



DECISION

Number 46/PUU-VIII/2010

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing 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] 1. Name : **Hj. Aisyah Mochtar also known as Machica binti H. Mochtar Ibrahim**

Place and Date of Birth : Ujung Pandang, March 20, 1970

Address : Jalan Camar VI Blok BL 12A, Neighborhood Ward / Neighborhood Block 002/008, Pondok Betung Village/Sub-District, Pondok Aren District, Tangerang Regency, Banten.

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

Place and Date of Birth : Jakarta, February 5, 1996

Address : Jalan Camar VI Blok BL 12A,
 Neighborhood Ward/
 Neighborhood Block 002/008,
 Pondok Betung Village/Sub-
 District, Pondok Aren District,
 Tangerang Regency, Banten.

By virtue of Power of Attorney Number 58/KH.M&M/K/VIII/2010 dated August 5, 2010, granting the power to i) Rusdianto Matulatuwa; ii) Oktryan Makta; and iii) Miftachul I.A.A., namely advocates at Matulatuwa & Makta Law Firm having its address at Wisma Nugra Santana 14th Floor, Suite 1416, Jalan Jenderal Sudirman Kav. 7-8 Jakarta 10220, either individually or jointly acting for and on behalf of the principal;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having examined the evidence of the Petitioners;

Having heard the statements of experts presented by the Petitioners;

Having heard and read the written statements of the Government;

Having heard and read the written statements of the People's Legislative
 Assembly;

Having read the written conclusions of the Petitioners;

2. FACTS OF THE CASE

[2.1] Considering whereas the Petitioners filed the petition dated June 14, 2010 which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the "Registrar's Office of the Court") on Monday, June 14, 2010 based on the Deed of Petition File Receipt Number 211/PAN.MK/2010 and which was registered on Wednesday, June 23, 2010 under Number 46/PUU-VIII/2010, which was revised and received by the Registrar's Office of the Court on August 9, 2010, which explains the matters as follows:

A. Legal Standing of the Petitioners

1. Whereas the Petitioners are Individual Indonesian citizens;
2. Whereas Article 51 paragraph (1) of the Constitutional Court Law states that:

Petitioners shall be parties considering that their constitutional rights and/or authorities are impaired by the coming into effect of a law, namely:

- 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.

Furthermore, the Elucidation of Article 51 paragraph (1) of the Constitutional Court Law states that:

“Constitutional Rights” shall be the rights referred to in the 1945 Constitution of the State of the Republic of Indonesia;

Therefore, the Petitioner is classified as an individual Indonesian citizen, whose constitutional rights are impaired by the laws due to different treatment of the legal status of her marriage before the law;

3. Whereas based on the aforementioned provision, there are two requirements which must be fulfilled for this petition for substantive review, namely as to whether or not the Petitioners have legal standing in the case of petition for substantive review of this law. The first requirement is the qualification to act as Petitioners as set out in Article 51 paragraph (1) of the Constitutional Court Law. The second requirement is that the constitutional rights and/or authorities of the Petitioners are impaired by the coming into effect of a law;
4. Whereas previously explained, the Petitioners are Indonesian citizens constituting “Individual Indonesian Citizens”, as referred to in Article 51 paragraph (1) of the Constitutional Court Law. Therefore, the Petitioners have the qualifications as Petitioners in this petition for substantive review;

5. Whereas according to the provision of Article 2 paragraph (1) of the Marriage Law stating that:

“A marriage shall be legitimate if it is conducted according to the religion and belief of each party”, therefore, the marriage conducted by the Petitioner shall be legitimate and it has been confirmed by Court Decision having permanent legal force (*inkracht van gewijsde*) as set out in the verdict of Stipulation of Case Number 46/Pdt.P/2008/PA.Tgrs., dated June 18, 2008, page 5, paragraph 5, stating that:

“... Whereas on December 20, 1993, the marriage between the Petitioner (Hj. Aisyah Mochtar also known as Machica binti H. Mochtar Ibrahim) and a man named Drs. Moerdiono took place in Jakarta, with H. Moctar Ibrahim as the marriage guardian, witnessed by 2 witnesses namely the late KH. M. Yusuf Usman and Risman, in which the dowry was in the form of praying kit, money amounting to 2,000 Riyals (the currency of Saudi Arabia), a set of gold jewelry, diamond, paid in cash and in which the ‘*ijab*’ (statement of consent) was pronounced by the aforementioned marriage guardian and the ‘*qabul*’ (statement of acceptance) was pronounced by the man named Drs. Moerdiono;

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

“Every marriage shall be registered in accordance with the

applicable laws and regulations.”

By the coming into effect of Article 2 paragraph (2) of the Marriage Law, the constitutional rights of the Petitioner as an Indonesian citizen which are guaranteed by Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution have been impaired;

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

“Any person shall be entitled to establish a family and to procreate through legitimate marriage.”

This provision of the 1945 Constitution creates the constitutional norms that the Petitioners who are Indonesian citizens shall have the rights equal to other Indonesian citizens for establishing a family and conducting marriage without being discriminated and must be treated equally before the law;

Meanwhile, Article 28B paragraph (2) of the 1945 Constitution states that:

“Every child shall have the right to live, grow and develop and shall have the right to be protected against violence and discrimination.”

This provision of the 1945 Constitution clearly creates the constitutional norms that the Petitioner’s child also has the right to his legal status and to equal treatment before the law.

This means that the 1945 Constitution prioritizes legal norms as the form of justice to any person without discrimination. However, the Marriage Law states otherwise, which resulted in the impairment of the constitutional rights of the Petitioners. Constitutionally, any person shall be entitled to get married insofar as it is in accordance with the religion and belief of each party. In this case, the Petitioner has been married in accordance with the norms of her religion, namely Islam, and in accordance with the basic principles of marriage as taught in Islam. It is impossible to reduce religious norms with legal norms, which causes a legitimate marriage to become illegitimate. The consequence of the reduction of religious norms with legal norms is not only the unclear marital status of the Petitioner, but also the unlawful existence of her child before the law;

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

“A child born out of wedlock shall only have civil relationship with his/her mother and his/her mother’s family.”

Based on Article 43 paragraph (1) of the Marriage Law, the Petitioner’s child shall only have civil law relationship with his mother and the same thing is also adhered in Islam. However, it becomes inappropriate if the legal norms of the Marriage Law

states that a child born out of wedlock shall only have civil relationship with his/her mother and his/her mother's family, based on the legitimacy of the marriage legitimacy according to the legal norms. Likewise, a legitimate marriage in Islam is based on the provisions regulated according to the *Koran* and the *Sunnah*. In this case, the Petitioner's marriage is legitimate and in accordance with the basic principles of marriage as well as religious norms as taught in Islam. The Petitioner's marriage is not caused by adultery or at least deemed as a form of adultery. Similarly, her child is also a legitimate child. From the viewpoint of Islam, the matter different and absolutely similar to the provisions of the Marriage Law is in relation to a pregnant woman and she is not committed in a marriage, the fate of her child shall be with the mother and the mother's family. So, the question is how can a legitimate marriage according to religious norms be reduced by the legal norms to become illegitimate?

By the coming into effect of Article 43 paragraph (1) of the Marriage Law, the constitutional rights of the Petitioner as the mother and her child to obtain legalization of her marriage and the legal status of her child which are guaranteed by Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution are impaired;

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

“Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law.”

