

## Sexual Reassignment in Islamic law : The Dilemma of Transsexuals

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### **Abstract**

Classical Islamic law in terms of assigning legal rules, *inter alia*, explicitly recognizes four genders among human beings, namely male, female, hermaphrodite, and effeminate male. In this context, the body of rules that regulate male and female behaviors is regarded as normative. Hermaphrodite upon birth are left in limbo until they can be absorbed into any one of the binary gender system upon puberty or else would be regarded as problematic. Effeminate male/transsexuals on the other hand, are expected to contain their psycho-pseudo female tendencies by not becoming erotic. With the advances in the field of medicine, psychology and sociology, the classical *fiqhi* postulates on transsexuals have been challenged on several grounds including the legitimacy of attempts by transsexuals for sex reassignment. Vast majority of the contemporary Sunni jurists refute it as it is tantamount to a flagrant violation of God's created human nature while some Sunnis and Shi`ah Imamiyyah validated it. Accordingly, Muslim transsexual, among others, face the acute dilemma of juristic conflicting views on sex-reassignment particularly when emotion runs high on account of sectarianism between its Shi`ah advocates and predominantly Sunni antagonists. This study, therefore, proposes to explore the juridical possibility of such an option in a Sunni context such as Malaysia.

**Key Notes: Transsexuals, dilemma, gender, sex reassignment, juristic conflict**

### **Introduction**

Human species overwhelmingly subsume two opposing dichotomous sexes, namely male and female. By and large, masculinity and femininity are biological and

resultantly, each one of the sexes are culturally, in most societies, expected to possess certain personal traits and assigned certain roles.<sup>1</sup> However, the order of biological engineering sometimes coupled with social orientation always create people of ambiguous sexual identity mainly of two sub-varieties:1) *inter-sexed (hermaphrodites- those with some biological or physiological abnormality)*;2) *or those anatomically males or females but exhibiting behaviors appropriate for the opposite gender.*<sup>2</sup> The latter are variously referred, such as “the third sex, psycho-sexual, effeminate, mixed sex etc.”<sup>3</sup> This group in terms of gender is regarded as people with “identity crisis.”<sup>4</sup> Therefore, to the social scientists, it seems that the solution is that today`s society must accept them as they are and treat them in the same way as people of pre-modernity accommodated *eunuchs* (castrated war captives) in their midst. For instance, Byzantine employed them to look after the women as chamberlains and some Muslim rulers like Mamluks made them to guard the harem (the inner sanctum of the ruler`s household where their women folk resided).<sup>5</sup>

One may not agree with the above analogy as transsexuals of today can hardly be equated with sexually de-capacitated castrated war captives of pre-modernity. Because transsexuals do not consist of castrated male captives but are a genre of males or females who “feel trapped in the body of the opposite sex” and thus either had already gone through sex-reassignment processes,<sup>6</sup> or are inclined to do so at present, known as *mukhannath* in Islamic tradition. Now the question is: Can their seemingly *de facto* declaration of changed gender per force entitle them to different kind of treatment at the legal and cultural plane? The answer is polemical as far as

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<sup>1</sup> Noraini Mohd Nor et al, *Sexual Identity-Effeminacy Among University Students*(Kuala Lumpur:IIUM Research Centre ,2005), 1.

<sup>2</sup> Ibid, 2. It is to be noted that some authors do not distinguish between the intersex and transsexuals. We however agree with sociological configuration as advanced by social scientists. For example see Mufti Allie Haroun Sheik , *Sexual Issues in Modern Era* (Delhi: Adam Publishers & Distributers,2008), 260.

<sup>3</sup> Noraini, *Sexual Identity-Effeminacy Among University Students*, 1.

<sup>4</sup> Ibid.

<sup>5</sup> For details see, Ibid, 2-4.

<sup>6</sup> Abraham carried out some kind of sex reassignment surgery in 1931 in Germany, followed by the case of a team of doctors having it done in 1953 in Denmark which has proliferated since then both in terms of research and currency at least in the developed and the developing worlds. See ibid, 4.

Islamic jurisprudence is concerned. Accordingly, in the pages that follow, first, we, present an eye-bird view of the procedure involved in sex reassignment; next, we present the juristic notion on the problematic of inter-sex and transsexual with specific focus on the latter; lastly, we critically examine the underlying reasons for juristic controversy over the issue with the purpose of making some preliminary concluding remarks.

### **Executive Summary of Sex Reassignment Procedures**

Depending on the degree of the desire for transsexuals to achieve sex-change, there are two levels of medical intervention, namely hormonal and surgical.

In tandem with other measures in terms of social support and legal measure, the process of "sexual transitioning,"<sup>7</sup> may start with hormonal therapy in the form of pills or injection and other hormonal replacements to enhance normally transsexuals' feminine desires. To proceed with this therapy, the candidate would be advised to undergo some psychological counseling in view of the reverse implications that hormonal changes may entail at least six month prior to resorting to it.<sup>8</sup> The process in the case of male-to-female transsexuals involves the use of estrogen therapy which helps "suppress the physical male characteristics and encourages physical female characteristics. Electrolysis of facial and bodily hair is still necessary, however, as estrogen does not halt hair growth."<sup>9</sup> But in the case of female-to-male transsexuals, it requires "androgens which does lower the pitch in voice."<sup>10</sup> Some transsexuals stop at this stage without proceeding to more drastic measures like surgery. For instance, in Malaysia, according to one study out of 73 transsexuals only six have undergone sex change surgery while in another research out of 50 transsexuals, 23 of them have

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<sup>7</sup> Anonym, *Sex change surgery*, accessed May 12,2011 from <http://www.faqs.org/health/topics/64/Sex-change-surgery.html#ixzz1JvPh9iUs>.

