

## Legal Studies on Gender Changes through Court Decisions on the Distribution of Inheritance (Comparative Study of Islamic Law and Civil Code)

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### Abstract

*The legal consequences of gender changes seen from the positive legal side of gender changes actors are not hindered from obtaining inheritance rights from the testator. This is due to the fact that blood relations are an absolute requirement when it comes to obtaining inheritance rights. What also needs to be remembered is that gender changes is not a right that can prevent someone from getting their inheritance rights. Whereas gender changes in the distribution of inheritance according to the Islamic law, the portion of the distribution of inheritance remains the same as the gender before gender changes operation. According to the civil code, gender changes has no effect on the distribution of inheritance for the person who undergoes gender changes. Moreover, the civil code does not comply with this at all. Whereas legal protection measures for people who carry out gender changes operation in obtaining a share of inheritance are by making regulations related to the legal consequences of gender changes operation.*

### Keywords

*Gender changes; distribution, inheritance; Islamic law; civil code*



### I. Introduction

The entry of western culture into Indonesia as a result of the swift currents of globalization, turned out to cause cultural changes in society, thus creating gaps in Indonesia's positive law. The development of the existing culture was not in harmony and in tune with the development of the applicable law. The impact is the occurrence of a legal vacuum that causes the judiciary to need a foothold or guidance for judges. Mochtar Kusumaatmadja argues that law is a set of principles and rules that regulate human life in society and includes the board of directors, institutions, and processes that make these rules apply in society as a reality (Sugiarto, 2014).

Technological advances that occur today are closely related to the discovery and development of science so that it is unavoidable and unavoidable in everyday life. Over time, many new inventions were developed by humans to meet the needs of life and facilitate human life. Various innovations found by humans provide positive benefits for humans, although there are also technological discoveries that allow them to be used in negative ways.

In the field of medicine, for example, new technologies discovered by humans are able to provide more effective and shorter treatment to their patients. People with a mediocre face can be beautiful with plastic surgery, irregular tooth shape can be corrected to look neat, a snub nose can be turned into a sharp, although it requires a lot of money. Not a few people who change their gender from male to female through surgery.

Sex surgery is performed by humans who have sexual identity problems (transsexual) and sexual development disorders (khuntsa). The phenomenon of genital

surgery certainly has legal consequences, both in positive law and in Islamic law. Several cases related to genital surgery also involve Muslims, which of course has an impact on the applicable legal provisions.

Gender changes due to surgery that occur are categorized into at least 2 forms. The first form is what many transgender people do. Transgender as a symptom of a person's dissatisfaction because they feel there is no match between physical and sexual forms with psychology or dissatisfaction with their genitals (Gibtiah, 2016). Transgender occurs because a person's gender identity is not the same as the gender assigned to him. Transgender is also the result of strict behavior or personality disorders, strict communication methods, and finally feeling anxious and deciding to undergo sex reassignment surgery (Nevid, 2005).

Changes in gender that are carried out by someone will certainly have legal consequences for themselves. On the other hand, the phenomenon of gender changes surgery is one form of success in medical science. On the other hand, from a legal perspective, currently, there is no regulation that regulates the target of sex reassignment surgery. Allah SWT created humans only in two genders, male and female.

Changes in sex must be reported because there has been a change in a person's identity. The existence of Article 56 paragraph (1) of Law Number 23 of 2006 concerning Population Administration (as amended by Law Number 24 of 2013) which states that gender change is included in the category of other important events, so it can be said that the rule is an opening for people who are going to make a gender change. The affirmation contained in the article above that the change of sex is one of the events that have been determined by the district court to be recorded at the implementing agency. This means that someone who will change gender status can be realized with a note that there must be a decision from the court. Thus, gender changes is part of population events.

Another problem that will befall the perpetrators of sex surgery from men and women is related to inheritance. The division of the amount of inheritance that becomes the right of the heirs depends on the gender of a person.

Various schools of jurisprudence that exist have explained that it is haram for people to change their genitals, whereas if someone performs an operation on their genitals to clarify their status as male or female because they have two genitals, then it is permissible. The law that allows for genital surgery for those who have two genitals, to provide legal certainty for their rights, especially those related to inheritance rights. Islamic inheritance law determines the share of each heir because of their gender status, whether male or female.

The case of Dorce Gamalama who has changed her genitals from male to female, of course, will have a broad impact on other legal events, especially the death of her parents. There will be tremendous confusion as to how the inheritance will be divided for Dorce, whether it is calculated by male status or female status.

