

DECISION

Number 12/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of Law Number 1 Year 1974 regarding Marriage against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **M INSA, S.H.** occupation: Entrepreneur, having his address at Jalan Merpati 1 Number 17 Block Q 2 Sector 1 Bintaro Jaya, South Jakarta, Telephone Number 021-7350206, hereinafter referred to as ----- **Petitioner**;

[1.3] Having read the Petition of the Petitioner;
Having heard the statement of the Petitioner;
Having heard and read the written statement of the Government;
Having heard and read the written statement of the People's Legislative Assembly of the Republic of Indonesia;
Having heard and read the written statement of the Indirectly Related Parties;
Having heard the statements of the Experts;
Having examined the evidence;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioner's petition, as described in the Principal Case section, is for judicial review of in the provisions of Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 5 Paragraph (1), Article 9, Article 15 and Article 24 of Law Number 1 Year 1974 regarding Marriage (State Gazette of the Republic of Indonesia Year 1975 Number 12, Supplement to the State Gazette of the Republic of Indonesia Number 3050, hereinafter referred to as the Marriage Law). In essence, the aforementioned provisions regulate the principles of monogamous marriage, the conditions and requirements of polygamy, the consent of the wife and the court, and if there is no such consent, it shall be possible to file an objection to or cancellation of a marriage. According to the Petitioner, such provisions are contrary to Article 28B Paragraph (1), Article 28E Paragraph (1), and Article 28I Paragraph (1) and Paragraph (2), and Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution).

[3.2] Considering whereas prior to further considering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

- First, whether the Court has the authority to examine, hear and decide upon the *a quo* Petition;

- Second, whether the Petitioner has the legal standing to file the *a quo* petition;

With respect to the foregoing two issues, the Court is of the following opinion:

AUTHORITY OF THE COURT

[3.3] Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution, the Court has the authority to hear at the first and final level the decision of which shall be final, among other things, to review a law against the 1945 Constitution. The aforementioned provision is further affirmed in Article 10 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 Paragraph (1) of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358);

[3.4] Considering whereas the Petitioner's petition is for judicial review of a law, *in casu* the Marriage Law against the 1945 Constitution, while the *a quo* law was enacted in 1974. In accordance with the provisions set forth in Article 24C Paragraph (1) of the 1945 Constitution, Article 10 Paragraph (1) and Article 51 Paragraph (3) of the Constitutional Court Law *juncto* Court Decision Number 066/PUU-II/2004 which has ruled that Article 50 of the Constitutional Court Law

no longer has any binding legal effect, and hence the Court has the authority to review the Marriage Law petitioned by the Petitioner;

LEGAL STANDING OF THE PETITIONER

[3.5] Considering whereas in order to be able to file a petition for judicial review of a law against the 1945 Constitution, Article 51 Paragraph (1) of the Constitutional Court Law provides that the parties qualified to act as a Petitioner shall be a) individual Indonesian citizens, b) customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law, c) public or private legal entities, or d) state institutions. In this case, the Petitioner is an individual Indonesian citizen, and he therefore fulfills the requirement or qualification provided for in Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law;

[3.6] Considering whereas in order to fulfill the legal standing requirements, not only is the Petitioner required to fulfill the qualifications stated in Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law, he is also required by Article 51 Paragraph (2) of the Constitutional Court Law that the Petitioner deems that his constitutional rights/authority have been impaired by the coming into effect of the law being petitioned for judicial review. The Court, following Decision Number 006/PUU-III/2005 and subsequent cases, is of the opinion that the impairment caused by the coming into effect of a law according

to Article 51 Paragraph (1) of the Constitutional Court Law must fulfill five requirements which are cumulative in nature, as follows:

- a. the Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;
- b. the Petitioner deems that his constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of rights and/or constitutional authority and the coming into effect of the law petitioned for review;
- e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.7] Considering whereas in his Petition, the Petitioner argued that his constitutional rights have been impaired by the coming into effect of Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 5 Paragraph (1), Article 9, Article 15 and Article 24 of the Marriage Law.

