

# The Legality of Trans-Sexual Marriage in Indonesia

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**Abstract**— Trans-sexual marriage is marriage between a man and a woman, which one of them has a genital-change, the problem is whether the marriage is legal according Indonesian National Law. Relating to Article 2 of Law Number 1 of 1974 on Marriage regulate that the legality of a marriage (in Indonesia) must be based on the legality of marriage according to the religion of the parties who get married. None of religions that recognized in Indonesia allows trans-sexual marriages. It means trans-sexual marriage is illegal according to Law Number 1 of 1974 on Marriage (Marriage Law).

**Keywords**— *Marriage, trans-sexual, legality*

## I. INTRODUCTION

Marriage is a form of sacred bond between men and women who have promised to build a household together forever, based on love, affection and awareness between the two. This relationship is a private affair according in the *Burgelijke Van Wet Book* (Known as BW)). But in National Law of Indonesia, marriage is considered as a government affair that regulated in Law Number 1 of 1974 on Marriage (Marriage Law).

Marriage according to Article 1 paragraph (1) of the Marriage Law is defined as an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Almighty Divinity. From the definition it can be concluded that marriage aims to unite between a man and a woman with a religious basis. It aims to maintain the psychology of both parties. The results of Kayla's research show that a person who has a trans-sexual marriage will experience major changes in life as a transitional relationship with his/her trans-sexual partner[1]. Therefore marriage can only carried out between a man and a woman, it means same-sex couple is prohibited to having a marriage. A marriage is legal if it is carried out based on religious provisions, as regulated in Article 2 of the Marriage Law "A marriage is legal if it is carried out according to the law of religion or belief of the couple and registered according to the applicable legislations".

As a result of the provisions in Article 2 of the Marriage Law, there is no opportunity for a same-sex couple having a marriage in Indonesia, because same-sex couple marriage is prohibited by any religions recognized in Indonesia. Also a couple with different religions cannot having a marriage in Indonesia, because none of religions that recognized in Indonesia justify interfaith marriages. The problem occurs when a couple who will getting married having the same

religion but one of the couples is trans-sexual, how is the legality of the marriage, Is the marriage can be carried out in Indonesia, or should it be carried out abroad and registered in Indonesia after? Trans-sexual marriages have been written by Day Wong [2], Karen L. Blair[3], Rhea Ashley Hoskinbut on the topic of Happiness In Marriage, but the focus of this paper is on its legality.

As an example is Dorce Gamalama who has a genital-change from man to woman and then married with Dinky Ardillano on wednesday night (15th May, 2013) or thursday (16th May, 2013) in the early morning around 00.30 WIB. The marriage held at Dorce's mosque in Lubangbuaya, Jakarta and witnessed by five witnesses. Is the marriage legal according to any religious law? Is it legal according to the Marriage Law?

## II. RESEARCH METHODS

This study uses normologies, which means that legal studies are related to various policy products, or legislation, but the product is not understood only as a formal binding text, but also seen that rules are a source of power and can function as a means of oppression, rules have dimensions of morality, ethics, politics, economics. This research will also try to use a transgressive approach which contains that this research is not focused on monodisciplinary studies or linear studies in its research, but also tries to use economics in this case the basic theories relating to LGBT.

## III. RESULT AND DISCUSSION

### A. *Trans-Sexual Legality Based on Religions Recognized in Indonesia*

The term trans-gender is different from trans-sexual. The discussion on what trans-gender and trans-sexual is, first, to know the meaning of gender and sex. Gender is the deepest part of men or women based on social culture (masculine and feminine). While sex refers to differences in chromosomes, hormones, male and female genitalia, and sex organs.

In conclusion, if someone has an identity that is not in accordance with their gender at birth, then it is considered as trans-gender. Trans-gender is a term that appears on the surface to describe a person's psychology which is in contrast to his biological sex. Like a man who has male genitalia but has character and appearance as a woman, and vice versa, a woman man who has female genitalia but behave like a man. They feel something wrong with the gender they carry and the biology of their genitals.

Trans-sexual is a condition of someone who feels himself supposed to be included in the opposite-sex. As result, they begin to assume the physical and gender roles of the opposite-sex. Trans-sexual usually use hormonal injections or other drugs that function to suppress and/or enhance the characteristics of the opposite-sex. For example, hormone injections to reduce facial hair or make breasts grow more. Even, not infrequently transsexuals choose to take gender reassignment surgery.

