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Analysis of Legal Position Due To Sex Change: A Comparison Of Indonesian Civil Law With Islamic Law

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Abstrack

The legal position of transgender people who have performed gender reassignment surgery is very important to be able to have a clear identity and legal certainty of law, so in this study we will see how the legal position of a transgender person who has performed a gender reassignment surgery is and to find out what the legal consequences are for someone. who have had sex reassignment surgery. The results of the study indicate that (1) the legal position of a person who has carried out a sex change operation according to civil law can change according to his gender after carrying out a sex change operation if he has received a determination from the court, while in Islamic law the legal position of a person who has made a change the same sex, does not change, remains in accordance with the original sex before the sex reassignment surgery even though it has received court approval. (2) The legal consequences for someone who has done a sex change is a change in the legal status in the civil inheritance law, whereas in Islam if the person has a normal sex then in the distribution of inheritance he follows the initial gender before the operation and the legal consequences for someone who does the change gender, if the marriage is carried out, then the marriage is considered invalid, because marriages that are considered valid are marriages carried out based on religious teachings, as stated in Article 2 paragraph (1) of the Marriage Law. Unless the person changes gender for perfection, then he is determined as the heir following his gender after the operation and the marriage he does is considered valid in the eyes of Religion and the State. It is recommended that the government can make a draft law that regulates this change in sex change (transsexual) because there is no law that regulates this issue. And to society, do not isolate and look down on people who change gender.

Keywords

Gender Change. Legal Position, Legal Consequences

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1. Introduction

In Indonesia, sex reassignment operations performed legally received different responses between civil law and Islamic law. In Islamic Law in MUI fatwa No MUI No. 03/MUNAS-VIII/MUI/2010 from the first time this case appeared expressly has forbidden sex reassignment surgery. A person who is male becomes a female or vice versa caused by sex reassignment surgery, until now there is no specific rule of law in positive law in Indonesia. In contrast to civil law, according to the MUI's view in Islamic law sources there are enough verses and hadiths that directly or indirectly offend the law of sex surgery. The arguments used in MUI fatwa No. 03/MUNAS-VIII/MUI/2010 are:

1. The postulate about the creation of man consists of two sexes and an indicator to know the sex of a person. QS. Al-Hujurat [49] :13
2. The postulate about the prohibition of changing the creation of Allah SWT is extracted from the Word of Allah SWT. in QS. An-Nisa [4]: 19, QS. Ar-Rum [30]:30,

QS. Al-Baqarah[2]: 216, QS. An-Nisa [4] : 19, QS. Ali 'Imran [3]: 36, and of Abdullah ibn Mas'ud RA. (HR. Imam Bukhari)

3. Prohibition of transsexual behavior : Hadith of Abdullah ibn Abbas RA "Rasulullah SAW circumcised men who resembled women and women who resembled men". (HR. al-Bukhari, Abu Dawud, at-Turmudzi and Ibn Majah)

In Islam, if sex change is in order to treat abnormalities in the patient, including eliminating things that obscure him, then this is not why. For God only created man in one of two sexes, male and female, and there is no third. So, in these conditions, both the patient and the doctor are allowed to perform genital repairs, even by removing part of the limb that needs to be removed. They are not considered sinful, and after the operation the patient is exposed to all the legal consequences related to his new gender. If the sex change is just because they want to resemble the opposite sex, even though the person concerned has no problem in his keamin device, then it is an illegitimate act. Even if there are people who are desperate to do it, then the patient's status will not change from male to female, and vice versa. Because what the patient does is not something allowed by sharia, so his status in the eyes of sharia has not changed.

One of the problems caused by this sex change is in terms of determining the right of inheritance or inheritance, and also makes it a problem to determine the status of the right to obtain a share of the inheritance. Inheritance is a variety of rights and obligations about a person's property when he dies will pass to a living person, in other words the law of inheritance can be formulated as one of the legal regulations governing the transfer of inherited property from the heir due to death to the heir or designated person. In the case of inheritance according to BW, the basic circumstance is that when a person dies, all rights and obligations are directly transferred to his heirs. Such rights and obligations insofar as they fall into the field of property law or only rights and obligations that can be assessed with money, as stated in Article 830 of the Civil Code, namely, inheritance only takes place by death. In contrast to the law of inheritance according to Islamic teachings, Allah Swt has clearly explained in his words contained in the Quran that Allah Swt determines rights based on a person's gender and position.

