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Ambiguous genitalia causing principle of utmost good faith in insurance agreements' violation

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ABSTRACT

The purpose of this study is to study the application of the principle of utmost good faith in ambiguous genitalia case studies in insurance agreements. The data collection technique is a literature study, aiming to draw conclusions on the application method of the principles of good faith. The results of the study confirmed that some insurance companies refuse to make an insurance agreement for individuals with gender ambiguity. Therefore, it is important to develop policies that are more inclusive and fair for all individuals, without exception.

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INTRODUCTION

God Almighty created humans consisting of 2 genders, namely male and female. The term sex refers more to the biological aspects of a person, including differences in hormones in the body, physical anatomy, reproduction, and other biological characteristics (Ratnasari, 2018). Gender is the concept of identifying differences between men and women in several aspects, such as social, cultural and other non-biological aspects (Ratnasari, 2018). The gender becomes a person's clear identity. The first term in the Qur'an explains that God created man from a man and a woman (Q.S Al-Hujarat (49: 13)).

In every human activity, risk is always inevitable. Every activity carried out by humans must always pose various risks. Starting from the risk of illness, accidents, losses, to the risk of death that always comes and cannot be predicted when and because of what happens. One way to minimize this risk is to include yourself in insurance (Iriana & Nasution, 2019). Insurance benefits people's lives by reducing the wealth that must be set aside to cover losses due to the risks obtained (Fazri & Kurniawan, 2021). Therefore, it can be defined that insurance is a system created with the aim of protecting people, groups, and business activities against risks that will arise with the onset of financial losses by transferring or dividing risks through premium payments. The transfer of risk originally borne by the owner automatically switches to the insurance company when there is a loss that arises due to something that has been agreed in the policy agreement, the loss experienced by the owner is realized in the form of payment of insurance claims from the insurance company, with the transfer of risk it needs to be balanced with the payment of a premium amount to the insurance company as a form of the insured's obligation to the insurer, which will later be realized in the return of losses by the insurer to the insured if the risk contained in an insurance agreement is fulfilled (Saputra et al., 2021). Premium payments in insurance depend largely on the type of policy chosen. Like life insurance, the premiums that must be borne by men are higher than women's premiums. It is that men generally have a shorter life expectancy than women, because men earn a living and are more often outside so are considered to have a great risk of accidents. Unlike health insurance, premiums are covered by women higher than men. Women are considered to have a higher risk than men because they live longer, visit the doctor more often, and give birth.

However, someone is born with a genetic disorder in their genitals. In Islamic law this event is called *Khuntsa*, which is a person who is born with multiple genders or in medical terms called Disorder of Sexual

Development (DSD) (Sunarya, 2023). The main cause is the imbalance of hormones received while in the mother's womb (Sunarya, 2023). Gender disorders or multiple genders cause new discussions, especially in Indonesia, gender identity must be absolute as a man or as a woman. People with *ambiguous genitalia* (multiple genders) will have difficulty closing the insurance policy. The certainty of gender in the insurance agreement determines the risk assessment. Often the notion of double gender is interpreted incorrectly by many societies. This makes it more vague and corners the condition of individuals with *ambiguous genitalia* in social life. The opportunity to divert risk to not incur medical or health care costs for people with *ambiguous genitalia* is lost. Some insurance companies categorically reject *ambiguous genitalia* because it is considered a high risk and unpredictable. Especially health and life insurance products, where between men and women differ in terms of premiums, protection against disease and death. *Ambiguous genitalia* can complicate this process, and some insurance companies may refuse to provide coverage.

