

The Indonesian Marriage Law: Battle for Constitutional Interpretation of Religious Freedom

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Abstract

This study discusses the Constitutional Court decisions on the constitutionality of the Law No. 1 Year 1974 on Marriage (Marriage Law) through several judicial review cases. The paper examines the polygamy, child born out of wedlock, and interfaith marriage case in understanding the reasoning behind controversial decisions made by the Constitutional Court. It is argued that from the cases, Islamic interests in the sense of incorporating Islamic law in the Indonesian legal system, were considered in the deliberation of the Court's decisions even though the Court also took consideration from certain human rights values such as children's and women's rights in balancing both interests. In doing so, the Court is perceived to contribute to the construction of sophisticated authoritarianism or autocratic legalism by using a seemingly democratic and constitutional means to accomplish hidden agenda of autocracy.

Keywords: Marriage Law, Polygamy, Child Born out of Wedlock, Interfaith Marriage

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1. Introduction

Lee Morgenbesser explains sophisticated authoritarianism as the use of constitutional or legal methods to accomplish their aims and hide the autocratic designs in the pluralism of legitimate legal form.¹ In a similar note, autocratic legalism occurs when electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda.² The use of law to oppress people, particularly minorities, is the practice of autocratic legalism. These autocrats use constitutional or legal methods to accomplish their aims and hide autocratic designs in the pluralism of legitimate legal forms.³ In this sense, seemingly democratic procedures can facilitate authoritarianism. Arguing that authoritarian rule has been a mainstay of political life in South-East Asia,⁴ Lee Morgenbesser defined an authoritarian regime as sophisticated insofar that it possesses most indicators and sufficiently mimics the fundamental attributes of democracy.⁵ The development of democratic institutions in Indonesia such as the establishment of Constitutional Court and democratically elected members of Parliament may facilitate coercion by using a secure rule of law.⁶ The coercion occurs when democratically elected politicians make laws according to their own interests, disregarding the interests and values of others.

This phenomenon is problematic because when the political elites bargain to conceptualise religion within the legal system through laws and court decisions, particularly in regard to religious freedom, the result will most likely represent the interest of the majority. Russel Sandberg, in ‘Clarifying the Definition of Religion Under English Law: The Need for a Universal Definition’, argued that legal definition delineates the granting of benefits and burdens of rights and duties.⁷ This means the rights and duties of those being included in (classified as) the legal definition are recognised, while those excluded are ‘denied legal recognition’.⁸ This is in opposition to the idea of freedom in liberal democracy where religion belongs to the private domain alongside other subjective, speculative preferences and not in rational, public life.⁹ There lies interesting construction of religious freedom from the liberal perspective: that religious freedom is, to cite Douglas Laycock, ‘first and foremost a guarantee of liberty. It is liberty with respect to religious choices

¹ Lee Morgenbesser, *The Rise of Sophisticated Authoritarianism in Southeast Asia* (Cambridge: Cambridge University Press, 2020), 1.

² Kim Lane Scheppele, “Autocratic Legalism,” *University of Chicago Law Review*, 85, no. 2 (2018): 547-8

³ Scheppele, “Autocratic Legalism,” 547-8.

⁴ Morgenbesser, *The Rise of Sophisticated Authoritarianism*, 1.

⁵ Morgenbesser, *The Rise of Sophisticated Authoritarianism*, 8.

⁶ Morgenbesser, *The Rise of Sophisticated Authoritarianism*, 21.

⁷ Russel Sandberg, “Clarifying the Definition of Religion Under English Law: The Need for a Universal Definition,” *Ecclesiastical Law Journal* 20, no. 1 (2018): 133.

⁸ Sandberg, “Clarifying the Definition,” 133.

⁹ Sandberg, “Clarifying the Definition,” 133.

and commitment. However, religion is not guaranteed, and neither is secularism—only liberty is guaranteed.’¹⁰ This is an important notion that happened to be forgotten by Indonesia after ratifying various international human rights norms on religious freedom as well as incorporating them in its domestic legal system such as the constitutional articles and human rights law. By accepting legal norms on religious freedom, Indonesia should emphasise its protection of (human) rights, instead of religion. In this regard, this study seeks to re-examine the Indonesia’s marriage law from the perspective of religious freedom by questioning the reconciliation of conflicting rights by the Constitutional Court interpretation.

The Constitutional Court relies upon the Constitution in conducting judicial review of a law. Under the Indonesian Constitution, the right to marriage is regulated under Article 28 B(1), which states, ‘Every person shall have the right to establish a family and to procreate based upon lawful marriage.’ The term to be emphasised here is ‘based upon lawful marriage’. This means, the right to marry is not an absolute right. It must satisfy the Marriage Law (lawful marriage) clauses, one of which requires marriage to be performed in accordance with the parties’ religion. Furthermore, the right to marry (establish family and to procreate) does not fall under the classification for absolute rights set under Article 28 I(1) of the Constitution. Therefore, the right to marry is subject to limitations under Article 28 J(2) of the Constitution which explicitly mentions religious values as one potential source of permissible limitations on rights protected by the Constitution.

In the Indonesian context, Islamic thought is influential although the state does not proclaim itself to be an Islamic state. Several provisions under the 1974 Marriage Law are controversial because they incorporate Islamic values that are forced on all Indonesians, including non-Muslims, in the matter of marriage. This includes the clause on polygamy and the status of a child born out of wedlock. One of the provisions under the Marriage Law that refers to Islamic law is Article 3 (2): ‘The Court may grant permission to a husband to have more than one wife, if all the parties concerned so wish’. This article is problematic for two reasons: (1) the lack of gender equality between men and women; and (2) it originates from Islamic teaching on polygamous marriage, which may not be acceptable to other religions, particularly religions that prohibit polygamy. Although the article does not force people to engage in polygamy, the mention of polygamy in this article—which later was confirmed by the Constitutional Court as taken from Islamic teachings—is evidence of the Marriage Law’s preference for Islam.

Another article taken from Islamic teachings is 43(1): ‘A child born out of wedlock has a civil relationship with his/her mother and her relatives only’.

¹⁰ Douglas Laycock, “Religious Freedom as Liberty,” *Journal of Contemporary Legal Issues* 7, no. 2 (1996): 313.

This provision is taken from Islamic (*hadits*) by Bukhori (6760) and Muslim (1457) saying, ‘A child has a civil relation with the legitimate husband of the mother, and those commit adultery get nothing’. The Islamic teaching has been articulated in Indonesian Marriage Law by stipulating that when a child is born out of wedlock, the child will be exclusively affiliated to his mother’s family. This means, for example, that a father may have no obligation to support his child. Further, the article is problematic because the father can deny responsibility for sharing child support with the mother. Here, an exercise of religious freedom in the sense of practising Islamic teaching may conflict with other human rights, particularly children’s rights, which are protected under the Indonesian Constitution. Another problem arising from the Marriage Law is that it does not allow interfaith marriage. The prohibition of interfaith marriage is not explicit under the Marriage Law. Article 2(1) states that, ‘A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned’. This article is problematic because it is presumed that the couple shares the same religion. If couples are of different religions and these religions do not allow interfaith marriage, they would not be permitted to marry.

