

Access to Justice for Transgender People in the Perspective of the State Law of Pancasila Through Legal Empowerment

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ABSTRACT

This research will discuss access to justice for transgender people from the perspective of the state law of Pancasila through legal empowerment. This research uses a juridical normative research method in a prescriptive form, which identifies the main issues to be discussed thoroughly with the legal norms contained in Article 28G and Article 28I of the 1945 Constitution of the Republic of Indonesia, Universal Declaration of Human Rights, International Covenant on Economic, Social, and Cultural Rights, International Covenant on Civil and Political Rights, and several related laws and regulations. From the research results, it is found that transgender people have not yet obtained access to justice in law enforcement, in addition, the rate of violence against transgender people in Indonesia is high, even though national and international norms require equal rights for everyone, including transgender people. The rule of law of Pancasila is to seek and construct human rights from various legal systems in accordance with the original values of the Indonesian nation.

Keywords: transgender, discrimination, the Pancasila rule of law, legal empowerment, justice.

1. INTRODUCTION

In Indonesia, trans people are seen as an abnormal minority group that adheres to a sexual orientation against the cultures in Indonesia. This trend is also believed to be more prone to diseases. This group has been struggling and voicing concerns for their category of people and campaigning for their rights. The terminology of LGBT (Lesbian, Gay, Bisexual, and Transgender) in Indonesia always provides pros and cons, especially regarding whether LGBT people have the right to live in Indonesia and whether marginalized people are a threat to the Indonesian nation. Based on data from Saiful Mujani Research and Consulting (SMRC), 41.1% of Indonesians state that LGBT people do not have the right to live in Indonesia, and 87.6% of people are threatened by the existence of LGBT people. Meanwhile, 57.7% of Indonesians think that LGBT people have the right to live in Indonesia, but this does not mean that LGBT people are free from threats of violence and discrimination. In Indonesia, LGBT people, especially transgender people, are often get criticized. Based on data from Community Legal Aid Institute in 2017, there were 937 cases of violence and discrimination by LGBT people, and 73% targeted transgender people [1]The gender construction created by society places men as masculine people, while women are feminine, so that if someone behaves not in accordance with this construction, the community considers it a deviation [2]. Therefore, in people's lives,

transgender people often become national targets of acts of violence. With the rampant cases of violence and discrimination against transgender people in Indonesia, the authors question the responsibility of the state in carrying out the constitutional mandate contained in paragraph IV of the Preamble to the 1945 Constitution of the Republic of Indonesia, which reads "... protect the whole people of Indonesia and the entire homeland of Indonesia ...," as well as Article 28G and Article 28I of the 1945 Constitution of the Republic of Indonesia. In addition, Indonesia has also ratified the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), which are instruments for the protection of international human rights. This is because transgender people are also human beings who have a dignity that the state must respect and protect. The Indonesian nation also has a fundamental norm, namely Pancasila, which is the source of all sources of law in Indonesia and has an open nature. Pancasila is an open ideology [3]. Where Pancasila can be adapted to the times so that it is dynamic and adaptive. In an open ideology, there is a dialogue between the noble values idealized in Pancasila and the empirical conditions that occur in society, thereby harmonizing the values of Pancasila with the actual conditions in society. Thus, this article will discuss the openness of the Pancasila ideology, which is combined with human rights values and instruments (both national and international) in order to protect the rights of transgender people in Indonesia.

2. RESEARCH METHOD

This research is conducted by juridical normative research method in a prescriptive form, which uses the law as the foundation of the norm. Identifies the main issues to be discussed thoroughly with the legal norms contained in Article 28G and Article 28I of the 1945 Constitution of the Republic of Indonesia, Universal Declaration of Human Rights, International Covenant on Economic, Social, and Cultural Rights, International Covenant on Civil and Political Rights, and several related laws and regulations.

3. FINDINGS AND DISCUSSION

Transgender is a term that describes people whose gender identity or expression does not match the sex they were assigned at birth, a trans, someone who uses gender attributes that are different from the conceptions that are socially constructed by society [4]. For example, society considers that a man must behave masculine, firm, and tough. Meanwhile, women must behave feminine and gentle. Therefore, if there are men who behave weakly in bulls or women whose behavior tends to be masculine, it will be considered as a deviation. Based on the explanation from Oetomo, the term transgender became popular in the 1970s, which is intended to describe individuals who lead cross-gender lives without going through the stages of sex-change operations. Around the 1980s, an umbrella term appeared, which was intended to collect all gender identities for individuals whose behaviors are not according to their gender [5]. In Indonesia, the term transgender is often equated with the term transsexual, even though the two are different. Transsexuals are people who experience a gender identity that is inconsistent with their assigned gender and wish to permanently transition to a specific gender, usually seeking medical assistance to fit their body with a specific gender [6]. This study discusses transgender because transsexuals are also part of transgender, while transgender people are not necessarily part of transsexuals.