Referring to this provision of the 1945 Constitution, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law is inconsistent and not in accordance with, as well as impairing the constitutional rights of the Petitioner and her child. If this is viewed based on the interest of legal norms, it definitely reduces the interest of religious norms because basically, something which is deemed legitimate and proper based on the religious norms becomes different and illegitimate based on the coercive approach of the legal norms. The consequence of the coercive nature of the legal norms in the Marriage Law is the loss of legal status of the Petitioner’s marriage and the Petitioner’s child. In other words, the legal norms have violated the religious norms;

9. Whereas at the same time, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law have resulted in impairment of the constitutional rights of the Petitioner and her child based on Article 28B paragraphs (1) and (2) of the 1945 Constitution as well as Article 28D paragraph (1) of the 1945 Constitution, namely the right to obtain legalization of her marriage and the legal status of her child. As a legislative regulation, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law have binding legal force and must be complied with by all

people, although such provision actually contains a quite fundamental error because it does not conform with the constitutional rights provided for in Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution, which resulted in the constitutional impairment of the Petitioner as previously explained. This shall be explained specifically in the further explanation which should be deemed *mutatis mutandis* as an integral part of the argument;

10. Whereas all of the aforementioned explanations clearly indicates that the Petitioner has legal standing to act as the petitioner in a petition for substantive review of law;

B. Reasons of the Petition for Substantive Review of the Marriage Law

11. Whereas the Petitioner is the party who directly experiences and suffers the impairment of her constitutional rights by the enactment of the Marriage Law, particularly in relation to Article 2 paragraph (2) and Article 43 paragraph (1). These articles have instead created legal uncertainty which resulted in the impairment of the Petitioner with respect to the marital status and the legal status of her child from the marriage;
12. Whereas the constitutional rights of the Petitioner which have been violated and impaired are the rights guaranteed in Article 28B paragraph (1) and Article 28B paragraph (2) of the 1945

Constitution. Based on the provisions of Article 28B paragraphs (1) and (2) of the 1945 Constitution, the Petitioner and her child have the constitutional rights to obtain legalization of her marriage and the legal status of her child. The constitutional rights of the Petitioner have been impaired by the legal norms in the Marriage Law. These legal norms are clearly unfair and impairing since the Petitioner's marriage is legitimate and in accordance with the basic principles of marriage in Islam. Referring to the constitutional norms set out in Article 28B paragraph (1) of the 1945 Constitution, the Petitioner's marriage conducted in accordance with the basic principles of marriage is legitimate, however, it is impeded by Article 2 paragraph (2) of the Marriage Law. The legal norms which require a marriage to be registered in accordance with the applicable laws and regulations have caused a marriage which is legitimate and in accordance with the basic principles of marriage in Islam (religious norms) to become illegitimate according to the legal norms. Subsequently, it affects the status of the child born to the Petitioner which also becomes illegitimate according to the legal norms in the Marriage Law. Therefore, the Petitioner's marriage (religious norms) is clearly violated by the legal norms in the Marriage Law. A similar statement has also been given by Van Kan: "If it is impossible for the legal norms to be implemented, the legal system shall enforce other matters which are as close as possible to the intention of the relevant legal norms or which

remove the consequences of the violation of such legal norms.”
(Van Kan, *Pengantar Ilmu Hukum* (translation of *Inleiding tot de Rechtswetenschap* by Mr. Moh. O. Masduki), PT. Pembangunan, Jkt, 3rd edition, 1960, pages 9-11.)

13. Whereas the consequence of the provisions of Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution is that every person shall have equality and equal rights including his/her rights to obtain legitimacy of his/her marriage and the legal status of his/her child. The constitutional norm arising from Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) is the same treatment and equality before the law. There shall be no discrimination in the implementation of legal norms to any person due to the different way of marriage, and the child born in such marriage is legitimate before the law and shall not be treated differently. However, in the practice, the religious norms have been ignored by coercive interest, namely legal norms. The legitimate marriage of the Petitioner according to the basic principles of marriage and Islamic norms becomes illegitimate since it is not registered according to Article 2 paragraph (2) of the Marriage Law. Therefore, the coming in to effect of these legal norms affects the legal status of a child born in the Petitioner's marriage which becomes a child born out of wedlock based on the provision of legal norms in Article 43 paragraph (1) of the Marriage Law. On the other hand, this discriminative treatment

certainly creates problems due to the unclear and illegitimate status of a child before the law. In fact, the 1945 Constitution states that the destitute children, the parental status of whom is unclear, shall be taken care of by the state. However, different treatment is given to the Petitioner's child who was born in the legitimate marriage in accordance with the basic principles of marriage and religious norms. The Petitioner's child is deemed illegitimate by the Marriage Law. The Constitution of the Republic of Indonesia does not intend that something which has been in accordance with the religious norms to be deemed violating the law based on the legal norms. This constitute violation of religious norms by the legal norms;

14. Whereas in her position as described above, it has been proven that the Petitioner has *causal verband* relationship between the constitutional impairment and the coming into effect of the Marriage Law, particularly Article 2 paragraph (2) and Article 43 paragraph (1), namely those related to marriage registration and legal relation of a child born in an unregistered marriage. The constitutional rights of the Petitioner as a citizen of the Republic of Indonesia have been violated since Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution. This has caused the Petitioner's marriage which was conducted legitimately in accordance with the religion adhered by the

Petitioner not having legal certainty, which also caused the child from the Petitioner's marriage not having legal certainty; The constitutional rights of a child is clearly regulated and acknowledged in Article 28B paragraph (2) of the 1945 Constitution. In reality, ever since he was born, the Petitioner's child has suffered discrimination, namely the removal of his origin by only including the Petitioner's name in his Deed of Birth and the state has removed the child's rights to sustenance, growth and develop since he only has civil relationship with his mother, which made the Petitioner's husband not having the legal obligation to look after, take care of and provide sustenance for the Petitioner's child. No children born in this world shall be blamed and discriminated due to their parents' different yet legitimate way of marriage according to the religious norms. Furthermore, the child shall be a legitimate child and must be treated equally before the law;

In reality, the purpose and objective of the enactment of the Marriage Law related to the registration of marriage and a child born in an unregistered marriage is that the child is deemed as a child born out of wedlock, therefore, he/she only has civil relationship with his/her mother. This reality has provided legal uncertainty and disturbed as well as harmed the sense of justice developing and existing in the community, which impairs the Petitioner;

The birth of the Petitioner's child to this world is not a presence without a cause, but rather, it is a result of love and affection relationship between his parents (the Petitioner and her husband), however, the provision of Article 43 paragraph (1) of the Marriage Law has resulted in legal uncertainty of the relationship between the child and his father. It has violated the constitutional rights of the child to know his origin. It also resulted in physical stress on the child due to the absence of recognition from his father of his existence in the world. This shall certainly leads to the apprehension, fear and discomfort in his social life in the community;

15. Whereas the Petitioner suffers material or financial loss objectively, in that the Petitioner must bear the living costs of the Petitioner and provide sustenance in looking after and taking care the child. This is resulted from the provisions of the Marriage Law which caused the absence of legal certainty of the Petitioner's marriage and the child resulted from such marriage. Therefore, the Petitioners cannot claim the right to her husband's obligation to provide sustenance, both physical and spiritual, as well as to bear the expenses in looking after and taking care the child.

Specifically, the Marriage Law does not reflect the sense of justice in the community and it has objectively-empirically reduced the constitutional rights of the Petitioners as citizens of

the Republic of Indonesia to obtain legal certainty and to be free from apprehension, fear and discrimination related to the marriage and the legal status of her child. Was it not Van Apeldoorn who stated in his book entitled *Inleiding tot de Rechtswetenschap in Nederland* that the purpose of law is to regulate the social life in a peaceful manner. The law desires peace. The peace among people is maintained by the law by way of protecting certain interests of a person, namely honor, freedom, life, property, etc. from things which may impair them. The interests of individuals and the interest of classes of persons are always contradictory to one another. The contradiction of these interests always leads to the hostility and confusion between one another if it is not regulated by law in order to create peace by providing balance among the protected interests, in which every person must obtain his/her rights to the extent possible (Van Apeldoorn, *Pengantar Ilmu Hukum*, the translation of *Inleiding tot de Studie van Het Nederlandse Recht* by Mr. Oetarid Sadino, Noordhoff-kalff N.V. Jkt. 4th Edition, 1958, page 13).