The substantive points regarding constitutional impairment as intended by the Petitioner may be formulated as follows:

- the provisions reduce his freedom to perform religious observance according to the Petitioner's religion namely to practice polygamy as a religious observance. By the application of the monogamy principle, thus the Petitioner cannot practice polygamy as a religious observance;
- whereas polygamy is allowed in the religion of Islam. The provisions of the articles in the *a quo* law, which require the consent from one's wife or the Court, have impaired or reduced the freedom of religion, particularly reducing the freedom to perform the religious observance of polygamy, reducing the Petitioner's prerogative right in his household, impairing the human rights, and are discriminatory in nature, while in fact those rights are guaranteed by Article 28B Paragraph (1), Article 28E Paragraph (1), and Article 28I Paragraph (1) and Paragraph (2), as well as Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution;

[3.8] Considering whereas with respect to the issue of whether the impairment suffered by the Petitioner has been specific and actual or at least potential in nature which pursuant to logical reasoning will take place for sure, the Petitioner has submitted an application to obtain polygamy permit to the local Religious Court, yet it could not be further processed because the Petitioner was unable fulfill the requirements provided for in the Marriage Law. Therefore, according to the Petitioner, the provisions regarding the aforementioned requirements have the potential to reduce his constitutional rights in relation to his freedom to perform religious observance according to the Petitioner's religion

namely the religious observance of polygamy, to reduce the Petitioner's prerogative right in his household and to impair human rights as well as are discriminatory in nature. Based on the abovementioned description, the Court is of the opinion that the Petitioner fulfills the requirements as intended by Article 51 Paragraph (1) of the Constitutional Court Law, and thus he has legal standing to file the petition for judicial review of the Marriage Law to the Court;

[3.9] Considering, since the Court has the authority to hear the *a quo* petition and the Petitioner has legal standing, hence the Principal Case shall be further considered;

PRINCIPAL ISSUE OF THE PETITION

[3.10] Considering whereas the Principal Issue of the Petitioner's Petition is concerning the constitutionality of the articles in the Marriage Law namely Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 4 Paragraph (2), Article 5 Paragraph (1), Article 9, Article 15, and Article 24 of the Marriage Law which, according to the Petitioner, are contrary to the Petitioner's constitutional rights guaranteed by Article 28B Paragraph (1), Article 28E Paragraph (1), Article 28I Paragraph (1), Article 28I Paragraph (2), Article 29 Paragraph (1), and Article 29 Paragraph (2) of the 1945 Constitution. The aforementioned articles of the Marriage Law respectively read as follows:

Article 3

Paragraph (1): *“In principle, in a marriage, a man shall only be allowed to have a wife, and a wife shall only be allowed to have a husband”;*

Paragraph (2): *“The court can give someone the permit to have more than one wife”;*

Article 4

Paragraph (1): *“In the event that a husband intends to have more than one wife, he is obligated to submit an application to the court of his domicile”;*

Paragraph (2): *“The court shall only give the permit to a husband who intends to have more than one wife on the following conditions:*

- a. The wife can no longer perform her obligations as a wife;*
- b. The wife has a physical handicap or suffers from an incurable disease;*
- c. The wife is incapable of procreation.”*

Article 5

Paragraph (1): *“To be able to submit the application to the Court, the following requirements must be fulfilled:*

- a. There is a consent from the wife/wives;*
- b. It is certain that the husband is capable of guaranteeing the living necessities of the wives and their children;*
- c. There is a guarantee that the husband will give a fair treatment to his wives and their children.”*

Article 9: *“A person who is still bound by a marriage with another person can not enter into another marriage except in the event as referred to in Article 3 Paragraph (2) and Article 4 of this law”.*

Article 15: *“Whosoever due to a marriage is still bound together with one of both parties and based on the existing marriage can prevent the new marriage”.*

Article 24: *“Whosoever due to a marriage is still bound with one of the parties either of the parties and based on the existing marriage can apply for cancellation of the new marriage”.*

According to the Petitioner, the aforementioned articles of the Marriage Law are contrary to the 1945 Constitution, namely:

Article 28B

Paragraph (1): *“Every person shall be entitled to found a family and to procreate through legitimate marriage”.*

Article 28E

Paragraph (1): *“Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to return”.*

Article 28I

Paragraph (1): *“The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever”.*

Paragraph (2): *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”.*

Article 29

Paragraph (1): “*The state shall be based upon Belief in The One and Only God*”.

Paragraph (2): “*The state shall guarantee the freedom of every resident to adhere to his/her religion and to worship in accordance with such religion and belief*”.

