

## CHAPTER II

### LITERATURE REVIEW

#### 2.1. Conceptual Framework

##### 2.1.1. Definition of Gender

The concept of gender is an inherent trait of men and women constructed socially and culturally. For example, that woman is known as gentle, beautiful, emotional or motherly, while men are considered strong, rational, manly and mighty. The characteristic changes of these traits can occur from time to time and from place to place. Also, change can occur from different classes of society. All things that can be exchanged between the nature of women and men, which can change from time to time and different from place to place, or different from one class to another that is known as the concept of gender.<sup>28</sup> It can be said that Gender is the different roles, functions and responsibilities between women and men that are the result of socio-cultural construction and can change according to the times. Social construction in relation to this is the status and role in a social system that is structured so that it can work in a harmony.

Gender in the social sciences and biology is a biological category, female or male. Regarding chromosome count, genetic pattern and genital structure. The determination of the sex category is relatively uncomplicated when compared with other concepts. Gender is the opposite of social concepts. The term femininity and masculinity associated with the term related to a number of

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<sup>28</sup> Mansour Fakhri, *Analisis Gender Dan Transformasi Sosial* (Yogyakarta: Pustaka Pelajar, 1996), 8–9.

psychological and behavioral characteristics that have been studied in complexity through its socialization experience.<sup>29</sup>

Gender is the sex that humans brought from birth, in this world the sexes are male, female and intersex (someone born with two sexes). Therefore, in terms of gender, everyone behaves according to the social construction built in his/her environment about how a man should behave and look as Foucault says that sexuality is a social construction<sup>30</sup> that control of human sexual desire through regulation becomes the foundation of social institutions and also as a conduit for punishment and domination of the organization.<sup>31</sup>

The patriarchal system is characterized by the institutionalization of male authority over women and children within the family. Therefore, in a patriarchal culture, sexual relationships that are considered normal and acceptable to society, religion and state are heterosexual relations, this means women should be paired with men and marriages that are recognized is between man and woman. The consequence is that sexual relations outside the standards are considered as a violation of religious law or rules and not in accordance with the socio-cultural norms of society. The construction of gender and sexuality that was discourse through cultural or religious norms and reinforced by state policy resulted in stigmatization of humans and considered as a normal.<sup>32</sup> In this context, the stigmatization of LGBT considered "different" and "abnormal" occurs because the

<sup>29</sup> Saparinah Saldi, *Identitas Gender Dan Peranan Gender Dalam Kajian Wanita Dalam Pembangunan* (Jakarta: Yayasan Obor Indonesia, 1995), 69–70.

<sup>30</sup> M. Foucault, *Seks Dan Kekuasaan : Sejarah Seksualitas*, ed. Rahayu S. Hidayat (Jakarta: PT. Gramedia Pustaka Utama, 1997).

<sup>31</sup> Sri. Yuliani, "Menguak Konstruksi Sosial Di Balik Diskriminasi Terhadap Waria," *Jurnal Sosiologi Dilema* 18 (2) (2006): 73–84.

<sup>32</sup> Yuliani.

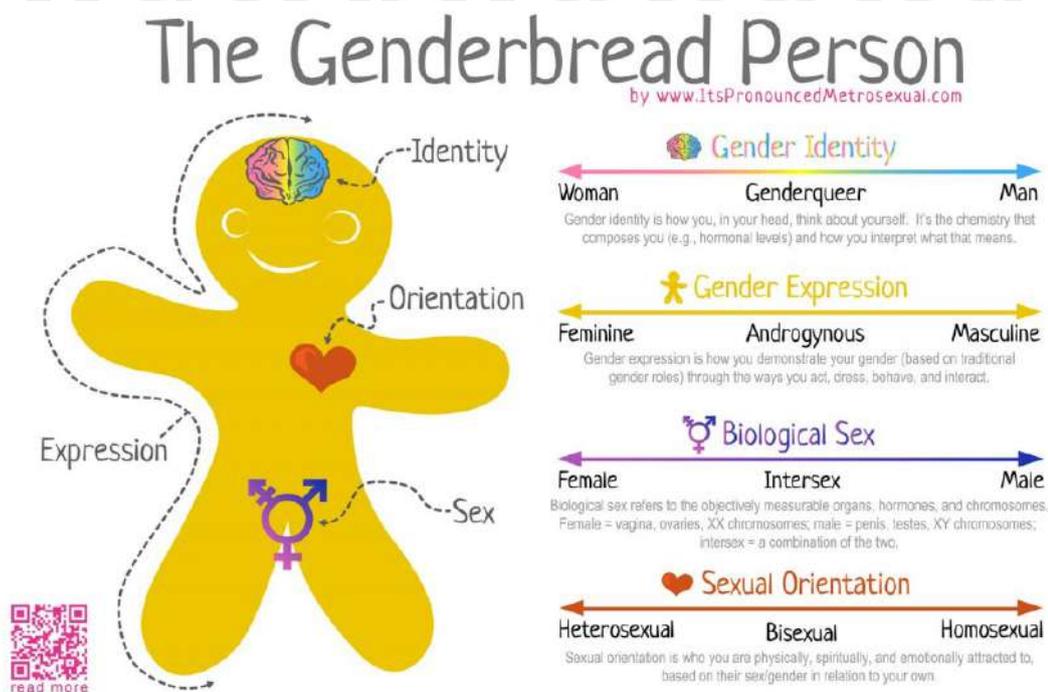
community's understanding of sexual orientation and gender identity is still low. For examples, man must be masculine, macho, and brave because it has become a man's nature.

Laws in many countries are also used to control the minority groups (LGBT), not to out of gender roles and characteristics that has been constructed.

In some countries this control is accompanied by threats or penalties imposed by the judiciary. To impose the role or gender characteristics expected by social values or religious norms, states often resort to coercion and violence.<sup>33</sup>

### 2.1.2. Definition of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)

Understanding of SOGIE can be read on the figure of Genderbread Person developed by Sam Killermann below:



Picture 2.1 The Genderbread Person, Sam Killermann

<sup>33</sup> Yuliani.