## **II. Review of Literature**

The research method is a step that is owned and carried out by researchers in order to collect information or data and conduct investigations on the data that has been obtained (Asyraini et al., 2022; Octiva, 2018; Pandiangan, 2015). The research method provides an overview of the research design which includes, among others: procedures and steps that must be taken, research time, data sources, and with what steps the data is obtained and then processed and analyzed. In this discussion, we first try to explain in advance the

purpose of research methods, the notion of research methods including the notion of research methods according to experts. And lastly, we explain examples of research methods and their benefits (Octiva et al., 2018; Pandiangan, 2022). The point is that this discussion will provide a comprehensive understanding of the research. And then we will explain the various methods of research in detail (Octiva et al., 2021; Pandiangan, 2018).

This type of investigation is normative and legal. Normative research is a scientific research procedure to find the truth based on scientific logic from the normative side. The normative side here is not limited to laws and regulations. Normative legal research does not always connote a juridical norm research. In general, juridical norm research is understood to be only legal research which limits it to the norms contained in the legislation (Pandiangan et al., 2018; Pandiangan et al., 2021). Meanwhile, normative legal research is broader. Normative legal research is a scientific research procedure to find the truth based on scientific logic from the normative side. The normative side here is not limited to laws and regulations (Pandia et al., 2018). Legal research is an analytical process that includes methods, systematics, and certain thoughts that aim to study certain legal phenomena, then seek solutions to problems that arise. Legal research is normative research but not only positivist law research (Pandiangan et al., 2022).

The type of data in this study is secondary data and is carried out by searching the literature to obtain related legal materials. Secondary data is primary data obtained by other parties or primary data that has been further processed and presented either by primary data collectors or by other parties (Tobing et al., 2018).

This study includes the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning human rights, Law Number 23 of 2006 concerning population management, Law Number 48 of 2009 concerning judicial rights, and Law No. 29 of 2004 concerning medical practice.

### **III. Research Method**

#### **3.1 Legal Consequences of Gender Changes Through Court Decisions**

According to Article 16(1), courts may not prohibit or refuse investigations and decide on previous legal disputes because the underlying law does not exist or is unclear. The judge or court is obliged to investigate and try. This method must be based on the provisions of Article 28 (1) of Law Number 4 of 2004, where judges and judicial institutions as law enforcement officers investigate, obey, and understand the legal values that exist in society. obligation to do so.

A well-known case in Indonesian courts where judges had to find a new law was the sex reassignment surgery of Vivian Rubyanti. From a legal perspective, this incident had a major impact on the development of society. Because the case of a change in status is a new social problem that is not regulated by law. The law only recognizes the terms male or female, and the existence of these two types of sacred creatures, a group of humans between men and women, who live between the two creatures above, constitutes a society that lives in society. The importance of legal issues emerged after the development of the medical field known as genital surgery (Asmawati, 2013).

The evolution of the judicial system requires the law to follow the development of science so that courts can use "tools" in the form of expert statements on certain issues that they want to know. Members' testimonies are provided by experts in their fields to facilitate judges' decision-making and to provide judges with deeper knowledge about certain issues related to the problems faced by judges will be given (Aswad, 2016).

Physical examination is the first examination performed by a specialist (doctor) to examine the male or female important organs (testes, penis, testicles) such as the breasts, lips, and vagina. The second test includes tests for reproductive organs and hormones, such as chromosomal and testosterone tests, and psychological tests for emotional problems and sexual orientation affect the legal status of the person and thus will also affect aspects of his life.

Decision Number 019/Pdt.P/2009/PN.Btg explains that the application submitted by Agus Widoyo who argued that he had been determined by the Batang District Court regarding the change in his gender status from male to female. Based on the circumstances of the applicant who was born a male but since the age of five the applicant feels that he has behavioral deviations, namely he has a tendency to behave like a woman and tends to hang out with women. Adolescent applicants have a psychological orientation towards women and should encourage the situation to perform sex reassignment surgery. This is of course done after going through a series of tests such as psychology, hormone tests, and personality tests. Psychiatrists, psychologists, surgeons, internal medicine, genetics, obstetrics and other specialists. Finally, the complainant was successfully operated on by a team of doctors led by Johansyah Marzoeki, who was able to perform a gender changes operation by changing the gender of the complainant from male to female.

The Civil Rights Authority (Burgerlijke Stand) is an institution whose mission is to include legal cases of people that affect a person's civil status, such as a change of name or identity, into a specific list. It determines the legal status of a person with a certain identity in civil law. The civil code does not directly explain cases of gender changes or the determination of legal status, but when applied and displayed in terms of a change of identity, the civil code is regulated by Article 1, 1316 of the civil code. You can address these needs through documentation.