One of the contents of the constitutional norms set out in the 1945 Constitution is the purpose of the law. The purpose of the law can be reviewed based on the ethical theory (*etische theorie*) which states that the law aims solely to actualize justice. The weakness is that the regulation is impossible to be made to regulate each person and each case, however, it is made for the

public, in an abstract and hypothetical nature. Another weakness is that the law does not always actualize justice. On the other hand, according to the utility theory (*utilities theorie*), the law only aims to actualize beneficial matters. The law aims to ensure the maximum happiness for as many people as possible. The weakness is that it only concerns general matters and highly individualistic, hence it does not satisfy the sense of law. The next theory is the combination of both theories explained by the scholars. Bellefroid said that the content of the law must be determined based on two principles, namely justice and benefit. Utrecht said that the law has a duty to ensure the existence of legal certainty (*rechtszekerheid*) in the social life of the people. There are two other duties included in the said duty, namely to guarantee that justice and law remain useful. A third duty is also included in the two other duties mentioned above, namely the policing duty of the law (*politie taak van het recht*). The law prevents the society from taking the law into their own hand (*eigenrichting*). Meanwhile, Wirjono Prodjodikoro is of the opinion that the purpose of the law is to provide safety, contentment and order in the public (Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, Pustaka Kartini, First Edition, 1991, pages 23-26). According to the said explanation, the legal norms set out in the Marriage Law have violated the constitutional rights which should have been obtained by the Petitioner;

16. Based on all of the aforementioned matters explained, the Constitutional Court is authorized to hear and decide upon the Case of Petition for Substantive Review of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law against Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution;

Based on all matters explained above and the evidence attached, the Petitioners hereby request the Constitutional Court to pass the following Decisions:

1. Accepting and granting the Petition for Substantive Review of the Petitioners in its entirety;
2. Declaring Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution;
3. Declaring that Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law have no binding legal force with all legal consequences thereof;

Or in the event that the Panel of Justices is of a different opinion, it is requested for the Decisions to be passed according to what is equitable and good (*ex aequo et bono*).

[2.2] Whereas to prove their arguments, the Petitioners have submitted documentary/written evidence marked as Exhibit P-1 up to and including

Exhibit P-6 as follows:

1. Exhibit P-1 : Photo-copy of Law Number 2 Year 1974 concerning Marriage.
2. Exhibit P-2 : Photo-copy of the Stipulation of Tangerang Religious Court Number 46/Pdt.P/2008/PA.Tgrs.
3. Exhibit P-3 : Photo-copy of Recommendation of Commission for Indonesian Children Protection Number 230/KPAI/VII/2007.
4. Exhibit P-4 : Photo-copy of Receipt of Complaint from Commission for Indonesian Children Protection Number 07/KPAI/II/2007.
5. Exhibit P-5 : Photo-copy of Letter Number 173/KH.M&M/K/X/2006 concerning Summons dated October 16, 2006.
6. Exhibit P-6 : Photo-copy of Letter Number 03/KH.M&M/K/I/2007 concerning Invitation and Clarification dated January 12, 2007.

In addition, the Petitioners also call an expert, namely **Dr. H. M. Nurul Irfan, M.Ag.**, the statement under oath of whom has been heard and he has submitted written statement at the hearing on May 4, 2011, which are principally as follows:

1. Article 2 paragraph (1) of the Marriage Law clearly acknowledges that a marriage shall be legitimate if it is conducted according to the law of the religion and belief of each party;
2. However, the existence of Article 2 paragraph (2) of the Marriage Law which states that each marriage shall be registered according to the applicable laws and regulations has resulted in two understandings. On the one hand, a marriage shall be legitimate if it is conducted in accordance with the religion or belief of each party; on the other hand, such marriage shall not have legal force since it is not registered;
3. In Islamic law perspective, a marriage is declared legitimate if it has fulfilled five basic principles of marriage, namely *ijab qobul*, a bridegroom, a bride, two witnesses and a marriage guardian from the bride's party;
4. Article 2 paragraph (2) of the Marriage Law is unclear, obscure and contradictory to Article 2 paragraph (1) of the Marriage Law, and it resulted in a marriage which has fulfilled Islamic requirements and basic principles to become illegitimate since it is not registered in the Religious Affairs Office;
5. Since the said marriage is illegitimate, Article 43 paragraph (1) of the Marriage Law further regulates that the child from such marriage shall only have lineage and family relationship with his/her mother and his/her mother's family. In the deed of birth, the child shall be written as a fatherless child;

6. The said child shall also suffer psychological loss, isolated from the society, experience difficulties with education, health and other physical prosperity;
7. The requirement to register a marriage which resulted in the status of child born out of wedlock having only civil relationship with his/her mother and his/her mother's family is contradictory to Article 28B paragraph (2) of the 1945 Constitution since the child who is supposed to be protected from various forms of violence and discrimination is eventually not protected because his/her parents have conducted unregistered marriage;
8. In Islamic law, a child is born innocent and he/she does not assume the burden of his/her parents' sins. Islam does not recognize the concept of original sin or the transfer of sin from one party to another;
9. Criminal responsibility in Islamic law is individual in nature. A person cannot assume the burden of another person's sins, or even held responsible for another person's sins, as set out in the *Koran* in the Chapters al-Isra'/17:15; al-An'am/6:164; Fatir/35:18; az-Zumar/39:7; and an-Najm/53:38;
10. In Islam, there is a concept of *anak zina* (child born from adultery) shall only have lineage to his/her biological mother, but this is not the child from a legitimate marriage (which has met the requirements and basic principles). A child born in a marriage which is legitimate in an Islamic manner, even though it is not registered in the relevant institution, must

have lineage to his/her father and mother;

11. Furthermore, child adoption is prohibited in Islam if such adoption breaks the lineage relation between the child and his/her father. If the origin and the biological father of a child to be adopted are unknown, the child must be acknowledged as a brother/sister in the religion or *aula*/foster child; and not considered as a biological child;
12. In *fiqh*, it is never mentioned that a marriage must be registered, but there is an order in *Koran* in Chapter an-Nisa' to obey the ruler (*ulil amri*) (in this case, the Law as the product of the *ulil amri*);
13. Therefore, Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are discriminatory thus they are contradictory to Article 27, Article 28B paragraph (2) and Article 28I paragraph (2) of the 1945 Constitution;
14. If Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law contain disadvantages, while the revocation of such articles also resulted in disadvantages, then in Islamic law, the option with lesser disadvantages must be chosen;

[2.3] Whereas upon the Petitioners' petition, the Government delivered a verbal statement in the hearing on February 9, 2011, and submitted written statement dated February 18, 2011 which was received by the Registrar's Office of the Constitutional Court on March 30, 2011, which states as follows:

I. Substance of the Petition

Whereas the Petitioners having the status as Indonesia citizen individuals submit the petition for review of the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (hereinafter referred to as the Marriage Law), which principally state as follows:

- a. Whereas according to the Petitioners, the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law cause legal uncertainty leading to the impairment to the Petitioners, particularly those related to the marital status and the legal status of the child from the Marriage of Petitioner I;
- b. Whereas the constitutional rights of the Petitioners have been harmed by legal norms in the Marriage Law. These legal norms are clearly unfair and disadvantageous since the marriage of Petitioner I is legitimate and in accordance with the basic principles of marriage in Islam. Referring to the constitutional norms set out in Article 28B paragraph (1) of the 1945 Constitution, the marriage of Petitioner I conducted in accordance with the basic principles of marriage is legitimate, but it is impeded by Article 2 of the Marriage Law and therefore, such marriage is illegitimate according to the legal norms. Hence, the coming into effect of such legal norms affect the legal status of the child (Petitioner II) born in the marriage of Petitioner I who becomes a child born out of wedlock based on the legal norm provisions of Article 34 paragraph (1) of the Marriage Law. On the other hand, this discrimination has certainly created a problem since

the status of a child before the law becomes unclear and illegitimate.

- c. In summary, according to the Petitioners, the provision *a quo* has led to unfair treatment before the law and created discriminatory treatment, therefore according to the Petitioners, the provision *a quo* is deemed inconsistent with the provision of Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution.

II. Legal Standing of the Petitioners

In relation to the legal standing of the Petitioners, for a person or a party to be eligible as a Petitioner who has legal standing in a petition for judicial review of a Law under the 1945 Constitution of the State of the Republic of Indonesia, the person or party must explain and evidence:

- a. His/her qualification in the petition *a quo* as referred to in Article 51 paragraph (1) of the Constitutional Court Law.
- b. His/her constitutional rights and/or authority in the intended qualification which are deemed to have been impaired by the coming into effect of the law petitioned for review;
- c. The impairment of the constitutional rights and/or authority of the Petitioner due to the coming into effect of the Law petitioned for review.

