d. That there is a causal relationship between the impairment and the enactment of the Law petitioned for review;
- e. That there is a possibility that with the granting of the petition, the perceived constitutional and/or authority will not or will no longer occur.

If these five conditions are not fulfilled by the Petitioners in the case of testing the a quo Law, the Petitioners do not have the legal standing as the Applicant.

With regard to the legal standing, the House of Representatives fully surrenders the decision to the Justices and Chief Justice of the Constitutional Court, who shall consider whether the Petitioners have legal standing or not, as regulated by Article 51 paragraph (1) of the Constitutional Court Law and according to Constitutional Court Decision No. 006/PUU-III/2005 and No. 011/PUU-V/2007.

### **III. Review of the Marriage Law against the 1945 Constitution.**

Concerning the Petitioners' claim that the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law have obstructed their constitutional rights to form families and continue lineage through legal marriage, as well as the child's rights in marriage, and the legal certainty of marital status, as stipulated in Article 28B paragraph (1) and paragraph ( 2) and Article 28D paragraph (1) of the 1945 Constitution, the House of Representatives offers the following explanation:

1. Whereas the Petitioners need to understand that, in order to understand the Marriage Law with regard to the provisions of the articles petitioned for review, it is necessary to first understand the meaning of marriage, namely the physical and spiritual bond between a man and a woman as husband and wife with the intention of forming a happy and eternal family or household under the One and Only God. This provision implies that marriage as a bond between a man and a woman is closely related to religion/spirituality. When viewed from this perspective, any marriage based on religious norms is valid. However, if it is associated with the purpose of marriage to form happy and prosperous families and offspring, then the result of marriage gives rise to civil rights and obligations.
2. Whereas to guarantee the civil rights and obligations that arise from a legal marriage, every marriage needs to be registered. Although marriage is included in the scope of civilisation, the state must provide legal certainty and provide



legal protection to the parties involved in marriage (husband, wife and children), especially in relation to population administration related to civil rights and obligations. Therefore the registration of each marriage becomes a formal requirement to validate an event which results in the juridical consequence of civil rights and obligations, such as the obligation to provide income and the right to inheritance. Marriage registration is stated in an official deed (authentic deed) and is included in the registration records issued by the authorised institution. Whereas the purpose of marriage registration is as follows:

- a. To maintain orderly marital administration,
  - b. To guarantee that certain rights will be obtained (obtaining a birth certificate, making a National Identity Card, making a Family Card, etc.),
  - c. To protect marital status,
  - d. To providing certainty of legal status of the husband, wife and children,
  - e. To provide protection of civil rights resulting from marriage;
3. Whereas, on the basis of the argument, the provisions of Article 2 paragraph (2) of the Marriage Law, which reads "every marriage shall be registered in accordance with the prevailing laws and regulations" is a norm that comprises legality as a form of legitimate marriage. Marriage registrations in the form of a marriage certificate are important to provide legal assurance and legal protection for each marriage. Accordingly, the House of Representatives argues that the Petitioner's claim that the provisions of Article 2 paragraph (2) of the Marriage Law have caused legal uncertainty is a false and unfounded assumption.
4. Whereas, concerning the Petitioners' assertion that they were prevented from registering their marriage because the Marriage Law is in principle based on monogamy, in turn preventing the Petitioners from forming a family and continuing their lineage through legal marriage as guaranteed in Article 28B paragraph (1) of the 1945 Constitution, The House of Representatives referred to Constitutional Court Decision No. 12/PUU-V/2007, which, in the legal considerations of pages 97–98 states:

*Whereas the Articles of the Marriage Act containing reasons, terms, and procedures of polygamy are solely an attempt to ensure the fulfilment of the rights*

*of the wives and the future wives, which are the obligation of the husband intending to engage in polygamy, in order to realise the purpose of marriage. Therefore, the interpretation of polygamous terms does not contradict Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia.*

Thus the claim that the Petitioners were prevented from registering their marriage because the Marriage Law is in principle monogamous is unfounded. The Petitioner was prevented from registering the marriage because of a failure to observe the terms regulating polygamy in the Marriage Act. Therefore, the difficulties faced by the Petitioners are not a question of constitutionality but rather a question of the Petitioner's failure to implement the law.

