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Islamic Law and Positive Law in Indonesia's Transgender Behavior

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Abstract

Transgender Issues in Islamic Law and Positive Law are the focus of this article. A multidisciplinary technique, specifically a normative-juridical approach, is used to address these questions and analyze descriptive data. This study is classified information. Analyzing representative literature and making sure its content is relevant to the issues being debated are all part of the process of conducting this form of library research. Researchers concluded that transgender is the transfer of behavior between men and women that is socially manufactured, essential differences between men and women that are not natural or decided by Allah SWT, but rather the result of the actions of both men and women themselves. It's still up for dispute whether or not there are transgender people in Indonesia. They can do whatever they want as long as the organization accepts that transgender individuals have the same human rights as everyone else. Changing one's gender is not a mental illness. Transgender people, on the other hand, are particularly vulnerable to mental health issues brought on by internal struggle and external pressure.

Keywords:

Trasgender Behavior; Islamic Law; Positive Law.

Abstrak

Artikel ini membahas tentang perilaku transgender perspektif Hukum Islam dan Hukum Positif. Dalam menjawab permasalahan tersebut dan analisis data yang bersifat deskriptif, penulis menggunakan pendekatan mutidisipliner, yaitu pendekatan normatif-yuridis. Penelitian ini tergolong *Library research* dengan jenis penelitian menganalisis isi (content analysis) terhadap literatur yang representatif dan mempunyai relevansi dengan masalah yang dibahas, kemudian mengulas dan menyimpulkan. Penelitian menemukan: transgender ialah perpindahan perilaku antara laki-laki dan perempuan yang dikonstruksi secara sosial yaitu perbedaan yang bukan kodrat (sejak lahir sebagai perempuan atau laki-laki) atau bukan ketentuan Allah SWT melainkan diciptakan oleh manusia baik laki-laki maupun perempuan. Keberadaan kaum transgender di Indonesia masih menjadi perdebatan sampai sekarang karena ada yang setuju dan ada yang tidak setuju. Ketika kelompok yang setuju bahwa transgender boleh dengan dasar Hak Asasi Manusia yang boleh berbuat apa saja yang menjadi keinginannya. Transgender tidak tergolong sebagai gangguan mental. Meski demikian, seorang transgender berisiko tinggi mengalami gangguan akibat konflik dalam dirinya sendiri dan tekanan sosial.

Kata Kunci:

Perilaku Transgender; Hukum Islam; Hukum Positif.

Introduction

Humans stand out among God's other creations as unique creations. As a sign of reverence for Adam's creation from the ground up, the angels bowed their heads in his honor. The Qur'an explains this. Man, God's first creation, possesses a special power known as *fitra*.¹ This is referred to as potential. This relates directly to the field of education. According to the Qur'an's holy book, humans are created in a pure or holy state. Humans will become factual humans as a result of this schooling.

Humans were created to be the *khalifah fi al-ardh* (caliph on earth), tasked with the responsibility of regulating human activity. Humans must follow their commands for everything to work properly.

Islam not only addresses matters of religion (aqidah), manners (morality), and morals, but Islamic law also incorporates additional elements.² In addition to the three previously mentioned, Islamic law's accommodative force is huge and comprehensive on a global scale. The Qur'an's vision of Islamic law is comprehensive and inclusive.³

Although the term "transgender" isn't used specifically in Islamic law, the concept can be traced back to a tale in the Al-Qur'an that describes the prophet Lut. Transgender persons can be traced back to a group of women and men who were involved in the occurrence. Transgender can be described using the term despite its lack of precision.

Allah SWT stated:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

Meaning :

*"O populace! Indeed, We formed you from a male and a female, and then divided you into countries and tribes to facilitate your communication. Indeed, the most honorable of you in Allah's eyes is the most pious. Indeed, Allah is the All-Wise, the All-Aware."*⁴

¹ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Badan Litbang dan Diklat Kementerian Agama RI, 2019), p. 263. doi:10.16309/j.cnki.issn.1007-1776.2003.03.004.

² Abdul Syatar, "Konsep Masyaqqah Perspektif Hukum Islam; Implementasi Terhadap Isu-Isu Fikih Kontemporer" (UIN Alauddin Makassar, 2012), <http://repositori.uin-alauddin.ac.id/id/eprint/6009>.