<sup>8</sup> *ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* see also Harold Reed, *Sex Change Operation - Sex Change Surgery*, accessed May 12, 2011, from <http://www.srsmiami.com>. See also <http://www.faqs.org/health/topics/64/Sex-change-surgery.html>.

done so.<sup>11</sup> However, in the case of those desiring to transform further, a sex change surgery will be the option today.

Sex reassignment surgery (SRS) or gender reassignment surgery (GRS), is a surgical measure through which “the physical transitioning of a transsexual or transgendered male-to-female or female-to-male” can be achieved. Medically SRS “entails removing the genitalia of one sex and constructing genital organs of the opposite sex.” Male –to- female operation of this description continues to gain currency and if carried out professionally is able *to bring to the transgender “orgasm, or at least a reasonable degree of erogenous sensitivity.”*<sup>12</sup> The essential distinction of this process is that unlike sex-hormonal therapy which is resorted to largely by transsexuals “a man or woman feeling entrapped in a body of the opposite gender, called gender dysphoria.” It has purely medicinal value as it provides treatment for “newborns with intersex deformities” as well.<sup>13</sup> To the medical profession, ironically, “technical consideration in both cases favors successful conversion to a female rather than a male gender.” Newborns with ambiguous sex organs will almost always be assigned the female gender, unless their penis is at least an inch long. Whatever their chromosomes, they are much more likely to be socially well adjusted as females, even if they cannot have children.”<sup>14</sup>

In the case of psychological transsexuals, as opposed to in-born people with sexual abnormality, the procedure of sex surgery is undertaken under strict conditions. The reason is twofold, namely, the irreversible nature of the change and the need for preparedness to cope with psychological and physiological adaptation to changed gender identity. That is why a doctor before agreeing to accept the candidate requires

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<sup>11</sup> Noraini *et al*, *Sexual Identity*, 8-9.

<sup>12</sup> Anonym, *Sex change surgery*, accessed May 12,2011 from <http://www.faqs.org/health/topics/64/Sex-change-surgery.html#ixzz1JvPh9iUs>.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

the certification by two certified psychiatrists or psychologists that he/she is appropriate for SRS.<sup>15</sup>

Thereafter, the SRS process begins with the surgeon subjecting the candidate to various lab tests, for HIV, obesity, or other venereal diseases. Once satisfied, then he/she briefs the candidate about health implications of such a choice and gets his consent for the treatment.<sup>16</sup>

At the surgery stage, as a matter of anatomical variation, the process somewhat differ from one gender type to another. In the case of male-to-female SRS, the procedures are as follows:<sup>17</sup>

1. Discontinuation of hormone therapy for duration of three weeks prior to the surgery which otherwise increases the risk of excessive bleeding during the surgery;
2. Removing the penile muscle and tissue, the testicles, and reshaping external genitalia to appear female and natural; and
3. Creating a vagina, deep enough to allow satisfactory intercourse for those who desire intercourse. To do so, there are two most favored procedures. First, “it involves using the inverted skin of the penis to line the newly created vaginal cavity. An incision is made from the base to the head of the penis, and the skin is peeled away from the shaft while remaining attached to the torso.” To preserve sexual stimulation, “a portion of the penis head (the glands) with its nerve supply intact is formed into a clitoris.” Second, it involves “using what are called “full thickness” skin grafts. These grafts are obtained from hairless portions of the sides or flanks and the penile skin is then used to create the labia *minora* and the scrotum skin to create the labia *majora*. The width and dept of the vagina are usually greater than with the inverted penile skin, and the new vagina has less of a tendency to

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> This section has been adopted from the above web-page with minimal adaptation, see Ibid.

shrink over time.”<sup>18</sup> To prevent the vagina from closing, “a balloon-type device called a vaginal stent is inserted and remains in place for the length of the hospital stay, which averages around six days with complete bed rest.”<sup>19</sup>

Post-surgery attendance to the patient ranges between six to twenty four months. The transgendered individual must observe regular check-up schedules to be monitored by her physician. *If major complications, such as shrinking of the vagina results the sex surgery will have to be repeated.*

In order to enhance her femininity, the transgendered person may opt for further medical procedures, such as breast enhancement techniques (saline-filled breast implant), returning to female hormone regiment, cosmetic thyroid cartilage reduction (tracheal shaving), cricothyroid approximation (toning feminine voice) or even laser assisted voice adjustment (LAVA) known as endoscopic surgery and other surgical procedures for reshaping of the chin and cheeks, forehead contouring, and rib removal. But it is mandatory that she must go for follow-up *medical check-ups annually.*<sup>20</sup>

In the case of female-to-male surgery, on the other hand, the success rate of sex reassignment surgery thus far has not been encouraging. This is “due to the difficulty of building a functioning penis from the much smaller clitoral tissue available in the female genitals.”<sup>21</sup> In consequence, “in some instances, simply removing the breasts adequately satisfies the female-to-male transsexual. Others use a prosthetic penis that is either glued or strapped on, while yet others choose to undergo a phallic plastid

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<sup>18</sup> However, another procedure involves using a piece of the rectosigmoid colon instead of skin grafts, or inverted penile tissue. This technique allows for the creation of a deep and lubricated vagina, but is a more invasive and dangerous procedure and rarely the technique of choice. See *ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* for more technical details see also , Harold Reed, *Sex Change Operation - Sex Change Surgery*, accessed May 12, 2011, from <http://www.srsmiami.com>; <http://www.faqs.org/health/topics/64/Sex-change-surgery.html>.

<sup>21</sup> Anonym, *Sex change surgery*, accessed May 12,2011 from <http://www.faqs.org/health/topics/64/Sex-change-surgery.html#ixzz1JvPh9iUs>.

