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Sex Change (Sex-Reassignment Surgery) Without Medical Grounds in Indonesia: Conflict Between Pancasila and Human Rights?

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Abstract

As a state that upholds the Pancasila as the nation's direction, Indonesia adjusts the values of human rights norms as the character of its country. Revealing divinity value as the first point in Pancasila Principle affects Indonesia's national policies and political views. However, this action is unsuitable for some court decisions granting sex-change cases. Some of the legal reasoning used in these decisions is considering human rights grounds by not considering the value of Pancasila principles. This article's purpose is to elaborate on the legal reasoning behind some court decisions that granted sex-change cases without medical grounds.

Keywords: Sex-Change; Non-medical grounds; Human Rights; Pancasila

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1.0 Introduction

In Switzerland, the Neuchatel Cantonal Court reported the first case of a transsexual person seeking legal sex recognition after undergoing reassignment surgery (1945). The case of Corbett v. Corbett happened in 1970 (Tobin, 2006); In Indonesia, sexual reassignment surgery has become an issue since 1973 (Vivian Case or case number 546/Pdt.P/1973) (Allagan, 2016). It was the first case in Indonesia of legally changing identity requests to the court (Nasution, 1978).

As a state revealing divinity, Indonesia upholds Pancasila as the first value in the highest philosophical principle (Yustikaningrum, 2018). Recognizing God and religion (article 29 of the constitution) is fundamental to its people's daily lives. Indonesia upholds modern state administration, by which putting the democratic system forward means that the power is all in the people's hands (Lubis, 2018) and believing in God is a fundamental principle (U.S. Department of State. '2020 Report on International Religious Freedom: Indonesia, 2020). Consequently, this principle affects the law in Indonesia (Wijayanti, 2019). An example of recognizing divinity values impacts many aspects of life is mentioning irah-irah as the first component of the judge's decision. Article 2 paragraph (1) Law Number 48 the Year 2009 about the Basics of Judicial Power stipulates that every judge's decision must include the irah-irah, which states "for the Sake of Justice based on the one Godhead" (The Law Number 48 the Year 2009 Regarding the Basics of Judicial Power, n.d.). Otherwise, the judge does not write the irah-irah down; the decision has non-executable (Anam, 2015).

All the explanations above relate to the sex-change issue, as the court decision shall be considered a connector between need and reality in society (Sulistyo, 2013). The main reason for non-medical grounds for sex reassignment surgery becoming a debatable topic

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is the divinity values factor. However, the number of individuals who have undergone surgery increases, and judges in different courts submit different legal reasoning.

This paper elaborates on the legal reasoning behind some decisions of sex-change cases but is limited to non-medical ground cases. However, some medical ground cases are mentioned slightly in this paper for comparison purposes to strengthen the arguments. The aim of exploring the conflicts between Pancasila and human rights on sex-change issues based on the judges' legal reasoning is to establish valid proof that the nonuniformity of judges' legal reasoning can lead to social conflicts. This circumstance can confuse society, such as why Indonesia, a state that upholds divinity values, allows sex to change identity without medical grounds.

2.0 Literature Review

The following articles discuss sex-change issues in Indonesia, namely:

1. Erman Rajagukguk, "Hakim Indonesia Mengesahkan Penggantian dan Penyempurnaan Kelamin".
2. Adnan Buyung Nasution, (1973), "Kasus Vivian: Beberapa Permasalahan Hukum".
3. Tiurma M.P. Allagan, 'Are You "(Wo)Man" Enough to Get Married"
4. Kholifah, thesis, "Kepastian Hukum dari Putusan Pengadilan tentang Perubahan Status Jenis Kelamin"
5. Reni Asmawati, thesis, "Hukum dan Pergantian Kelamin: Studi tentang Pertimbangan Hakim dalam Penetapan Pengadilan."
6. Tiara Feronika, thesis, "Tinjauan Yuridis terhadap Penggantian Kelamin dan Akibat Hukum yang menyertainya (Studi Putusan Pengadilan Negeri Kendal Nomor: 1412/Pdt.P/2012/PN.Kdl)"

All 6 papers above discuss the sex-change issue in Indonesia. Most of them explore the law aspect of sex-change surgery and its impacts on other laws. The author found those papers explore similar ideas. Still, there is a significant difference: in this writing, the author highlights sex-change cases on non-medical grounds and concerns about the judge's legal reasoning. Not all papers divide the cases between medical and non-medical grounds nor explore the judges' legal reasoning in the verdicts. This writing adds to and complements previous writings by emphasizing the legal reason of judges in decisions.

