

Modification of the sentencing of transgender convict

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Abstract

The existence of transgender people in Indonesia cannot be accepted by society because they are considered to deviate from existing cultural values. Their status as transgender also makes it difficult to place them in correctional institutions when someone commits a crime. There is no legal certainty and there is a legal vacuum so that there is a need for criminal law modifications such as alternative punishments outside of prison for transgender inmates. This study has two aims: First to find out criminal modifications in the current punishment of transgender inmates, Second to that describe the concept of ideal criminal modification for transgender inmates. this study uses a normative juridical and empirical juridical approach with data collected through literature studies and field studies. The conclusion is there is a need for modifications in the criminal system, such as the placement of transgender prisoners as seen from their identification cards such as ID cards or passports, as well as court decisions if they have applied for a sex change and it has been legalized. In addition, alternative punishments other than imprisonment for transgender convicts can provide legal certainty for them in order to avoid a legal vacuum. Alternative punishment also serves to protect prisoners from the possibility of bullying and harassment for transgender prisoners.

Keywords: modification; punishment; transgender

1. Introduction

Transgender is not a new thing in Indonesia (Marpaung et al., 2020). One part of the LGBT group or an abbreviation of Lesbian, Gay, Bisexual, and Transgender, Indonesia ranks fifth with the largest LGBT population after China, India, Europe, and America (Sugiarto, 2022). Regarding the existence of transgender people in Indonesia, it has become a fairly complex discussion. This is due to personal culture and politics that have a big influence on the political policies taken by Indonesia regarding state identity. Those who act in the name of Human Rights or Human Rights and support the existence of transgender people think that these minorities also have the same rights and opportunities to get protection from the government. Indonesian people who only know men and women consider transgender to be something taboo, because it is considered not in accordance with the nation's personality and values that exist in Indonesia (Mustika & Nurbayani, 2018). Quite a lot of Indonesian people from various circles ranging from civil society itself, officials, academics to religious leaders who reject the existence of transgender people. The rejection received by these minorities is in the form of verbal, psychological, discrimination, and even threats that threaten them. With their safety and well-being. Transgender individuals in Indonesia often face societal stigma and prejudice, leading to their marginalization and exclusion from various aspects of life.

The societal disapproval towards transgender people is deeply rooted in cultural and religious norms in Indonesia. Traditional gender roles and expectations often dictate that individuals should conform to binary notions of male and female, leaving little room for those who identify as transgender. Religious beliefs also play a significant role, as

conservative interpretations of Islam, which is the dominant religion in the country, often condemn non-binary gender identities.

The lack of legal recognition and protection for transgender individuals further exacerbates their struggles. Indonesian law does not explicitly recognize or protect transgender rights, and this legal void leaves them vulnerable to discrimination and harassment. Many transgender individuals face difficulties in accessing basic services such as healthcare, education, employment, and housing. They often encounter hurdles in obtaining legal documents that accurately reflect their gender identity, which leads to further marginalization and denial of their rights.

Nonetheless, there are efforts by activists, human rights organizations, and some progressive individuals within Indonesian society to advocate for transgender rights and promote inclusivity. These individuals argue that every person, regardless of their gender identity, deserves equal rights and protections under the law. They emphasize the importance of recognizing and respecting the diversity of gender identities and expressions within society. Despite the challenges and resistance faced by transgender individuals in Indonesia, there have been positive developments in recent years. Some local governments and institutions have taken steps towards recognizing transgender rights and providing limited protections. Additionally, there is a growing awareness and understanding among segments of society regarding gender diversity and the need for greater inclusivity.

However, there is still a long way to go in terms of achieving full acceptance and equality for transgender individuals in Indonesia. It requires continued efforts to raise awareness, challenge prejudices, and advocate for comprehensive legal protections that address the specific needs and rights of transgender people. Ultimately, the goal is to create a society where transgender individuals can live authentically, free from discrimination and violence, and fully enjoy their rights as equal citizens.

In order to foster a more inclusive and accepting society, education and awareness campaigns are crucial. It is essential to educate the public about transgender issues, dispel myths and misconceptions, and promote empathy and understanding. Schools and educational institutions can play a significant role in this process by incorporating comprehensive and inclusive sex education that covers diverse gender identities and expressions.

Engaging religious leaders and communities in dialogue and promoting a more nuanced understanding of gender and sexuality can also contribute to fostering acceptance. By highlighting the shared values of compassion, respect, and justice, it is possible to bridge the gap between religious teachings and the rights of transgender individuals. Furthermore, it is imperative to advocate for comprehensive legal protections for transgender people. This includes recognizing their right to legal gender recognition and ensuring that they are protected from discrimination in all areas of life, including employment, healthcare, housing, and public services. It requires the enactment and enforcement of anti-discrimination laws that explicitly cover gender identity and expression.

