
COMPARATIVE STUDY OF GENDER REASSIGNMENT IN INDONESIA IN THE
PERSPECTIVE OF POSITIVE LAW AND ISLAMIC LAW

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ABSTRACT; *Gender and sex are two different things. Sex is synonymous with the difference in physical form between women and men. While gender refers more to the characteristics, roles, functions, status, and responsibilities. Some people feel that their gender and sex are not in harmony, so they decide to change their sex by having sex reassignment surgery, and ask for a court order. This is certainly a pro and con for Indonesian society, which is predominantly Muslim, especially if a Muslim changes his or her gender. This research aims to analyze the regulation of sex reassignment in Positive Law and Islamic Law in Indonesia. This research uses the normative juridical method, namely with statutory documents, and other literature studies related to this research. The results of the study show that in Indonesia there is no specific regulation regarding sex reassignment due to sex reassignment surgery, but judges usually use jurisprudence and use the provisions of Article 56 Number 24 of 2013 concerning Population Administration, while in the view of Islamic Law the law of sex reassignment surgery is prohibited, unless the surgery is for health purposes then there are some scholars who allow it.*

Keywords: Gender; Sex change; Sex reassignment surgery; Transgender.

INTRODUCTION

Humans are created in two sexes, male and female, but in reality, there are those who experience confusion in determining their sex. This can happen because there is something that does not match their psychology and sex, even though the person is born normal. In addition to sex, there are human identifiers based on gender.¹

Gender and sex are two different things. The difference is that gender is more concerned with differences in the biological organs of men and women, especially in the reproductive organs. As a consequence of the function of reproductive organs, women have reproductive functions such as menstruation, pregnancy, childbirth and breastfeeding; while men have the function of fertilizing (spermatozoid). Gender concerns differences in the roles, functions and responsibilities of men and women as a result of agreements or the formation of society. As a consequence of the results of community agreements, the division of men's roles is to earn a living and work in the public sector, while women's roles are in the domestic sector and are responsible for household problems.²

Gender can change while biological sex does not. This is what allows people to change their gender orientation. Transgender people have a dissatisfaction with themselves because they feel incompatible between body anatomy and psychology. This will lead to an urge to change the way they speak, grooming, behavior to perform sex reassignment surgery.³

Gender reassignment in Indonesia is still being debated today because there are pros and cons. The pro group says that gender reassignment is allowed on the basis of human rights that can do

¹ Henry Alejos, "Transgender Dalam Perspektif Hukum Positif Dan Hukum Agama," Universitas Nusantara PGRI Kediri 01 (2017): hlm 5.

² Herien Puspitawati, "Konsep , Teori Dan Analisis Gender Oleh : Herien Puspitawati Departemen Ilmu Keluarga Dan Konsumen Fakultas Ekologi Manusia- Institut Pertanian Bogor Indonesia . PT IPB Press . Bogor .," Jurnal Ilmu Sosial dan Humaniora 4, no. 1 (2013): hlm 7.

³ Lilis Karwati, "Menolak Subordinasi Gender Berdasarkan Pentingnya Peran Perempuan Dalam Pembangunan Nasional Menjelang Bonus Demografi 2035", Jurnal Cendekiawan Ilmiah Pls, Vol. 5, N.D.

whatever they want. The cons say that sex reassignment is against nature and that sex reassignment is a disease, not a human right.⁴

Something that is still being debated today is the question of identity for LGBT people, especially transgender people who decide to undergo gender reassignment whether the state should recognize them as having an identity other than male and female. This is where Mashood A. Baderin termed the margin of appreciation where local/regional, cultural, or religious aspects govern. Similarly, in the formal legal perspective of Islamic law, the philosophical basis of which is the benefit of them still getting *karamah insaniyah* (human dignity) at any time.⁵

One example of gender reassignment that has implications for various matters is Decision Number: 965/Pdt.P/2019/ PN Jkt. Utr, which is about a request for a determination of gender reassignment by the applicant Bong Jan Tong. The applicant intends to make changes to the name and sex on the birth certificate, identity card, family card, passport, driver's license (SIM) and other letters related to the applicant's legal provisions in the future, and authorized by the district court. This was approved by the judge based on the following considerations.