This article highlights the importance of balancing conflicting rights when determining the scope of religious freedom.¹¹ Even when the state proclaims its religiosity to adopt certain religious values (in this case, Islamic law) in the state law, it should balance other rights that may conflict with these values, such as the rights of children and women. To better understand the socio-political construction beyond the legal text of the Marriage Law, this study will begin with an elaboration of the making of the Indonesian Marriage Law before examining three interesting cases reviewing the constitutionality of this law: Case Number 12/ PUU-V/2007 on Polygamy (2007 case); Case Number 46/ PUU-VIII/2010 on Children Born Out of Wedlock (2010 case); and Case Number 68/PUU-XII/2014 on Interfaith marriage (2014 case). These three cases discuss the tension between religious freedom and human rights in greater depth than other cases challenging provisions of the Marriage Act, such as Case Number 69/PUU-XIII/2015 on Prenuptial agreement and Case Number 22/PUU-XV/2017 on the minimum age of marriage, where the court does not offer sustained reasoning on matters of religion.

The 2007 polygamy case at first seems to be a progressive response by the state to affirm its authority to control the application of Islamic law in Indonesia. However, the fact that the Court affirmed the constitutionality of polygamy shows that Islamic law is still being accommodated by the state. The 2010 case on children born out of wedlock was a complicated case in which the Court partially granted the petition under the so-called

¹¹ Ahmad Rofii, “The Religiosity of the Indonesian Constitution,” *Constitutional Review* 7, no. 2 (2021): 233.

'conditionally unconstitutional' doctrine. Although this decision should be applauded for progressively disregarding the Islamic law doctrine denying the existence of a civil relationship between a biological father and his child by emphasising the interests of the child (Article 43 (1)), the Court's reasoning in upholding the constitutionality of Article 2 (2) shows the state's endorsement of religion (including Islam) to validate a marriage. Meanwhile, in case No. 68/PUU-XII/2014 on interfaith marriage, the Court rejected the challenge to Article 2(2), affirming the validity of the requirement for the couple to have the same religion to marry. Interestingly, the Court in the 2014 case stressed the importance of religion in Indonesian society in upholding the law which prevents interfaith marriage. These three cases show how sophisticated authoritarianism or autocratic legalism is done by deciding cases in ways that, perhaps implicitly, take Islamic values into consideration in deciding cases related to Islam, similar to the way that law makers considered Islamic values when enacting the Marriage Law.

2. Method

This study analyses the idea of religious freedom in the context of marriage law in Indonesia. In doing so, it combines doctrinal aspect of the legal text and the broader sociolegal aspect of the politics of lawmaking processes on the issue of marriage law. This study is doctrinal in its framework. This means that it explains, makes coherent or justifies a segment of the law as part of a broader system of law.¹² Specifically, it explains the concept of religious freedom in the Indonesian marriage law framework. However, it does not stop at explaining the Indonesian legal framework of marriage as constructed by lawmakers. A purely doctrinal analysis would be insufficient for this study because the study starts with an overview of the problem caused by the Indonesian legal construction of marriage law. Thus, this study builds a more persuasive doctrinal analysis. As Emerson Tiller and Frank Cross stated, 'a persuasive doctrinal analysis could show the judiciary the error of its ways and provoke [a] new course of legal reasoning'.¹³ The persuasive doctrinal analysis is conducted by embracing a sociolegal approach. David N Schiff explained that in a sociolegal approach, 'analysis of law is directly linked to the analysis of the social situation to which the law applies and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance, and/or change of the situation'.¹⁴

3. Analysis and Discussion

3.1. The 1974 Marriage Law

¹² Terry Hutchinson, and Nigel James Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Legal Education Digest* 21, no. 3 (2012): 83.

¹³ Emerson H Tiller and Frank B Cross, "What is Legal Doctrine," *Northwestern Law Review* 100, no. 1 (2006): 518.

¹⁴ David N Schiff, "Socio-Legal Theory: Social Structure and Law," *Modern Law Review* 39, no. 3 (1976): 287.

The Indonesian Marriage Law was enacted in 1974 after a series of heated debate inside and outside the Parliament. Because the Marriage Law regulates matters related to religion, Islamist movements were involved in the debate, alongside the women's movement which struggles for women's rights to be accommodated in the law. There were three key issues in the debate on Marriage Law at that time: (1) whether marriages could be required to be registered with the state; (2) whether interreligious marriage was permissible; and most importantly, (3) whether there should be one marriage law for all citizens regardless of religion or separate laws for each religion.

Throughout the law-making process, the draft of Marriage Law was revised several times to accommodate different interests. The first draft of the Indonesian Marriage Law was proposed to the Parliament by the Ministry of Law in July 1973. It consisted of 15 chapters and 73 articles. It was argued by Katz and Katz that the making of the law was an attempt to unify the diverse legal system regulating marriage in Indonesia.¹⁵ Some parts of the draft were taken from the Civil Code and HOCI which were designed for non-Muslims.¹⁶ The 1973 draft of Marriage Law proposed by the government was controversial for the Muslim community because it was viewed as an attack on Islamic doctrine.¹⁷ For example, the government proposal required that a marriage must be registered with the state for it to be considered 'valid'. Meanwhile, according to Islam, registration is not required for a marriage to be valid. If the marriage fulfils the requirement set by Islamic law (Islamic ceremony), the marriage should be valid. Under the government's proposal, a valid marriage according to Islam could be viewed as invalid marriage by the state because the marriage was not registered. Thus, such proposal can be viewed as delegitimising Islamic law.

During the making of the law in 1973–1974, various Islamist movements reacted to the proposed law, including Islamist movements who support the establishment of Islamic state and/or Islamic law in Indonesia.¹⁸ They claimed that Muslims had been pushed aside in the formulation of the draft law and that the Ministry of Religion and Muslim leaders were not given a role in drafting the proposal.¹⁹ Some Islamist movements fiercely objected to the draft as they perceived the proposed law to be in contradiction to their

¹⁵ June S Katz and Ronald S Katz, "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal System," *American Journal of Comparative Law* 23, no 4 (1975): 653.

¹⁶ The laws were Dutch Domestic Law adopted by the Dutch Colonial Government.

¹⁷ Mark Cammack, Lawrence A Young, and Tim Heaton, "Legislating Social Change in an Islamic Society- Indonesia's Marriage Law," *American Journal of Comparative Law* 44, no. 1 (1996): 61.

¹⁸ Ahmad Rifai, Ibnu Sodik, and Abdul Muntholib, "Sejarah Undang-Undang Perkawinan Atas Pendapat Hingga Pertentangan dari Masyarakat dan Dewan Perwakilan Rakyat Tahun 1973–1974," *Journal of Indonesian History* 4, no 1 (2015): 2.