In Indonesia, various inheritance law systems still exist and apply to citizens, namely including Islamic inheritance law called positive law which is used in the judiciary in determining the division or dispute of inheritance as described in book II of the compilation of Islamic Law. The problem of inheritance of multiple genital sufferers is some of the other problems that there are no provisions in the compilation of Islamic Law and the Indonesian Civil Code. This sex reassignment operation does not yet have a legal basis that clearly regulates the law of inheritance

Similarly, the inheritance law for the change of sex in Indonesia also does not have a law or legal basis that specifically regulates it, causing uncertainty. Law. In this case, legal certainty is needed in regulating the problem of legal position from someone who is female to someone who is male or vice versa. Based on the background of the problem, the author is interested in conducting a study with the title: Analysis of Legal Position Due to Sex Change: A Comparison of Indonesian Civil Law with Islamic Law.

2. Method

Jenis the research used is a type of normative legal research. Normative legal research is usually only a document study, namely using sources of legal materials in the form of, laws and regulations, court decisions/decrees, contracts/agreements/contracts, legal theories and the opinions of scholars. Another name for normative legal research is doctrinal legal research also referred to as literature research or document studies.

In this research, the approach used is the *stautute approach*, and the conceptual *uproach* approach. This research is descriptive, where descriptive research aims to describe precisely the properties of an individual, circumstances, or the frequency of a certain relationship between a symptom and other symptoms in society. Data collection techniques in this study are limited to the use of document studies, or library materials carried out by collecting written data related to the problem under study. In this study, the author used qualitative analysis techniques, namely the data obtained and then compiled systematically to be further analyzed qualitatively based on civil law disciplines to achieve clarity on the problem to be discussed. The legal materials that have been collected are then analyzed and reviewed using a conceptual approach, a statutory approach, and other approaches to obtain an overview or answer to the problems that are the focus of the study under study.

3. Results And Discussion

3.1. Anlysis Of The Legal Position Of Sex Change In Indonesian Civil Law And Islamic Law

a. Analysis of the legal position of sex change in Indonesian civil law

In essence, the problem of gender confusion or what is often called the symptom of transsexualism is a problem that arises because a person feels dissatisfied or does not match the gender he has now. In Indonesia, there is currently no law or regulation that specifically regulates the procedure for changing sex or the legal position of transsexuals, but currently it is widely done for transsexuals to demand their legal rights and certainty on the grounds that they have the right to recognition, guarantees, and fair certainty for themselves in the eyes of the law. In order to provide protection, recognition, determination of personal status and legal ststus of every population event and important event experienced by Indonesian residents and Indonesian citizens, it has been regulated in Law No. 23 of 2006 amending Law No. 24 of 2013 concerning Population Administration (Administrative Law). Population administration is very important for every Indonesian citizen. In population administration, it regulates population registration and civil registration which are two important things that must be present. These two main things have the same purpose, namely, based on Article 2 of Indonesia's presidential regulation Number 25 of 2008 concerning requirements and procedures for population registration and civil registration. According to the legal view for those who undergo sex reassignment surgery, then will change status officially or legally can apply for a change of status to the court, because only the court has the authority to grant the determination of the status. This is necessary as a legal protection for the person concerned in order to get legal recognition, so that his rights and obligations are in accordance with his new status. To obtain legality and legal certainty for her new status who has performed sex reassignment surgery and a change on her behalf, it is necessary to apply for a court

determination. After obtaining an injunction from the court a name change can be recorded in the civil registry.

b. Analysis of the legal position of sex change in Islamic Law

The legal position of transsexuals is strongly defined by transsexual law. As it has been explained that the transsexual law for clear and normal genital surgery in Islam is haram, the result of transsexual (genital surgery) is not recognized. The legal position of transsexual offenders remains in accordance with their gender before transsexuality, as stated in the fatwa of the Indonesian Ulema Council dated June 1, 1980, decision No. 2, "persons whose gender is replaced by the legal position of their sex are the same as the original sex before it was changed". Similarly, this was confirmed through the MUI national deliberation on July 27, 2010 in Jakarta as stated by the secretary of the MUI Fatwa Commission Asrosun Niam Sholeh: "Because its validity cannot be established, the legal position of the sex of the person who has performed the sex operation remains with the original sex as before the operation, without exception for those who have received a determination from the court".