³ Abdi Wijaya, "Sejarah Kedudukan Hukum Islam Dalam Konstitusi-Konstitusi Indonesia (Sistem Ketatanegaraan Indonesia)," *Jurnal Hukum Pidana Dan Ketatanegaraan* 7, no. 2 (2018): 263.

⁴ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya*.

Women are no longer physically or mentally repressed; women also play a significant role in the advancement of human civilisation today. The site of Islamic Shari'a justice, where Allah has defined the balance and equality of men and women's responsibilities. This condition demonstrates the provision's remarkable wisdom; women previously lacked rights, but with the flexibility of Islamic law, women reclaimed their rights and achieved parity with men.⁵

In essence, Allah SWT created humanity with two genders, male and female, but in addition to these two sexes, there are those who struggle with establishing their gender and psychology; this is referred to as transgender. Men and women are in the same position except in terms of piety.⁶

In Islam, women and men have the same status; the only distinction is their faith and dedication toward Allah SWT.⁷ However, social and cultural events have relegated women to the status of second-class beings behind men. Indonesia, being a Muslim majority country, it is appropriate to provide specific protection for women's participation in the public arena, as long as they do not neglect their natural responsibilities. This additional protection can take the shape of policies enshrined in legislation.

Transgender is derived from two sentences, namely trans and gender. The term trans refers to a hand transfer (dependent), whereas gender refers to both men and women's genitals. Transgender issues were also briefly explored and later resurfaced as a point of contention in Indonesia and even abroad.⁸

Everyone has human rights; Allah SWT endows them with intellect and instincts that enable them to discern between good and evil. This is declared in Law Number 39 of the Republic of Indonesia from 1999.⁹

Human rights must be implemented in accordance with the principles of the Pancasila philosophy, as the source and basis of human rights are found in

⁵ Achmad Musyahid, "Kesetaraan Gender Pespektif Filsafat Hukum Islam," *Jurnal Sipakalebbi* 1, no. 1 (2013): 176.

⁶ Adriana Mustafa, "Perilaku Seksual Transgender (Studi Komparatif Hak Asasi Manusia Antara Perspektif The Universal Declaration of Human Right The Cairo Declaration of Human Right)," *Al-Risalah: Jurnal Ilmu Syariah Dan Hukum* 19, no. 2 (2019): 254.

⁷ Muammar Bakry et al., "Arguing Islamophobia during COVID-19 Outbreaks: A Consideration Using Khuṣūṣ Al-Balwā," *International Journal of Criminology and Sociology* 9, no. Desember (2020): 2757–65, doi:10.6000/1929-4409.2020.09.340.

⁸ Pius A. Partanto and M.Dahlan Al-Barry, *Kamus Ilmiah Populer* (Surabaya: Arkola, n.d.), p. 757.

⁹ Redaksi Sinar Grafika, *Undang-Undang HAM 1999* (Jakarta: Sinar Grafika, 2001), p. 38.

Pancasila, which means that human rights have been given a strong mandate by the nation's philosophy, namely Pancasila.¹⁰

Not just changes in gender are understandable, but many contemporary occurrences are as well, such as why someone decides to be a lesbian, transgender, homosexual, or even transsexual/transgender. The primary reason is that a man's soul contains a gentle side similar to that of a woman, and he desires to become someone who behaves inconsistently with his genuine identity in order to demonstrate who he truly is. Another reason could be that a father abandoned his wife and son in the past, leaving the boy with a strong loathing for men.

It is simply that LGBT people are beginning to expand in Indonesia and will express themselves in order for their presence to be recognized and for them to obtain their specific rights, following the release of the Universal Declaration of Human Rights emphasizing the importance of human rights (UDHR). This incident garnered attention due to the international community's acceptance, indicating that the presence and security of LGBT people's rights must be emphasized in accordance with international human rights legal instruments responsible for human rights and freedoms, such as the right not to discriminate. If you desire peace, everyone has the right to self-determination. Liberation from tyranny. Take no arbitrary action. Right to freedom of expression.