(plastic surgery to attach a penis).<sup>22</sup> The phallic plastid known as penis construction involves the following procedures<sup>23</sup>:

1. It begins less than a year after the uterus and ovaries are removed; and
2. It involves constructing a tube-shaped structure from the abdomen or upper thigh skin of the candidate and attaching it over the clitoris to preserve as much sexual stimulation as possible.

It should be noted that *the truth of the matter is that the constructed penis as such though can be used for sexual intercourse is not perfect. To top it all, this kind of surgery “often creates unsatisfactory urination ability.”*<sup>24</sup>

### **Juridical legislative paradigm**

In the Islamic paradigm “dimorphic gender classification” subsumes, as a general rule, males and females.<sup>25</sup> The *raison d’être* for this is that in the Islamic view religious rules of conduct whether moral or legal are gender-oriented. Hence, the supreme value is that Muslims must be content with what God has created in them and should not tamper with their primary natural created characteristics. The Qur`an succinctly declares: “God creates what he wills: He gives to whom He wills females, and gives to whom He wills male or He couples them, both males and females : and He makes whom He wills barren.”<sup>26</sup> Man-made changes to one`s nature is described as following the plan of Satan as it wowed to God, saying “I will assuredly ...lead them astray, and fill them with fancies... and I will command them and they will alter God`s creation.”<sup>27</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Abdulaziz Sachedina, *Islamic Biomedical Ethics*( New York: Oxford University Press, 2009),p.191.

<sup>26</sup> The Qur`an, 42: 49-50.

<sup>27</sup> The Qur`an, 4: 119.

However, the Qur`an acknowledges the existence of transsexuals and the Sunnah somewhat characterizes this category and the intersex. While delineating women`s code of ethics for social encounter with the opposite sex, the Qur`an ordains them to guard their chastity from all males except those within the lawful family circle and “male attendants free of sexual desires,”<sup>28</sup> termed as *ghayr uli al-irbah*. *Ghayr uli al- irbah*, according to some erudite exegetes were those effeminate men with no feelings of desire towards women.<sup>29</sup> Intersex, on the other hand, was given recognition in the Sunnah where the Prophet in an answer to a question as to determination of the sex of a child born with two opposite sex organs pointed that the deciding factor in such a case is by looking at the organ from which it urinates.<sup>30</sup> Accordingly, the traditional Islamic jurisprudence detailed the law and ethics for these abnormal genders by classifying the first type as *mukhannath* (effeminate men) and the second as *khuntha*(hermaphrodite).

*Mukhannath* literally means a man whose voice tone resembles woman`s voice.<sup>31</sup> Technically, however, the jurists defined *mukhannath* variously. To Hanafis and Hanbalis *mukhannath* are two types: one with tender effeminate voice and having no desire towards women and displaying no anti-social behavior. If this be the case they will be free to enter the women`s quarter. The other ones, though physically the same are morally corrupts (*fasiq*), and thus, should be barred from interaction with women.<sup>32</sup> The Shafi`is and Malikis, essentially characterized *mukhannath* as a man whose voice resembles woman`s voice and exhibits several other effeminate features in talking, looking, thinking and judgment. Thus, so long as he does not have

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<sup>28</sup> The Qur`an, 24: 31.

<sup>29</sup> Muhammad ibn Ahmad al-Qurtubi, *al-Jami` li Ahkam al-Qur`an*(Beirut : Ihya al-Turath al-Arabi, n.d), 12, 234; Muhammad ibn Jarir al-Tabari,*Jami` al-Bayan fi Tafsir al-Qur`an*(Bierut: Dar al-Fikr al-Ma`rifah, n.d), 19, 163; Isma`il Abi Fida Ibn Kathir , *Tafsir al-Qur`an al-Azim* (Riyad: Maktabat al-Riyad al-Hadithah, n.d), 6, 48.

<sup>30</sup> Abu Dawud, vol.4, 228.

<sup>31</sup> Muhammad ibn Mukrim Ibn Manzur, *Lisan al-Arab*( Beirut: Dar Sadir,n.d), 2,145

<sup>32</sup> Muhammad ibn Abi Ashal al-Sarakhsi, *al-Mabsut*( Beirut: Dar al-Ma`rifah, 1986),12,382; Abd Allah ibn Ahmad ibn Qudamah,al-Mughni(Riyad: al-Maktabah al-Riyad al- Hadithah, n.d), 7, 462.



sexual feelings towards women can be regarded as *mukannath* of acceptable type for the purpose of social encounter with women.<sup>33</sup>

However,, the jurists formulated a set of different laws for the *mukhannath* of the erotic type based on a Prophetic tradition, “God cursed the males who appear like females and the females who appear like males.”<sup>34</sup> Accordingly, unlike popular belief, Islamic tradition does not condemn *mukhannath* all and sundry as it is flexible in dealing with transsexuals of biological type, in terms of voice or bodily features. Stressing this, Ibn Hajar maintained that the Prophetic condemnation is confined to those who deliberately deviate from the norm of their set genders with which they are born. It does not extend to those who innately suffer from some kind of behavioral abnormality. Instead they need to be supported to re-adjusts themselves to their assigned gender roles.<sup>35</sup>

However, erotic *makhannath* was subjected to several legal restrictions including : he was prohibited from committing homosexuality, such as sodomy;<sup>36</sup> 2) he was not allowed to lead Muslim prayers as he/ lacked moral rectitude except under dire conditions according to some Malikis and Hanbalis;<sup>37</sup> 3) he was not allowed to mingle with women;<sup>38</sup> 4) he was not allowed to marry a woman if he indulged in homosexuality since God forbids the marriage of a chaste women to a sexually promiscuous person;<sup>39</sup> 5) he was not encouraged to accept employment in slaughter

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<sup>33</sup> Muhammad al-Khatib al-Shirbini, *Mughni al-Muhtaj* (Beirut: Dar al-Fikr, n.d), 4,430; Muhammad ibn Abd Allah al-Khurashi, *al-Khrashi`ala Mukhtasar Khalil*(Beirut: Dar al-Fikr), 2,273.