Legal protection, especially health insurance for people with *ambiguous genitalia*, is becoming increasingly difficult to obtain. Even though health problems in people with gender ambiguity are quite high such as infections in the reproductive tract, cancer, depression which can cause suicide risk. If forced to make a choice of gender in the process of closing the policy, people with *ambiguous genitalia* are considered to violate the principle of good faith or utmost good faith. For manipulating the insurance in a dishonest way. As a result, when filing a claim, the insurance company will refuse because it has concealed the truth from the material facts that should be revealed. In fact, people with gender ambiguity should be treated fairly and non-discriminatory. Gender identity theory sees people with *ambiguous genitalia* as individuals who have the same rights as other individuals. They should be given protection and support to be able to live with the same dignity and freedom as ordinary people. Fair treatment must be given to all individuals without discrimination, including people with gender ambiguity in order to create an inclusive environment. Insurance companies should take into account the special needs of people with *ambiguous genitalia* and provide appropriate services to ensure fairness and equality for all individuals.

A problem arises / *Legal Gap* for people with multiple genders. The guarantee of rights and obligations and justice by the State is obtained through legal certainty. Legal certainty governs logically and clearly. Logical means as a system of norms with other norms so as not to cause conflicts between the two. While clearly means as something that is not doubtful (multi-interpretation) (Robiatussolihah, 2022). Indonesian law does not explicitly mention its regulation, but multiple gender events are categorized as important events based on Law Number 24 of 2013 concerning Population Administration (Solekhan & Mubarok, 2020).

If we refer to the Civil Code (KUHP), basically insurance is an agreement that is regulated based on general principles and provisions of contract law. An agreement made and fulfilling the elements of Article 1320 of the Civil Code binds the parties entering into the agreement as if it were a binding law. In accordance with the principle of freedom of contract, the insurer and the insured have the freedom to implement the agreement as long as they do not violate laws and regulations.

The principles of freedom of contract, consensus, compliance with the agreement and good faith are the basis for the implementation of the insurance agreement, meaning that the insured must realize that his party has the obligation to provide complete information about the condition of the insured object. As the principle of good faith is stated in Article 1338 paragraph (3) of the Civil Code, that "the agreement must be executed in good faith". Subekti explained that good faith according to Article 1338 paragraph (3) of the Civil Code is one of the most important joints of contract law which gives the power to judges to supervise the execution of a contract so as not to violate propriety and justice (Nurhayati, 2023).

One form of violation of this principle of good faith is to hide the fact about changing the sex of the insured by not conveying information to the insurance institution. This violation can cause legal problems in the future against the agreement that has been made between the insured and the insurance institution as the insurer (Masri, 2018). An agreement if found not to meet the principle or principle of good faith at the time of closing an agreement will cause a defect of will, as the meaning of all basic provisions regulated by articles 1320-1329 of the Civil Code.

To avoid such events, the procedure that must be carried out by prospective policyholders when sex change occurs is to make a sex change in the Civil Registration Service by bringing the results of the determination of sex change by the District Court. Based on Article 56 paragraph 1 of the Population Administration Law to insurance institutions. Although the legal event is not regulated in the Civil Code, according to Presidential Regulation No. 96 of 2018 in Article 58 paragraph 1 letter a states that the recording of sex change as one of the other important events requires a copy of the district court determination.

Therefore, it is important to conduct research on *ambiguous genitalia* in insurance agreements to provide understanding and knowledge for the wider community about the needs of people with *ambiguous genitalia* in their lives who seem to be 'belittled'. Their limitations in activities and socializing should need to be observed as a disorder in itself, because psychologically their sense of comfort will be disturbed. Even though their

ambiguous condition is not a contagious and deadly disease that needs to be isolated, but a different condition that God bestows on them which of course only God knows the meaning of their condition.

To be able to blend and move in community life, especially regarding insurance agreements, this study aims to create policies that are more inclusive and fair for all individuals, without exception. A deeper understanding of the needs of people with *ambiguous genitalia* by insurance companies will lead to changes in the development of policies that are more sensitive and responsive to individuals with gender ambiguity so that discrimination does not occur.

METHOD

This study uses the normative juridical method, which examines the application of rules or norms in positive law. It uses library materials and secondary data to conduct research on regulations and literature reviews related to the problems studied. Primary legal materials, such as binding laws and decisions, and secondary legal materials, such as law journals and internet sources, are used. Descriptive analysis is used to describe facts related to regulations. The data collection technique is a literature study, aiming to draw conclusions on the application of the principle of good faith in ambiguous genitalia case studies in insurance agreements.

