


## Legal Review of Transgender Heirs from the Perspectives of Islamic Law and Civil Law

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### Abstract

This study aims to explore the legal status of transgender or transsexual heirs, their entitlement to inheritance shares, and the legitimate approaches for resolving related inheritance issues. The research employs a normative juridical methodology, focusing on written legal sources. The findings indicate that, in Islamic law, the inheritance rights of transsexual individuals are determined based on their biological sex prior to undergoing gender reassignment surgery, with varying interpretations across different Islamic schools of thought. Additionally, civil laws often differ based on the social and legal frameworks of individual countries, which influence the status and rights of transsexual heirs. Resolving inheritance disputes, particularly those involving transsexual individuals, is complex due to the ambiguity in gender identity and the diverse legal perspectives. Overall, the treatment of transsexuals in inheritance law is evolving, necessitating careful consideration and reforms to ensure equal rights in inheritance matters.

*Keywords:* Transgender, Inheritance Law, Islamic Law, Civil Law

## Introduction

Indonesia is a nation governed by law, but it is also a country rich in ethnic, cultural, and religious diversity. Islam is the predominant religion among Indonesians.<sup>1</sup> Islamic law broadly encompasses all aspects of human life, from marriage to ethical conduct, and even criminal behavior, deriving from the same source as the rules for prayer and fasting.<sup>2</sup>

In Indonesia, inheritance law is a significant part of legal practice in Religious Courts, particularly concerning the resolution of inheritance distribution and disputes. The foundation of this legal practice can be found in Book II of the Compilation of Islamic Law.<sup>3</sup> However, contemporary scholars are increasingly confronted with complex questions regarding the application of inheritance laws to transgender individuals.<sup>4</sup>

Traditionally, gender is understood as naturally divided into two types: male and female. Each gender has distinct characteristics, which lead to the classification of traits between them. Social roles, shaped by societal structures, are often the reason for this classification. For example, males are commonly associated with being rational, strong, and masculine, whereas females are often perceived as emotional and gentle.<sup>5</sup>

However, with societal changes, new phenomena, both positive and negative, have emerged. One prominent issue is when individuals experience dissatisfaction with their biological gender and consider sex-reassignment surgery as a solution to address their internal conflicts.<sup>6</sup>

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<sup>1</sup> Alfara Derista Felany, “Nilai Persatuan Dan Kesatuan Dalam Keragaman Suku Bangsa,” 2021, <https://osf.io/preprints/3b6gz/>.

<sup>2</sup> Andi Darna, “Perkembangan Hukum Islam Di Indonesia: Konsep Fiqih Sosial Dan Implementasinya Dalam Hukum Keluarga,” *El-Ushrah: Jurnal Hukum Keluarga* 4, no. 1 (2021): 90–107.

<sup>3</sup> Abdul Ghofur Anshori, “Sources and Legal Principles of Islamic Inheritance\* Dynamics in Indonesia,” *Journal Equity of Law and Governance* 2, no. 2 (2022): 157–65.

<sup>4</sup> Khilman Rofi Azmi, “Enam Kontinum Dalam Konseling Transgender Sebagai Alternatif Solusi Untuk Konseli LGBT,” *Jurnal Psikologi Pendidikan & Konseling* 1, no. 1 (2015): 50–57.

<sup>5</sup> Muhammad Satria Praja Perwira and Anjar Sri Ciptorukmi Nugraheni, “Kedudukan Hak Waris Seorang Transeksual Yang Telah Mengganti Identitas Jenis Kelaminnya Melalui Putusan Pengadilan Negeri,” *Jurnal Privat Law* 12, no. 1 (n.d.): 137–46.

<sup>6</sup> Ahmad Zuhairuz Zaman, “Analisis Hak Waris Bagi Transgender Menurut Hukum Islam Dan Hukum Kewarisan Di Indonesia,” *Mabahits: Jurnal Hukum Keluarga Islam* 4, no. 02 (2023): 120–35.

Most religions, including Islam, generally prohibit actions related to gender transition, except in cases of intersex individuals where natural or accidental changes justify a gender reassignment.

