

# Transgender Between Culture and Positive Law

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**Abstract**—The transgender issue in Indonesia is get quite attention, in this article focuses on the existence of transgender in cultural and legal viewpoint. In answering the problem by using historical approach as well as statute approach. Transgender that are more commonly known as "bencong" or "waria" in the community began to be known along the formation of transgender, lesbian, gay and bisexual (LGBT) organizations in the late 1960s. Even if you look at the history since pre-Islamic times, gender crossers have been known. Transgender is very close to Indonesia culture. They have fairly central role, in art activities such as "ludruk", "rateb sedate dance", in the religious ritual "bissu" in Sulawesi. And some art symbols today, transgender do not take much role in culture. Recognition as culture part is not directly proportional to the existing positive law. In the positive law there is no third gender. Although LGBT organizations ask the government to give recognition to the third gender as in Thailand. Even if they have rights, but constitutionally the right as part of state giving, it can be because they are citizens.

**Keywords**—transgender, law, culture

## I. INTRODUCTION

Many studies have discussed the transgender issues, especially after the emergence of lesbian, gay, bisexual and transgender (LGBT) issues in the 1960s, accompanied by the establishment of LGBT organizations such as: Hiwad, Gaya Nusantara, Srikandi. Research is carried out from many perspectives, one of which will be discussed in the cultural and legal perspective in Indonesia. Cultural diversity in Indonesia, more or less has been introduced to public about "transgender" and ultimately brought into their daily lives, though with different terms. From Sumatra, Java and Sulawesi and others.

Cultural activities involving transgender have been greatly reduced, but the number of transgender increases out of cultural activities (Representing themselves). There are pros and cons about transgender existence. Between acceptance and refusal, the public perception is very strong to be able to categorize that there is wrong action in those who appear not in accordance with the their gender type (innate from birth). For example, how do people criticize public figures such as Milendaru, better known as millen cyrus because he is transgender (male who look female). Transgender acceptance in general is still acceptable if it is part of the cultural procession. This then led to discrimination acts against them. Some jobs do not allow to receive individual transgender, so many of them become "selegram", "salon owner," and other informal jobs. Even to

be civil servant or SOE employee who sets strict conditions with female or male gender. Not all public facilities can be accessed. This is not because the state does not give recognition to the transgender.

When the LGBT problem began to heat up, the transgender got the impact. Rejection of the group existence emerged from various groups. Representing religious groups, the general public, even from government institutions. Entertainment that contained content relating to transgender is stopped. Following the issuance of Decree from The Indonesian Broadcasting Commission (KPI). KPI in the Broadcasting Behavior Guidelines and Broadcast Program Standards in 2012 prohibits programs that stigmatize "people who have a certain sexual orientation and gender identity. KPI requests that broadcasters not display men as hosts, talent, as well as other performers (both actors and supporters) who have a look like:

1. Women's dress style;
2. Female make up;
3. Female body language (including but not limited to gait, sitting style, hand movements, or other behaviors);
4. Female speech style;
5. Showing justification or promotion of a man to behave as woman
6. Showing greetings to men as they should be for women;
7. Showing typical terms and expressions that are often used among transexual

Access to information via television is most widely absorbed by the community. So it is not surprising that KPI gives restrictions on broadcasts. However, in reality, we can still see some broadcasts that are filled with "transgender" content. At comedy shows, in horror films, etc. Culture is an integral part of Indonesian law. So it will be difficult to refuse, it is also difficult to give recognition, because this is not accepted by the majority in Indonesia.

## II. RESEARCH METHODS

To discuss problem by using doctrinal legal research, with legal history approach, and statute approach. So able to analyze how the existence of transgender in the culture corner Indonesia and how the law in Indonesia positioning transgender. Either from the Constitution, the Human Rights Law, Population Administrative Law, and other supporting laws.

### III. RESULTS AND DISCUSSION

Transgender is part of Indonesian citizens. Its existence must be equated with other citizens. Regardless of the gender choice. Etymologically, transgender comes from two words, trans means to move, and gender means sex. Gender can also be interpreted as gender biologically, but also its role in society as male and female sociologically. Transgender in question is someone who has gender identity or gender expression that is different from the gender they have at birth, both from woman to man, and vice versa. The words we often use in society are "bencong" or "waria".