### A. Gender Identity

Gender identity is defined as something that leads to a deeply felt personal and internal experience felt by him/her about his/hers gender that may be incompatible with the sex set at birth. To better understand the gender identity is one's view of him/herself is a man, woman or transgender. Most people identify their gender identity according to their biological sex, such as: "I am a female, because I have vagina", or feel like a male because the biological sex of his is a male organ (penis, testis). Oftentimes, problems arise when someone is assigned a gender based on their sex at birth that doesn't align with how they come to identify. These people can be categorized as transgender. While gender identity such as transgender is often equated with transsexual, but in fact they are two different things, transgender is someone who has a desire to live as opposite of assigned gender, while transsexual is someone who has a desire to live and be accepted as a member of the sex opposite to her biological gender and wants hormonal and surgical treatment to make her body as similar as possible to the opposite sex biologically and in accordance with its gender identity<sup>34</sup>

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<sup>34</sup> Galink, *Seksualitas Rasa Rainbow Cake: Memahami Keberagaman Orientasi Seksual Manusia* (Daerah Istimewa Yogyakarta: Perkumpulan Keluarga Berencana Indonesia, 2013).

## B. Gender Expression

Gender expression is defined as how a man demonstrates gender through the ways he/she act, dress, behave, and interact - whether that is intentional or unintended. Gender expression is interpreted by others based on traditional gender norms (e.g., men wear pants; women wear dresses). Gender expression is something that often changes from day to day, outfit to outfit, and event or setting to event or setting. It's about how the way a man express him/herself aligns or doesn't with traditional ways of gendered expression, and can be motivated by him/herself gender identity, sexuality, or something else completely.<sup>35</sup>

Person's gender expression may be inconsistent with a gender role and may also reflect her gender identity. Gender expression is about the masculinity and femininity of a person. These masculinity and femininity are determined by traditional gender norm.<sup>36</sup> Between masculine and feminine there are androgynous that oppose masculinity and femininity.

## C. Biological Sex

“Biological sex refers to the objectively measurable organs, hormones, and chromosomes you possess. Considered biological sex in the ultra-reductive way society does: being female means having a vagina, ovaries, two X chromosomes, predominant estrogen, and the ability to grow a baby in your abdominal area; being male means having testes, a

<sup>35</sup> Sam Killermann, “Breaking Through the Binary,” 2011, <https://www.genderbread.org/wp-content/uploads/2017/02/Breaking-through-the-Binary-by-Sam-Killermann.pdf>.

<sup>36</sup> Galink, *Seksualitas Rasa Rainbow Cake: Memahami Keberagaman Orientasi Seksual Manusia*.

penis, an XY chromosome configuration, predominant testosterone, and the ability to put a baby in a female's abdominal area; and being intersex can be any combination of what just described above. For example, someone can be born with the appearance of being male (penis, scrotum, etc.), but have a functional female reproductive system inside. There are many examples of how intersex can present itself, and below is some statistics from the Intersex Society of North America illustrating the frequency of intersex births”.

Not XX and Not XY	1 in 1,666 births
Klinefelter (XXY)	1 in 1,000 births
Androgen Insensitivity Syndrome	1 in 13,000 births
Partial Androgen Insensitivity Syndrome	1 in 130,000 births
Classical Congenital Adrenal Hyperplasia	1 in 13,000 births
Late Onset Adrenal Hyperplasia	1 in 66 individuals
Vaginal Agenesis	1 in 6,000 births
Ovotestes	1 in 6,000 births
Idiopathic (no discernible medical cause)	1 in 110,000 births
Iatrogenic (caused by medical treatment)	No estimate
5 Alpha Reductase Deficiency	No estimate
Mixed Gonadal Dysgenesis	No estimate
Complete Gonadal Dysgenesis	1 in 150,000 births
Hypospadias (in perineum or penile shaft)	1 in 2,000 births
Hypospadias (between corona and tip of penis)	1 in 770 births
<b>Total number of people whose bodies differ from standard male or female</b>	1 in 100 births
Total number of people receiving surgery to “normal” genital appearance	1 or 2 in 1,000 births

*Table 2.1* Frequency of Intersex Births

#### **D. Sexual Orientation**

“Sexual orientation is understood as a person's ability to feel emotionally, mentally and physically attracted to the same sex and / or different sex. This refers to the gender that someone is interested in. Sexual orientation consists of homosexual, heterosexual and bisexual”.

The above explanation confirms that SOGIE is a sexual orientation and gender identity of a person integrated with human sexuality that is a part of human rights that is inherent and possessed by all human beings in the world. Lack of public understanding about SOGIE resulted in LGBT groups getting violent treatment from the surrounding environment, both in domestic and public spaces.

### **2.1.3. Understanding of Lesbian, Gay, Bisexual and Transgender (LGBT)**

United States are very focused on LGBT human rights issues, because according to them with the absence of discrimination and criminalization of LGBT people, LGBT life will run normally with heterosexual people. The UN has worked with state members to reject discrimination and criminalization based on homophobia and trans phobia for LGBT people. This is a form of recognition of human rights for LGBT people and the results of more than 30 countries have legalized homosexuality in the past 20 years. To deal with resistance from NGOs and groups that oppose the provisions of the United Nations, the United Nations through representation from each member states ordered to guarantee LGBT human rights. Today, under the leadership of Secretary General Ban Ki-moon, there is no doubt for the United Nations to make a decision towards global inclusion in recognition of LGBT human rights.<sup>37</sup>

The existence of LGBT in the world has existed for a long time, starting from the earliest time the phenomenon was discovered, namely the 19<sup>th</sup> century.

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<sup>37</sup> Meilanny Budiarti Santoso, "LGBT Dalam Perspektif Hak Asasi Manusia," *Social Work Journal* 6, no. 2 (n.d.): 222.

