



# **Juridical Analysis of Marriage for People Who Change Sex Based on Law No. 1 of 1974 Concerning Marriage and Islamic Law (Study of Determination No.60/Pdt.P/2021/Pn.Sbr )**

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## **Abstract**

The case of gender change in Indonesia is quite common in society. This has legal implications in various aspects, especially regarding marriage. As in the Decision of the Sumber District Court No. 60/Pdt.P/2021/PN.Sbr, the judge granted the gender change. Following this decision, legal consequences related to the validity of the marriage arise. Based on this description, the formulated issues are how Islamic law views gender change and what the legal consequences are for marriage for those who have changed their gender. In discussing this topic, the author uses a normative juridical method by examining the Marriage Law and Islamic Law, particularly related to the marriage of people who have changed their gender. According to the perspective of Islamic law, gender change in Indonesia is considered haram (forbidden) because it contradicts the Quran, Hadith, and the views of scholars, including the MUI Fatwa No. 03/UMNas-VII/MUI/2010. However, surgery aimed at perfecting sexual organs is permissible and considered halal in Islam. For instance, the case of the applicant Hamidah is an effort to cure her genital organ defect and has no legal implications, so it is allowed by law. When Hamidah, also known as Muhammad Hamdan, wants to marry a woman, it should no longer be an issue because religiously Hamidah's actions are justified by religion, and the elements contained in Article 4 of the Compilation of Islamic Law (KHI) and Article 2 Paragraph 1 of the Marriage Law have been fulfilled. Overall, the legality of gender change through the District Court's decision becomes important to determine the legal consequences of marriage, particularly regarding gender status in inheritance distribution and the ability to have offspring.

**Keywords: Sex change, marriage, Law No.1 of 1974, Islamic Law.**

## **INTRODUCTION**

As living beings, humans want to form a family so that they can continue to have offspring and the smallest component of society is the family. A family can be formed if there has been a marriage, which is one of the biological needs of humans (Jamil et al., 2023; Zulaiha & Mutaqin,

2021). A concrete example is the rampant phenomenon of gender change. Not only do men behave like women or women behave like men, even more than that, men have changed the gender of women with the gender of men, and women have changed the gender of men with the gender of women. This phenomenon is known as "transsexual" (Bragg et al., 2020; Kashish & Kishore, 2023; Umar et al., n.d.).

For instance, the case of the applicant Hamidah, who requested to be officially recognized as having changed her gender from female to male, followed by a name change (DuBois & Shattuck-Heidorn, 2021). The reason for this request was that Hamidah had a genital defect. Chromosome examination revealed that Hamidah was more dominantly male, having 46 XY chromosomes, with testicles located on the right side, and no uterus or ovaries. The vagina was present but not normal, with a depth of only 1.5 cm compared to the normal depth of 7 cm. Therefore, the gender change was considered a correction or improvement, and medically, it was permissible. The judge granted this request in the decision No. 60/Pdt.P/2021.PN.Sbr.

The judge approved this decision based on the MUI Fatwa No. 03/Munas-VIII/MUI/2010 concerning Gender Change and Correction, which states that it is permissible to perform surgery on sexual organs for those with defects or imperfections in their sexual organs, or even for those with ambiguous genitalia. It is allowed for a person with ambiguous genitalia to remove one of their sexual organs through surgery. However, if a person undergoes gender reassignment surgery without a necessary reason, it is considered haram (forbidden) (Noralla, 2023; Wati, 2022; Yenti et al., 2023).

Additionally, the judge took into account Law No. 24 of 2013 on Population Administration, which amends Law No. 23 of 2006, and Law No. 39 of 1999 on Human Rights. Article 56 of the Population Administration Law states that any change in population data must be recorded, including gender changes (Imaniyati & BAKTI, 2010). This recording requires a court decision as the legal basis for the data change. The Human Rights Law emphasizes basic human rights, including the right to identity and legal status (Rangkuti & Agustar, 2022; Safiera & Retnaningsih, 2024). This includes the right for a person to have their gender identity recognized and to obtain population documents that correspond to their gender identity.