How religious viewpoints are about trans-sexual and trans-gender?. Pamela Dickey Young goes on to argue that there will be a variety of religious viewpoints concerning the legalization of same-sex relationships as marriages or marriage-like relationships[4]. Based on Article 1 of Law Number 1/PNPS/1965 on Prevention of Abuse and/or Blasphemy of Religion, there is a clause : " the religions recognized in Indonesia are Islam, Kristen, Katolik, Hindu, Budha and Khong Hu Cu (Confusius) ". If related to the study of sharia law the term trans-gender is closer to the term al-mukhannits (men who behave like women) wal mutarajjilat (women who behave like men). In the classical jurisprudence (Fih) it is stated that a mukhannits and mutarajjil status remains unchanged. Mentioned in kitab Hasyiyatus Syarwani :

في نقض فلا عكسه أو المرأة ب صورة الرجل ت صور ولو لم العين بأن ل لقطع ال ثانية في الوضوء ويد ن نقض الاولي صورة إلى صورة من ان دخلت وإنما ن قلب

"If there is a man changing his form with a female form or vice versa, then - if there is a man who touches it - his ablution is not invalidated in the first problem (a man who changes his form like a woman), and canceled his ablution in the second problem (a woman who changes form like a man) because it is ensured that there is no change essentially, what changes is nothing but the external form"[5].

In conclusion, trans-gender or trans-sexual cannot be changed in status, that is to say men are still men and women are still women.

Relate to takhannuts An-Nawawi said :

ال تخلق ي تكلف ولم كذلك خلق من أحدها ضرب ان المخنث اثم ولا عله نم لا وهذا وحركاتهن ولامهن وزين النساء بأخلاق أخلاق ي تكلف من وال ثاني معذور لأنه عقوبة ولا عيب ولا الذي المذموم هو ف هذا وزين ولامهن وسكناتهن وحركاتهن النساء لعنه الحديث في جاء

"There are two Mukhannits, first a person who is born in such conditions (mukhannits) and he unintentionally tries to behave like the behavior of women, clothes, speech and movements, such mukhannits are blameless, innocent, have no disability and are not burdened with punishment because indeed he is a ma'dzur (forgiven because it was not due to deliberate effort and effort from him). Second, people who deliberately try to behave like the behavior of women, their

movements, silence, speech and clothes. This second Mukhannits is what is cursed in the hadith"[6].

An example of a person who was born as a mukhannits named Maher Ibrahim Borhan, a man from Philippines since his birth in 1993, is believed to be a woman. Strangeness began to feel when he was growing adolescents her breasts did not get bigger and no menstruation. He is more interested in his female friends. This oddity felt when he grew Adam's apple in his neck. Maher began to feel something was wrong with him and decided to get a medical Test. Medical tests held during his college years, the results showed Maher was actually a man, so he began to change his appearance. Reporting from Viral4real Maher was apparently born with two sex organs.

Narrated by Ibn Abbas (RA):

وَالْمُتَرَجَّلَاتِ الرَّجَالِ مِنَ الْمُخَنَّيْتِينَ لَعَنَ وَسَلَّمَ عَلَيْهِ اللهُ صَلَّى النَّبِيُّ أَنْ النِّسَاءِ مِنَ

"The Prophet (May peace be upon him) cursed effeminate men (mukhannathan) and women who imitated men (mutarajjilat)," (Al-Bukhari, Abu Dawud).

This hadith explicitly states that the Prophet (SAW) cursed the behavior of takhannus and tarajjul which ensured that the act was unlawful. The reason and wisdom of the prohibition on such actions violating the nature that has been established by Allah SWT.

Al-Munawi said in his opus, Faidhul Qadir:

وضعها التي صدفته عن الشيء إخراجته تشد به من لعن وحكمة الحكماء أحكم عليه

"The wisdom of the curse of people who try to resemble the opposite-sex is to get something out of the quality set by the Supreme Master (Allah SWT)"

Men behave like women or vice versa, actually there are certain reasons which are judged not good according to Shari'a. This is similiar to opinion of Ibn Taymiyyah quoted by Al-Munawi in Faidhul Qadir:

وقد لهن ومباشرتة النساء عشرة ف صده ي كون قد والمخنث لأمرين ي جمع وقد له الرجال مباشرة ف صده ي كون

"A mukhannits sometimes aims to get along and get together with women, sometimes the goal is to be liked by men, and sometimes the goal is both" .