In the 19<sup>th</sup> century, the American Psychiatric Association (APA) still regarded LGBT as a mental disorder. As in the development of the diagnosis of psychiatrists in America and their research, in 1952 the original *Diagnosis and Statistical Manual of Mental Disorders (DSM)* stipulates that LGBT is a sociopathic personality disorder.<sup>38</sup>

Over time, the community of LGBT gets severe discrimination from society. Starting from being expelled from work, being considered as a mad, as a criminal, and other discrimination issues. In 1951, Donald Webster Cory published book “*The Homosexuals*” in America, which stated that gays and lesbians were legitimate minority groups. Until 1950-1970s LGBT support communities gave rise to movements calling for the elimination of discrimination against the LGBT community.<sup>39</sup>

LGBT which stands for Lesbian, Gay, Bisexual, and Transgender is a term used at the beginning of the 1990s until now. LGBT is taken from the abbreviation LGB which was originally used as a substitute for the expression gay community. Nowadays, the term LGBT is used by someone or anyone who has a different sexual orientation and gender identity based on traditional culture, namely heterosexual. Easier, people who have sexual orientation and non-heterosexual identities such as homosexuals, bisexuals, or others can be called LGBT.<sup>40</sup>

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<sup>38</sup> Santoso, 222.

<sup>39</sup> Santoso, 222.

<sup>40</sup> Sinyo, *Anakku Bertanya Tentang LGBT* (Jakarta: PT Elex Media Komputindo, 2014), 11.

### A. Gay

At first, the word gay is used to indicate the meaning of happy or fun. However, in the United Kingdom this word also has the meaning homosexual (around 1800's). As time goes by, the term gay is more used to refer to the meaning of homosexuality. Nowadays the term gay is more specifically used to show that someone has an SSA, and then makes it a self-identity in social life. SSA (Same-Sex Attraction) itself used to explain that a person has a sense of sexual attraction with same-sex (same gender), either totally or partly. SSA also often used to replace the term of homosexual and bisexual.<sup>41</sup>

Because gay has become a term used to show self-identity in social life, the term is not merely a show of same-sex interest, but also an overall image and acceptance of his/her life as someone who has same-sex sex orientation. This term becomes a choice of sexual identity in social life such as heterosexual and bisexual. So, it can be concluded, if there is someone who has an SSA but does not identify himself as gay, then it cannot be called gay. On the contrary, a gay person certainly has SSA.<sup>42</sup>

### B. Lesbians

Lesbian or Lesbianism comes from the word Lesbos which is an island in the middle of the Aegean Sea which in the past is inhabited by women. Actually the word gay applies to all genders, men and women.

<sup>41</sup> Sinyo, 5.

<sup>42</sup> Sinyo, 5.

But lately women who identify themselves as gay (same-sex attraction) prefer to use of the term lesbian. In other words, it can be concluded that lesbians are gay women. Gay and lesbians are equally attracted to same-sex and have accepted the sexual orientation happily without the slightest resistance or no anxiety to want to be heterosexual.<sup>43</sup>

### C. Transgender

Transgender literally comes from the word trans which means displacement and gender which means role. As for the term, transgender is a term to indicate the desire to appear opposite to the sex they have. A transgender person may have a heterosexual, bisexual, gay or even asexual social identity. Transgender people do not question the sex they have and do not want to change their genitals through surgery. Therefore, someone who is male, has a heterosexual orientation, but wants to always dress or appear as a woman, then he can be called a transgender.<sup>44</sup>

In addition to the term transgender, the term transsexual is also known. At first glance, the meaning of these two terms is almost the same, but there are differences. The use of these two terms often overlaps, even by individuals who are directly involved with them. Transsexual refers to people who want to change their life habits and sexual orientation biologically, as opposed to what they have since birth. For example, someone who is born as a man then decides to be a woman (biologically,

<sup>43</sup> Kartini Kartono, *Psikologi Wanita Jilid I* (Bandung: Alumnus, 1977), 263.

<sup>44</sup> Sinyo, *Anakku Bertanya Tentang LGBT*, 8.

habits, self-identity, etc.), then he is called transsexual. The person replaces vital organs with regard to sex being the opposite sex, looks like a woman, acts like a woman, and changes her identity officially as a female. One real example of transsexual is Mother Dorce Gamalam.<sup>45</sup>

#### **D. Bisexual**

Bisexually literally comes from the word bi which means two, and sexual. In bisexual terms it is used for people who have two orientations, namely sexual attraction to same-sex and other types simultaneously. Bisexuals also represent sexual identities in the lives of people other than heterosexuals and gays. For example, a man is attracted to a woman, and desires to have sex with her, but on the other hand when he also has a desire to have sex with men.<sup>46</sup>

#### **2.1.4. Understanding the Concept of Human Rights**

Meriam Budiardjo, in her book “Dasar-dasar ilmu Politik” states that Human rights are the rights that humans have acquired and brought along with their birth and his life. It is assumed that some of these rights are owned without differences on the basis of nation, race, religion, sex and the arena is universal. The basis of all human rights is that humans have the opportunity to develop according to their values and aspirations.<sup>47</sup>

<sup>45</sup> Sinyo, 8–9.

<sup>46</sup> Sinyo, 8.

<sup>47</sup> Meriam Budiardjo, *Dasar-Dasar Ilmu Politik* (Jakarta: PT. Gramedia, 1980), 4.

Leach Levin, a United Nation Human Rights activist stated that there are two basic concepts of human rights, namely: First, that human rights cannot be separated and revoked. Rights are moral rights derived from the humanity of every human being and those rights aim to guarantee the dignity of every human being. Second, human rights are rights according to law, which are made through the process of legal formation of the community itself, both nationally and internationally.<sup>48</sup>

There are various limitations regarding human rights, Hendarmin Ranadirekasa provides a definition of human rights is a set of provisions or rules to protect citizens from possible oppression, fund placement knows the restrictions on citizens' movement by the state, meaning there are certain restrictions applied to the state therefore the most essential citizens' rights are protected from the arbitrariness of power. Whereas Mahfu MD defines human rights as inherent rights to human dignity as God's creatures, and these rights are brought by humans from birth therefore these rights are natural, not gifts from humans or the state.<sup>49</sup> So from the two meanings above, it can be concluded that human rights are basic rights inherent in every individual from birth and not a gift of humans or a state that must be protected by the state.