International organizations and human rights advocates can support local activists by providing resources, expertise, and amplifying their voices. They can also pressure the Indonesian government to uphold its commitments to human rights and encourage the development of policies and legislation that safeguard transgender rights. Importantly, creating safe spaces and support networks for transgender individuals is crucial for their well-being. Establishing counseling services, helplines, and community centers where they can seek guidance, emotional support, and access to healthcare can make a significant difference in their lives.

By addressing the social, cultural, and legal barriers faced by transgender individuals in Indonesia and promoting inclusivity and acceptance, it is possible to create a society where everyone can live with dignity and equality, regardless of their gender identity. It requires a collective effort from individuals, communities, organizations, and the government to create lasting change and ensure that transgender individuals can thrive and contribute to Indonesian society.

As the movement for transgender rights in Indonesia continues to gain momentum, it is important to address the intersectional challenges faced by transgender individuals. Transgender people who belong to marginalized communities, such as those who are low-income, disabled, or from ethnic and religious minority backgrounds, often face compounded discrimination and exclusion. Efforts must be made to ensure that the rights and needs of these intersectional identities are acknowledged and protected.

Employment opportunities and economic empowerment are critical aspects of transgender inclusion. By promoting workplace diversity and implementing inclusive hiring practices, businesses and organizations can create environments where transgender individuals can thrive professionally. Providing vocational training and entrepreneurship support can also empower transgender individuals to build sustainable livelihoods.

Access to comprehensive healthcare is another crucial area that needs attention. Transgender individuals often face barriers in accessing gender-affirming healthcare, including hormone therapy and gender confirmation surgeries. It is essential to advocate for healthcare policies that recognize and address the specific needs of transgender people, ensuring their access to safe, affordable, and culturally competent healthcare services. Legal reforms are necessary to protect transgender rights comprehensively. This includes recognizing transgender identity through legal gender recognition processes and allowing individuals to update their identification documents to reflect their affirmed gender. Additionally, laws must be enacted to specifically criminalize discrimination and violence based on gender identity or expression, ensuring that perpetrators are held accountable.

In the realm of education, fostering inclusive school environments is crucial for the well-being and academic success of transgender students. Schools should implement policies that prohibit discrimination and bullying based on gender identity, provide support systems such as gender-neutral facilities and trained counselors, and include inclusive curriculum that educates all students about gender diversity. To achieve lasting change, community engagement and grassroots activism are vital. It is essential to involve transgender individuals and their allies in decision-making processes, allowing their voices to be heard and their perspectives to shape policies and programs. By fostering a sense of community, organizing support groups, and promoting solidarity, transgender individuals can find strength and resilience in their collective journey towards equality.

Ultimately, the journey towards full transgender rights and acceptance in Indonesia requires a comprehensive and multi-faceted approach. It involves addressing societal attitudes, implementing legal protections, ensuring access to essential services, promoting inclusive education, and fostering community support. By recognizing the inherent dignity and worth of every individual, regardless of their gender identity, Indonesia can create a society where diversity is celebrated and everyone can live authentically and without fear of discrimination or violence. Sentencing is the imposition of sanctions as a legal remedy on someone who through the criminal justice process is proven legally and convincingly guilty of committing a crime (Binder, 2002). Criminals are imposed on a person or group of people who commit a crime, because it also functions as a social institution to regulate the system of social relations in society (Anderson, 2012). A crime that constitutes deprivation of liberty is carried out by a correctional institution where a person or group of people is temporarily exiled from the community as if their citizenship has been revoked from the community but at one time they will be returned to the community and become a citizen again (Barker, 2013). Implementing prison sentences for inmates is not an effort to take revenge and keep prisoners away from society, but to correct the mistakes made by inmates (Uggen et al, 2013). Through efforts to rehabilitate the social reintegration of prisoners in prison which is carried out in an integrated manner to improve the quality of prisoners in prison so that they realize their mistakes, improve themselves, and do not repeat criminal acts again. Guidance carried out in the correctional system by treating prisoners as subjects as well as objects, dimana intended as unity and parallel.

