

Shifting Paradigms: The Controversy and Complexity of LGBTI Protection in Indonesia as the Biggest Muslim Country

By Ida Susanti*

The existence of Lesbian, Gay, Bisexual, Transgender, and Intersexual (LGBTI) as a legal subject in a religious community like Indonesia is very problematic. When religious values control a community, the members will use their holy books to measure whether any commotion or condition is tolerable. Collisions between the law of religion (such as Sharia Law of Muslims) and national law are sometimes unavoidable. Most conservative religious values may not protect and acknowledge the existence of LGBTI people, while national law must recognise the ratified international conventions, especially regarding human rights. It creates a different treatment between national law and religious law. Protection of the rights of LGBTI in Indonesia is barely reported. This study will be important to share how Indonesia copes with LGBTI legal problems and protections. The method of this study is a juridical normative study, by evaluating Indonesian positive law, the living law ruled by the Indonesian Court Decrees, and any decree or decision made by Indonesian executive and judicative bodies, which become the basis for determining the existence of rights and protections of LGBTI people. Classification of the protection from various sectors of laws will be identified, to conclude the protection level of LGBTI people in Indonesian law.

Keywords: *LGBTI; Indonesia; Positive law; Religious values.*

Introduction

In 2015, the existence of lesbian, gay, bisexual, transgender, and intersexual (LGBTI)¹ had been re-exposed and it had been controversial. The trigger of this issue was the joint initiative from twelve United Nations agencies that mentioned: “Our organizations stand ready to support and assist Member States and other stakeholders as they work to address the challenges outlined in this statement including through constitutional, legislative and policy changes, strengthening of national institutions, and education, training and other initiatives to respect,

*Permanent Faculty Member, Parahyangan Catholic University, Jl. Ciumbuleuit No. 94, Bandung 40141 – Indonesia.

Email: idanti@unpar.ac.id

¹This paper uses terminology LGBTI. This terminology is more commonly used in Indonesia because other types under the scope of queer beside LGBTI is not often be discussed. See Rouse (2022).

*protect, promote and fulfill the human rights of all LGBTI people*²”.³ This initiative activated opposition to LGBTI⁴ because many people in Indonesian society have sexuality-related phobias such as homophobia or transgenderphobia⁵. They thought that those 12 UN agencies had promoted diverse sexual orientations and gender identities in Indonesia and therefore many people in Indonesia openly refused their existence.

There was protection for LGBTI at the international level, especially with the support from the United Nations for all activities aimed at protecting, promoting, and fulfilling the human rights of LGBTI people. On the other hand, there had been various criticisms from within the country, which concerned about the emergence of disruption to stability in society, caused by the movement to support these LGBTI people. Another thing that triggered the re-emergence of this old phenomenon was the presence of several organizations on campus such as the Support Group and Resource Center on Sexuality Studies at the University of Indonesia. This Center provided counseling to LGBTI people, which led to the notion that the campus accepted the presence of LGBTI. No less than the Minister of Research, Technology and Higher Education at that time, M. Nasir gave a statement rejecting the presence of LGBT people on campus⁶. The Minister of Research and Technology then corrected his statement by saying that their presence on campus was not refused, but their activities⁷. Several members of the *Dewan Perwakilan Rakyat* (DPR - House of Representatives) gave statements condemning the existence of LGBTI in society, for example, Mohhammad Nasir Djamil, Member of Commission III of the DPR from the *Partai Keadilan Sejahtera* (PKS - Prosperous Justice Party) at that time stated that "the campus should be more concerned and sensitive in protecting its students from attempts to infiltrate LGBT understandings"⁸. According to him, we must firm to prevent this idea from damaging the nation. From this opinion, it can be concluded that Mohhammad Nasir Djamil considers LGBTI an "understanding" and does not include the existence of abnormalities or physical deviations that cause a person to become LGBTI.

²This paper will not theoretically elaborate the concept of LGBTI. It just describes LGBTI people as 'diverse sexual orientations and gender identities'. See: Drafting Committee.

³12 UN Agencies, Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People. This document is available online at the Office of the High Commissioner for Human Rights website.

⁴The letter I refers to intersexuality, which until now in Indonesia has not been explicitly categorized as a separate group. Intersexual is defined as "a human being who is born with sexual characteristics (including genitals, reproductive organs and, chromosomal patterns) that are not following the characteristics of a man or a woman". Free and Equal (United Nations for LGBT Equality), 2015, p. 1.

⁵The LGBTI terminology will be used in this paper, except if this paper refers to other resources, which use different terminologies, such as LGBT, the original terminologies in the references will be used. So far, more Indonesians are concerned about and disturbed by transsexuals, even though there are a lot of transsexuals in Indonesia who occur because of intersexual issues. In Indonesia, transsexual is the most expressive and coming out.

⁶Batubara (2016).

⁷Harian Rakyat Merdeka, (2016).

⁸Irawan (2016).

Opposition statements against LGBTI from various political elites were addressed not only toward LGBTI people but also LGBTI-supporting organizations or initiatives. Fundamental legal issues emerge: Can LGBTI be considered “full legal subjects”, having the same rights as heterosexual-oriented groups in society? Or are they (in specific rights) only considered as “pseudo-legal subjects”, who do not have the same rights as heterosexuals? Is there any shifting paradigm in Indonesia as the biggest Muslim country in the world in protecting LGBTI people?

Research Method

This paper will employ a normative juridical method to observe the existence and recognition of LGBTI in Indonesian law. This normative juridical study will provide an objective study to interpret or construct positive laws and court decrees, which will lead us to conclusions about the level of protection of Indonesian law for the rights of LGBTI people in Indonesia. This paper will not examine all positive laws related to LGBTI rights, but it will select several rules related to the most basic rights, which will be selected using the guidelines for human rights in the 1945 Constitution. The report will observe the pattern of protection from different eras, to show the shift of paradigms regarding LGBTI in Indonesia.

