

## JUDICIAL STUDY OF GENDER TRANSITION (TRANSGENDER) ON INTEGRITY DISTRIBUTION

<sup>1</sup>Sri Nanang Meiske KAMBA, <sup>2</sup>Moh Taufiq Zulfikar SARSON, <sup>3</sup>Dolot Alhasni BAKUNG

<sup>1,2,3</sup>Faculty of Law, Universitas Negeri Gorontalo, Indonesia.

Corresponding author: Sri Nanang Meiske KAMBA

Email: [srinanangmeiskekamba@ung.ac.id](mailto:srinanangmeiskekamba@ung.ac.id)

Received: 2022-07-07

Revised: 2022-07-20

Accepted: 2022-07-09

### Article History:

Volume: 1

Number: 1

Page: 12-16

### Abstract:

Gender change (transgender) is a contemporary phenomenon both globally and nationally. In Indonesia, the issue of transgender has several problems, one of which is regarding the position of transgender in Indonesian law and especially in inheritance law, both in the Civil Code and the Compilation of Islamic Law. The problem is due to the legal vacuum of transgender arrangements in the distribution of inheritance. This research is categorized into normative legal research types, and it is based on the issues and or themes raised as research topics. The research approach used is philosophical and analytical, namely research that focuses on rational, critical, analytical and philosophical views and ends with conclusions that aim to produce new findings as answers to the main problems that have been determined. It will also be analyzed using a descriptive-analytical method by describing the applicable laws and regulations related to legal theory and positive law enforcement practices related to these problems. The study results indicate that the legal position of transgender has not been clearly regulated, and there is a legal vacuum, which results in the unclear distribution of inheritance for transgender people. This problem is important because it results in legal uncertainty in the distribution of inheritance. In Islamic law, the distribution of transgender inheritance will be returned to its original gender and does not follow the physical changes made. Meanwhile, in the Civil Code, the distribution of inheritance is carried out based on the method of obtaining inheritance.

**Keywords:** Gender Transition (Transgender), Inheritance Law, Civil Code Procedure, Islamic Compilation Law.

Cite this as: KAMBA, S.N.M., SARSON M.T.Z., BAKUNG D.A. (2022) "Judicial Study Of Gender Transition (Transgender) On Integrity Distribution". Protection: Journal Of Land And Environmental Law, 1 (1), 12-16.

Copyright (c) (2022) by <sup>1</sup>Sri Nanang Meiske KAMBA, <sup>2</sup>Moh Taufiq Zulfikar SARSON, <sup>3</sup>Dolot Alhasni BAKUNG

This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.



## INTRODUCTION

Gender and sex are major predictors of health and well-being. Gender is a set of biological characteristics in people and animals connected to physical and physiological factors such as chromosomes, gene expression, hormone activity, and reproductive/sexual anatomy. Gender is often classified as female or male, while there is variety in the biological characteristics that comprise sex and how these characteristics are represented (Coen S & Banister E, 2012).

Gender is often classified as female or male, while there is variety in the biological characteristics that comprise sex and how these characteristics are represented. Transsexuality is a modern social phenomenon. This transsexual phenomenon has consequences in many aspects. One of them is regarding the person's legal position in Islamic inheritance.

According to Mukti & Sutomo (1993), Transsexuals are sexual behavior deviations in the conflict between the nature of a person's sex and his mental state. He is biologically a guy with male genitals, but his demeanor and soul are female or vice versa. This case tends to be a case of mental disorders, namely psychosexual disorders. Sex change surgery is not the only therapy. In this case, there must be clarity about the motivation or intention of the sufferer, for example, to seek satisfaction.