The Concept of Transgender

Transgender is a phrase that refers to someone whose gender identification differs from the gender assigned at birth. Transgender is classified into two categories:

- a. Tranwomen, or trans women, are individuals who were born male but identify as female.
- b. A transman, often known as a male trans, is someone who is born a woman who self-identifies as a man.¹¹

Transgender is a term that refers to someone who is dissatisfied since there is no match between sex and physical and mental characteristics. According to the

¹⁰ Meilanny Budiarto Santoso, "LGBT Dalam Perspektif Hak Asasi Manusia," *Jurnal Share Social Work* 6, no. 2 (2016): 154, doi:<https://doi.org/10.24198/share.v6i2.13206>.

¹¹ Luis Ma'luf, *Al-Munjid Fi Al-Luyah Wa Al Adab Wa Al A'lam* (Cairo: Maktabah Al Syarqiyah, 1986), p. 197.

makeup he wears, his acts that are inconsistent with his gender, and the more invasive genital reassignment operation.¹²

Ibnu 'Abbas *Radhiyallahu 'anhuma* stated:

لَعَنَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - الْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ، وَالْمُتَشَبِّهَاتِ مِنَ
النِّسَاءِ بِالرِّجَالِ

Meaning:

"*The Prophet sallallahu 'alaihi wa sallam chastised both men and women who emulate women.*" (HR. Bukhari 5885).

Transgender people seeking to change their sexual orientation face considerable opposition from a variety of organizations. Circumstances such as these make transgender cases perplexing and unclear; as a result, a law regulating transgender issues is required, but there is currently no law that meets the interests of transgender people.

Transgender people do not exhibit any particular sexual orientation; they might identify as asexual, bisexual, homosexual, polysexual, or heterosexual, and rights breaches frequently occur to people of various sexual orientations, including lesbian, gay, bisexual, and transgender (LGBT) individuals. There are numerous forms of violations, but the most prevalent include discrimination, sexism, and violence against most groups. Both abroad and in Indonesia.¹³

A critical notion that must be grasped to analyze women's issues is the distinction between the concepts of sex and gender; comprehending and distinguishing these two concepts is critical to comprehend the problems of social injustice that have befallen women. The disparity in roles between men and women is viewed as a product of gender disparities in a patriarchal culture. While women's responsibilities such as cooking in the kitchen, compensating for their spouses, and caring for children and other jobs are a result of their gender, women's responsibilities are everlasting, just as their gender identity is eternal. This view originates from the paradigms of gender and sex being confused. Indeed, gender and sex are distinct concepts; gender refers to distinctions between men and women

¹² Mahjuddin, *Masailul Fiqhiyah Berbagai Kasus Yang Dihadapi Hukum Islam Masa Kini* (Jakarta: Kalam Mulia, 2005)., p. 25.

¹³ Arianto and Rido Triawan, *Jadi Kau Tak Bersalah? Studi Kasus Diskriminasi Dan Kekerasan Terhadap LGBT* (Jakarta: Citra Grafika, 2008)., p. 12.

on a socio-cultural level, whereas sex refers to anatomical and biological differences between men and women

Transgender in Indonesia

Indonesia is a developing country with a fundamental philosophy of Pancasila that includes human rights. However, the meaning of Pancasila needs to be expanded for its implementation to be more meaningful, particularly in terms of operationalizing the concept of human rights in the context of living as a nation and state within the Republic of Indonesia.¹⁴

Transgender identity evolved in the twentieth century in Indonesia's major cities. Previously, it was assumed that men's sexual behavior varied in the context of performing arts and martial arts, as well as in everyday social circles, particularly for men in many ethnic linguistic groups (ethnolinguistics) throughout the archipelago, with identity occasionally associated in this context.¹⁵

In Indonesia, the antecedent of transgender campaigning began in the late 1960s with the founding of the Djakarta Wadam Association (Hiwad), formerly known as Wadam (Wanita Adam). The term was then changed to waria (male women) in 1978, because the Indonesian Ulema Council deemed it unacceptable to include the name of a prophet (Adam) in a term for men who showed their gender by resembling women.

