



Formulation of Legal Provisions Concerning Gender Change

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Abstract

Sex change that is carried out through a medical process or commonly called sex change surgery, invites pros and cons in the community. The purpose of this study is to formulate regulations regarding the formulation of legal provisions regarding sex change that can reflect justice, benefit, and legal certainty as well as support the welfare of Transgender and Ambiguous Genitalia sufferers. This research is a normative legal research with philosophical, legislative, conceptual, case and comparative approaches. The analysis technique uses descriptive, comparative, evaluative and argumentative techniques. The results of the study indicate that the formulation of legal provisions regarding gender change is the use of the phrase the right to live in physical and spiritual prosperity in the formulation of legal norms as a large group that can reach various things, and the prohibition against plastic surgery to change identity, except for patients who have received court decision.

Keywords: *Gender Change; Legal Provision Formulation; Transgender; Ambiguous Genitalia*

1. Introduction

Everyone has human rights that must be protected, respected, and enforced for the sake of commemorating human dignity, welfare, happiness, intelligence and justice, including the human right to change sex. Human rights are regulated in the 1945 Constitution of the Republic of Indonesia (fourth amendment) in Chapter XA, the provisions of Article 28A to Article 28J, but in these articles, there is not a single article that specifically mentions human rights related to sex change. Likewise, Law Number 39 of 1999 concerning Human Rights (UU HAM) also does not mention sex change. Even the word "sex" is only found in 1 (one) provision, namely in Article 1 point 3 of the Human Rights Law which regulates the definition of "Discrimination".

The concept of the right to live in prosperity based on the 1945 Constitution of the Republic of Indonesia and the Human Rights Law includes two aspects, namely physical prosperity and inner prosperity, both of which cannot be separated and must be fulfilled. The right to live in prosperity is the right of every citizen in Indonesia. Including for people with Ambiguous Genitalia and Transgender people who have the right to live in physical and spiritual prosperity as Indonesian citizens. The group of

people with Ambiguous Genitalia is a group that is really physically sick (genital) which affects their psychological condition (Faradza, 2012). While "transsexual" or "transgender" are individuals with psychological disorders of men who are like women or women like men without physical/genital abnormalities. Transsexuals are often considered sissies or homosexuals in society.

Medically, in order for this group to be eligible for sex change through surgical surgery, in relation to plastic surgery and reconstruction there is a provision in Article 69 paragraph (2) of Law Number 36 of 2009 concerning Health which states "Plastic and reconstructive surgery may not contrary to the norms prevailing in society and is not intended to change identity. This provision is slightly different from the previous regulation, namely Article 37 paragraph (2) of Law Number 23 of 1992 concerning Health (has been revoked) which states "plastic and reconstructive surgery must not conflict with the norms prevailing in society". Sanctions for violating this provision, in Article 193 it is stated that: "Anyone who intentionally performs plastic and reconstructive surgery for the purpose of changing a person's identity as referred to in Article 69 is threatened with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1.000.000.000,00 (one billion rupiah)"

The issuance of the health law that is currently in effect is a new chapter for plastic and reconstructive surgery, which strictly prohibits plastic and reconstructive surgery aimed at changing identities. Changing a more specific identity changes gender, either from male to female or vice versa. There are no exceptions to the provisions of Article 69 paragraph (2) of this Health Law. Even for someone who has gender/multiple ambiguity though. On the other hand, Law Number 23 of 2006 concerning Population Administration has provided space for everyone to submit an application to change their resident identity in this case for a change in gender as long as it has received a determination by the district court as stipulated in the provisions of Article 56 paragraph (1) Population Administration Law.

Referring to the 2 (two) statutory provisions mentioned above, the proposition built by the researcher, that a person can make a sex change through the initial step by submitting a sex change application addressed to the district court Furthermore, in the event that the district court decides to grant the request for a sex change that is requested by a person with Ambiguous Genitalia or Transgender, then the next process is a gender change in the identity of the Transgender or a person with Ambiguous Genitalia by the Civil Registration Officer.

The process of changing gender identity by the Civil Registration Officer is carried out through a mechanism for recording other important events as regulated in Article 56 paragraph (1) of the Population Administration Law. After changing gender identity, then Transgender or someone with Ambiguous Genitalia can perform plastic and reconstructive surgery without being deemed to have violated the provisions of Article 69 paragraph (2) of the Health Law.

In the event that the district court in its stipulation turns out to have rejected the request for a sex change from a transgender or a person with ambiguous genitalia, the identity change process through the mechanism for recording important events cannot be carried out. In essence, plastic and reconstructive surgery solely with the aim of changing gender from male to female or vice versa can only be carried out after a district court ruling is followed by the recording of other important events by the Civil Registration Officer.

In relation to the legality of sex change, the 1945 Constitution of the Republic of Indonesia and the Human Rights Law provide guarantees that every citizen has the right to live in physical and spiritual prosperity. Clarity on the meaning of the right to live in physical and spiritual prosperity as regulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 9 paragraph (2) of the Human Rights Law is needed as a measuring tool for the realization of the principle of justice by the court in deciding the application for sex change submitted by the court. Transgender and Ambiguous Genitalia Sufferers.