The problems experienced by transgender people in Indonesia are quite diverse, ranging from scorn from the public, religious leaders, even politicians, problems of poverty, humiliation, and even physical violence. Based on data from Community Legal Aid Institute (2017), in Indonesia, there are around 973 reports of violence against lesbian, gay, bisexual, and transgender (LGBT) people, of which 73% are violence experienced by transgender people, especially transgender people. In 2020, Community Legal Aid Institute also released data on the most dominant actors in spreading the bad stigma against LGBT people, in which the first position was community organizations (mass organizations) and non-governmental organizations (NGOs). In addition, in the same data, there are also members of parliament who often issue stigmatizing statements against LGBT people for political purposes. The following are statements of several figures

who are considered discriminatory against transgender people (or LGBT in general): 1) Chairman of the Indonesian Islamic Boarding School Association, K.H. Ahmad Zaini, in his statement, once conveyed to the Indonesian Solidarity Party (PSI) that instead of making an ad against polygamy, it would be better to make an advertisement for rejecting drugs and LGBT, because it is considered more dangerous and has the potential to damage the younger generation [7]. 2) Member of Commission I DPR RI from the United Development Party (PPP) faction Syaifullah Tamliha once said that "There is no place for LGBT in Indonesia, because our country is not a religious state, but a country that has a religion. for Muslims, the Bible for Christians, and the Torah for Jews, and others prohibit same-sex marriage" [8]. In addition, there are several difficulties faced by transgender people in order to fulfill their rights as citizens, including the following: 1) Chairman of the Forum Indonesian transgender woman, Yuli revealed that 50% - 60% of elderly transgender people do not have an identity card which makes it difficult for them to get access to social assistance during the Covid-19 pandemic [9]. 2) Chairman of the Suara Kita Association Board of Directors, Hartoyo, stated in his statement that many transgender people do not have population documents such as electronic identity cards (KTP-el), family cards (KK) and birth certificates. This results in some difficulties in accessing health services, especially social security, namely BPJS Kesehatan [10]. From the description of the sociological data above, it can be seen that transgender people in Indonesia are still often the target of discrimination from various parties. The social construction that is indirectly created by politicians and public figures can result in a biased perspective from society towards transgender people. Apart from discriminatory actions, the government's lack of effort to ensure the fulfillment of the rights of transgender people as citizens is also lacking. This is evident from the difficulty of transgender people in obtaining social assistance and health insurance because they do not have identity cards and other population documents. Supposedly, the state must act fairly in fulfilling the rights of its citizens because transgender people are none other than human beings whose rights are protected by law, both national law and international law.

Apart from the construction of society, the construction of the media also plays a role in directing the public's perspective on transgender people, for example, the mass media, which often reports on negative things about a transgender person. So far, some people still think that transgender people are synonymous with commercial sex workers (CSWs), make-up artists, and street singers, even though there are not a few transgender people who have positive roles. For example, the Bugis ethnic group in Indonesia recognizes three genders apart from men and women, namely calabai (a man who behaves like a woman), calalai (a woman who behaves like a man), and bissu (a man that is not a man, male and not female, neither a calabai nor a calalai) [11]. However, most bissu are calabai, who are basically transgender men. Bissu had a

special and honorable position during the pre-Islamic kingdom in South Sulawesi; they were made royal advisors because they had knowledge of customs, traditions, family tree, social life in the world, and the life of the gods, mastering medicine and mysticism [12].

The social construction created by society, the rampant negative coverage of transgender people by the media, the influence of religion, the absence of adequate human rights protection instruments, and the lack of openness from society ultimately raises the stigma that transgender people are deviant human beings who do not have the same dignity and dignity human in general. This kind of stigma makes transgender people vulnerable to discrimination and human rights violations.