5. Whereas, therefore, the House of Representatives believes that marriages not registered in accordance with the provisions of the law can be interpreted as marriage events that fail to meet formal requirements, which has implications towards the civil rights arising as a consequence of marriage, including those of the children born of any such unregistered marriage.
6. Whereas moreover, it is necessary to state that children born of an unregistered marriage, in accordance with legislation, may face implications regarding evidence of the parental relationship between child and father, given that children born of an unregistered marriage only a relationship only with the mother and mother's family.
7. Based on the above, according to the House of Representatives, the provisions of Article 43 Paragraph (1) of the Marriage Law are intended to ensure the realisation of the purposes of marriage, and to provide protection and legal certainty regarding the status of children and their relationship with the mother and mother's family. If the provisions of Article 43 paragraph (1) of the Marriage Law are revoked, it will have implications towards the legal certainty of the status of children born of an unregistered marriage. Accordingly, the provisions of Article 43 Paragraph (1) of the Marriage Law do not conflict with Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution.

Whereas, based on the above arguments, the House of Representatives appealed to the Justices and Chief Justice of the Constitutional Court to hand down the following decision:

1. Refuse the *a quo* petition wholly or at least declare the *a quo* petition inadmissible;
2. Accept wholly the statement of the House of Representatives;
3. Declare Article 2 paragraph (2) and Article 43 paragraph (1) of Law No. 1/1974 on Marriage consistent with Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;
4. Declare Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law to have legally binding force.

If however the Justices and Chief Justice of the Constitutional Court consider otherwise, we request the fairest decision (*ex aequo et bono*).

**[2.5]** Considering, whereas the Petitioner has submitted a written conclusion dated 11 May 2011, received at the Registrar's Office on 11 May, 2011, which is essentially unchanged from its original state;

**[2.6]** Considering, whereas in the interests of efficiency, all events of the trial are adequately addressed in the proceedings, which is an integral part of this decision;

### **3. LEGAL CONSIDERATIONS**

**[3.1]** Considering, whereas the intention and purpose of the *a quo* petition is to review Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law (State Gazette of Year 1974 No. 1; Supplement to State Gazette No. 3019) against the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

**[3.2]** Considering, whereas, before considering the principal matters of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

- a. The Court's authority to hear the *a quo* application;
- b. The legal standing of the Petitioners in the *a quo* petition;

### **Authority of the Court**

**[3.3]** Considering, whereas under Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) letter a of Law No. 24/2003 on the Constitutional Court as amended by Law No. 8/2011 on Amendment to Law No. 24/2003 on the Constitutional Court (State Gazette Year 2011 No. 70, Supplement to State Gazette No. 5226, hereinafter referred to as the Constitutional Court Law), and Article 29 Paragraph (1) letter a Law No. 48/2009 on Judicial Power (State Gazette Year 2009 No. 157, Supplement to State Gazette No. 5076, hereinafter referred to as Law No. 48/2009), one of the Constitutional Court's authorities is to judge at the first and final instance and to offer the final decision in review of the Law against the Constitution;

**[3.4]** Considering whereas the petition is to examine the constitutionality of the norms contained within Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law against the 1945 Constitution, which is within the jurisdiction of the Court; therefore, the Court has the authority to decide on the *a quo* petition;

### **Legal Standing of the Petitioners**

**[3.5]** Considering, whereas, under Article 51 paragraph (1) of the Constitutional Court Law and its Explanation, those who may apply for Review of the Law against the 1945 Constitution are those who consider their constitutional rights and/or authorities conferred by the 1945 Constitution impaired by the enactment of a Law, namely:

- a. an Indonesian citizen;
- b. a group under customary law provided that the group is still extant and in accordance with the development of society and the principles of the Republic of Indonesia as regulated by Law;
- c. a public or private legal entity; or
- d. a state institution

Accordingly, the Petitioners must demonstrate in advance:

- a. standing as Petitioners in accordance with Article 51 paragraph (1) of the Constitutional Court Law;

- b. Impairment by enactment of the law for which the appeal is sought of rights and/or authorities granted by the 1945 Constitution;

**[3.6]** Considering also that the Court has, since Constitutional Court Decision No. 006/PUU-III/2005, dated May 31, 2005 and Constitutional Court Decision No. 11/PUU-V/2007, dated September 20, 2007, as well as subsequent decisions, which offer the opinion that constitutional rights/authorities, as referred to in Article 51 paragraph (1) of the Constitutional Court Law, must fulfil five the following conditions:

- a. That the constitutional rights and/or authorities of the Petitioners have been granted by the 1945 Constitution;
- b. That the Petitioner's constitutional rights and/or authorities are deemed by the Petitioners to have been impaired by the Law petitioned for review;
- c. That the aforementioned impairment of constitutional rights and/or authorities is specific and actual or at least potential in nature, which can be logically assumed to occur;
- d. That there is a causal relationship between the impairment and the enactment of the Law petitioned for review;
- e. That there is a possibility that with the granting of the petition, the perceived constitutional and/or authority will not or will no longer occur.

**[3.7]** Considering whereas based on the description in paragraphs [3.5] and [3.6] above, the Court will further consider the legal standing of the Petitioners in the *a quo* petition as follows:

**[3.8]** Considering, whereas principally, the Petitioners claim, as individual Indonesian citizens to possess constitutional rights as regulated by the 1945 Constitution as follows:

Article 28B paragraph (1) which states, "*Everyone has the right to form a family and continue his/her lineage through a legal marriage*";

Article 28B paragraph (2) which states, "*Every child has the right to survival, growth and development and is entitled to protection from violence and discrimination*", and

Article 28D Paragraph (1) which states, "*Every person has the right to just recognition, guarantee, protection and legal certainty as well as equal treatment before the law*";

These constitutional rights have been impaired due to the coming into effect of the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law;

**[3.9]** Considering, whereas, having observed the consequences experienced by the Petitioners in relation to their constitutional rights, according to the Court, there is a causal relationship between said impairment and the enactment of the Law petitioned for review, such that the Petitioners meet the requirements for legal standing to file the *a quo* petition;

**[3.10]** Considering, whereas, since the Court has the authority to hear the *a quo* petition, and the Petitioners have the necessary legal standing, the Court will consider the principal matters of the petition;

### **Opinion of the Court**

#### **Principal Matters of the Petition**

**[3.11]** Considering whereas the principal matter of the petition is the constitutionality of Article 2 paragraph (2) of the Marriage Law, which states, "*Every marriage shall be registered in accordance with the prevailing laws and regulations*", and Article 43 paragraph (1) of the Marriage Law, which states, "*Children born outside of wedlock shall have a civil relationship only with their mother and mother's family*", especially regarding the right of the child to obtain a legal status;

**[3.12]** Considering whereas the legal issue of marriage registration according to the prevailing laws and regulations concerns the legal meaning of marriage registration. In this regard, General Explanation number 4 letter b of the Marriage Law concerning the principles or fundamentals of marriage states,

*"...whereas a marriage is legitimate if it is conducted according to the laws of the respective religions and beliefs; and in addition, each marriage must be registered according to the prevailing laws and regulations. The registration of marriages is the same as registering other important events in a person's life, such as birth and*

*death, which are marked with official certificates and are also recorded in the civil records".*

Based on the above Elucidation of the Marriage Law, it is clear that (i) marriage registration is not a factor that determines the validity of marriage; and (ii) registration is an administrative obligation required by law.

The validity of marriage is determined by the conditions set forth by the respective religions of the bride and groom. The obligation to register the marriage imposed by the state through statutory regulations is an administrative obligation.