3.0. Methodology

The methodology used in this article is desk-based research and uses doctrinal and socio-legal approaches. The method used in this paper is collecting all the primary resources by accessing the official website of the Supreme Court and dividing the cases into two groups: sex-change cases based on medical and non-medical grounds. The period time of the verdicts: 2012-2021. 9 cases were used as the primary resources.

4.0. Findings

4.1 59/Pdt.P/2019/PN.Mkd (Magelang di Mungkid)

The judge found that the applicant's chromosomal shows number 46, which means that the gender must be male. As the applicant's religion is Islam, the court considers Islamic laws by considering Indonesian Ulema Council Fatwa Number 03/Munas-VIII/MUI/2010 on July 27th, 2010. According to the fatwa, changing the genitals intentionally is haram. The judge confirms that there is no evidence proving the applicant has a genitals abnormality. Therefore, instead of proving genitals abnormality, the applicant's medical record evidence strengthens the judge's intuition that the applicant is genuinely male. All the medical records merely explain that the applicant has performed various medical examinations.

4.2 7/Pdt.P/2019/PN.Cirebon (Cirebon)

The judge highlights some facts:

- The applicant has undergone surgery and has Harry Benjamin Syndrome Diagnosis.
- The priest reminds the applicant not to undergo surgery because it is forbidden in Catholicism.

The judge submits that the sex-change violated God's nature as a woman and that undergoing surgery is not the proper treatment because Harry Benjamin Syndrome is a form of psychological, not a physical disorder and the proper treatment is psychological therapy. The judge emphasizes that Indonesian people believe in God. Indonesia is a legal state but also wrapped in theological joints. God creates a human who consists of body and soul. When a body has an identity as a male, but the soul shows a female side, it does not mean to change the sex. The judge also emphasizes maintaining the balance of moral values that live in society and preventing distortion of values believed by the community.

4.3 42/Pdt.P/2020/PN.PIK (Palangka Raya)

The judge emphasizes several facts: a) she has already used a male name. However, on the identity documents, it is still used in her female name. b) The applicant's parents have already known. c) The applicant has not undergone surgery. d) All her colleagues approved her decision in the workplace; however, the community where she lives is against it. Therefore, the judge decided the submission was against living norms.

4.4. 467/Pdt.P/2018/PN.Sby (Surabaya)

The judge finds several facts: a) The applicant has surgery and male genital organs. b) The applicant requests the court to approve her sex-change identity by submitting legal documents and a doctor's certificate. The judge affirms that changing identity is not against propriety norms because it is not against the law. Moreover, the applicant can prove that she has already undergone surgery and has male genital organs by providing a doctor's certificate.

4.5. 1188/Pdt.P/2018/PN.Sby (Surabaya)

The judge submits that no statutory provision in Indonesia regulates the sex-change issue. In judicial practice, there have been many cases, such as the Vivian Rubiyanti (1973), the Dorce Gamalama (1980), and the Nadia (2009). The judges affirmed that sex-change application is not merely a social symptom, but it becomes a practical need. The state must facilitate through the judiciary. The judge submits that the applicant has a blessing from his mother. Although the applicant was born a male, the applicant's appearance or face and body look like a female's. Accordingly, the judge granted the application.

4.6. 517/Pdt.P/2012/PN.Yk (Yogyakarta)

The judge submits that there is no legal regulation on the sex-change issue. Considering the development of the medical field, the Court shall explore, follows, and understands the legal value and sense of justice that live in society. The judge highlights that the applicant consulted to doctor. The consultant explains that the applicant has no psychological disorder and the applicant's physical appearance is female. The consultant wrote a recommendation letter for the applicant to undergo surgery. The judge submits that it is reasonable to grant the submission.

4.7. 39/Pdt.P/2015/PN.Kln (Klaten)

The applicant was born as a female, but during her growth period, she had a beard, no growth breast, never experienced period time, male genital organ growth, and her testosterone scale was 4.61 ng/ml. The doctor testified that the applicant has ambigo genitalia, which means that the applicant is a man phenotypically. Still, genotypically, the applicant is a woman. The judge cites Indonesian Ulema Council Fatwa Number 03/Munas-VIII/MUI/2010; The judge affirms that after considering the applicant's medical, religious, juridical, and psychological considerations, the court granted the submission.

4.8. 508/Pdt.P/2019/PN.Jkt Pst (Jakarta Pusat)

The applicants are the parents. The child was born as a female, but during the growth period, the child's genital organ shows different gender. The judge found that the child has chromosomal 47 XYY and does not have female reproductive organs. The doctor confirmed that the child is a male, and this medical situation is called *khuntsa*. The judge considers some perspectives to examine this case, such as law, Islamic law, sociological, and medical perspectives. Regarding Islamic Law, the judge elaborates on Indonesian Ulema Council Fatwa Number 03/Munas-VIII/MUI/2010; The judge also notes that the Indonesian Ulema Council recommends that the Supreme Court writes a *Surat Edaran* to all judges not to stipulate guidelines for changing-sex cases as the result of genital surgery, which Islamic Law forbids. The judge also mentions the 26th *Nahdatul Ulama* congress decision in Semarang on June 5th-11th, 1979 M.