¹⁹ Katz and Katz, "The New Indonesian Marriage Law," 660.

religion such as in the case of marriage registration and restrictions on polygamy.²⁰

Despite the urge to soften the Islamists' interests, the Marriage Law still accommodates Islamic values for being fiercely forced by the Islamist movement. For instance, Article 4 of the Marriage Law allowing polygamous marriage which was taken from Islamic law. Here, although the Islamist party (PPP) was not the majority in the Parliament, it seems that demonstrations staged by Islamist groups outside Parliament also played significant role in shaping the content of the law. Moreover, the president was also agreed to delete all the provisions that contradicted Islamic law from the draft,²¹

The draft of Marriage Law was finally agreed by the Parliament on 22 December 1973 and was enacted as the Marriage Law on 2 January 1974, formally named the Law Number 1 1974 on Marriage. The Marriage Law consists of 67 articles within 14 chapters (Principle of Marriage; Marital Condition; Marriage Prevention; Marriage Cancellation; Rights and Obligations of Husband and Wife; Property in Marriage; The End of Marriage; Children; Rights and Obligations of Parents and Children; (Child) Custody; Other Provision (Proof of the Origin of Child, Marriage Outside Indonesia and Inter-marriage—between Indonesian and foreigner); (Court) Jurisdiction; Transitional Provision; and Closing).

Some of the controversial articles in the 1974 Marriage Law are:

- Article 2(1), 'A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned.'
- Article 2(2), 'A marriage shall be registered according to the regulation.'
- Article 3(1), 'In principle, man may only have one wife. Woman may only have one husband.'
- Article 3(2), 'The Court may grant permission to a husband to have more than one wife, if all the parties concerned so wish.'
- Article 42, 'A child is legitimate if born in or as a result of a legitimate marriage.'
- Article 43(1), 'A child born out of wedlock has only civil relationship to his/her mother and her relatives.'

On the issue of marriage registration, the provisions under the Marriage Law are controversial for some people arguing that their polygamous marriage is already considered valid for it has been performed in accordance with Islamic Law. The Marriage Law itself acknowledges it under Article 2 (1) stating that a marriage is valid, if it is performed in accordance with the laws of the respective religion and belief of the parties concerned. Therefore, registering a marriage should not be an issue. However, Article 2(2)'s

²⁰ Katz and Katz, "The New Indonesian Marriage Law," 660.

²¹ Katz and Katz, "The New Indonesian Marriage Law," 660.

statement that marriage should be registered creates legal uncertainty of a valid marriage that has not been registered. For example, Islamic polygamous marriage of ‘*siri*’ (secret marriage performed under Islamic law) is performed in accordance with Islamic law. However, there might be cases that polygamous marriage is not registered because the marriage does not satisfy the polygamous clause under Article 4 of the Marriage Law which require permit from District Court.

Here, although all the provisions (directly) contradict to Islamic law (sharia) were erased, the Marriage Law, particularly in the polygamy clause adjusts the adoption of sharia by giving additional clause such as the permit of the wife and court that the Islamic law does not originally set. The permit from court is not known under the sharia, therefore the polygamous marriage of ‘*siri*’ without the court’s permit is still valid under sharia. However, the Office of Religious Affairs (KUA) will not accept the marriage to be registered because it does not satisfy Article 4 of the Marriage Law.

Articles 3(1) and 3(2) of the Marriage Law are also controversial in the sense of breaching gender equality as a man (husband) may have more than one wife, but women may not have more than one husband. According to Marriage Law, a marriage performed under a religious law is valid. However, such a valid religious marriage may violate the state’s Marriage Law, so the civil registrar may refuse to register the marriage. This can be observed for example, in the case of polygamous secret marriage or *nikah siri*. Under the sharia law, a marriage is valid if it fulfils these aspects: the offer from the man (*ijab*), the acceptance from the woman through the woman’s father/ male relative (*qobul*), payment of dowry (*mahar*), and two witnesses.²² There is no requirement for the husband to ask for the wife’s permission for him to enter a second marriage. Therefore, if the husband marries the second wife fulfilling all the required aspects (*ijab*, *qobul*, *mahar*, and witnesses) without the permission of the first wife, the second marriage is still considered valid under sharia.

However, the Marriage Law requires the husband to ask permission from the first wife, as well as the court to allow him to do polygamy. Without the permits, the second marriage cannot be registered under the state’s law. In this case, such unregistered valid marriage will give no legal protection for the couple and the child. This is because, as relate to Article 2(2) of the Marriage Law, the unregistered marriage will have no marriage certificate that is needed to claim other civil registration benefit such as family card. In most cases, the second wife and the children in unregistered marriage are those having most disadvantages.

²² Majid Khadduri, “Marriage in Islamic Law: The Modernist Viewpoints,” *American Journal of Comparative Law* 26, no 2 (1978): 213.

On the issue of children born out of wedlock, Article 42 of the Marriage Law is problematic because the term 'legitimate child' gives lack protection for children's rights, especially for those children considered to illegitimate. The parents may derogate their obligation to take care of the children under this clause. Similar to Article 42, Article 43 is also problematic because it gives a lack of protection for children rights, especially for those children born out of wedlock (eg, their right to access inheritance from the biological father). If a child cannot be proven legitimate, the father can deny responsibility to pay maintenance to the mother.

On the issue of interfaith marriage, it may be argued that in general, the Marriage Law closes the door for interfaith marriage with its Article 2(1) requiring the marriage to be performed in accordance with the parties' religion to be considered valid. Although the article does not explicitly state the parties need to have the same religion, in effect, it makes it impossible for adherents of different religions to marry because the marriage ceremony needs to be performed in accordance with the religion's ceremony. Therefore, unless the religious ceremony for marriage allows person with different religion to perform its ceremony, interfaith marriage would not be possible. Moreover, The Indonesian Supreme Court in 17 July 2023 has issued guideline for judges in Indonesia to not legalise interfaith marriage.²³ This guideline makes it even harder for interfaith marriage because judges will contradict the Supreme Court policy if they would allow interfaith marriage.

3.2. Case Law

The Indonesia Marriage Law has been judicially reviewed seven times before the Constitutional Court.²⁴ Four of the challenges to the constitutionality of the law were rejected, and three were granted in part. Some of the most controversial issues brought before the Court are the legal status of a child born out of wedlock; polygamy; and interfaith marriage.

3.2.1. Polygamy Case

The polygamy case involved constitutional review of Articles 3 (1), (2), 4(1), (2), 5(1), 9, 15 and 24 of the Marriage Law. Mohammad Insa as the applicant in the case, argued that the reviewed articles breached his constitutional right to religious freedom because the articles limited his right to enter into polygamy.²⁵ The applicant claimed the articles made it difficult for him to exercise his religious freedom because polygamy is allowed and viewed as

²³ Indonesia, Supreme Court, Surat Edaran Mahkamah Agung (SEMA) Nomor 2 Tahun 2023 tentang Petunjuk Bagi Hakim dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat yang Berbeda Agama dan Kepercayaan. Jakarta, July 17, 2023.