Normative Review and Analyses

The Fundamental Principle of the State and Its Impact on LGBTI Rights

As a first step in studying LGBTI rights, we should use Pancasila as a guideline, bearing in mind that Pancasila is the basic norm and fundamental principle of the state. The values of Pancasila cannot be violated. The fundamental values of Pancasila include 5 precepts (it is called *sila*), which consist of:

- First *sila*: *Ketuhanan yang maha esa* [Belief in the one and only God];
- Second *sila*: *Kemanusiaan yang adil dan beradab* [Just and civilized humanity];
- Third *sila*: *Persatuan Indonesia* [The unity of Indonesia];
- Fourth *sila*: *Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan* [Democracy guided by the wisdom in the unanimity arising out of deliberations among representatives];
- Fifth *sila*: *Keadilan sosial bagi seluruh rakyat Indonesia* [Social justice for all Indonesian people].

In practice, these values are implemented through Laws and other operational legislations. The first *sila*, “Belief in the one and only God”, is the most relevant *sila* for LGBTI protection. The implementation of this *sila* is not neutral, because it is interpreted based on the values of religions. For example, it affects the right of

LGBTI to marry (this will be discussed further in a separate section). These precepts have been reduced to the right to have a religion, which is regulated both in the 1945 Constitution and other laws. Until now, in Indonesia, the right to religion is implemented closer to the concept of the obligation to have religion. This is very visible in the population administration system in Indonesia, which requires every citizen to indicate their religion on their identity card. In a context like this, it shows that this first *sila* will greatly influence the implementation of the religious life of Indonesian people. As an example, religion becomes a measuring tool to determine the legality/illegality of a legal action or relationship. Other rights that are more neutral, such as civil rights (other than rights in family law), political rights, and economic rights can be linked to the second, fourth, and fifth *silas*. The right of LGBTI to get fair treatment based on humanity is a civil right inherent in them. The right of LGBTI to be elected or vote in elections, for example, is an application of the fourth *sila* of Pancasila. The right of LGBTI to benefit from the national social security system is an application of the fifth *sila*. To find out the rights of LGBTI in more detail, we will discuss how Indonesian Law protects their rights.

LGBTI in the 1945 Indonesian Constitution

Indonesia's population is 277,534,122 people, occupying the fourth position in the world's most populous country⁹. Out of this very large population, even though Indonesia is not a religion-based country, Indonesia acknowledges 6 religions as Indonesia's official religion¹⁰. It means Indonesians cannot choose other religions than those official religions. Of the six religions, Islam is the biggest religion in Indonesia. Therefore, most Indonesians are Muslim, and Indonesia is the largest Muslim nation in the world. Consequently, the existence of LGBTI is analysed based on Islamic values by most people.

The problem is that according to the 1945 Constitution Article 1 paragraph (3) "Indonesia is a state law", which must be based on a rule of law. The rule of law must meet several conditions¹¹. According to A.V Dicey, the three important characteristics of a state based on the rule of law are the supremacy of law, equality before the law, and human rights¹². How should we give context to these three characteristics in Indonesia context?

⁹United Nations, 2022.

¹⁰Article 1 of Law No. 1/PNPS/1965 & Law No. 5 of 1969 regarding the Prevention of Abuse of Religion and/or Blasphemy [*Undang-Undang Nomor 1/PNPS/1965 jo. Undang-Undang Nomor 5 Tahun 1969 Tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama*] indicates that "Setiap orang dilarang dengan sengaja di muka umum menceritakan, menganjurkan atau mengusahakan dukungan umum, untuk melakukan penafsiran tentang sesuatu agama yang dianut di Indonesia." ["Everyone is prohibited from intentionally telling in public about, advocating or seeking public support, to interpret a religion practiced in Indonesia." What is meant by "religions practiced in Indonesia" can be found in the explanation of this article, including Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism.

¹¹Principe (2000) at 359.

¹²Craight (2007).

First, the supremacy of law means that law is above other things. All matters within the country must be regulated by law. Therefore, legislation and jurisprudence are important sources for solving legal problems. The imposition of sentences or the execution of acts that burden certain parties, for which there is no legal basis, can be considered arbitrariness. What is meant by "law" here? This law will refer to the rules of law. Furthermore, rules of law can be interpreted as "a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power"¹³. These rules of law are used to protect citizens from actions taken by the government arbitrarily and unlawfully. One of the important characteristics of the rules of law is that "the law should be written with reasonable clarity to avoid unfair enforcement". The rules of law require a promulgation process so that the legal instruments must be formulated precisely in written legislation or court decrees, to create legal certainty for its enforcement. What is referred to as the rules of law in the Indonesian legal system are legislations promulgated by authorised officials, in the form of legal sources stated in the hierarchy of Indonesian laws, as stipulated in Law No. 12 of 2011 concerning Formation of Legislation. Therefore, the main reference is the state law, not sharia or customary laws, which are not parts of the hierarchy.

Second, equality before the law means that everyone has the same position before the law. Everyone has the right to obtain legal protection and obtain their normative rights. This principle is emphasised in Article 27 paragraph (1) of the Republic of Indonesia Constitution, namely "all citizens have the same position before law and government and are obliged to uphold law and government with no exceptions". Article 27 paragraph (1) not only regulates the equal status of all citizens before the law and government but also regulates the supremacy of the law, because every citizen is obliged to uphold the law and government. Furthermore, the 1945 Constitution also elaborates on the issue of equality before the law in Article 28D paragraph (1), which reads "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". and Article 28I paragraph (2) which states "Everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment". These regulations are in line with the non-discrimination principle, which has been recognised as a universal principle in the protection of human rights.