In 1986, seven lesbians from Jakarta founded the Indonesian Lesbian Association (Perselin), motivated by the 1981 marriage of two women that gained widespread media coverage. The early 1990s saw a rise in media coverage of HIV, with virtually frequent references to homosexual men and waria. This includes the establishment of new organizations in other areas. There were also several early national meetings during this time period, which coincided with several significant developments in the LGBT movement, including the formation of alliances with various feminist organizations, sexual and reproductive health organizations, pro-democracy and human rights movements, and academia.

¹⁴ Muladi, *Hak Asasi Manusia: Hakekat, Konsep Dan Implikasinya Dalam Perspektif Hukum Masyarakat* (Bandung: Refika Aditama, 2009)., p. 159.

¹⁵ Vience Mutiara Rumata, "Lesbi, Gay, Biseksual, Dan Transgender Dalam Bingkai Kajian Media Dan Komunikasi: Sebuah Kajian Literatur Sistematis," *Diakom : Jurnal Media Dan Komunikasi* 2, no. 2 (2020): 168–77, doi:10.17933/diakom.v2i2.64.

Following the momentous events of 1998, which fundamentally altered Indonesia's political system and government, the LGBT movement expanded in size and scope through improved national organization, formally financed initiatives, and the use of human rights language to push for national policy change. national. However, this achievement is quite tiny in the grand scheme of things, with numerous organizations and people succeeding in making minor improvements without affecting big legislation or general acceptance.

As a general summary of LGBT human rights in Indonesia, national legislation does not provide protection for LGBT individuals, despite the fact that homosexuality is not defined as a crime. LGBT persons are not permitted to marry or adopt. There are no explicit anti-discrimination statutes addressing sexual orientation or gender identity.

Due to the fact that Indonesian law recognizes only male and female genders, transgender individuals who do not opt to have sex change surgery may encounter difficulties in processing identity documents and other connected procedures.

Factor Contributing to the Transgender Development in Indonesia

1. Internal Factors

Internal factors are those that originate within a person and contribute to the creation and discovery of something that benefits a large number of people. These factors include the following:

Family Factor

Internal factors are those that originate within an individual and contribute to their creation and discovery. My home, my palace, is life in a harmonious, loving, and instructive household. Family members will feel at ease being near one another because their lives are filled with love, whereas My house is my hell is not a harmonious family-owned home. There is no love, no serenity, and no consolation because the Qur'an does not establish the premise for marriage. something that benefits a large number of individuals, these factors include the following.¹⁶

¹⁶ Eko Mulya Tua, "Pembinaan Terhadap Kaum Lesbian, Gay, Bisexual, Transgender (Sebuah Konsep Pembinaan Warga Gereja)," in *Prosiding Seminar Nasional Pendidikan Agama Kristen Sekolah Tinggi Teologi Simpson Nasional Pendidikan Agama Kristen Sekolah Tinggi Teologi Simpson Ungaran*, 2016, 58–67.

Moral and Moral Factors

Considering the position and circumstances, it is becoming increasingly vital to uphold ethics today, because without ethics and without being backed up by law, one human being can be regarded a rival to another. Transgender persons are formed as a result of society's violation of moral standards. Weak faith, a lack of self-control in the face of lust, and excessive sexual stimulation from the outside can all influence a transgender person's morals and character.¹⁷

Weak Religious Knowledge

The primary reason a person enters the transgender section is for religious reasons. Religion does not justify transgender because it is diametrically opposed to the premise of human creation. Where Allah SWT created just man and woman as a priceless pair.¹⁸

Economic Needs

In light of their distinct economic circumstances. Of course, in today's age of self-sufficiency, sexual orientation cannot be used as an excuse to prevent someone from obtaining employment. Their means of subsistence are dictated by their abilities and capabilities.

2. External Factors

External factors are those that originate from outside a person and contribute to the discovery of something that is then helpful to a large number of people. Examples of external factors include the following:

Social Aspects

In social terms, there is no issue with transgender individuals coexisting in the same setting as long as they preserve environmental comfort and adhere to established social norms.

The Educational Aspect

Parents' education has an effect on children; for example, if parents desire a son but are blessed with a female, if the parents do not comprehend religion or are dissatisfied with fate, their son may be treated as a man, as if he were purchasing a

¹⁷ Nana Rukmana, *Etika Kepemimpinan Perspektif Agama Dan Moral* (Bandung: Alfabeta, 2007)., p. 7.