²⁴ Judicial Review Number 1 of 1974 on Marriage, No. 12/PUU-V/2007; No. 46/PUU-VIII/2010; No. 38/PUU-IX/2011; No. 30-74/PUU-XII/2014; No. 68/PUU-XII/2014; No. 69/PUU-XIII/2015; and No. 22/PUU-XV/2017 (The Constitutional Court of the Republic of Indonesia 2007, 2012, 2012, 2015, 2015, 2016, 2018).

²⁵ Judicial Review Number 1 of 1974 on Marriage, No. 12/ PUU-V/2007 (The Constitutional Court of the Republic of Indonesia), 3.

an act of religious observance in Islam. He argued that the challenged provisions of the statute violated articles to Articles 29(1) and (2) of the Constitution guaranteeing his religious freedom.

According to the applicant, the requirements for polygamy in the challenged provisions of Marriage Law lacked a basis in Islamic law.²⁶ He claimed that Articles 29(1) and (2) of the Constitution gave him and other Muslims the right to perform their religion based on Islamic law instead of strictly following the state's law.²⁷ The applicant further argued that his constitutional right to worship (he claimed polygamy as the practice of religious observance) was limited by the state because the Marriage Law afforded his wife the authority to approve or not his polygamous marriage.²⁸ The applicant also claimed that the limitations on polygamy contained in the Marriage Act breached his right to establish family and to procreate. Therefore, the applicant also claims that the reviewed articles of Marriage Law also contradicts Articles 28 B(1), 28 E(1), 28 I(1) and (2) of the Constitution.

The Constitutional Court in its decision discussed the rules regarding polygamy under Islamic law. The Court felt it necessary to examine Islamic teachings on polygamy not because Islamic law is recognised in Indonesia, but because the applicant used Islamic law reasoning in the application.²⁹ According to the Court, the existence of polygamous marriage clauses in the Marriage Law is a form of accommodation for Islamic law.³⁰ The Court held that the requirements for polygamy set under the Marriage Law are necessary to protect the rights of men's current and future wives.³¹

The Court argued that the reviewed articles do not breach the constitutional articles because: (1) the requirements under the law to gain permission to take a second (or more) wives do not limit the right of person to establish family and to procreate as they still can enter into monogamous marriage;³² and (2) the requirements to enter into a polygamous marriage do not prohibit the practice of polygamy.³³ The mention of polygamy in the Marriage Law is an acknowledgement of Islamic law. Thus, the Court believes that the Marriage Law is accommodating Islamic law and does not contradict the religious freedom clauses in the Constitution.³⁴ Based on their reasoning, the

²⁶ Judicial Review No. 12/ PUU-V/2007, 3.

²⁷ Judicial Review No. 12/ PUU-V/2007, 3.

²⁸ Judicial Review No. 12/ PUU-V/2007, 3.

²⁹ Judicial Review No. 12/ PUU-V/2007, 91.

³⁰ Judicial Review No. 12/ PUU-V/2007, 97.

³¹ Judicial Review No. 12/ PUU-V/2007, 97.

³² Judicial Review No. 12/ PUU-V/2007, 98.

³³ Judicial Review No. 12/ PUU-V/2007, 98.

³⁴ Judicial Review No. 12/ PUU-V/2007, 98.

Constitutional Court rejected the application and declared the polygamy clauses in the Indonesian Marriage Law constitutional.³⁵

According to Simon Butt, the decision of the Court in the polygamy case resembles a more progressive interpretation of Islamic law³⁶ as it rejected the argument of the applicant that limiting polygamy violates his religious freedom.³⁷ Butt argues that the Court's decision to uphold the government's limitation on polygamy shows that the state has the absolute control over the use of Islamic law in Indonesia.³⁸ Moreover, it can also be viewed as an attempt 'to restrict the state's recognition of Islamic law to limited areas of law and to deny Islam independent legal authority'.³⁹ Although the argument that the state in the polygamy case did show its authority to limit Islamic law can be justified, it did not fully consider a more comprehensive approach such as the issue of gender equality.

Addressing the Marriage Law's articles on polygamy, Nur Kholis et al in their study argued that while the Marriage Law set requirements that make it difficult to enter into polygamy, the Law's polygamy provisions nevertheless reflect gender inequality because they emphasises the vulnerability of the first wife (woman) to allow her husband to take a second wife.⁴⁰ It can be seen, for example, in Article 4(2) of the Marriage Law, there are three conditions that can be used as a reason for polygamy: (1) If the wife cannot fulfil her obligations as wife; (2) If the wife has disability or incurable disease; and (3) If the wife is infertile. Here, the law does not protect the interest of the first wife, and even makes her situation worse. Moreover, the law only focuses on the interest and advantage of the husband on one hand, without prescribing the right of the wife to equally claim something if the husband could not fulfil his obligation as husband or has a disability or incurable disease or is infertile.

The principle of gender equality does not presuppose women to be treated the same as man. However, it stresses the fairness of the treatment by balancing the interest and access to both men and women.⁴¹ There are two factors that contribute to the lack of attention to gender equality in the Marriage Law provisions that regulate polygamy: political configuration during the making of the law and the method used to interpret Islamic law during the making of the law.⁴² Nur Kholis et al argued that during the making of the Marriage Law, Islamic law (sharia) was literally interpreted without

³⁵ Judicial Review No. 12/PUU-V/2007, 99.

³⁶ Simon Butt, "Islam, the State and the Constitutional Court in Indonesia" *Pacific Rim Law & Policy Journal* 19, no. 2 (2010): 282.

³⁷ Butt, "Islam, the State," 281.

³⁸ Butt, "Islam, the State," 285.

³⁹ Butt, "Islam, the State," 285.

⁴⁰ Nur Kholis, Jumaiyah, Wahidullah, "Poligami dan Ketidakadilan Gender dalam Undang-Undang Perkawinan di Indonesia," *Al-Ahkam* 27, no. 2 (2017): 204.

⁴¹ See e.g. Principles and Practices of Gender Equality provided by UNHCR.

⁴² Kholis, Jumaiyah, Wahidullah, "Poligami dan Ketidakadilan Gender," 210.

considering a more comprehensive context.⁴³ Because of this, they asserted that Article 4 of the Marriage Law concerning polygamy should have been removed from the draft.⁴⁴ By deleting polygamous clause in the Marriage Law, only monogamous marriage will be allowed in Indonesia. However, it will also directly clash with Islamic law, which allows polygamy. If this is the case, there would be significant disagreement from the Islamist movements. The decision of the Constitutional Court to preserve polygamous clauses in the Marriage Law shows its attempt to minimise potential conflict by balancing the accommodation of Islam and human rights interests, such as gender equality. In the end, the decision of the Court to affirm the constitutionality of polygamy shows that the Court agrees with this accommodation, despite the lack of gender equality. If the Court were to emphasise the priority of human rights, especially women's rights, it would have declared the articles to be unconstitutional.