[3.11] Considering whereas during the hearing, the Court has examined written evidence presented by Petitioner, the complete list of which has been described in the abovementioned Principal Case (Exhibit P.1 through Exhibit P.19). In addition, the Court has also heard the statements of the experts presented by the Petitioner, as completely set out in the Principal Case, which in essence are as follows:

- a. Expert Dr. Ahmad Sudirman, M.A. presents a statement that the religion of Islam will not allow a husband to practice polygamy if his wife is disabled or is unable to perform her observance. In the teachings of Islam, in relation to the Islamic principles, there is one principle that may be interpreted as *ma'qulatul ma'na*, insofar that it is approved by ulema and it is not forbidden, yet generally there are no additional statements in the aforementioned principle;
- b. Expert Dr. Eggi Sudjana, S.H., M.Si. presents a statement that the monogamy principle adopted by the *a quo* law is contrary to the polygamy principle allowed by the Almighty God (*Allah* SWT) and violates the human

rights possessed by a person who has faith in the Koran and the Sunnah of the Prophet Muhammad and will cause people to easily fall into adultery, sexual affairs and prostitution;

[3.12] Considering whereas the Government has presented written and oral statements, as completely set out in the Principal Case, which in essence state that the provisions in the articles of the *a quo* law are intended to prevent any arbitrary acts by a husband and to guarantee that in polygamy, there will be harmony, happiness and prosperity at home. In addition, the Government also presents Experts whose statements have been heard by the Court as follows:

- a. Expert Prof. Dr. M. Quraish Shihab, presents a statement that marriage is intended to achieve peacefulness (*sakinah*). *Sakinah* is a spiritual peace following a turbulent situation. Within their loneliness, human beings can feel isolated and that feeling of isolation may disappear when human beings have found their perfect partner. Therefore, *Allah* SWT has created spouses for both men and women and given them the potential for being affectionate (*mawaddah*) and compassionate (*rahmah*) so that the aforementioned peacefulness may live on. By *mawaddah* and *rahmah* it will not be possible for either of the couple to commit an act that he/she knows will hurt his/her spouse's feelings. By *mawaddah*, a man does not practice polygamy because his love is devoted only to one woman. By *rahmah*, although a husband feels the urge and need to practice polygamy, he will refrain from doing so if he considers that by practicing

- polygamy, he will consequently hurt his wife's feelings, yet on the other hand, a wife may allow her husband to re-marry, sacrificing her feelings for her husband to do so if she feels that her husband really needs to practice polygamy. This is how marriage is taught in Islam, hence the principle is basically monogamy, yet there is still an opportunity to practice polygamy. Relating it to the *a quo* law, although the requirements contained therein are not explicitly stated in the Koran and the *Sunnah* of the Prophet, they are nonetheless justifiable because judicial provisions always revolve around *illah* (God) and its objectives, hence it is possible to implement new requirements not stated explicitly in the aforementioned verses of the Koran and the *Sunnah* of the Prophet.
- b. Expert Prof. Dr. Hj. Huzaemah T. Yanggo, presents a statement that there are two types of religious observance; *mahdlah* observance and *ghairu mahdlah* observance. The *mahdlah* observance is a religious observance which cannot be compromised, while the *ghairu mahdlah* observance is the opposite, for instance gathering for a good purpose is considered as a religious observance. Polygamy is a personal issue, but it is justifiable for the Government to interfere in such an issue order to guarantee the realization of collective interest. This is in line with the holy words of *Allah*, which means, "O faithful devotees, obey Allah, the Apostle and *ulil amri* (the authorities)".

[3.13] Considering whereas the People's Legislative Assembly (DPR) has presented written and oral statements as completely described in the Principal Case, which in essence state that the provisions of the articles of the *a quo* law do not impair the constitutional right of the Petitioner to have the freedom of religion, including to practice polygamy to the extent that the Petitioner is capable of fulfilling the requirements provided for in the intended law;

[3.14] Considering whereas the Indirectly Related Parties have presented both written and oral statements during the hearing as completely described in the Principal Case, which in essence state that the practice of polygamy is a violation of women's rights because it does not create a conducive environment within a household in order to achieve the objectives of a marriage as provided for in the *a quo* article and may trigger acts of violence at home;