<sup>34</sup> Fazlul Karim, *Mishkat al-Masabih* (Delhi: Islamic Book Service,1994), 1, 613.

<sup>35</sup> Ahmad ibn Ali Ibn Hajar, *Fath al-Bari* (Beirut : Ihya al-Turath al-Arabi, 1985), 10, 332. The jurists discussed various rehabilitative measures which the state can initiate if such *mukhannath* people do not want to conform, such as exile, imprisonment etc. see al-Sarakhsi, *al-Mabsut*, 27:205; al-Shirbini, *al-Mughni al-Muhtaj*, 4: 192; al-Bahuti, *Kashshaf al-Qina`*, 6:128.

<sup>36</sup> Ahmad ibn Sharaf al-Nawawi, *al-Majmu`* (Madinah : Maktabah al-Salafiyyah, n.d), 12: 317.

<sup>37</sup> Ibid, 4: 287; al-Sarakhsi, *al-Mabsut*, 1:111; al-Dasuqi, *Hashiyat al-Dasuqi*, 1:307; Ali Ibn Muhammad ibn Hazm, *al-Mahalla*(Beirut: Dar al-Fikr, n.d), 4: 212; Ali ibn Sulayman al-Mardawi, *al-Insaf*(Beirut: Dar Ihya al-Turath al-Arabi,1957), 2: 252.

<sup>38</sup> Al-Shirbini, *al-Mushni al-Muhtaj*, 3:128; al-Sarakhsi, *al-Mabsut*,12: 382; Ibn Qudamah , *al-Mughni*, 7:462.

<sup>39</sup> This is held by Ibn Taymiyyah who even doubted the permissibility of greeting them . See Ahmad ibn Abd al-Halim , *Mujmu`at al-Fatawa*(Beirut: Dar al-Kutub al-`Ilmiyyah, n.d) , 15: 321.

houses or cooking jobs according to some Malikis;<sup>40</sup> 6) he was not regarded as a credible witness for the purpose of testifying before the court;<sup>41</sup> 7) if he committed homosexuality, would be subjected to Islamic punishments.<sup>42</sup>

Overall, in the Islamic tradition, erotic effeminacy is morally so abhorrent a behavior that if a person calls a normal Muslim a *mukhannath*, he will be charged for libel punishable by flogging amounting to twenty lashes at the discretion of the judge.<sup>43</sup>

*Khuntha* on the other hand, juridically refers to an intersex or an individual with gender ambiguity upon birth. For instance, Ibn Qudamah defined a *khuntha* as, "a person with both male and female organs or with an opening in place of a sexual organ from which he urinates."<sup>44</sup> To integrate *khuntha* into the social system and law, classical jurists divided them into two sub-categories: non-problematic hermaphrodite (*khuntha ghayr mushkil*) and problematic hermaphrodite (*khuntha mushkil*).

Non-problematic hermaphrodite was a person with both male and female genitals capable of being assigned a sex type based on the dominant function of one of the two. For instance, he would be regarded as a male if he shows male signs such as urinates from the penis, ejaculates semen, grows facial hairs, etc. On the contrary, if such a person developed female bio-physical characters would be classified as a woman.<sup>45</sup> Problematic hermaphrodite, on the contrary, was a person who would not transform to one of the sexes, for instance he continues to urinate from both the penis and vagina.<sup>46</sup> With the progress of modern technology in medicine, the problem of

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<sup>40</sup> Al-Hattab, *Mawahib al-Jalil*, 3: 342. But this is not upheld by the majority . See Ibn Qudamah, *al-Mughni*, 11:36.

<sup>41</sup> Al-Nawawi, *al-Majmu*, 20:227 ; *Ibn Qudamah, ibid*, 12: 40; al-Dasuqi, *Hashiyat al-Dasuqi*, 4:166.

<sup>42</sup> For details see, al-Sarakhsi, *al-Mabsut*, 11: 78; Ibn Qudamah , *al-Mughni*, 10:175.

<sup>43</sup> This held to be a ruling base on a Prophetic tradition. See Muhammad ibn `Isa al-Tirmidhi, *Sunan al-Tirmidhi* (Beirut: al-Maktab al-Islami, 1988), 4:62. See also Ibn Qudamah, *ibid*, 10:202; al-Shibini, *al-Mughni al-Muhtaj*, 3:369; Sahnun Ibn Sa`id, *al-Mudawwanah al-Kubra* (Beirut: Dar Sadir, n.d), 16: 216.

<sup>44</sup> Ibn Qudamah, *al-Mughni* , vol.6, 221; see also Muhammad Arafah ibn Abd al-Baqi al-Dasuqi, *Hashiyat al-Dasuqi `ala Shark Kabir* (Egypt: Ihya al-Kutub al-Arabi, n.d), vol.4, 489.

<sup>45</sup> For details see, al-Sarakhsi, *al-Mabsut*, 30, 130; Muhammad ibn Muhammad al-Hattab, *Mawahib al-Jalil* (Beirut: Dar al-Fikr, 1978), 6, 430; Mansur ibn Yunus al-Bahuti, *Kahshshaf al-Qina`* (Beirut: Dar al-Fikr, 1982), 2, 594; al-Shirbini, *Mughni al-Muhtaj*, 3, 29.