The legal problem that occurs is the void of legal norms (vacuum of norm) which is the basis for judges in deciding to accept/reject requests for sex change submitted by Transgender or Ambiguous

Genitalia sufferers. The judge's position will be even more difficult when the applicant first performs plastic surgery before the applicant submits a sex change application to the court. Of course, this seems to "force" the judge unavoidably to grant the request for a sex change requested by a Transgender or Ambiguous Genitalia sufferer in order to realize conformity between identity (gender) and the physical condition of the sex concerned.

The legal facts above show the need for the existence of legal norms that function as tools for judges in examining, adjudicating, and deciding on requests for sex change, so that the decisions issued are expected to be decisions that reflect justice, benefit, and legal certainty for transgender people or a person with Ambiguous Genitalia as the applicant for sex change. On the other hand, as stipulated in Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it is stated that the court cannot refuse to try on the pretext of the absence of legal rules governing.

Even if there is no legal norm that regulates it, the judge is still considered to know the law for what he is examining (adagium: *iura novit curia*). Therefore, the judge must seek the law for what he is examining. The Panel of Judges in the legal considerations of their decision should have a "framing" of justice for Ambiguous Genitalia and transgender sufferers as well as "For Justice Based on God Almighty". Because it means that judges must make justice above others, including legal certainty (Fanani, 2014). Especially because sex change does not yet have legal certainty in Indonesia.

Several researchers have conducted research with the same theme but with different discussions, Netti (2020) in her writing discusses Transgender according to Buya Hamka in the Book of Tafsir Al-Azhar. Prasetyo (2019) in his research discusses the process of forming the Trans Male personality through a long and gradual process, from childhood to adolescence. Darmayanti (2004) examines the effects of the Law on Sex Change Operations from Male to Female on Family Law and Indigenous Inheritance in the Balinese Customary Law Society. The three researchers have something in common with this study, namely they both study transgender. However, the location of the difference in this research is the discussion on the formulation of legal provisions regarding sex change that can reflect justice, benefit, and legal certainty as well as support the welfare of Transgender and Ambiguous Genitalia sufferers.

2. Research Method

This type of research is a legal research, which is a research conducted through a way of reviewing the rules and laws that apply to answer the legal problems studied (Efendi and Ibrahim, 2016). The research approach uses a philosophical approach, a statutory approach, an analytical approach, a conceptual approach, a case approach and a comparative approach. The sources of legal materials used consist of primary legal materials, secondary legal materials, tertiary legal materials or non-legal materials. Primary legal materials consist of statutory regulations, secondary legal materials consist of all publications on law that are not official documents. Tertiary legal materials consist of encyclopedias and legal dictionaries. Legal material analysis techniques are carried out through several stages, namely: descriptive techniques, comparative techniques, evaluative techniques and finally argumentative techniques (Diantha, 2015).

- a. Descriptive technique, namely by describing the legal conditions regarding land tenure
- b. Comparative technique, namely by analyzing secondary legal material in which there are various views of legal experts as a "dialectical layer" both pros and cons. Then it is crystallized to produce a provisional truth for the researcher's argument.
- c. Evaluative technique to determine the legal conditions associated with pro and contra opinions.
- d. Argumentative techniques to provide reasoning or reasoning or explanations that make sense in order to answer research problems.

3. Results and Discussion

3.1 Transsexuals in Positive Law in Indonesia

In the laws and regulations in force in Indonesia, only two genders are recognized, namely male and female. This is explicitly stated about men and women in the Marriage Law, namely Law Number 1 of 1974 and in the provisions regarding the contents of the resident card stipulated in the Population Administration Law that in the gender column there are only 2 (two) gender options are male and female.

However, nowadays, among the classification of the 2 (two) sexes, there are people who have a tendency to behave contrary to the nature of their gender. These people are then known as Waria or transsexuals. Along with the development of technology, some of these transgender people have changed their gender which is then called transsexual. A transsexual is someone who clearly does not identify with his gender as at birth, but identifies himself as the opposite sex. So that a Sex Change Surgery or Sex Completion is carried out. Transsexual is a condition where a person shows discomfort with the anatomical condition of the body and has a desire to change his genitals through Sex Reassignment Surgery (Kring et al. 2010).

However, the phenomenon that occurs in society is that Sex Reassignment Surgery is carried out with the aim of changing the patient's genitals so that they are similar to the genitals of the opposite sex (Fausiah & Widuri, 2007). In practice some Sex Reassignment Surgery is done with the excuse of changing the genitals of transsexuals even though their genitals are anatomically normal (Wulandari, 2006).

In other words, these transsexuals perform surgery to change their innate sex only according to their soul's desires even though in reality they are born with a perfect gender condition. Sex Reassignment Surgery performed on transsexuals is different from the Sex Enhancement Surgery performed on hermaphrodite or multiple sex sufferers. In modern medicine, there are several terms or forms of genital surgery, in general there are 3 kinds, as follows (Maesaroh, 2018).

1. Genital repair or refinement surgery is an operation performed on people who from birth have abnormalities or disorders of the genital organs (congenital abnormalities).
2. Sex Adjustment Surgery or surgery to clarify one of the sex organs, namely sex surgery carried out by removing one of the multiple sexes, which is carried out on infants, children or patients who have external genital organs that are not clear whether male or female, or for patients who have a picture of both sexes, both male and female (there are two external sex organs at once, namely the penis and vagina, which later became known as "Ambiguous Genitalia/hermaphrodite/intersex").
3. Sex Change Surgery, namely sex surgery performed on people who from birth have normal biological sex whether as male or female, but in subsequent developments experience psychological and behavioral problems which then arise problems of psychological sex identity opposite to their biological sex organs, this condition known as transsexual disorder.