If there is a claim that in the past the Prophet (SAW) once let a mukhannits enter the middle of the women so that this shows that takhannuts are not forbidden, then in fact the incident was due to the person having the condition of his takhannuts from birth and it is suspected that he had absolutely no desire for the opponent-sex. But after it was discovered that he could mention the conditions every

woman in which environment he had entered, he was also prohibited from gathering with the women[6].

The conclusion from explanations above are:

1. Trans-gender or trans-sexual synonym with takhannuts and tarajjul.
2. Trans-gender cannot change gender status.
3. Trans-gender is haram and gets cursed.

The Bible does not literally discuss trans-gender, but it does deal with the topic of human sexuality. The simplest understanding of sex, that God created two (and only two) sexes: "male and female He created them" . An understanding of the various sexes or conditions of the unlimited sex is unbiblical.

The verse that deals with this topic is a condemnation of homosexuals and transvestites . The Greek word translated "homosexuals" or "sissy" in 1 Corinthians 6: 9 literally means "men who behave like women". Although the Bible does not address trans-gender directly, it does deal with other cases of genital "confusion", clearly regulates as sin things.

The Bible does not cite the existence of hermaphrodites (a condition in which a person is born with two genitals at once), which actually exists (although very rarely). People can be born with a variety of problems and deficiencies in the function and performance of the brain, there may be someone born with brain function that tends to gender dysphoria. However, that does not mean we have to accept it as normal and true. There are people who are born with very high libido. This condition does not allow them to act obscene. It has been clinically proven that psychopaths / sociopaths have a brain with self-impulse resistance. However, they are not allowed to do every evil action that comes to their mind.

Regardless of whether sexual deviations are caused by genetics, hormones, physical, psychological or spiritual conditions, they can be defeated and restored through faith in Christ and by continuing to rely on the power of the Holy Spirit. Healing is acceptable, sin can be overcome, and life can be changed by the salvation provided by Jesus, despite biological / physical factors. The believers at Corinth are examples of the changes Christ made: "And some of you were before. But you have been purified, you have been sanctified, you have been justified in the name of the Lord Jesus Christ and in the Spirit of our God" . There is hope for sinners, trans-sexual, trans-genders, those who experience interference with their sexual identity, including shemale and transvestites, because forgiveness from God is available in Jesus Christ.

Buddhism order that homo-sexual behavior is still gray, but most monks reject same-sex marriage. According to Bhikkhu Uttamo Mahathera, as quoted from the Indonesian Bodhi Buddhist Center website, that someone who behaves sexually perversely can follow the Buddha's Dhamma, after he/she knows the Dhamma, gradually, he/she will improve his deviant behavior.

Bhikkhu Uttamo Mahathera explained that trans-gender or trans-sexual behavior is violating the 3rd Precepts, which is

to commit immoral acts, which means to satisfy a deviant sensual desire.

In Hinduism (dharma), trans-gender or trans-sexual do not contradict the Dharma, as reviewed in a fanpage labeled Hindu on social media, its statement that people who live with compassionate devotion, and have mastered desires, impulses (sexual and others) have the same ability and possibility to achieve Moksha, even though he is trans-gender or trans-sexual. On the contrary anyone who is a slave to desire and lust will not reach Moksha. Hinduism does not discriminate against people who behave trans gender or trans sexual. Sruti sacred literature has no writings that support to treat trans gender or trans sexual people as inferior or support oppression of them.

Hindu saint, Shri Sri Ravi Shankar, believes, "Homosexuality has never been considered a crime in Hinduism. In fact, the Ayyappa deva was born from Hari-Hara (Vishnu and Shiva). So this is not mentioned as a crime in the holy literature of Smriti. Everyone has male and female elements. According to their dominance, tendencies will emerge and can change. No one must face discrimination because of their sexual preferences. Being labeled a villain because this doesn't make sense".

