

The Constitutionality of Polygamy in Indonesia: How Indonesian Constitutional Court Decision Number 12/PUU-V/2007 Interpreted Polygamy

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Abstract

M. Insa is an Indonesian citizen intending to perform religious observance of polygamy. However, according to Law No. 1 the Year 1974 regarding Marriage (the Marriage Law), he does not qualify to practice polygamy. M. Insa then files a petition for the judicial review of the Marriage Law, particularly regarding the Articles regulating polygamy. As such, the Court considers the arguments presented by the Petitioner groundless and therefore the Petitioner's petition is declared rejected. This study analyses the reasons of the Constitutional Court in defining constitutionality of polygamy in Indonesia. According to the Court, the conditions to practice polygamy are still required to guarantee the realisation of marriage purpose. The articles in the Marriage Law containing the reasons, conditions and procedures for polygamy are the efforts to guarantee the fulfilment of the rights of the wife and prospective wife in the context of realising the marriage purpose. Therefore, the intended articles can not be interpreted as nullifying the provision that allows the polygamous marriage. The provision included in the Marriage Law states that the principle of marriage is monogamy. Polygamy is allowed, provided that specific reasons, conditions and procedures are not contradictory to the teachings of Islam.

INTRODUCTION

Based on the provision of Article 24C Paragraph (1) of the 1945 Constitution, the Indonesian Court has the authority to hear at the first and final level the decision of which shall be final, among other things, to review a law against the 1945 Constitution (Eddyono: 2019, 1210). The provision mentioned above is further affirmed in Article 10 Paragraph (1) of Law Number 24 the Year 2003 regarding the Constitutional Court and Article 12 Paragraph (1) of Law Number 4 the Year 2004 regarding Judicial Power.

Law Number 1 the Year 1974 regarding Marriage (Marriage Law) was promulgated on 2 January 1974 after years of vociferous debate (Katz: 1975, 1). According to Marriage Law, polygamy is still permitted, but permission from the Religious Court' must first be sought before entering a polygamous marriage (Nurmila: 2016, 1). In 2007, the case of a petition for judicial review Marriage Law against the 1945 Constitution of the State of the Republic of Indonesia filed by M. Insa. He argued that his constitutional rights had been impaired by the coming into effect of Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 5 Paragraph (1), Article 9, Article 15 and Article 24 of the Law.

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

At last, Indonesian Constitutional Court pronounced Decision 12/PUU-V/2007 in the Plenary Meeting of the Constitutional Court open for public on Wednesday, October 3, 2007, with a decision "To declare that the petition of the Petitioner shall be rejected." On its Concluding, the Court stated, the provisions contained in the Marriage Law stating that the principle of a marriage shall be monogamy, and that polygamy

shall only be allowed under specific reasons, conditions and procedures are not contrary to the teachings of Islam. Moreover, the Court have argumentation that the provisions are not contrary to the right to found a family, the freedom to embrace a religion and to worship according to one's religion, the right to be free from discriminatory treatment as regulated in Article 28B Paragraph (1), Article 28E Paragraph (1), Article 28I Paragraph (1), and Paragraph (2), as well as Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution. Therefore, the arguments presented by the Petitioner, according to Court, are not sufficiently grounded and hence it must be declared that the petition of the Petitioner shall be rejected.

This paper will find out the reasons of the Constitutional Court in defining constitutionality of polygamy. This paper is the result of normative legal research by examining primary data, namely the decision of the Constitutional Court and other library materials as secondary data. Descriptive discussion is used to describe cases submitted to the Constitutional Court related to marriage law and polygamy. This paper will provide the

opinion of experts in order to deliver insight for the Court.

DISCUSSIONS

1. The Statements of the Experts from Petitioner

According to Petitioner, polygamy is allowed in the religion of Islam. The provisions of the articles in the Marriage Law which require the consent from one's wife or the Court have impaired or reduced the freedom of religion, particularly reducing the freedom to perform the religious observance of polygamy, reducing the Petitioner's prerogative right in his household, impairing the human rights, and are discriminatory, while those rights are guaranteed by Article 28B Paragraph (1), Article 28E Paragraph (1), and Article 28I Paragraph (1) and Paragraph (2), as well as Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution.

