



The Challenge of Using the Transcendental Principle in the Law of Marriage in Indonesia

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Abstract

Marriage law in Indonesia is a law based on God. This divine basis is applied in Article 1 of Law Number 1 of 1974 on Marriage that marital relations are based on the belief in the One and Only God. In practice, this is overlooked when it comes to law enforcement in court applications. The waiver has the potential to occur if it is related to interfaith marriages/marriages between religions and beliefs in court, lack of public knowledge, or is considered a violation of the right to marry. Remembering that marriage is one's privacy. This article aims to analyze the transcendental principle in Law Number 1 of 1974 on Marriage and to elaborate the enforcement of the transcendental principle in court. This article uses the methodology juridical and normative research, which means that research is using principle of law and doctrine to answer the legal issues. This results show that the practice of transcendental principle is the nature of God Almighty, so every marriage must be based on this principle. Another finding, there are attempts to change this principle through judicial review but are always rejected by the court in Constitutional Court. Transcendental principle has not been able to answer the needs of each society individually. It is because there are still people who ignore this principle.

I. Introduction

Indonesia is one of the countries that implement a marriage law legal system which is referred to the value of God.¹ This statement can be confirmed clearly in Law Number 1 of 1974 on Marriage (hereinafter referred to as "Marriage Law") which has been amended by Law Number 16 of 2019 on Amendent to Law Number 1 of 1974 on Marriaeg (hereinafter referred to as "Amendment to Marriage Law" in chapter 1 Article 1. Article 1 describes the basis of marriage in Indonesia. The basic principle of marriage in Indonesia is the bond between a man and a woman as a husband and wife which is formed based on God.

¹ Perkawinan di Indonesia sepatutnya dilakukan atas dasar keimanan dalam membentuk keluarga lihat Sayuti Thalib, *Hukum Kekeluargaan Di Indonesia* (Jakarta: UI Press cetakan 5, 1986). h. 46-47

The value of God is the value that become the philosophy by Indonesia in formulating the regulation or laws,² its clearly stated in Indonesian Grund Norm namely Pancasila in the first article. Article 1 states that Belief in the One and only God. It means Indonesia must incorporate religious or moral values into every formulation of laws and legislations.³ Pancasila itself is basic principles that is contained in the 1945 Indonesian Constitution. Religious value is also emphasized by the wordings provided under Article 29 (1) of the 1945 Indonesian Constitution, namely "Indonesia is a country based on the one and only God".

Based on the two sources, Pancasila and Constitution 1945, laws and regulation in Indonesia have the substance of nobility of human moral based on the values of God that should be enforced. One of them is the regulation of marriage. Marriage of law in Indonesia is becoming "masterpiece" regulation if it is considered from the history of political will design. This regulation tries to unify the pluralism of people's backgrounds of beliefs such as Islam, Christianity, Catholicism, Buddha, Hindhu, Kong hu cu, and *Penghayat* in Indonesia. The unification is needed because before 1974, the marriage practice is carried out in three (3) ways, such as : (1) based on Islamic religious practices, (2) customary/*adat* law, (3) Indonesian civil code. All of them are used by each society based on their respective religious backgrounds.⁴

At that time pluralism also occurred in the types of the residents they are divided into three (3) groups such as (1) European type, (2) foreign eastern type, and (3) native type. From these three (3) types arise several provisions (pluralism) in marital law enforcement, for examples : (1) European and foreign eastern residents are enforced by Indonesian civil code (*burgelijk wetboek*), (2) the muslim residents are enforced by Islamic law including native residents, (3) the Christianity residents are enforced by Christianity law (*Huwelisk ordonantie christen inlanders / HOCI/S.1933*) including native residents, (4) residents other than muslims and Christianity then they can use the customary law (*adat law*) according to their respective customs, (5) also for the mix marriage will enforce by *regeling op de gemengde Huwelijken S. 1898 No. 158*.

After independence of Indonesia in 1945, there were efforts to eliminate the practice of plularism in marriage context. One of the reasons is to keep the mechanism of marriage in Indonesia did not influenced by foreign culture. Why foreign culture? It is because at that time most marriage law enforcement refers to the Indonesian Civil Code (ICC),

² Dapat dikatakan bahwa Indonesia sebagai *religious nation state* yang memiliki jiwa ketuhanan dalam menegakkan aturannya lihat pada Muhyar Fanani, *Membumikan Hukum Langit : Nasionalisasi Hukum Islam Dan Islamisasi Hukum Nasional Pasca Reformasi*, ed. Ibnu Burdiah (Yogyakarta: Tiara Wacana, 2008), <https://opac.perpusnas.go.id/DetailOpac.aspx?id=420081>. h. 10-15

³ Agus Yudha Hernoko, "Keseimbangan Versus Keadilan Dalam Kontrak (Upaya Menata Struktur Hubungan Bisnis Dalam Perspektif Kontrak Yang Berkeadilan)," *Pidato Pengukuhan Jabatan Guru Besar Fakultas Hukum Universitas Airlangga*, 2010. h. 22

⁴ Undang-Undang perkawinan yang pertama di miliki oleh Indonesia dengan menggabungkan system hukum yang ada untuk disesuaikan dengan kebudayaan yang ada lihat pada June S. Katz and Ronald S. Katz, "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems," *The American Journal of Comparative Law* 23, no. 4 (1975), <https://doi.org/10.2307/839240>. h. 653-654.

which are the ICC most of them are concept and legacy from Dutch civil code.⁵ Based on the Dutch law concept, marriage is only a civil relationship and it is completely different from the original culture of marriage in Indonesia which have basic religion and belief. Thus, marriage law in the ICC must be replaced by adjusting to the nobility of the Indonesian culture.