That in accordance with Exhibits P-11, P-12 Medical Certificate dated August 29, 2017 signed by Doctor of Psychology Dr. Palangsan Chongruk and Certificate of KAMOL COSMETIC HOSPITAL dated September 11, 2017 signed by Dr. Kamol Pansritum, MD. (Exhibit P-3), Official Cosmetic Hospital Translation of Medical Certificate for the Name of BONG JAN TONG has undergone sex reassignment surgery on August 29, 2017 (Exhibit P-5), Photo Copy of Certificate from Psychiatrist Prof. Dr. dr. H.Dadang Hawari, SpKj (K). which explains: Mr. Bong Jan Tong has performed gender reassignment (transgender) from male to female, Photo Copy of Certificate from the MINISTRY OF HEALTH DIRECTORATE GENERAL HEALTH SERVICES NATIONAL HOSPITAL Dr. CIPTO MANGUNKUSUMO JAKARTA signed by dr. Djaja Surya Admadja, SpFm. Phd.SH.DFM. dated 26 November 2019, which explains that Mr. Bong Jan Tong is physically a woman. It is true that the applicant Bong Jan Tong had undergone gender reassignment from male to female on August 29, 2017.

PROBLEM

Based on the description above, the author conducts research on how the regulation of gender reassignment based on positive law in Indonesia and how the legalization of gender reassignment in the perspective of Islamic law.

RESEARCH METHODS

The type of research used by the author is Normative Juridical research. This type of normative legal research is used in legal research conducted through examination of existing literature. This research uses a type of qualitative research that is descriptive and tends to use analysis. Process and meaning (subject perspective) are emphasized in qualitative research.⁶ The approach used in this research is a statute approach, which is carried out by examining all laws and regulations that are related to the legal issues being addressed.⁷

DISCUSSION

Sex reassignment arrangements in Indonesia

⁴ *Ibid* hlm 2

⁵ Irvan Hasbiyulloh and Abdur Rahim, "Peranan Negara Mengantisipasi Transgender Dalam Perspektif Hukum Islam," *Mizan: Journal of Islamic Law* 5, no. 2 (2021): 291.

⁶ Soerjono Soekanto dan Sri Mamudji, 2009. "Penelitian Hukum Normatif Suatu Tinjauan Singkat", Jakarta: PT Grafindo Persada, hlm 13.

⁷ Amiruddin dan Zainal Asikin, "Pengantar Metode Penelitian Hukum", Cet. IX, (Jakarta: PT. Raja Grafindo Persada, 2016), hlm 118.

Sex reassignment surgery, also known as transgender surgery, is a procedure performed to change a person's sexual characteristics to match their perceived gender identity. The aim of this surgery is to address gender dysphoria, which is a condition where the patient feels a mismatch between the sex they were born with and their perceived gender identity.⁸

The reasons why a person decides to change sex can be varied and complex, and can involve both personal and social factors. Some of the common reasons why people want to change sex, as indicated by the search results, are that many individuals feel that they were born with the wrong sex or that their gender identity does not align with the sex they were assigned at birth. The mismatch between their gender identity and physical characteristics can cause significant discomfort and distress.⁹ So finally decided to perform sex reassignment surgery which is usually done abroad including in the decision of the request for determination Number: 965/Pdt.P/2019/PN Jkt. Utr. Sex change through sex reassignment surgery in Indonesia has not been directly regulated by law.¹⁰

District Courts in Indonesia consider applications for sex reassignment surgery based on previous judicial decisions. However, a surgical sex change must first go through a court process, where the court will consider all medical, psychological, and social aspects of the individual applying. This court decision becomes the basis for applying to the Civil Registry Office for a change of birth certificate. Although there is no law that specifically regulates gender reassignment surgery, court decisions and applicable legal principles are used to provide legal protection for individuals who wish to undergo gender reassignment.¹¹

According to Article 50 paragraph (1) of Law No. 48/2009 on Judicial Power states that "Court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging." In addition, Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that "Judges and Constitutional Court Judges are obliged to explore, follow, and understand the values of law and a sense of justice that live in society".¹²