Legal certainty is also seen from the consistency in the judge's decision, namely between the decisions of one judge and the decisions of other judges for similar cases that have been decided. When viewed from this side, several judges' decisions in Indonesia have given stipulations on requests for gender changes. These decisions included the cases of Dorce Gamalama, Dena Rachhman, Vivian Rubianti, Agus Wadoyo, and Aprilia Manganang. The determination of the judge in the perspective of legal certainty must provide benefits for the applicant. Based on this, the decisions by the court judge have provided benefits for the person concerned. When viewed from a psychological perspective, the determination has provided inner peace for the perpetrators of the gender changes applicants. Prior to the gender surgery, the applicants felt that there was something incompatible between gender and the orientation of the applicants, so that it created anxiety for the applicants. The judge's determination of the gender changes application has provided certainty for the applicants to live according to the sexual orientation they want.

Based on the theory of legal protection, legal stipulations given by court judges have actually legitimized the permissibility of changing sex, although with certain conditions. This means that when these conditions have been met, the determination of the gender changes will be granted by the district court judge.

### **3.2 Legal Certainty of the Distribution of Inheritance Linked to Gender Changes Through Court Decisions**

According to the Indonesian Ulema Council, intentional sex-change operations, such as sex-change operations, are unlawful. Therefore, those who have undergone sex reassignment surgery do not have a shar'i legal impact and remain in the same condition as before the sex reassignment surgery (Maulidina, 2015).

The gender status of a person who performs sexual surgery in this inheritance depends on the type and purpose of the sexual operation performed. If the type and purpose of the gender changes operation is *tabdil/tagillil khilqah*, it means changing God's creation through gender changes surgery from male to female and vice versa. After that his gender status did not change, so for example his position as an heir remained the same as his normal gender status at that time. Based on this, women who have undergone sex reassignment surgery to become men still have the status of women according to law, so the inheritance percentage is the same as men (for boys and girls according to Islamic law), I am not entitled to receive 2:1) (Utomo, 2003).

Meanwhile, gender reassignment surgery is carried out on someone who has a sexual disorder (eg multiple sex) with the aim of increasing or perfecting *tasih* or *takmil* and in accordance with the law will clarify the identity and legal status of the person.

In this case, Indonesian Ulema Council states that genital enlargement surgery is allowed in accordance with Fatwa Number 03 of 2010 concerning changes and repairs of the genitals. Only genital repair/repair operations that affect marriage and inheritance can affect this Indonesian Ulema Council *syar'i fatwa* method.

The legal position of transsexual actors is mainly determined by transsexual law. The consequences of *wallia* (genital surgery) are not recognized because the law governing normal or complete genital surgery in Islam is haram. A transsexual is a woman who changes her gender to a man. Islam does not allow legal status as male or considered female as the preoperative sex. Even if a transgender man becomes a woman, his legal status is still recognized as a man.

The hadith of the Prophet was narrated by Bukhari and six other hadith experts from Ibn Mas'ud and the value of the hadith is valid, which means:

"Allah cursed women with tattoos, those who seek tattoos, those who shave their eyelashes, those who shave their faces, and who cut their teeth, all for the sake of beauty by changing Allah's creation." (Narrated by HR. Al-Bukhari and Muslim from Ibnu Mas'ud *radhiyallahu`anhu*).

The above hadith confirms that what is created by God cannot be changed. Similarly, even if a man or woman is born of the normal sex, because of the environment he suffers from disorders such as sexual tendencies and decides to dress and behave like other people of the opposite sex. Basically he has a normal organ/gender, but in his soul is not normal. Islam also prohibits people from dressing and acting against their gender. This is forbidden by the Prophet based on a religious hadith, which means: "The Messenger of Allah *sallallahu 'alayhi wa sallam* cursed men who imitate women and (curses) women who imitate men." (HR. Al-Bukhari No. 5885).

Talking about the distribution of *wallia's* inheritance according to the civil code, children from legal marriages receive the same share as other families and *wallia*. The provisions regarding the equal distribution of inheritance for each family heir are contained in Article 852 of the civil code: children or descendants inherit the inheritance of their parents, grandparents, and parents, even though from different marriages. Or, regardless of sex or birth, the next relative in a straight line is, first of all, if all are still first-degree relatives of the deceased and each is entitled to himself, inheriting an equal share. All of them inherit parts one after another.

If the provisions of Article 852 of the civil code are applied to the distribution of the inheritance of a transgender, then the transgender will receive a share of the inheritance if the transgender is a legitimate child (Saliro and Kasmaja, 2019). Based on this information, changing gender does not eliminate a person's inheritance rights.