Waria is a term in the society that has an extension of 'pria-wanita(man-woman)'. Wariais previously known by the term of wadam which has an extension of 'wanitaadam (adam-ladies)'. From those two terms, it seems that the term wariasurvives until now to indicate men who behave and speak like a woman. Wariaexists in every region. Wariais a part of the minority groups and organizations that possess organized activities [1].

The first organization emerged which fight for the transgender rights was the Djakarta Wadam Association (Hiwad) in the late 1960s, the term wadam (Wanita Adam) was introduced as a substitute for the insulting sissy or bencong word[2]. in Yogyakarta an organization called IWAYO (Association of WariaYogyakarta)This term was later replaced by transvestite (male woman) in 1978 because the Indonesian Ulema Council found it inappropriate to name prophet (Adam) as part of the term for men who express their gender in way that is more like woman, then there were many similar organizations, especially about the homosexuality. And the big one is the organization "Srikandi Indonesia".

Even before the existence of Hiwad organization, there were many individuals who carried out gender crossings. For example, how state law and cultural history positioned transgender today. If they see reality, they are present but many are rejected.

#### A. *Indonesian cultures that are close to transgender.*

There is no doubt that Indonesia is one of the countries with so many living cultures. Stories, symbols, regional languages, regional songs, musical instruments, dances, even rituals performed by indigenous tribes. The rituals of death, birth, marriage, etc. And in this cultural activity many can be done by traditional elders, by small children, by teenagers both male and female, or carried out by those who are men but act like women or even vice versa. Culture that lives in Indonesia that knows gender crossing, such as:

#### 1. Bissu "is known in South Sulawesi culture.

Tom Boellstorff said that Bissu had existed for a long time, considered to be holy person and was liaison with the god. And considered a male hemaprodite.

"The community of Bissu is a part of Indonesian pre-Islamic tradition. In the tribe of the Bugis, Bissu is a hermaphrodite man. He is regarded as a sacred person because of his power to dialogue with the goddess. Bissus are mediators between the goddess and the people on earth. To conduct their rituals, Bissu wear androgynous costumes"[3].

In fact, in the Bugis community, for example, there are even at least five genders known as different Bissu The analogous ones are oroane (male) makkunrai (female), and the other three are referred to as bissu, calabai, and calalai. Bissu represent aspects of women and men, who become spiritual leaders after the pilgrimage. Chalabai represents aspects of being born male and then become a woman. While Calalai represented aspects that were born as women and then became men[4].

Sharyn Graham once conducted research on "Bissu" as outlined in paper entitled "Sex, Gender and Priests in South Sulawesi, Indonesia" giving an overview of "Bissu" in South Sulawesi. They place Badi '(a big knife) and flowers as symbols of masculinity and femininity [5].

Although bissu classified as transsexual, they are not usual transgender. To be bissu, a transgender person to be ordained (irebba) firstly. They have supernatural power, in addition to a role in ritual ceremonies .They also have a position in society as guardians of sacred heritage (arajang) in a palace believed to be inhabited by ancestral spirits. The tradition of cross-dressing (men who act as women) in the Bugis community has been going on since hundreds of years ago [6].

Bissu's existence is real example that in Indonesian culture it is well known that gender crossing practices that we know today are transgender. And the position of Bissu is considered a saint and also the god liaison proves that they are recognized and respected for their existence. Unlike the current transgender conditions. The existence of Bissu is diminished, especially after the rebellion of the Darul Islam / Indonesian Islamic Army (DI / TII) rebellion which strives to abolish and forbidding all who are considered polytheists or associating God for Muslims in 1950-1965. The numbers are shrinking especially after the tragic events experienced by bissu during the Old Order and the New Order.

