



# Positive Legal Review and Social Construction of Transwomen/Transvestites Case Analysis in Medan

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## Abstract

The existence of transvestites in Indonesia has become a subject of debate in postif law until now due to the pros and cons. If his group supports allowing transgender people on the basis of human rights they can do what they want. While that defies the idea that transgender people are against nature and even transgender is a non-human right. So they are steamed and treated discriminatoryly. This study aims to obtain a picture of rejection experienced by transvestites not only from the normal and religious society but the first rejection from parents and families because of normal behavior. This study uses qualitative methods. The results of the analysis showed that the dominant society did not know what and how transvestite was, and further saw that their values tended to stay away from transvestites unless they were concerned with their existence.

**Keywords:** positive law;transvestite,; social construction

## 1. Introduction

As a process through actions and interactions where individuals create continuously a reality that is owned and experienced together subjectively. The origin of social constructing from the philosophy of conformivity begins with the idea of cognitive constructs [4] Individuals who from birth have a male sex type, but in the process subsequently reject it as a man. [5] The transvestite made various efforts to become a woman, both from her behavior and appearance. make various efforts to become a woman, both from her attitude, behavior and appearance. It is further suggested that most transvestites are in the transsexual position. Since birth transvestites are physically male, but in the next process there is a desire to be accepted as a different gender. This is in accordance with koeswinwrno's opinion that in the context of transvestite psychology includes transsexuals, i.e. individuals who psychically tend to present themselves as the opposite sex. [6]

Transganders are referring to people whose gender identity is different from the gender established at birth. Transgender people are divided into two: Trasmen, trans men who are designated as women at birth but identify themselves as male. Transwomen, trans women are people who remain as men at birth but identify themselves as female. In the Indonesian dictionary Khuntsa is a man and a woman (not male and female), or a man who behaves and dresses like a woman[1] Encyclopedia of Islamic Law, khuntsu is alkhansa, the plural form khunnatsa meaning

"gentle" or "broken". [2] In positive law transwomen/transvestites under the legal umbrella of "Human Rights" ask the public and the state to recognize the existence of this community. When viewed from the Indonesian constitution of the 1945 Constitution of Indonesia, namely the 1945 Constitution Article 28 D which states (1) "Everyone has the right to recognition, guarantee, protection, and certainty of fair law and equal conduct before the law." Verse (2) "Everyone has the right to work and to be rewarded and treated fairly and appropriately in the way of work." Paragraph (3) "Every citizen is entitled to equal opportunities in government." Positive laws in the constitution see human rights as having limits, meaning that boundaries should not be contrary to morals, religious values, and public order. Indonesia is not a country based on religion, but Pancasila clearly asserts in the first precept "The One True God." This makes religion a joint of the constitution in realizing the democratic life of the Indonesian nation. Similarly, it is affirmed in Law No. 39 of 1999 on Human Rights Article 70 which says as follows: "In exercising his rights and freedoms everyone must submit to the restrictions that by law with the intention to exercise recognition and respect for the rights and freedoms of others. Transwomen / transvestites as a social reality must be understood as a group that is entitled to be free from discriminatory behavior on any basis, let alone understood as a minority group, therefore in essence transvestites are human beings. Transwomen/transvestites are part of the rest including physical, gender, and sexual presentation. Therefore it deviates from what people should expect from cultural, legal and religious values. Transwomen / transvestites experience social conflicts that they face, and social pressures in their lives, namely the coercion of the environment that disrupts their behavior or follow the habits that exist in the environment. There are two social pressures that he faces first pressure from the family that is usually seen as a disgrace because the world of transvestites / transvestites are framed by the world of abuse and abnormal sexual behavior, this usually makes him uncomfortable in the family environment. Both pressures from society are usually due to their behavior deviating from the norm [3] Transwomen/transvestites become problems in sexually that can accelerate the spread of Sexually Transmitted Infections (STIs) and HIV/AIDS. Therefore, the regulations that provide social services to transwomen / transvestites in a coordinated, integrated and sustainable so that the need for access to education and employment has not gained optimal attention, especially in the city of Medan.