With due observance of the aforementioned matters, the Petitioners in this petition have qualification or act as Indonesian citizen individual considering that their constitutional rights and/or authorities have been impaired by the coming into effect of Law *a quo* or the assumption of such

impairment due to the coming into effect of Law petitioned for review.

Whereas based on the foregoing description of the Petitioners' Petition, the Government is of the opinion that the impairment of constitutional rights and/or authorities suffered by the Petitioners is not due to the coming into effect and/or as a result of the coming into effect of the Law petitioned for review, since in fact, the marriage conducted by the Petitioner to a married man is not in accordance with the procedures, guidelines and requirements as provided for in Article 3 paragraph (2), Article (2), Article (4), Article 5, Article 9 and Article 12 of the Marriage Law as well as Government Regulation Number 9 Year 1975 concerning the Implementation of the Marriage Law. Therefore, the Polygamous marriage conducted by the Petitioner cannot be registered.

If the Marriage of Petitioner I has been conducted in accordance with the legal provisions set out in the Law *a quo*, the Petitioner I shall not be impeded in registering her marriage and it is guaranteed that the Petitioner I shall obtain legitimate marital legal status and the rights of her child status.

Therefore, the Government through the Chairperson/Panel of Justices of the Constitutional Court requests the Petitioners to prove that they are the parties considering that their constitutional rights and/or obligations are impaired by the coming into effect of the provisions petitioned for review, particularly in constructing the existence of constitutional rights and/or authorities impaired by the coming into effect of the provisions petitioned for review.

Based on the foregoing description, according to the Government, the

problem faced by the Petitioners is not related to the constitutionality of the coming into effect of the matters of normative substance of Law *a quo* petitioned for review, but rather, it is related to the non-compliance with the applicable laws and regulations conducted deliberately and in common sense, in which the future risks of legal consequences should have been known.

Based on the foregoing description, according to the Government, it is proper for the Constitutional Court to wisely declare that the Petitioners' petition inadmissible (*niet ontvankelijk verklaard*).

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

III. Government's Statement on the Petition for Review of Law Number 1 Year 1974 concerning Marriage

Before giving detailed explanation/argumentation on the Petitioners' arguments and assumptions mentioned above, the following matters may be conveyed:

A. In general, Law Number 1 Year 1974 concerning Marriage is consistent with the 1945 Constitution of the State of the Republic of Indonesia.

A marriage is an institution to legalize a relationship of two persons having different gender to become a husband and wife couple. Generally, a marriage is intended to establish a family which is everlasting, complete, harmonious and happy, both physically and mentally. Therefore, conformity is required automatically from both parties which will be united as the smallest unit in the community, hence the social background of both parties is important, and one of such social backgrounds is religion.

Religion, according to the sociologist, is something that has great potential for creating integration, however, on the other hand, it can easily trigger a conflict. Therefore, the Marriage Law follows monotheism not only because it follows certain religious teaching which forbids mixed marriage, but also because religious similarity has more potential in establishing an eternal, harmonious as well as physically and mentally happy family, rather than *heterotheism* (between different religions) which is vulnerable to disunity, disharmony, unhappiness and poverty.

A marriage is one of the forms of materialization of constitutional rights of citizens which must be respected, protected by each person in the community, national and state life order as set out in the 1945 Constitution, which is expressly stated in Article 28B paragraph (1): "Every person shall be entitled to establish a family and to procreate through legitimate marriage.", and Article 28J paragraph (1): "Every person shall be obligated to respect the human rights of other people in

the community, national and state life order.” Therefore, it is necessary to realize that within the said constitutional rights, there is an obligation to respect the constitutional rights of others. Hence, the constitutional rights provided by the state are impossible to be implemented as freely as possible by any person, because there is a possibility that the implementation of one’s constitutional rights can violate the constitutional rights of other persons. Thus, the arrangement for the implementation of the constitutional rights is required. The arrangement shall be as set out in Article 28J paragraph (2) of the 1945 Constitution stating that “In exercising their rights and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose of guaranteeing the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.”

Although the arrangement set out in Article 28J paragraph (2) of the 1945 Constitution basically limits the freedom, the said arrangement has purposes in the context of national interest or the interests of public at large, namely in order that the implementation of one’s constitutional rights does not impair the constitutional rights of other persons. In addition to that, the arrangement for the implementation of the constitutional rights is a logical consequence of the state obligation mandated by the Preamble of the 1945 Constitution, “.....to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian motherland, and in order

to promote general welfare, to develop the intellectual life of the nation...”.

It means that the drafting of Law, even though it contains norms or matters deemed to limit one's constitutional rights, is actually a part of efforts made by the state in order to protect the entire Indonesian nation, to promote public order, welfare, to develop the intellectual life of the nation, and so on.

Similar to the provision set out in Law Number 1 Year 1974 concerning Marriage, the materialization of the implementation of constitutional rights is provided by the 1945 Constitution, particularly the right to establish a family and procreate, however the provision *a quo* also provides limitation to the implementation of constitutional rights which have sole purpose to protect the citizens in order to create a fair, prosperous and wealthy society, as idealized in the Preamble of the 1945 Constitution. Therefore, a marriage is an institution which highly determines the establishment of a happy and prosperous family, thus a family, which is the smallest unit in the society, will form the community of Indonesian state to be a fair, prosperous and wealthy society. If the family established is a disharmonic, unhappy and poor family, it is impossible to create a prosperous Indonesian community.

Therefore, the Marriage Law is consistent with the constitutional mandate and therefore, it is not contradictory to the 1945 Constitution because the Marriage Law does not contain matters of substance which are impairing and impeding one's right to get married, but it

regulates how a marriage should be conducted in order that one's constitutional rights can be fulfilled without impairing the constitutional rights of other persons.

B. Explanation of the Matters of Normative Substance Petitioned for Review by the Petitioners.

In relation to the assumptions of the Petitioners in their petition stating that Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law, namely:

Article 2 stating that:

Paragraph (2): *“Each marriage shall be registered pursuant to the applicable laws and regulations”*

Article 43 stating that:

Paragraph (1): *“A child born out of wedlock shall only have civil relationship with his/her mother and his/her mother's family”*

The Petitioners consider the aforementioned provisions to be inconsistent with the provisions of Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution, which state as follows:

Article 28B paragraph (1): *“Every person shall be entitled to set up a family and to procreate through legitimate marriage.”*

Article 28B paragraph (2): *“Every child shall have the right to live,*

grow and develop and shall have the right to be protected against violence and discrimination.”

Article 28D paragraph (1): *“Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law.”*

With respect to the assumptions of the Petitioners above, the Government can explain as follows:

1. With respect to provision of Article 2 paragraph (2) of Law *a quo*, the following matters can be explained:

Whereas the marriage as referred to in Article 1 of the Marriage Law is a physical and mental relationship between a man and a woman as a couple in order to establish a happy and eternal family (household) under The One Almighty God. Therefore, a couple must support and complete each other in order for them to be able to develop their respective personality, support and achieve spiritual and material prosperity.

Subsequently, Article 2 paragraph (1) of Law *a quo* states that *“a marriage shall be legitimate if it is conducted pursuant to the law of the religion and belief of each party”*; and Article 2 paragraph (2) states that *“Each marriage must be registered pursuant to the applicable laws and regulations”*.

Whereas based on Law *a quo*, the legitimacy of a marriage shall be

based on the law of religion of each party, however the legitimacy of a marriage cannot be acknowledged if it is not registered in accordance with the provisions of the laws and regulations. The purpose of the registration of a marriage as provided for in Article 2 paragraph (1) are to:

- a. have proper marriage administration;
- b. provide certainty and protection for legal status of husband, wife and child; and
- c. provide guarantee and protection for certain rights arising from a marriage, such as inheritance rights, right to obtain deed of birth, etc;

The Government is of a different opinion with the Petitioners' assumption which states that Article 2 paragraph (2) is inconsistent with Article 28B paragraphs (1) and (2), as well as Paragraph 28D paragraph (1) of the 1945 Constitution, since the marriage registration is not intended to limit the human rights of the citizens, but on the contrary, it is intended to protect the citizens in establishing a family and procreating, as well as to provide legal certainty to the rights of the husband, the wife and their children.