2. In cultural symbols, such as the statue of Ardanarishvara / Ardhanary (14th century), which is found in the Medan Merdeka Barat Museum, Jakarta. The name "Ardanarishvara" is combination of three words namely, 'ardha', 'nari', and 'ishvara', which means God 'half', 'female' and 'male' [7]

#### 3. Ludruk Art in East Java

In Java Island, homosexual development and gender crossing clad in culture and art thrived until now it can still be found. One of them is the art of "Ludruk" in East Java, namely art that displays dialogue and dance, or singing. Actually ludruk is identical to the role of women (thandhak) played by men. According to various sources, the origin of thandhak is influenced by the culture of the East Java community pesantren which prohibits women from being on stage with men. Even so, until now Ludruk is still traditional art that is synonymous with the presence of male players who dress up in women. If previously this thandhak ludruk player was a man who only dressed up women on stage, currently thandhak ludruk players are played by transgender or the layman we call "transvestites" [8].

#### 4. Rateb Sedati in Aceh

Not only that, Aceh, which is known as the Serambi Mekah, which since 2005 has implemented Islamic law

(Islamic Shari'a), has long known homosexuality and strong gender crossing in the art of "Rateb Sadati Art" in Nangroe Aceh Darussalam which was danced by 15-20 adult men with a beautiful boy.

Culture is part of human rights, as in the General Declaration of Human Rights (GDHR) and in the International Covenant on Social, Economic and Cultural Rights. So the actions that reduce rights will basically be contradictory actions. Culture that grew along with adat also became Indonesia's most important legal source, even before independence. Transgender in culture will differ from those who are outside their cultural role. Transgender in culture are not usual person. So the state need to see from viewpoint of history, in determining attitudes and policies related to the transgender position in Indonesia.[9]

#### *B. Indonesian law regulates the position of Transgender.*

There is nothing specifically regulating the law concerning transgender. If it is seen in the legislation. But there is also nothing that explicitly prohibits the existence of transgender. There are only two sexes known in Indonesia, namely men because the third gender is not known in Indonesia, although if you go to Thailand there will be many, beautiful men or handsome women. Even if someone wants to be recognized as a woman or a man must be able to show their identity. The following is the statement that confirms that there are only two types of gender in Indonesia.

##### 1. In Law No. 1 of 1974 concerning Marriage

Interpretation in Law No. 1 In 1974, especially Article 1, which was more or less consistent, "marriage is a relationship between men and women". that means only men are recognized. There are no half men and half women. Even if they look up to what happens, what the state recognizes is in accordance with their identity.

##### 2. Provisions in Law No. 23 of 2006 concerning Population Administration.

This provision for transgender people is a problem, because the difference between gender statements and their appearance can be difficult in terms of obtaining services, traveling, managing business licenses and so on[10]. Sometimes, thanks to the results of advocacy by transgender organizations or AIDS prevention services, local governments can provide dispensation, although this is not always possible and can change at any time. If you see a variety of self-identity columns, the sex will be very difficult, even there is no column that provides gender other than men and women.

If transgender wants to get recognition of his new choice. Then there must be several stages of gender change even though the rules of positive law do not yet exist. But it can refer to the provisions in the Law No. 24 Year 2013 on the Amendment of Law No. 23 of 2006 concerning Population Administration. In Article 56 paragraph (1) there is clause as "other important events". In Elucidation of Article 56 paragraph (1)

that "What is meant by other important events is the event set by the "district court" to be registered with the implementing agency, including gender changes".

Like what Dorce Gamalama has done. Or what is currently done by artist Lucinta Luna, when she was born she was a man but because she felt her instinct led her to change her sex and become woman. This can be triggered because of the environment in which you associate, because of dissatisfaction with what you get at birth (congenital genitals). As well as the desire for satisfaction if you can use clothes, dress up or position yourself on the opposite gender. With this change, the community is slowly able to accept and consider "Dorce" as a woman.

Sex change or transsexual is known since the development of the DSM method [10] . Someone to be able to carry out sex change operation according to the IDI standard (Indonesian Doctors Association) must be preceded by observations by team of doctors which includes psychological tests, hormonal tests, personality tests, health tests conducted by experts such as psychiatrists, psychologists, surgery, natural diseases , genetic, obstetric and gynecology.