THE STAND OF THE COURT

[3.15] Considering whereas due to the fact that the Petitioner bases his arguments on the teachings of Islam, therefore prior to further considering the constitutionality issue of the provisions in the Marriage Law petitioned for judicial review through the *a quo* petition, it is important for the Court to first consider the rules regarding marriage and polygamy according to the teachings of Islam;

[3.15.1] Whereas, it has been generally known and it has also been described by the experts of the Government, at the time when Islam was revealed through the Prophet Muhammad, polygamy or marriage between a man

and several women had been practiced. In fact, polygamy has been a familiar concept known by almost all nations in the world even since thousands of years ago. The Persians, Romans, Egyptians, Babylonians, Indians, Assyrians and Greeks knew polygamy. Prophets before the Prophet Muhammad such as the Prophets Abraham, Solomon, and David recognized and practiced polygamy. The Prophet Moses also did not prohibit his people from practicing polygamy. In times prior to the appointment of Muhammad as an Apostle, also known as the *jahiliyah* age, polygamy was not only familiar to the Arabs but it was also a custom. The practice of polygamy during the *jahiliyah* age extremely degraded the status of women. Men could easily marry or divorce women as they liked, and as many times they wished. During the *jahiliyah* age, women were treated as no more than objects. For instance, widowed women whose husbands had died were allowed to be given to their husbands' sons to be married. Therefore, polygamy is not a new creation or issue made by the teachings of Islam. The teachings of Islam in fact wish to organize polygamy in a **gradual** manner, with the purpose that, among other things, in its practice, **there will not be any form of arbitrary treatment by men** and in the context of **preserving the dignity of women**. The provisions of Koran in relation to marriage and polygamy, among others are contained in the following Letters:

Ar-Ruum verse 21

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

Which means:

And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.

(Indonesian translation by the Department of Religious Affairs of the Republic of Indonesia, 1990)

An-Nisaa verse 1

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً وَاتَّقُوا اللَّهَ
الَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ إِنَّ اللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا

Which means:

O mankind! Reverence your Guardian-Lord, who created you from a single Person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women; fear Allah, through Whom ye demand your mutual (rights), and (reverence) the wombs (that bore you): for Allah ever watches over you. (Indonesian translation by the Department of Religious Affairs of the Republic of Indonesia, 1990)

An-Nisaa verse 3

وَأِنْ خِفْتُمْ أَلَّا تُفْسِدُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً ...

Which means:

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal

justly with them, then only one, ... (Indonesian translation by the Department of Religious Affairs of the Republic of Indonesia, 1990)

An-Nisa verse 129

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُوراً رَحِيماً

Which means:

Ye are never be able to be fair and just as between women, even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to a friendly understanding, and practice self-restraint, Allah is Oft-Forgiving, Most Merciful. (Indonesian translation by the Department of Religious Affairs of the Republic of Indonesia, 1990)

From the abovementioned quotes of Koran verses, most ulema, as may be observed from the statements of experts Prof. Dr. M. Quraish Shihab and Prof. Dr. Hj. Huzaemah T. Yanggo presented before the hearing, it may thus be concluded as follows:

[3.15.2] Whereas the objective of a marriage is to achieve peacefulness (*sakinah*). A man and a woman living together in the bond of marriage will receive peace. Beforehand, a man or a woman as an individual experienced passionate urges which could not be channeled, and thus they were unable to achieve peace. The *sakinah* may be perpetuated when the couple preserves

mawaddah, namely the sincere affection bonded between the two individuals without expecting anything in return but rather merely for the willingness to sacrifice their respective personal wishes and give pleasure to their spouse. Therefore, *mawaddah* is altruistic in nature, not egoistic. Egoism, namely the human nature which desires everything pleasing to himself/herself, regardless of the fact that such an action will hurt the feelings of his/her spouse, will imply the purposive disconnection of *mawaddah*. With such disconnection from *mawaddah*, *sakinah* is thus no longer preserved. That is the reason why, for the sake of sustaining a *sakinah* family, it is considered reasonable for a husband wishing to practice polygamy to first ask for the opinion and consent from his wife so that she will not be hurt. In addition, the wife's consent is required because it is closely related to the wife's position as an equal partner and as a legal subject in a marriage whose dignity and status must be respected. Aside from the obligation to preserve *mawaddah*, *sakinah* will consequently occur and be preserved if both husband and wife preserve *rahmah*, namely the act of mutual giving and taking on the basis of sincere affection upon the different positions they occupy, namely as a husband and as a wife, with their respective strengths and weaknesses;