In the opinion of Quraish Shihab, talking about the operation to replace or perfect the genitals is permissible to do it, with the motivation of treatment, according to the words of the Prophet Muhammad. He ordered sick people to seek treatment. Meanwhile, the Indonesian Ulema Council (MUI) forbids sex change. This illegitimate decision is under the fatwa decision of the Indonesian Ulema Council, in the Second National Deliberation in 1980 concerning the operation of changing and perfecting sex, according to the fatwa of the Indonesian Ulema Council, even if the gender is changed from the original, the legal position of the sex is the same as the original gender before it was changed (Agususanto et al., 2020).

Within the scope of legislation in Indonesia, transgender problems are not only in the aspect of social behavior that is a problem, but also inheritance law problems. It is because the Indonesian legal system does not recognize the change of genitals as a subject of inheritance law.

In Indonesia, it has been regulated regarding heirs, contained in the 1945 Constitution, regarding absolute rights, namely: Article 28G paragraph (1) of the 1945 Constitution: *"Everyone has the right to personal protection, family, honor, dignity and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not do something which is a human right."*

Article 28H paragraph (4) of the 1945 Constitution: *"Everyone has the right to have private property rights, and these property rights cannot be taken arbitrarily by anyone"*. Book II of the Compilation of Islamic Law (KHI) has regulated inheritance law. According to Article 171 letter of the Compilation of Islamic Law, inheritance law is the law that regulates the transfer of ownership rights to the inheritance (*tirkah*) of the heirs and determines who is entitled to become heirs and how much each share. So the group of heirs regulated in the Compilation of Islamic Law consists of 2 (two) groups, namely the male sex group and the female sex group, as is the case with Islamic inheritance law, which has the principle that the distribution of boys and girls is two to one.

Islamic inheritance law applies to Muslims everywhere. Islamic inheritance law is based on several verses of the Koran as the word of God revealed to the Prophet Muhammad and the Prophet's hadith, which consists of the words, actions and things that the Prophet kept silent. In QS. An-Nisa '(4): 11, Allah determines the division of inheritance for a man and a woman, namely two parts for men and some for women.

Transgender actors are also objects of law, and their rights must be protected in the matter of inheritance. However, Inheritance Science has regulated inheritance and inheritance rules in such a way as to be strengthened by the Compilation of Islamic Law in Indonesia as legal standing to protect the rights of heirs in Indonesia. It is not enough to be able to accommodate various social developments, especially for transgender actors.

## METHODS

This research is categorized into normative legal research types. It is based on the issues and or themes raised as research topics. The research approach used is philosophical and analytical, namely research that focuses on rational, critical, analytical and philosophical views and ends with conclusions that aim to produce new findings as answers to the main problems that have been determined. It will also be analyzed using a descriptive-analytical method by describing the

applicable laws and regulations related to legal theory and positive law enforcement practices related to these problems.

## RESULT AND DISCUSSION

**Legal Positions of transgender in Indonesia Laws and Regulations.** In Indonesia, there are no special rules regarding sex change for someone who has had sex surgery. However, to provide protection, recognition, determination of personal status and legal status for every population event and important events experienced by Indonesian residents and Indonesian citizens who are outside the territory of the Unitary State of the Republic of Indonesia, Law Number 23 of 2006 has been issued concerning Population Administration. Law No. 24 of 2013 concerning Amendments to Law No. 23 of 2006 concerning Population Administration.

In Chapter 1 General Provisions, Article 1, number 17 of the Population Administration Law states: "*What is meant by an important event is an event experienced by a person including birth, death, stillbirth, marriage, divorce, child recognition, ratification of children, adoption of children, change of name and change of citizenship status*". Based on this, it can be said that sex change is not included in the category of important events as intended. The change of sex is known in Article 56 paragraph (1) of the Population Administration Law as "another important event".

In the Elucidation of Article 56 paragraph (1) of the Population Administration Law, it is stated that "*Other Important Events are events determined by the district court to be registered with the Implementing Agency, including changes in gender*". If it is true that someone has changed his gender, then he must apply to the court to get a decision from the court. This court ruling is used to obtain ratification of sex change.