Marriage Law		According to the Petitioner, the Marriage Law are contrary to the 1945 Constitution, namely:	
Article 3		Article 28B	
Paragraph (1):	"In principle, in a marriage, a man shall only be allowed to have a wife, and a wife shall only be allowed to have a husband";	Paragraph (1):	"Every person shall be entitled to found a family and to procreate through legitimate marriage".
Paragraph (2):	"The court can give someone the permission to have more than one wife";	Article 28E	
Article 4		Paragraph (1):	
Paragraph (1):	"In the event that a husband intends to have more than one wife, he is obligated to submit an application to the court of his domicile";	"Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to	
Paragraph (2):	"The court shall only give the permit to a husband who intends to		

Article 5 Paragraph (1):	<p>have more than one wife on the following conditions:</p> <ol style="list-style-type: none"> The wife can no longer perform her obligations as a wife; The wife has a physical handicap or suffers from an incurable disease; The wife is incapable of procreation.” <p>“To be able to submit the application to the Court, the following requirements must be fulfilled:</p> <ol style="list-style-type: none"> There is a consent from the wife/wives; It is certain that the husband is capable of guaranteeing the living necessities of the wives and their children; There is a guarantee that the husband will give fair treatment to his wives and their children.” 	Article 28I Paragraph (1):	<p>choose residence in the state territory and to leave it, and shall have the right to return”.</p> <p>“The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever”.</p>
Article 9:	<p>“A person who is still bound by a marriage with another person can not enter into another marriage except in the event as referred to in Article 3 Paragraph (2) and Article 4 of this law”.</p>	Paragraph (2):	<p>“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”.</p>
Article 15:	<p>“Whosoever due to a marriage is still bound together with one of both parties and based on the existing marriage can prevent the new marriage”.</p>	Article 29	<p>“The state shall be based upon Belief in The One and Only God”.</p>
Article 24:	<p>“Whosoever due to a marriage is still bound with one of the parties either of the parties and based on the existing marriage can apply for cancellation of the new marriage”.</p>	Paragraph (1):	

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

In addition, the Court has also heard the statements of the experts presented by the Petitioner. Expert Dr. Ahmad Sudirman, M.A. presents a statement that the religion of Islam will not allow a husband to practice polygamy if his wife is disabled or is unable to perform her observance. In the teachings of Islam, in relation to the Islamic principles, there is one principle that may be interpreted as ma’qulatul ma’na, insofar that it is approved by ulema and it is not forbidden, yet generally there are no additional statements in the aforementioned principle. Expert Dr. Eggi Sudjana, S.H., M.Si. presents a statement that the monogamy principle adopted by the law is contrary to the polygamy principle allowed by the Almighty God (Allah SWT) and violates the human rights possessed by a person who has faith in the Koran and the Sunnah of the Prophet Muhammad and will cause people to easily fall into adultery, sexual affairs and prostitution.

2. The Statements of Government and People’s Legislative Assembly

The Government has presented written and oral statements, which in essence state that the provisions in the articles of the law are intended to prevent any arbitrary acts by a husband and to guarantee that in polygamy, there will be harmony, happiness and prosperity at home. Besides, the Government also presents Experts whose statements have been heard by the Court as follows:

a. Expert Prof. Dr M. Quraish Shihab presents a statement that marriage is intended to achieve peacefulness (sakinah). Sakinah is a spiritual peace following a turbulent situation. Within their loneliness, human beings can feel isolated and that feeling of isolation may disappear when human beings have found their perfect partner. Therefore, Allah SWT has created spouses for both men and women and given them the potential for being affectionate (mawaddah) and

compassionate (rahmah) so that the aforementioned peacefulness may live on. By mawaddah and rahmah it will not be possible for either of the couple to commit an act that he/she knows will hurt his/her spouse’s feelings. By mawaddah, a man does not practice polygamy because his love is devoted only to one woman. By rahmah, although a husband feels the urge and need to practice polygamy, he will refrain from doing so if he considers that by practicing polygamy, he will consequently hurt his wife’s feelings, yet on the other hand, a wife may allow her husband to re-marry, sacrificing her feelings for her husband to do so if she feels that her husband really needs to practice polygamy. This is how marriage is taught in Islam, hence the principle is basically monogamy, yet there is still an opportunity to practice polygamy. Relating it to the law, although the requirements contained therein are not explicitly stated in the Koran and the Sunnah of the Prophet, they are nonetheless justifiable because judicial provisions always revolve around illah (God) and its objectives, hence it is possible to implement new requirements not stated explicitly in the aforementioned verses of the Koran and the Sunnah of the Prophet.

b. Expert Prof. Dr. Hj. Huzaemah T. Yanggo, presents a statement that there are two types of religious observance; mahdlah observance and ghairu mahdlah observance. The mahdlah observance is a religious observance which cannot be compromised, while the ghairu mahdlah observance is the opposite, for instance gathering for a good purpose is considered as a religious observance. Polygamy is a personal issue, but it is justifiable for the Government to interfere in such an issue order to guarantee the realization of collective interest. This is in line with the

holy words of Allah, which means, “O faithful devotees, obey Allah, the Apostle and ulil amri (the authorities)”.