In 1973, the marriage law draft was officially submitted by the President of Indonesia to the House of Representatives by letter No. R.02/PU/VII/1973 on 31st July 1973. Unfortunately, most of the articles generally only translate the ICC before, with no original Indonesian cultural value. Many protests came from the public (especially from Muslims) toward the draft because it did not reflect the constitution, one of them being the values of God.

Finally, the discussion of marriage law draft resulted in several conclusions which accommodated the values of god. Those conclusions are: (1) marriage law in Indonesia follows the system in Islamic Religious even the Islamic legal norms; (2) clearly declare the use of religion and belief as the validity of marriage in Article 2(1) the marriage law; (3) facilitate the legal provision for divorce and polygamy, considering the women's movement at that time. One of the reasons for releasing this regulation is to provide legal protection for women. In early 1974 the marriage of law was legalized and became the only law which is governing a marriage.⁶

Implementation of the value of god began from Pancasila and Constitution 1945, then both are applied to regulation. In other words, Indonesia already tried to apply the transcendental principle at that time. A principle that implements the value of god, prophetic, and religion into the positive law.⁷ It is a kind of necessity in Indonesian laws and regulations because the Indonesian people believes in it. Indirectly, it is illustrated the thinking of Thomas Aquinas in his thought that the holy book as god's law must be placed above the constitution and all its derivatives.⁸

Nowdays, using the transcendental principle is quite worthy. It because of the development of legal science that no longer emphasizes to school of modernist, positivistic, objectivity, and rational but also transcendental it self into positive law.⁹ Indonesia has concretely enforced this principle, it is shown in the implementation of marriage. Marriage is becoming legal if it is carried out according to the religious law and belief from each married couple. Therefore, a marriage which is not legalized based on substantively truths in religion and beliefs will be consider as the violation.

⁵ Fathol Hedi, Abdul Ghofur Anshori, and Harun Harun, "Legal Policy of Interfaith Marriage in Indonesia," *Hasanuddin Law Review* 3, no. 3 (2017), <https://doi.org/10.20956/halrev.v3i3.1297>.

⁶ Tri Chandra Aprianto, "ATURAN DI PERSIMPANGAN JALAN: Perdebatan Rancangan Undang-Undang (RUU) Perkawinan 1973-1994," *Historia* 1, no. 1 (2018): 70-86.

⁷ Khudzaifah Dimiyati et al., "Indonesia as a Legal Welfare State: A Prophetic-Transcendental Basis," *Heliyon* 7, no. 8 (2021), <https://doi.org/10.1016/j.heliyon.2021.e07865>.

⁸ Suteki, "Hukum Progresif, Hukum Berdimensi Transendental Dalam Konteks Keindonesiaan," Sabtu, 27 Januari (Surakarta, 2018). h. 22

⁹ Elviandri, "Hukum Transendental Dalam Konstelasi Pemikiran Hukum Positivistic Di Indonesia," *Jurnal Yustisia Merdeka* 2, no. 1 (2016): 30-34, <http://yustisia.unmermadiun.ac.id/index.php/yustisia/issue/archive>.

Previously, transcendental principle contained in the regulations were often ignored to be studied in legal science, but now they have already developed and can be influence the law. Modern law is not only apply the rationality, but also it is able to integrate between the positive aspects and spiritual values.¹⁰

Inserting the religious elements into marriage of law has a broad impact implementation in the future. Actually it has been predicted before, that using transcendental principle in the law of marriage is doubtful.¹¹ Predictions describing that religion is a person's privacy as well as marriage also a privacy relation, but this privacy context is governed by positive law. Based on that prediction it will rises legal problems someday if there is no anticipatory effort from the Indonesian legal experts.

At least the prediction has been proven by applying for a judicial review of article 2 Law Number 1 of 1974 on Marriage. There are two (2) cases of application, in year 2014 request the judicial review for article 2 clause (1) and also in year 2010 for article 2 clause (2). Thus, the two (2) of clause in article 2 Law Number 1 of 1974 which is discusses the validity of marriage have been requested for judicial review in Constitutional Court. Both request happened because the applicant wanted to examine the existence of religion in the implementation of marriage as previously predicted. Also to prove whether the previous prediction was true or not.