Gender reassignment or change has been recognized as legal in several Court Stipulations if it meets the requirements. This has not been clearly regulated in Indonesian law, but if a person changes their gender and is accepted by the District Court then this is in accordance with Article 56 of Law No. 24 of 2013 concerning Population Administration, namely regarding "other events". The same thing is also regulated in Article 58 paragraph (1) of Presidential Regulation No. 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, namely that there must be a district court decision on other Important Events so that it can apply for a change of gender or legal status for every Indonesian resident.¹³

Article 56 of Law Number 24 of 2013 concerning Population Administration states about the recording of important events experienced by Indonesian residents and Indonesian citizens who are outside the territory of Indonesia. These important events include birth, death, stillbirth, marriage, divorce, child recognition, child attestation, child adoption, change of name, change of citizenship status, and change of sex. Article 56 provides the legal basis for recording sex changes in population administration. Article 56 of Law Number 24 Year 2013 regulates the recording of gender change as one of the important events in population administration. This article provides a legal basis for the administrative process of sex change in the context of population in Indonesia.¹⁴

Determination Number: 965/Pdt.P/2019/PN Jkt. Utr legalizes sex reassignment due to sex reassignment surgery, the judge considers that regarding changes in a person's sex status, because there are no positive legal rules governing it, so the judge is obliged to find the law as long as it

⁸ Khodijah Nur Tsalis et al., "Terapi Hormon Bagi Transgender" 10, no. 2 (2023): hlm 81.

⁹ Huriyah Saleh, *BAHASA DAN GENDER Dalam Keragaman Pemahaman, Journal of Chemical Information and Modeling*, vol. 53, 2019.

¹⁰ Muhammad Candra Syahputra, "Pendidikan Islam Multikultural (Studi Komparasi Pemikiran Abdurrahman Wahid Dan Nurcholish Madjid)," *Skripsi* 53, no. 9 (2019): hlm 8.

¹¹ I Vitri, *Tinjauan Yuridis Terhadap Penggantian Jenis Kelamin Perspektif Hak Asasi Manusia (Studi Putusan Pengadilan Negeri Kebumen Nomor: 1/Pdt.P/2021/PN Kbm) SKRIPSI*, 2022.

¹² L E Y D E Adquisiciones et al., "Pertimbangan Hukum Pergantian Kelamin (Studi Penetapan Pengadilan Negeri Yogyakarta No. 517/PDT.P/2012/PN. YK Dan Penetapan Pengadilan Negeri Boyolali No. 54/PDT.P/2015/Pn.Byl)," *Duke Law Journal* 1, no. 1 (2019).

¹³ Kholifah, *Kepastian Hukum dari Putusan Pengadilan Tentang Perubahan Jenis Kelamin fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta* 2020.

¹⁴ Tasnim Jamaluddin, "Registrasi Penduduk Sebagai Syarat Lahirnya Hak Dan Kewajiban," *UIN Ar-Raniry* (2020).

does not conflict with the living law, and also the principle of propriety. The judge also considered based on the provisions of Article 52 and Article 56 of Law No. 23/2006 on Population Administration, as well as complete evidence from witnesses that the sex reassignment surgery performed by the applicant had been approved by the family of the applicant so that the application for determination could be approved by the judge after going through various considerations, as explained in the theory of legal certainty.

The theory of legal certainty is a concept in law that demands clarity and certainty in legal regulations made by authorized and authoritative parties, so that these rules have juridical aspects that can guarantee the certainty that the law functions as a rule that must be obeyed. Gustav Radbruch argued that legal certainty is one of the products of law or more specifically a product of legislation. The importance of certainty in law, which means that the law must be clear, consistent, and accessible to everyone. Article 28G paragraph (1) of the 1945 Constitution also confirms that everyone has the right to protection of self, family, honor, dignity, and property under their control, and is entitled to a sense of security and protection from threats of fear to do or not do something that is their human right. legal certainty is realized through clear and consistent laws and regulations, as well as through fair and transparent law enforcement. Legal certainty can also be realized through an independent and effective judicial system, which can guarantee human rights and resolve disputes fairly.¹⁵ In the issue of gender reassignment, it is in accordance with the theory of legal certainty and article 28 G paragraph (1) of the 1945 Constitution, where there is a court decision stating that the application for gender reassignment is accepted, so that the implication provides a valid and strong identity, thus ensuring the fulfillment of legal certainty.

