

Intellectual Discourse

Volume 26

Number 1

2018



International Islamic University Malaysia
<http://journals.iium.edu.my/intdiscourse/index.php/islam>

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Intellectual Discourse is a highly respected, academic refereed journal of the International Islamic University Malaysia (IIUM). It is published twice a year by the IIUM Press, IIUM, and contains reflections, articles, research notes and review articles representing the disciplines, methods and viewpoints of the Muslim world.

Intellectual Discourse is abstracted in *SCOPUS*, *ProQuest*, *International Political Science Abstracts*, *Peace Research Abstracts Journal*, *Muslim World Book Review*, *Bibliography of Asian Studies*, *Index Islamicus*, *Religious and Theological Abstracts*, *ATLA Religion Database*, *MyCite*, *ISC* and *EBSCO*.

ISSN 0128-4878 (Print); ISSN 2289-5639 (Online)

<http://journals.iium.edu.my/intdiscourse/index.php/islam>

Email: intdiscourse@iium.edu.my; intdiscourse@yahoo.com

Published by:

IIUM Press, International Islamic University Malaysia

P.O. Box 10, 50728 Kuala Lumpur, Malaysia

Phone (+603) 6196-5014, Fax: (+603) 6196-6298

Website: <http://iiumpress.iium.edu.my/bookshop>

Printed by:

Workline Systems Sdn. Bhd.

37-1(1st Floor), Jalan Setiawangsa 11A

54200 Taman Setiawangsa, Kuala Lumpur, Malaysia

The Gaps in Fatwā on Intersex Corrective Surgery: Some Reflections in the Context of Malaysia

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Abstract: Intersex being a birth impairment in human babies is a fact of human precreation. Opposed to normal birth of humans as males and females incidents of babies with vague gender identity have perturbed people and families as to how to socially place them within the binary system of men and women in the community. In Islam, it is more important in view of the gendered orientation of some Islamic laws and its system of social ethics. Accordingly, jurists formulated an Islamic blueprint to manage this segment. However, their main criteria to align such individuals to one of the normal genders were inadequate to assign a specific sex to all intersex. Medical science, on the other hand, proposes not only to achieve precise diagnoses of intersex conditions but also to manage them medically. Accordingly, Muslim jurists and muftis

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by and large celebrated this medical solution as a better remedy to resolve this juridical perplexing question. This study, however, argues that juristic stamp of approval needs to be more ethically grounded so as to avoid pitfalls inherent in this medical innovation.

Keywords: corrective surgery, ethical gaps, fatwā, intersex.

Abstrak: Intersex (khunsa) yang merupakan kecacatan kelahiran dalam kalangan bayi adalah satu fakta pembentukan asal manusia. Berbanding dengan kelahiran bayi secara normal, sama ada sebagai lelaki mahupun seorang perempuan, kejadian bayi-bayi yang mempunyai identiti yang samar ini telah mengganggu-gugat manusia dan keluarga mereka kerana agak sukar untuk meletakkan mereka dalam masyarakat duo sistem ini yang rata-ratanya merangkumi lelaki dan perempuan sahaja. Dalam Islam, hal ini adalah penting untuk melihat orientasi jantina daripada perspektif undang-undang Islam dan sistem etika masyarakat. Justeru itu, penggubal undang-undang Islam yang mutlak diperlukan untuk menangani isu ini. Walau bagaimanapun, kriteria utama untuk menyelaraskan individu-individu tersebut adalah kepada satu daripada dua jenis jantina yang normal sahaja. Adalah sukar untuk memberikan jantina yang khusus kepada semua intersex (khunsa). Di sebalik itu, sains perubatan telah mencadangkan bukan hanya setakat untuk mencapai diagnos yang tepat terhadap keadaan intersex tetapi ia mampu menguruskan mereka secara perubatan. Oleh itu, penggubal undang-undang Islam dan Mufti-mufti khususnya patut meraikan penyelesaian perubatan tersebut sebagai penyelesaian yang lebih baik untuk menangani persoalan yang membingungkan ini. Walau bagaimanapun, kajian ini membincangkan tentang keperluan untuk satu persetujuan yang lebih beretika untuk mengelakkan mereka daripada perpecahan yang wujud dalam inovasi perubatan ini.