Whereas Article 2 paragraph (2) of Law *a quo* is indeed dependent, since the phrase "shall be registered pursuant to the applicable laws and regulations" has a meaning that the registration of the marriage cannot be performed immediately, but rather, it must follow the

requirements and procedure stipulated in the legislations. The purpose is to ensure that the rights of husband, wife and their children are truly guaranteed and protected by the state. Such requirements and procedures shall include the provisions provided for in Article 3 paragraph (2), Articles 4, 5, 9 and 12 of the Marriage Law and Government Regulation Number 9 Year 1975 concerning the Implementation of the Marriage Law, particularly Article 2 up to and including Article 9.

Whereas it is true that the Marriage Law follows monogamy principle, but it does not mean that the said law prohibits a husband to have more than one wife (polygamy). If a husband has an intention to conduct polygamy, he may conduct polygamy with his second wife and so forth. However, the polygamy may only be conducted by the relevant party after meeting the requirements and procedures stipulated in Law *a quo*, particularly as provided for in Article 3 paragraph (2), Articles 4 and 5 as well as Government Regulation Number 9 Year 1975.

If a polygamous marriage does not meet the provisions of the Marriage Law, such marriage cannot be registered in the Religious Affairs Office or Vital Records Office, with all legal consequences thereof, among other things: not having legitimate marital status and not having inheritance rights for the husband, the wife and their children.

Whereas the provisions concerning the requirements of and procedures for polygamous marriage provided for in the Marriage Law

shall be applicable to each Indonesian citizen and they shall not allow discriminatory treatment for certain person or group including the Petitioners. In addition to that, the said provision is consistent with the provision of Article 28J paragraph (2) of the 1945 Constitution which reads: "In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society."

Based on the foregoing explanation, it is clearly and expressly indicated that according to the Government, the marriage registration either in the Religious Affairs Office or Vital Records Office is not related to the issue of the constitutionality of the coming into effect of the matters of normative substance petitioned for review by the Petitioners.

Therefore, the provision of Article 2 paragraph (2) is not inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution.

2. With respect to the provision of Article 43 paragraph (1) of the Marriage Law, the following matters may be explained:

Whereas Article 43 paragraph (1) of the Marriage Law stating that:
"Child born out of wedlock shall only have civil relationship with his/her

mother and his/her mother's family", according to the Government, is intended to provide protection and legal certainty to the civil relationship between a child and his/her mother and his/her mother's family since a marriage which cannot be registered may be construed as non-existent marriage, hence the child born out of wedlock who are not registered according to Law *a quo* is categorized as the child born out of wedlock. The provision in this article is a logical consequence of the existence of regulation concerning the requirements of and procedure for legitimate or illegitimate marriage based on Law *a quo*, therefore, it becomes illogical if the law ensures that the legal relationship of a child born to a woman shall have legal relationship as a child from a man uncommitted in a legitimate marriage.

Based on the foregoing explanation, according to the Government, the provision of Article 43 paragraph (1) of Law *a quo* is instead intended to provide protection and legal certainty to the civil relationship between a child and his/her mother as well as his/her mother's family.

Therefore, according to the Government, Article 43 paragraph (1) of the Marriage Law is not inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution because if the marriage is conducted legitimately, the Petitioners' rights as referred to in Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution may be fulfilled.

Furthermore, the Government is also of a different opinion with the Petitioners' assumption stating that the foregoing provision has

provided discriminatory treatment and limitation on the Petitioners, since the said limitation has been in line with the provision of Article 28J paragraph (2) of the 1945 Constitution stating that: “In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.”

Based on the foregoing description, the provision of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law is not inconsistent with the provision of Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution.

IV. Conclusion

Based on the foregoing explanation, the Government requests the Constitutional Court hearing the petition for review of Law Number 1 Year 1974 concerning Marriage under the 1945 Constitution to pass the decisions as follows:

1. Declaring that the Petitioners do not have legal standing;
2. Rejecting the Petitioners' petition in its entirety or at least declaring that the Petitioners' petition for review inadmissible (*niet onvankelijk verklaard*);

3. Accepting the Government's Statement in its entirety;
4. Declaring that the provision of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law are not inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution;

However, if the Constitutional Court is of a different opinion, it is requested for the Decisions to be passed according to what is equitable and good (*ex aequo et bono*).

[2.4] Whereas with respect to the Petitioners' petition, the People's Legislative Assembly has given a statement in the hearing on February 9, 2011 and delivered a statement which was received at the Registrar's Office of the Constitutional Court on February 24, 2011, which explains the matters as follows:

Statement of the People's Legislative Assembly of the Republic of Indonesia

With respect to the Petitioners' arguments as set out in the Petition *a quo*, the People's Legislative Assembly in giving their opinion described the legal standing first which can be explained as follows:

I. Legal Standing of the Petitioners

Qualifications which must be met by the Petitioners as the Parties have been provided for in the provision of Paragraph 51 article (1) of Law Number 24 Year 2003 concerning Constitutional Court (hereinafter referred to as the

Constitutional Court Law), stating that *“The petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a law, namely:*

- 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;*

The constitutional rights and/or authorities referred to in the provision of Article 51 paragraph (1) is emphasized in its elucidation, that *“the “constitutional rights” are rights provided for in the 1945 Constitution of the State of the Republic of Indonesia.”* This provision of Elucidation of Article 51 paragraph (1) emphasizes that the “constitutional rights” only include the rights explicitly provided for in the 1945 Constitution.

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

- a. His/her qualification as Petitioner in the petition *aquo* as referred to in Article 51 paragraph (1) of the Constitutional Court Law;

- b. His/her constitutional rights and/or authority as referred to in the “Elucidation of Article 51 paragraph (1)” are considered being impaired by the coming into effect of Law.

With respect to the parameter of constitutional impairment, the Constitutional Court has provided definition and limitation of constitutional impairment arising due to the coming into effect of a law must meet 5 (five) requirements (*vide* Case Decision Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007), namely as follows:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such 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, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners’ petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

In the event that the Petitioners do not meet the five requirements mentioned above in the case of judicial review of Law *a quo*, the Petitioners do not have legal standing qualification as Petitioners.

In response to the petition of the Petitioners *a quo*, the People's Legislative Assembly is of an opinion that the Petitioners must first prove that the Petitioners are actually the parties considered that their constitutional rights and/or authorities are impaired by the coming into effect of the provision petitioned for review, especially in constructing the impairment of their constitutional rights and/or authorities as a result of the coming into effect of the provision petitioned for review.

With respect to the aforementioned legal standing, the People's Legislative Assembly fully entrusts the Chairman/Panel of Judges of the Constitutional Court to consider and assess whether the Petitioners have legal standing or not as provided for in Article 51 paragraph (1) of Law concerning Constitutional Court and based on the Decision of the Constitutional Court on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007.

II. Review of the Marriage Law against the 1945 Constitution of the State of the Republic of Indonesia

With respect to the argument of the Petitioners stating that the coming into effect of provision of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law has impeded the implementation of the Petitioner's constitutional right to establish a family and procreate through legitimate

marriage, the rights of legitimate children and legal certainty of her marriage as provided for in Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution has been impaired. The People's Legislative Assembly provides explanation as follows:

1. Whereas it is necessary to be understood by the Petitioners that in order to understand the Marriage Law which is related to the provision of Articles of Law *a quo* which are petitioned for review, it is deemed necessary to first understand the definition of Marriage, namely physical and mental relationship between a man and a woman as a couple for the purpose of establishing a happy and eternal family or household based on the Belief in the Almighty God. This means that a marriage as a relationship between a man and a woman is closely related to religion/spirituality. If it is viewed in terms of its definition, any marriage conducted based on a religion shall be legitimate. However, if it is linked to the purpose of marriage which is to establish a happy and prosperous family and to procreate, civil rights and obligations arise from such marriage.
2. Whereas in order to guarantee the civil rights and obligations arising due to a legitimate marriage, any marriage must be registered. Even though a marriage is included in the civil scope, the state must provide a guarantee of legal certainty and legal protection to the relevant parties of marriage (husband, wife and children), particularly in its relation with the population administrative regulation related to the civil rights and obligations of such parties. Therefore, the registration of

such marriage is a formal requirement for the legality of an event which may lead to juridical consequences in the civil rights and obligations of such parties, such as the obligation to maintain livelihood and inheritance rights. The marriage registration is specified in an official deed (authentic deed) and contained in a list of registration issued by the competent institution. Whereas the purposes of marriage registration are as follows:

- a. to have proper marriage administration;
 - b. as a guarantee to obtain certain rights (to obtain deed of birth, to make Identity Card, Family Card, etc);
 - c. to provide protection for marital status;
 - d. to provide certainty of husband, wife and children legal status;
 - e. to provide protection for the civil rights arising from a marriage;
3. Whereas based on the aforementioned argument, the provision of Article 2 paragraph (2) of the Marriage law which reads “*each marriage shall be registered according to the applicable laws and regulations*” is a norm containing legality as a formal form of marriage. The marriage registration in the form of deed of marriage (authentic deed) is necessary to provide guarantee of legal certainty and legal protection for every marriage. Therefore, the People’s Legislative Assembly is of an opinion that the Petitioners’ argument stating that the provision of Article 2 paragraph (2) of the Marriage Law has caused legal

uncertainty is an erroneous and unwarranted assumption.