## **2. Method**

### **2.1 Types of Research**

The research uses qualitative methods in order to discover the essence of each phenomenon. Starategi qualitative research developed is a case study. Case studies are very useful to understand a case comprehensively to know future prospects. According to Bogdan and Taylor as meleong attitude (2004:76) defines that qualitative method as a research procedure that produces description data in the form of written or spoken words from people and behavior that can be observed from many masalah that is growing in various countries including Indonesia regarding transgender

## 2.2 Time and Place

The research time was conducted for 3 (three) months starting from March 2021 to June 2021. Salon research place in Simpang Selayang subdistrict of Medan Tuntungan

## 2.3 Research Subjects

The informant in this study was *transsexual male-to-female*, an individual who realized that he had a male gender, but in character or attitude presented himself as female. The number of informants as many as 6 (six) salon workers and 1 (one) supporting informant

## 2.4 Data Collection Techniques

Primary data collection is obtained from the results of data collection in the form of interviews and observations from informants, while secondary data collected by researchers but obtained from other parties

## 3. Results and Discussion

### 3.1 The Existence of Positive Laws Against Transgender

Positive law is a law that applies now to certain communities in a particular region. According to Indonesia's positive law, it consists of written law or statutory provisions and unwritten law including customary law. In Indonesia, there are two positive legal sources, substantive and formal. The source of substantive law is public awareness or legal awareness in a society that is considered appropriate. The source of formal (official) law is a place where we can find laws, procedures, or ways of lawmaking, which include: (a) legislation; (b) customs or traditions; (c) jurisprudence; (d) the Agreement; (e) Legal doctrine. Ketut Artadi, stated that a written law and an unwritten law are the work of a human being whose purpose is to regulate the social life of the community, so that in life and the work of legal experts remain alive [4. [I Ketut Artadi, *Law In Cultural Perspective: Cultural Approach to Law*, (Denpasar: Pustaka Balai Post, 2006), p. 29]. In positive law, it is recognized as a conditioned phenomenon based on spatial and temporal factors. However, the concept of absolute legal value is not entirely lost. The concept remains a recognized idea even in positive jurisprudence, that is, the idea of ethical justice. Even when the difference between law and justice is clearly depicted, the two remain bound together with relatively visible bonds. To become "law," so the theory of accepting it, a positive state system must pay some attention to justice, ensure it becomes effective, strives, albeit inadequately, to be a "true" law. Positive laws should adjust some measures, albeit slightly, to the concept of law, with justice.

Every human being is the freedom to love another individual and legalize their romantic relationship in a social institution in the form of marriage regardless of gender, ethnicity, race, religion, or social group behind both. President Barack Obama gave a statement that LGBT is part of human rights, to celebrate the dignity of every human being, and to underline that every human being has the right to live a life free from fear, violence, and discrimination regardless of who they are and who they love. The statement was delivered at the *International Days Against Homophobia and Transphobia (IDAHOT)* celebration celebrated annually since May 17, 1990, the date of the elimination of homosexuals from the category of mental illness by the World Health Organization. Since then, the LGBT community has sought legal legalization of

marriage in states that have legalized same-sex marriage. The increasing awareness of human rights makes them no longer a problem for LGBT people become a big problem. Some countries around the world have legalized same-sex marriage and LGBT. They are countries that apply the principle of human rights is everything that is a desire and must be fulfilled without coercion and discrimination. Human rights are very important in human life. Because, human rights guarantee people to live peacefully, fairly, safely, and happily. Therefore, proper and proper enforcement and protection of human rights is indispensable for human life. This is stated in article 1 number (1) of Law No. 39 of 1999 "Human rights are a set of rights inherent in the nature of human existence as a creature of God Almighty and is His grace that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity and dignity." It is then continued by article 4 which reads as follows: "Regarding the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances and by anyone." That is, those rights are the fundamental rights most inherent in each individual, and no individual can take away the human rights of another individual. Equality before the law is one of the human rights protected by the constitution.