<sup>46</sup> *Ibid*.

the second type would be solved. Because medical criteria for sex determination goes beyond the physiological function of genitals, by looking instead to the composition of sex chromosomes, sex gonad, supernal gland, womb and fallopian tube, testosterones etc. That is why to al-Bar and Kazimi today medical doctors are better equipped to distinguish between a real female hermaphrodite with the appearance of a man (female pseudo hermaphrodite) and a real male hermaphrodite with the external signs of a woman (male pseudo hermaphrodite).<sup>47</sup>

A question then arises: What is the position of Islam on medical intervention to correct sex abnormality? Modern jurists while validating it in the case of hermaphrodite disputed its legitimacy in the case of effeminate individuals mainly because in the former case it is regarded as a legitimate medical reason but in the latter it is considered as cosmetic impelled with malice of defying God's ethico-legal imperatives.

Accordingly, jurists have a consensus that sex change mechanisms to restore malformation in the case of a hermaphrodite cannot be disputed as it is legally sanctioned by Islamic law. For instance, the Sunnah ordains Muslims to seek medical treatment," God has not created ailments except that He has anticipated by His will a cure for it."<sup>48</sup> And , "O Servants of God seek medical treatment for your ailments."<sup>49</sup> The Prophet also commanded the removal of the harms and their after effects when he said:" Harm shall neither be inflicted nor reciprocated."<sup>50</sup> Accordingly, since such

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<sup>47</sup> Muhammad Ali al-Bar," Mushkilat al-Khuntha bayn al-Tibb wa al-Fiqh", *Majallat al-Majama` al-Fiqhi al-Islami*, 2007, 6, 354; Muhammad Kazim al-Khaqani , *al-Khuntha bayn al-Tibb wa al-Fiqh*, 2006, accessed May 13,2011 from <http://www.alkhaghani.com>. See also, Paula Sanders, "Gendering the Ungendered Body: Hermaphrodites in Medieval Islamic Law,"in Nikki R. Keddie and Beth Baron, eds., *Women in Middle Eastern History* (New Haven and London: Yale University Press, 1991), 74-95; Ammar Muhammad al-Amin, "*al-Athar al-Qanuniyyah al-Mutratabah `ala Taghyir al-Jins*," accessed May 13, 2011, from <http://www.startimes.com/f.aspx>; al-Qaradaghi, "*Ma Huwa Jins al-Thalith?*" accessed May 13,2011,from?http://www.qaradaghi.com/portal/index.php?option=com\_content&view=article&id=1237:2010.

<sup>48</sup> Muhammad ibn Yazid Ibn Majah, *Sunnan Ibn Majah*(Beirut: Dar Ihya al-Turath al-Arabi, n.d) , 2:252.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, 2:60.

a person has no ulterior motive of hiding his real identity but recovering it by such an action provides further moral reason for the legitimacy of seeking medical help to that effect.<sup>51</sup>

However, the debate rages over the validity of medical treatment for transsexuals. There are supporters and opponents, the gist of whose arguments we present here.

The opponents, being the majority, represented by official bodies of Sunni jurists affiliated with the Assemblies of Fiqh Academies argued against it on the basis of the following grounds:

1-It amounts to tampering with one`s God-made nature in consonance with the primordial evil handiwork of Satan;<sup>52</sup>

2- Its ultimate objective is to alter one`s social sexual role from the one created by God to that of the opposite one, hence, *ultra-virus* of the Prophetic prohibition on effeminacy and masculinity as we referred earlier on;<sup>53</sup>

3- It is mostly done with the intention of hiding one`s true identity thus is a kind of deceit which is *haram* by virtue of the Prophet`s saying, “anyone who plays deceit does not belong to our community;”<sup>54</sup>

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<sup>51</sup> Muhammad Shafi`i Miftah Bushiah, *Jirahat al-Dhukurah wa al-Unuthah fi Daw`al-Tibb wa al-Fiqh al-Islami*(Beirut: Dar al-Falah, n.d) , 471-472;

<sup>52</sup> Al-Nisa:119. See also Muhammad al-Shanqiti, *Ahkam al-Jirahah al-Tibbiyyah*(Riyad: Maktabah al-Shabah, n.d), 135.

<sup>53</sup> Ibn Hajar, *Fath al-Bari*, 10: 333; and Muhammad Khalid Mansur, *al-Ahkam al-Tibbiyyah al-Mu`alliaqah bi al-Nisa fi al-Fiqh al-Islami* ( Beirut: Dar al-Nafa`is, n,d), 204.

<sup>54</sup> Ibn Majah , *Sunan Ibn Majah*, 2:23, see also Bushiah, *Jirahat al-Dhukurah wa al-Unutha*, 480.

4- Since its surgery involves de-capacitating one organ with the intention of replacing it with a cosmetic one, it is akin to castration which was prohibited by the Prophet when he forbade his companions from doing so;<sup>55</sup> and

5- It is not only unnecessary from medical point of view, as it is resorted not for medical reason/lawful reason but cosmetic motivation, it also entails post-surgery or hormonal therapy complications, thus is prohibited in Islam by virtue of the Prophetic edict on unlawfulness of self-inflicted injuries on one's inviolable person. To top it all, the person doing it finds it hard to be socially accepted by the rest of the Muslim communities, thus placing him under unbearable psychological stresses of unwarranted type.<sup>56</sup>