Third, human rights are an important aspect that is expressly guaranteed by laws in Indonesia. Human rights are regulated in Chapter XA Articles 28A-28J and some articles outside the Chapter on Human Rights in the Indonesian Constitution. If we classify human rights protection in the 1945 Constitution, we can divide them into four major groups:

- Civil and political rights, which are regulated in Article 27 (1), Article 28, Article 28 D paragraph (3), 28 E paragraph (3) and (4);
- Security rights, which is regulated in Article 27 paragraph (3), Article 28 G, 28 I paragraph (1), 28 J and Article 30);

¹³Yu & Guernsey (2016).

- Social and cultural rights, which are regulated in Articles 28 A, 28 B, 28 C, 28 E paragraph (1), 28 F, 28 H paragraph (1) – (3), 28 I paragraph (2) – (5), 28 J, 29, 31 and 32);
- Economic rights, which are regulated in Article 27 paragraph (2), Article 28 D paragraphs (1) and (2), 28 H paragraphs (4), 33 and 34.

The author does not intend to theoretically debate the above categorization of human rights. The purpose of this division is to guide the writer to examine the most important rights of LGBTI.

The human rights provisions in the Indonesian constitution must be regulated further in operational regulations. In 1999, the government passed Law No. 39 of 1999 concerning Human Rights (Law on Human Rights). In addition, Indonesia adopted/ratified international legal instruments on human rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Child. This shows that Indonesia recognises and upholds human rights.

As a state law, Indonesia must recognise the rule of law. criteria put forward by A.V. Dicey above, Indonesia has met all the criteria. Consequently, Indonesia must also act as a rule of law state and must implement the three pillars of a rule of law state above in all aspects of people's lives, including in regulating LGBTI issues, bearing in mind that Article 27 paragraph (1) of the 1945 Constitution unequivocally states that "all citizens have the same status in the law [...]". This shows that LGBT, as long as they are citizens, must have the same position before the law. Therefore, this paper will examine further, whether is it true that Indonesian law has upheld the rights of LGBTI, as it is mandated in the 1945 Constitution.

Civil and Political Rights of LGBTI

Civil and political rights in Indonesia, apart from being regulated in the 1945 Constitution as described above, can also be found in various separate regulations, for example:

- Every citizen has the right to become a member of a political party because the formation and membership of a political party is by a group of Indonesian citizens¹⁴.
- Every worker/laborer can form a trade union or labor union, both within the company and outside the company¹⁵.
- Everyone is free to vote and be elected according to his political beliefs¹⁶.

¹⁴Article 1 point 1 Law No. 2 of 2011 on Ammendment of Law No. 2 of 2008 on Political Party.

¹⁵Article 1 point 17 Law No. 13 of 2003 on Manpower, which is reaffirmed by article 5 paragraph (1) Law No. 21 of 2000 on Labour Union. This issue is also regulated by Law No. 39 of 1999 concerning Human Rights (Law on Human Rights).

¹⁶Article 23 para (1), 43 para (1) and 44 Law on Human Rights.

- Every citizen is obliged to participate in defending the country¹⁷.

The above provisions acknowledge the civil and political rights of all people, citizens or workers, regardless of their sexual orientation. On the other hand, they also have the same responsibility in carrying out civil and political obligations. Even though protection for LGBTI is not affirmed in any regulation, every LGBTI people must enjoy the rights, because they are a part of “every citizen/worker/ everyone”.

Furthermore, Indonesia has ratified the International Covenant on Civil and Political Rights and ratified it through the Law of the Republic of Indonesia Number 12 of 2005 concerning The Ratification of the International Covenant on Civil and Political Rights (ICCPR). Article 2 paragraph (1) expressly states that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status”. This means that the protection of civil and political rights must be applied equally, regardless of their sex or other statuses. This provision regulates prohibition of discrimination based on “sex [...] or other status” in article 4 paragraph (1), article 24 paragraph (1) and article 26 of the ICCPR. In Indonesia, “sex” is only interpreted as binary, i.e. male and female¹⁸. Therefore, non-discrimination based on sex will be implemented as non-discrimination between males and females. No other sex or sexual orientation is acknowledged in Indonesia. Therefore, another possibility to cover LGBTI in ICCPR protection is under the “other status” classification. Indonesia does not have any interpretation of the “other status” terminology. If we look at *Toonen v. Australia*¹⁹, whether sexual orientation will be covered in the “other status” terminology, the International Covenant on the Human Rights Committee introduced four parameters of examination:²⁰

- whether the national laws draw a distinction on the basis of sex or sexual orientation;
- whether someone is a victim of discrimination;
- whether there are reasonable and objective criteria for the distinction; and
- whether the national laws are a proportional means to achieve a legitimate aim under the Covenant.

Under the Indonesian context, those parameters examination will be difficult to do, because in Indonesian Law there is no legislation concerning sexual orientation at the national level. There is no recognition nor objection against LGBTI. This floating policy raised criticism because it can be interpreted differently and create legal uncertainty. The writer believes that however diverse

¹⁷Article 68 Law on Human Rights.

¹⁸Article 64 para (1) Law No. 23 of 2006 on Population Administration.

¹⁹The court decision is available at: <http://hrlibrary.umn.edu/undocs/html/vws488.htm>.

²⁰Paragraph 6.10. It is reported at *Toonen v. Australia*.

the understanding about whether LGBTI is within the terminology of “other status”, the bottom line is discrimination or criminalization of LGBTI must be considered as a violation of ICCPR²¹.