To conclude the analysis on the polygamy case, this article argues the Constitutional Court decision in the polygamy case shows that Indonesia does acknowledge Islamic law in its legal system. However, the state's law regulates or modifies Islamic law as appropriate in Indonesia. The Court recognises need to consider and balance the rights of others (eg, women and children), although the Court's balancing of those interests produces gender inequality. The decision made by the Court to uphold the requirements for polygamy means that polygamy is still allowed, and anyone may still enter into polygamy provided they satisfy the requirements of the statute. Thus the polygamy clause in the Marriage Law is accommodating and acknowledging Islamic law.

3.2.2. Child Born Out of Wedlock

On 18 February 2012, the Constitutional Court published its decision on the constitutional review of article 2 (2) of the Indonesian Marriage Law. The petition for judicial review was submitted by Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim (Machica Mochtar) and Muhammad Iqbal Ramadhan bin Moerdiono.⁴⁵ The applicants claim that Article 2(2) and Article 43(1) of the Marriage law give legal uncertainty and discrimination for the son (Muhammad Iqbal Ramadhan bin Moerdiono) because of his status as illegitimate child who was born to a marriage which, though valid under sharia, was not considered legal under state law because the marriage was not registered.⁴⁶ Therefore, the applicants were requesting the Constitutional Court to declare article 2 (2) and article 43 (1) unconstitutional because those two articles contradict article 28 B p (1) and (2) and article 28

⁴³ Kholis, Jumaiyah, Wahidullah, "Poligami dan Ketidakadilan Gender," 209.

⁴⁴ Kholis, Jumaiyah, Wahidullah, "Poligami dan Ketidakadilan Gender," 209.

⁴⁵ Judicial Review Number 1 of 1974 on Marriage, No. 46/ PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2012), 1.

⁴⁶ Judicial Review No. 46/ PUU-VIII/2010, 4

D (1) of the Constitution regarding the right to establish a family and the rights of children.⁴⁷

The constitutional judges took more than one year to decide the case.⁴⁸ In a unanimous decision with one concurring opinion (based different reasoning), the Court decided Article 2(2) of the Marriage Law to be constitutional, and Article 43(1) to be conditionally unconstitutional.⁴⁹ The Court concluded that registration does not determine the validity of marriage,⁵⁰ but constitutes an administrative requirement set by the law.⁵¹ Thus, her claim that Article 2(2) made her marriage invalid was not accepted.⁵² For Article 43 (1) of the Marriage Law, the Court the article to be conditionally unconstitutional if interpreted as to not recognise civil relationship between the child and the man who can be proven based on science and technology and/or other evidence according to law he biological father of the child.⁵³

Article 43 (1) originally states, ‘A child born out of wedlock only has civil relation with its mother and the mother’s family.’ The problem here is the word ‘only’. The Court declared the article to be unconstitutional if it eliminates civil relation between the child and a man who can be proven medically or legally as the child’s biological father. In its decision, the Court erased the word ‘only’ from the original article and decided that article 43 (1) has to be read, ‘a child born out of [valid] marriage has a civil relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child.’⁵⁴

In general, the Constitutional Court decision in the case of child born out of wedlock should be appreciated for its breakthrough in the state’s control over Islamic law. Similar to the polygamy case, the Court affirms the authority of the state to depart from Islamic law, because under Islamic law there is no relationship between children born out of wedlock and their biological father. The fact that the Court affirms children’s rights is a progressive statement for human rights. However, the fact that the Court affirmed the constitutionality of Article 2(2) reflects a different direction: that the Court affirmed the importance of religious institutions (including Islamic law) to validate a marriage. In its *ratio decidendi*, the Court argued that

⁴⁷ Judicial Review No. 46/ PUU-VIII/2010, 11

⁴⁸ Mariana Amiruddin, “Maria Farida Indrati: UU Perkawinan Perlu Diuji Secara Konstitusional.” *Jurnal Perempuan* 73 (2012): 139.

⁴⁹ Judicial Review No. 46/ PUU-VIII/2010, 37.

⁵⁰ Judicial Review No. 46/ PUU-VIII/2010, 33.

⁵¹ Judicial Review No. 46/ PUU-VIII/2010, 33.

⁵² Judicial Review No. 46/ PUU-VIII/2010, 36–7.

⁵³ Judicial Review No. 46/ PUU-VIII/2010, 37.

⁵⁴ Judicial Review No. 46/ PUU-VIII/2010, 35.

marriage registration does not determine the validity of a marriage because it is just an administrative matter.⁵⁵ Although Judge Maria Farida filed a concurring opinion questioning relevance between Article 2(1) and Article 2(2) on the determinant factor for validating marriage,⁵⁶ the judges further emphasises Article 2 (1) saying that the determinant factors for validity of a marriage are the conditions set by religion of the couple.⁵⁷ This means, the judge agreed that the sharia or other religious based marriage ceremonies have the authority to determine the validity of marriage before the law in Indonesia. This indicates the Court (and the state)'s endorsement of religion (including sharia) to control marriage validation.

There are two points to be made regarding this decision: (1) legal uncertainty for the applicant; and (2) judicial activism in the sense of making conditional judgment.

For the first issue on legal uncertainty, there is a complication in the court's decision because the applicants requested for both article 2 (2) and article 43 (1) to be declared unconstitutional due to violating her and her child's constitutional rights. However, the Court mixed the logic of concrete review and abstract review in this case. The case was brought by the applicants who must satisfy a preliminary assessment on the legal standing. In this stage, the applicants must prove that they have loss or potential loss caused by the law (concrete review). However, the decision of the court will be binding not only for the applicant, but for everyone (abstract review), as the decision of the court will change the law and the law is binding for everyone under the Indonesian jurisdiction.

To get a legal standing in this case, the applicant argued that her marriage was conducted in accordance with sharia and not being registered as required by article 2 (2) of the Marriage Law therefore she believed her marriage was not valid and her child was considered born out of wedlock. The court said, in relation to article 2 (2), that registration is not a condition that must be satisfied for a marriage to be considered valid.⁵⁸ A marriage is valid if it is conducted in accordance with the parties' religion.⁵⁹ Therefore the court rejected the application to annul article 2.⁶⁰ It could be argued based on this decision that the court recognised the applicant's marriage, thus her child should not be considered a child born out of wedlock.

However, the Court seems to have inconsistent logic in dealing with Article 43 (compared with the decision for article 2 (2)). This is because the court, in examining Article 43 referred to (the applicant and) her child as a

⁵⁵ Judicial Review No. 46/ PUU-VIII/2010, 33.

⁵⁶ Judicial Review No. 46/ PUU-VIII/2010, 39.

⁵⁷ Judicial Review No. 46/ PUU-VIII/2010, 33

⁵⁸ Judicial Review No. 46/ PUU-VIII/2010, 33.

⁵⁹ Judicial Review No. 46/ PUU-VIII/2010, 36–7.