Meanwhile, for someone who performs sex change surgery because it is for the improvement or improvement of their gender, their legal position in Islam is in accordance with the sex that has been performed by the operation. For people with *khuntsa* sex reassignment surgery is not haramed in Islam but on the contrary it is allowed because for the consummation of their sex.

In Islamic studies (*fiqih*) it is known as the existence of *khunsa* as a form of abnormality or abnormality. *This khunsa* is divided into two, namely *khunsa musykil* and *gairu musykil*. *Khunsa musykil* is a type of *khunsa* that is difficult to determine its sex because its physical characteristics do not indicate a specific sex, while *khunsa type gairu musykil* is a type of *khunsa* which is not difficult to determine its sex based on dominant fissile traits, such as the *seserang* that has double sex, penis and vagina, but yes it is plowed, mustachioed, has epidermis, and sperm ducts. To determine the latter it is clear that yes is male.

There are several opinions in Islam about this *khunsa* or genital reassignment: Genital surgery according to Islam is permissible provided that what is meant by genital surgery is surgery of refinement (*takmil*) and adjustment or repair (*tashih*), not surgery to replace genitals. The surgery here is that if a person from birth has a vagina that is not hollow and has a uterus and ovaries then he can perform surgery, it is even recommended by Islam to perform surgery by giving a hole in his vagina so that he becomes a biologically normal woman. Meanwhile, repair surgery (*tashih*) is if a person has multiple genital organs, penis and vagina then he is allowed to remove one of his genitals by adjusting the internal organs, if he has a penis and vagina and he also has a uterus and ovaries which are characteristic for the female sex, then he can and is even recommended for surgery by cutting his penis in order to emphasize his female sex. And the operation becomes illegitimate if it removes her vagina and lets her penis go against the female internal organs. Therefore, the role of parents is very important for the development of children. Parents should not give toys to their children that do not match their gender, including dressing, nor should they mix their adult children of different sexes in one bedroom

because psychologically these things can affect sexual orientation and behavior that occurs in children and result in psychological disorders.

Sex surgery is legally illegitimate. What is meant by sex surgery here is sex reassignment surgery (not refinement/adjustment) which was originally male sex operated on to female or vice versa. It is not allowed to have sex reassignment surgery because it changes the creation of Allah Almighty which has been perfectly given to him and the determination of sex is the authority of God. A male sex who is then operated on to become a forging will cause new problems, such as those relating to the manner of his prayers, whether to wear mukena or not, the bearing of his inheritance, the ordinances of treating him when he dies, how to close his aurat and marriage. It is on the basis of this consideration that according to Islamic law the operation of changing the genitals is legally haram and will cause *mafsadah* (damage). Islam only allows genital surgery in the definition of genital adjustment and repair.

3.2. Consequences Of Sex Change Law In Indonesian Civil Law And Islamic Law

a. Analysis Of The Legal Consequences Of Sex Substitution In Civil Inheritance Law

Based on Article 852 of the Civil Code above, it can be explained that a child born from a valid marriage gets an inheritance whose share is equally large. Similarly, transsexuals born as legitimate children still get the same property as the other heirs. The inheritance law under the Civil Code does not have problems related to male or female sex and the inheritance law in the Civil Code does not affect the size of the share obtained by the heirs. And in the Civil Code it does not matter that a person performs sex pergantia (transsexual) surgery as long as the person is entitled to be the heir then he still gets his share. The amount of share obtained by a transsexual after obtaining a valid determination from the court whether he is a man or as a woman. In the acquisition of inheritance of the Civil Code, a person who has received an injunction from the court, both male and female, the amount of his inheritance is in accordance with the gender that has been determined by the court.