Meanwhile, at the regional level, some regional legislations criminalise LGBTI. Article 14 letter i Tanjungpinang City Regional Regulation No. 7 of 2018 concerning Amendments to Regional Regulation no. 5 of 2015 concerning Public Order regulates, "Every person is prohibited from engaging in and/or being reasonably suspected of having had same-sex relations in open spaces and/or closed spaces." It is clear that in Tanjungpinang, the capital of Riau Islands Province, there is affirmative rejection against LGBTI. Furthermore, Article 11 paragraph (1) letter f Karawang Regency Regional Regulation No. 4 of 2016 concerning Child-Friendly Districts Implementation states, "Every child has the right to special protection rights, including protection from the effects of sexual disorientation." Karawang is a city in the West Java Province. The government in this regency determined LGBTI as sexual disorientation. In this area, the majority of heterosexuals with the binary mainstream are the standard group of society, while the minority homosexuals with the non-binary stream are inappropriate and unacceptable. They have a bad impact on children's mental development, which is expected to be heterosexual male or female. Another regional legislation is West Sumatra Province Regional Regulation No. 8 of 2019 concerning Social Welfare Implementation. It creates data on People with Social Welfare Problems. In this data, one of the classifications is a minority group²². In the Elucidation of Article 5 paragraph (2) letter o, the coverage of minority group is “non-dominant individuals or groups with specific national, ethnic, religious or linguistic characteristics that are different from the majority of the population, such as transexuals, gays and lesbians”. Based on this Regional Regulation, transexuals, gays and lesbians are classified as “people with social welfare problems”²³. The Chief of the National Commission on Human Rights at that time, Mr. Taufan Damanik, during his meeting with the Governor of West Sumatra on 14 February 2019 declared that “The people of West Sumatra have customs that cannot be separated from Islam. This has been around for a long time. Suppose the community and government here [in West Sumatra] make regulations prohibiting LGBT behavior because it is not following the customary law. In this case, the prohibition of LGBT is not wrong or violates human rights”²⁴. Furthermore he said “People from outside West Sumatra do not understand the human rights perspective from Minangkabau which is under traditional norms and customs, so that in the end there is a monopoly of perspective. Moreover, that would be impossible if an international human rights perspective were forced to apply to West Sumatra. Indonesian regions are diverse. Let the perspectives be different, the important thing is that

²¹Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006.

²²Article 5 paragraph (2) letter o of West Sumatra Province Regional Regulation No. 8 of 2019.

²³Chapter II, Articles 4 and 5 of West Sumatra Province Regional Regulation No. 8 of 2019.

²⁴Tirto.id, *KOMNAS HAM* (2019).

violence and discrimination do not occur”.²⁵ Those regional regulations showed how the influences of Islamic Law and Customary (*Adat*) Law

Institute for Criminal Justice Reform criticised this statement. For implementing ICCPR using Indonesia’s context, it referred to Article 27 paragraph (1) of the and Article 28D paragraph (1) of the 1945 Constitution, which emphasises that every citizen has the same position before the law and the government, has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment²⁶. The prohibition of LGBTI violates not only ICCPR, which is legally binding for Indonesia but also violates Indonesian human rights recognised by the 1945 Constitution.

Rights to Security of LGBTI

Apart from the Articles in the 1945 Constitution described above, the rights to security in Indonesia can also be found in several regulations. One of the most important regulations is Law No. 39 of 1999 regarding Human Rights (hereinafter - Law on Human Rights), which specifically regulates the issue of the right to security in Section Six, Articles 28 to 35 concerning the Right to a Feeling of Security. If we summarise, the most important parts of these articles are that “Everyone has the right to asylum and political protection from other countries²⁷, everyone has the right to protection for themselves, their families, honor, dignity, and property rights²⁸, everyone has the right to a sense of security and peace from all threats²⁹; the residence of all people may not be disturbed, entered, or stepped on against the will of the person concerned³⁰, everyone has the right to be free from torture, punishment, or treatment that is cruel, inhuman, degrading, and human dignity and free from enforced disappearance and loss of life³¹, everyone may not be arrested, detained, tortured, ostracised, exiled, or disposed of arbitrary authority³², everyone has the right to live in a peaceful, safe, and secure social and state order that respects, protects, and fully implements human rights and basic human obligations³³. These articles expressly give everyone the right to obtain security, from various violence against life, politics, honor, and comfort. Even further, everyone has the right to protection of the confidentiality of their identity as a claimant³⁴. Thus, LGBTI people should also be protected by these articles and

²⁵ *Ibid.*

²⁶ Institute for Criminal Justice Reform, *ICJR Kritik Pernyataan Komnas HAM tentang Pelarangan LGBT Tidak Melanggar HAM* [ICJR criticizes National Commission on Human Rights’s statement regarding the LGBT ban not violating human rights]. <https://icjr.or.id/icjr-kritik-pernyataan-komnas-ham-tentang-pelarangan-lgbt-tidak-melanggar-ham/>. <https://icjr.or.id/icjr-kritik-pernyataan-komnas-ham-tentang-pelarangan-lgbt-tidak-melanggar-ham>

²⁷ Article 28 Para (1) Law on Human Rights.

²⁸ Article 29 Law on Human Rights.

²⁹ Article 30 Law on Human Rights.

³⁰ Article 32 Law on Human Rights.

³¹ Article 33 Law on Human Rights.

³² Article 34 Law on Human Rights.

³³ Article 35 Law on Human Rights.

³⁴ Article 92 Law on Human Rights.

have these rights. Impliedly the Indonesian Human Rights Law recognises LGBT's rights even though there is no affirmative protection in the law.