Therefore, every citizen always gets the same place before the law. Theoretically, equality is a principle or principle attached to the nature of man as a creation of Almighty God. But on the other hand, this human right does not mean that freedom is given to individuals as freely as they are. Such freedoms must comply with applicable legal norms. There is "Human Rights is a set of rights attached to the nature of human existence as a creature of God Almighty and is His grace that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity and dignity." It is then continued by article 4 which reads as follows: "Regarding the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances and by anyone." That is, those rights are the fundamental rights most inherent in each individual, and no individual can take away the human rights of another individual. Equality before the law is one of the human rights protected by the constitution. Therefore, every citizen always gets the same place before the law. Theoretically, equality is a principle or principle attached to the nature of man as a creation of Almighty God. But on the other hand, this human right does not mean that freedom is given to individuals as freely as they are. Such freedoms must comply with applicable legal norms. Terdapat Hal tersebut ditegaskan pula dalam Undang-Undang Nomor 39 tahun 1999 tentang Hak Asasi Manusia, dalam pasal 70 yang menyatakan sebagai berikut: "In exercising his rights and freedoms, everyone must submit to the restrictions set forth by the Law with a view to ensuring recognition and respect for the rights and freedoms of others and to meet fair demands in accordance with moral, security, and public order considerations in a democratic society." Furthermore, article 73 of the Act states as follows: "The rights

and freedoms set forth in this Law may only be limited by and under the law, solely to ensure recognition and respect for the human rights and basic freedoms of others, decency, public order, and the interests of the nation." Human rights restrictions allow for respect for human rights itself. Therefore, the state plays a role in enforcing these restrictions. Human rights cannot be used as an excuse to interfere with the rights of others or the public interest. There is no relevant argument for removing the ban on same-sex marriage on the basis of eliminating discrimination. Lesbian, gay, bisexual and transgender (LGBT) is not a human nature but a disease, so it is irrelevant to maintain the wishes of those who support the existence of LGBT people, namely by invoking the legalization of same-sex marriage on the basis of equality. However, equality is applied in terms of service to people of different ethnicities, skin color, and other things accepted in society. LGBT people need to be treated so as not to damage society and therefore, it is the duty of the state to treat them, not preserve them. In the context of the LGBT community, if LGBT couples want to perform same-sex marriage in Indonesia, then it is contrary to article 1 of Law No. 1 of 1974 on Marriage, which reads as follows: "Marriage is a bond born between a man and a woman as a husband and wife with the aim of forming a happy and eternal family (household) based on the One True God." This means that marriage between a man and another man, or a woman and another woman is considered invalid by Indonesian national law. Although in article 28B paragraph 1 of the 1945 Constitution states that "Everyone has the right to form a family and continue offspring. The State of the Republic of Indonesia recognizes and upholds human rights and basic human freedoms as inherent rights and are not separate from human beings that must be protected, respected, and upheld for the sake of improving the dignity of humanity, welfare, happiness, and intelligence and justice. The principles of human rights can be seen in various instruments, including: 1. The 1945 Constitution, which is contained in Article 28I, Article 28J of the NRI Constitution of 1945. 2. Law No. 39/1999 on Human Rights, in Chapter I on General Provisions and Chapter II on Basic Principles. Where in the above two instruments can be concluded that: HUMAN RIGHTS is a set of rights inherent in the nature and existence of man as a creature of God YME, and is a god's grace that must be respected, upheld and protected not only by the state but also by everyone, and man not only has human rights but clearly mentioned that man also has a basic obligation where when the obligation is not implemented then it will not be possible the implementation and establishment of human rights, it is as a counterbalance to human rights. LGBT is an aberration of nature and human nature. Man was created in two kinds to pair, namely male and female. The conception was clearly embraced by Law No. 1 of 1974 on Marriage.

Marriage according to Article 1 of the law, only between men and women. Thus, same-sex marriage is contrary to Indonesian law. In Indonesia, it is widely concluded that human rights can be distinguished as follows: 1. *Personal rights* which include freedom of expression, freedom of religion, and freedom of movement. 2. *Economic rights (property rights)* which include the right to own something, the right to buy and sell and make use of it. 3. *Political rights* are the right to participate in government, the right to vote (to be elected and to vote in elections) and the right to establish a political party. 4. The right to equal treatment in law and government. 5. *Social and cultural rights*. For example, the right to education and the right to develop culture. 6.