RESULTS AND DISCUSSION

Sex differences can determine human activity in legal traffic. This gender includes a wide range of conditions that affect a person's sexual development and gender identity. This includes medical conditions such as sexual dysfunction, impaired sexual development, and gender identity issues. As for multiple sex disorders. In the realm of medicine, khuntsa is known as *ambiguous genitalia* or sex ambiguity, which is a disorder in which sufferers have genetic, anatomic and/or physiologically dubious characteristics between men and women. In Indonesian this is called dubious or confusing gender. It is also called a double sex because sometimes the clitoris is so large that it looks like there are two sexes. This disorder is also known in other scientific terms as intersexual, a term that refers to the notion that the sexes are divided into two poles, male or female, so the dubious form of sex lies between the two poles. In its development, endocrinologists now more often use the term Disorders of Sexual Development (DSD) (Sunarya, 2023).

DSD is a congenital disorder of the reproductive system that can occur during the development of chromosomes, gonads, as well as internal and external genitalia. Some types of DSD that are often found, including small penis size (micropenis), undensensus testicles, and complete sex reversal (Welni & Fakhrurrazi, 2023). The causes and symptoms of DSD vary widely and require an understanding of the development of the urogenital system during pregnancy. The management of children with DSD aims to maximize the reproductive, fertility, and sexual functions of individuals. In addition, management is also expected to be able to provide phenotypic and psychosocial final results in accordance with the assigned sex. Management includes medical therapy, surgery, sex steroid replacement therapy, sex determination, and psychosocial support. Sex determination should be done as soon as all diagnostics have been done because it is strongly influenced by the patient's final diagnosis, the karyotype and phenotype of genitalia, the choice of surgery, and local social and cultural factors. Until now there has been no consensus on the indications and timing of operation on DSD. Sex steroid replacement therapy aims to allow secondary sex signs to develop while helping psychosocial development. DSD patients require hormone therapy if they have *hypogonadism* (Welni & Fakhrurrazi, 2023).

Disorders of Sexual Development (DSD) events also occur in Indonesia but many people are not aware of it and also people feel taboo to discuss it. Even Disorders of Sexual Development (DSD) can occur in 1% of male births (Pranita & Dewi, 2021). So, the Disorders of Sexual Development (DSD) event is the main discussion because it is related to several principles and also aspects in the legal field, especially in insurance agreements.

Good Faith Principle in Insurance Agreement

The definition of agreement as stipulated in article 1313 of the Civil Code states that an agreement is an act by which one or more people associate themselves with one or more people. An agreement is an event where two people promise each other to do something (Saputra et al., 2021). The agreement becomes one of the sources of the issuance of the engagement because there are rights and obligations that must be fulfilled by both parties (Saputra et al., 2021).

Article 1320 of the Civil Code mentions the terms of the agreement but based on Article 250 and Article 251 of the Criminal Code there are special conditions in the insurance agreement so that the number of insurance agreement conditions becomes 6 (six) elements: (1) Agreed, the insured party and the insurer first agreed in matters related to the insurance agreement. The agreement that occurs between the two parties is made based on freedom, which means that the parties do not get pressure, influence or coercion by the other party. (2) Competence, the parties must be in an adult state and have the power to perform legal actions.