After the determination, there are legal consequences in various aspects, one of which is related to marriage for people who change their gender. This is due to the lack of specific and comprehensive regulations in civil law related to the recognition and protection of the rights of individuals who have undergone gender changes (Imaniyati & BAKTI, 2010). Regarding the validity of a marriage, one of the most important legal events in human life is. Law No. 1 of 1974, which states that "marriage is valid if it is carried out according to each religion, Marriage Law No. 1 of 1974, is also known as the Marriage Law (Jamil et al., 2023). The law clearly states that marriage is only allowed between a male and female couple. However, couples who have changed their sex one or even both, either through sex reassignment surgery or gender recognition, are not uncommon in the modern era (Oladosu-Uthman, 2021; Turban et al., 2021).

This is what causes questions and problems that occur among the community. Some argue that gender change is part of the human right for those who want it. However, if we return to religion, a change in gender based on only wanting to indulge lust, then this will be considered a sinful act because it has violated what God has incarnated to him (Umbu & Agada, 2021). On the other hand, marriage carried out by a person who changes his gender is prohibited by religious teachings because it is considered a same-sex marriage (Susilo et al., 2022). Then it becomes necessary to be researched in order to obtain legal certainty regarding the legal consequences of changing sex on the validity of marriage (Hsieh & Umar, 2022; Jamil et al., 2023).

Based on the above explanation, the author is interested in raising this title because there is debate and legal uncertainty regarding the marital status of couples whose one or both partners have changed genders. The author wants to explore and elaborate on the juridical perspective in looking at this issue. Considering the explanation above, the problem that can be seen is the view of Islamic law on gender change in Indonesia and the consequences of the Marriage Law No. 1 of 1974 on marriage after gender change.

## RESEARCH METHODS

In this research, the method is the most important element and is based on logical facts and reasoning so that what is conveyed is the truth. This study uses a normative legal method, where the approach to the problem is carried out by examining the provisions of the applicable laws and regulations related to marriage law in general, as well as the legal procedures for individuals who have undergone sex reassignment surgery, including marriage for those who have undergone such surgery (Negara, 2023).

This research is descriptive-analytical, which means it aims to provide a detailed and systematic description of the problems being studied. The analysis is conducted based on the descriptions and facts obtained, with a careful approach to answer the problems and conclude solutions as answers to those problems.

This study will collect data from primary, secondary, and tertiary legal materials through document and literature studies, which include:

1. In this research, primary legal materials consist of norms and basic regulations related to marriage law. Among them are Law No. 1 of 1974 on marriage, Government Regulation No. 9 of 1975 on the implementation of Law No. 1 of 1974 on marriage, the Compilation of Islamic Law (KHI), the Qur'an, and Hadith as legislation (Khadduri, 2017).
2. Secondary legal materials refer to documents that offer interpretations of primary legal materials. These include books, research findings, and legal literature related to the marriage law for individuals undergoing sex changes (Arizona et al., 2023). These secondary materials provide information on marriage law for individuals based on the positive legal provisions governing marriage in Indonesia.

In this research, data collection methods involve techniques such as library research and interviews. Document study is used as a data collection tool to obtain secondary data by reading, studying, and identifying primary sources of legislation governing marriage law in Indonesia, including Law No. 1 of 1974, Government Regulation No. 9 of 1975, and the Compilation of Islamic Law (KHI) (Susilo et al., 2022). Additionally, the positive legal provisions regarding marriage for post-operative individuals are also sought. Interview techniques are used to obtain factual information or statements.

## RESULTS AND DISCUSSION

### Islamic Law's View on Gender Reassignment

The desire to undergo sex change surgery is part of the human rights of transsexual offenders (Umar et al., n.d.). However, in the view of religion, gender change that is done only to indulge lust is considered an act that is contrary to God's destiny and can be considered a sin.<sup>1</sup> Although the law of changing sex is not discussed in the Qur'an and Hadith, there is a view that man should not change what God has given him.