In Indonesia, the issue of transgender individuals remains a highly controversial topic, sparking a variety of opinions. Many view transgender identity, particularly when it contradicts one's biological sex, as a violation of Islamic principles and a sign of ingratitude for the gender assigned by God.<sup>7</sup>

Changing one's gender status from male to female or vice versa has significant legal implications, particularly because there are no clear guidelines in Indonesia addressing transgender issues, leading to a legal vacuum.<sup>8</sup> This has raised several concerns, especially in the realm of inheritance law. Inheritance law plays a vital role in human life, as every individual will inevitably encounter legal matters related to death.<sup>9</sup>

In Islamic jurisprudence, a transgender person is referred to as *Khuntsa*. The term *Khuntsa* originates from the Arabic word "*Khanatsa*," meaning broken or weak. According to Ali Attabik, *Khuntsa* linguistically refers to a person resembling a woman. In a broader sense, *Khuntsa* describes someone whose gender is ambiguous, often due to indeterminate or absent sexual organs. In Islamic law, such individuals are classified as *Khuntsa Musykil* a term used for those with ambiguous genitalia.<sup>10</sup>

The existence of *Khuntsa* reflects an intersex condition, which complicates inheritance matters due to uncertainties about one's biological and physiological status. Scholars such as Sayyid Sabiq and Yasin Ahmad Ibrahim Daradikah describe *Khuntsa* as a person who possesses both male (*zakar*) and female (*farji*) genitalia, or lacks both.<sup>11</sup>

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<sup>7</sup> Risky Kasmaja and Sri Sudono Saliro, "Studi Komparatif Hak Waris Transgender Menurut Kitab Undang-Undang Hukum Perdata Dan Hukum Islam," *Jurnal Mabkamah: Kajian Ilmu Hukum Dan Hukum Islam* 4, no. 1 (2019): 45–62.

<sup>8</sup> Lina Nur Anisa, "Transeksualisme: Perspektif Multidisipliner," *HUMANISTIKA: Jurnal Keislaman* 10, no. 2 (2024): 233–52.

<sup>9</sup> Muhamad Syaifullah Abadi Manangin, Leni Dwi Nurmala, and Nurmin K. Martam, "Pengalihan Atas Harta Warisan Di Indonesia," *DiH: Jurnal Ilmu Hukum* 16, no. 2 (2020): 177–89.

<sup>10</sup> Ilham Ghoffar Solekhan, "Urgensi Penetapan Status *Khuntsa* Menurut Hukum Islam," 2018, <https://dspace.uui.ac.id/handle/123456789/8238>.

<sup>11</sup> Anindita Ayu Pradipta Yudah, "Representasi Transgender Dan Transeksual Dalam Pemberitaan Di Media Massa: Sebuah Tinjauan Analisis Wacana Kritis," *Jurnal Kriminologi Indonesia* 9, no. 1 (2013): 37–49.

Although Islamic law clearly regulates inheritance for men and women, there is no explicit guidance on the inheritance rights of transgender individuals.<sup>12</sup> This creates uncertainty, particularly when an individual's gender status is unclear such as a biologically male individual identifying as female, or vice versa.<sup>13</sup> Disputes often arise due to a lack of understanding regarding proper procedures for distributing inheritance in accordance with Islamic teachings.<sup>14</sup>

In Indonesia, there are three main frameworks for inheritance law: the Civil Code, which applies to the people of Foreign East and European descent throughout Indonesia; Islamic inheritance law, based on the Compilation of Islamic Law, which applies to Muslim communities; and customary inheritance law, which governs indigenous communities. In the context of inheritance law, three key components must be present:<sup>15</sup>

1. The Heir (Erflater),
2. The Beneficiary (Erfgenaam), and
3. The Inheritance (Nalaten Schap)

Islamic teachings also outline similar components of inheritance:

- a. Al-Muwarris: the deceased person who bequeaths the property,
- b. Al-Waris: the heirs who survive the deceased at the time of their death, and
- c. Al-Maurus: the inherited property, also called *tirkah*.<sup>16</sup>

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<sup>12</sup> Vivi Hapsari, "Implikasi Hukum Pada Transgender Terhadap Pembagian Waris Perspektif Hukum Islam Dan Hukum Positif Di Indonesia" (PhD Thesis, IAIN Metro, 2022), <http://repository.metrouniv.ac.id/id/eprint/7116/>.

<sup>13</sup> Ratih Rinda Puspitaningrum, "Pengaruh Gender, Level Pendidikan, Tingkat Pendapatan, Dan Keragaman Etnis Terhadap Perilaku Kepatuhan Wajib Pajak Orang Pribadi (Penerapan Theory of Planned Behavior)" (Master's Thesis, Universitas Islam Indonesia, 2018), <https://dspace.uui.ac.id/handle/123456789/11606>.