[3.15.3] Whereas based upon the holy word of *Allah* as quoted above, most ulema are of the opinion that the original law of polygamy is *mubah* or *halal*, namely a permissible act. Even so, the permission to practice polygamy is subject to certain conditions, one of them being just treatment. Polygamy may become *sunnah* or *makruh* in nature. This is, however, not caused by its

substance, but due to the condition of the person practicing polygamy, the time, and the situation as the backgrounds. Hence, actually the principle of marriage adopted by the teachings of Islam as indicated by the abovementioned opinion of the expert Prof. Dr. M. Quraish Shihab is the principle of monogamy. Polygamy is an exception which may be sought under certain circumstances, both objectively in relation to time and place, and subjectively in relation to the parties (the persons practicing polygamy) within the marriage. Such circumstances may normatively be in the form of reasons and conditions stipulated by law and enforced through certain procedures in the court;

[3.15.4] Whereas one of the most important requirements of polygamy is being fair. Although the term “fair” in its ideal sense which implies the ability to love one’s wives and children equally is indeed unachievable by mere mortals, despite a husband’s sincere struggle to fulfill such a requirement according to the Holy Word of *Allah* in the Letter of *An-Nisaa* Verse 129 as quoted above. Therefore, the term “fair” as one of the requirements of polygamy implies the sense of to share (*al-qisth*), related to the capacity to provide for one’s wives and/or future wife as well as the born children and the ones who will be born from the aforementioned polygamous marriage. Also, it is related to one’s capability to be present during certain times and in certain places. Thus, the state as the highest organization within a society established on the basis of convention, not only has the authority to regulate (*bevoeg te regel*) but also has the obligation to regulate (*verplicht te regel*) in order to realize the aforementioned fairness by means of laws and regulations within its authority and through their enforcement

through the court. This is in accordance with the principle of *fiqh* as quoted by Expert Prof. Dr. Hj. Huzaemah T. Yanggo, which means that “*The Government (the state) shall take care of its people in accordance with their collective interest* “. Therefore, according to the teachings of Islam, the state as *ulil amri* has the authority to stipulate requirements which must be complied with its citizens wishing to practice polygamy for the sake of *public interest*, particularly for the sake of achieving the objective of a marriage, namely to form a happy and everlasting family (a household) on the basis of the Belief in the One and Only God, which is identical to the abovementioned sense of a *sakinah* family;

[3.15.5] Whereas polygamy, as well as the interaction among human beings, falls into the category of *mu’amalah*. Even so, *mu’amalah* may indeed be considered as *an act of religious observance* in a broad sense when it is conducted according to the commandments given by *Allah (syari’ah)*. This is in line with the teachings of Islam that it is the duty in every human’s life to worship, pursuant to *Surah adz-Dzariyat Verse 56* which means “*I have only created Jinns and men, that they may serve Me*“. Such an understanding of an act of worship or *ibadah* implies *ibadah* in its broad sense, which includes the acts of a human being in interacting with other human beings (*hablun min an-nas*), with other non-human creatures, and even with *Allah* as his Creator (*hablun min Allah*). The act of a human being in interacting with other fellow creations of *Allah*, including other human beings, is called *mu’amalah*, while the act of a human being in interacting exclusively with *Allah* Himself is called *ibadah* in a special sense. This special sense of *ibadah* may be further distinguished between the *ibadah* which

is merely an interaction between a human being with *Allah (ibadah mahdlah)* and the *ibadah* with a certain aspect related to human beings and other creations of *Allah (ibadah ghairu mahdlah)*;