Of the three types of genital surgery mentioned above, two of them are genital surgery that is often performed by transsexuals. However, there is a difference between the two, namely: If sex adjustment surgery is usually only carried out by people who have multiple genders, but in gender reassignment surgery, sex surgery is carried out by people who have perfect sex and normal functioning genitals. The following are some cases of transsexuals who perform sex reassignment surgery in Indonesia, including (Andriyani, 2019):

- 1) The case of Vivian Rubianti (Year 1973) In Indonesia, the court's decision for transsexuals regarding sex change became known in the case of Iwan Rubianto Iskandar in 1973. Iwan Rubianto Iskandar has undergone sex change surgery, which was initially male and then changed to female . After undergoing genital surgery, Iwan Rubianto Iskandar changed his name to Vivian Rubianti Iskandar.
- 2) The case of Henriette Soekotjo (Year 1978) Born as a male with the name Soekotjo, then Soekotjo asked for legalization of his status as a woman and changed his name to Henriette Soekotjo. The Surabaya District Court in September 1978 granted Henriette Soekotjo's request to be declared a woman, after she underwent genital surgery.
- 3) Dorce Gamalama Case (1988) Born as a male with the name Dedi Yuliardi Ashadi in Solok, July 21, 1963. Then on May 3, 1988, Dedi underwent sex change surgery at Dr. Hospital. Soetomo Surabaya. Dedi submitted an application for a change of sex status to the Surabaya District Court on October 24, 1988. Dedi Yuliardi Ashadi changed his name to Dorce Ashadi or known by his stage name Dorce Gamalama.
- 4) The case of Nadia Ilmira Arkadea (Year 2010) Born male with the name Agus Widoyo born in Semarang, August 16, 1979 then he resided in Batang, Central Java. Agus struggled to change his gender since 2005. The operation was carried out for 3 years. On December 22, the judge granted the request for a sex change and changed Agus Widoyo's name to Nadia Ilmira Arkadea, through the decision of the Batang District Court Number 19/Pdt/2009/PN.Btg. It was this decision of the Batang District Court that had become controversial and was denounced by MUI so that finally MUI issued a Fatwa on Gender Change and Improvement Number 03/Munas-VIII/MUI/2010 dated 27 July 2010, stating that changing the genitals from male to female or vice versa which is done intentionally.
- 5) The case of Avika Warisman (In 2018) Born with a male gender named Warisman. In 2015, he decided to have sex surgery at the Soetomo General Hospital. Two years later, Avika applied for a gender identity change at the Nganjuk District Court but was rejected. A year later, he again submitted an application for a sex change to the Surabaya District Court and it was granted (Purbasari, 2017).

In addition to cases of transsexuals who change sex, there are also cases of transsexuals who make sex adjustments (double sex/ambigua genitalia), which are as follows:

- 1) The case of Siti Maimunah (Year 2011) initially when she was born, her physical condition, especially the genitals, did not appear clearly as male or female. Then with that condition, her parents named her Siti Maemunah and Sembungharjo Village Semarang issued a Birth Certificate No. 474.1/55/1009 dated January 28, 1992 with a female gender. After becoming an adult, Siti Maimunah saw many irregularities when she was categorized as female, among others, she did not menstruate and did not grow breasts in addition to the appearance of lumps that resembled male genitalia, so she checked herself at the Karyadi Doctor Hospital in Semarang. Furthermore, Karyadi Hospital Semarang conducted an examination and concluded that Siti Maimunah was male so a gender adjustment operation was performed, then Siti Maimunah submitted a sex change determination to the Semarang District Court and was granted with the issuance of the determination number 3077/Pdt.G/P./ 20No11/PN.Smg dated January 3, 2012 and changed his name from Siti Maimunah to Muhammad Prawirodijoyo (Subekti & Mahdi, 2005).
- 2) The case of Juanita Ria (2015) Juanita Ria was born in Majalengka on December 19, 1992, initially according to the midwife's gender, she was female. However, in 2000, when she entered elementary school, Juanita Ria's genitals appeared a bulge that was approximately 2cm long and grew by 3cm four years later. The situation continued when she was a teenager, Juanita Ria did not menstruate and even experienced physical changes like a man, which was marked by the growth of her Adam's apple and her voice became heavier. In 2013 Juanita Ria finally checked herself into the Sunan Gunung Djati Regional General Hospital and the hospital stated that the person concerned was a man. Furthermore, JuanitaRia, submitted an application for a court order regarding sex change to the

Majalengka District Court and it was granted with the issuance of the decision number 05/Pdt.P/2015/PN.Mjl dated March 19, 2015 and changed her name from Juanita Ria to Ilham Liquddin Fattah.

The case of this gender change in terms of the law is a very big influence on developments in society, because the event of this status change is a new problem in society. This matter has not been specifically regulated by law because the legislators at that time did not or did not predict the occurrence of such things. The law only recognizes the term male or female, and it is a social fact that lives in society that between these two types of divine beings, male and female, there is also a group of people who live between the two creatures mentioned above.