In carrying out a sentence, each inmate will be divided into several groups. Based on Article 12 Paragraph (1) of Law Number 12 of 1995 Law Number Of 2022 concerning Corrections, convicts who are convicted are distinguished by:

- a. Age
- b. Gender
- c. The length of the sentence
- d. Types of criminal
- e. Other criteria according to need

The classification of prisoners based on the law states that one of them is based on gender which is divided into male and female (Jiang & Winfree, 2006). The classification will be difficult if the inmate is known to be transgender. It becomes a new problem because there are no rules that regulate transgender prisoners. The transgender inmate who has ever existed is a public figure named Lucinta Lunia with a case of drug abuse. His transgender status makes the police confused in placing prisoners in prison. The absence of regulations explain about the facilities that discuss transgender prisoners makes the authorities confused in dealing with transgender prisoners, especially in the placement that determines how to treat prisoners in prison.

There are no rules regarding transgender prisoners in Indonesia because most of the people think that transgender is something that is taboo. Unlike the United Kingdom, one of the countries on the European continent officially announced the opening of a prison dedicated to transgender inmates in March 2019. The British policy to build special prisons for transgender people was behind the case of a transgender inmate named Karen White who sexually abused two female convicts in a detention cell (Sexton et al, 2010). Even so, it does not mean that the policies taken by the British State can be directly adapted in Indonesia. Precisely from the policy of the British State, Indonesia needs a policy to be taken in dealing with transgender prisoners so that they also get justice.

Carrying out punishments that are oriented towards human values (Schwartz, 2007), especially for individual crimes that are in accordance with the aim of not just taking revenge on criminal offenders but to re-socialize the perpetrators of criminal acts is very important to protect individual perpetrators of criminal acts. The application of the principle of criminal individualization in the process of imposing sanctions is one method that can be used if the perpetrator is a transgender person (Tata, 2007), because criminal individualization is based on the importance of individual protection in the criminal law system. The principle of criminal individualization always pays attention to the characteristics and circumstances of the perpetrator in the sentencing process so that not all perpetrators of criminal acts will or can be sentenced to imprisonment. There are several situations where the sanctions should be given in the form of alternatives other than imprisonment.

Alternative punishment is a policy of imposing criminal offenses other than imprisonment for convicts. Alternative punishment is part of the concept of legal modification in which the formation of new legal norms by those in power due to changes that occur in society. In addition to functioning as an anticipation of overcapacity in prison, alternative punishment is also another alternative in imposing sanctions on transgender people. Because many parties are also worried about the existence of transgender prisoners in detention cells, such as fear of harassment by transgender prisoners themselves or transgender prisoners who are victims.

Problems regarding the sentencing of transgender prisoners have resulted in a legal vacuum which requires policies to be taken by the authorities in dealing with this matter. Because it is not a trivial matter, the authorities must also be careful in making decisions so that these transgender prisoners still get their rights. Based on this, the main problem in this research is how is the criminal modification in the current punishment of transgender prisoners? And what is the ideal concept of criminal modification for transgender prisoners?

2. Methods

This research uses a normative juridical approach, namely research is carried out by studying, viewing, and analyzing several theoretical matters concerning legal principles, conceptions, views, legal doctrines, legal regulations, and systems related to the problem of

this research. Meanwhile, the empirical juridical approach is where the research is carried out by conducting field observations regarding the modification of the punishment of transgender prisoners. Methods of data collection through literature studies and field studies.

3. Results and Discussion

3.1. Criminal Modifications in the Current Conviction of Transgender Prisoners

Modification itself is the process of updating the applicable legal rules in accordance with existing developments in society to create more just social relations (Basu, 2004). Modifications in the law are needed because there are some old rules that are no longer in accordance with current and future conditions. The need for legal modification is not solely without reason, the importance of legal modification of course has reasons, namely:

- a. Political reasons; viewed from a political point of view, the Indonesian state should have its own Criminal Code, not merely continue to use the rules of the country that once colonized the Indonesian state. With Indonesia having its own Criminal Code, it will make the State of Indonesia have the political identity of an independent country.
- b. Sociological reasons; From a sociological point of view, the rule of law is a reflection of the political ideology of a nation. That means the social and cultural values of the nation have a place in the rule of law. Because some of the rules in the Criminal Code do not meet the needs of the Indonesian people, then reforms are carried out by incorporating the social and cultural values of the Indonesian people into the existing legal rules.
- c. Practical reasons; From a practical point of view, because the official text of the Criminal Code is in Dutch, there is a high possibility of misinterpretation of the language which can lead to misunderstandings in the rules. In addition, the independent Indonesian nation has its own national language, so it is necessary to replace the Criminal Code with the National Criminal Code. New National Criminal Code Law Number 1 of 2023.