If there are people who question the existence of element of religious in Indonesian marriage of law, then the right argument to answer is using the transcendental approach. This approach will answer that humans are creatures created by god, they have a nature, then it is impossible for human to deviate from their nature. It means that humans cannot be prioritize the human rights absolutely until push away the existence of god or religious in creating regulations. Through the marriage law, Indonesia wants to show the real identity of a nation that does not want to be influenced by foreign cultures. Also, Indonesia has had the courage to show that transcendental principle is an origin nature of the Indonesians people who are used to formulate the regulations. By this nature, marriage law in Indonesia was designed to approach the values of nobility and humanity in marriage rather than fulfill the formality and legality of marriage.¹²

According to the background and methods above, the main issues to be discussed are: (1) whether transcendental principle is exist under the Law Number 1 of 1974 on Marriage?; and (2) how is the enforcement of the transcendental principle in court? ? and does the marriage of law in Indonesia have transcendental characteristic ?. Basically, the transcendental is a study of the philosophy of science with the purpose of creating

¹⁰ David F. Mullins, "The Effects of Religion on Enduring Marriages," *Social Sciences* 5, no. 2 (2016), <https://doi.org/10.3390/socsci5020024>.

¹¹ Ronald S.Katz June S.Katz, "Legislating Social Change in a Developing Country : The New Indonesia Marriage Law Revisited," *The American Journal of Comparative Law* 26, no. 2 (1978): 308-9, <https://doi.org/https://doi.org/10.2307/839677>.

¹² Ditunjukkan didalam undang-undang perkawinan bahwa nilai kemanusiaan lebih diutamakan dibandingkan hanya untuk formalitas, hal ini menggambarkan bahwa undang-undang perkawinan tidak sebatas berupa peraturan yang formal, tetapi turut pula mengedepankan rasa kemanusiaan lihat pada Bernard L Tanya, Yoan N Simanjuntak, and Markus Y Hage, "Teori Hukum : Strategi Tertib Manusia Lintas Ruang Dan Generasi," *Genta Publishing*, 2010. h. 1-2

harmony between social, institutional and civil morality of society with actual values in society. This principle is also used as an alternative in the future in balancing positivistic understanding in law enforcement. However, in this study it will be used as a benchmark for enforcing marriage law in Indonesia considering that the essence of the transcendental principle that has ethical, religious, moral, and spiritual values. Previous research discusses the transcendental principle in the development of legal science such as progressive thought, rational, and argumentative. Thus, legal science will create the law based on two combinations between morals and logic with the prophetic value which it is all provide in Pancasila.¹³ The law does not only carry out instrumental norms but also transcendental to create a substantive justice. Thus, transcendental is looks like to god's law which is placed in constitution as human law.¹⁴ The focus of this study is to look at transcendental principle in marriage law in Indonesia only, considering that marriage law has that spirit. Also to examine the existing norms in marriage law which have transcendental values where that norms examined by the Constitutional Court.

2. Research Method

The article uses normative legal research which collaborating the legal basis, legal document, facts with the support of literature studies. It also uses the qualitative methods to describe the analysis and statutory as well case approaches to analyze the existencethe transcendental principles of the marriage law in practice and norms.¹⁵ The primary data sources of used in this research such as : Indonesian constitution 1945, Law Number 1 of 1974 which has been amended to Law Number 16 of 2019 on Marriage, Constitutional Court decision No.12/PUU-V/2007, Constitutional Court decision No. 68/PUU-XII/2014, Constitutional Court decision No. 46/PUU-VIII/2010.

To answer the legals issues being raised, this study will use the following stages methods such :¹⁶ (1) observe the marriage of law act and constitutional court decision, , (2) analyzing data to seek the existence of transcendental principle in Indonesia through the contents in Marriage of law and decisions of Constitutional Court, (3) making conclusion and recommendations.

¹³ Suteki, "Hukum Progresif: Hukum Berdimensi Transendental Dalam Konteks Keindonesiaan," *Hukum Transendental: Pengembangan Dan Penegakan Hukum Di Indonesia, Diselenggarakan Oleh*, 2018,

322,<https://doi.org/https://publikasiilmiah.ums.ac.id/xmlui/bitstream/handle/11617/9667/1.%20Suteki.pdf?sequence=1&isAllowed=y>.

¹⁴ Khudzaifah Dimiyati et al., "MORALITY AND LAW: Critics upon H.L.A Hart's Moral Paradigm Epistemology Basis Based on Prophetic Paradigm," *Jurnal Dinamika Hukum* 17, no. 1 (2017), <https://doi.org/10.20884/1.jdh.2017.17.1.823>.

¹⁵ Al]. Sri Mamudji, [et, *Metode Penelitian Dan Penulisan Hukum* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia., 2005).

¹⁶ Sri Mamudji Soekanto S, "Penelitian Hukum Normatif Suatu Tinjauan Umum," in *Rajawali Pers, Jakarta*, 2007.