Changes in the legal status of a person's gender from male to female or vice versa caused by the existence of a sex change operation until now there are no specific legal rules in positive law in Indonesia. However, this case can be related to several legal rules, namely:

1. 1945 Constitution. Article 27 guarantees that every citizen has the same position in law and government. Article 28 states that recognition as a person before the law is a human right that cannot be reduced.
2. Human Rights Act

In accordance with human rights, both transsexuals and other people are entitled to equal rights and treatment before the law regardless of rich or poor and regardless of the person's social status. Likewise, transsexuals can apply for sex change/change in accordance with the Civil Code, Population Administration Law, Presidential Regulation (Presidential Regulation) even though the law has not yet been established for transsexuals but they have the same rights as citizens.

Judges cannot reject cases submitted to him with no or unclear legal evidence in accordance with Article 10 of Law Number 48 of 2009 concerning judicial powers Judges are prohibited from refusing to examine, try, and decide on a case submitted on the pretext that the law does not exist. or less clear, but it is obligatory to examine and try it. Judges can make legal discoveries / law making (rechvinding) even though the law is not clear so that judges can make legal discoveries for concrete cases using both legal interpretation and legal arguments.

3.2 Formulation of Sex Change Regulations in Indonesian Legislation

3.2.1 Principles of Justice in the Rule of Law

Based on its characteristics, justice is subjective, individualistic and does not generalize. If law enforcement focuses on the value of justice while the value of usefulness and legal certainty is ruled out, then the law cannot run well. On the other hand, if the emphasis is on the value of expediency, while legal certainty and justice are ruled out, then the law does not work. Ideally, in enforcing the law, the basic values of justice which are the basic values of philosophy and the basic values of expediency are a sociologically valid unity, as well as the basic values of legal certainty which constitute a legal entity that must be applied in a balanced manner in law enforcement.

An interesting thing that needs to be observed if there are 2 (two) elements that mutually attract each other between justice and legal certainty, Rusman Saleh in Siregar (2008) states: "Justice and legal certainty are two legal goals that are often not in line with each other and are difficult to avoid. in legal practice. A legal regulation that fulfills more demands for legal certainty, the greater the possibility of pressing justice aspects. The imperfections of this legal regulation in practice can be overcome by giving an interpretation of the legal regulation in its application to concrete events. If in its application in

concrete events, justice and legal certainty are mutually pressing, then the judge must, as far as possible, prioritize justice over legal certainty.

Roscoe Pound as one of the famous legal experts with his theory which states that, "law is a tool to update (engineer) society (law as a tool of social engineering)". Many important changes in an advanced society were initiated by a change in law, especially a change in law. Although it must also be acknowledged that these legal changes are usually triggered by changes in the local community as well as the international community. But the changes in society are not yet valid until they are legalized by law, especially for the development of actions, events, modes, which have close relations with the wider community and the state. Every time there is a draft of a law, it means that a change is being made in society (Fuady, 2013).

Pound's statement is interpreted by Kusumaatmadja (2012) in the context of the development of national law in Indonesia, which essentially means how to play the law as a means of community renewal. One of the most important reforms in society is to create a sense of justice for minorities in Indonesia, especially transgender people. Thus, that the position of justice is a very important element in law enforcement in Indonesia. Indonesia has a diverse community culture and has noble values, of course, really hopes that justice and benefits are prioritized compared to elements of legal certainty. Justice is the essence of law, so law enforcement must also realize this. In addition to legal certainty and justice, another element that needs to be considered is expediency. The issue of legal certainty is not merely a matter of law, but rather a matter of human behavior. Legal certainty has become a big problem since the law was written. Before that, for thousands of years, when we talked about law, we talked more about justice.

The 1945 Constitution has explicitly guaranteed that "all citizens are equal before the law and government and are obliged to uphold the law and government with no exceptions" in Article 27 paragraph (1). This article means that every citizen regardless of whether he is a native or not, comes from an educated class or an illiterate commoner, the upper middle class or people who struggle with poverty must be served equally before the law.

Position means placing citizens with equal treatment before the law. So that with an equal position, no citizen in dealing with the law is above the law. 'No man above the law', meaning that there are no privileges given by law to legal subjects, if there are legal subjects who have the privilege of placing the legal subject above the law. In realizing equality before the law, Indonesia has ratified the concepts and principles of Human Rights contained in the Constitution and the spirit of Pancasila. Human rights instruments that have been ratified are reflected in the Human Rights Law, Law No. 11 of 2005 on the Covenant on Economic, Social and Cultural Rights and Law No. 12 of 2005 on the Covenant on Civil and Political Rights, and UN conventions and norms other.

The juridical affirmation shows three forms of obligations of the state (government) towards human rights, namely: first, the obligation to respect (to respect), namely the state may not intervene or may not take action that results in preventing access to the rights in question. Second, the obligation to protect (to protect), the state must ensure that third parties do not violate the rights of other individuals and impose sanctions on those who violate. Third, the obligation to fulfill human rights (to fulfill). The state must be proactive by supporting intervention (positive measures) so that everyone's human rights are protected, and the process of fulfilling/retrieving their human rights which cannot be fulfilled through their own efforts, is now guaranteed in the Human Rights Law.