The right of human rights to get the treatment of judicial ordinances and *protection (procedural rights)*. For example, regulations in terms of detention, arrest, search, and trial. For the Indonesian nation, with its legal instruments, must guarantee the protection and fulfillment of human rights. The law cannot be separated from the values of civility and always conforms to the common sense and fitrah of man. The law exists to protect the dignity and dignity of humanity. Basically in the context of the state law Indonesia should weigh all the behavior of the state society, and nation in the glasses of law means that between citizens can differ in a way. However, it must be returned to the legal review in obtaining its juridical status. Whether it can be justified or not. Adherence to positive legal norms or prevailing legal norms is a concession of patriotism that is most important as joints of constitutional behavior in the state. That is why there is general justice and legal certainty. Thus, it appears that transgender people in Indonesia demand human rights, social recognition for their existence and also legality. Under the pretext of human rights the group considers that what they do is legal because it is a personal matter. In Indonesia, campaign movements that demand significant support from academic and women's activists. They moved from the political realm to theological or religious institutions. Politically, they are doing this to make it happen through the application of laws that provide a loophole for same-sex marriage. By organizing a campaign attracting community sympathizers, especially religious leaders, to acknowledge them.

### **3.2. Construction Sosial Waria**

The 40-year-old informant admits to being a transgender person who started from an attraction to being a woman since she was in junior high school. At that time the informant was hiding the change wanting to be a woman, short story at the time of finishing high school education was not shy and hard work to buy women's clothes for daily needs. The informant admitted that his family did not blame his decision to become a transgender person, instead the informant said his sister lived in padang bulan area. Informant has a person who does not want to trouble others in the sense of independent, diligent and hard work seen from his craft work in one of the beauty salons in Jalan Setia Budi Simpang Selayang. The informant said, "I don't want to make trouble to anyone else so as to ruin the good name of the family, even though I don't know about my decision this sometimes embarrasses my extended family." The informant has a girlfriend who already has a wife and children, they are in a relationship like a lover. However, the informant does not want to change gender by means of surgery, because for him can torture himself and not give thanks god's creation. Informants are also diligent in worship even though they are Christians. Informen work claimed to have worked 4 (four) years in a beauty salon and feel happy even comfortable with his work by providing beauty for others, especially women.

The 29-year-old informant admitted she felt there had been a disorder in her since she was a child and the informant said when she was 12 she had experienced sexual abuse. Informants are also born in families that are all women, have 7 (seven) brothers, of which 6 (six) women and 1 (one) informant male. Admitting she has a boyfriend who is now someone else's husband and already has children. Their relationship starts with just chatting and eventually becomes comfortable and then they form a relationship. but actually the informant has told him to be abandoned

because it is impossible if they go any further the possibility of his girlfriend informant can not see his son again but his girlfriend does not want to. Eventually their relationship went a step further and the informant also admitted they had had sexual intercourse and not once and the informant admitted they enjoyed each other even though their relationship was known to his girlfriend, but they continued the relationship. The informant is also not afraid and ready to cover the risks posed by his actions even the informant said what I planted it also that I will harvest. But to minimize the disease caused by his actions informant using safety (condoms). The informant said to face the community and the criticism that comes into him must have a strong mental. Although many people do not like their existence but the informant himself does not feel offended even more think this is who I live it. The informant said he was accepted by the rest of his family. The informant said he was accepted by the rest of his family. The way the informant faces criticism coming from outside the informant always conveys motivation with good norms so that people do not become like him and the informant says do not associate transvestites with religion because it is very contrary and religion does not accept it but it is a social right. The informant always remembers his family and religion regardless of the circumstances the informant always remembers the prayer and always shows positive things to everyone especially to the children.

The 45-year-old informant claimed he began to have abnormalities since the age of 4 years, born to a family of 9 (nine) sisters, informants the smallest child of the tenth child who is a boy. His sister always treated him like a girl. This he did not realize eventually more inclined to play with girls. Informant dropout at the age of 19 (nineteen) years began to dabble in the world of beauty even had lived in Singapore. There he was married but broke up, and then he returned to Medan. The informant admits that his father did not approve of his actions, but ultimately could not prohibit his actions. The informant is aware of his whereabouts but has already said what can be said.

The 26-year-old informant born on the old island of Java has died since the age of 5 and was raised by his cousin. Then at the age of 10 ran away from his cousin's family. Meet a transvestite who makes her safer and eventually changes attitude. The first informant to follow-up ended up like being tied to a changed lifestyle and tending to wear women's clothes.