Based on the definition above, it can be seen how the position of human rights with the law made by the state. The existence of human rights precedes the law in other words that human rights are basic rights inherent in human beings

<sup>48</sup> Santoso, "LGBT Dalam Perspektif Hak Asasi Manusia," 225.

<sup>49</sup> Muladi, *Hak Asasi Manusia: Hakekat, Konsep Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat* (Bandung: Refika Aditama, 2005), 7.

throughout their lives as a gift from God, it is universal and must be protected legally or humanely formalized into a set of existing legal rules. From this position, the law is a *condition of sine qua non* in the enforcement of human rights, the complete legal instrument on human rights is one of the sources of human rights law awaiting the political steps of each leader to enforce it.

The contents of human rights can only be traced through the search for legal and moral rules that apply in society. John Locke (1632-1704) who was known as the father of human rights, in his book entitled "Two Treatises On Civil Government", stated that the purpose of the state was to protect the human rights of the citizens. Humans before state life or in natural conditions (naturalist status) have lived peacefully with their rights, namely the right to life, the right to freedom and the right of property.<sup>50</sup>

In human rights there are two important principles underlying the concept of human rights itself, namely the principle of freedom and equality, where the two things are the basis of a justice. John Rawls, argues that there are three things that are a solution to the main problem of justice, namely:

1. The principle of greatest equal liberty, this principle includes freedom to participate in political life, freedom of speech, freedom of the press, freedom of religion, freedom to be yourself, freedom from arbitrary arrest and detention, and the right to retain private property

<sup>50</sup> Santoso, "LGBT Dalam Perspektif Hak Asasi Manusia," 226.

2. The difference principle, the essence of this principle is that socio-economic differences must be regulated to provide great benefits for those who are disadvantaged.
3. The principle of fair equality of opportunity, the essence of this principle is that socio-economic inequality must be arranged in such a way that it opens the position and social position of everyone under conditions of equal opportunity.<sup>51</sup>

Based on the above principles it can be seen that these three principles are the main things that exist in human rights, where human rights do not look at one's economic, social and cultural position, and do not see how they stand as civilians or their position in politics, everyone has freedom and also has the same position.

Human rights in Indonesia originate and lead to Pancasila, which means that human rights have a strong guarantee from the philosophy of the nation, namely Pancasila. Stating on Pancasila is meant that the implementation of human rights must pay attention to the lines that have been determined in the provisions of the Pancasila philosophy. For the Indonesian people, carrying out human rights does not mean carrying out freely, but must pay attention to the provisions contained in Pancasila. This is because basically there are no rights that can be exercised absolutely without pay attention to the rights of others. Every right owned by a person will be limited by the rights of others.

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<sup>51</sup> John Rawls, *A Theory of Justice, Journal of Experimental Psychology: General*, Revised Ed, vol. 136 (United States of America: Harvard University Press, 1999), 52–56.

The Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently and must be protected, respected, and upheld for the enhancement of dignity, humanity, welfare, intelligence and justice. The principles of human rights can be seen in various instruments, including:

1. The 1945 Constitution, which is contained in Article 28I, Article 28J of the 1945 Constitution of the Republic of Indonesia.
2. Law Number 39 of 1999 concerning Human Rights, in Chapter I concerning General Provisions and Chapter II on Basic Principles.<sup>52</sup>

For the Indonesian, with their legal instruments, state must guarantee the protection and fulfillment of human rights. Law cannot be separated from the values of civilization and always correspond to common sense and human nature.

The law exists to protect the dignity of humanity.<sup>53</sup>

#### **2.1.5. Definition of Child Rights**

The legal foundation used in carrying out the fulfillment of children's rights is based on the Constitution of the Republic of Indonesia in 1945 and the basic principles of the Convention on the Rights of the Child which was adopted in 1990 then absorbed into Law No. 23 of 2002. Based on something inherent the child is a right that must be protected and maintained to develop naturally.

<sup>52</sup> Santoso, "LGBT Dalam Perspektif Hak Asasi Manusia," 227.

<sup>53</sup> Santoso, 228.

There are four main principles contained in the Convention on the Rights of the Child, these principles are then absorbed into Law Number 23 of 2002 which is mentioned briefly in article 2. These principles are:<sup>54</sup>

1. The Principle of Non-Discrimination.

This means that all rights recognized and contained in the Convention on the Rights of the Child must be applied to every child without any exception or discrimination. This principle is stated in Article 2 of the Convention on the Rights of the Child.

2. The Principle of Best Interest of the Child).

All actions related to children carried out by the government or legislative social welfare institutions must be the best and take a consideration to the interests of the children. Therefore, the best interests for children must be the main consideration. This principle is in Article 3 paragraph 1 of the Convention on the Rights of the Child

3. Principles for the Rights to Life, Survival and Development).

Participating states recognize that every child has inherent rights to life. It was also stated that participating states would guarantee to the maximum extent of child survival and development. This principle is stated in Article 6 paragraphs 1 and 2 of the Convention on the Rights of the Child.

4. The Principle of Respect for The Views of The Child).

The point is that children's opinions, especially when it comes to matters that affect their lives, need to be considered in every decision making. This

<sup>54</sup> Supriyandi W. Eddyono, *Pengantar Konvensi Hak Anak* (Jakarta: ELSAM, 2005), 2.

principle is stated in Article 12 paragraph 1 of the Convention on the Rights of the Child

Affirmation of children's rights in Law No. 23 of 2002 is the legalization of children's rights absorbed from the CRC and national legal norms. Thus, Articles 4 to 19 of Law No. 23 of 2002 creates legal norms about what constitutes children's rights.<sup>55</sup>

In Law No. 23 of 2002 regulates the rights and obligations of children listed in Article 4 to Article 19. Broadly speaking, children's rights can be categorized into four categories, namely as follows:

1. The right to survival which includes the right and obtains adequate health services (survival rights).
2. The right of child development which includes all types of education formal and formal and the right to enjoy a decent standard of living for physical, mental, spiritual, moral, non-moral and social growth (development rights)
3. Protection rights that include discrimination, abuse and neglect protection, protection of children without family and protection for children of refugees (protection rights).
4. The right of participation which includes the rights of children to express their opinions/views in all matters concerning the fate of the child (participation rights).<sup>56</sup>

<sup>55</sup> Muhammad Joni, *Hak-Hak Anak Dalam UU Perlindungan Anak Dan Konvensi PBB Tentang Hak Anak: Beberapa Isu Hukum Keluarga* (Jakarta: KPAI, n.d.), 11.