The concept of the rule of law turns out to be very closely related between the rule of law and human rights issues, so it can be said that the rule of law is a forum, and human rights are the content. The implementation of human rights in Indonesia requires coordination between various elements, realizing

that human rights issues in Indonesia are still very broad, both civil and political rights, economic, social and cultural rights as well as the right to development and so on (Rukmini, 2007).

Speaking of social justice, there is no separation between civil and political rights with economic, social and cultural rights. These two human rights masters must go hand in hand. Nothing is prioritized in its implementation. Regarding equality before the law, it's not just one side above. Rights in politics, for example; Basic rights in the field of politics are reflected in Article 28 of the 1945 Constitution, namely "freedom of association and assembly, expressing thoughts in writing and orally is stipulated in law". Furthermore, Article 27 paragraph (1), "all citizens are equal before the law and the government there are no exceptions". The explanation of the article emphasizes the important principle that Indonesia is a state of law and is strengthened in the amendment to Article 1 Paragraph (3) which reads "The State of Indonesia is a state of law".

As a state of law (*rechtsstaat*), the state must guarantee the equality of everyone before the law and protect human rights. Equality of treatment before the law for everyone applies regardless of their background (race, religion, descent, education or place of birth), to obtain justice through the judiciary. Equality before the law must be interpreted dynamically and not interpreted statically. That is, if there is equality before the law for everyone, it must also be balanced with equal treatment for everyone. Equality before the law, which is defined dynamically, is believed to guarantee access to justice for everyone regardless of their background. According to Aristotle, justice must be distributed by the state to everyone, and it is the law that has the task of guarding it so that justice reaches everyone without exception. Whether people are capable or poor, they are the same to gain access to justice.

3.2.2 Policy Formulation

The realization of law enforcement in Indonesia, lately, is often not seen as something important in the democratization process. Law is more often seen as a pillar of improvement in other fields such as politics and economic recovery. If we trace back the history of reform, it will be clear that when we really believe that the lawlessness in Indonesia for decades is caused by an undemocratic political system. Law-making policy is the work of the legislature which in fact is political work in the true sense and not legal work in a technical sense. So that legal policy products are more of a crystallization of competing political wills.

Thus the law reflects the will of the configuration of political power, if the politics is democratic then the law will also be populist, whereas if the configuration is authoritarian then the law will be conservative. A democratic political configuration is always followed by the emergence of responsive/autonomous legal products, while an authoritarian political configuration is always accompanied by the emergence of laws with a conservative/orthodox character (Mahfud, 1999).

The problem that arises is from the point of view of human rights, it is still necessary to debate about the meaning of the acceptance of the concept of transgender. Are their existence sufficiently recognized and accepted as workers, such as in the reception area which is usually filled by women and with the acceptance of male to female transgenders, the receptionist will look female but have a male voice. Or should the gender change be recognized without or with a gender change, for example a transgender woman becomes a man who is placed in the male workforce such as security personnel. Or is it also recognized as a new gender.

Problems in social life can also extend and are not limited to employment, but also education, health, etc. In everyday life, a transgender person has difficulty getting placement in a toilet, an education class that only has one gender, a treatment room in a hospital that does not mix men with women but a transgender male to female will be difficult to be placed in the treatment room. women while she would not want to be placed in a male treatment room, health insurance coverage, calculation of inheritance

rights which will be more for men than women so the question is what if the heirs who are transgender women become men, will they remain get more rations or stay with the female portion, and so on (Pelangi 2014).

Gender can experience abnormalities due to failure of sexual differentiation due to mutations or structural anomalies in genes such as hermaphrodites that have both ovaries and testes, congenital adrenal hyperplasia or androgenital syndrome which affects women with 46 XX but male appearance due to inherited autosomal recessive disorders resulting in cortisol deficiency. , androgen insensitivity syndrome is a recessive disorder associated with the X chromosome where the individual is genetically male but has developed breasts and looks like a woman due to his body tissue not responding to androgen hormones but instead estrogen. Chromosomal abnormalities can also cause gender abnormalities, namely in aneuploidy conditions (Centre of Genetics Education, 2016). Aneuploidy is a condition in which the number of chromosomes is reduced (monosomy) or excessive (polysomy). Aneuploidy conditions can be seen in Turner's syndrome with monosomy 45X, Klinefelter's syndrome which has 47 XXY, because having 2 X chromosomes results in abnormal development of the testes and incomplete secondary sex development, sometimes individuals appear female.

The existence of transgender and transsexualism throughout the world is still a controversy, despite these objections, their existence should still be protected or appreciated because of the human rights inherent in them as individuals. When looking at this, there are several things that become a problem because of his existence as a human being. Starting from the legality of their existence in the midst of the community structure, as long as they are not recognized as a whole individual, there will be a lot of stigma that usually arises from their appearance or the way they behave and communicate. The inherent negative stigma will make them a layer of society that is vulnerable to various forms of violence, both physical violence such as torture, psychological violence such as insults, sexual violence, coercion to marry the opposite sex as a form of their "healthy" efforts, including injustice get a job.