The People’s Legislative Assembly (DPR) has presented written and oral statements which in essence state that the provisions of the articles of the law do not impair the constitutional right of the Petitioner to have the freedom of religion, including to practice polygamy to the extent that the Petitioner is capable of fulfilling the requirements provided for in the intended law.

3. The Stands of the Court

According to the Court, since the Petitioner bases his arguments on the teachings of Islam, therefore before further considering the constitutionality issue of the provisions in the Marriage Law petitioned for judicial review through the petition, it is essential for the Court to first consider the rules regarding marriage and polygamy according to the teachings of Islam.

Polygamy and Teachings of Islam

The Court makes arguments that it has been generally known and it has also been described by the experts of the Government, at the time when Islam was revealed through the Prophet Muhammad, polygamy or marriage between a man and several women had been practised. Polygamy has been a familiar concept known by almost all nations in the world even since thousands of years ago. The Persians, Romans, Egyptians, Babylonians, Indians, Assyrians and Greeks knew polygamy. Prophets before the Prophet Muhammad such as the Prophets Abraham, Solomon, and David recognised and practised polygamy. The Prophet Moses also did not prohibit his people from practising polygamy. In times before the appointment of Muhammad as an Apostle, also known as the jahiliyah age, polygamy was not only familiar to the Arabs, but it was also a custom. The practise of polygamy during the jahiliyah era extremely degraded the status of women. Men could easily marry or divorce women as they liked, and as many times they wished. During the jahiliyah age, women were treated as no more than objects. For instance, widowed women whose husbands had died were

allowed to be given to their husbands’ sons to be married. Therefore, polygamy is not a new creation or issue made by the teachings of Islam.

According to the Court, the teachings of Islam wish to organise polygamy in a gradual manner, with the purpose that, among other things, in its practice, there will not be any form of arbitrary treatment by men and in the context of preserving the dignity of women. The provisions of Koran in relation to marriage and polygamy, among others are contained in the following Letters:

Ar-Ruum verse 21

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

Which means:

And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect. (Indonesian translation by the Department of Religious Affairs of the Republic of Indonesia, 1990)

An-Nisaa verse 1

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

Which means:

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

An-Nisaa verse 3

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

Which means:

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

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

An-Nisa verse 129

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمِيلِ فَتَنُزُّوهُمَا كَالْفُحْلَةِ وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

Which means:

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

The Court then observed the statements of experts Prof. Dr M. Quraish Shihab and Prof. Dr Hj. Huzaemah T. Yanggo presented before the hearing, and it may thus be concluded as follows:

- The objective of marriage is to achieve peacefulness (sakinah). A man and a woman living together in the bond of marriage will receive peace. Beforehand, a man or a woman as an individual experienced passionate urges which could not be channeled, and thus they were unable to achieve peace. The sakinah may be perpetuated when the couple preserves mawaddah, namely the sincere affection bonded between the two individuals without expecting anything in return but rather merely for the willingness to sacrifice their respective personal wishes and give pleasure to their spouse. Therefore, mawaddah is altruistic in nature, not egoistic. Egoism, namely the human nature which desires everything pleasing to himself/herself, regardless of the fact that such an action will hurt the feelings of his/her spouse, will imply the purposive disconnection of mawaddah. With such disconnection from mawaddah, sakinah is thus no longer preserved. That is the reason why, for the sake of

sustaining a sakinah family, it is considered reasonable for a husband wishing to practice polygamy to first ask for the opinion and consent from his wife so that she will not be hurt. Besides, the wife's consent is required because it is closely related to the wife's position as an equal partner and as a legal subject in a marriage whose dignity and status must be respected. Aside from the obligation to preserve mawaddah, sakinah will consequently occur and be preserved if both husband and wife preserve rahmah, namely the act of mutual giving and taking based on sincere affection upon the different positions they occupy, namely as a husband and as a wife, with their respective strengths and weaknesses;