<sup>14</sup> Rafika Kurnia Saputri, "Pemahaman Masyarakat Tentang Penerapan Pembagian Harta Warisan Menurut Hukum Waris Islam," *Journal of Comprehensive Islamic Studies* 2, no. 2 (2023): 205–20.

<sup>15</sup> Effendi Perangin, "Hukum Waris" (Jakarta, PT Raja Grafindo Persada, Jakarta, 2016).

<sup>16</sup> Ucik Fatimatuazzahro, Yohanna Andriani NH, and Gita Laksmi Zalsabilla, "Analisis Hukum Pembagian Waris Anak Yang Berganti Jenis Kelamin Berdasar Perspektif Hukum Perdata Dan Islam," *JURNAL HUKUM, POLITIK DAN ILMU SOSIAL* 2, no. 1 (2023): 30–41.

Under Indonesia's Civil Code, Article 832 outlines four groups of heirs, while Article 174 paragraph (1) of the Compilation of Islamic Law categorizes heirs into groups based on blood relations and marriage. These groups include males such as fathers, sons, brothers, uncles, and grandfathers, and females such as mothers, daughters, sisters, grandmothers, and spouses.<sup>17</sup>

Given the legal complexities surrounding transgender inheritance, this study seeks to examine previous research and legal sources to address the transgender issue. The goals of this study are to:

1. Determine the legal status of transgender heirs from the perspectives of Islamic law and civil law,
2. Analyze the inheritance shares of transgender heirs under Islamic and civil law, and
3. Explore legal policies for resolving transgender inheritance disputes in the context of Islamic and civil law.

## Methods

**A study cannot be considered research without a proper research method. This study employs a library research approach, which involves systematically collecting and analyzing data to achieve specific objectives.<sup>18</sup> Data collection and analysis are conducted in a natural manner, utilizing both quantitative and qualitative methods, and may include experimental or non-experimental, as well as interactive or non-interactive approaches. The research methodology used in this study is normative legal research, which focuses on examining legal principles through the analysis of library resources and secondary data.<sup>19</sup>**

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<sup>17</sup> Oemar Moechthar, *Perkembangan Hukum Waris Praktik Penyelesaian Sengketa Kewarisan Di Indonesia* (Prenada Media, 2019).

<sup>18</sup> Vikas Anand Saharan et al., "Introduction to Research Methodology," in *Principles of Research Methodology and Ethics in Pharmaceutical Sciences* (CRC Press, 2020), 1–46, <https://www.taylorfrancis.com/chapters/edit/10.1201/9781003088226-1/introduction-research-methodology-vikas-anand-saharan-hitesh-kulhari-hemant-jadhav-deep-pooja-surojit-banerjee-anupama-singh>.

<sup>19</sup> Norbert E. Haydam and Pieter Steenkamp, "A Methodological Blueprint for Social Sciences Research—the Social Sciences Research Methodology Framework," *EIRP Proceedings* 15, no. 1 (2020), <https://www.dp.univ-danubius.ro/index.php/EIRP/article/download/38/37>.

## Result And Discussion

### 1. *Legal Status of Transgender Heirs According to Islamic Law and Civil Law*

In Islam, the legal status of transgender individuals is based on the belief that sex reassignment surgery contradicts religious teachings, as it is viewed as altering Allah's creation. This stance is supported by several fatwas that declare such surgeries to be haram (forbidden). In 1980, the Indonesian Ulema Council (MUI) issued a ruling in decision number 1, stating, "Changing a male into a female or vice versa is haram because it contradicts the Qur'an, specifically Surah an-Nisa' 19, and the essence of Sharia." The relevant Qur'anic verse says: "... Perhaps you dislike something while Allah has placed much good in it" (QS. An-Nisa' [4]:10). This position is further reinforced by a hadith in which Allah condemns those who alter His creation.

Additionally, in the MUI's decree number 2 (1980), it was declared, "A person who undergoes gender reassignment surgery retains the same legal status as their original sex before the surgery." Therefore, in Islamic law, if a transgender individual was originally male and then transitions to female, their legal standing remains as a male, particularly regarding inheritance. The same applies in reverse: if a female transitions to male, they are still legally recognized as female in matters of inheritance. This principle is supported in the Contemporary Fiqh Studies, which emphasizes that the legal status of a transgender heir is determined based on their original gender at birth.