3. Result and Discussion

3.1 The Existence of Transcendental Principle Under the Law Number 1 of 1974 on Marriage

The transcendental principle is knowledge that comes from God, this knowledge (called as revelation) was brought by prophets and understood through the holy books. In the holy book, transcendental values are learned and applied as guidelines in the lives of each religious society.¹⁷ The holy book has been used to regulate the lives of religious people and their values began to become recommendations to be used to fill the rules of the nation. It means that state has include the religious values from the holy book as a guide for it. This kind of state is known as a theocratic state.

The development of religious teachings has an impact to the development of people' thought, then it also will affect toward the legal culture. In Europe, transcendental thoughts can be seen in the thought of Thomas Aquinas,¹⁸ he introduces God's law and natural law. He has the thought that the laws made by humans must be based on natural law, while natural law are the nature of God which taken from the holy book.¹⁹

Unfortunately, the existence of transcendental values in human law did not last long. It happened during renaissance, thought of god and moral began to be abandoned. It because of humans began to use their thought it self to organize a more scientific and rational life namely rationalism.²⁰ This thinking occurs when the law begins to be regulated and made positively, most of arrangement in making regulation must be rational. Then, religion, morals, and ethics should be separated in formulating the regulation. Thus, the regulation at that time lost their touch of transcendental values or divine.

Indonesia is a nation that includes the value of transcendental in legislation. It has been designed by the founders of the nation as a state that has a religious nationalist concept.²¹ Indonesia is standing in the middle of various concepts, it does not be secular nor atheist but also does not lead to be religious state (theocratic).²² In fact, Indonesia is a state that upholds the existence of all religion and beliefs in the form of The Unitary State of the Republic of Indonesia (Negara Kesatuan).²³

¹⁷ Rane Willerslev and Christian Suhr, "Is There a Place for Faith in Anthropology?: Religion, Reason, and the Ethnographer's Divine Revelation," *HAU: Journal of Ethnographic Theory* 8, no. 1-2 (2018), <https://doi.org/10.1086/698407>.

¹⁸ Jordan Loveridge, "Rhetorical Deliberation, Memory, and Sensation in the Thought of Thomas Aquinas," *Philosophy and Rhetoric* 50, no. 2 (2017), <https://doi.org/10.5325/philrhet.50.2.0178>.

¹⁹ Danny Frederick, "A Puzzle about Natural Laws and the Existence of God," *International Journal for Philosophy of Religion* 73, no. 3 (2013), <https://doi.org/10.1007/s11153-012-9343-8>.

²⁰ Muhammad Tahir Jaan, "Secularism and Its Evolution in Muslim Society: A Research Study," *ĪQĀN* 1, no. 02 (2019), <https://doi.org/10.36755/iqan.v1i02.54>.

²¹ Henry Dianto Pardamean Sinaga, "Reorientation of Tax Legal Certainty in Indonesia: An Exploration of Transcendental Law," 2018, <https://doi.org/10.2991/icils-18.2018.53>.

²² Helen Pausacker Tim Lindsey, *Eligion, Law and Intolerance in Indonesia* (London: Routledge, 2016), <https://doi.org/https://doi.org/10.4324/9781315657356>.

²³ Umar Haris Sanjaya, Agus Yudha Hernoko, and Prawitra Thalib, "Prinsip Maslahah Pada Putusan Mahkamah Konstitusi Terhadap Perkawinan Bagi Umat Beragama Dan Penghayat Kepercayaan," *Jurnal Hukum Ius Quia Iustum* 28, no. 2 (2021), <https://doi.org/10.20885/iustum.vol28.iss2.art2>.

In Indonesia, the existence of transcendental principle starts from Pancasila as the basic philosophical for legislation. Pancasila it self is stated in the preamble of Indonesian Constitution 1945 which is consist of five (5) precepts. Those precepts are : (1) divinity in the one and only God, (2) just and civilized humanity, (3) the unity of Indonesia, (4) democracy led by wisdom in deliberation/representation, (5) social justice for all Indonesian people. Each of precept in Pancasila reflect the values of the nobility of the nation, it is made to equate the nature and character of the Indonesian people.

Basically, Indonesian people have a history of learning intens religious teaching, it makes sense that the values contained in religious teachings become the nation's guidelines to be used as references in legislation. Therefore, enforcing the regulations which contained in Pancasila is similar as enforcing the religious teaching. Satjipto Raharjo, a legal scholar once had the idea for Indonesia. One of his idea in legal development, he tried to filling the law containing with a view of life, noble moral which is taken from original characteristic of Indonesian.²⁴ But he feels that effort is not easy to achieve considering the diverse culture in Indonesia such as the culture, ethnicity, language, even religion or beliefs. At least by highlighting morality, then it can unite the diversity or plurality that exist in Indonesia and also can create the legal institutions more reflective the Indonesian culture not just formalities.