<sup>56</sup> Joni, 16.

### 2.1.6. Principle of Legal Certainty

In the understanding of ordinary people, certainty is defines as a provision, whereas if the word certainty is combined with the word legal becomes legal certainty, which has a meaning as a provision or legal provision of a country that is able to guarantee the rights and obligations of every citizen. Normatively a legal certainty is when a rule is created and enacted as it is clearly defines and logically. Clearly are meant that it dies not cause multi-interpretation and logically are means that it does not cause deviation and ambiguities between norms in the norm system. The ambiguities of norm are arising from the uncertainty of the rule of law, can lead to multi-interpretations of something of a rule.

The definition of legal certainty is in line with the opinion of E. Fernando M. Manulang who put forward the definition of legal certainty is a value which in principle provides legal protection for every citizen of arbitrary power, so the law gives responsibility to the state to run it, in this case there is relationship between the issue of legal certainty with the state.<sup>57</sup> Soedikno Mertokusumo mentions legal certainty as a justice protection against justifiable acts, which means that a person will be able to obtain something to be expected under certain circumstances.<sup>58</sup>

Legal certainty is a form of principle of legality (legalistic) interpreted by sudargo Gautama from two sides, namely:

<sup>57</sup> E. Fernando M. Manulang, *Menggapai Hukum Berkeadilan, Tinjauan Hukum Kodrat Dan Antinomi Nilai* (Jakarta: PT Kompas Media Nusantara, 2007), 94–95.

<sup>58</sup> Manulang, 94–95.

- a. From the citizen side, as a continuation of the principle of limiting state power to individuals, violations of individual rights can only be made where permitted and based on legal regulations
- b. From the state side, that is every state action must be based on law. The former legislation is the limit of state power.<sup>59</sup>

The law in developing countries, according to Gustav Radbruch, there are two notions of legal certainty. First, certainty due to law, and the second is certainty in or from law. Ensure certainty due the law becomes the duty of the law. Successful law ensure a lot of certainty in community relations is a useful law. While the certainty in or from the law is achieved if between the laws are no conflicting provision (The law is based on logical and definite system). The law is based on legal reality (*rechtswerkelijkheid*) and there are no legal terms that can be interpreted differently.<sup>60</sup> Moreover it is mentioned that certainty means that in concrete terms the two parties are at dispute can determine their position. In this sense of legal security means that it provides protection for both parties to the dispute over the arbitrary act of the judge. While the certainty because of the law is meant, that the law ensures certainty between the party.<sup>61</sup> From the description above this legal certainty theory provides the task to the law to ensure legal certainty in the relationship between one individual to another by the state based on the laws and regulations.

<sup>59</sup> Sudargo Gautama, *Pengertian Tentang Negara Hukum* (Yogyakarta: Liberty, 1973), 9.

<sup>60</sup> E. Utrecht, *Pengantar Dalam Hukum Indonesia*, 6th ed. (Jakarta: PT. Penerbit Balai Buku Ichtiar, 1959), 26.

<sup>61</sup> Utrecht, 26.

## 2.2. Legal Framework

### 2.2.1. Legal System of Indonesian and Taiwan

#### A. Indonesia

Indonesia is a secular democratic and the largest Muslim-majority nation in the world. But despite this Muslim-majority, Indonesia is not an Islamic country based on Islamic Law. Indonesia is considered as a *Negara Hukum* (*Rechtsstaat* and the rule of law). Jimly Asshiddiqie<sup>62</sup> quoted that Law is everything. Law is the king. Law is the structure of the state and its content. The 1945 Constitution of the Republic of Indonesia (UUD 1945) - the legal basis of Indonesia-states in Article 1(3) that The State of Indonesia shall be a state based on the rule of law.

To understand how Indonesian rules and regulations are made, we can use two theories, namely Hans Kelsen's hierarchy of norm theory (*stufentheorie*) and Hans Nawiasky's hierarchy of legal norm theory (*die theorie vom stufentordnung der rechtsnormen*). Both theories say that the legal norm is always structured in tiers and is hierarchical in nature, particularly that the lower norm is based on the higher norm until the point where it meets the highest norm which then becomes the basic norm. It basically means that every norm has to derive its validity from other higher norm. The enactment procedure and the hierarchy of Indonesian rules are governed by Law No. 12 of 2011 on Enactment of Laws.

<sup>62</sup> The Chairman of the General Election Organizer Honorary Council of the Republic of Indonesia (DKPP-RI), 2012-2017.

## B. Taiwan

Chinese law as implemented and practiced in Taiwan today, along with its attending institutions, developed over a period of thousands of years; it contains remnants of Imperial Chinese law, as well as elements from contemporary China, while also borrowing heavily and adopting principles and concepts from civil law jurisdictions (such as Germany and Japan) as well as the United States. This base -combined with a rich business culture, an entrenched administrative structure, and the linguistic barriers presented by numerous Chinese dialects- confronts, and often confounds, the foreign investor and its legal counsel when tackling legal problems connected to Taiwan.<sup>63</sup>

The central government in Taiwan is divided into five branches, which are known as "Yuan" meaning house. There is one for executive, legislative, judicial, impeachment, and examination affairs. The branches who obligate in legal system are legislative and judicial Yuan.

The legislative branch is composed of the unicameral Legislative Yuan and the unicameral National Assembly. The *Legislative Yuan* is the highest legislative body in Taiwan. It legislates, examines budgetary bills, reviews audits, and oversees the operation of the Executive Yuan. Legislative Yuan also do legislation and the Law-Making Process.