In contrast, civil law offers more flexibility in the recognition of transgender heirs, depending on the jurisdiction of each country. Some countries have enacted laws that provide greater legal recognition for transgender individuals, including in matters of inheritance. For example, in certain jurisdictions, transgender individuals may legally identify with their chosen gender, which can impact their legal standing in inheritance matters.

In Indonesia, there are currently no specific legal regulations addressing transgender individuals who undergo gender reassignment. This creates a legal vacuum, leaving it to the

discretion of judges to interpret and apply existing laws in cases involving gender changes. As such, judges are expected to draw upon their understanding of the law to resolve these issues.

Indonesia is a country that highly values human rights, including the principle of equal treatment and justice for all individuals under the law, without discrimination (Salsabila, Fatahullah, & Wagian, 2023). According to Article 838 of the Civil Code, the following individuals are considered ineligible to inherit:

1. Those convicted of murdering or attempting to murder the deceased;
2. Those found guilty by a judge of defaming the deceased;
3. Those who, through force or deceit, prevented the deceased from creating or revoking a will;
4. Those who have embezzled, destroyed, or altered the deceased's will.

Transgender individuals are not included among the groups excluded from inheriting under Article 838 of the Civil Code. The Civil Code does not differentiate between male and female genders in matters of inheritance distribution, meaning that transgender individuals are eligible to inherit and have the right to their share.

Furthermore, Article 832 of the Civil Code states: "By law, the right to inherit belongs to blood relatives, both legitimate and illegitimate, and to the surviving spouse." Based on this provision, it is clear that those with the legal right to inherit are blood relatives, whether legitimate or born out of wedlock. Consequently, transgender individuals who are blood relatives of the deceased are also entitled to inherit, meaning they retain the right to a share of the inheritance.

## ***2. Portion of Transgender Heirs According to Islamic Law and Civil Law***

In Islam, the legal status of transgender people in inheritance is determined by their original sex before sex reassignment surgery is performed. The surgery is not recognized in Islam, so transgender legal standing remains in accordance with their gender before the surgery. The fatwa from the Indonesia Ulema Council (MUI) reinforces this by stating that the gender of a person who performs genital surgery remains the same as the

original sex before the surgery, unless there is a court ruling to the contrary. This means that transgender people who change their gender from male to female or vice versa are still considered to have their original gender in inheritance law.

In the realm of Islamic inheritance law, a person's gender is considered very important, because the part or portion of the inheritance of the heirs has been regulated in the Qur'an. Therefore, Islam strongly prohibits its people from performing Transgender surgery or changing their gender by performing gender reassignment surgery. However, if the purpose of the surgery is to correct or perfect sex because physical imperfections are allowed and even recommended, as long as it is done for the benefit and eliminate harm. However, sex reassignment surgery performed on the basis of gender identity or sexual preference is not allowed.

There are several possibilities to determine the amount of inheritance that a khuntsa heir will receive as follows: To determine how much part of a person is khuntsa is by finding the clarity of the gender of the person concerned by identifying the physical indications that the person has in question.

This opinion is based on the expression of the Prophet Muhammad (peace be upon him). In a narration Ibn Abbas is stated as follows:

When he (the Prophet Muhammad (peace be upon him) conceived a sissy child, this khuntsa child (such as the part of a boy or a girl) remembered which genitals were first used for defecation.

Another way that can be done to determine the part of the inheritance of a person is to examine the signs of maturity, because usually between a man and a woman there are distinctive signs of maturity, for example from the mustache, beard, voice, or boobs. If these signs are clearly known, then the person concerned is classified as a gender that has these distinctive signs, such as if his breasts show growth as a woman, then he is classified as a female, while if his mustache or beard grows, he is classified as a male (Lubis & Simanjuntak, 2008).

According to Islamic Law, the division of inheritance has been stated in Article 176 of The Compilation of Islamic Law, it is explained that the division of inheritance for a boy has the right of two to one with a daughter and two-thirds if both are girls who have been classified into several groups (Perwira & Nugraheni,



2024). The classification has been regulated in Article 174 of the The Compilation of Islamic Law, namely:

1. Based on blood relations, which in this case has been divided according to gender, including men who are fathers, sons, brothers, uncles and then grandfathers, then women who are mothers, daughters and sisters of grandmothers.
2. Based on the marital relationship, namely widows or widows.