[3.15.6] Whereas the aforementioned distinction between *ibadah* and *mu'amalah* is related to the *syari'ah* of *Allah* in regulating the aforementioned aspects. *Allah* has determined certain forms of *ibadah* which are limited in number, yet the commandments regulating those forms of *ibadah* are extremely specific (*tafshily*). Human beings, both as individuals and collectives, have no room for *ijtihad* intended to further complete the commandments set forth by *Allah* and His Apostles. If the room for *ijtihad* exists, in *ibadah ghairu mahdlah*, the number will be extremely limited and it will consist of merely technical issues. At the opposite extreme, regarding *mu'amalah*, *Allah* has not given any specific scope to it. The freedom to determine such aspects has been completely given to human beings. The commandments regulating such matters, the *syari'ah*, only comprise the general guidelines (*ijmaly*). The remaining matters are given to human beings who, by the Apostle of *Allah*, are declared as the most knowledgeable concerning the issues of their world. “*You have better knowledge of your own world*”. This is also in accordance with the principle of *fiqh (qaidah fiqh)* in the aspect of *ibadah* which states, “*in essence, worship is forbidden unless there is a commandment which expressly orders one to do so*”, while the *qaidah fiqh* in the aspect of *mu'amalah* states, “*in essence, mu'amalah is allowed unless there is a commandment which expressly forbids one to do so* “. Due to the fact that polygamy does not constitute an act of worship in its special sense

as intended above, therefore regulations regarding the requirements to practice polygamy are not contrary to the teachings of Islam. In comparison, Moslem pilgrimage (*ibadah haji*) constitutes one of the five pillars of Islam. Even so, for the sake of well-performed pilgrimage, the Government regulates certain requirements for prospective Moslem pilgrims due to the limited quota of Moslem pilgrims annually;

[3.16] Considering whereas the Petitioner argues that limitations on polygamy have contributed to the high rate of divorce, promoted adultery and caused the tendency for widowed women to become commercial sex workers (PSK). With respect to this argument, the Court is of the opinion that such accusations are the Petitioner's personal hypotheses which are yet to be proven. This is because the results of surveys performed by several institutions showed the opposite phenomenon, namely that the high percentage in divorces caused by polygamy is much higher than the number of divorces caused by other reasons. Likewise, the Petitioner's argument which states that the limitations on polygamy has promoted adultery has also yet to be studied whether amongst the adulterers, there are also husbands having more than one wife. Adultery and PSK are not related only to the fact that one practices polygamy or not, but also to other issues, such as the socio-economic condition of a person and more importantly, they are related to the person's moral quality (*akhlaq*). Moreover, such arguments cannot be utilized as the bases for constitutional review of the norms of the *a quo* law;

[3.17] Considering whereas the Petitioner also argues that polygamy is necessary because the number of women exceeds the number of men. With respect to this argument, the Court is of the opinion that if it is true, it cannot be construed in such a way that in order to practice polygamy, certain requirements are not necessary. The articles being petitioned for judicial review state that polygamy is not forbidden. However, in order to guarantee the realization of the aim of a marriage, requirements for practicing polygamy are still necessary. Such a circumstance is similar to the one when the verse regarding polygamy was revealed, namely after the Uhud war finished. Back then, many Moslem men died at the war, resulting in the increased number of widowed women and orphans who urgently needed protection. It was under such a circumstance that practicing polygamy was allowed and legal (*halal*) for the first time in the history of Islam. Even under such circumstance, the legal practice of polygamy was still followed by certain requirements, one of them being fair treatment. Meanwhile, based on the observation conducted by the National Family Planning Board (BKKBN) and Statistics Central Agency in 2006, apparently the number of men exceeded the number of women, with a ratio of 50.2% to 49.8%, hence the Petitioner's argument is not correct. Even if the Petitioner's argument were correct --*quod non*--such an issue would have no relationship with the issue of constitutionality of the norms of the law being petitioned for judicial review;

[3.18] Considering whereas the Petitioner argues that the articles in the Marriage Law which relate to polygamy, namely Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 5 Paragraph

(1), Article 9, Article 15 and Article 24, are contrary to Article 28B Paragraph (1), 28E Paragraph (1), 28I Paragraph (1), Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution. With respect to the aforementioned Petitioner's argument, the Court is of the following opinion:

[3.18.1] Whereas the provisions existing to regulate polygamy for Indonesian Citizens (WNI) whose religious laws on polygamous marriage are acceptable, because according to Article 2 Paragraph (1) of the Marriage Law, a marriage is legitimate insofar as it is conducted according to their respective religions and beliefs. On the contrary, it will not be acceptable if the Marriage Law regulates polygamy for those whose religious laws do not recognize the practice of polygamy. Thus, the difference in such regulation is not a form of discrimination, because the regulation does not discriminate any party, but instead, it regulates according to which matters are necessary, while discrimination is the act of giving different treatments towards two similar issues;