⁶⁰ Judicial Review No. 46/ PUU-VIII/2010, 36–7.

child born out of wedlock. This means, the court simply disregarded the applicant's condition examined under Article 2 (2) and examined Article 43 (1) in a more general (abstract) review for any child born out of wedlock. If the court declared the applicant's marriage to be valid, the applicant simply does not have legal standing to review Article 43 (1) and the case should no longer be continued. In the end, the Court decided that Article 43 (1) is conditionally unconstitutional.

As a result of this decision, any child born out of wedlock has civil relations with its biological father provided that paternity can be proven by science and technology and/or another form of legally recognised evidence. Interestingly and sadly, Machicha Mochtar as the applicant in this case was unable to prove her child's claim to inheritance from the deceased father because they could not take the DNA test to prove the biological linkage between the son and the father. The family of the deceased father refused to do DNA test, arguing that this is a civil case, and they could not be forced to do a DNA test.⁶¹ However, as negative legislation,⁶² the decision of Constitutional Court is equivalent to legislation (Law/ *Undang-Undang*). The decision is binding not only for the applicant, but also for all other Indonesian citizens. This means, any child born out of wedlock who can prove its biological relationship with the father has civil relations with the father. This includes those children whose parents had never married.⁶³

This decision was protested by MUI (Majelis Ulama Indonesia), the most influential Islamic institution in Indonesia.⁶⁴ Soon after the Constitutional Court decision, MUI issued its fatwa on children born out of wedlock.⁶⁵ It is explicitly stated in MUI's fatwa that the establishment of the fatwa is a response to (against) the Constitutional Court decision. Using purely Islamic legal considerations, MUI substantially rejected the Constitutional Court decision by declaring that the child born out of wedlock should not have civil relation with the biological father.⁶⁶ As it claims to be an authoritative Islamic council in Indonesia, MUI's fatwa is influential for Muslims across

⁶¹ Yazir Farouk, "Alasan Keluarga Moerdiono Tolak Tes DNA," *Tempo.co*, March 13, 2013, <https://seleb.tempo.co/read/466769/alasan-keluarga-moerdiono-tolak-tes-dna>.

⁶² The Constitutional Court is said to be a negative legislator (thus, its decision on judicial review is called negative legislation) because it may annul (positive) legislation made by the Parliament (*Undang-Undang*). On this matter, see Mohammad Mahfud Mahmodin, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Press, 2009), 280.

⁶³ See also Simon Butt, "Illegitimate Children and Inheritance in Indonesia." *Legal Studies Research Paper* 12, no. 63 (2012): 197.

⁶⁴ "MUI Nilai Keputusan MK Soal Status Anak di Luar Nikah Overdosis," *Detik News*, March 13, 2012, <https://news.detik.com/berita/d-1866192/mui-nilai-keputusan-mk-soal-status-anak-di-luar-nikah-overdosis>.

⁶⁵ Majelis Ulama Indonesia (MUI), Fatwa (Islamic Legal Opinion) Number 11 of 2012 on Child Born Out of Wedlock, Jakarta.

⁶⁶ Majelis Ulama Indonesia (MUI), Fatwa Number 11 of 2012.

Indonesia. The contradiction between the Constitutional Court decision and MUI's fatwa raises the issue of legal pluralism in Indonesia.

The Constitutional Court decision involved state (positive) law intertwined with Islamic law regarding the status of a child born out of wedlock. As state law, the Constitutional Court decision is binding for everyone under the Indonesian jurisdiction. This means that every Muslim is bound by the Constitutional Court decision saying that a child born out of wedlock must have civil relationship with the child's biological father if the biological relationship can be proved. In contrast, Islamic law regulates the matter of a child born out of wedlock in a different way. According to the Islamic law, a child born out of wedlock only has a civil relation with his/her biological mother.

The second issue to highlight in this case is the judicial activism of the Court regarding the 'conditionally unconstitutional' doctrine. According to Black's Law Dictionary, judicial activism is "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, *uss.* with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."⁶⁷

For article 43 (1), the court decided the article to be conditionally unconstitutional unless it eliminates the civil relation between the child and a man who can be proven medically and/or legally as the biological father of the child. The court also erased the word 'only' in the article.⁶⁸ Thus, after the decision, the article should read, 'a child born out of [valid] marriage has a civil relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child.'

Looking at the Court reasoning in relation to article 43 (1),⁶⁹ it can be argued that the Court was examining the article for a wider group of stakeholders (abstract review) and not just considering the applicant's situation. The court considered child's rights as can be seen in this *ratio decidendi*, 'aside from the administrative matter of the marriage, a child must have legal protection. If not, a child born out of wedlock will lose his/her rights. Law must provide fair legal protection and legal certainty for the status of a child, although his/her parents' marriage is still disputed'.⁷⁰ The condition that will eliminate the civil relation between the child and its biological father is when the biological father does not marry the mother thus,

⁶⁷ *Black's Law Dictionary*, 8th ed., s.v. "Judicial Activism."

⁶⁸ Judicial Review No. 46/ PUU-VIII/2010, 37.

⁶⁹ Judicial Review No. 46/ PUU-VIII/2010, 34–5.

⁷⁰ Judicial Review No. 46/ PUU-VIII/2010, 34–5.

he does not count as the family of the mother. The Court decision seems to emphasise the second condition, in which the biological father does not marry the mother of the child. Hence, the court states that if it becomes the condition, Article 43 (1) will be unconstitutional.

From a legal perspective, the Constitutional Court's decision on the constitutionality of Article 43(1) can be described as judicial activism. The judicial activism happened because the Court decision is not in accordance with what the Court should do. The Constitutional Court in this case was asked to review the constitutionality of Article 43(1) in light of the constitutional articles (Articles 28 B(1) and (2) on children's rights and Article 28 D(1) on equality before the law. If the Constitutional Court finds the wording of Article 43, 'a child born out of [valid] marriage only has a civil relationship with its mother and her family', violates Articles 28 B(1), (2) or 28 D(1) of the Constitution, it simply just have to declare Article 43(1) of the Marriage Law unconstitutional.

The Court decision added a new legal norm on Article 43(1), although it states, 'if it is interpreted'. The Court was asked to review the constitutionality of Article 43(1), which regulates the civil relation between the child and his or her biological mother. The article does not regulate the civil relation between the child and his or her biological father. Meanwhile, the applicant concern was on the civil relation between the child and his father. Because Article 43(1) does not explicitly deprive civil relation between the child and his or her biological father, the Court chose to not directly declare Article 43(1) unconstitutional. The Court chose to give condition for interpretation in declaring whether Article 43(1) is constitutional. This means, Article 43(1) may still be constitutional if the condition set by the Constitutional Court in this decision is met. The condition set by the Court is: that the article would not eliminate civil relation between the child and the man who can be proven by science and technology and/or other evidence according to law as the biological father of the child. In practice, the Court was adding provision in Article 43(1). This provision (civil relation between the child and the biological father), although claimed by the court as a 'condition for interpretation', has to be read as a legal norm because it has equivalent position as the civil relation of the child and its biological mother written in the original Article 43 (1).