In Indonesia, there is a law that supports the existence of human rights so that it can indirectly support the existence of transgender people (including transsexualism), namely Article 2 of the Human Rights Law. Several countries in the world already have policies to regulate sex change. In the United States, the law that applies to sex change depends on the state in which it is occupied, as in Texas for sex change it was banned in 1999 for whatever reason, but in 2009 this situation changed where gender change was legalized through court. In New York, sex change is authorized by the Department of Health after receiving a legal document regarding the change from doctors, nurses, physician assistants, who are licensed to practice in the United States, administering therapy, reviewing, and evaluating sex changes by including the practice license registration number, the statement is unbiased in the assessment, and the patient has received appropriate therapy.

In Hawaii the recognized gender is in accordance with the circumstances at that time, so that changes can be made on condition that the treating doctor has a good relationship with the patient, therapy and evaluation have been carried out on the medical history, the patient has received appropriate clinical therapy and a change in gender has been completed perfectly and the doctor has checked for any sex change from the time of birth to the current one. Slightly different in the legal process, in Oregon, for a sex change, it is preceded by a medical assessment that states that sex reassignment has been carried out such as surgery, hormonal therapy, and other therapies, which continues with a submission to the court for approval (WHO, 1991).

On the European continent, namely the Netherlands, a sex change in a legal document can be carried out with or without a sex change operation. Meanwhile in Australia there are separate guidelines for sex change, where this change can be made provided there is a letter stating the current gender from the doctor (surgery, urology, obstetrics, endocrinology, psychiatry or general practitioner) or from the regional registry.

In one of the Asian regions which is known for having many transgender people, namely Thailand, there is no law that stipulates whether sex reassignment surgery is legalized or not, so this procedure, known as Sexual Reassignment Surgery (SRS), is still carried out as long as the applicant is 18 years old. and above that have been approved by parents or over the age of 20 accompanied by a statement from 2 psychiatrists (one of whom is licensed in Thailand) that this action is necessary. In Thailand the change from female to male is more difficult to find and more expensive than the other way around.

Judging from several laws and regulations in other countries that explicitly mention the rules for changing sex, sex adjustment in Indonesia is not explicitly stated in the Health Law, it is only stated in Article 69, namely plastic surgery and reconstruction can only be carried out by health workers. authorities, must not conflict with the norms that apply in society and are not intended to change identity.

In terms of gender adjustment, several religious norms in Indonesia expressly disapprove of sex change because it is considered against human nature that has been created perfectly, but the MUI Fatwa still allows for gender adjustment in the case of someone with multiple genders. It can be freely said that sex adjustment can still be done but with certain criteria and procedures. The criteria so that gender adjustment can be carried out is still being questioned, because the detailed rules regarding the latest gender adjustment are in the Decree of the Minister of Health of the Republic of Indonesia number 191/MENKES/SK/III/1989 concerning the Appointment of Hospitals and Expert Teams as Places and Implementation Sex Adjustment Surgery. In the regulation it is said that in principle humans consist of male and female types, but in reality there are people of the opposite sex with their mental state, causing mental suffering or mental disorders, and if necessary, sex adjustment surgery is carried out as a last action.

It can be seen that this Decree of the Minister of Health still does not stipulate in detail what criteria and procedures are needed for sex adjustment, including what legal steps must be taken before the surgical decision is approved. The legal steps regulated in Indonesia can only be found in the Population Administration Law in Article 56 paragraph (1), it is said that "the recording of other important events is carried out by the Civil Registration Officer at the request of the person concerned after a district court decision has obtained permanent legal force". In the explanation it is stated that "Other Important Events" are events determined by the district court to be registered with the Implementing Agency, including changes in gender.

Therefore, to provide justice, benefit, and legal certainty as well as support the welfare of Transgender and Ambiguous Genitalia sufferers, the reconstruction of the proposed norm formulation is as follows:

Table 1. Norm Reformulation

NO.	BASIC	FORMULA
1.	Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia	Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy environment and have the right to obtain health services.
	The results of this study	Everyone has the right to live in physical and spiritual prosperity by living and getting a good, safe, peaceful and healthy environment and has the right to obtain health services.
2.	Article 9 paragraph (2) of the Human Rights Law	Everyone has the right to live peacefully, safely, peacefully, happily, physically and mentally.
	The results of this study	Everyone has the right to live in physical and spiritual prosperity by getting a sense of security, peace, tranquility

NO.	BASIC	FORMULA
		and freedom from all kinds of disturbances and suffering.
3.	Article 69 paragraph (2) of the Health Law	(1) Plastic and reconstructive surgery can only be performed by health workers who have the expertise and authority to do so. (2) Plastic and reconstructive surgery must not conflict with the prevailing norms in society and shall not be aimed at changing identity. (3) Provisions regarding the requirements and procedures for plastic surgery and reconstruction as referred to in paragraph (1) and paragraph (2) shall be stipulated by a Government Regulation.
	The results of this study	1. Plastic and reconstructive surgery can only be performed by health workers who have the expertise and authority to do so. 2. Plastic and reconstructive surgery may not conflict with the prevailing norms in society and shall not be aimed at changing identity, unless it has obtained a court order. The court decision as referred to in paragraph (2) may be given in the event that <ol style="list-style-type: none"> a. there is a real identity disorder in the patient as evidenced by a certificate from a sworn medical officer; b. carried out by considering the continuity of the patient's life in the future; and c. to fulfill a sense of justice and do not conflict with the norms prevailing in society. 3. Provisions regarding the requirements and procedures for plastic surgery and reconstruction as referred to in paragraphs (2) and (3) shall be stipulated by a Government Regulation.