b. Analysis of the Legal Consequences of Sex Substitution in Islamic Inheritance Law

Unlike Indonesian civil law which does not dispute the division of inheritance for transsexuals as long as he or she is entitled to bequeath and has the right as a legal child in obtaining inherited property, the change of sex has no effect in terms of inheritance and in civil law. Sex differences have no effect on the size of the share of inherited property. Meanwhile, in Islamic law, the problem of sex change is considered to be able to cause legal problems in terms of inheritance because in the Quran and the Compilation of Islamic Law sex has an effect in the division of inheritance. If the nature and purpose of sex surgery is to change God's creation by the surgical way of changing sex from male to female or vice versa, then the status of the sex remains, unchanged. So that his position as heir remained in status with his original normal gender at the time of his birth. Therefore, a woman who performs sex change surgery to a man has no right to claim her inheritance

is the same as the male part (2:1 for male and female children in Islamic law), because she by law remains a woman. But if the nature and purpose of the genital surgery is only to correct or perfect the sex alone by functioning one of the outer genital organs corresponding to the inner genital organs, and turning off the outer genital organs as opposed to the inner genital organs, or by normalizing the external genital organs which are only one but there are defects or less than perfect, for example, a vagina that does not have holes, so such sex surgery, in addition to being justified by Islam, also results in changing the gender status from a transvestite to a woman full of identity, in accordance with the reality of the outer and inner genital organs that are treated after surgery.

c. Analysis of the Legal Consequences of Sex Substitution In Marriage Law

In the case of performing a marriage based on the Fatwa of the Indonesian Ulema Council regarding marriage carried out for parties, one of whom has undergone sex reassignment surgery, the marriage is invalid or haram according to Islamic views. Because in principle he has performed a marriage with a person who has the same sex as himself or is considered a same-sex marriage which is classified as a great sin. As the Fatwa of the Indonesian Ulema Council (MUI) that if a person performs sex change or change surgery, his sex status is the same as the sex before sex surgery. A marriage performed by a person who has performed sex reassignment surgery is not in accordance with the understanding of marriage contained in Article 1 of the Marriage Act. Because there are no elements in the Article. The marriage of a person who has performed sex reassignment surgery is considered invalid because the marriage is not in accordance with the provisions of religious law as stated in Article 2 paragraph (1) of the Marriage Law. This is because every recognized religion in Indonesia prohibits a person from performing sex reassignment surgery because it is considered not grateful for God's gift, therefore marriage by a transsexual is not allowed and prohibited. Unlike if a person performs sex reassignment surgery because they have multiple genitals or sex enhancement, religion does not prohibit if a person who has multiple genitals performs sex enhancement, it is done to further emphasize their sex. A marriage performed by a person who performs sex enhancement is valid and permissible under the provisions of religious law. In addition, the fulfillment of the elements contained in Article 1 of the Marriage Law.

4. Conclusion

The legal position of transsexuals after performing sex reassignment surgery in Indonesian civil law may change its legal position if it has applied for a court determination. After obtaining an injunction from the court a name change can be recorded in the civil registry. After that, the transsexual was only recognized as the new gender according to the gender he has now after obtaining an injunction from the court. Meanwhile, the legal position of transsexuals in Islamic law remains in accordance with the initial sex before performing kelmin type change surgery.

The legal consequence is the change in the legal status of transsexuals in civil inheritance law. The division of inherited property to transsexuals in civil inheritance gets a share of the estate according to their sex now after performing sex reassignment surgery. Because in Indonesian civil law it does not matter for a person who pergantia his gender. In contrast to Islamic law. If a man changes his gender to a woman then in the

division of inheritance in Islam he is still considered the heir of the male sex. Unless a person performs sex reassignment surgery for sex refinement or called *khuntsa* the division of his inheritance in Islam follows sex after he performs sex change surgery . In the case of a transsexual marriage, a person who has performed sex reassignment surgery is considered invalid because the marriage is not in accordance with the provisions of religious law as stated in Article 2 paragraph (1) of the Marriage Act. Because a marriage cannot be seen from whether or not a marriage is recorded in the Civil Registration or Kua, but the validity of a marriage is seen from the provisions of religious law.