### 3.3 Legal Protection Against Heirs who Gender Changes Through Court Decisions on the Distribution of Inheritance

If you pay attention to the good provisions contained in Islamic law and the civil code, then in fact there are no significant problems. Both the civil code and Islamic law still provide inheritance rights for perpetrators who change gender. The civil code does not even regulate inheritance rights for heirs who change gender, so Islamic law still provides inheritance rights for perpetrators who change gender, according to the gender before the operation. The heated discussion is even related to the law of gender surgery itself.

Sex surgery in Latin, namely "sirru" means hand, action performed using hands, surgery or surgery is any action performed by a surgeon, especially the act of using a tool. Surgery is also a matter of correcting deficiencies of non-neutral (defective) anatomical parts of the body.

Linguistically, the meaning of sex is a tool in the body to produce offspring. In medical terms, sex is known as sex which allows the reproduction of organisms through the union of male and female germ cells (Sulistiani, 2016).

Genital surgery is carried out by someone who is in normal condition since birth and has perfect intimate organs, in Islamic law it has violated the law. This sex operation tends to follow lust (Rafiq, 2010). This is based on the argument in the Word of Allah SWT in Surah Al-Hujurat verse 13.

The potential for commotion in the community regarding the formation of a gender changes law in Indonesia is very large. There are challenges from religious laws, traditions and culture that exist in society, not to mention the bullying that will be obtained by people who perform genital surgery. If viewed on the other hand, people who undergo a gender changes, of course, will experience mental disorders and a sense of mysticism which of course cannot be ignored.

When viewed from the concept of the rule of law, the omission of the inner feelings of people who experience the desire to make a gender changes is not appropriate to be left alone. There must be a solution for such people, because they are citizens whose rights must be protected. This means that gender changes surgery is only carried out if it is based on recommendations from experts for the person.

Change or change of gender related to the law within the scope of law in Indonesia, is not something that is easy and can be taken for granted. The provisions of religious law, especially Islamic law, have provided firm and clear provisions regarding the prohibition of changing sex. This means that it is almost impossible for a gender reassignment or gender changes operation to be legal from an Islamic perspective. Islam only allows genital surgery only to get gender certainty, if there is someone who has multiple sexes (khuntsa musykil).

Buya Hamka saw that advances in medical technology should be able to end the mental suffering experienced by people like Vivian Rubianti. The sex reassignment surgery is expected to be able to provide a better life for people with the suffering experienced by Vivian Rubianti. Buya Hamka said that Islamic teachings teach that humans with their knowledge must be used for the benefit of human life itself. Buya Hamka concluded that Vivian Rubianti's effort to change gender did not conflict with God's law and was in accordance with Islamic teachings that prioritized benefit.

Based on Buya Hamka's opinion, the necessary condition to allow someone to change or change gender is to repair or rehabilitate a person's mental or mental disability. Eliminating the mental disability experienced by a person is part of the benefit, so it does not conflict with Islamic law. The narration expressed by Buya Hamka has provided insight into the spirit of the Shari'a, namely the benefit for humans. A person with the

condition experienced by Vivian Rubianti, Dena Rachman, and Dorce Gamalama, should not be understood only from the perspective of a normal human being mentally or mentally, but also must be seen from the suffering experienced by people like Vivian Rubianti. The existence of bullying and being labeled as a person who violates God's destiny must also be questioned again, because such a situation is not something that is desired.

#### IV. Conclusion

Whereas the legal consequences of gender changes according to Islamic law are not changing any legal provisions, considering that gender changes is *haram*, while the legal consequences of gender changes are seen from the positive legal side of gender changes actors are not hindered from obtaining inheritance rights from the heir. Whereas the gender changes in the distribution of inheritance according to Islamic law, the portion of the inheritance distribution remains the same as the gender before gender changes operation. According to the civil code, gender changes has no effect on the distribution of inheritance for the person who undergoes gender changes. Moreover, the civil code does not comply with this at all. Whereas legal protection measures for people who carry out gender changes operations in obtaining a share of inheritance are by making regulations related to the legal consequences of gender changes operations.

It is better to make regulations related to the inheritance rights of people who change their gender in order to get legal certainty, especially for people who are non-muslims. Islamic law itself has stipulated that there is no change in inheritance rights for someone who changes or changes gender. Preferably for preventive measures, the government should make additional regulations so that people who carry out gender changes operations do not get inheritance rights through inheritance, but can be through grants or wills, which can be added to existing rules, for example in the Supreme Court Regulation. There must be a law that regulates the mechanism for changing or changing sex, so that gender changes or replacement must remain in a corridor that does not violate moral norms, is not biased and is recommended by a competent doctor for it. It aims to provide a clear and measurable concept in terms of gender replacement or change.

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