4. Whereas with respect to the Petitioner's assumption stating that the Petitioner cannot register her marriage due to the Marriage Law is principally based on monogamy so that it impedes the Petitioner to establish a family and procreate through legitimate marriage as guaranteed in Article 28B paragraph (1) of the 1945 Constitution, the People's Legislative Assembly refers to the Decision of the Constitutional Court of Case Number 12/PUU-V/2007 in legal consideration on pages 97-98 stating that: *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 the description of the conditions of polygamy are not contrary to Article 28B paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia.*

Therefore, the reason that the Petitioner did not register her marriage since the Marriage Law is principally based on monogamy is extremely unwarranted. The Petitioner cannot register her marriage because she cannot meet the requirements of polygamy as provided for in the Marriage Law. Therefore, actually the Petitioner's issue is not the issue of norm constitutionality, but it is the issue of application of law which is not fulfilled by the Petitioner.

5. Whereas therefore, the People's Legislative Assembly is of an opinion

that a marriage which is not registered in accordance with the provisions of laws and regulations may be defined as a marriage event which does not meet the formal requirements, so that it affects the civil rights resulted from a marriage including a child born out of registered wedlock as provided for in the provisions of the laws and regulations.

6. Whereas in addition to the foregoing, it is necessary to state that a child born out of registered wedlock in accordance with the provisions of the laws and regulations may have implication to the substantiation of civil relationship between a child and his/her father. Therefore, a child born out of registered wedlock certainly has civil relationship only with mother and his/her mother's family.
7. Based on the foregoing explanation, according to the People's Legislative Assembly, in fact, the coming into effect of the provision of Article 43 paragraph (1) of the Marriage Law will guarantee the realization of the purposes of a marriage and provide legal protection and certainty to the civil status of the child and his/her relationship with his/her mother as well as his/her mother's family. In fact, in the event that the provision of Article 43 paragraph (1) of this Marriage Law is revoked, it will affect the legal certainty of civil status of a child born out of registered wedlock. Therefore, the provision of Article 43 paragraph (1) of the Marriage Law is not inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Whereas based on the aforementioned arguments, the People's

Legislative Assembly requests the honorable Chairman/Panel of Justices of the Constitutional Court to kindly provide injunction of decision as follows:

1. Declaring that the petition *a quo* is rejected in its entirety or at least the petition *a quo* cannot be accepted;
2. Declaring the Statement of the People's Legislative Assembly is accepted in its entirety;
3. Declaring that Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage is not inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution;
4. Declaring that Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law shall continue to have binding legal force.

In the event that the Chairman/Panel of Justices of the Constitutional Court is of a different opinion, it is requested for the decisions to be passed according to what is equitable and good (*ex aequo et bono*).

[2.5] Whereas the Petitioners have submitted written conclusion dated May 11, 2011 which was received at the Registrar's Office of the Court on May 11, 2011, which basically remained in their position;

[2.6] Whereas to shorten the description of this Decision, all that happened at the hearing are indicated in the Hearing Minutes which shall constitute an integral and inseparable part of the Decision.

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the petition *a quo* are to review Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019, hereinafter referred to as Law 1/1974) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas before considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) will first consider the following matters:

- a. Authority of the Court to hear the petition *a quo*;
- b. Legal standing of the Petitioners to file a petition *a quo*;

Authority of the Court

[3.3] Whereas based on Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law), and Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009

concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereinafter referred to as Law 48/2009), one of the constitutional authorities of the Court is to hear at the first and the last levels, the decision of which shall be final for reviewing a Law against the Constitution;

[3.4] Whereas that the Petitioners' petition is to review the norm constitutionality of Article 2 paragraph (2) and Article 43 paragraph (1) of Law 1/1974 against the 1945 Constitution, which is one of the Court, therefore, the Court is authorized to hear the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the Petitioners in a judicial review under the 1945 Constitution shall be those who consider that their constitutional rights and/or authorities granted by the 1945 Constitution have been impaired by the coming into effect of a Law namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- 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;

Therefore, the Petitioners in a judicial review of Law under the 1945 Constitution must first explain and prove:

- a. their standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. existence of impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the law petitioned for review;

[3.6] Whereas that the Court following the Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Constitutional Court Number 11/PUU-V/2007 dated September 20, 2007, as well as subsequent decisions, the Constitutional Court is of the opinion that the impairment of constitutional rights and/or authorities as referred to in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the constitutional impairment must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured

of occurring;

- d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of a law petitioned for review;
- e. it is likely that with the granting of the petition, the constitutional impairment argued will not or will no longer occur.

[3.7] Whereas based on the description as set out in paragraph **[3.5]** and paragraph **[3.6]** above, the Court will consider the legal standing of the Petitioners in the petition *a quo* as follows;

[3.8] Whereas basically the Petitioners argue as individual Indonesian citizens having constitutional rights provided for in the 1945 Constitution, namely:

Article 28B paragraph (1) stating that “*Every person shall be entitled to set up a family and to procreate through legitimate marriage.*”

Article 28B paragraph (2) stating that “*Every child shall have the right to live, grow and develop and shall have the right to be protected against violence and discrimination*”, and

Article 28D paragraph (1) stating that “*Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law,*”

The said constitutional rights have been impaired due to the coming into effect of the provision of Article 2 paragraph (2) and Article 43 paragraph (1) of Law

1/1974;

[3.9] Whereas in view of the consequences experienced by the Petitioners related to the constitutional rights of the Petitioners, according to the Court, there is a causal relationship (*causal verband*) between such impairment and the effectiveness of the Law petitioned for review, so that the Petitioners meet the legal standing requirements in order to file the petition *a quo*;

[3.10] Whereas since the Court has authority to hear the petition *a quo*, and the Petitioners have legal standing, then the Court shall consider the substance of the petition.

Opinion of the Court

Substance of the Petition

[3.11] Whereas the substance of the Petitioners' petition is the constitutionality review of Article 2 paragraph (2) of Law 1/1974 stating that, "*Any marriage shall be registered according to the applicable laws and regulations*", and Article 43 paragraph (1) of Law 1/1974 stating that, "*A child born out of wedlock shall only have civil relationship with his/her mother and his/her mother's family*", particularly concerning the right to obtain legal status of a child;

[3.12] Whereas the legal substance of the petition concerning the marriage registration according to the laws and regulations shall be with regard to the legal meaning of the marriage registration. With respect to the said issue, General Elucidation number 4 sub-paragraph b of Law 1/1974 concerning

bases or principles of marriage states that,

“...a marriage shall be legitimate if it is conducted according to the religion and belief of each party; and in addition, any marriage must be registered according to the applicable laws and regulations. The registration of any marriage is similar to the registration of important events in one’s life, for example birth, death specified in statements, a deed which is also contained in the list of registration”.

Based on the Elucidation of Law 1/1974 above, it is clear that (i) the marriage registration is not a factor determining the legitimacy of a marriage; and (ii) registration is an administrative obligation required according to the laws and regulations.