- Based upon the holy word of Allah as quoted above, most ulema is of the opinion that the fundamental law of polygamy is mubah or halal, namely a permissible act. Even so, the permission to practise polygamy is subject to certain conditions, one of them being just treatment. Polygamy may become sunnah or makruh in nature. This is, however, not caused by its substance, but due to the condition of the person practising polygamy, the time, and the situation as the backgrounds. Hence, the principle of marriage adopted by the teachings of Islam as indicated by the abovementioned opinion of the expert Prof. Dr M. Quraish Shihab is the principle of monogamy. Polygamy is an exception which may be sought under certain circumstances, both objectively concerning time and place, and subjectively with the parties (the persons practising polygamy) within the marriage. Such circumstances may normatively be in the form of reasons and conditions stipulated by law and enforced through certain procedures in the court;
- One of the most important requirements of polygamy is being fair. Although the term "fair" in its ideal sense which implies the ability to love one's wives and children equally is indeed unachievable by mere mortals, despite a husband's sincere

struggle to fulfil such a requirement according to the Holy Word of Allah in the Letter of An-Nisaa Verse 129 as quoted above. Therefore, the term “fair” as one of the requirements of polygamy implies the sense of to share (al-qisth), related to the capacity to provide for one’s wives and/or future wife as well as the born children and the ones who will be born from the aforementioned polygamous marriage. Also, it is related to one’s capability to be present during certain times and in certain places. Thus, the state as the highest organization within a society established on the basis of convention, not only has the authority to regulate (bevoeg te regel) but also has the obligation to regulate (verplicht te regel) in order to realize the aforementioned fairness by means of laws and regulations within its authority and through their enforcement through the court. This is in accordance with the principle of fiqh as quoted by Expert Prof. Dr. Hj. Huzaemah T. Yanggo, which means that “The Government (the state) shall take care of its people in accordance with their collective interest “. Therefore, according to the teachings of Islam, the state as ulil amri has the authority to stipulate requirements which must be complied with its citizens wishing to practice polygamy for the sake of public interest, particularly for the sake of achieving the objective of a marriage, namely to form a happy and everlasting family (a household) on the basis of the Belief in the One and Only God, which is identical to the abovementioned sense of a sakinah family;

- Polygamy, as well as the interaction among human beings, falls into the category of mu’amalah. Even so, mu’amalah may indeed be considered as an act of religious observance in a broad sense when it is conducted according to the commandments given by Allah (syari’ah). This is in line with the teachings of Islam that it is the duty in every human’s life to worship, pursuant to Surah adz-Dzariyat Verse 56 which means

“I have only created Jinns and men, that they may serve Me“. Such an understanding of an act of worship or ibadah implies ibadah in its broad sense, which includes the acts of a human being in interacting with other human beings (hablun min an-nas), with other non-human creatures, and even with Allah as his Creator (hablun min Allah). The act of a human being in interacting with other fellow creations of Allah, including other human beings, is called mu’amalah, while the act of a human being in interacting exclusively with Allah Himself is called ibadah in a special sense. This special sense of ibadah may be further distinguished between the ibadah which is merely an interaction between a human being with Allah (ibadah mahdlah) and the ibadah with a certain aspect related to human beings and other creations of Allah (ibadah ghairu mahdlah);

- Distinction between ibadah and mu’amalah is related to the syari’ah of Allah in regulating the aforementioned aspects. Allah has determined certain forms of ibadah which are limited in number, yet the commandments regulating those forms of ibadah are extremely specific (tafshily). Human beings, both as individuals and collectives, have no room for ijtiḥad intended to further complete the commandments set forth by Allah and His Apostles. If the room for ijtiḥad exists, in ibadah ghairu mahdlah, the number will be extremely limited and it will consist of merely technical issues. At the opposite extreme, regarding mu’amalah, Allah has not given any specific scope to it. The freedom to determine such aspects has been completely given to human beings. The commandments regulating such matters, the syari’ah, only comprise the general guidelines (ijmaly). The remaining matters are given to human beings who, by the Apostle of Allah, are declared as the most knowledgeable concerning the issues of their world. “You have better knowledge of your own world“. This is also in accordance with the principle of

fiqh (qaidah fiqh) in the aspect of ibadah which states, “in essence, worship is forbidden unless there is a commandment which expressly orders one to do so”, while the qaidah fiqh in the aspect of mu’amalah states, “in essence, mu’amalah is allowed unless there is a commandment which expressly forbids one to do so “. Due to the fact that polygamy does not constitute an act of worship in its special sense as intended above, therefore regulations regarding the requirements to practice polygamy are not contrary to the teachings of Islam. In comparison, Moslem pilgrimage (ibadah haji) constitutes one of the five pillars of Islam. Even so, for the sake of well-performed pilgrimage, the Government regulates certain requirements for prospective Moslem pilgrims due to the limited quota of Moslem pilgrims annually.