Islamic Views on the Legalization of Gender Reassignment in Indonesia

The Islamic legal view on gender reassignment or sex reassignment surgery is a complex debate within the realm of Islamic scholarship. In general, the majority of Islamic scholars and scholars agree that a person's gender identity is determined by God and cannot be changed. In this view, Allah clearly created human beings as male or female, and considers sex reassignment or genital surgery to be against His decree. Some scholars and schools of thought in Indonesia argue that sex reassignment surgery is not allowed in Islam. They argue that Islam recognizes the biologically determined sex at birth as one's gender identity and role, and that changing this through surgery is against the teachings of the religion.¹⁶

Hadith of the Prophet "Allah curses the tattooers, those who ask to be tattooed, those who remove eyebrows and those who cut (pangur) their teeth, all of which are for beauty by changing the creation of Allah" (HR Al-Bukhari).

Hadith narrated by Ibn Abbas:

لعن رسول الله صلى الله عليه وسلم المتشبهين من الرجال بالنساء، والمتشبهات من النساء بالرجال

“The Messenger of Allah (SAW) has cursed men who resemble women and cursed women who resemble men.” (HR Bukhari). This Hadith forbids the act of men resembling women or the act of women resembling men, so gender reassignment surgery is forbidden, because it becomes a medium (wasilah) for men or women who are operated on to resemble the opposite sex. The fiqh rule states “Al-Wasilah ila al-haram muharramah.” (Any means to the haram is also haram).

Based on MUI fatwa Number 03/Munas/VIII/2010, it explains the law of gender reassignment surgery in Indonesia. According to this fatwa, sex reassignment surgery is forbidden, because this surgery includes changing Allah's creation. The legal basis used is the Qur'an, Hadith, Istishab, and fiqhiyyah rules. From the results of the research conducted, 3 forms of sex reassignment surgery are known, namely; Sex reassignment surgery, Sex correction/enhancement surgery, Surgical removal of one of the double sexes.¹⁷

A person who is born in a normal and perfect condition of his genital organs, namely the penis (dzakar) for men and the vagina (farj) for women, equipped with a uterus and ovaries, is forbidden by Islamic law to perform genital surgery. This forbidden decision is in accordance with the fatwa of the Indonesian Ulema Council (MUI) in its 1980 National Conference on Sex Reassignment Surgery. According to this MUI fatwa, even if the sex is changed, the legal position of the sex is

¹⁵ Hasaziduhu Moho, “Penegakan Hukum Di Indonesia Menurut Aspek Kepastian Hukum, Keadilan, Dan Kemanfaatan,” *Jurnal Warta* 13, no. 1 (2019): hlm 12.

¹⁶ Muhammad Candra Syahputra, “Pendidikan Islam Multikultural (Studi Komparasi Pemikiran Abdurrahman Wahid Dan Nurcholish Madjid),” *Skripsi* 53, no. 9 (2019): hlm 36.

¹⁷ Septira Putri Mulyana and Kristi Fosa Akwila, “Analisis Waria Atau Transgender Melakukan Operasi Ganti Kelamin Dalam Perspektif Hukum Islam Dan Hukum Positif,” *Istinbâth: Jurnal Hukum dan Ekonomi Islam* 18, no. 2 (2019): hlm 20.

the same as the original sex before it was changed, based on QS Al-Hujurat: 13 All human beings before God and the law have been determined by their sex and this provision of God should not be changed, a person must live his life according to his nature.¹⁸

However, there is also another view that says that sex reassignment surgery can be justified in some special situations, such as if there is a medical condition that requires such surgery for the health or life of the individual. This opinion has as its basis the argument that the main principle in Islam is to maintain health and personal hygiene and avoid unnecessary damage or suffering. They argue that in these cases, doctors can choose the physically dominant gender or adapt it to the behavior they deem more appropriate. However, this minority view is not widely accepted in the Muslim community. The majority of scholars consider genital surgery to be an interference with Allah's creation and contrary to Islam's fundamental principles of justice, equality, and harmony between the body and its soul, they argue that in certain situations, genital surgery may be possible if a person is born with an unclear or ambiguous gender.¹⁹