The factors determining the legitimacy of a marriage are the requirements stipulated by the religion of each bride and groom. The marriage registration obligated by the state through the laws and regulations is the administrative obligation.

The important meaning of administrative obligation in the form of the said marriage registration, according to the Court, can be viewed from two perspectives. *First*, according to the state perspective, the registration is intended in the context of the state function to provide the guarantee of protection, promotion, enforcement and fulfillment of human rights of the party concerned which shall be the responsibility of the state and must be conducted in accordance with the principles of democratic rule of law state provided for in and set out in the laws and regulations [*vide* Article 28I

paragraphs (4) and (5) of the 1945 Constitution]. In the event that the intended registration is considered as a restriction, the said registration, according to the Court, is not inconsistent with the constitutional provisions since the restriction stipulated by Law and conducted with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society [*vide* Article 28J paragraph (2) of the 1945 Constitution].

Second, the administrative registration conducted by the state has the purpose to make a marriage, as an important legal action in life conducted by the relevant parties, which has extensive legal consequences, it can be proven by perfect evidence by an authentic deed, so that the protection and service by the state related to the rights arising due to the relevant marriage may be provided effectively and efficiently. It means that by the ownership of authentic evidence of marriage, the rights arising due to a marriage may be well protected and serviced since it does not require substantiation process consuming more time, money, energy and thought, such as the substantiation concerning a child lineage set out in Article 55 of Law 1/1974 regulating that in the event that a child lineage cannot be proven by an authentic data, such matter will be stipulated by the decision of the competent court. The said substantiation is certainly not more effective and efficient if it is compared to the existence of authentic deed as its evidence;

[3.13] Whereas the legal substance of the petition concerning a child born out of wedlock is related to the legal meaning of phrase "*born out of wedlock*". In

order to find an answer in a broader perspective, it is necessary to answer the relevant issue, namely the issue of the child legitimacy.

Naturally, it is impossible for a woman to be pregnant without any insemination between ovum and sperm, either through sexual intercourse (*coitus*) or other methods based on technology development leading to fertilization. Therefore, it is unnecessary and unfair if the law stipulates that a child born out of wedlock only has relationship with such woman as his/her mother. It is also incorrect and unfair if the law releases a man having the sexual intercourse which leads to the pregnancy and birth of a child from the responsibility as a father and concurrently, the law denies the rights of the child to the man as his/her father, furthermore, if based on the development of the existing technology, it is possible to prove that a child is a son/daughter of certain man.

The legal consequence of legal act of birth due to pregnancy, preceded by sexual intercourse between a woman and a man, is the legal relationship containing mutual rights and obligations, the legal subject of which includes children, mother and father.

Based on the foregoing explanation, the relationship between a child and a man as his/her father is not only due to the existence of marriage relationship, but it may also based on the substantiation of blood relation between the child and the man as his/her father. Therefore, apart from the issue of the marriage procedure/administration, a child must obtain legal protection. Otherwise the party impaired is the child born out of wedlock, in fact, the child is innocent since he/she was not born of his/her own accord. The child born with vague

status of his/her father often receives unfair treatment and social stigma. The law must provide fair legal protection and certainty to the status of a child born and his/her inherent rights, including to a child which the legitimacy of his/her parents' marriage remains being disputed;

[3.14] Whereas based on the aforementioned explanation, Article 43 paragraph (1) of Law 1/1974 stating that “*A child born out of wedlock must have civil relationship with his/her mother and his/her mother’s family*” **must be read** “*A child born out of wedlock must have civil relationship with his/her mother and his/her mother’s family as well as with a man as his/her father which can be proven based on science and technology and/or other evidence that such child has blood relation, including civil relationship with his/her father’s family*”;

[3.15] Whereas based on all of the foregoing considerations, the Petitioners' argument, insofar as it is related to Article 2 paragraph (2) of Law 1/1974, is not legally founded. Article 43 paragraph (1) of Law 1/1974 stating that “*A child born out of wedlock shall only have civil relationship with his/her mother and his/her mother’s family*” is conditionally unconstitutional insofar as such paragraph is interpreted as to breaking off the civil relationship with the man which can be proven by science and technology and/or other evidence as having blood relationship as his/her father according to the law;

4. CONCLUSION

Based on the assessment of facts and laws as explained above, the Court is of the following opinions:

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

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

[4.3] The substance of the petition is legally founded in part.

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. DECISIONS

Passing the decision,

Declaring:

- to grant the Petitioners' petition;
- Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) stating that "*A child born out of wedlock shall only have civil relationship with his/her mother and his/her mother's*

family”, is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia insofar as it is interpreted as to breaking off the civil relationship with the man which can be proven by science and technology and/or other evidence as having blood relationship as his/her father according to the law;

- Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) stating that “*A child born out of wedlock must have civil relationship with his/her mother and his/her mother’s family*” does not have binding legal force insofar as it is interpreted as to breaking off the civil relationship with the man which can be proven by science and technology and/or other means of proof which evidently has blood relationship as his/her father according to the law **must be read** “*A child born out of wedlock must have civil relationship with his/her mother and his/her mother’s family as well as with a man as his/her father which can be proven based on science and technology and/or other evidence that such child has blood relationship, including civil relationship with his/her father’s family*”;
- To reject the other and the remaining parts of the petition of the Petitioners;
- To order the inclusion of this decision in the Official Gazette of the Republic of Indonesia properly;

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent 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, February the thirteenth two thousand and twelve**, and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Friday, February the seventeenth two thousand and twelve**, by nine Constitutional Court Justices namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Maria Farida Indrati, Harjono, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, M. Akil Mochtar and Muhammad Alim, respectively as Members, assisted by Mardian Wibowo as Substitute Registrar, in the presence of the Petitioners and/or their proxy, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.

Achmad Sodiki

Sgd.

Maria Farida Indrati

Sgd.

Harjono

Sgd.

Ahmad Fadlil Sumadi

Sgd.
Anwar Usman

Sgd.
Hamdan Zoelva

Sgd.
M. Akil Mochtar

Sgd.
Muhammad Alim

6. CONCURRING OPINION

With regard to this Court's Decision, the Constitutional Justice Maria Farida Indrati is of the concurring opinion as follows:

[6.1] Marriage according to Article 1 of Law 1/1974 shall be "*...physical and mental relationship between a man and a woman as a couple in order to establish a happy and eternal family (household) under The One Almighty God.*"; while with regard to the requirements of legitimate marriage, Article 2 of Law 1/1975 states that: paragraph (1) "*A marriage shall be legitimate, if it is conducted according to the religion and belief of each party.*" Meanwhile, paragraph (2) states that, "*Every marriage shall be registered in accordance with the applicable laws and regulations.*"

The existence of Article 2 paragraph (2) of Law 1/1974 shall create ambiguity in the interpretation of Article 2 paragraph (1) of Law 1/1974 since the registration referred to in Article 2 paragraph (2) of Law *a quo* is not confirmed whether it is only an administrative registration which does not affect the legitimacy of the marriage took place according to the religion or belief of each party, or such registration affects the legitimacy of the marriage took place.

The existence of religious norms and legal norms in the same laws and

regulations is potential to debilitate each other and even to be contradictory. In this case, the potential to debilitate each other exists between Article 2 paragraph (1) and Article 2 paragraph (2) of Law 1/1974. In fact, Article 2 paragraph (1) which principally guarantees that a marriage shall be legitimate if it is conducted according to the religion and belief of each party, impedes and is otherwise impeded by the coming into effect of Article 2 paragraph (2) which basically regulates that a marriage shall be legitimate and have legal force in the event that it has been registered by the competent institution or marriage registrar.

In the event that Article 2 paragraph (2) of Law 1/1974 is interpreted as an administrative registration which does not affect the legitimacy of a marriage, the said article is not inconsistent with the 1945 Constitution since no supplement to the marriage requirements exists. In line with the foregoing matter, the word "marriage" in Article 43 paragraph (1) of Law *a quo* shall also be interpreted as legitimate marriage according to Islam or a marriage according to the five basic principles of marriage.