After ratifying the sex change from the state based on the court's stipulation, it is possible to apply to change the identity, both name and gender, in the residence document. As a follow-up to the rules in the Population Administration Law, Presidential Regulation of the Republic of Indonesia Number 25 of 2008 has been issued concerning Requirements and Procedures for Population Registration and Civil Registration (Mustaqim, 2016)

Similar to the rules in Article 56 paragraph (1) of the Population Administration Law regarding the recording of other important events, in Article 97 paragraph (2) of Presidential Regulation 25 of 2008, it is also stated that other important events referred to include changes in gender.

After all the procedures have been passed, a person who has had sex reassignment surgery or sex reassignment surgery has a new identity listed in the residence document. The residence document is essential to affirm a person's status, whether male or female. Because of the determination of such status, it is vital if someone wants to get married, explain inheritance status, work identity, and others for the necessities of life as a citizen.

The case of this gender change in terms of the law is a tremendous influence on developments in society because the event of this status change is a new problem in society. This matter has not been specifically regulated by law because the legislators at that time did not or did not predict the occurrence of such things. The law only recognizes the term male or female, and it is a social fact that lives in a society that between these two types of divine beings, male and female, there is also a group of people who live between the two creatures mentioned above (Andriani & Antasari, 2015).

**Legal Consequences for Status Changes of Transgenders on Inheritance.** The legal position of transgender actors is primarily determined by the law that regulates transsexuals. The law that regulates transgender people who perform genital surgery under normal or perfect conditions in Islam is forbidden, so the results of transsexuals (genital surgery) are not recognized. A transsexual is a woman who changes her sex to a man. In Islam, her legal position as a man is

not recognized or is still considered a woman as her gender before surgery, and vice versa, if a man who is transsexual becomes a woman, his legal position will still be recognized as a man. The legal position for transsexual perpetrators will remain under the gender they had before they had transsexual surgery, as stated in the fatwa of the Indonesian Ulema Council on June 1, 1980, in decision number 2, "*A person whose gender is changed in legal status is the same as gender before changing*" (Majelis Ulama Indonesia, 2020).

The legal position of transgender actors will still be recognized according to their original gender before sex surgery. Therefore, for a male transgender person who changes his genitals to become a woman, in Islamic inheritance law, his legal position will still be recognized as a man's heir. Vice versa, if a transgender woman who performs a sex change operation becomes a man, then in Islamic inheritance law, her legal position will still be recognized as the heir of a woman.

The Civil Code does not classify transgender. The Civil Code also does not recognize gender differences in inheritance issues. In the Civil Code, the groups of heirs consist of. According to blood relations, the male group consists of a father, son, brother, uncle, and grandfather. Moreover, the women's group comprises mothers, daughters, sisters and grandmothers (Djun'astuti, 2013). In the explanation, there is no explanation for this transgender problem. The Civil Code is known as "not appropriate to inherit". According to Article 838 of the Civil Code, what is included in the category of inappropriate inheritance are:

- a. Those who have been convicted of murdering or attempting to kill the heir.
- b. Those who have been blamed by a judge's decision for slandering the heir are threatened with a 5-year prison sentence or a heavier sentence.
- c. Those who, by force or action, have prevented the testator from making or revoking his will.
- d. Those who have embezzled, tampered with, or falsified the testator's will.

Based on the grouping of heirs and people who are not eligible to inherit above, it can be concluded that the position of transgender is still an heir because there are no rules in the Civil Code that regulate sex differences, as long as transgender is included in the lineage of the heir, he is entitled to an inheritance.

Transgender is not known in Islamic law because Islam strictly prohibits the act of changing sex without a good reason. Known in Islamic law are khuntsa and mukhonats, khuntsa are people who have multiple sexes or have no sex at all or have a genetic composition that is identical to their physical condition, so for reasons of health and legal certainty for him, genital surgery is allowed.