Al Khunsa is a term used to refer to the condition where a person has multiple genital organs or genital organs that are deformed or abnormal. This term comes from the Arabic word *khants*, formed from the *wazan* (form) *fu'la* with the initial meaning of "soft", "smooth", or "soft". In Indonesian, words that come close to the meaning of *al khunsa* are *banci* (effeminate), *waria* (female-male), or *wadam* (female-Adam) which means: (1) neither male nor female; and (2) a man who acts and dresses as a woman and vice versa. Since the position of *al khunsa* is not clear whether it is male or female, scholars discuss it specifically. They divided *al khunsa* into two types: (1) *al khunsa musykil* and (2) *al khunsa gair musykil* which is also called *al khunsa wadih* (clear).²⁰

According to the MUI fatwa, genital enhancement surgery is permissible, because it is to emphasize and clarify the genitals that already exist but are less than perfect by operating on the external genital organs to match the internal genital organs. While sex reassignment surgery does not have any implications for the perpetrator, and sex enhancement surgery can have shar'i legal implications for the perpetrator.²¹

Views of Islamic law may vary between individuals and religious authorities. Some Muslims may feel the need to follow their religious views in considering gender reassignment surgery, whereas others may be more flexible on the issue. This diversity of views makes dialog and broader understanding important in the context of Islamic law in Indonesia.²²

Sex reassignment surgery from male to female or vice versa that is performed intentionally is haram according to MUI fatwa No. 03/Munas/VIII/2010. This fatwa explains that the determination of the validity of gender status due to genital reassignment surgery is not permissible and has no shar'i legal implications related to the change. Therefore, if someone experiences the state of *al khunsa*, sex reassignment surgery is not legalized according to the MUI fatwa. However, sex enhancement surgery performed by someone who has multiple genital organs or genital organs that are defective or abnormal is permissible.²³

CONCLUSION

The district court may grant an application for sex reassignment authorization based on the reason for sex reassignment surgery due to the existence of a district court stipulation that is necessary for the recording of sex change as one of the other important events Article 56 of Law No. 24 of 2013 concerning Population Administration. In the ruling, the judge stipulates the granting of permission for the requested sex change. However, a person must previously undergo an evaluation and understand all the risks and possible outcomes before undergoing sex reassignment surgery. In addition, the legality of gender reassignment surgery in Indonesia has not been

¹⁸ Abdul Rokhim, "Tinjauan Hukum Mengenai Kasus Pergantian Jenis Kelamin Berdasarkan Undang-Undang Ham Dan Perspektif Hukum Islam," *Focus Upmi* 8, no. 3 (2019): hlm 7.

¹⁹ Alejos, "Trasgender Dalam Perspektif Hukum Positif Dan Hukum Agama."

²⁰ Amalia Yunia Rahmawati, "Kedudukan Hukum Seseorang Berkelamin Ganda (Khunsa) Dalam Waris Secar Hukum Islam," no. July (2020): hlm 13.

²¹ Nurul Wafa Maulidina, "Analisis Fatwa MUI Nomor 03/M UNA S/V III/2010 Tentang Perubahan Dan Penyempurnaan Enis Kelamin Dan Kaitannya Dengan Implikasi Hukumnya," *UIN Wali Songo*, no. 112111092 (2015): 62.

²² Mhd. Syahnan, *Hukum Islam Dalam Bingkai Transdisipliner*, 2019.

²³ Siti Maemah, "Jakarta 2018 M / 1440 H," *Operasi Penyempurnaan Dan Penggantian Alat Kelamin Dalam Tinjauan Hukum Islam Serta Pengaruhnya Terhadap Status Perkawinan Dan Kewarisannya* (2018).

specifically regulated in law, so one must obtain approval from the court and fulfill the requirements set by the hospital.

The view of Islamic law regarding sex reassignment surgery is haram, because being male or female is an absolute nature given by Allah SWT to a person. Sex reassignment surgery can be done with the technology of health science, but it becomes haram as well because it changes the creation of Allah. However, sex enhancement surgery performed by someone who has multiple genital organs or genital organs that have defects or abnormalities is permissible.

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