Social and Cultural Rights

Article 14 of the Human Rights Law expressly recognises that everyone has the right to communicate, obtain, store, process, and convey information needed to develop his personality and social environment. Furthermore, Article 32 of the Law on Human Rights also emphasises that the contents of information and communications made either through correspondence or electronic means may not be disturbed, except on the orders of judges or other legitimate authorities following the provisions of the law. Thus, it is also clear that LGBTI people also have the right to enjoy the right to communication and information, which is carried out using secure media and confidentiality can be guaranteed, except when ordered by a judge or other lawful authority, the contents of the information and communication are required for certain purposes.

Economic Rights

One of the economic rights for LGBTI has been regulated in Law No. 13 of 2003 concerning Manpower. Article 5 of this law states that "every worker [sic: including LGBTI workers] has the same opportunity without discrimination to get a job". It was further emphasised that "every worker/laborer [sic: including LGBTI] has the right to receive equal treatment without discrimination from employers". This provision guarantees LGBTI rights to access work and receive equal treatment with heterosexual male or female workers. This article stipulates that the rights of job seekers and workers are protected from anyone. Thus, the coverage of manpower can be anyone, regardless of their sex or sexual orientation.

Another example of economic rights is related to the ownership of goods. It is emphasised in article 574 of the Civil Code that "the owner of the goods [sic: including the owner of the goods who are LGBTI] has the right to demand that anyone who controls the goods, to return it in its original condition". Furthermore, Article 31 of the Law on Human Rights stipulates that one's residence cannot be disturbed. This is also binding for LGBTI, so they have the right to enjoy their privacy in their residence.

LGBTI Rights in the Marital Law

LGBTI rights in family law are protected by Article 28B paragraph (1) of the 1945 Constitution, "Every person shall have the right to establish a family and to procreate based upon lawful marriage". Thus, all residents of Indonesia, including LGBTI people, will enjoy the right to form a family. However, in reality, the rights of LGBTI in Article 28B paragraph (1) of the 1945 Constitution are undermined by Law No. 1 of 1974 concerning Marriage. Article 1 of the Law emphasises that "Marriage is an inner bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief

in the One God". Based on that provision gays and lesbians will not be able to get married, because an Indonesian marriage is a heterosexual relationship. Furthermore, Article 2 paragraph (1) of the Law on Marriage states "Marriage is valid, if it is held according to the parties' religion and belief."

Currently, Indonesia recognises the state's official religion through Law Number 1/PNPS/1965 and Law Number 5 of 1969 concerning The Prevention of Religion Abuse and Blasphemy. The regulation was implemented through Government Regulation No. 55 of 2007 concerning Education on Religions and Religious Study. In Article 9 paragraph (1), the Government Regulation recognises that "Education on religions includes Islamic, Christian, Catholic, Hindu, Buddhist and Confucian religious education". With this regulation, it is emphasised that the 6 (six) religions are accepted as the official religion of Indonesia. Thus, Article 2 paragraph (1) of the Marriage Law has the effect that only people who can legally get married based on one of these religions, whose marriage can be considered valid.

The problem is: that in 2016 no single religion, out of the six official religions, allowed same-sex marriage. On 16 February 2016, even the Catholic religion stated that it rejected LGBTI behavior, although it emphasised that they should not be alienated³⁵. They need to be rehabilitated for their missbehaviour so that they return to normal, said the religious leaders, including the Chair of the Indonesian Ulema Council (MUI) Religious Harmony Division, Yusnar Yusuf, Executive Secretary of the Commission for Justice and Peace of the Indonesian Bishops' Conference (*Konferensi Waligereja Indonesia-KWI*) Romo PC Siswantoko, Chairperson of the Widya Sabha representative of Indonesian Buddhists (Walubi) Mpu Suhadi Sendjaja, and General Chairperson of the Indonesian Confucian Council of Religion (Matakin) Ung Sendana in a press conference at the Central Office of the Indonesian Ulema Council (MUI), Jakarta. They also reject the legalization and propaganda of LGBT activities in society and urge the government to immediately take a stand³⁶. By taking into account the attitude of the prevailing religious leaders in Indonesia, it is clear that marriage between people of the same sex is currently impossible.

However, Pope Francis decided in 2023 that same-sex marriage might be blessed. It is not the same as the blessing associated with the sacrament of marriage. While it opens the couple's lives to God, this blessing does not provide legitimacy. It implores the power of the Holy Spirit to live the Gospel ideals more faithfully³⁷. Therefore, based on this value, we cannot claim that the Catholic church will acknowledge the validity of a Catholic same-sex couple's marriage. Consequently, it will not affect the right of Catholic LGBTI people to get married in Indonesia, because as long as the Catholic church does not legalise their marriages, those marriages cannot be validated by the Office for Civil Registration.

³⁵UCAN Indonesia (2018).

³⁶Sindo Daily (2016).

³⁷Dicastery for The Doctrine of The Faith, Declaration of *Fiducia Supplicans* on the Pastoral Meaning of Blessings.

The description above applies to same-sex marriages. The question is, what about marriage for bi-sexuals? Adhering to the provision that so far marriage in Indonesia is not possible for people of the same sex, it is best if a bi-sexual person wishes to formalise his relationship into a legal marriage relationship, then he chooses to do so with a partner of the opposite sex. Even if he is bi-sexual, once he has decided to marry someone of the opposite sex, then that person's marriage can be legalised, as long as it fulfills the requirements and procedures stipulated in the Marriage Law and its implementing regulations.

Further, we need to examine the authority to marry a transgender person and an intersexual person in Indonesian law. These two groups only have a better position in Indonesian law if they get a surgical "correction". When someone has determined their sex, even if this happens because someone changes their sex (for example, at birth someone is recorded as male, but then changes their sex to female through a surgery procedure), the new status can be officially registered through an application to the District Court. As long as the request has been granted by the Court, the sex change will be legally recognised. As a juridical consequence, they can marry a person of a different sex from their last registered sex at the District Court.