Transcendental principle also exist in Indonesian Constitution 1945 as the national law development guide. In this constitution, many transcendental values are accommodated, at least six (6) chapter which are represent the religious values. Those chapter are : (1) chapter about Indonesian is a state believe in god almighty, (2) chapter about every official in Indonesia must be sworn in according to religion, it apply toward president, House of Representative, and public officials, (3) chapter about developing science and technology must be uphold the religious values, (4) chapter about the existence of religious court in judicial power, (5) chapter about prioritizing a religion in every action, and (6) having faith and practicing worship is part of human rights. Thus, Indonesia is state believes in religious teaching, but Indonesia is not a religion country, because it does not only based on one religion. Indonesia is more of country that believes in God and recognizes various religion.

Term of transcendental is taken from word of transcend which has meaning "to rise above" or beyond above everything. It is still abstract to be interpreted, but if it combining with a science knowledge then it will be an integration of meaning where it has meaning is morality, nobility, and religion. When transcendental is linked into a legal context, it has a holistic function in understanding the law. The law will be influenced by religion that has a moral and ethical approach and wisdom.²⁵ Finally, those condition create an objective and perfect in legal culture. In one of the religious teaching, there is a purpose for applying the law is to achieve the happiness in the world here and after.

²⁴ Muhammad Harun, "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law," *Walisongo Law Review (Walrev)* 1, no. 2 (2019), <https://doi.org/10.21580/walrev.2019.2.2.4815>.

²⁵ Dimiyati et al., "MORALITY AND LAW: Critics upon H.L.A Hart's Moral Paradigm Epistemology Basis Based on Prophetic Paradigm."

In essence, the transcendental principle contained in the law are well accepted by legal scholar in Indonesia. In addition to being accepted, the existence of transcendental principle began to develop since scholar began to feel that the truth possessed by human was not perfect. The transcendental principle has developed along with the progress of civilization, this also happens in the development of law which created. Humans have never found the outer and inner truth during the development of the laws they made, its because of humans are only guided by the characteristic of modern law.

Most modern laws is always put forward several characteristic such as : (1) seeking the objective truth, (2) empirical truth, (3) logic, (4) systematice, (5) formal, and (6) procedural. Characteristic of them seems minimal about spiritual values when viewed from the point of view of legal epistemology. Thus, transcendental principles followed by spiritual influences began to be presented in legislation by legal expert, so that they could color the formulation of laws to be more civilized.²⁶

This study tries to find the influence of transcendental principle in the Indonesian marriage of law. Indonesian marriage of law is deliberately formulated to preserve the noble values and cultures of Indonesian people, the preservation is the essence of the validity a marriage, it must be based on religion or belief. Interestingly, if the application of the transcendental principle toward marriage of law is inappropriate or violates the constitution 1945, it can be submitted for judicial review to the constitutional court. Since the establishment of the constitutional court in 2003, there have been several submission for judicial review of the marriage of law, and three (3) of them relate to article 2 concerning the validity of marriage.

Marriage of law in Indonesia was made to respect and maintain the original culture of Indonesian, one of them is believe in god and belief.²⁷ After Independent of Indonesia many movements from women's organizations tries to initiate and expect the making marriage of law, they encourage the equality and protection toward women in marriage relationship. This makes sense, because equality and protection are needed by woman, considering the views of past civilizations which saw women as : (1) wives, (2) concubines, (3) prostitutes, and even only as entertainment.²⁸

One of the example is the case of polygamy. In Indonesia, there are many records of polygamy, this matter is carried out by prominent people such as aristocratic or people with high levels property or education. Most polygamy perform by powerful or rich people, of course social status has contribution toward number of wives a person has, while polygamy is not regulated or there is no regulation related polygamy. Thus,

²⁶ Sigit Sapto Nugroho, "Pengembangan Epistemologi Ilmu Hukum Berbasis Transendental," *Perspektif* 21, no. 2 (2016): 97, <https://doi.org/10.30742/perspektif.v21i2.174>.

²⁷ Ni Nengah Budawati, "Sejarah Hukum Kedudukan Perempuan Dalam Perkawinan Menurut Hukum Adat Bali (Kaitannya Dengan Perkawinan Nyentana Beda Wangsa)," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 5, no. 2 (2016): 301, <https://doi.org/10.24843/jmhu.2016.v05.i02.p07>.

²⁸ Asmanidar, "KEDUDUKAN PEREMPUAN DALAM SEJARAH (The Women's Position in Ancient Greece, Athens) (Sekitar Tahun 1050-700 SM)," *Gender Quality, International Journal of Child and Gender Studies* 1, no. 2 (2015): 1576-80, <https://doi.org/DOI:http://dx.doi.org/10.22373/equality.v1i2.786>.

polygamy marriage became arbitrarily with the victims being a woman.²⁹ The movement from women's organization who demanding the equality in marital relationship began in 1953, 1955, and 1962, they demanded the government to submit the draft (bill) marriage of law toward House of Representative. The initiator of the movement at that time was driven by the Association of Indonesian Women Scholar and the Indonesian Islamic Women's Organization with the issues raised is protection of women and polygamy.³⁰