According to the Civil Code, a person is considered an adult if he has reached the age of 21 years or is married and subjectively the condition of the party must be physically and psychologically healthy. (3) Certain objects, objects in the insurance agreement include insured objects, can be in the form of property and interests attached to property, can be human body and soul, transfer of risk, premiums, events, and transfer of losses. (4) The lawful clause means that the making and content of the agreement does not violate and is prohibited according to the provisions of legislation, public order and decency. (5) Insurable interest, in this condition there is still a correlation with the object of insurance as stipulated in article 250 of the KUHD which states that "if a person has established an insurance for himself, or if a person for whom an insurance has been held, at the time of holding the coverage does not have an interest in the object insured, then the insurer is not obliged to provide compensation". (6) Notification, the insured party has the obligation to notify the insurer regarding the condition or condition of the insurance object properly. If the insured does not do this or is negligent, then the legal consequence is the cancellation of insurance. As stated in Article 251 of the Criminal Code which states that "all false or incorrect notifications, or concealment of circumstances known to the insured about the object of insurance result in insurance becoming void". The obligation regarding notification also applies when there is an objection or change in risk from the insurance object must be conveyed by the insured to the insurer (Saputra et al., 2021).

In Article 1338 paragraph (3) of the Civil Code, the agreement must be executed in good faith or honestly. The purpose of Article 1338 paragraph (3) of the Civil Code is to carry out an agreement must be honest or appropriate and appropriate (Turagan, 2019). Therefore, based on Article 1338 paragraph (3) of the Civil Code, the insured party must provide true information regarding its condition to the insurer. Regarding DSD patients when going to make an insurance agreement, they must tell their situation, but the insurer/insurance has a regulation that filling in personal data must be in accordance with an identity letter/ID card.

The prospective insured fills in the identity according to the identity letter/KTP, then something happens but because the insured has Disorders of Sexual Development (DSD) that does not match the identity, the policy cannot be claimed because it can be considered as not good faith. So to avoid this incident, people with Disorders of Sexual Development (DSD) must apply for a change in gender identity to the court first.

Principles of Gender Equality

Gender equality refers to the principle that all people, regardless of their sex or gender, have equal rights in all aspects of life. This includes removing discrimination and providing equal opportunities to all individuals, no matter their gender. Gender equality means the realization of equal conditions for women and men to obtain opportunities and rights as human beings in order to be able to play a role and contribute to development, politics, economy, social, culture, education, defense and security in enjoying the results of development. Gender equality, also known as sexual equality, refers to the view that men and women should be subjected to proper treatment and that there should be no discrimination on the basis of sex, except for biological reasons for different treatment (Sulistyowati, 2021).

The Islamic view of gender equality between men and women is in the form of relations and cooperation. The differences between men and women complement each other because humans essentially need each other in any aspect so that good relationships are built (Azizah, 2021).

Gender equality in insurance agreements is important because it ensures fair and non-discriminatory treatment of all individuals. Without gender equality, insurance companies may charge unfair premiums or provide different benefits based on sex, which is not only unfair but also violates the principles of equality and fairness. By implementing gender equality, insurance can create an inclusive and equitable environment for all policyholders.

Validity of Insurance Agreement and Legal Protection Aspects

Law is a whole of principles and rules that govern human life in society and also includes the institutions and processes that bring about the enactment of that rule in society as a reality (Sugiarto, 2014). Every citizen has been guaranteed the right to have equal standing in law and government, which is contained in the 1945 Constitution which explains human rights. This shows that Indonesia upholds human values to protect the rights of its citizens. The validity of an agreement is essential for legal certainty and protection for the parties. Likewise in the insurance agreement as evidence of risk transfer from the insured to the insurer. At first glance, it seems that there is no problem with the insurance registration form, where two genders are listed, namely male and female (in validation). This choice shows the certainty of the right to get insurance protection, especially health insurance and life insurance, which differs between men and women. However, both options are not possible to choose for individuals who have a lack of gender obscurity or called gender ambiguity. This can cause a discrepancy between the identity of the individual and the existing official documents and the validity of the insurance agreement made so doubtful.

The position of a patient who has a genital disorder in positive law in Indonesia itself there are no clear rules regarding ambiguous *genetalia*, both regarding the legal status of sufferers, and clarity about what they should do. Self-identity which is a characteristic of a human being that can distinguish from other humans cannot be separated from gender. Gender is one of the elements to determine an identity that will be given to newborn humans (Sunarya, 2023).