Limitations on Polygamy

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

The Petitioner also argues that polygamy is necessary because the number of women

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

The Petitioner argues that the articles in the Marriage Law which relate to polygamy, namely Article 3 Paragraph (1) and Paragraph (2), Article 4 Paragraph (1) and Paragraph (2), Article 5 Paragraph (1), Article 9, Article 15 and Article 24, are contrary to Article 28B Paragraph (1), 28E Paragraph (1), 28I Paragraph (1), Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution. Concerning the Petitioner mentioned above’s argument, the Court is of the following opinion:

- The provisions existing to regulate polygamy for Indonesian Citizens (WNI) whose religious laws on polygamous marriage are acceptable, because according to Article 2 Paragraph (1) of the Marriage Law, a marriage is legitimate insofar as it is conducted according to their respective religions and beliefs. On the contrary, it will

not be accepted if the Marriage Law regulates polygamy for those whose religious laws do not recognise the practice of polygamy. Thus, the difference in such regulation is not a form of discrimination, because the regulation does not discriminate any party, but instead, it regulates according to which matters are necessary, while discrimination is the act of giving different treatments towards two similar issues;

- 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 realising the objective of a marriage. Thus, such an effort cannot be construed as being intended to eliminate provisions which allow the polygamous marriage. Thus the description of a condition which requires a husband who wishes to practice polygamy to be able to give fair treatment is as follows:
 - a. They are not contrary to Article 28B Paragraph (1) of the 1945 Constitution, because the provisions regarding the reasons, requirements and procedures of polygamy are not by any means limiting the right of every person to found a family and procreate through legitimate marriage. For Moslems, it may be achieved through either monogamous or polygamous marriage, under the condition that they fulfill the reasons, requirements and procedures of either type of the marriage as intended in the Marriage Law;
 - b. They are not contrary to Article 28E Paragraph (1), Article 28I Paragraph (1), Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution either because the conditions required to be fulfilled by a husband to be able to practice polygamy do not in any way disallow every person to freely perform the religious observance of their adopted religions. Likewise, the 1945 Constitution only contains principles which guarantee the freedom to perform

religious observance according to one's religion. The Marriage Law which regulates the intended reasons, requirements, and procedures of polygamy is not contrary to the abovementioned principles. The Law reinforces such guarantee as expressly described in Elucidation on Article 2 Paragraph (1) of the Marriage Law which reads, "By the formulation of this Article 2 Paragraph (1), there shall be no marriage outside the laws of one's respective religion and belief, in accordance with the 1945 Constitution. That which is intended by in the laws of one's respective religion and belief shall include the provisions of applicable laws for his/her religion and belief insofar as they are not contrary to or otherwise provided in this Law".

According to Faye Chan, based on the decision, the Indonesian Constitutional Court upheld that "Islamic law is not merely a matter of private belief, but is determined by what the state interprets as 'Islamic law', especially when it has social and political consequences" (Chan: 2012, 145). Simon Butt stated that the Court "sought to justify the government's restriction of unbridled polygamy by reference to Islamic law, including the Koran" (Butt: 2010, 299).

CONCLUSION

Indonesian Constitutional Court on Decision 12/PUU-V/2007 stated that the provisions contained in the Marriage Law stating that the principle of a marriage shall be monogamy, and that polygamy should only be allowed under specific reasons, conditions and procedures are not contrary to the teachings of Islam. According to the Court, 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 realising the objective of a marriage. Thus, such an effort cannot be construed as being intended to eliminate provisions which allow the polygamous marriage. At last, to get permit of polygamy in Indonesia still need

specific reasons, conditions and procedures fulfilled such as there is a consent from the wife/wives, the husband is capable of guaranteeing the living necessities of the wives and their children, and the husband will give a fair treatment to his wives and their children.

Decision 12/PUU-V/2007 showed that the Indonesian Constitutional Court could use the teachings of religion as consideration. Since the Petitioner bases his arguments on the teachings of Islam, therefore before further considering the constitutionality issue of the provisions in the Marriage Law petitioned for judicial review through the petition, the Court consider the rules regarding marriage and polygamy according to the teachings of Islam. Indonesian Constitutional Court stated polygamy is allowed, provided that specific reasons, conditions and procedures are not contradictory to the teachings of Islam.

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