Legislation in the Republic of China (ROC) is clearly defied as bills that

<sup>63</sup> Hungdah Chiu and Jyh-Pin Fa, *Taiwan's Legal System and Legal Profession, Contemporary Asian Studies Series*, vol. 5, 1994, <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1123&context=mscas>.

have been passed by the legislature (Legislative Yuan) and promulgated by the head of state (President of the Republic)." The hierarchy of norms is also formally recognized by the provision in the Constitution that any law that is in conflict with the Constitution shall be null and void. The same principle applies in cases where a regulation is in conflict with a law or the Constitution.<sup>64</sup>

The *Judicial Yuan* is made up of justices appointed by the president with the consent of the National Assembly. Beginning this year, the justices will be appointed by the president with the consent of the Legislative Yuan. The Judicial Yuan is the highest judicial organization of the state and is responsible for civil, criminal and administrative cases as well as cases involving the discipline of public functionaries. The Council of Grand Justices serves as the main body with 17 grand justices according to Article 3 of the *Organic Law of Judicial Yuan*. The number has been reduced to 15 through Article 5 of the *Additional Articles of the Constitution*. The president and the vice president are to be selected from among the members consists of a president, the vice president, a secretary general, and a deputy secretary. The Judicial Yuan also has a panel of 17 justices. The Judicial Yuan has the following powers:

1. The Power to Interpret, The President of the Judicial Yuan presides over meetings of the Grand Justices of the Judicial Yuan held to interpret the Constitution to unify the

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<sup>64</sup> Chiu and Fa.

interpretations of statutes and regulations. In recent years, the Grand Justices have exercised this function to the full extent playing a very important role as protectors for both constitutional order and people's rights.

2. The Power to Adjudicate, The Grand Justices of the Judicial Yuan handles cases concerning the dissolution of political parties violating the Constitution. From 1948 to July 20, 2001, 529 interpretations of the Constitution were rendered at the request of government agencies, individuals, judicial persons, and political parties. The Supreme Court, high courts, and the district court and their branches hear civil and criminal cases. The Court system is governed under the "three-level and three-instance" paradigm where issues of facts are decided in the first and second instances and only issues of law are decided in the third instance. There is also a separate Administrative Court set up to and decide administrative cases. These Courts are run by a "one level and one-instance" paradigm where retrial proceedings may only be initiated if there are legitimate grounds.

3. Disciplinary Power, Cases concerning disciplinary measures against public officials are adjudicated by the Committee on the Discipline of Public Functionaries. Decisions by the Committee are final but re-adjudication may be available where there is a legitimate ground. Cases are adjudicated independent and are

free from any interference because judges of the Courts and members of the Committee hold office for life and are considered to be above partisanship.

4. The Power of Judicial Administration, The President and the Vice President of the Judicial Yuan exercise the power over judicial administration. They have the power and the ability to develop a sound judicial system, increase the effectiveness of the judicial functions, improve the working conditions for the judiciary, and elevate the quality of the judicial decisions that are promulgated.<sup>65</sup>

Meetings may be held by the Grand Justices of the Judicial Yuan, and presided over by the President, to interpret the Constitution and to unify the interpretation of statutes and regulations.

The Constitution in Taiwan is the supreme law of the land and contains 175 articles in the original text. The Constitution has been amended five times since its initial promulgation. The five amendments are made up of eleven articles that have been consolidated into a single text and is maintained as a separate portion of the Constitution. The term law according to Article 170 of the Constitution means any legislative bill duly passed by the Legislative Yuan and promulgated by the President.

Articles 171 and 172 state that laws and ordinances that contravene the Constitution shall be null and void. The Taiwanese legal system is not

<sup>65</sup> Chiu and Fa.

without flaws similar to those found in other legal systems throughout the world. The President of the Judicial Yuan is in charge of judicial reform.

Reforming the following areas will pose a challenge: efficiency; accessibility; judicial transparency; judicial fairness, and judicial integrity. Some steps taken to improve civil proceedings include alternative dispute resolution and contracting out legal enforcement. To expedite criminal proceedings, there has been expanded use of summary judgments and the introduction of a plea bargaining system. Other steps taken to improve the judicial system include the establishment of civil courts, specialized courts, and specialized judges. These changes are expected to increase the public's confidence in the judiciary.

### **2.2.2. International Legal Instruments**

#### **A. Universal Declaration of Human Right**

##### Article 1

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”*

##### Article 2

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made*

*on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”*

Article 7

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

Article 19

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 26

*“(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

*(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and*

*friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*

*(3) Parents have a prior right to choose the kind of education that shall be given to their children.”*

## **B. United Nations Convention on the Rights of the Child**

### Article 2

*“(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”*

### Article 28

*“(1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*

*(a) Make primary education compulsory and available free to all;*

*(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*

*(c) Make higher education accessible to all on the basis of capacity by every appropriate means;*

*(d) Make educational and vocational information and guidance available and accessible to all children;*

*(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.*

*(2) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.*

*(3) States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”*

#### Article 29

*“(1) States Parties agree that the education of the child shall be directed to:*

*(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;*

*(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*

*(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;*

*(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;*

*(e) The development of respect for the natural environment.*

*(2) No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”*

Article 30

*“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or*

*who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”*

### **2.2.3. National Laws of Indonesian and Taiwan**

#### **A. Constitution of Republic of Indonesia 1945**

##### Article 28A

*“Each person has the right to live and the right to defend his life and existence”*

##### Article 28B (2)

*“Each child has the right to live, grow up, and develop as well as the right to protection from violence or discrimination”*

##### Article 28C (1)

*“Every person has the right to self-realization through the fulfillment of his basic needs, the right to education and to partake in the benefits of science and technology, art and culture, so as to improve the quality of his life and the well-being of mankind”*

##### Article 28D (1)

*“Each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law.”*

##### Article 28E (3)

*“Each person has the right to freely associate, assemble, and express his opinions”*

Article 28I

*“(1) The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.*

*(2) Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment.*

*(4) Protecting, promoting, upholding, and the full realization of human rights are the responsibilities of the state, foremost of the government.*

*(5) To uphold and protect human rights in accordance with the principles of a democratic and law-based state, the implementation of fundamental human rights is to be guaranteed, regulated, and laid down in laws and regulations.”*

Article 28J (1)

*Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state.*

Article 31 (1)