¹⁸ Tua, "Pembinaan Terhadap Kaum Lesbian, Gay, Bisexual, Transgender (Sebuah Konsep Pembinaan Warga Gereja)."

doll. Islam does not justify these parents' attitudes, as they may influence children to act counter to their holy nature.

The surrounding environment

Environmental variables contribute to someone's decision to join the transgender community. Other indicators that support community membership include a lack of sympathy and obscene treatment. Adolescent association is influenced by the familial environment. Social habits and environment are the primary variables that contribute to this sexual disease, in which one family member exhibits little affection and parents maintain a taboo attitude toward sex.

There is a Global Movement

The transgender phenomenon is not unique to Indonesia. Almost every country on Earth is affected by this phenomena. Drajat, head of the Sociology Laboratory at Sebelas Maret University's (UNS) Faculty of Medicine, stated that there was an international movement that purposefully financed LGBT, particularly transgender persons, in order for it to become a global issue.

Comparison of Transgender Behavior in the Perspective of Positive Law and Islamic Law

Transgender is a highly contentious subject, not only academically but also in everyday life. The Indonesian public has been abuzz recently with stories regarding transgender people. This is a point of contention; there are advantages and disadvantages for many reasons. The presence of transgender persons in Indonesia continues to be a point of contention, as some agree and others reject. When a group agrees on the basis of human rights that transgender persons are allowed, they can do anything they wish. Transgender is not considered a mental illness. However, a transgender person is more likely to encounter difficulties as a result of internal conflicts and social pressures.

The Qur'an categorizes transgender or homosexual activity as *fahisyah*, which refers to a horrific crime regarded as a serious sin, and *khabits*, which refers to an insulting act, both logically and empirically. Transgender behavior is horrible on a logical level, because it contradicts the nature of regular human beings who

prefer the opposite sex. Transgender persons are generally reviled by the majority of people in diverse countries.

When it comes to LGBT persons, particularly transgender people who apply in positive legislation, there is no conflict with the fundamental principle of human rights. However, the reality experienced by both people is frequently inconsistent with reality. Thus, according to Halliday, as cited by Mashood A. Baderin, Muslims who dispute international human rights have at least four answers or views, namely:

- a. Islam is in accordance with international human rights standards.
- b. In reality, human rights can be completely realized only under Islamic law.
- c. International human rights are a manifestation of imperialism that must be opposed.
- d. Human rights on a global scale are incompatible with Islam.

However, Mortimer asserts that Halliday overlooked one viewpoint, namely that the purpose of international human rights has a hidden agenda, namely anti-religion.

When regarded critically, much of the Muslim community's opinion is a reaction to what is frequently described as Western countries' double standards in the name of international human rights. Their opinion reflects an attempt to pervert human rights between humanitarian and international political dimensions, rather than affirming the notion of human rights in Islamic law, because opinions will be evaluated according to Islamic law's parameters.

Legal studies reconcile the opinions of pluralistic sources that do not result in major legal disparities when compared to other jurisdictions. Finally, law is a product of its sources and techniques, and Islamic law is no exception to this rule. This is critical in order to distinguish between shari'ah as the source of law and fiqh as the origin and application of jurists' understanding.

Distinguishing between shari'ah and fiqh is critical for an accurate understanding of Islamic law's essence. Although the phrases shari'ah and fiqh are sometimes used interchangeably with the term Islamic law, they are not strictly synonymous. In literal terms, shari'ah refers to the straight path⁶, and fiqh refers to comprehension.

Conclusion

Men and women who identify as transgendered through a lengthy social and cultural process in which they adapt their behavior from one gender to the other. This process is known as "transgender" and is a socially manufactured phenomenon. For example, women are expected to be more delicate, while men are expected to be more aggressive. Transgender conduct causes men and women to switch genders.

In Islamic law, which is based on the idea of benefit, transgender individuals still retain human rights, but with some limitations, such as the right to vote, the right to be elected, and the ability to participate in the political process. The sexual conduct of lesbian, gay, and bisexual people who are considered aberrant cannot be accepted by religion and culture, unlike the case of transgender, which was described earlier.

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