[3.18.2] Whereas the articles in the Marriage Law which state the reasons, requirements and procedures of polygamy, are none other than an effort to guarantee the recognition of the rights of wives and future wives the exercise of which becomes their husbands' responsibility as the ones engaging in polygamy in the context of realizing the objective of a marriage. Thus, such an effort cannot be construed as being intended to eliminate provisions which allow polygamous marriage. Thus the description of a condition which requires a husband who wishes to practice polygamy to be able to give fair treatment is as follows:

- a. They are not contrary to Article 28B Paragraph (1) of the 1945 Constitution, because the provisions regarding the reasons, requirements and procedures of polygamy are not by any means limiting the right of every person to found a family and procreate through legitimate marriage. For Moslems, it may be achieved through either monogamous or polygamous marriage, under the condition that they fulfill the reasons, requirements and procedures of either type of the marriage as intended in the Marriage Law;
- b. They are not contrary to Article 28E Paragraph (1), Article 28I Paragraph (1), Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution either because the conditions required to be fulfilled by a husband to be able to practice polygamy do not in any way disallow every person to freely perform the religious observance of their adopted religions. Likewise, the 1945 Constitution only contains principles which guarantee the freedom to perform religious observance according to one's religion. The Marriage Law which regulates the intended reasons, requirements, and procedures of polygamy is not contrary to the abovementioned principles. In fact, the *a quo* Law reinforces such guarantee as expressly described in Elucidation on Article 2 Paragraph (1) of the Marriage Law which reads, "*By the formulation of this Article 2 Paragraph (1), there shall be no marriage outside the laws of one's respective religion and belief, in accordance with the 1945 Constitution. That which is intended by in the*

laws of one's respective religion and belief shall include the provisions of applicable laws for his/her religion and belief insofar as they are not contrary to or otherwise provided in this Law".

4. CONCLUDING OPINION

In view of the interpretations argued by the Petitioner and the experts presented by the Petitioner, regarding marriage and polygamy based on all the above, the Court is of the following opinion:

[4.1] Whereas the provisions contained in the Marriage Law stating that the principle of a marriage shall be monogamy, and that polygamy shall only be allowed under certain reasons, conditions and procedures are not contrary to the teachings of Islam;

[4.2] Whereas the *a quo* provisions are not contrary to the right to found a family, the freedom to embrace a religion and to worship according to one's religion, the right to be free from discriminatory treatment as regulated in Article 28B Paragraph (1), Article 28E Paragraph (1), Article 28I Paragraph (1), and Paragraph (2), as well as Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution;

[4.3] Whereas therefore, the arguments presented by the Petitioner are not sufficiently grounded and hence it must be declared that the petition of the Petitioner shall be rejected.

5. DECISION

In view of the provision of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the decision:

To declare that the petition of the Petitioner shall be rejected.

Hence the decision was passed in the Consultative Meeting of Constitutional Court Justices attended by nine Constitutional Court Justices on Tuesday, October 2, 2007 and pronounced in the Plenary Meeting of the Constitutional Court open for public on this day, Wednesday, October 3, 2007, by us Jimly Asshiddiqie, as Chairperson and concurrent Member, H. Achmad Roestandi, H.M. Laica Marzuki, Maruarar Siahaan, Abdul Mukthie Fadjar, H.A.S. Natabaya, Harjono, I Dewa Gede Palguna, and Soedarsono, respectively as Members, assisted by Wiryanto as the Substitute Registrar, and attended by the Petitioner, the Government or its representative, and the People's Legislative Assembly or its representative, as well as the Indirectly Related Parties.

CHIEF JUSTICE,

SGD.

Jimly Asshiddiqie

JUSTICES,

SGD.

H. Achmad Roestandi

SGD.

H.M. Laica Marzuki

SGD.

Maruarar Siahaan

SGD.

Abdul Mukthie Fadjar

SGD.

H.A.S. Natabaya

SGD.

Harjono

SGD.

I Dewa Gede Palguna

SGD.

Soedarsono

SUBSTITUTE REGISTRAR

SGD.

Wiryanto