*“Each citizen has the right to an education.”*

## **B. Act No. 39 Year 1999 – Human Rights**

### Article 1 (1)

*“Human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth.”*

### Article 1 (3)

*“Discrimination means all limitations, affronts or ostracism, both direct and indirect, on grounds of differences in religion, ethnicity, race, group, faction, social status, economic status, sex, language, or political belief, that results in the degradation, aberration, or eradication of recognition, execution, or application of human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life”*

### Article 1 (4)

*“Torture means all deliberate acts that cause deep pain and suffering, both physical or emotional, inflicted on an individual person to obtain information or knowledge from that person or from a third party, by punishing an individual for an act carried out or suspected to have been carried out by an individual or third party, or by threatening or coercing an individual or third party, or for reasons based on discriminative considerations, should this pain or suffering arise as a result of*

*provocation by, with the approval of, or with the knowledge of any person or public official whatsoever”*

Article 1 (5)

*“Children mean all unmarried persons under the age of 18, including, should this be in their interest, all unborn children”*

Article 1 (6)

*“Human rights violations mean all actions by individuals or groups of individuals, including the state apparatus, both intentional and unintentional, that unlawfully diminish, oppress, limit and/or revoke the human rights of an individual or group of individuals guaranteed by the provisions set forth in this Act, and who do not or may not obtain fair and total legal restitution under the prevailing legal mechanism”*

Article 4

*“The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever.”*

### **C. Act No. 35 Year 2014 – Child Protection**

Article 1

*“(2) Protection of Children shall mean all activities designed to guarantee and protect children and their rights so that they may live, grow, develop*

*and participate optimally in society in accordance with the dignity to which they are entitled as human beings, and so that they may be protected against violence and discrimination;*

*(12) Rights of Children shall mean those human rights pertaining to children that must be guaranteed, protected and complied with by parents, families, the government and the state.”*

#### Article 2

*“The protection of children shall be based upon Pancasila (the national ideology), the 1945 Constitution and the basic principles contained in the Convention on the Rights of the Child, including the following:*

- a. Non-discrimination;*
- b. The best interests of the child;*
- c. The right to life, continuity of life and to develop;*
- d. Respect for the opinions of children.”*

#### Article 3

*“The protection of children is intended to guarantee the rights of children so that they may live, grow, develop and participate optimally in society in accordance with their dignity as human beings, and that they will be protected against violence and discrimination in order to ensure the moral values and well-being of Indonesian children.”*

#### Article 4

*“Every child shall be entitled to live, grow, develop and participate normally in society in accordance with his/her dignity as a human being, and to be protected against violence and discrimination.”*

Article 9

*“(1) Every child shall have the right to an education and training in the context of his personal and intellectual development based upon his interests and talents.”*

#### **D. Constitution of Republic of China (Taiwan) 1947**

Article 7

*“All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law.”*

Article 21

*“The people shall have the right and the duty to receive elementary education”*

Article 22

*“All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.”*

#### **E. The Protection of Children and Youths Welfare and Rights Act**

Article 1

*“The purpose of this Act is to promote healthy development of body and mind, protect their interest, and increase the welfare of children and adolescence (youth).”*

Article 3

*“Parents or guardians are responsible for the protection and education of children and youth, and should cooperate and assist any measure conducted by authorized agencies, competent authorities, welfare institutes, and groups for children and youth relating to this Act.”*

Article 5

*“The government, public/private institutes, and groups will make the best rights and interests of children and youth their first consideration and balance their opinions according to each individual’s mental maturity when dealing with relevant affairs; the relevant protection and assistance will be the top priority. In the case of unlawful invasion, the government will properly assist and protect the rights and interests of children and youth.”*

Article 49

*“No one will do the following to children and youth:*

- 1. Desertion*
- 2. Mental abuse*

3. *Utilize children and youth to undertake dangerous activities or deceiving behaviors against health.*”

## **F. General Act of Gender Equity Education Act**

### Article 1

*“This Act is prescribed in order to promote substantive gender equality, eliminate gender discrimination, uphold human dignity, and improve and establish education resources and environment of gender equality, For matters not set forth in this Act, the relevant provisions of other laws shall govern”.*

### Article 12

*“The school shall provide a gender-fair learning environment and establish a safe campus environment. The school shall respect the gender' temperaments and sexual orientation of students, faculty and staff.”*

### Article 13

*“The school shall not discriminate against prospective students and their admission acceptance on the basis of their gender or sexual orientation. This does not apply to schools, classes and curricula with historical tradition, special educational missions, other non-gender related reasons, upon the approval of the competent authority.”*

### Article 14

*“The school shall not discriminate against students on the basis of their*

*gender or sexual orientation in its teaching, activities, assessments, award and punishment, welfare and services. This does not apply to matters only suitable for specific gender.*

*The school shall affirmatively provide assistance to students who are disadvantaged due to their gender or sexual orientation in order to improve their situation.*

*The school shall affirmatively protect rights to education of pregnant students, as well as provide assistance where necessary.”*

#### Article 20

*“The central competent authority shall prescribe regulations to prevent and handle sexual assault or sexual harassment on campus, such regulations shall contain campus safety plans, matters needing attention regarding instruction and interpersonal interaction on and off campus, as well as handling mechanisms, procedures and relief for cases of sexual assault or sexual harassment on campus.*

*The school shall prescribe and promulgate prevention and handling guidelines for the aforesaid regulations.”*

#### Article 21

*“In its handling of a campus sexual assault or sexual harassment case, the school or competent authority shall fulfill its report responsibility in accordance to pertinent laws and regulations.*

*The school or competent authority shall turn over the case to its gender equity education committee for investigation and handling.”*

#### 2.2.4. Yogyakarta Principles

The Yogyakarta Principles try to resolve various international human rights issues and their application to issues of sexual and gender identity. The Yogyakarta Principles are a set of principles in the application of the Human Rights Act related to sexual orientation and gender identity. These principles affirm the binding international standards of law that all states must abide by.