Before the entry of Islamic influence in South Sulawesi, the indigenous people of the Bugis tribe recognized five gender classifications, namely men, women, calabai, calalai, and bissu. The word bissu comes from the word *bessi*, which means a person who is holy; this holiness is supposed because bissu does not experience menstruation, does not have breasts, and does not bleed [13]. Bissu plays a role in traditional ceremonies because of its ability to master the language of the gods so that it becomes an intermediary between humans and gods. Bissu generally comes from the calabai group, namely men who behave like a woman, although not all calabai are bissu. To become a bissu, a calabai must have certain qualities, for example, mastery of mysticism and reading of the signs of nature, can read lontar, and other signs. Therefore, the pre-Islamic position of bissu in Bugis lands was highly respected [14]. However, when the influence of Islam began to spread in South Sulawesi, especially among the indigenous Bugis tribes, the existence and role of bissu waned. For example, the role of bissu in leading the ceremony was replaced by Puang Kali, because the followers of Islam at that time considered that the existence and role of bissu violated religious norms. They (bissu) are also considered idolaters because worshippers of gods are considered to be against the Oneness of God [13].

The bissu in Bugis land experienced the peak of darkness during the DI/TII (Darul Islam/Indonesian Islamic Army) rebellion, where many bissu experienced violence; for example, they were forced to repent, the facilities for the ceremony were burned, their heads were shaved, and even some bissu were thrown away to the sea and finally died. As a result, many bissu chose to flee to the forest to survive [13].

The bissu, calabai, (and calalai) are generally transgender people; currently, their existence is often considered as pests by society [15]. Apart from negative social constructions, the influence of religious fanatics also results in frequent acts of discrimination against transgender people of this kind. In fact, there are not a few transgender people who play an important role, both in government and in terms of customs.

In this article, the rights of transgender people that will be discussed include civil and political rights, which include the right to life, freedom of opinion, and the right to have a religion and belief. Especially in economic, social, and cultural rights, the state has an active role in

guaranteeing and fulfilling these rights. Therefore, these rights are known as positive rights [16]. Protection of the rights of transgender people cannot be separated from the concept of protecting human rights; even though they are often underestimated, transgender people are just the same as other people. In human rights, there is a principle of universality; that is, even though everyone is born with different skin color, gender, language, culture, and nationality, they still have these rights. From this principle, it can be seen that transgender people, regardless of their sexual orientation and behavior, must have their human rights guaranteed and protected by the state, as is the main obligation of the state to protect, respect, and fulfill human rights in general [16]. Human rights are also inseparable from the principle of equality and the principle of non-discrimination. The principle of equality requires equal treatment, where the same situation warrants the same treatment. The principle of non-discrimination means avoiding actions that result in inequality caused by unequal/equal actions [16]. From these two basic principles, it can be concluded that neither the state (government) nor its citizens are allowed to commit acts of a discriminatory nature, especially against transgender people who are very vulnerable. The state should protect the basic rights of transgender people and eradicate all forms of discrimination, both acts and verbally. In protecting and respecting human rights, it is also recognized that there are rights that can be derogated (excluded) and that cannot be derogated (non-derogable). Some of the non-derogable rights are as follows: the right to life, the prohibition of torture, the prohibition of slavery, protection against retrospective operation of criminal laws, and freedom of thought, conscience, and religion. In Indonesia, these rights are contained in Article 28I of the 1945 Constitution of the Republic of Indonesia, which reads: "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted based on retroactive law is a human right that cannot be reduced under any circumstances." Indonesia, as a state party that has ratified the convention with Law Number 12 of 2005 concerning Ratification of the International Covenant On Civil and Political Rights (International Covenant on Civil and Political Rights), has an obligation to implement these provisions. Especially in relation to the rights of transgender people, the state is obliged to guarantee the right to live, protect them from acts of torture, and guarantee them to be able to worship according to their religion and belief. This is in line with the constitutional mandate contained in paragraph IV of the Preamble of the 1945 NRI Constitution, which reads "... protect the whole people of Indonesia and the entire homeland of Indonesia" Likewise, the state has an obligation to fulfill and protect other rights of the transgender people, as regulated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). For example, the right to social security, as stated in Article 9 of the ICESCR and mandated in Article 28H of the 1945 Constitution of the Republic of Indonesia,

transgender people as citizens are also entitled to social security provided by the state. Other rights include the right to work, as regulated in Article 6 of the ICESR and Article 28D Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In other human rights instruments, the Universal Declaration of Human Rights (UDHR), namely in Article 21, the first point reads, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." In Indonesia, the right to participate in government has been guaranteed in Article 28D Paragraph (3) of the 1945 Constitution of the Republic of Indonesia and further elaborated in Article 43 of the Law. Law Number 39 of 2009 concerning Human Rights.

In this case, the state must provide equal opportunities for every citizen to participate in governance, including transgender people. Marginalized people like transgender people also need representatives in parliament who can voice their rights. For example, in the United States, in 2017, the Governor of Pennsylvania appointed dr. Rachel Levine, who is a transgender person, becomes the Head of the Pennsylvania Health Service. In 2021, US President Joe Biden even appointed her to be deputy US health minister after getting approval from the state Senate [17]. This is a positive example that transgender people also have expertise in certain fields and remove the stigma that transgender people are always synonymous with commercial sex workers, make-up artists, and street singers.