So that if explained in more detail, the portion distribution is divided into three groups, namely:

1. *Asbhabul-furudh*, which is a group of experts who have a predetermined share of rights, namely  $\frac{2}{3}$ ,  $\frac{1}{2}$ ,  $\frac{1}{3}$ ,  $\frac{1}{4}$ ,  $\frac{1}{6}$  or  $\frac{1}{8}$ .
2. *Asbabah*, is a group of heirs whose share of rights is not determined, but gets *ushubah* or the rest of the *Asbhabul-furudh* or gets all if there is no *Asbhabul-furudh*.
3. *Dzafil-arham*, is a group of relatives who do not belong to the two groups mentioned above.

However, there are differences of opinion among madhhabs regarding the large share of inheritance that a transgender person will receive, including:

- a. The Hanafi school gives the smallest part of the two estimates of male or female to the khunsa and gives the largest share to other heirs. That is, by comparing first how much of the share if he is classified as a man and how much is the share if he is classified as a woman, after this comparison is known, then the person who is given the smallest part of the two possibilities is given.
- b. The Shafi'i school gives the smallest part of the two male or female estimates to the khunsa and the other heirs, and the rest of the property is suspended until there is clarity, or the settlement is left entirely to the mutual agreement of the heirs.
- c. The Maliki school gives half of the two estimates of men and women to the polytheistic khunsa and the heirs. This

means that the khunsa is given 1/2 part as a man and plus 1/2 part as a woman.

Meanwhile, the division of the portion of heirs according to civil law can be seen in Article 852 paragraph (1) of the Civil Code which explains as follows:

"Children or all their descendants, even if they are born from any other marriage, inherit from both parents, grandparents, or all their subsequent blood relatives in a straight line upwards, with no difference between male or female and no difference based on birth first"

So, based on the kalamat in the article above, namely "with no difference between a man or a woman". This explains that the Civil Code does not differentiate between the portions between male heirs and female heirs. Thus, the portion for transgender heirs should also be the same as for male and female heirs.

### ***3. Legal Policies in Resolving Transgender Inheritance Disputes According to Islamic Law and Civil Law***

Transgender issues, within the context of Islamic and civil law, present a range of legal complexities, particularly in the settlement of inheritance disputes. In Islamic law, transsexuality is often considered forbidden, and the legal status of transgender individuals is typically based on their biological sex prior to any gender reassignment surgery. While some fatwas maintain that transgender individuals retain their inheritance rights based on their original gender, the process of determining their inheritance can become complicated, especially when the individual's gender identity is unclear.

In Islamic inheritance law, transgender individuals who identify with a gender different from their biological sex may face difficulties in establishing their legal standing and determining their rightful share of inheritance. Islamic jurists (fuqaha) often encounter challenges in allocating inheritance shares for transgender individuals, particularly when there is ambiguity regarding their actual gender.

The resolution of transgender inheritance disputes in Islamic law can vary depending on the specific school of jurisprudence (madhhab) followed. For instance, the Hanafi school tends to grant a minimal share of inheritance to transgender individuals, while the Shafi'i school may delay the

distribution of inheritance until the person's actual gender can be definitively determined. In contrast, in civil law, the resolution of such disputes depends largely on the legal framework of the respective country.

It is important to recognize that while Islamic law has clear views on transgender individuals, the practical resolution of inheritance disputes involving transgender persons can be highly complex. These cases often require careful consideration, particularly in determining the individual's true gender identity and their rightful inheritance share. Achieving a balance between Islamic law and civil law, while ensuring the protection of transgender individuals' rights in inheritance matters, remains a significant challenge that requires proportional and fair solutions.

## Conclusion

In Islam, the law concerning transgender individuals is based on the view that sex reassignment surgery is contrary to religious teachings, with the Indonesian Ulema Council declaring such procedures illegal. Transgender individuals are legally recognized based on their original sex prior to surgery, and there are no specific rules in Indonesia regarding the distribution of inheritance for transgender heirs. Islamic law varies among schools of thought regarding the share of inheritance transgender individuals receive, with gender clarity being a key factor in inheritance distribution. In civil law, the recognition of transgender heirs differs across jurisdictions, but in Indonesia, inheritance is based on blood relations rather than gender. While Islamic law differentiates inheritance shares based on gender, civil law in Indonesia does not. The resolution of transgender inheritance disputes in Islam often depends on the specific sect, and civil law also plays a role depending on the country's legal framework, making the process complex and requiring careful consideration to determine true gender identity and the appropriate inheritance share.

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