Some of the insurance company's agreements exclude gender health issues in *ambiguous genitalia* for gender-focused services, often in outdated language that appears to have been maintained in the agreement for years. Research with 3 (three) insurance companies on prospective insureds who have Disorders of Sex Development (DSD) obtained results that can be concluded that 2 (two) insurances, namely AXA Mandiri and Tafakul Keluarga identity must be in accordance with the identity letter / KTP so that the prospective insured must follow the determination of the sex change application in court first to get legal protection later on (Kirkland et al., 2021).

Ambiguous genitalia has an impact on the application of the principle of utmost good faith in insurance. This principle requires good faith from all parties in providing true and relevant information or information completely and honestly without any cover-up. Prospective customers who have ambiguous genitalia have difficulty determining their gender. The legality of the documents in possession shows the opposite gender to the actual conditions. Choosing one gender will cause material truth not to be conveyed so that it is considered manipulating material facts and violating the principle of utmost good faith. *Ambiguous genitalia* itself does not directly invalidate the insurance agreement. However, the implications of ambiguous genitalia in the context of an insurance agreement can affect the validity of the contract depending on certain factors, such as the incompatibility of the information provided by the customer with the information contained in the contract. An insurance agreement may be declared void if there is a violation of the principle of utmost good faith or if there is incorrect or incomplete information provided by either party. In Indonesia, the principle of utmost good faith is also known as the "principle of honesty and good faith" in the context of insurance. This principle is regulated in Law No. 40 of 2014 concerning Insurance, which regulates the relationship between the parties involved in the insurance agreement. Although the law does not specifically mention persons with *ambiguous genitalia*, the principles of honesty and good faith apply to all individuals, regardless of their sex or gender identity. That is, every individual who applies for insurance is expected to provide accurate and complete information to the insurance company according to their knowledge.

In the context of *ambiguous genitalia*, its relevance to the terms of validity of an agreement from Article 1320 of the Civil Code is mainly related to the terms of the agreement. If an individual with *ambiguous genitalia* is unable to convey accurate information about their gender identity due to the inability of the insurance form, this may affect the underlying agreement of the insurance agreement. If an agreement between the customer and the insurance company is not reached due to the inability of the insurance form to accommodate diverse gender identities, this may affect the validity of the agreement under Article 1320 of the Civil Code. The agreement may not meet the terms of the agreement required to be legally valid. The practice of gender identification by insurance companies may vary depending on each company's policies and the legal requirements applicable in the countries in which the company operates. Insurance companies usually ask customers to provide information about their gender when applying for insurance. Customers are required to provide information about their gender based on an official identification document, such as an identity card or passport. This is because official identification documents are often used as valid legal proof of an individual's identity. In situations where a customer has stated that they have a dual gender condition or gender identity different from that stated in their identification documents, the insurer's attitude towards applications from individuals with *ambiguous genitalia* may vary depending on each company's policy. In general, insurance companies may be able to reject applications from individuals with *ambiguous genitalia* or accept by requesting additional information or clarification to verify their identity. The refusal is due to the possibility that some insurers may face challenges in processing applications from individuals with gender ambiguity due to the inability of insurance systems or forms to accommodate *ambiguous genitalia*. Some insurance companies may have policies that are inclusive and sensitive to gender diversity, allowing them to accept applications from individuals with gender ambiguity by treating them with respect and accommodating their needs as may be necessary.

The court's decision is a decision on the first and last instance petition cases. In court determinations, judges need to pay attention to legal considerations, so that anyone can be judged that the verdict handed down is sufficient to have objective reasons. In addition, all court decisions or decisions must contain reasons and bases for the decision, and include certain articles of legislation relating to cases decided or based on unwritten law, jurisprudence or legal doctrine (Hanif et al., 2022).