In verse 4 of surah At-Tin, Allah SWT says: "Indeed, We have created human beings in the best possible form", this shows that human beings were created as living beings on earth.

The postulate explains that every creature created by Allah SWT has been made in a perfect state according to His will, and as humans, we must be grateful for everything He has created. Allah SWT created human beings with two genders, male and female, as mentioned in verse 11 of Surah Fadir, which means: "And Allah has created you from the soil and semen, then He made you a couple (male and female)."

Then this is reaffirmed in the Word of God: "And all things We have created in pairs for you to remember (the greatness of Allah). Verse 49 Q.s adz Dzariat. In Q.S. An-Nisa verse 1 Allah also says: "O man! fear your Lord who created you from one self (Adam), and from him (Eve); He created his partner".

These evidences are some of the words of Allah SWT in the holy verse of the Qur'an saying that humans are created as a couple, not only between men and men or vice versa men and women. So that humans can still continue their offspring and continue to have generations in future lives.

In addition, in the hadith it is also explained that it is contained in the hadith according to Al-Bukhari Number 5885; Abu Dawud Number 4097; and Tirmizi number 2991, the Prophet PBUH cursed men who resemble women and women who resemble men."

Islam teaches that a person who resembles the opposite sex is cursed by Allah and his messenger, especially when the person changes his gender without any permissible reason. A person who wants to change God's creation must still obey the provisions that have been set by Allah SWT without crossing the limit, for a person who makes physical changes in his genitals, either from male to female or vice versa, without any abnormalities in his genitals or having

physical defects in his genitals, it shows that he is not grateful for what has become his destiny by changing Allah's forbidden creation. Although there are many pros and cons in society against the act of sex reassignment surgery, but the scholars agree that if sex reassignment surgery is carried out on a personal desire of a worldly nature and without any abnormalities or defects in the sex that allow the surgery to be performed, then even if the sex reassignment surgery, or sex change, is successful and has accepted the decision of the district court on sex change, The sex change surgery is haram. However, if the surgery is carried out because of a defect or there is a reason allowed by religion, then the law is mubah.

In the decision of the leadership board of the Indonesian Ulema Council at the Second National Conference in 1980, it was decided that:

1. Changing the gender of a man to a woman or vice versa is haram, because it is contrary to the Qur'an surah an-Nisa' verse 19 and contrary to the spirit of Sharia'. The verse of the Qur'an in question is: "... Maybe you don't like something but Allah has done him a lot of good." (QS. An-Nisa'[4]: 10).
2. When a person's gender is changed, the legal status of their gender remains the same as the previous status.
3. A khunsa (sissy) whose male character is clearer may be perfected. On the contrary, and the law becomes positive (male).

In MUI fatwa No. 03/Munas-VIII/MUI/2010 on genital changes and enhancements, the fatwa states that the law of intentionally changing the genitals is haram, either by changing the genitals from male to female or vice versa. The fatwa contains:

1. Genital enhancement for a khunsa whose male genital function is more dominant or vice versa, through genital enhancement surgery is permissible.
2. Assisting in genital enhancement as referred to in point 1 is permissible.
3. The implementation of genital enhancement surgery as referred to in point 1 must be based on medical considerations, not just psychological considerations.
4. Determining the validity of sex status as a result of genital surgery as referred to is permissible, so it has shar'i legal implications related to the enhancement.
5. The legal position of the sex of the person who has undergone genital enhancement surgery as intended is in accordance with the sex after the enhancement, even though a court decision has not been issued regarding the change in status.

In the MUI fatwa on changes and improvements to the genitals, it is stated that the law of genital modification that is carried out deliberately is haram, either by changing the genitals from male to female or vice versa. This fatwa is based on the Qur'an, Hadith, Istishab, and fiqhiyah rules.