Several cases related to the recognition of the legal status of transgender had been decided by several District Courts in Indonesia. The judges considered the physical and psychological condition of the applicant in granting the request. In the Court Decree No. 20/Pdt.P/2009/PN.Ung, Sofwan Dahlan (a medical doctor), the expert witness in this case, used 5 (five) considerations to determine whether a person is considered suitable for changing sex, i.e. chromosomal aspects, primary reproductive organ aspects, secondary reproductive organ aspects, hormonal aspects, and psychological aspects. Nevertheless, the judges decided 3 (three) aspects in determining the real sex of the transgender, i.e. "chromosomal aspects, secondary genitalia aspects, and psychological aspects"³⁸. This Court Decree provided the clearest indicators to determine the possibility of having surgery and to change the sex status. Nevertheless, some Court Decrees did not have the same indicators to decide. Some examples of Court Decrees regarding this transgender issue are as follows:

- a. The Bantul District Court Decree No: 22/ Pdt. P/2003/PN. Btl regarding the change in gender status of Suratini, who was registered as a woman at the time of birth. This Decision was based on the results of a physical examination by a doctor, which stated that Suratini had a congenital disorder of the genitals called hypospadias. As a result, Suratini had separate testicles, and there was a bent-down penis separated the testicles. She also never got her period, had no breasts, and had no vaginal opening. However, Suratini did not have a prominent Adam's apple. Under these conditions, he was granted to change his status to become a man and change his name to Suratno Adi Legowo. He also performed surgery to

³⁸ Asmawati (2013).

perfect his physique to become a real man. This Decision does not have chromosomal and psychological considerations.

- b. The Jayapura District Court Decree No. 12/Pdt.P/2010/PN.JPR regarding Alterina Hofan, who was registered as a woman at birth, to become a man after going through the surgery process. That person had Klinefelter's syndrome. In conclusion, he was a male because most of his cells had X chromosomes, but his genitals became unclear from birth. He grew up as a human who has a penis but also has breasts. Before changing his status to a man, Alter had breast removal surgery. This decision uses chromosomal and secondary genitalia considerations and does not have psychological considerations.
- c. Semarang District Court Decree No. 3077/Pdt.P/2011/PN.Smg regarding Siti Maemunah, who was registered as female at birth then requested to change her gender status to male and change her name to Mohammad Prawirodijoyo. The person concerned had deformities of the reproductive organs, i.e. no breasts, no testicles, a small penis size with an inward position, and a split testicular sac that was shaped like a vagina. However, in the laboratory examination, it was found that the person concerned had a chromosome type of 46XY, which meant that the karyotype number of chromosomes corresponds to the number of male chromosomes. This Court Decree does not have psychological consideration.
- d. Ungaran District Court Decree No: 518/Pdt.P/2013/PN.Ung. regarding Supriyati, who at the time of birth was registered as a girl and then changed her status to a boy with the name Bagus Supriyanto. One of the considerations for granting Supriyati's request was the finding that Supriyati had a chromosome showing 46 XY and a high testosterone hormone of 1053 ng/dl indicating 100% generally male. Furthermore, there was information from a psychiatrist who explained that if Supriyati was forced to become a woman, she would experience prolonged depression. Before the change in gender status, Supriyati had undergone surgery 3 (three) times to perfect her physique as a man. This Court Decree does not use secondary genitalia consideration to decide.

The four decisions above show clear considerations to grant the request for the sex change legal status. However, we must also analyse the Batang District Court Decree No. 19/Pdt.P/2009/PN.Btg concerning the sex change of a man named Agus Widoyo. He filed validation of a sex change status to a woman named Nadia Ilmira Arkadea. Since childhood, Agus had grown up with the physical characteristics of a woman, even though he was registered with the legal status of a man. To make himself fully a woman, Agus underwent surgery, which caused his physical condition to appear as a woman. In this Court Decree, no chromosomal or secondary genitalia considerations are applied. It is different than the Court Decree discussed previously. Supposedly, a Court Decree must have clearer criteria and considerations other than just everyday physical appearance. For Indonesian Courts, this consideration is very necessary, to avoid the sex change done solely because of the wishes of the applicant, and not because of

physical and mental needs, triggered by an intersexual condition experienced by someone.

Legal Consequences of Sex-Change Status

The sex change acknowledgment by the Court Decree must be followed with administrative legal action. Law No. 23 of 2006 concerning Population Administration which was later amended by Law No. 24 of 2013 concerning Amendments to Law No. 23 of 2006 concerning Population Administration (hereinafter referred to as the Adminduk Law). Article 3 of the Adminduk Law confirms that *"Every Resident is obliged to report Population Events and Important Events that they experience to the Implementing Agency by fulfilling the requirements in Population and Civil Registrations."* The question is whether sex change can be categorised as part of "population events" and "important events" that must be recorded. Article 1 number 16 of the Adminduk Law confirms that *"Civil Registration Officials are authorised to record Important Events experienced by a person at the appointed implementing authority by the provisions of the Legislation"*. Thus, as long as the actions committed fall into the "important events" or "population events" category, any change must be recorded.

Article 1.17 of the Adminduk Law confirms that "important events" are *"events experienced by a person including birth, death, stillbirth, marriage, divorce, child recognition, child validation, child adoption, change of name, and change of citizenship status"*. From the scope of "important events" or "population events" above, it is clear that this change in sex status is not included in these events.