The importance of this administrative obligation in the form of marriage registration, according to the Court, can be seen from two perspectives. First, from the perspective of the state, registration is required in the framework of the state's function to guarantee the protection, promotion, enforcement and fulfilment of human rights for which the state is responsible in accordance with the principles of a democratic rule of law as regulated and set forth in the legislation [*vide* Article 28I paragraph (4) and paragraph (5) of the 1945 Constitution]. If said registration is considered a limitation, such registration, according to the Court, nevertheless does not conflict with constitutional provisions because the limitation is stipulated by Law and carried out with the sole purpose of guaranteeing recognition of and respect for the rights and freedoms of others, and to fulfil just claims with consideration to morality, religious values, security and public order in a democratic society [*vide* Article 28J paragraph (2) of the 1945 Constitution].

Secondly, administrative records maintained by the state regarding marriage as an important legal act in life carried out by the person concerned, which implies the occurrence of very wide legal consequences, which can later be proven with perfect evidence with an authentic deed, are intended so that protection and service by the state in relation to the rights arising from marriage can be carried out effectively and efficiently. That is, with the possession of authentic proof of marriage, the rights that arise as a result of marriage can be protected and served properly, because there is no need for a lengthy, costly or otherwise demanding verification process, such as proving the child's origins which Article 55 of Law 1/1974 stipulates shall be necessary if the origin of a child cannot be proven by an authentic deed, in which case the matter will be determined by decision of the authorised court. Such proof is

certainly not more effective and efficient when compared to the existence of an authentic deed as evidence;

**[3.13]** Considering, whereas, the legal issue concerning a child born outside of wedlock is about the legal meaning of the phrase "who was born out of wedlock". To take a broader perspective, it is necessary to answer related problems, namely the problem of the legitimacy of the child.

Naturally, it is not possible for a woman to become pregnant without a meeting between the ovum and spermatozoa either through coitus or through other means provided by technological developments that lead to conception. Therefore, it is inappropriate and unfair that the law should stipulate that a child born of a pregnancy because of sexual relations outside of marriage only has a relationship with the woman as his mother. It is also inappropriate and unfair that the law should free men who engage in coitus that leads to pregnancy and birth of a child from their fatherly responsibilities, and at the same time the law eliminates the rights of the child to recognise the man as his father. Moreover, when based on existing technological developments, it is possible to prove that a child is born of a certain male.

The legal consequences of a legal birth event due to pregnancy, which is preceded by a sexual relationship between a woman and a man, is a legal relationship in which there are reciprocal rights and obligations, whose legal subjects include children, mothers and fathers.

Based on the above description, the relationship of a child with a man as his father is not solely reliant on a marriage bond but can also be based on proof of the existence of a blood relationship between the child and the father. Thus, regardless of the matter of the marriage procedure/administration, the child must receive legal protection. If this is not the case, then it is child born out of wedlock that experiences loss, even though the child is not guilty because his birth is not his will. A child born without a clear relationship to his father often faces unfair treatment and stigma in the community. The law must provide fair legal protection and certainty to the status of any child and the rights that he receives, including children of a marriage whose legitimacy is under dispute;



**[3.14]** Considering, whereas, based on the above description, Article 43 paragraph (1) of the Marriage Law, which states, "*Children born outside of wedlock shall have a civil relationship only with their mother and mother's family*" must be interpreted, "*Children born outside of wedlock shall have a civil relationship with his mother and his mother's family and with his father and father's family, which relationship can be proven based on science and technology and/or other evidence of blood relationship according to the law*";

**[3.15]** Considering whereas, based on all of the above considerations, the Petitioners' argument insofar as it relates to Article 2 paragraph (2) of the Marriage Law has no legal grounds. As for Article 43 paragraph (1) of the Marriage Law, which states, "*Children born outside of wedlock shall have a civil relationship only with their mother and mother's family*" is contradictory to the 1945 Constitution and is thus conditionally unconstitutional; that is that it should be considered unconstitutional insofar as the verse is interpreted as eliminating civil relations with a man that can be proven based on science and technology and/or other evidence according to the law to have a blood relationship with the child as his father;

#### **4. CONCLUSION**

Based on an examination of the facts and laws as described above, the Court concludes:

**[4.1]** The Court has the authority to hear the *a quo* petition;

**[4.2]** The Petitioners have legal standing to file the *a quo* petition;

**[4.3]** The subject matter of the argument has partial legal grounds;

Based on the 1945 Constitution, The Constitutional Court Law and Law No. 48/2009 on Judicial Power;

#### **5. Decision**

Justify,

**Declare:**

- The Petition partially granted;

- Article 43 paragraph (1) of Law No. 1/1974 on Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "*Children born outside of wedlock shall have a civil relationship only with their mother and mother's family*", contrary to the 1945 Constitution of the Republic of Indonesia insofar as it is interpreted as eliminating civil relations with men who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as the father of the child;
- Article 43 paragraph (1) of Law Number 1/1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "*Children born outside of wedlock shall have a civil relationship only with their mother and mother's family*", to have no legally binding force insofar as it is interpreted as eliminating civil relations with men who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as the father of the child, so that verse must be read, "*Children born outside of wedlock shall have a civil relationship with his mother and his mother's family and with his father and father's family, which relationship can be proven based on science and technology and/or other evidence of blood relationship according to the law*";
- the remainder of the petition rejected;
- Order this decision to be published in the State Gazette of the Republic of Indonesia as appropriate;

This was decided in the Judicial Consultation Meeting by nine Constitutional Justices, namely Moh. Mahfud MD., As Chairman concurrently Member, Achmad Sodiki, Maria Farida Indrati, Harjono, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, M. Akil Mochtar, and Muhammad Alim, respectively as Members, on **Monday, the thirteenth day in the month of February, two thousand and twelve** and was pronounced at the Plenary Session of the Constitutional Court open to the public on **Friday, the seventeenth day in the month of February, two thousand and twelve**, by nine Constitutional Justices, namely Moh. Mahfud MD., As Chairman concurrently Member, Achmad Sodiki, Maria Farida Indrati, Harjono, Ahmad Fadlil

Sumadi, Anwar Usman, Hamdan Zoelva, M. Akil Mochtar, and Muhammad Alim, respectively as Members, accompanied by Mardian Wibowo as Registrar Substitute and attended by the Petitioners and/or their proxies, the Government or a representative and the House of Representatives or a representative.

**CHIEF,**

**ttd.**

**Moh. Mahfud MD.**

**MEMBERS,**

**ttd.**

**Achmad Sodiki**

**ttd.**

**Maria Farida Indrati**

**ttd.**

**Harjono**

**ttd.**

**Ahmad Fadlil Sumadi**

**ttd.**

**Anwar Usman**

**ttd.**

**Hamdan Zoelva**

**ttd.**

**M. Akil Mochtar**

**ttd.**

**Muhammad Alim**

## 6. DISSENTING OPINIONS

Regarding this Decision of the Court, Constitutional Justice Maria Farida Indrati has a concurring opinion, as follows:

**[6.1]** Marriage according to Article 1 of the Marriage Law is "*... the spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Almighty God*"; whereas concerning the legal requirements for marriage, Article 2 of the Marriage Law states in paragraph (1) that, "*Marriage is legal, if it is conducted in accordance with the laws of the respective religion and belief.*" and in paragraph (2) that, "Every marriage shall be registered in accordance with prevailing laws and regulations".

The existence of Article 2 paragraph (2) of the Marriage Law raises ambiguity for the meaning of Article 2 paragraph (1) of the Marriage Law because the registration referred to in Article 2 paragraph (2) of the *a quo* Law does not confirm whether administrative records affect the legitimacy of a marriage that has been carried out according to the religion or belief, or whether registration has an effect on the validity of the marriage.

The existence of religious norms and legal norms in the same law and regulation has the potential to weaken or even contradict each other. In this case, the potential for mutual elimination occurs between Article 2 paragraph (1) and Article 2 paragraph (2) of the Marriage Law. Article 2 paragraph (1) which basically guarantees that marriage is valid if it is carried out according to the laws of the respective religion and belief, is in fact obstructed, and vice versa, by the application of Article 2 paragraph (2) which basically stipulates that marriage will be valid and has power law if it has been registered by an authorised agency or marriage registrar.