4.9. 9/Pdt.P/2021/PN.Wat (Wates)

The applicant was aware that she was transgender. In 2018, the applicant actively sought professional help from psychiatry and had Harry Benjamin Syndrome. The judge highlights that the applicant is transgender and undergoes hormone therapy. The judge emphasizes that transgender persons face many challenges in life. The judge submits that the choice of the male gender was personal. This choice is a human right and must be protected, as referred to under article 28D paragraph (1) of the 1945 Constitution and article 3 paragraph (2) the Act Number 39 the Year 1999 about Human Rights.

5.0. Discussion

5.1 Certainty of time

Despite the first sex-change case submitted before the court in Indonesia (1973) (Allagan, 2016), Indonesia still needs more laws. The judges are the only party with the power to create the law, and the judge's interpretation and comprehension of the sex-change issue become a significant factor in deciding the case. The only law that regulates sex change issues cited several times in the decisions is Islamic law through the 26th *Nahdatul Ulama* congress decision in Semarang on June 5th-11th 1979 M and Indonesian Ulema Council Fatwa Number 03/Munas-VIII/MUI/2010 on July 27th, 2010. Under these 2 (two) Ulema Fatwa, undergoing sex-reassignment surgery without medical grounds is haram.

There is a case in which the judge submits (*Case number 508/Pdt.P/2019/PN. Jkt Pst*, n.d.) "the surgery can be undergone after obtaining a decision from the court." However, society includes individuals and is unaware of the judge's comprehension or the regulation about the certainty of time in applying to the court. Should the application be submitted before or after undergoing sex-reassignment surgery? It is because based on the 9 cases elaborated earlier, it is found that there are two types of applicants, namely: a) those who have undergone surgery before obtaining the court decision and; b) those who are requesting sex-change submission to the court before undergoing surgery. Moreover, there is a situation when the applicant has undergone sex-reassignment surgery (female to male) before submitting a legal request to the court. Still, the court rejected the applicant's submission (*Case Number 7/Pdt.P/2019/PN.Cirebon*, n.d.).

5.2. Certainty of sex-reassignment surgery (non-medical ground) permissibility

The divinity values contained under the first principle in Pancasila affect many aspects of life in Indonesia. The law remains silent on the sex-change issue, but the judges admit it (*case number 1188/Pdt.P/2018/PN.Sby*, n.d.; *case number 508/Pdt.P/2019/PN.Jkt Pst*, n.d.; *the case number 517/Pdt.P/2012/PN.Yk*, n.d.), Indonesia's views and attitude choices on sex change (non-medical grounds) are questioned. At the same time, Indonesia declares itself as a nation that upholds divinity values. On the other hand, none of the laws regulates sex-change issues. In addition, there is a case where the judge affirms that changing identity after undergoing sex-reassignment surgery is not against the law (*Case number 467/Pdt.P/2018/PN.Sby*, n.d.).

5.3. Court Decision: Is There Conflict between Pancasila and Human Rights Principles?

It is found that all judges have different comprehension of this issue. Not all judges agree that sex change without medical grounds is against norms. The main issue shall be answered: 'Is the legal reasoning explained by the judges in the decision in line with the laws and norms upheld by Indonesian people?' Does it mean that as a tool of social engineering connecting need and reality in society, the judges' decisions always consider the values/norms upheld by the Indonesian people? If the judges do not consider norms upheld by society, is it safe to submit that they ignore the community's standards of living?

Some judges submit that sex change is not against norms (*467/Pdt.P/2018/PN.Sby*). Unfortunately, even the judge does not elaborate more about why the judge proposes that sex change is not against propriety norms. However, it must be highlighted because propriety norms are part of Indonesia's characteristics. Thus, dismissing the point of view of norms in the sex change case can be considered as not sensitive to Indonesian society. Meanwhile, the judge for case number *1188/Pdt.P/2018/PN. Sby* and *517/Pdt.P/2012/PN. Yk* submits that no statutory provision regulates the sex-change issue in Indonesia; Both judges have granted the submissions.

The former highlights that sex change is not merely a social symptom. Still, it becomes a practical need so that the state, through the judiciary, must facilitate it. The latter emphasizes that the Court shall explore and understand the legal value and sense of justice in society due to the development of science. The aim is to find the law as long it is not against legal norms and propriety. In this case, the judge does not explore the sex-change issue from a medical ground perspective.