Before 1974, a draft marriage of law ever submitted to House of Representative in 1967. At that time, the draft proposal was rejected by Catholic faction because it contained the religious elements.³¹ Then in 1973 a draft marriage of law proposal was officially submitted by the Indonesian government. In this draft, happened quite a long discussion to accommodating the application of religion. In the end, came the term of "negotiation" to agree the draft proposal in session House of Representative. One of the major agreements in negotiation is to accommodate the majority mechanism that exists in Islam. It can clearly see the differences between latest marriage law (Law Number 1 of 1974) and the previous law, these differences that stated in latest law are :³² (1) marriage must be use religious law or belief, (2) adopted children have a different position from biological children, (3) adopted children are not prohibited to marrying their adoptive parents, (4), it is facilitated the legal provision for divorce and polygamy, and (5) interfaith marriage are prohibited.³³ Based on the reasons above, it shows that marriage of law in Indonesia applies transcendental principle from the start. It has meaning that the existence of transcendental principle is emphasizing that marriage absolutely is not only a civil relationship, but marriage is a sacred moral bond with religion as its foundation.

Marriage of law in Indonesia has fourteen (14) chapters with details of each chapter divide into sixty seven (67) articles, some of them articles have transcendental principles. This chapter will describe the existing articles which has transcendental principles as proof that they are real. There are only three (3) articles that will be explained in detail, because they have a thick transcendental dimension, those are : (1) in article 1 related with the basis of marriage, (2) in article 2 related with validiy of marriage, (3) in article 3 related with the polygamy.

First, article 1 of Indonesian Marriage law stated that : marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy

²⁹ Marie Boltz and Isabelle Chort, "The Risk of Polygamy and Wives' Saving Behavior," *World Bank Economic Review* 33, no. 1 (2019), <https://doi.org/10.1093/wber/lhw054>.

³⁰ Ratna Batara Munti, "Aturan Hukum Tentang Perkawinan Dan Implikasinya Pada Perempuan," *Program Studi Kajian Wanita, Jakarta, Universitas Indonesia*, 2000, https://www.bphn.go.id/data/documents/hak_hak_perempuan.pdf.

³¹ Taufiqurrohman, "Proses Pembentukan Undang-Undang Perkawinan Tahun 1974 Dan Hubungannya Dengan Hukum Perkawinan Islam," *Program Pascasarjana Universitas Indonesia, Jakarta*, 1993, 5, <http://lib.ui.ac.id/file?file=pdf/abstrak-81981.pdf>.

³² Suparman Usman, *Hukum Islam, Asas-Asas Dan Pengantar Studi Hukum Islam Dalam Tata Hukum Indonesia* (Jakarta: Gaya Media Pratama, 2001), <http://katalogdppkprovbanten.perpusnas.go.id/detail-opac?id=8700>.

³³ Siti Nur Fatoni and Iu Rusliana, "Pernikahan Beda Agama Menurut Tokoh Lintas Agama Di Kota Bandung," *Varia Hukum* 1, no. 1 (2019): 95-114, <https://doi.org/https://doi.org/10.15575/vh.v1i1.5139>.

and eternal family based on God almighty. It is clearly illustrated that marriage does not view as agreement or civil relationship, but it's a form to be prefer in making happy and eternal family with the outer and inner bond. Marriage can only be carried out by couples of different sex such male and female. Taken from religious teaching that same-sex marriage is declared to violate the human nature and conscience because it has killed the reproductive process which it is concerning the human future, if it is happened will be threatened as a criminal conduct.³⁴ The main issues in article 1 is the basis for recognizing the value of God as the basis for marriage which is god is transformed into religion and belief. This looks special, Indonesia as a state will recognize the someone's marriage if it is recognized by the religion. In other word, marriage is a ritual of worship that is standardized into a norms that it can become a legal act which has legal consequences.

Second, article 2 of Indonesian marriage law broadly explains that marriage is legal if it is carried out according to the law of each religion and belief of the marriage actor. In this norm, Indonesia wants to combine religious elements with elements of legal certainty in the one legislation. This means marriage recognized if it fulfill two (2) of elements : (1) done by religion and belief and (2) registered according to law, first element as a morality bonding, second element as a legal certainty bonding.³⁵

Third, articles that explain the mechanism of polygamy in Indonesia. In general, marriage can only be performed by a husband toward a wife, and vice versa, a woman can only have a husband, this term is commonly called as monogamy. In Indonesia, there are opportunities for polygamy or having more than one wife. Polygamy is permitted if it qualify the conditions such as : permission from the previous wife and court. Different from a man, a woman prohibited or opportunity to have more than one husband namely polyandry.

Polygamy practice exists in religion especially Islam, it's a kind of rights given to men, so it is deliberately regulated, if polygamy is not regulated or prohibited, its like the same as being against religious teaching. It is clearly determined in Holy Book Al-Quran in chapter An-Nisa ayat 3. Polygamy is regulated as proof of legal protection for women, because before Act No.1 Year 1974, men could practice polygamy without a limit on the number of wives and also did not pay attention to their respective rights. Thus, in this regulation the number of wives is limited to a maximum of 4 as stated in the Qur'an. The main condition for polygamy in regulation is getting permission from the court, why should there be an involvement from the court ? because only the judiciary can examine objectively the request. The court acts as an institution that filters polygamous with the aim of enforcing the law, giving protection to women, and creating legal certainty.³⁶

³⁴ Timbo Mangaranap Sirait, "Menilik Akseptabilitas Perkawinan Sesama Jenis Di Dalam Konstitusi Indonesia," *Jurnal Konstitusi* 14, no. 3 (2018), <https://doi.org/10.31078/jk1438>.