Source: The results of the researcher's analysis.

The reformulation of the provisions of Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 9 paragraph (2) of the Human Rights Law above is based on the results of research on the meaning of the word physical and spiritual prosperity which is more appropriate if it is positioned as a large family of feelings of peace, security, prosperity, and free from suffering or disturbance. Meanwhile, the reformulation of the provisions of Article 69 paragraph (2) of the Health Law is intended as a synchronization and harmonization between the provisions of Article 62 paragraph (2) of the Health Law as referred to in Article 56 paragraph (1) of the Population Administration Law in conjunction with Law 24 of 2013 Changes in Population Administration which regulates the recording of events. other important matters carried out by the Civil Registration Officer at the request of the resident concerned after a district court decision has obtained permanent legal force, one of which is the registration of a change in sex.

3.3 Analysis of the Formulation of Sex Change Arrangements based on the Theory of Legislation

Legal politics here is interpreted as an official direction or line that is used as a foothold and a way to make and implement laws in order to achieve the goals of the nation and state. This meaning implies that legal politics contains two inseparable sides, namely as a direction for making laws or legal

policies of state institutions in forming laws and at the same time as a tool to assess and criticize whether the laws made are in accordance with the legal framework of the policy.

According to Hans Kelsen and Hans Nawiasky as cited by Maria Farida Indrati Soeprapto, in their book *Science of Legislation*, among other things, it is said that legal norms are tiered and layered in a hierarchy of structure, where a lower norm applies, sourced, and based on higher norms, but Hans Nawiasky added by grouping the legal norms into four groups. In relation to the issue of the formation of laws and regulations, the theory of Hans Kelsen and Hans Nawiasky has inspired how the regulation of legal norms in Indonesia.

If we look at Article 7 paragraph (1) and paragraph (2) of Law No. 12 of 2011 concerning the Formation of Legislation, we can find a hierarchy in our legal norms. In this article, the types and hierarchies of laws and regulations have been regulated, namely:

- a. 1945 Constitution of the Republic of Indonesia
- b. MPR Decree
- c. Law/Perpu
- d. Government regulations
- e. Presidential decree
- f. Provincial Regulations
- g. Regency/City Regional Regulation

The legal power of laws and regulations is in accordance with the principle of hierarchy, which means that the ranking of each type of legislation is based on the principle that lower laws and regulations must not conflict with higher laws and regulations. Thus, what is included in this definition is regarding the legal politics of lower laws and regulations that may not conflict with the legal politics of higher laws and regulations. The legal politics contained in the constitution (because it is the highest written basic law) must be the basis and guide for legal politics for the legislation under it, including the Law.

Legal politics regarding Human Rights in Indonesia is based on the concept of Pancasila, namely the existence of rights along with obligations to society and the state in implementing existing legal provisions, including affirming the function of institutions and fostering members of law enforcement. Meanwhile, in particular, there are guidelines for legal politics regarding human rights in Indonesia based on the concept of Pancasila, namely the existence of rights along with obligations to society and the state in implementing existing legal provisions, including affirmation of institutional functions and coaching members of law enforcement. Whereas specifically there are guidelines for legal protection so that people know that the state really protects the rights of citizens so that it is appropriate if in essence administrative law is law related to the control of government power, an interest is the target of rights, not only because it is protected by law, but also because there is an acknowledgment of it. Rights do not only contain elements of protection and interest, but also will. Administrative law has proven to be a vehicle capable of promoting human rights in many situations. So that it is not only legal protection written in laws and regulations, but also must provide legal protection in the judicial area which must present legal certainty (*rechtsmatigheid*) as the last bastion of the existence of a just state administration concept.

Conclusion

The formulation of legal provisions regarding sex change that can reflect justice, benefit, and legal certainty as well as support the welfare of Transgender and Ambiguous Genitalia sufferers is as follows, the use of the phrase the right to live in physical and spiritual prosperity in the formulation of legal norms as a large group that can reach various things so that it is not equated with specific matters

such as housing, health services and so on; and provisions on the prohibition of plastic surgery to change identity, except for patients who have received a court order. This is a step to harmonization and synchronization of legal provisions governing sex change between the Health Law and the Population Administration Law.

Based on this conclusion, the People's Consultative Assembly as the state institution with the power to amend the 1945 Constitution of the Republic of Indonesia, to amend the provisions of Article 28H paragraph (1) of the NRI Constitution by placing the right to live in physical and spiritual prosperity as a large group that is meta-norm and does not align with other things. which is specific and concrete, and to the President and DPR and DPD as the holder of the power to amend the Law, to amend the provisions of Article 69 paragraph (2) of the Health Law which regulates the exclusion of plastic surgery for the purpose of changing identity with the requirement of a court order and adding 1 one) new paragraph which aims to provide legal norms for judges to grant/reject requests for sex change.