To find whether a sex change status must be officially recorded, we must check Article 56 paragraphs (1) and (2) of the Adminduk Law. It stipulates that the registration of "other important events" is carried out by the civil registration official at the request of the resident concerned based on an in-forced District Court Decree. Further, what is meant by "other important events" in that Article? Based on the Elucidation of Article 56 paragraph (1) of the Adminduk Law, which explains: *"What is meant by "other important events" are events determined by the District Court to be registered by the implementing authority, including a sex change status."* This is also reaffirmed by Article 97 paragraph (2) of the Presidential Regulation of the Republic of Indonesia Number 25 of 2008 concerning Requirements and Procedures for Population and Civil Registration, which also includes sex change status as an important event that must be recorded. Thus, to make a sex change status legally binding, it must be granted by a District Court Decree, and it must be registered with the Civil Registration Officer. After the sex change status, the person has the right to get married to another person with an opposite sex status.

National Law and Religious Law Intertwined

As a country with the biggest Muslim country in the world, even though Indonesia is a state law and neither Sharia law nor customary law is acknowledged

as part of the hierarchy of law³⁹, non-neutral matters are influenced by custom, tradition, or religion⁴⁰. Furthermore, registration of Indonesian Muslim marriage and many other family law matters must be done in the Office for Religious Affairs. If there is any specific dispute in Family Law involving Indonesian Muslims, the case will be settled by the Religious Court. Therefore, Sharia Law is applied to settle disputes by the Religious Court. To understand the influence of Sharia Law on LGBTI issues, we must study Religious Court Decree No. 0142/Pdt.P/2020/PA.Sdn. The case did not involve the LGBTI issue. Nevertheless, in the legal consideration of the judges when they must determine whether the parties had legal capacities to get married (in this context the sex of the parties were male and female), they applied *argumentum a contrario* to argue that the parties did not have legal obstacles to get married. The reference was the Book of al-Bajuri, Juz II, which mentioned that “[... From the male side, he must be a real man and from the female side she must be a real woman. A marriage with a transgender is not exist, even though it is obvious his masculinity”. Based on that reference we can conclude that the judge determined transgender as an obstacle to getting married and considered the parties in a marriage to be only male and female, no Indonesian Muslim transgender can get married. In this case, religious law is in parallel with the national law.

Shifting Paradigm?

In general, Indonesian Law protects LGBTI people, except in the marital law (especially for gays, lesbians, and transgenders). Yet the right to get married is enjoyed by transsexuals who have already gone through surgery, to get a Court Decree to grant a permit to change their sex status, to register their sex change status in Population and Civil Registration, and to get married to a person of their opposite sex. By including human rights in the amendment of Indonesia’s 1945 Constitution on 18 August 2002, many human rights of everyone, including LGBTI people, are recognised. Nevertheless, the recent development showed a setback phenomenon.

Purwokerto District Court Decree No. 30/Pdt.P/2022/ PN Pwt had refused a request for a sex change status by Faqih al Amien, a male at birth. He had had surgery to change his reproductive organ from male to female, even though before the surgery, a prior chromosomal test No. Reg. Lab: 85/XI/2019 at Dr. Sardjito Hospital had been done and it showed that he had 46/cel (from the counted 25 cells). 7 cells were analysed. The karyotype was 46, XY. It proved that he was a male. Furthermore, from the endocrinal test, there was no genotype, phenotype, or hormonal function abnormality in his body. The medical doctor took the surgery based on his psychiatric consideration, i.e. he suffered from transsexualism, emotional instability, and DD/Cyclothymia, and his clarity to prepare for the surgery (mentally and financially). The judges rejected the request because of the result of those chromosomal and endocrinal tests. Consequently, recently there has

³⁹Article 7 paragraph (1) Law No 12 of 2011 regarding Lawmaking. See Susanti & Sebastian (2017) at 116.

⁴⁰Susanti & Sebastian (2017) at 119.

been even more contradiction in the Faqih al Amien's identity because his sex status is male while his physical appearance is female. This judge's decision is widely criticised. Recently there has been a legal vacuum regarding the procedure and requirements of the sex change surgery. Because of that legal vacuum, the judges just used the biologist consideration concluded from some previous Court Decrees. As a country with civil law tradition, Indonesian people rely on legislation rather than Court Decrees or Decisions. Therefore, many people think this decision will be unfair to the requesting person.

There is another setback in the right to freedom of expression implementation, On 26 February 2016, the Indonesia Broadcasting Commission (KPI) sent Circular Letter No. K/KPI/02/16 to all television broadcasters, which prohibited them from showing feminine male hosts, talents, or other performers, which are demonstrated by their feminine clothing style, make-up, gestures, speaking style, designating call, promotion of a man to behave effeminately, and using typical terms and expressions often used by transgender. For example, an Indonesian comedian namely Tessy Srimulat (his original name is Kabul Basuki) who acted as a transgender had been banned from performing in any television program. He got depressed and was jailed due to misuse of drugs. He did not have any job for more than six years. He must sell his property to survive⁴¹. Therefore, to a certain extent, freedom of expression for transgenders is a myth in Indonesia.

LGBTI people do not have a right to work as a public servant. Without any affirmative protection for the economic rights of LGBTI people, it can threaten their capacity to access it. For example, Ministry of Internal Affairs Regulation No. 11 of 2020 on Public Servants' Uniform in the Ministry of Internal Affairs and Regional Government indicates that public servants are only males and females. No transsexuals may work as public servants, because all public servants must wear uniforms either for males or females. Furthermore, they must choose to perform in a specific pattern, such as cutting their hair short and neat as a male⁴² and wearing a male or a female uniform. Thus, the right to work in the public sector is not enjoyed by transgenders.

Need Affirmative Action?

If we look at the provisions discussed in the previous section, it is clear that the rights of LGBTI are derived from general provisions. Because various rights are granted to "everyone", these rights are automatically granted to LGBTI, who are included in the term "everyone". This then raises the pros and cons. On the one hand, supporters of LGBTI rights think that the government is not strong enough to protect LGBTI, with no explicit protection specifically for LGBTI. The law can be interpreted differently in the community. On the other hand, religious leaders and conservative groups want the government to control the LGBTI people as

⁴¹Sari (2022).