In conclusion, for the case of a child born out of wedlock, there are two important things to be noted: (1) In regard to Article 2 (2), the Court affirms the importance of religious institutions in validating marriage. This indicates the state's endorsement of Islamic law in this regard. (2) In regard to Article 43 (1), the Court bravely prioritised the rights of the child over Islamic law. This is a progressive movement by the Court. However, it should be noted that the Court was conducting judicial activism (making decision out of its authority) in its decision of Article 43(1) by making a conditionally

unconstitutional judgment that give rise to a new legal norm in the article (establishing civil relationship between the child and its biological father). It is not the authority of the Constitutional Court to make a legal norm (positive legislation).⁷¹ Instead, it is the task and authority of the legislature to revise or make a new Marriage Law. If the Court thinks that Article 43 (1) needs to be revised, it should recommend the legislature the revise it, instead of giving a new interpretation that leads to an establishment of a new legal norm.

Beyond the legal debate, the Constitutional Court decision on the issue of a child born out of wedlock is controversial for Muslims and triggered MUI to establish a fatwa opposing the Constitutional Court decision. The protest from MUI can be viewed as a sign that the Islamist movement in Indonesia still play a significant role as an interest party in the law-making in Indonesia. The Islamist movements do not mind making ‘their own law’ such as fatwa that contradict to the state law if they find the state law to be in contradiction to their Islamic law.

3.2.3. Interfaith Marriage

The third case in this study is about the interfaith marriage, which was registered before the Constitutional Court as Case Number 68/ PUU-XII/2014. The case was submitted by four applicants: Damian Agata Yuvens, Rangga Sujud Widigda, Anbar Jayadi and Luthfi Sahputra. The applicant asked the Constitutional Court to constitutionally review Article 2(1) of the Marriage Law which stipulates, ‘A marriage is valid, only if it has been performed in accordance with the laws of the respective religion and belief of the parties concerned’. Looking for the recognition of interfaith marriage, the applicants claim the reviewed article to be in contradiction with article 28 E(1) and (2); 28 I(1); 29(2); 28 B (1); 28 D(1); and 27(1) of the Constitution.

According to the applicants, Article 2(1) of the Marriage Law breaches their constitutional rights because it uses a single interpretation of religious law to define a valid marriage.⁷² This article, the applicants claimed, limits their right to marriage.⁷³ The applicants further argued that because the Marriage Law authorises religion to determine the validity of marriage, it gives no legal certainty for Indonesians, especially those who are looking for interfaith marriage.⁷⁴ The article gives no legal certainty for interfaith marriage because it does not explicitly regulate interfaith marriage, nor does it prohibit interfaith marriage.

Although it may be interpreted that the law allows interfaith marriage, this may not be the case, because according to the law, ‘a marriage is valid, only if it has been performed in accordance with the laws of the respective religion

⁷¹ Mahfud Mahmodin, *Konstitusi dan Hukum dalam Kontroversi Isu*, 280.

⁷² Judicial Review Number 1 of 1974 on Marriage, No. 68/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia 2015), 10.

⁷³ Judicial Review No. 68/PUU-XII/2014, 10.

⁷⁴ Judicial Review No. 68/PUU-XII/2014, 11.

and belief of the parties concerned.’ This means, the law gives authority to religion to determine whether interfaith marriage is permissible. Because there are two parties to the marriage (husband and wife), there are two different religions that need to be considered. If both religions do not permit interfaith marriage, the couple will not be able to marry. If the religion of one of the parties does not allow interfaith religion, while the religion of the other party allows interfaith religion, will the marriage be considered valid for the party whose religion does not allow interfaith marriage? If the two religions allow interfaith marriage, which religion will be used in the ceremony? Under the previous Marriage Law (under the Dutch colonial era), the man (husband’s) religion will be used in the case of interfaith marriage.⁷⁵ However, such a condition is not set under the 1974 Marriage Law. Therefore, the applicants argued that the 1974 Marriage Law provides no legal certainty for interfaith marriage and asked the Constitutional Court to declare Article 2(1) of the Marriage Law unconstitutional.

The Constitutional Court rejected the application, stressing that religion is the very foundation of Indonesian society.⁷⁶ Although the Constitution recognises the right of everyone to marry, the Constitutional Court stated that this right may be limited under Article 28 J (2) of the Constitution for the sake of other people’s rights, public morality, religious values, public security and public order.⁷⁷ The Court further stated that the limitation of Marriage set under the Marriage Law is necessary to implement the principle of *Pancasila* and the Constitution as well as accommodating the social aspect of the society.⁷⁸ This means that the Court acknowledges the role of religion, particularly Islam, in Indonesia. The Court also further justifies the authority given to religion to validate marriage.

Article 28 B (1) of the Indonesia Constitution reads, ‘Every person shall have the right to establish family and to procreate based upon lawful marriage.’ This means the Constitution requires condition to be fulfilled before getting the right to establish family and to procreate. The condition required is a lawful marriage. Thus, the court argues that anyone may claim their rights to establish family and to procreate only if they satisfy the lawful marriage. Further, the Court affirms that the lawfulness of marriage is determined by the parties’ religion, not the state.⁷⁹ Therefore, if the parties’ religions do not permit interfaith marriage, the interfaith marriage will be unlawful. In a situation where at least one person to a marriage is Muslim, the Compilation of Islamic Law is considered. The Compilation provides in

⁷⁵ Dutch East Indies, Staatsblad van Nederlandsch-Indië, Number 158 of 1898. Batavia (Jakarta): Landsdrukkerij, 1898.

⁷⁶ Judicial Review No. 68/PUU-XII/2014, 153.

⁷⁷ Judicial Review No. 68/PUU-XII/2014, 153.

⁷⁸ Judicial Review No. 68/PUU-XII/2014, 152

⁷⁹ Judicial Review No. 68/PUU-XII/2014, 153.

Article 40(C) that a Muslim man may not marry non-Muslim woman, and Article 44 asserts that Muslim woman may not marry non-Muslim man. Therefore, when the Indonesian Marriage Law (Law Number 1 1974) states that a valid marriage is a marriage conducted in accordance with the parties' religion, there is no possibility for Muslims in Indonesia, both Muslim man and woman, to enter into an interfaith marriage.⁸⁰

There are 29 countries throughout the world that prohibit interfaith marriage: Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Burma (Myanmar), Djibouti, Egypt, India, Indonesia, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, West Bank and Gaza and Yemen.⁸¹ Most of these countries prohibiting interfaith marriage are Islamic states (state using Islamic law) or Muslim-majority countries including Indonesia. This data shows that religion is an important factor in the making of law in religious countries, particularly in regard to religion-related law such as marriage. Interestingly, as a self-declared secular state, India is among the countries in the list to prohibit interfaith marriage. Thus, the title of secular state does not guarantee separation between religion and the state. Indonesia, which does not classify itself as secular state, seems to have stronger reason to not exclude religion from its law-making in the name of existing legal pluralism in its society.