Nevertheless, based on sociologic review of the marriage institutions in the society, the legitimacy of a marriage according to certain religion and belief may not directly guarantee the satisfaction of the civil rights of the wife, the husband and/or the children born in such marriage since the implementation of religious norms and customs in the society is fully entrusted to individual awareness and awareness of the community without being protected by the official (state) authority having coercive power.

[6.2] Marriage registration is required as the state protection to the parties in

the marriage and also to avoid the tendency of inconsistency in the application of ideal/complete religious and belief teaching in a marriage conducted according to the said religion and belief. In other words, the marriage registration is required to avoid applying the religion and belief law of each party in part in a marriage to legitimate a marriage, while the post-wedding life is inconsistent with the purpose of the intended marriage. The neglected wife and children, domestic violence, phenomenon of marriage by contract, phenomenon of mistress (the other woman), and so on, are the evidence of inconsistency in the application of marriage purposes as a whole.

The essence of registration, in addition to the administrative control, is also to protect women and children. The requirements of the intended marriage registration may be placed at least in two main contexts, namely (i) to avoid and (ii) to protect women and children from a marriage conducted irresponsibly. The registration as the effort to protect women and children from the misuse of marriage may be conducted by stipulating the requirements in order to avoid and reject a marriage having the potential of resulting in impairment.

The state regulates (enacts) the marriage requirements as an effort to affirm religion or belief norms in the marriage law. The marriage requirements constructed by the state, the fulfillment of which becomes the condition for marriage registration and the condition for the issuance of the Deed of Marriage, can be found in Law Number 1 Year 1974 concerning Marriage and other laws and regulations related to the marriage and population administration. I hope that there will be an effort to synchronize the laws and

regulations related to the religion or belief with the construction of organic law concerning marriage and population administration. I hope that there will be an effort to synchronize the laws and legislations related to the marriage according to the religion and belief of each party and the issues related to population administration.

[6.3] It cannot be denied that in its practice, the law cannot always be implemented in accordance with the intention of the law maker. In fact, to this day, there are still marriages disregarding Law 1/1974 and only refer to the marriage requirements according to the teachings of certain religions and belief. With respect to a marriage according to the law of religion or belief which is not conducted according to Law 1/1974 which is of course not registered, it will be difficult for the state to provide maximum protection to the rights of wife and children to be born in such marriage.

The Petitioners states that Article 2 paragraph (2) of Law 1/1974 stating that *“Every marriage shall be registered according to the applicable laws and regulations”* is inconsistent with Article 28B paragraphs (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution. In my opinion, Article 2 paragraph (2) of Law 1/1974 is not inconsistent with Article 28B paragraph (1) of the 1945 Constitution since Article 2 paragraph (2) of Law *a quo* requiring a registration, although in fact, it adds the requirement to conduct a marriage, the non-existence of which does not impede the marriage itself. This fact may be indicated from the implementation of mass marriage program/activity conducted by a number of couples which have conducted marriage but such marriage has not been registered yet.

In addition to that, the rights of child protected by Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution are not impaired by the existence of Article 2 paragraph (2) of Law 1/1974 requiring the marriage registration. In fact, the protection of the child rights as provided for in Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution will be able to be maximized in the event that all marriages are registered, so that the child genealogy and the party having obligation to such child will be found easily. Marriage registration is a social dimension intended to provide guarantee of the legal status and consequences of a legal event which is also similar to the registration of birth and death.

Based on the foregoing consideration, in my opinion, no constitutional impairment is suffered by the Petitioners as a result of the existence of Article 2 paragraph (2) of Law 1/1974, even if the registration is interpreted as an absolute requirement of the marriage legitimacy, article *a quo* potentially impairs the constitutional rights of Petitioner I.

[6.4] It must be admitted that day-to-day legal practice indicates the existence of legal pluralism since there is a group of community in the day-to-day civil relation of which is guided by religious law or is guided completely by national law, or is based on its civil relationship with local customary law. The legal pluralism is regulated and strictly protected by the 1945 Constitution insofar as it is consistent with the objectives of the Unitary State of the Republic of Indonesia.

As the implication of legal pluralism, indeed frictions cannot be avoided, either

simple or complex friction, related to the practices of the intended national law, religious law or customary law. In spirit to avoid frictions and negative effects of the intended frictions, the state presents national law (laws and regulations) which tries to be the umbrella for legal pluralism. It cannot be avoided that if an effort to make an umbrella to protect the law pluralism, must in one hand conform to the interpretation to implement the religious law or customary law. This kind of restriction practice is justified in the constitutionalism ideology, even Article 28J paragraph (2) of the 1945 Constitution expressly states that , *“In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.”*

In reality, there are still many marriages in Indonesia which are only based on religious law or belief, namely guided by the requirements of marriage legitimacy according to certain religious or belief teachings without registering such marriage as a form of guarantee of legal certainty from the state upon the consequences of a marriage. This reality, in its practice, may impair a woman, as a wife, and the children born in such marriage. In relation to the protection of women and children as explained above, there are different impairments in a marriage not conducted pursuant to Law 1/1974 in terms of the legal subject, namely (i) consequences for the woman or the wife; and (ii) consequences for the children born in such marriage.

[6.5] Theoretically, the norms of religion and belief cannot be forced by the state to be implemented, since the said norms of religion and belief is an area of private transcendental belief, namely a relationship between a person and his/her Creator; meanwhile, legal norm, in this case Law 1/1974, is the provision made by the state as the materialization of agreement between the residents (community) and the state, thus the coming into effect of which may be forced by the state (Government).

The potential impairment due to a marriage which is not conducted pursuant to Law 1/1974 is varied for women (wives), but actually, the most important thing is whether the impairment can be recovered or not. This is the crucial point of Law 1/1974, especially the regulation concerning marriage registration. In the context of marital law system, protection from the state (Government) for the parties in a marriage, especially the woman as a wife, may only be provided if a marriage is conducted deliberately in accordance with Law 1/1974, one of the requirements of which is a marriage shall be conducted along with the registration of which in accordance with the applicable laws and regulations (*vide* Article 2 of Law 1/1974). Further consequence, with respect to the unregistered marriage, the state cannot provide protection for the marital status, joint properties, inheritance and other rights arising due to a marriage, since in order to prove the existence of rights of woman (wife), the existence of marriage between woman (wife) and her husband must be proven first.

[6.6] A marriage which is not conducted pursuant to Law 1/1974 also has potential of impairing the child born in such marriage. The main potential

impairment for the child is the denial of relationship between a child and his/her natural father (biological father), which certainly leads to the inability to demand the performance of his/her natural father to finance the child's life needs and other civil rights. In addition to that, in the community which still makes an effort to maintain the wisdom of traditional values, the definition of family always refers to the definition of nuclear family or elementary family, namely a family which consists of the husband, the wife and the child (children). The existence of child in a family which does not have the completeness of nuclear family element or is not acknowledged by his/her biological father will provide negative stigma, such as, illegitimate children. This stigma is a potential impairment for a child, especially socio-psychological impairment which can actually be avoided by continuously acknowledging the relationship between a child and his/her biological father. From the perspective of laws and regulations, the different treatment to a child due to certain reasons which are in no way resulted from the action of the relevant child may be categorized as discriminatory treatment.

The potential impairment is affirmed by the provision of Article 43 paragraph (1) of Law 1/1974 stating that "*Child born out of wedlock shall only have civil relationship with his/her mother and his/her mother's family.*" The existence of Article *a quo* excludes the possibility for a child to have civil relationship with his/her natural father. That is the risk of unregistered marriage or a marriage which is not conducted pursuant to Law 1/1974, however it is not appropriate if a child should also suffers the impairment arising due to the action (marriage) of his/her parents. In the event that it is considered as sanction, the organic law or religious law (in this case, Islam) does not recognize the

concept that a child should also face the sanction as a result of the action conducted by his/her parents, or known as “original sin”. In other words, the potential impairment due to a marriage which is not conducted pursuant to Law 1/1974 constitutes the risk for the man and the woman conducting the marriage, but it is not the risk which must be assumed by the child born in such marriage. Therefore, in my opinion, the fulfillment of the rights of a child born in a marriage, regardless of the legitimacy of the marriage according to organic law, remains to be the obligation of his/her natural parents or biological parents.

SUBSTITUTE REGISTRAR,

Sgd.

Mardian Wibowo