If Article 2 paragraph (2) of the Marriage Law is interpreted as administrative registration that does not affect the legality or legitimacy of a marriage, then it does not contradict the 1945 Constitution, because there is no addition to the terms of marriage. Accordingly, the word "marriage" in Article 43 paragraph (1) of the *a quo* Law will also be interpreted as a legitimate marriage in Islam or marriage according to the five pillars of marriage.

However, based on sociological reviews of the marital institution in society, the validity of marriage according to certain religions and beliefs cannot directly guarantee the fulfilment of the civil rights of the wife, husband and/or children born of the marriage, because the implementation of religious and customary norms in the community relies solely on individual awareness and public awareness without the protection of any official authority that has coercive power.

**[6.2]** Marriage registration is necessary so that married parties can receive protection from the state and also to avoid the tendency for inconsistency in the implementation of religious teachings in marriages conducted in accordance with said religion or belief. In other words, there is a need for marriages to be registered in order to avoid the partial or incomplete implementation of religious norms for the sake of legitimising a marriage, meanwhile the post-marital household is not maintained in accordance with the intentions of the marriage. Abandonment of wives and children, domestic violence, the phenomenon of contract marriages, the phenomenon of mistresses, and so on, are all evidence of the lack of consistency in the application of marriage objectives in their entirety.

The objective of registration, in addition to maintaining orderly administration, is to protect women and children. The terms of marriage registration can be placed in at least two main contexts, namely (i) preventing and (ii) protecting, women and children from marriages carried out irresponsibly. Marriage registration as an effort to protect women and children from marital abuse can be done by setting conditions so that marriage events that have the potential to cause harm can be avoided and rejected.

The state regulates the terms of marriage in an effort to positively normalise religious teachings or beliefs in marriage law. Marriage conditions formulated by the state, whose fulfilment is a requirement for marriage registration as well as the terms of the

issuance of the Marriage Certificate, can be found in the Marriage Law and other laws and regulations relating to marriage and population administration. I hope that there will be an effort to synchronise laws and regulations relating to religion or belief with the construction of state law regarding marriage and population administration.

**[6.3]** It cannot be denied that in practice, the law cannot always be carried out according to the author's wishes. In fact, until now there are still marriages that fail to observe the Marriage Law and refer only to the terms of marriage according to certain religious teachings and beliefs. With respect to the legality of such marriages, which are certainly not registered, the state will experience difficulties in providing maximum protection for the rights of women as wives and the rights of any children born of such marriages.

The Petitioners claim that Article 2 paragraph (2) of the Marriage Law, which states, "Every marriage shall be registered according to the prevailing laws and regulations", is contrary to Article 28B paragraph (1) and paragraph (2), as well as Article 28D Paragraph (1) of the 1945 Constitution. I am of the opinion that Article 2 paragraph (2) of the Marriage Law is not contrary to Article 28B paragraph (1) of the 1945 Constitution because Article 2 paragraph (2) of the *a quo* Law requires registration, which, while this adds to the procedural requirements for marriage, does not preclude the marriage itself in its absence. This fact can be seen from the mass marriage programmes/activities carried out by a number of couples who have long standing marriages that are not registered.

In addition, children's rights protected by Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution are not harmed by the existence of Article 2 paragraph (2) of the Marriage Law, which requires marriage registration. Protection of children's rights as regulated in Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution can in fact only be maximised if marriages are registered so that the genealogy of children and the identities of those who have obligations to the children are easily known. Marriage registration is a social dimension that is intended to guarantee the legal status and the consequences of a legal event just as the registration of births and deaths.

Based on these considerations, in my opinion there is no constitutional impairment experienced by the Petitioners as a result of the existence of Article 2 paragraph (2)

of the Marriage Law, although if the recording is interpreted as an absolute requirement for the validity of marriage, then the *a quo* article has the potential to impair the constitutional rights of Petitioner I.