⁴²Article 25 (b) of the Ministry of Internal Affairs on Public Servants' Uniform in the Ministry of Internal Affairs and Regional Government.

much as possible, and even carry out rehabilitation for them⁴³. LGBTI people are seen as an obstruction in the community.

What is the possibility of protecting LGBTI rights through affirmative action in the Indonesian legal system? To answer this question, we must pay attention to the following considerations:

a. Pancasila as the Foundation of the State

As previously explained, Pancasila is the foundation of the Indonesian state, which inevitably must become Indonesia's guide in the law-making process. The first *sila* of Pancasila (that is implemented by the marital principle in the Law on Marriage does not allow LGBTI people to have the right to have a family. Therefore, the application of this affirmative action can be limited only to neutral rights (not influenced by culture or religion), which cover civil and political rights, the right to security, and economic and social rights.

b. Proportionality

Implementing affirmative action on LGBTI rights means that laws governing these rights will specifically and strictly address the rights of LGBTI people. One example of its formulation is as follows:

"Every employer is obliged to provide equal opportunities to LGBTI people to access employment opportunities and to be employed in positions based on their qualifications and certifications".

Such a formulation will bring up very sharp pros and cons in Indonesia. It has the potential to open conflicts in society. In 2022, a US Special Envoy to discuss the rights of LGBTQ, Jessica Stern, canceled her visit to Indonesia because of objections from many parties. Mr Anwar Abbas, the vice chairman of the Indonesian Ulema Council (the biggest Muslim organization in Indonesia) stated that "Indonesia cannot host guests who have a mission to support LGBTQ. It will destroy and ruin the noble values of the Indonesian cultures and religions"⁴⁴. This objection was affirmed by the vice chairman of the Indonesian House of representative, Dr. H. M Hidayat Nur Wahid, MA⁴⁵, which used Article 28J paragraph (2) of the 1945 Constitution as his reference:

"In exercising his rights and freedoms, everyone is obliged to comply with restrictions established by law for the sole purpose of ensuring recognition and respect for other people's rights and freedoms, and to fulfill fair exigences by considering morality, religious values, security, and public order in a democratic society".

He emphasised human rights applications must consider the local context, especially the religious and social conditions of the community as well as the legal

⁴³Sindo Daily (2016).

⁴⁴Tarigan (2022).

⁴⁵The Indonesian People's Consultative Assembly.

system that applies in each community.⁴⁶ The Indonesian House of Representatives had supported this standing. Mrs. Kurniasih Mufidayati as a representative stated that “The LGBTQ values that the US envoy will promote are contrary to the values of the first *sila* of Pancasila “the belief in the one and only God”, because all religions in Indonesia do not embrace LGBTQ behaviour”⁴⁷.

The discussions above showed the strong rejection of the LGBTI existence. Surely it will be more intense repudiation against the protection of the rights of LGBTI people. Therefore, asserting the rights of LGBTI people through affirmative recognition in the legislation seems impossible. It will have a more negative social impact on Indonesian society. This argument arises not only because LGBTI people are minorities, so the negative effects of their demands will be more easily suppressed, but also because in fact, LGBTI people can already use the existing laws to uphold their neutral rights (from the limits of religion and custom. Implementing affirmative action will cause more social disunity than sticking to the *status quo*. Therefore, for now, using affirmative action to protect LGBTI rights in Indonesia is disproportional. It may trigger social tensions in the community.

Conclusion

This section will briefly answer the formulation of the problem stated in the previous section, namely “Can LGBTI be considered “full legal subjects”, having the same rights as heterosexual-oriented groups in society? Or are they (in specific rights) only considered as “pseudo-legal subjects”, who do not have the same rights as heterosexuals? Is there any shifting paradigm in Indonesia as the biggest Muslim country in the world in protecting LGBTI people?”

From the above analysis, it can be concluded that there are two groups of protections for the rights of LGBTI people in Indonesia:

- a. In neutral rights (no religious or custom restrictions), LGBTI rights are protected the same as the rights of males or females with some exceptions, such as having no access to work as civil servants.
- b. However, regarding the right to have a family, only transsexual and intersexual groups are given the right to enter into a legal marriage, as long as they must get surgery to correct their sex organs, their sex change status must be granted by a District Court Decree, the sex change status must be registered with the Civil Registration Officer, and their spouse has the opposite sex. Indonesia recognises only binary marriages between males and females. It means that homosexuals (lesbians and gays) are pseudo-legal subjects in the field of marital law.

⁴⁶The Indonesian People’s Consultative Assembly.

⁴⁷The Indonesian House of Representatives.

Indonesia made good progress in protecting the human rights of its citizens in 2002 when the protection of human rights was explicitly recognised and absorbed in the Amended 1945 Constitution. In general, the human rights of LGBTI people are also protected by the Constitution, because it applies to “everyone”. However, protection for LGBTI people fluctuates and goes up and down. When there was a movement to affirm LGBTI rights in 2015 and 2022, powerful opposition emerged in society. From the angle of the shifting paradigm in society, it seems that currently, it is shifting to a more conservative direction, which is done by rejecting the existence of LGBTI. The influence of religious values (especially Islamic values) recently more intensively affected many aspects of Indonesian society. Based on Pancasila and religious values deliberation, the Indonesian People Consultative Assembly and the Indonesian House of Representatives are openly opposed to the existence of LGBTI. Therefore, Indonesian LGBTI people must go to a long and tiring effort to fight for their rights and protections, as long as this standing is still maintained.

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