The next process is to get approval from the state, it must be preceded by the determination of the court beforehand as mandated by the Population Administration law. Because without the endorsement of the state, there will be no recognition, this affects the availability of the state to fulfill its rights . And because it is not permissible a person can change, change, or add to his identity. With the existence of certain types of changes there are of course also changes regarding population data, especially relating to administrative activities, permits, passports, marriage, adoption, worship, political realm, welfare guarantees, employment, etc.

And also clearly stated in Law No. 24 Year 2013 on the Amendment of Law No. 23 of 2006 concerning Population Administration in article 3.

"Every Resident is obliged to report the Population and Important Events that he experiences to the Implementing Agency by fulfilling the requirements required in the Population Registration and Civil Registration"

Thus, someone who has made gender change (transsexual) is required to report changes to the data on his residence identity to the Executing Agency, in this case what is meant by the Implementing Agency is the Population and Civil Registry Service in the relevant Regency / City Government. Only after that can use new status.

This process is not easy for transgender people to go through. Many factors become their basis. The lack of confidence in choice, because if you want to change your identity, one of the beginning is change of sex. And this is not a matter of cheap costs. It is quite expensive to do it. Only need different hair, clothes, makeup, how to talk, how to walk.

After the process is complete, the transgender has officially assumed a new gender status. Recognition is only given if gender changes occur. Not just physical changes.

3. Based on the attitude shown by the Central Board of the Indonesian Psychiatric Specialist Association (PP PDSKJI), it was suggested that Transsexuals as People With Mental

Disorders (ODGJ), as referred to in the Mental Health Act No. 18 of 2014, referred to as ODGJ.

People With Mental Disorders are, people who experience disturbances in thoughts, behaviors, and feelings manifested in the form of a set of meaningful behavioral symptoms and / or changes, and can cause suffering and obstacles in the functioning of people as human beings.

This statement raises opposition. The Transgender cannot accept if it falls into the category of people with mental disorders. Because if you enter mental disorder, then one of efforts to do through rehabilitation as way of healing. Whereas they judge, that being transgender is basic right they want to fight for.

In the absence of rule that recognizes the third gender. Affirming Indonesian law does not recognize the existence of transgender. As minority group in Indonesia, LGBT groups in which there are transgender people continue to fight for their rights especially related to sexual orientation and gender identity. Although not recognized. But as a legal state, each action based on law and one of the strict rules is to include human rights. As the character of legal state.

One of them eliminates the discrimination acts as stipulated in Article 28 H in the 1945 Constitution. Every person is free from all forms of discrimination on any basis. This means that even if there is no third gender recognition, there should be no discrimination, demeaning human dignity, differences in gender orientation. Likewise in Article 1 of the Universal Declaration of Human Rights, secondly International Covenant on Civil and Political Rights (ICCPR) of 1966; and thentthirdly, International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Indonesia has ratified the ICCPR by Law of 12 of 2005 on the Ratification of the International Covenant on Civil and Rights, in addition to ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR) by Law of 11 of 2005 on Ratification of International Covenant on Economic, Social and Cultural Rights.

In international human rights instruments, it is stated that the fulfillment of human sexual rights is based on seven main principles, namely sexual rights as a human rights, protection for the growth of children, non-discrimination, pleasure and comfort, responsible freedom, respect to human freedom, and fulfillment of rights [11] One way to do that then the state is an act of restriction (limitation) and subtraction (derogation) to the rights of the people, to protect the rights of others who feel the LGBT presence harm them.

#### IV. CONCLUSION

That in Indonesian culture has known about transgender. Not only talking about transgender in the sense of sex but also the role in society. The existence of transgender is clad in indigenous cultures such as the Ranteb sedate dance, Bissu in Sulawesi, Ludruk in East Java, in fact it is acceptable to the community. And still exists until now. Even though the amount has decreased

In Indonesian law there is no third gender. There is only division between men and women. The existence of transgender in reality is able to be accepted by some people as evidenced by the work filled by transgender people, but in positive law there is no recognition. Nonetheless, in terms of human rights, as in the 1945 Constitution of the Republic of Indonesia, the UDHR states that every human being receives the same treatment without discrimination. This shows, someone with different sexual orientation and gender orientation is still treated as citizen who has the same rights as other citizens.

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