References

- Andriani, A. (2019). Kajian Teori Eksistensi Status Hukum Transeksual Terhadap Perubahan Jenis Kelamin Pasca Penetapan Pengadilan. *Muamalah*, Volume 1.
- Atmasasmita, R. (2012). Teori Hukum Integratif. Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif. Yogyakarta, Genta Publishing.
- Centre of Genetics Education. (2016). An Introduction to DNA, Genes, and Chromosomes. NSW. Available from: <http://www.genetics.edu.au/Publicationsand-Resources/Genetics-FactSheets/FactSheetDNAGenesChromosom> cited 2021 May 31.
- Darmayanti. (2004). *Akibat Hukum Operasi Ubah Kelamin Dari Laki-laki menjadi Perempuan Terhadap Hukum Kekeluargaan dan Waris Adat Dalam Masyarakat Hukum Adat Bali (studi Kasus di Kabupaten Buleleng-Bali)*. Semarang, Universitas Diponegoro (UNDIP).
- Diantha, I M. P. (2015). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Denpasar, Kencana Prenadamedia Group.
- Efendi, J. and Ibrahim, J. (2016). *Metode Penelitian Hukum Normatif dan Empiris*. Depok, Prenadamedia Group.
- Fanani, A.Z (2014). *Berfilsafat dalam Putusan Hakim (Teori dan Praktik)*. Malang, CV Mandar Maju.
- Faradz, S.M.H. (2011), *Kelamin Ganda, Penyakit atau Penyimpangan Gender?*. Available on <http://pustaka-juned.blogspot.com/2012/02/kelamin-ganda-penyakit-atau.html> accessed on 15 July 2018 at 21.01 WIB
- Fausiah, F. and Widury, J. (2007). Psikologi Abnormal Klinis Dewasa. Jakarta, UI-Press.
- Fuady, M. (2013). Teori-Teori Besar (Grand Theory) Dalam Hukum. Jkarta, Kencana.
- Kring, A.M., Johson, S.L., Gerald, and Neale, J.M. (2010). *Abnormal Pshychology*, eleventh edition, America: Wiley.
- Maesaroh, S. (2018). Operasi Kelamin Transeksual dalam Kajian Hukum Islam. Yogyakarta, Thafa Media.
- Mahfud, M.D. (1999). Pergulatan Politik dan Hukum di Indonesia. Yogyakarta, Gama Media.
- Netti, M. (2020). *Transgender Menurut Buya Hamka (1908-1981) Dalam Kitab Tafsir Al-Azar*. Riau, Universitas Islam Negeri (UIN) Sultan Syarif Kasim.
- Pelangi, A. (2014). Peringatan Hari Mengenang Kekerasan dan Diskriminasi Terhadap Transgender. Available from: <http://aruspelangi.org/siaran-pers/siaranpers-peringatan-hari-mengenangkekerasan-dan-diskriminasi-terhadaptransgender-se-dunia/> cited 31 May 2021.
- Prasetyo, D. (2019). *Fluiditas Gender, Studi Trans Laki-Laki Indonesia*. Surabaya, Universitas Airlangga.
- Purbasari, I. (2017). Hukum Islam Sebagai Hukum Positif di Indonesia, Malang, Setara Press.
- Rukmini, M. (2007). Perlindungan HAM Melalui Asas Praduga Tidak Bersalah dan Asas Persamaan Kedudukan dalam Hukum Pada Sistem Peradilan Pidana Indonesia. Bandung, Alumni.
- Siregar, B. (2008). Kata Hatiku, Tentangmu. Jakarta, Diandra Press.

- Subekti, W.I., & Mahdi, S.S. (2005). *Hukum Perorangan dan Kekeluargaan Perdata Barat*, cet. Pertama, Jakarta, Gitama Jaya.
- WHO. (1991). Principles for the protection of persons with mental illness and the improvement of mental health care Available from: http://www.who.int/mental_health/policy/en/UN_Resolution_on_protection_of_persons_with_mental_illness.pdf cited 2021 May 31.
- Wulandari, A. (2006). *Gambaran Proses Pengambilan Keputusan pada Transeksual Laki-Laki yang Menjalani dan Tidak Menjalani Operasi Pengubahan Kelamin*. Depok, Universitas Indonesia.

Law and Regulation

- Indonesia, The 1945 Constitution of the Republic of Indonesia, Available on <https://www.mkri.id/public/content/infoumum/regulation/pdf/UUD45%20ASLI.pdf>
- Indonesia, Law Number 1 of 1974 concerning Marriage, Available on <https://ngada.org/uu1-1974.htm>
- Indonesia, Law Number 39 of 1999 concerning Human Rights, Available on <https://www.komnasham.go.id/files/1475231474-uu-nomor-39-tahun-1999-tentang-%24H9FVDS.pdf>
- Indonesia, Law Number 23 of 2006 concerning Population Administration, Available on https://www.dpr.go.id/dokjdi/document/uu/UU_2006_23.pdf
- Indonesia, Law Number 11 of 2009 concerning Social Welfare, available on <https://luk.staff.ugm.ac.id/atur/sehat/UU-11-2009KesejahteraanSosial.pdf>
- Indonesia, Law Number 36 Year 2009 concerning Health, Available on <https://rskgm.ui.ac.id/wp-content/uploads/2021/03/07.-Nomor-36-Tahun-2009-Tentang-Kesehatan.pdf>
- Indonesia, Law Number 48 of 2009 concerning Judicial Power, Available on https://www.dpr.go.id/dokjdi/document/uu/UU_2009_48.pdf

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