As already explained, modification is a renewal that is carried out following the development of society, including because of the emergence of transgender people in Indonesia. Transgender is a form of behavior that is considered to deviate from the supposed gender role (Levy & Lo, 2013). Transgender has a close relationship with sexual orientation, this refers to physical, arousal, emotional, and sexual descriptions of other people. However, their existence is difficult to be accepted by society because they are considered people who have mental disorders or social deviations. The number of rejections in society makes it difficult for them to live a normal life which in the end makes these minorities commit criminal acts.

According to Indiyanto Seno Adji, a criminal act is an act that is threatened with a crime where the action is against the law and the perpetrators who violate the law must be able to take responsibility for their actions. Everyone can certainly commit a crime, including transgender people. However, because of their transgender status, the authorities are confused in carrying out their sentencing. There are no rules that regulate the punishment of transgender people because the sex grouping of prisoners as regulated in Law Number 12 of 1995 concerning Corrections is only male and female.

Like the case that happened to a public figure, namely Lucinta Luna, where he was arrested because he was caught in a case of drug abuse. In this case, because Lucinta Luna is a transgender, the authorities are confused in carrying out her sentencing. When the detention was to be carried out, judging by Lucinta Luna's identity card, the gender was female, but in her passport, the sex listed was male. Had been placed in a male detention cell because it was considered male by nature but was eventually transferred to a female detention cell, because it is known that Lucinta Luna has officially changed her gender from male to female as stated in the decision of the South Jakarta District Court number 1230/Pdt.P/2019/PN.Jkt.Sel which has been legalized since 20 December 2019 ago.

Based on the above case, it can be seen that in convicting inmates cannot only refer to the identification of the perpetrators of criminal acts such as based on their ID cards or passports, because it is feared that the status of the type of victim is different as in the case of Lucinta Lunia. It is also necessary to find out whether a transgender person has officially changed his gender status like Lucinta Lunia, who was finally found to have submitted an application for a sex change to the court and it was legally ratified..

Even though it is official when the transgender prisoner changes his gender status, the authorities are still worried about placing him in prison, such as fear of bullying or sexual harassment by other inmates. such as the case that occurred in England where transgender prisoners committed crimes of sexual harassment of female prisoners in detention cells. Because of this case, the UK finally built a special prison for transgender inmates as an effort to prevent the risks that could be caused by each party, both transgender and other inmates.

The case in the UK can serve as an example for the Indonesian state in preventing unwanted things from happening to prisoners in detention cells. However, that does not mean that the State of Indonesia must adopt the policies taken by the British State. The Indonesian state must have its own criminal modifications in dealing with transgender prisoners. As in the case experienced by the public figure Lucinta Lunia, the punishment for transgender inmates can be based on their identification cards such as ID cards or passports and can also be based on court decisions if they have submitted an application and have been approved by the court. This can provide legal certainty to transgender inmates so that they can also get their rights as prisoners in prison.

3.2. The Ideal Criminal Modification Concept for Transgender Convicts

As explained above that modification is the process of updating the applicable legal rules in accordance with existing developments in society to create fairer social relations (Wilson, 2012) . So that in modifying the criminal law, it must be adapted to the conditions of the community, including in terms of punishment (Robinson & Darley, 2004) (Shearing, 2001). Modification is very important to create justice for the whole society, including prisoners (Maguire & Raynor, 2006). A convict is someone who has been convicted or sentenced and must serve his sentence (Alschuler, 1978) (Blumstein & Cohen, 1979). The convicts who have been sentenced will be divided into several groups (Sumpter, 2017) as stated in Article 12 Paragraph (1) of Law Number 12 of 1995 concerning Corrections where the punishment of convicts is divided into several groups, namely:

- a. Age
- b. Gender
- c. The length of the sentence
- d. Types of criminal
- e. Other criteria according to need

The separation of prisoners based on the above law makes it easier for the authorities to provide guidance to prisoners. However, it becomes difficult if it turns out that the prisoners detained are transgender. Sentencing transgender prisoners becomes difficult because their gender status is not clear so they do not know whether to be placed in male or female detention cells. This also affects the process of coaching prisoners, because the treatment of male prisoners and female prisoners will definitely be different. As explained above regarding the case of a public figure Lucinta Lunia who was detained for a drug case. Because of his transgender status, it makes it difficult for the authorities to place his prisoners.