The proponents, Shi'ah Imamiyyah and some Sunni jurists, however, are of the view that the regulated use of sex-change medical intervention can be tolerated because: first, although being unlawful, it will become permissible on account of dire need of transsexuals by virtue of a well-know legal maxim, "necessity overrides prohibition."<sup>57</sup> Secondly, it does not amount to tampering with one's God created innate nature but is a remedy/treatment for a transsexual's psychic –pathological condition.<sup>58</sup> For instance, one anonymous medical doctor protagonist strongly believes that transsexual tendency is biological in nature and a sickness when she said: "the psycho-sociological theories attributing transsexual tendencies to social factors and family upbringing are mere myths." To her, instead it is a biologically mandated phenomenon, namely, these individuals' sex brain region is responsible for generating sexual feelings which are contrary to their anatomical makeup. As a matter of fact these abnormalities in a fetus develop due to some hormonal abnormalities which affect its genes and consequently its sex brain cells before birth. Accordingly, after the birth such a child starts to display the feelings of reverse

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<sup>55</sup> Muhammad ibn Isma'il al-Bukhari, *Sahih al-Bukhari*(Beirut: Dar al-Fikr, n.d),936;al-Qurtubi, *al-Jami' li Ahkam al-Qur'an*, 5:391; al-Shanqiti, *Ahkam al-Jirahah al-Tibbiyyah*, 136.

<sup>56</sup> Ibid. see also Bushiah, *Jirahat al-Dhukurah wa al-Unutha* 489-490; Fawaz Salih, "Jirahat al-Khunuthah wa Taghyir al-Jins fi al-Qanun al-Suri," *Majallah Jami'ah Damascus*, 2003, 19:2, 58.

<sup>57</sup> Faisal Mawlawi, accessed on May 14, 2011 from [www.malawi.net](http://www.malawi.net).

<sup>58</sup> Ibid.

gender from the age of three. Therefore, to her, this is a kind of inborn defect with which a child is born and no other remedies can work for him/her except a sex-change medical intervention. This should, indeed, be allowed in Islam as: firstly, it does not amount to changing one's inborn nature but restoration of something amiss in him/her. It is analogous to the lawfulness of undergoing surgery to replace one's malfunctioned organ, which in no way is regarded as tampering with one's nature. Secondly, the jurists who oppose it have not adequately pondered over the ensuing immoral consequences of their verdict for transsexuals, namely, who out of no legitimate outlet would express their aberrant feelings by way of homosexuality or lesbianism?<sup>59</sup>

Niya of Shi'ah Imamiyyah representing his sect's position echoes the same by maintaining that unlike the Sunni jurist who by classifying sex reassignment at the behest of transsexuals as tampering with one's God-created nature, the Imamiyyah holds the contrary. To us this is a kind of treatment for gender-dualism sickness and as such does not amount to altering one's primordial nature but seeking medication which is lawful in Islam. That is why Khumayni issued a verdict on the treatment of transsexualism by way of hormonal therapy. Practically 700 sex change operation takes place annually in Iran.<sup>60</sup>

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<sup>59</sup> Anonymous lady medical doctor, *Marad Idtirab Hawyah al-Jinsiyyah wa `Amaliyyat Tahwil al-Jins*, accessed May 15, 2011, from [http://www.amjaonline.com/ar\\_f\\_details.php?fid=22813](http://www.amjaonline.com/ar_f_details.php?fid=22813). Kamali seems to express similar sentiment by invoking some general provisions of the Qur'an on human nature, human dignity, prohibition of oppressing other fellow humans and Islamic fraternity to address the legal limbo faced by the transgenders and transsexuals in Malaysia. Nevertheless, such a simplistic treatment of the issue cannot rebut the rigor of arguments by the opponents. See Muhammad Hashim Kamali, *Transgenders, from Islam's perspective*, accessed May 15, 2011 from [iaais.org.my/en/publications/articles/item/download/55.html](http://iaais.org.my/en/publications/articles/item/download/55.html).

<sup>60</sup> Muhammad Mahdi Karimi Nia, n.d., *Taghyir al-Jins fi al-Fiqh al-Shi'i*, accessed May 29, 2011, from [http://www.iqna.ir/fa/news\\_detail.php?ProdID=586808](http://www.iqna.ir/fa/news_detail.php?ProdID=586808). It is to be noted that Imam Khumayni reportedly did not distinguish between psychological and biological transsexuals as he predicated his *fatwa* (verdict), 47 years ago, on the caveat, "a woman feeling trapped in the body of man or vice versa." See Anonym, *`Amalyat Taghyir al-Jins fi Iran*, accessed May 29, 2011, from <http://www.frqan.com/videos/video.php?id=230>.

Lastly, Mawlawi, one of the chief proponents of this group disputed the understanding of textual evidences adduced by majority to oppose the permissibility of sex reassignment. To him, the Prophet`s prohibition of men resembling women and *vice versa* has no bearing on this issue. The reason is that to construe the prophetic tradition in a sense that it prohibits all forms of effeminate resemblance on the part of a *mukhannath* is not correct. This is evident from the context of the *hadith* as some noted classical jurists like Ibn Hajar tried to construct. For instance, he held that if the *mukhannath* was unable to correct his effeminate voice and speech, he must be medically treated. Accordingly, it is clear that the *hadith* in question does not cover a transsexual of anatomical type who is intrinsically engineered to feel to be the other sex. As such this kind of condition is nothing but an illness which needs to be healed and not touted, cursed and condemned.”<sup>61</sup>

Nevertheless, the opponents disagreed by saying: first, the maxim, `necessities render prohibited permissible when the urgency is to save human life or limbs. Hence, the case of transsexual does not qualify as such as it does not fulfill the requirement of being a condition of extreme necessity (*darurah mulji`ah*) which is intended by the maxim; secondly, the contention that sex- change does not come within the purport of prohibition in the *hadith* on “resemblance” to the opposite sex is not valid. Because according to Ibn Hajar the *ratio legis* of the Prophetic injunction was to prohibit the alteration of a thing from its original state. Thus, sex change affects such a transformation and thus, is covered by the law in question.<sup>62</sup> Thirdly, al-Qaradawi argued that in Islam not every feeling can be allowed to manifest itself into outward actions particularly if it is impelled by vain desires.<sup>63</sup> Lastly, The Fatwa Committee of

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<sup>61</sup> Ibid.