³⁵ Adiyani Zella Putri Anya, "STRATEGI DINAS KEPENDUDUKAN DAN PENCATATAN SIPIL DALAM MENINGKATKAN KEPEMILIKAN AKTA PERKAWINAN MASYARAKAT SUKU AKIT DI KABUPATEN KEPULAUAN MERANTI PROVINSI RIAU," *Jurnal Dukcapil* 6, no. 1 (2018): 87-104.

³⁶ Murniati Murniati, Henry Agus Sulistiyono, and Wahidullah Wahidullah, "ANALYZING POLYGAMY REQUIREMENTS IN INDONESIA BY READING WOMEN IN TEXT AND CULTURE," *JICSA (Journal of Islamic Civilization in Southeast Asia)* 9, no. 2 (2020), <https://doi.org/10.24252/jicsa.v9i2.14355>.

Overall, there are several norms in Law Number 1 of 1974 on Marriage that still have a transcendental value apart from the three articles previous, those are : (1) in article 10 concerning the implementation of Talak kubro, (2) in article 11 concerning the period of Iddah for women in divorce, (3) in article 31 concerning the husband as head of the family, and (4) in article 42 concerning the legal position of the child.

3.2 Enforcement of Transcendental Principle By Judges in the Court

In this chapter tries to discussion about the important role of judges and its consistency in overseeing transcendental principles toward Law Number 1 of 1974 on Marriage. This chapter uses case examples from court decision in the Constitutional Court. In fact, there is a judicial review of the marriage of law which is related several articles of transcendental value. Facing a judicial review, will the judge use transcendental approach, maintain it, or eliminate it ? The Constitutional Court has examined and decided several cases related judicial review of the marriage law, those are related to : (1) polygamy, (2) interfaith marriage, and (3) legal position of children in the marriage without marriage registrastion.

First, the judicial review of Law Number 1 of 1974 on Marriage articles 3, 4, and 5 regarding the condition of polygamy in Constitutional Court decision No. 12/PUU-V/2007. This decision begins from someone who did not get permission for polygamy form the court where he intends to polygamous. He was rejected because he did not fulfill the conditions such getting permission from the previous wife. The applicant has argument that the issues of polygamous is worship, then it should not be prohibited if he wishes to do. But his goodwill to polygamous did not get permission from the court because of he did not get permission from his previous wife. The judges gave a consideration of transcendental value which refer to teaching of Islamic religion. Some judges's consideration such as : (1) basically Islam adheres to monogamy, but there are exceptions for someone who want polygamy with certain conditions, the most important thing is fairness, (2) the existence of Islam tries to regulate polygamy, (3) polygamy in Islam is to protect the dignity of women and from arbitrariness, (4) marriage has the purpose to create love each other, and it is altruistic characteristic not egoistic, thus polygamy is not justified to do if it without permission from previous wife. Based on these consideration, the constitutional judges decided to reject the request for judicial review in Constitutional Court decision No. 12/PUU-V/2007.

Second, in judicial review Law Number 1 of 1974 on Marriage in article 2 poin (1) regarding the interfaith marriage in Constitutional Court decision No. 68/PUU-XII/2014. This decision was motivated by a young couple who wanted to have an interfaith marriage, but its hindered by the regulation in article 2 paragraph 1. They argue that the article cause legal uncertainty, the implementation of religion and belief must be the business of each individual. Another reason is that interfaith marriage often involve legal smuggling practices, so that the prestige of the marriage law begins to disappear. Thus, they offered to add the phrase in article 2 paragraph 1 in their request being phrase : "as long as the interpretation of religious law and belief is left to each prospective parties (bride and groom). Indonesia has 6 religions and more than 300 sects

of belief, each of which lives together and interacts, making it possible for interfaith marriage between them, or its perhaps unavoidable.³⁷

The judges refused the judicial review with the following considerations such as : (1) people in Indonesia have an emotional bond with religion, that is the basic consequences of the Indonesia state believing in God, (2) marriage actor must have the protection of rights because of each is protected by the constitution, (3) in the phrase religion and belief in article 2 paragraph 1 there are restrictions, this aims to respect the rights of other people morally, religiously, security, and orderly, (4) marriage in Indonesia uphold spiritual and social aspect, not only formally, therefore it is the religion that legalize marriage and the regulation that ratify it administratively, (5) Indonesia is not a secular state so the prohibition of interfaith marriage is not a violation of human rights, considering that each country has its own limitations.³⁸ It should be remembered that the history of including religious elements as the legitimacy of marriage is the political will of the marriage law. Thus, marriage can be legalized or registered under civil law if it is legal according to religion and belief.