The absence of rules governing the sentencing of transgender prisoners causes a legal vacuum (Sumner & Jenness, 2014) (Wacquant, 2001). The development of society is faster than the development of laws and regulations, there are problems with things that have not been or are not regulated in laws and regulations. The legal vacuum that occurs due to the absence of regulations makes the government have to modify the criminal law related to the sentencing of transgender prisoners. This modification does not mean that the State recognizes the existence of transgender, this modification is carried out so that all

prisoners can get legal certainty and their rights as prisoners. One of the concepts of criminal law modification is criminal individualization. According to Sudarto, criminal individualization is the provision of criminal sanctions by taking into account the nature and condition of the perpetrator of the crime (Darlisma, 2022). Criminal individualization is based on the importance of individual protection (Vorapatr et al, 2023) (Frank et al, 2010), in this case the perpetrators of criminal acts in the criminal law system. The concept of criminal individualization has also been reflected in the provisions of Article 12 of Law Number 12 of 1995 concerning Corrections so that the development of prisoners is based on age, gender, type of crime, and the length of the sentence carried out. Sentencing carried out by the authorities must also be oriented towards human values, especially on the perpetrators (individuals) of crimes in accordance with the purpose of punishment which is not only to take revenge but also to re-socialize the perpetrators of criminal acts. This is important in protecting every criminal, including transgender prisoners.

Then in the modification of the criminal law to fill the legal vacuum, transgender inmates can be sentenced to other than imprisonment, namely with alternative punishments. Alternative punishment itself is a policy of imposing criminal law other than imprisonment for prisoners (Kerr, 2019). The alternative crimes referred to are:

1. Fines; Fines are a type of financial sanction that requires the perpetrator to pay a certain amount of money in accordance with the law (White, 2017). Crimes that are usually subject to fines are usually the type of crimes that are classified as not serious (Posner, 2001). Fines are usually imposed in addition to a suspended sentence, and as an alternative to imprisonment
2. House arrest or home confinement; is an alternative type of punishment that is classified as severe but is classified as lighter than imprisonment. House arrest requires the offender to remain at home for a set amount of time. Leaving the house is only allowed for very important purposes and for essential purposes such as, work and shopping for necessities. Usually, perpetrators who are sentenced to house arrest are perpetrators with the category of serious crimes but not serious enough to be sentenced to prison.
3. Social work; Social work crime is one of the alternative types of criminal acts of deprivation of liberty which are mostly carried out by European countries. Social work crimes require offenders to provide a certain amount of time for work that is of a public service nature. Social work is an alternative form of punishment to short-term imprisonment which requires criminals to work without pay. Social work punishment is intended so that the convict can be freed from guilt and the community can play an active role in socializing prisoners by doing useful things.
4. Probation or probation; is a condition in which the perpetrator is free but remains under surveillance in the community as an alternative form of imprisonment. Probation was developed as an effort to lighten the severity of the punishment of an offense or crime. Probation gives criminals the opportunity to remain in society and work until they are free from surveillance.
5. Diversion; Diversion is a community-based punishment that aims to prevent criminals from being formally processed in the Criminal Justice System (DeMatteo et al, 2013). Criminal Justice Officials can disengage from the formal process of perpetrators for a number of reasons. Diversion usually occurs when it is believed that it will be better for both the perpetrator and the community if the case is diverted from the formal process (Li & Su, 2020).

This alternative punishment is one solution so that transgender inmates get clear legal certainty and can also obtain their rights as prisoners in prison. In addition, the imposition of alternative penalties on transgender inmates is also to prevent bullying and sexual harassment in detention cells, whether transgender prisoners become victims or become perpetrators.

4. Conclusions

Based on the research and discussion above, the authors can draw the conclusion that the modification of criminal law is very important, especially the rapid development of society at this time makes some laws and regulations need to be updated following the development of society in order to create justice, including in the criminal system. The reform of the criminal system is very much needed, especially the emergence of the phenomenon of transgender criminals. The punishment of transgender inmates is difficult because there are no rules that regulate it.

Therefore, a policy is needed to modify the existing criminal system. One of them is seen from their identification cards, namely ID cards or passports. Bias is also from the judge's decision if you have ever submitted a legalized sex change application. In addition, alternative punishments can be a solution for transgender prisoners in addition to sending witnesses to imprisonment. This alternative punishment is also aimed at preventing bullying and sexual harassment in detention cells.

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Author Contribution

Conceptualization, Maya Shafira and Hasna Niditya Rosyaadah.; Methodology, Emilia Susanti; Software, Gunawan Jatmiko; Validation, Damanhuri Waganegara; Formal Analysis, Maya Shafira and Hasna Niditya Rosyaadah; Data Curation, Hasna Niditya Rosyaadah.; Writing – Original Draft Preparation, Hasna Niditya Rosyaadah; Writing – Review & Editing, Hasna Niditya Rosyaadah.

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Informed Consent Statement

Informed consent was obtained from all subjects involved in the study.

Data Availability Statement

The data is available upon request.

Conflicts of Interest

The authors declare no conflict of interest.

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