The conclusions of Shri Sri Ravi Shankar's opinion are :

First, trans-gender or trans-sexual is not a crime, but it is still a sin that is borne by each individual. Hinduism does not justify marriage between men and men (gay), women and women (lesbian). In other words, homo-sexuals are not given the right to get a wedding or marriage ceremony with a Vedic puja mantra.

Second, there are several versions of the birth of the Lord Ayyappa. One of them mention that the Lord Ayyappa is the spiritual son of the Lord Vishnu and the Lord Shiva. Lord Ayyappa was not born of a god with a god or Hara with Hari, but the Lord Vishnu was transformed into Mohini, a very attractive woman. Lord Ayyappa was born spiritually from Lord Shiva with Mohini (female avatar of the Lord Vishnu). It was a mistaken if the mythology used as a reference as a justification for trans-gender or trans-sexual, without considering the purpose of union between Lord Shiva and Lord Vishnu. Similarly to superficial interpretation of Arjuna became a transvestite named Brihanala as a justification for the existence of transvestites. It is very clear, Arjuna's goal to become Brihanala for a noble goal, to not uncover the Pandavas disguises. The prohibition of marriage between homosexuals is clearly regulated in the scriptures, especially in the Manawa Dharmasastra and Kama Sutra scriptures. Homosexuality in the Vedic literature is called Auparistaka.

Trans-gender or trans-sexual is not a grave sin according to Confucius. Therefore Confucius is a unique religion because its tenet are more focused on the relationship between humans than with God.

#### *B. The Legality of Trans-Sexual Marriage Under National Law of Indonesia*

Marriage in Indonesia regulated in Law Number 1 of 1974 on Marriage. Article 2 regulates the legality of a marriage :

- (1) Marriage is legal, if it is done according to the law of each religion and belief
- (2) Every marriage registered according to applicable laws and regulations.

This means that the marriage is legal if it based on the religion of the parties that carry out the marriage and is registered in accordance with applicable law.

Related to trans-sexual marriage issue, it is necessary to analyze first whether trans-sexual intercourse is allowed based on each religion. Religion is the legal foundation of marriage according to Article 2 of the Marriage Law. Whereas marriage registration is a condition of administration.

Based on the explanations relating to the legality of transgender or trans-sexual according to recognized religions in Indonesia, it can be concluded that all religions refuse. Even Confucianism considers trans-gender or trans-sexual acts a sin, even though it is not a major sin. If trans-sexual is not justified, then trans-sexual marriages are also considered to violate religious rules. Any recognized religions in Indonesia does not justify trans-sexual marriages on the grounds that trans-sexual violates their nature. This means that someone who is born with the nature of women or men should not violate his nature by changing his sex. In other words, a woman who changes her sex as a man will still be recognized by religion as a woman, and vice versa. Therefore trans-sexual marriages are considered as a form of lesbian or gay marriage which is strictly forbidden by all religions. In Spain trans-sexual are under pressure from society and the country's political policies. they are forced to comply with regulations that deny trans-sexual existence and homo-sexual relations[7]. Lisa's research results show that: "Trans-sexual have gained recognition in America, however they are still legally underestimated by the police, especially when making out in recreational areas"[8].

Based on the description above it can be concluded that trans-sexual marriages are that deviate according to religions tenet. This means trans-sexual marriages are illegal according to Article 2 of the Marriage Law, considering that the marriage does not appropriate to the conditions mentioned in paragraph (1), which must be legal based on the religion of the man and woman who committed the marriage.

The conditions stipulated in Article 2 paragraph (2) of the Marriage Law can only be carried out if the marriage is legal. Because Article 2 paragraph (2) is an administrative requirement that follows paragraph (1).Conclusion

#### IV. CONCLUSION

Marriage can only be carried out by a man and a woman according to their nature. Marriage conducted by men and women, one of which is trans sexual, is an illegal marriage based on Article 2 of the Marriage Law, because there is no religion that allows a person to change his nature. While religion is the legal foundation of marriage.

As a suggestion that trans-sexual should only be carried out by those who outwardly have multiple sexes, because by nature he/she shows characteristics as male or female. This means that he/she does not change nature but only clarifies his/her nature. This does not violate the provisions of religion.

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