These principles promise a different future form, in which all people are born free and equal in terms of dignity and rights and can fulfill that precious right that they have been brought with them since they were born. Here are the rights contained

in the principles of Yogyakarta used in writing of this thesis:

##### Principles 2: The Rights to Equality and Non-Discrimination

*“Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.*

*Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of*

*the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.*

*States shall:*

- a. embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;*
- b. repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;*
- c. adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;*
- d. take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. such measures shall not be deemed to be discriminatory;*

- e. *in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;*
- f. *take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.”*

### Principles 3: The Right to Recognition before the Law

*“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.*

*States shall:*

- a. ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;*
- b. take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity; take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;*
- c. ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;*
- d. ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;*
- e. undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.”*

### 2.3. Theoretical Framework

#### 2.3.1. The Theory of Progressive Law by Satjipto Rahardjo

The term progressive law is a legal term introduced by Satjipto Rahardjo, based on the basic assumption that law is for the benefit of man himself. Satjipto Rahardjo is concerned with the low contribution of law science in enlightening Indonesian, in overcoming the crisis, including the crisis in the field of law itself. For that reason, he gave a problem solving with the idea of progressive law.

The notion of progressive law itself is to change rapidly, make fundamental reversals in the theory and practical law, as well as doing various breakthroughs. The liberation is based on the principle that law is for man and not vice versa and the law does not exist for itself, but for something wider that is for human dignity, happiness, and welfare of the nation.<sup>66</sup>

The definition, as stated by Satjipto Rahardjo, means progressive law is a series of radical actions, by changing the legal system (including changing the rules of the law if necessary) so that the law is more useful, especially in raising human dignity and guaranteeing human happiness and welfare. More simply he says that progressive law is a law that liberates the way of thinking and acting in law, therefore as to let the law to flow and complete its duties for humanity. So there is no legal fraud or alignment in enforcing the law. Because according to him, the law aims to create justice and welfare for all people.<sup>67</sup>

Satjipto Rahardjo tries to highlight the above conditions into the social sciences, including science of law, although not as dramatic in physics, but

<sup>66</sup> Satjipto Rahardjo, *Membelah Hukum Progresif* (Jakarta: Kompas, 2007), 154.

<sup>67</sup> Satjipto Rahardjo, *Ilmu Hukum: Pencarian, Pembebasan, Dan Pencerahan* (Surakarta: Muhammadiyah Press University, 2004), 17.

basically there is a phenomenal change in the law formulated with a sentence from simple to complicated and from the fragmented grouping. This is what he calls a holistic view of science of law. Such a holistic view gives the visionary awareness that something in a particular order has parts that are interconnected with either the other part or with the whole. For example, to understand the whole man is not enough just to understand eyes, ears, hands, feet or brain only, but must understood thoroughly every single parts of them.<sup>68</sup>

According to Satjipto the fall of the Newton era suggests an important change in the methodology of science and the law should also pay close attention to it. Because of the similarity between Newton's linear, mathematical and deterministic methods with the *analytical-positivism* or *rechtdogmatiek* legal method that nature (in Newton terminology) or law positivistic terminology (Kelsen and Austin) is seen as a logical, organized and defects.<sup>69</sup>

The physic-related analogy with Newton's theory can change as well as the law of positives.<sup>70</sup> A theory formed from that community views what is called law, meaning a changing and evolving environment will inevitably change that legal system. Progressive law means law that cares about humanity therefore it is not merely dogmatic. Specifically progressive law can be refereed to as law that favored people and justice. That concept of progressive law is that the law does

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<sup>68</sup> Rahardjo, 18.

<sup>69</sup> *Analytical-positivism* or *rechtdogmatiek* is a view in science of law which is based on positivism movement. This movement emerged in the nineteenth century as a counter to the view of natural law. Rahardjo, 260.

<sup>70</sup> Positivism is one of the ideals in philosophy of law that the theory of law is concerned only with positive law. Science of law does not discuss whether positive law is good or bad, nor does it deal with the effectiveness of law in society. Achmad Roestandi, *Responsi Filsafat Hukum* (Bandung: Armico, 1992), 80.

not exist for its own sake, but for a purpose that is outside of itself. The progressive character is characterized by a tendency in critical reasoning and favor of justice and humanity. Therefore, progressive law leaves the tradition of analytical jurisprudence or *rechtsdogmatiek*. Other legal theories only look into the law and discuss and conduct inward analysis. Progressive law is responsive in which in the responsive law will always be linked to objectives beyond the textual narrative of the law itself.<sup>71</sup>

The presence of law is linked to its social purpose, so progressive law is also close to the *sociological jurisprudence* of Roscoe Pound. Roscoe Pound states that the law does not use to perpetuate power only, but law can serve as a social engineering tool ("*Law as Tool of Social Engineering*").<sup>72</sup> Progressive law also invites criticism of the liberal legal system, because Indonesian law also inherits the system. A monumental change occurs when pre-modern law becomes modern. It is because modern law shifts from its place as a justice seeking institution into a bureaucratic public institution. Laws that follow the presence of modern law must undergo a total overhaul to be rearranged into a rational and bureaucratic institution. As a result, only legislative legislation is legally called the law.<sup>73</sup>

Progressive law teaches that the law is not a king, but a tool to describe the basic of humanity that serves to give grace to the world and man. The underlying assumption of progressive law is, first the law exist for man and not for itself,

<sup>71</sup> Rahardjo, *Ilmu Hukum: Pencarian, Pembebasan, Dan Pencerahan*, 19.

<sup>72</sup> Lili Sasyidi, *Dasar-Dasar Filsafat Hukum* (Bandung: Citra Aditya Bakti, 1990), 47.

<sup>73</sup> Rahardjo, *Ilmu Hukum: Pencarian, Pembebasan, Dan Pencerahan*, 20.

second. The law is always in the status of “*law in the making*” and is not final, and third, laws are the moral institutions of humanity.<sup>74</sup>

Based on the above assumption, the progressive law criteria for this thesis are:

- a. Have a great purpose in the form human welfare and happiness;
- b. Progressive law is a liberating law encompassing a vast dimension that not only moves in the realm of practice but also theory;
- c. Critical and functional.

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<sup>74</sup> Rahardjo, 20.