Based on this description, the gender change made by Hamidah in case No.60/Pdt.P/2021/PN.Sbr is considered not to violate Islamic religious law because the gender change is not based on sexual desire but based on abnormalities. This is in line with the opinion of Ustadz Anwar Faiz as the caretaker of the Ash-Shiddiqi Islamic boarding school in Depok

Cirebon that gender change is permissible if it aims to eliminate things that obscure his masculinity or femininity, not to change God's creation, the emphasis is on healing and not to change God's creation. As MUI Fatwa Number 05 Munas II/MUI/1980 was then perfected in MUI Fatwa Number 03/MUNAS-VIII/MUI/2010 concerning Gender Change and Improvement, that sex change surgery can be carried out if it aims to improve and clarify the gender. Because indeed in the Islamic view, if it is categorized as a disease, it is obligatory for them to find a way out of their problems and treat the pain they suffer.

When Hamidah alias Muhammad Hamdan as a man marries a woman, the marriage is still declared valid because of the fulfillment of Article 2 paragraph 1 of Law No. 1 of 1974 concerning Marriage and Article 4 of the KHI.

In this case, the author can explain that what Hamidah experienced was an abnormality or defect in her genital organs so that treatment was needed for the disease she suffered, and when Hamidah decided to have genital surgery, the first thing that needs to be considered in the act of genital surgery is to consider the good and bad. The purpose of these considerations is none other than to avoid the bad possibilities that could occur after the surgery which then leads to a deep regret. So the consideration that needs to be considered is that the benefits (benefits) must be greater than the mudharot so that there are no problems and the law is mubah (permissible). Because the surgery performed by Hamidah is one of the efforts to treat and cure her genital defects and has no legal implications, this is allowed by Islamic law.

### **Legal Effects of Marriage for Persons Who Change Sex**

According to Law No. 1 of 1974 concerning Marriage, marriage is a physical and mental bond between a man and a woman as husband and wife, with the aim of forming a happy and eternal family, which is based on the principle of the One Godhead. Marriage is only considered valid if it is carried out in accordance with the religious law adhered to by the married couple. The meaning of the couple here is that man and woman are natural natures, that is, God's creation from birth, not the result of human manipulation through sex change surgery. Although advances in medical technology allow surgery to change a male sex to a woman, there is no known surgery that can turn a vagina into a penis. Women who become men through sex surgery are not recognized as women in marriage law. In accordance with law Number 1 of 1974 concerning Marriage, the marriage law stipulates the requirements that must be met, both subjectively and objectively. Subjective conditions are related to the characteristics of the bride-to-be, while objective conditions are related to marriage procedures that are in accordance with religious teachings and laws.

In accordance with the definition of marriage, it can be seen that a marriage must have at least 3 main elements, namely:

1. Marriage is an innate and inner bond between a man and a woman.

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2. The purpose of marriage is to form a happy family. This has been affirmed in Article 28 B of the 1945 Constitution of the Republic of Indonesia that everyone has the right to form a family and offspring through legal marriage.
3. Marriage must be carried out based on divinity. This has also been affirmed according to the Compilation of Islamic Law (KHI), every marriage is valid if it is carried out based on the religious law and beliefs of each person.

The author argues that basically marriage is an agreement to legalize a relationship between a man and a woman that must meet the requirements and harmonize the marriage based on the religion and beliefs embraced by each individual. The main goal is to have a happy family and hope that every offspring obtained from the marriage can continue the life cycle. The author's opinion is in line with the concept of marriage regulated in article 1 of Law Number 1 of 1974 concerning Marriage and religious provisions found in articles 2 and 3 of the KHI. Any marriage that does not meet the provisions that have been set by each religion, clearly does not meet the elements contained in Article 2 paragraph (1) of the Marriage Law.

Related to the marriage of couples who change their gender, there are pros and cons. There are those who change their gender, both male to female transsexual and vice versa, women change to male (female to male transsexual)(Utami et al., 2023). This is because the sacred bond between two individuals is based on agreement and wholehearted willingness and affection from both parties to achieve happiness in family life.

According to article 2 paragraph 1 of Law No. 1 of 1974 concerning Marriage, every marriage must meet several conditions, namely the inner innate bond between a man and a woman, to form a family, and based on the One Godhead. In addition, the article stipulates that marriage must not be carried out outside the law of a person's religion or belief, in accordance with the applicable law.