**[6.4]** It must be acknowledged that the day-to-day practice of the law demonstrates the existence of legal pluralism because there are communities of people who, in their daily civil relations, adhere to religious law, or fully adhere to national law, or base their civil relations on local customary law. This legal pluralism is regulated and expressly protected by the 1945 Constitution, as long as it does not conflict with the ideals of the Republic of Indonesia.

As an implication of legal pluralism, certain frictions cannot be avoided, both simple and complex, in relation to the practices of national law, religious law, or customary law. In the spirit of avoiding such frictions and their negative consequences, the state provides legislation that seeks to be an umbrella for legal pluralism. It cannot be avoided that such efforts should, on the one hand, harmonise interpretations for the implementation of religious law and customary law. This kind of restrictive practice gets its justification from constitutionalism, whereby even Article 28J paragraph (2) of the 1945 Constitution expressly states that, "In exercising his rights and freedoms, every person is obliged to submit to the restrictions set forth by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfil just demands in accordance with moral considerations, religious values, security and public order in a democratic society."

In reality, in Indonesia, there are still many marriages that are only based on religious law or belief, which adhere to the teachings of certain religions or beliefs without registration. This fact, in practice, threatens to harm women—as wives—and children born of these marriages. In relation to the protection of women and children, as described above, there are differences in losses resulting from marriages that are not based on the Marriage Law in terms of the legal subject, namely (i) the consequences for women or wives; and (ii) consequences for children born of the marriage.

**[6.5]** Theoretically, religious norms cannot be imposed by the state to be implemented, because religious norms are areas of transcendental beliefs that are private, namely the relationship between humans and their creators; whereas legal

norms, in this case the Marriage Law, are provisions made by the state as a manifestation of the agreement between citizens (communities) and the state so that it can be enforced by the Government.

While the potential loss due to marriages not based on the Marriage Law for women is very diverse, the most important matter is whether in fact the loss can be recovered or not. Here is seen the crucial point of the Marriage Law is primarily the regulation of marriage registration. In the context of the marriage legal system, protection by the state of married parties, especially of the women as wives, can only be implemented provided the marriage is conducted consciously in accordance with the Marriage Law, one of the conditions being that the marriage is conducted in accordance with prevailing laws and regulations (*vide* Article 2 of Law 1/1974). A further consequence for marriages that go unregistered is that the state cannot provide protection regarding marital status, property rights, inheritance rights and other rights arising from a marriage, because to prove the existence of a wife's rights, one must first prove the existence of a marriage between the woman and her husband.

**[6.6]** Marriages not based on the Marriage Law also have the potential to harm children born of those marriages. The potential loss for children, which is primarily the lack of recognition of the child's relationship with his biological father, which naturally results in the inability to invoke the obligation of the father to provide for the child's financial needs and other civil rights. In addition, in a society that is trying to maintain traditional wisdom and values, understanding the concept of the family must refer to the nuclear family, which is a family consisting of father, mother and child or children. Any child born of a family that does not fulfil the model of the nuclear family or who does not have the recognition of his biological father will face negative stigma, for example, as an illegitimate child. This stigma is a potential harm to the child, in particular social-psychological harm, which can actually be prevented by recognising the child's relationship to his biological father. From the perspective of laws and regulations, differentiating treatment against children for certain reasons which are not caused by the child's own actions can be categorised as discriminatory.



The potential loss is confirmed by the provisions of Article 43 paragraph (1) of the Marriage Law, which states, "Any child born out of wedlock has a civil relationship with only the mother and the mother's family". The existence of the *a quo* Article closes the possibility for children to have civil relations with their biological father. This is the risk of unregistered marriages or marriages that are not carried out in accordance with the Marriage Law, but it is not appropriate that the child must experience harm as a result of the actions of his parents. If it is considered a sanction, neither state law nor religious law (in this case the Islamic religion) recognises the concept of "derived sin". In other words, the potential harm arising from marriages that fail to observe the provisions of the Marriage Law are risks to the men and women who engage in these marriages, but must not be borne by children born of the marriage. Thus, in my opinion, the fulfillment of the rights of children born of a marriage, whether that marriage is valid or not according to state law, remains the duty of their biological parents.