Khuntsa is included in a separate group in the Islamic inheritance system because according to the Qur'an Surah An Nisa verse 7, verse 11, verse 12, verse 33 and verse 176, which are mentioned in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) Article 174, states that the heirs consist of heirs according to blood relations and marital relations, for heirs because of brotherly relations are regulated in the Qur'an Surah al-Ahzab verse 6 and for heirs due to hijrah is regulated in the Qur'an Surah al-Anfal verse 75 (Basyir, 2001).

The Compilation of Islamic Law is "barred from being an heir". According to Article 173 KHI, those who are prevented from becoming heirs are:

- a. Convicted of having killed or attempted to kill or severely abused the heir;
- b. Convicted of slanderously filing a complaint that the testator has committed a crime punishable by five years imprisonment or a heavier sentence.

In this regard, it has no shari legal implications, so in inheritance law, it is seen from the initial gender before the change. If the initial gender is male, he will only inherit the male share and vice versa. If the initial gender is female, he will inherit only the female share.

The inheritance distribution system, according to the civil law code, is based on the way the person becomes the heir. Two ways are mentioned in the civil law code of conduct to obtain an inheritance. First, as heirs, according to the law, heirs are based on straight and side blood descendants. Second, because it was appointed in a will.

Civil law laws never distinguish between genders in terms of inheritance. If it is related to the hereditary system, then the Civil Code follows a bilateral hereditary system, where everyone relates himself to his parents' descent. Therefore, the term transgender has never been discussed in the Civil Code, so the share of inheritance for transgender people is calculated based on how he gets the inheritance.

## CONCLUSION

The position of transgender in Indonesian laws and regulations is still ambiguous. It is due to the absence of special regulations that accommodate gender change for transgender people, as for the legal consequences of inheritance for transgender people in Islamic law, namely based on the initial gender, not based on the change of genitals and in the Civil Code the distribution of transgender inheritance is based on how to get it.

## REFERENCES

- Agususanto, Andiko T., Fahima, I. (2020). Perubahan Status dan Akibat Hukum Pelaku Transgender terhadap Kewarisan dalam Perspektif Fikih Empat Mazhab. *Jurnal Qiyas*, 5(1).
- Andriani A.& Antasari R.R. (2019). Kajian Teori Eksistensi Status Hukum Transeksual terhadap Perubahan Jenis Kelamin Pasca Penetapan Pengadilan. *Jurnal Raden Fatah Muamalah*, 5(1).
- Basyir A.A. (2001). *Hukum Waris Islam*. Yogyakarta: UII Press.
- Coen S & Banister E. (2012). What A Difference Sex and Gender Make: A Gender, Sex and Health Research Casebook. *Canada: Canadian Institutes of Health Research*.
- Djun'astuti E. (2013). *Hukum Keluarga Dan Waris*. Pontianak: BW.
- Kompilasi Hukum Islam. (2000). Yogyakarta: Pustaka Widyatama.
- Majelis Ulama Indonesia. (2010). *Himpunan Fatwa Majelis Ulama Indonesia*, Edisi Ketiga. Jakarta.
- Mukti, A.G. & Sutomo, A.H. (1993). *Abortus, Bayi Tabung, Euthanasia, Transplantasi Ginjal, dan Operasi Kelamin dalam Tinjauan Medis, Hukum, dan Agama Islam*. Yogyakarta: Aditya Media.
- Mustaqim, Abdul. (2016). Homoseksual dalam Perspektif Al-Qur'an Pendekatan Tafsir Kontekstual al-Maqaisidi. *Jurnal Şuhuf*, 9(1).
- Subekti, R,& R. Tjitrosudibio. (2003). *Kitab Undang-undang Hukum Perdata (KUH Perdata)*. Jakarta: Pradnya Paramita.
- Undang-Undang No. 24 Tahun 2013.
- Undang-Undang Nomor 23 Tahun 2006.