The 20-year-old informant admitted that his father had until now not recognised him as a child, as it was a disgrace to his family. This act is recognized since childhood likes the game of girls, his mother does not forbid so does his sister. Until finally being transgender and feeling innocent and hoping they are recognized for their rights in accordance with human rights. The 25-year-old informant claimed that she had been transgender since she was 14 (fourteen) years old. And realizing herself more inclined to expertise in the world of beauty, eventually changed her whole life and liked women's clothing. The informant joined the transvestite at the beauty salon and claimed to have been married to someone's husband and eventually separated. Informants hate people who do not want to accept their existence, when human rights recognize the right to life, "Why are we not accepted?"

### 3.3 Ignorance of society

Ignorance of society, especially fathers as an example of boys. Peranan parents to the process of establishing gender identity in transvestites found that the role of father as a figure for his children is considered inappropriate in the eyes of the child. Togetherness in doing activities with father is very minimal. Children also feel less interested in doing activities with their father, even though bersma activities are a means to teach children about their gender roles. Fathers tend not to give enough attention and affection to the child, so often the mother who acts as the protector of the child. Fathers are also rarely present when needed, so there is a distance and closeness antara father and son. As a result of the father's attitude, the child is not given an example to perform his gender role as a boy that should be obtained by the father figure. People of a higher social class have negative views about transgender people and don't want to get along with transgender people. As a result of stigma or negative views as the most marginal or fringe.

The lack of public knowledge about transvestites due to gender anomalies can be seen since childhood and occurs due to improper learning about gender by parents, teachers, peers, regions and the mass media. Transgender teenage boys enter puberty with alkaline dreams in which they have same-sex sex, which is very different from other male adolescents. The satisfaction she experienced during wet dreams strengthened the teenager's attachment to the same sex and believed that she was different from the others. Lastly, the image of the world of prostitution gave rise to negative thinking in society which ultimately led to a discount on its existence in several factors, especially the narrowing of transvestite employment in the formal sector. Research on transvestites has actually been conducted by researchers from various circles, namely journalists and social science academics. However, this study was unable to answer a number of questions that researchers think are very important to answer. A question is how transgender knowledge and strategi relate to people's exposure to social space. This question arises because although transvestites have been considered as an abandoned group in society and even tend to be rejected on religious grounds, they still survive today and researchers are confident that it will continue to be so. They assume that their lives are right if no prevention is found. Furthermore, the researchers found that this study only explores the background of a person who becomes a transvestite and what social pressures look like when a person lives as a transvestite.

Researchers found that the most important thing to avoid transgender is that parents play a role including the whole family to pay attention to all family members who have strange behavior. Children who are still toddlers should not be given games that do not correspond to their gender such as boys should not be given doll games for girls even if girls are given games according to their gender. If this is not noticed then one day the growth of the child can tend to turn into transgender.

One's association can also influence therefore the relationship that belongs to the social relationship between one person and another that lasts relatively long so that it affects each other. In social life there are various forms of association there are healthy ones that are categorized as unhealthy. Associations that have a positive association on personality development. On the other hand, unhealthy relationships lead to patterns of behavior that are harmful to their own development and impact on

others. Healthy association is a relationship that focuses on the formation of personalities in accordance with the values and social norms that apply including the value of decency.

#### 4. Conclusion

Human rights cannot be used as an excuse to interfere with the rights of others or the public interest. There is no relevant argument for removing the ban on same-sex marriage on the basis of eliminating discrimination. Lesbian, gay, bisexual and transgender (LGBT) is not a human nature but a disease, so it is irrelevant to maintain the wishes of those who support the existence of LGBT people, namely by invoking the legalization of same-sex marriage on the basis of equality. However, equality is applied in terms of service to people of different ethnicities, skin color, and other things accepted in society. LGBT people need to be treated so as not to damage society and therefore, it is the duty of the state to treat them, not preserve them. Parents and the whole family play a role in paying attention to all family members who have strange behavior. Children who are still toddlers should not be given games that do not correspond to their gender such as boys should not be given doll games for girls even if girls are given games according to their gender. If this is not noticed then one day the growth of the child can tend to turn into transgender.

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