In practice, there are many interfaith marriages in Indonesia.⁸² One of the ways to achieve this for couples from different religions is for one of the parties to convert to the religion of the other, so the couple share the same religion. After the religious-based marriage ceremony, the converted party then returns to his/her original religion.⁸³ Another way to achieve interfaith marriage is by performing the ceremony twice, each according to the party's religion. For example, a Muslim man and a Christian woman will conduct two marriage ceremonies: one Islamic ceremony and one Christian ceremony. The couple will then ask the civil registry officer to register their marriage. In their interview with civil register officer in Yogyakarta, Indonesia, Ermi Suhasti et al discovered that the civil registry officials will still register interfaith marriages without examining the validity of the marriage because the issue (of marriage validity) is left to the parties' religions. If the religious

⁸⁰ Islamiyati, "Analisis Putusan Mahkamah Konstitusi Number 68/PUU-XII/2014 Kaitannya dengan Nikah Beda Agama Menurut Hukum Islam di Indonesia," *Al-Ahkam* 27, no. 2 (2017): 165.

⁸¹ Law Library of Congress, *Prohibition of Interfaith Marriage* (Washington, D.C.: Law Library of Congress, 2015), 1.

⁸² Ermi Suhasti, Siti Djazimah, and Hartini, "Polemics on Interfaith Marriage in Indonesia Between Rules and Practice," *Al-Jamiah Journal of Islamic Studies* 56, no. 2 (2018): 377; Fathol Hedi, Abdul Ghofur, and Anshori Harun, "Legal Policy of Interfaith Marriage in Indonesia," *Hasanuddin Law Review* 3, no. 3 (2017): 264.

⁸³ Suhasti, Djazimah, and Hartini, "Polemics on Interfaith Marriage," 377.

authorities give them certificate of marriage, the civil registry officers should not refuse to register their marriage.⁸⁴

However, there are also some cases where civil registry officials have refused to register the marriages of couples having different religions.⁸⁵ The officials mostly base their refusal on the fact that the couple shares different religions. If the civil registry officer refuse to register interfaith marriage, the couple may file a lawsuit in the civil court to acknowledge their marriage.⁸⁶ Due to the absence of precedent in the Indonesian court system, the result of such a lawsuit may vary. Therefore, in 17 July 2023, the Supreme Court announce the guideline for judges to not allow legalisation of interfaith marriage.⁸⁷

In conclusion, the different treatment for interfaith marriage shows legal uncertainty for interfaith marriage in Indonesia. There is a need to amend the Marriage Law to give a clear legal stipulation for interfaith marriage in Indonesia, whether Indonesia allow interfaith marriage or not. The Constitutional Court as a negative legislator⁸⁸ does not have the authority to create or to add new stipulation to the law. Thus, amendment of Indonesian Marriage Law may only be done by the Parliament and president in a collaborative work.

4. Conclusion

The examination of the judicial review cases show that the Marriage Law is an arena in which constitutional interpretation is being used to construct reconciliation between Islamic law and human rights values. When it comes to the Constitutional Court decisions, it can be seen from the three examined cases above that the Court is still heavily consider the Islamic law although the Court also emphasises the importance of human rights. In this sense, the Court is contributing to autocratic legalism in a sophisticated authoritarianism.

The polygamy case was submitted by a Muslim man, who argued that the strict requirement of permission from the first wife for a husband to enter a second marriage made it difficult for him to have a polygamous marriage. Further, the applicant argued that practising polygamy is part of his right to manifest religion because polygamy is an Islamic teaching. He asked the Court to delete the requirement clause for polygamy under the Marriage Law as it violates his right to manifest religion protected under the Constitution. The Court in its decision affirmed the constitutionality of polygamous marriage in Indonesia. This shows that the Court does not object to the

⁸⁴ Suhasti, Djazimah, and Hartini, "Polemics on Interfaith Marriage," 377.

⁸⁵ Hedi, Ghofur and Harun, "Legal Policy of Interfaith Marriage," 264.

⁸⁶ Hedi, Ghofur and Harun, "Legal Policy of Interfaith Marriage," 264.

⁸⁷ Indonesia, Supreme Court, Surat Edaran Mahkamah Agung (SEMA) no. 2 year 2023.

⁸⁸ As a judicial body, the Indonesia Constitutional Court may only erase the article or law proven to be in contradiction to the Constitution. The Court may not add new stipulation to the law.

accommodation of Islam under the Marriage Law. However, the Court did refuse to delete the strict requirement for polygamy under the Marriage Law despite the fact that this requirement is a limitation that is not found in the Islamic law traditions. According to the Court, the strict requirement clause for polygamy under the Marriage Law affirms the state's authority to filter and adjust Islamic law in accordance with the Indonesian context, including accommodating and balancing other peoples' rights involved in the case, especially women's and children's rights that will be affected by polygamous marriage. However, this study found the Court's decision to uphold the weakness of the wife as the reason for polygamy to be lack in gender equality perspective.

The child born out of wedlock case was a landmark decision made by the Constitutional Court showing a similar pattern to adjust Islamic law by balancing women's and children's rights. One of the provisions submitted to be judicially reviewed in this case was Article 43(1) of the Marriage Law: 'Child born out of wedlock only has civil relation with its mother and the mother's family'. The stipulation was adopted from Islamic teaching, 'A child has a civil relation with his legitimate husband of the mother, and those commit adultery gets nothing'. The Constitutional Court in its decision give conditional interpretation for Article 43 (1) to be constitutional: that it should not eliminate the civil relationship between the child and his biological father. The decision of the Court was soon protested by *MUI*, a national organisation that claims to be the authoritative Islamic organisation in Indonesia. Seeing the Court decision had breached Islamic teaching, *MUI* responded by explaining its Islamic legal opinion (fatwa) to reject the Constitutional Court decision. *MUI* also asked its followers to disregard the Constitutional Court decision and continue to uphold Islamic teaching, saying that children born out of wedlock should not have a civil relationship with their biological father. Such acts that incite civil disobedience show the level of political confidence of the Islamic organisation in resisting the state law.

The Court's treatment of the case of interfaith marriage was a little different. The Court in its decision did not confront Islamic law to balance other rights involved. It affirmed that religion is the very foundation of society and according to the Court, no religions in Indonesia allow interfaith marriage. Therefore, the Court held that interfaith marriage should not be allowed in Indonesia even though such prohibition may limit one's civil right to establish family protected under the Constitution. In assessing the conflicting rights, the Court determined that the right to establish family may be limited under Article 28 J (2) of the Indonesian Constitution. In its reasoning, the Court reaffirmed the importance of religious values in Indonesia by stating that the limitation of marriage, including the prohibition of interfaith marriage set under the Marriage Law, is necessary to implement

the (first) principle of *Pancasila* and the Constitution, and accommodate the social aspect of the (religious) society.

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