The rule of law of Pancasila is a concept of the rule of law based on the values of the Indonesian nation, which are crystallized in Pancasila. The rule of law of Pancasila is a prismatic state of law, which is a combination of various elements from various legal systems, then integrated into a new and complete system. Religions are integrated into it so that a prerequisite is created that legal certainty must be upheld to uphold justice in a society according to the principles of Pancasila [18]. One of the values of Pancasila is the value of humanity as stated in the 2nd principle of "Just and civilized humanity."

In the context of Pancasila, it is based on the second principle of "Just and civilized humanity" that transgender people are also human beings who have dignity. Humans are creatures that, in the perspective of social justice, access, participation, and social control of society, including transgender people, must get as citizens. Transgender people are also entitled to the benefits of development and welfare. For example, the right to social security, good health services. Thus, this research suggests:

1. For the Community

In fulfilling the rights of transgender people as described above, society plays a very important role. If society only views transgender from a negative side, then discrimination against transgender people will continue to occur. Therefore, people must open themselves and broaden their views by looking at the positive side of transgender people.

2. For the Government

The government is a representation of the state, which is an actor in the human rights context, especially because the state has an obligation to protect, uphold, and advance human rights that are at least intended for its citizens. So the Indonesian government is obliged to make efforts to protect and fulfill the rights of transgender people who are part of the Indonesian nation.

3. For Law Enforcement Officials

In carrying out its role as an actor of law enforcement in Indonesia, it is fitting that law enforcement officials, in carrying out their roles, adhere to the principles of justice and equality. Law enforcement officers must not look down on transgender people because transgender people are also human beings whose dignity and self-worth are protected by law. So, law enforcement officers need to be provided with good training and understanding so that they have sensitivity in overcoming problems for marginalized people, especially transgender people.

4. For Community and Religious Leaders

Religious and community leaders must be given socialization about how to be fair to marginalized people such as transgender people. With a good understanding, it is hoped that the views of the community and religious followers in Indonesia can also have a positive understanding of transgender people and realize that they are an inseparable part of the Indonesian nation.

4. CONCLUSION

Based on the discussion above, the rule of law of Pancasila can protect the rights of transgender people and does not contradict the values of Pancasila because Pancasila is an ideology that is open to developments in society. Based on this research, the rights of transgender people in Indonesia still need to be protected with specific legal instruments. The absence of legal instruments makes it unclear to what extent the rights of transgender people can be protected by the state. In human rights, there is a principle of universality, namely that all people in all parts of the world and, regardless of religion, nationality, language, ethnicity, regardless of political and anthropological identity, and regardless of their disability status and sexual orientation have equal rights. This principle, it must be guaranteed that transgender people's human rights, regardless of sexual orientation and behavior, must be protected and protected by the state, the main obligation of the state to protect, respect, and fulfill human rights in general.

As Roscoe Pound has stated, the law is a means of social engineering [19]. According to Soerjono Soekanto, it can also be interpreted as a means aimed at changing the behavior of citizens in accordance with predetermined goals [20]. The negative stigma created by the wrong views and attitudes of society towards transgender people can be changed through the rule of law. In this case, the law plays a role in directing the views of society. What are the concrete solutions of social engineering? The answer is by

accommodating the rights of transgender people, the right to work and decent wages, the right to social security, the right to access to health, the right to develop one's potential, including the right to participate in government, whether they are directly involved as has been done by Dr. Neither Rachel Levine nor directly like involvement through the general election[17]. With the protection of rights accommodated by law, the perspective of the society that tends to view transgender people negatively can be changed slowly through legal instruments. The law should not become someone's restraint to develop the potential and talents in everyone. According to Aristotle, man will not get happiness if he does not actively realize his talents and the potentials contained in him [21]. Likewise, transgender people who are also human beings have the right to develop their potential and talents. In order to develop their potential, for example, through education and training, transgender people often experience discriminatory actions that restrict them from developing their potential. So, in this case, the law exists to protect the rights of transgender people. Founded on the principle of universality, the principle of equality, and the principle of non-discrimination, which are the main principles of human rights, the law in Indonesia must be constructed as a law capable of respecting and fulfilling the rights of its subjects, especially transgender people. Every time the rights of transgender people are violated either by fellow citizens or by means of state power, the law must be present to provide protection.

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