Remembering related cases *ambiguous genitalia* What is still a debate and discussion of the wider community in this phenomenon can be understood concept *ambiguous genitalia* As a condition where a person experiences a persistent feeling of discomfort towards his gender. In order not to occur the principle of good faith for the insurer to carry out civil registration, which in article 56 paragraph 1 of the Administrative Law

stipulates that the recording of other important events is carried out by the civil registration official at the request of the resident concerned after the determination of the district court that has obtained permanent legal force. Therefore, the competence stipulated in Article 56 paragraph 1 of the Population Administration Law is within the scope of the court, in this case the District Court. Article 58 paragraph 1 letter a of Presidential Decree 96/2018 also stated that the registration of sex change as one of the other important events requires a copy of the district court's determination. The requirements for sex change, by applying for a court determination, are basically determined by each court. The ruling stated that the application aims to change the gender identity of a woman to a male one. Based on chromosome tests, laboratory examination results have been obtained which concluded that the diagnosis *Disorder of Sexual Development* with a genome of 46 XY (male). The applicant submits the following evidence: 1. Photocopy of ID card; 2. Copy of kk; 3. Photocopy of parents' marriage certificate quotation; 4. Photocopy of birth certificate; 5. Photocopy of vocational high school diploma (SMK); 6. Original sex change certificate; 7. Original certificate of name change; 8. Photocopy of chromosome analysis result letter; 9. Photocopy of county general hospital inpatient resume; 10. Photocopy of X-ray answers issued by the hospital. In the ruling, the judge decreed the granting of permission to change/change the name and gender from female to male and ordered the head of the Kuningan Regency Population and Civil Registration Office to record it.

Ambiguous Genitalia in Insurance Agreements seen from Gender Identity Theory

Gender identity theory is a concept that refers to an individual's understanding of themselves in terms of gender, which can be different from the biological sex they have. This includes female identity, male identity, or non-binary gender identity, which can be more complex than just those two categories. Individuals with *ambiguous genitalia* refer to individuals who may not be clearly identifiable as male or female based on their physical characteristics or gender identity. This could include people born with intersex medical conditions, where they have sexual characteristics that don't fit the standard definition of male or female. This condition can include variations in chromosomes, reproductive organs, or hormones. Gender identity theory, particularly in the context of individuals who are not clearly identifiable as male or female, is more likely to lean on the framework developed by Judith Butler. Butler emphasizes that gender identity is not fixed or determined by biological characteristics alone, but is the result of repeated social practices. In Butler's understanding, individuals are not only given their gender identity, but they also actively "do" that gender identity through everyday actions. Thus, in the context of *ambiguous genitalia*, Butler's gender identity theory brings a sensitive understanding of gender diversity and emphasizes the importance of recognizing and respecting an individual's gender identity, regardless of biological characteristics or existing social conventions. In the context of insurance agreements, the concept of gender identity is important because the process of risk assessment and premium setting is often based on a variety of factors including gender. However, for individuals with gender ambiguity, traditional sex determination becomes more complicated, as it may not match their gender identity. The results of the study confirmed that some insurance companies refuse to make an insurance agreement for individuals with *ambiguous genitalia*. That is, the ambiguous *genital element* can be one of the factors that cause the rejection of making insurance agreements by insurance companies. There must be firmness in determining the gender shown legally through birth certificates and identity cards. Even though in good faith prospective customers express the truth about their gender abnormalities, still some insurance companies cannot accept such conditions. The reason put forward is because the choice of gender in the form is only two, namely male or female. Different protection differences and different premium calculations are also behind the refusal to make the insurance agreement. Two pieces of advice offered by insurance companies for people with *ambiguous genitalia* are to have a sex change on the identity card or have sex-affirming surgery appropriate.

CONCLUSION

Risk transfer to insurance companies requires identity information for claims, based on periodic premium payments. However, not everyone can claim insurance, especially those with ambigouos genitalia, as gender certainty can lead to a violation of good faith. Sexual uncertainty can also cause health transition loss, making legal protection difficult. Forced sex choice in policy closure can violate the principle of utmost good faith. Insurance companies should consider these conditions by including a table of choices and providing a certificate from the District Court for sex determination to ensure the fulfillment of good faith.

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