The judge's legal reasoning in case number *9/Pdt.P/2021/PN. Wat* considers human rights perspective, such as Yogyakarta Principles and United Nations Resolutions Number A/HRC/19/41 the year 2011 in strengthening the arguments. However, in this case, the exciting part is that the doctor confirms that the applicant has Harry Benjamin Syndrome, and the judge knows that the applicant is a Muslim. Still, none of the legal reasoning discusses the Harry Benjamin Syndrome and Islam perspective in the decision. The judge considers this case only from the human rights side. In the writer's opinion, it becomes the judge's duty to examine a case from many perspectives because the case happens in Indonesia, which upholds divinity values and norms. As the judge in case number *7/Pdt.P/2019/PN. Cirebon* submitted the decision, stating that the judges, through their decisions, can benefit the community. It is vital to maintain the balance of moral values that live in society and prevent distortion of values believed by the community.

Harry Benjamin Syndrome is also used as the medical ground by the applicant in case number *7/Pdt.P/2019/PN.Cirebon*. However, the Judge takes a different approach than the Judge for case number *9/Pdt.P/2021/PN.Wat*. The Judge in the case *7/Pdt.P/2019/PN. Cirebon* submits that the law is for humans, in which the judges, through their decisions, can benefit the community. The Judge considers Harry Benjamin Syndrome a psychological disorder, not a physical one. The Judge submits that instead of undergoing sex-reassignment surgery as a treatment, the applicant's adequate treatment is psychological therapy, which relates to psychological treatment.

The Judge also considers the religious aspect that does sex-change meant that the applicant violates God's nature as a woman. Moreover, the priest has reminded the applicant not to do sex-change because it is forbidden in Catholicism, the applicant's religion. Interestingly, the Judge also emphasizes maintaining the balance of moral values that live in society and preventing distortion of values believed by the community.

Regarding the religious perspective considered in the decision, the judge's legal reasoning for case number *59/Pdt.P/2019/PN.Mkd* applies religious values (the applicant is Islam). The judge submits Indonesian Ulema Council Fatwa Number 03/Munas-VIII/MUI/2010 to strengthen the arguments that changing the genitals from male to female or vice versa intentionally is *haram*. In applying for the Fatwa, the judge needs to submit the Fatwa and pay attention to the medical ground of the applicant. Before deciding, the judge submits that examining chromosomal is the primary basis for determining sex, and the applicant's chromosomal is a male. None of the applicant's medical reports authenticates the applicant's argument about sex-change needs, including chromosomal test results; the judge submits that the applicant can only do a sex-change on medical grounds. Therefore, the judge views the case from a religious and medical perspective. Regarding society's living norms, the judge in case number *42/Pdt.P/2020/PN.PIK* considers that the applicant's request to change-sex is against propriety norms and customs among the community because of the community where the applicant lives do not accept the applicant's decision and appearance.

To sum up, the judge shall comprehend that their role in society is vital in maintaining the community's balance. Thus, the judges shall consider all aspects before deciding on the case. It does not mean that the judge shall obey society's norms by ignoring the applicant's situation. However, applying both shall help society to comprehend that the law system works well. Thus, the law will protect people's rights and respect living norms in society.

6.0. Conclusion& Recommendations

Even though Indonesia has Pancasila, a law is absent regulating the sex-change surgery issue. As sex-change without medical grounds has become a lifestyle for some groups of people, they use this 'legal vacuum' to undergo surgery to change their identity. Moreover,

there is no uniformity for the judges to decide the result of the sex-change cases on non-medical grounds. Some judges passed the case, but some did not. This uncertain consideration and condition cause legal and sociological societal problems.

Moreover, those who grant a new identity in sex-change cases without medical grounds directly contribute to public confusion as the legal reasoning against the divinity principle. To clear this situation, the government and the Supreme Court need to increase the judges' ability to analyze sex-change cases without medical ground issue. Also, Supreme Court needs to create a uniform legal standard for the judges to pass sex-change cases by putting Pancasila values and local norms in the legal reasoning and considering the limitation of human rights applications in Indonesia. As Pancasila values limit human rights implementation, considering the values in Pancasila is not against the human rights principles. To identify a new direction for further research, the author suggests a study exploring the urgency of implementing Pancasila values in the court's decision regarding the sex-change issue. Unfortunately, many judges should have considered Pancasila values in their legal reasoning regarding sex-change cases. The judges shall realize that the purpose of viewing Pancasila values is to maintain the ideological goals of the Indonesian nation.

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