Third, judicial review Law Number 1 of 1974 on Marriage in article 2 paragraph (2) regarding the marriage Registration in Constitutional Court decision No. 46/PUU-VIII/2010. The case began with a mother with one child who previously had an underhand marriage with a man (still not registered and no marriage book) based on Islam (commonly called siri marriage in Indonesia). Based on article 43 paragraph (1), children are not considered legitimate and only have a civil relationship with their mother, because of the marital status of their parents is not registered.³⁹ Basically, underhand marriage is legal, if it meets the terms and conditions of the religion (paragraph 1). However, it does not cause legal consequences if it is not registered to the authorized institution (paragraph 2). If a marriage is not considered a legal act, then the consequences arising from it also have no legal impact. The consequences such as : no rights and obligation between couple and its properties, children who are born do not have legal relationship with his father, and many more who were harmed civilly from the wife and child. Thus, paragraph (1) and paragraph (2) in the Marriage law article 2 give rises to multiple interpretations in implementation, and it considered as violation of women's constitutional rights.⁴⁰

In considering the decision of the Constitutional Court No. 46/PUU-VIII/2010 the panel of judges has dissenting opinion, but accepting the request, those considerations are : (1)

³⁷ Hedi, Anshori, and Harun, "Legal Policy of Interfaith Marriage in Indonesia." *Hasanuddin Law Review*, Vol. 3 issues 3, 2017. DOI:10.20956/halrev.v3i3.1297

³⁸ Burhanudin Harapah, Solikhah Muslich Sugiyono, and Luthfiyah Trini Hastuti, "NON SECULARIZATION OF MARRIAGE LEGAL PROCEDURE BASED ON BELIEF IN ONE ALMIGHTY GOD IN INDONESIA," *Yustisia Jurnal Hukum* 9, no. 2 (2020), <https://doi.org/10.20961/yustisia.v9i2.27394>.

³⁹ Liky Faisal, "PENCATATAN PERKAWINAN DALAM KONSEP NEGARA HUKUM PANCASILA," *ASAS* 11, no. 01 (2019), <https://doi.org/10.24042/asas.v11i01.4645>.

⁴⁰ Zeni Lutfiyah, Agus Rianto, and M. Rasyid Ridlo, "PERKAWINAN SIRI DALAM REFORMULASI HUKUM PERKAWINAN ISLAM DI INDONESIA SEBAGAI UPAYA PREVENTIF TERHADAP DISHARMONI SOSIAL DALAM MASYARAKAT (PERSPEKTIF GENDER DAN HAK ASASI MANUSIA)," *Yustisia Jurnal Hukum* 4, no. 1 (2015), <https://doi.org/10.20961/yustisia.v4i1.8632>.

the validity of a marital relationship is determined by religion, marriage registration is not a determining factor, but an administrative duty, (2) marriage registration is a limitation that aims to guarantee the recognition of people's rights as evidenced by an authentic deed, (3) children who are born should not be harmed and must receive legal protection due to the action of their parents, (4) the redaction of article 43 paragraph (1) must be read with the addition of the phrase "children has civil relationship with a man as father who can be proven based on science, technology, or other evidence according to law", in this phrase also includes the underhand marriage.⁴¹

The two (2) essence of marriage registration is prevention and protection. Prevention from irresponsibility husband, neglecting the wife and child, domestic violence, and affairs and protect against marital abuse. Thus, it will create the legal certainty in marital relationship.

4. Conclusion

Marriage law in Indonesia is a law that has a transcendental principle, this is based on the culture and morals possessed by Indonesian citizens who are religious and believe in God Almighty. This religious culture then influenced Indonesia people to make provisions with a divine dimension, which was clearly reflected in the use of Pancasila and the 1945 Constitution as guidelines in making laws and regulations. Thus, transcendental principle is the nature of God Almighty, so every marriage must be based on this principle. The marriage law also has the full support of judges in court in interpreting and enforcing its norms. there are attempts to change this principle through judicial review, but are always rejected by the court in Constitutional Court. This can be seen from the three descriptions of the Constitutional Court decisions: Constitutional Court Decision Number 46/PUU-VIII/2010, Constitutional Court Decision Number 68/PUU-XII/2014, and Constitutional Court Decision Number 12/PUU-V/2007. The panel of judges unanimously defended the transcendental principle that had been embedded in the marriage law. So that the transcendental principle still exists and does not disappear from the law of marriage. Transcendental principle have not been able to answer the needs of each society individually, it because there are still people who ignore this principle.

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⁴¹ I ketut Sudantra Ni Nyoman Sukerti, I Gst. Ayu Agung Ariani, "SIKAP MASYARAKAT HUKUM ADAT BALI TERHADAP PUTUSAN MK NO. 46/PUU-VII/2010 TERKAIT KEDUDUKAN ANAK LUAR KAWIN" 4, no. 3 September (2015): 603-9.

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Law and Regulations

the constitution Indonesia 1945

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