In this case, Prof. Hazairin, an expert on Indonesian customary law and Islamic law, interpreted that the law of Law No. 1 of 1974 is the law of every religion and belief for its adherents. Therefore, it is impossible for Muslims to marry in violation of their religion. Then it was linked to the case of Dedi Ashadi and Solena Chaniago. Dedi Ashadi or Dorce and Solena Chaniago are also one of the many transsexual perpetrators who since childhood he felt that his physical genitalia were not in accordance with his soul (Jamil et al., 2023). If examined further, of course, the marriage carried out by Dedi Ashadi and Solena Chaniago is a marriage that is prohibited by religion and thus based on what has been mentioned in article 4 of the KHI, and articles 1 and 2 paragraph 1 of the Marriage Law are clearly not fulfilled. The result of the marriage law of a couple who change their gender without a determination from the District Court, namely that the marriage is not recorded as a marriage under the hands and the status of the sex during the distribution of inheritance in the decision of the District Court based on the status before the change of gender. Then the consequences of a marriage of a couple who change their sex due to

worldly desires without or without the legality of sex change, which means that both will not have children.

The granting of the application of Hamidah alias Muhammad Hamdan in the determination of the Sumber District Court No.60/Pdt.P/2021/PN.Sbr has legal consequences where if Hamidah holds a marriage, the marriage follows the gender after she gets a court determination so that her marriage becomes valid based on Law No.1 of 1974. If Hamidah wants to carry out a marriage based on the provisions of Islam and Law No. 1 of 1974, then she must register based on the new sex after the change is made so that the marriage becomes valid. This is in line with the opinion of Bob Muntaram as the Acting Head of KUA Kedawung and as the head of KUA Babakan that the determination of the court of the person who changes the gender is binding on the parties and can be the basis for registering or holding a marriage. Because in the determination there are considerations of the judge in the form of expert testimony such as specialist doctors and sworn according to their religion. After this determination, the identity of both birth certificates, family cards, ID cards, and diplomas of what gender exists now. Therefore, in this case, Brother Hamidah will change his identity to a man. The conditions for holding the marriage are also based on gender identity after the determination. Likewise, as a result of the law in his inheritance, Hamidah alias Muhammad Hamdan will get his share of the inheritance as a son in his family and when he gets married, the status of an applicant named Muhamad Hamdan inherits as a husband and father. As the opinion of Ustad Anwar Faiz as the caretaker of the Ash-Shidiqi Islamic boarding school in Depok Cirebon that a person who changes his gender in the context of Islamic heritage still has their inheritance rights. However, this process requires several steps to confirm gender identity, such as court determination.

## CONCLUSION

In the view of Islamic law, the gender change in case No.60/Pdt.P/2021/PN.Sbr is considered not to violate Islamic religious law because it is carried out based on abnormalities, not sexual desires. MUI Fatwa Number 05 Munas II/MUI/1980 which was later changed to MUI Fatwa Number 03/MUNAS-VIII/MUI/2010 states that genital surgery can be carried out to improve and clarify gender. In this case, the marriage between Hamidah alias Muhammad Hamdan and a woman was declared valid because it met Article 2 paragraph 1 of Law No. 1 of 1974 concerning Marriage and Article 4 of the KHI. This change of gender has legal consequences for marriage and inheritance. Marriage follows sex after a court determination, so it is legal according to Law No. 1 of 1974. Hamidah must register a marriage based on the new sex for the marriage to be valid. In terms of inheritance, Hamidah alias Muhammad Hamdan will inherit as a son and husband and father in the family. It is recommended that everyone who wants to change their gender consider the religious and medical aspects well. The reason behind the decision must be clear, whether due to personal desire or abnormality, because it has future legal consequences. For couples who want to change their gender, it is recommended to obtain a determination from the District Court first



to secure marital status and rights related to the distribution of inheritance according to the new gender.

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