<sup>62</sup> Bushiah, *Jirahat al-Dhukurah wa al-Unutha* 492-495. For similar argument see also Omar Hasan Kasule, *Islamic Medical Ethics with Special Reference to Maqasid al Shari'at*, accessed on May 15, 2011 from <http://i-epistemology.net/medicine/813-islamic-medical-ethics-with-special-reference-to-maqasid-al-shariat.html>.

<sup>63</sup> Al-Ra`d: 39. See also Yusuf al-Qaradawi, *`Amaliyyat Taghyir al-Jins*, accessed May 15 , 2011, from [http://www.qaradawi.net/site/topics/article.asp?cu\\_no=2&item\\_no=75&version=1&template\\_id=105&parent\\_id=16](http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=75&version=1&template_id=105&parent_id=16)

the Assembly of Muslim Jurists of America challenges the biological imperative argument. It, among other things, considers the hermaphrodites also as transsexuals but born with “a congenital deformity in the reproductive organs” whose legal status is clear in Islamic law. The second category consists of those who were born anatomically as males or females but “transformed themselves into females or males via hormone replacement or surgery.” However, such medical intervention in their case from the genetic point of view does not transform them into totally different genders (their genotypes remain as before i.e., xx or xy). For instance, an effeminate male transgender can only have a new reproductive organ with no ovary and uterus to have a baby. Thus, for all practical purposes, he would be treated as a hermaphrodite after transition entailing complicated legal issues if he had children prior to that.<sup>64</sup>

To top it all, to the majority of the jurists, changing one’s sex entails change in one’s legal personality and consequently is a matter of serious implications for a Muslim in terms of marriage, inheritance, socialization, and most importantly one’s acts of worship. A transgender’s marriage is invalid as he or she is not a real male or female. The portion of his/her inheritance, would either be reduced or increased which will be *ultra virus* of God’s variant limits of shares based on gender and so forth.<sup>65</sup>

### **Critical appraisal**

The foregoing juridical divide at macro-level represents a tension between idealism and pragmatism. The opponents are carried by idealisms of adhering to non-negotiable principles of preserving one’s primordial nature, avoiding infliction of unnecessary

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<sup>64</sup> *The Fatwa of the Permanent Fatwa Committee of the Assembly of Muslim Jurists of America*, accessed May 16, 2011 from [http://www.amjaonline.com/en\\_f\\_details.php?fid=21701](http://www.amjaonline.com/en_f_details.php?fid=21701). The same view was upheld by the Conference of Rulers in Malaysia in 1983 and Conference of Jurists in Al Azhar in 1988. See Anonymous, *Gender Identity and Islam*, accessed May 18, 2011, from <http://www.safraproject.org/cgi-genderidentity.htm>.

<sup>65</sup> For details see, Sachidina, *Islamic Biomedical Ethics*, 194-195; al-Hattab, *Mawahib al-Jalil*, 5: 148; Ahmad Muhammad Sa’d, *Taghyir al-Jins Bayn al-Hazr wa al-Ibahah* (Egypt: Dar al-Nahdah al-Arabiyyah, n.d), 84-89; <http://forums.understanding-islam.com/showthread.php?10039-Sex-Change-and-Islam&p=150455&viewfull=1> (accessed May 15, 2011).



harms to one's person, thwarting moral deviation on account of reversing one's role contrary to one's anatomical gender nature. The supporters on the other hand, while agreeing with the above, by and large, invoked the principle of necessity to counter balance the legal prohibition with the predicament faced by the transsexuals.

A non-partisan evaluation of the above, in the case of psychological transsexuals, would lead us to submit the following:

- 1- Sex- change medical procedure whether by way of hormonal therapy or surgery undoubtedly entails altering one's nature, changing one's born-gender role and involving a painful experience if it obtains via surgery. It is thus, prohibited according to majority but justifiable by their opponents. However, since such a change is not real as argued by the opponents, one may retort by saying that it does not worth trying it. To top it all, transsexuals' ordeal of reintegration to society would make it all the more unnecessary as is evident from the reality on the ground in Muslim majority countries like Iran and Malaysia. For instance, according to Bahram Mir Jalali, a famous sex-reassignment surgeon in Iran, in spite of religious legitimacy of sex-change mechanism and procedural facilities in Iran, the next of kin of transgenders find it hard to accept them back once they have changed their gender status.<sup>66</sup> The scenario is gloomier in the Sunni world. For instance, in Malaysia even transvestite, men impersonating woman, are not tolerated. For instance, in April 15, 2011, a famous local singer by the name of Kajol was nabbed by anti-vice officers from Kelantan Islamic Affairs Department for indecently dressing in public during a performance in the state.<sup>67</sup> Sex change for male transsexual Muslims is not a happy option at all in the Malaysian society as they cannot change their gender in their National Identity Registration Card(NIRC). For example, the High Court in Kuala Terengganu refused such an application by Ashraf Hafiz Abdul Aziz now

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<sup>66</sup> Anonym, *'Amalyat Taghyir al-Jins fi Iran*, accessed May 29,2011, from <http://www.frqan.com/videos/video.php?id=230>.

<sup>67</sup> I would rather die than be a man, says singer, April, 21, 2011, accessed May 27, 2011, from <http://thestar.com.my>.

Aleesha Farhana, a transgender who underwent sex-change operation in Thailand three years ago. The prosecution contended that her female nature is external and not internal and the judge said that there is no psychological evidence to suggest that the operation has turned him into a natural woman.<sup>68</sup>

- 2- Nevertheless the supporters score a point, on consideration of undesirable consequences of denying transsexuals the option for sex reassignment. For instance, in Iran homosexuality carries capital punishment, thus legalizing sex change is a savior for those feeling the other way. In the Sunni world, such as Malaysia, however, according to Khartini Slamah, a transsexual and activist, the situation is not promising when she says: "We are all in a dilemma. We are Muslims. They (religious authorities) say this is not allowed, but they never tell us what the options are. I felt like it is being used to oppress. But I know that religion, Islam is so flexible...."<sup>69</sup> She also says that we are not gay men or transvestites as the society has "located us."<sup>70</sup> Nevertheless, the good news is that in Malaysia unlike Iran they are not punished with death penalty although they will be subjected to imprisonment or fines if dressed like women in public. Their further predicament is that if they cross-dress, would have no choice but

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<sup>68</sup> See Man seeks a woman`s name, May 26, 2011, accessed May 28, 2011, from <http://thestar.com.my>. The courts even in the case of non-Muslim transsexuals have made conflicting decisions in Malaysia. For instance, the Court refused it in the case of Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara, but allowed it in the case of J.G v. Pengarah Jabatan Pendaftaran Negara. Wong was born with two sex organs and registered as a female but according to psychiatrist was mentally a man and physically a woman. He changed his sex and wanted to alter his NICR but the court held that there is no law to re-register a transgender. Nevertheless, in the second case, where the plaintiff, a born male, became a female after sex reassignment was granted his plea as the court held that his appeal was supported by sufficient medical evidence. For full analysis, see JEFFREYJESSIE, *RECOGNISING TRANSSEXUALS*, November 17, 2005, accessed May 29, 2011, from [www.malaysianbar.org.my/.../jeffrey\\_jessie\\_recognising\\_transsexuals\\_by\\_honey\\_tan\\_lay\\_ean.html](http://www.malaysianbar.org.my/.../jeffrey_jessie_recognising_transsexuals_by_honey_tan_lay_ean.html). The same position was reiterated by Justice Datuk Mohd Yazid Mustafa, in the case of *Mohd Ashraf who after undergoing sex change operation wanted his name changed into Aleesha Farhana. Among others, He contended that "plaintiff did not satisfy three other criteria for being declared a woman - chromosome count, and exterior as well interior organs."* See FARIK ZOLKEPLI, "Man fails in bid to be legally declared a woman," 18,07,2011, accessed on 18,07,2011 from <http://thestar.com.my/>.

<sup>69</sup> Liao Y-Sing, *Malaysia's Muslim transsexuals battle sex change woes*, September 3, 2007, accessed May 29,2011, from <http://thestar.com.my>.

<sup>70</sup> *Ibid.*

to become prostitutes as they cannot seek other employments as men dressed like women.<sup>71</sup> A question arises? Can they be allowed sex reassignment in order to save them from vice? We believe that given the socio-cultural conditions in this part of the Sunni world, an affirmative answer may not solve their problems. The reason being that the apparently altered sex orientation may help their problem of sexuality but not their reintegration into the socio-cultural structure. This is especially so when they cannot lawfully be married as they are not regarded as real women. Accordingly, the only outlet open for them to fulfill their carnal desire is sex- industry or homosexuality, both of which have no legitimacy within the moral paradigm of Islam. However, we were unable to appraise the Iranian experience though unhelpful for easing the problem of transgenders in a predominantly Sunni society like Malaysia.

## Conclusion

All in all, the juridical work of Muslim jurists on transsexuals demonstrates a desperate attempt to reconcile the accepted norms with the need of the third sex. For biologically abnormal humans, they have tried to work out culturally defined mechanisms of sex reassignment and thus solving the problem of their crisis of personhood. In this way, they have resolved the problem of non-problematic hermaphrodite once and for all. As for the problematic hermaphrodites, they have formulated an interim solution pending the disclosure of their real personhood. Accordingly, the medical science today can solve this dilemma with more certainty which was not possible then. When it comes to the question of *mukannath*, again, the jurists were not fatalistic but prudent and

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<sup>71</sup> Tasha was one of such case of cross-dresser in 2007. See *Malaysia's transsexual left in limbo*, accessed May 28, 2011 from <http://beta.dawn.com/wps/wcm/connect...in-limbo-ss-07>. According to Teh, more than half of male transsexuals, called Mak Nyahs in Malaysia “in spite of Welfare Department financial help for them to set up tailoring shops and beauty salons,” are involved in sex industry. See Ong Ju Lynn, *Misconception About Transsexuals*, October 2, 2000, accessed May 28, 2011, from , <http://thestar.com.my>. To address these peoples predicament, local civil societies voice their protest under the name of safeguarding the right of sexual minorities. See *Religious fundamentalisms in Muslim societies: the impact of the religious right on sexual and reproductive health and rights* , accessed may 28, 2011, from <http://www.thefreelibrary.com/Religious+fundamentalisms+in+Muslim+societies%3A+the+impact+of+the...-a0219451132>.

proactive enough to draw a distinction between the clearly biologically mandated ones and those apparently artificial ones. Medical science together with psychological therapy can help rehabilitate the first category. In the whole process, therefore, medical technology both in the form of surgery and hormonal therapy is a legitimate option. But the question of using this to deal with socio-psychological *mukhannath* is a contested issue on many legal and moral grounds as we detailed in this study.

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