Kata Kunci: Pembedahan pembedahan, jurang etika, fatwā, intersex (khunsa)

Introduction

Biomedical issues in general and medical technological novelties in particular comes with their own challenges against the traditional practices and beliefs not only for Muslims but also for people of all cultures. In the case of Muslims when it comes to the question of legal and ethico-religious acceptability of such innovations, it is of paramount importance that they have to be in line with ethico-legal Islamic norms, known as Shari`ah. The creative tool to resolve such dilemma are found within the mechanism of fatwā (juridical opinion/

verdicts). Contextualising this thesis in the case of ethico-legal legitimacy of intersex surgery, it is observed that juristic verdicts on both international as well as local scene contain certain ethical gaps which this study proposes to pinpoint with the prime purpose of calling for more ethically sound decision making by both muftis and medical practitioners. To this end, this paper will delineate juridical responses on this both in general as well as in Malaysia together with their critics to arrive at its conclusion

Intersex Surgery in Contemporary Islamic Law

Kunthā (intersex) literally comes from word *khunuth* which means *Layyin* (soft)(Ibn Manzur, 1955, Vol.2, p. 145). It is not applied to *mukhannath*, a term used for a man who clearly identifies as male but chooses to behave and dress like a woman (Verdit, 2007, p. 69). Hence, *kunthā* refers to an individual that is completely not male or female, or an individual that has both male and female reproductive systems, but cannot be identified as either (Al-Fayrūzabādī, 1887, p. 216; al-Jurjānī, 1988, p. 137; al-Farāhīdī, 2003, p. 248).

Muslim jurists have also given various definitions of *kunthā*. Some of them describe variations in sex characteristics of *kunthā*. Hanafi jurist, al-Kāsānī, defines *kunthā* as a person born with both male and female external genitalia. *Kunthā* cannot be claimed as both male and female as its identity, but must be identified as either man or woman (Al-Kāsānī, 1986, p. 418). As for al-Zailā'ī, *kunthā* is the condition of having a male and female characteristic (Al-Zailā'ī, 1896, p. 215).

Malikī jurist, al-Khurashī, defines *kunthā* as an individual that has both male and female organs, and also an individual that does have male or female organs. This person must not be identified as man or woman. This is because such variations may involve genital ambiguity or vague combinations of one's physical characteristics as long as there is no proof to distinguish them (Al-Khurashī, n.d, p. 227).

Shāfi'ī jurist, al-Nawawī, defines *Kunthā* in his book *al-Majmū'* as an individual with two sex organs that may not match the gender identity of a man or a woman. The identity of such a *kunthā* remains undecided on whether he/she is going to be a father or a mother, bride or groom, and grandfather or grandmother when he/she grows up (Al-Nawawī, 2003, p. 53).

Hanābilah jurist, Ibn Qudāmah al-Maqdisī, in his book *al-Mughnī*, defines *kunthā* as those born with both male and female sexual organs. If the person urinates from male sex organs, then the individual can be defined as male or vice versa (Ibn Qudāmah, n.d: 114).

Khunthā in juristic paradigm either can be identifiable as male or female during infancy or such determination has to be deferred until its puberty. If still such individual cannot be assigned a normal sex, would remain as intersex, called *khunthā mushkil*. To differentiate a male from female infant *khunthā*, they looked at the physical appearance of the genital, quantity of urine and sequence of urination as yardsticks. Otherwise, they deferred their judgements until the appearance of secondary sexual signs in such an individual when it reaches puberty, such as the growth of beard, breast, change of voice and even sexual inclination to a particular sex. In the absence of which they resolved him/her as indeterminable *khunthā* (Al- Bahūtī, 1997, p. 475; Al-Sarakhsī, 1989, p. 93; Al-Nawāwī, 2003, pp. 53-55).

Muslim medical experts define *kunthā* as 'intersex' or 'hermaphrodite' (an old word for intersex used until the mid-20th century). According to their edict, intersexuality is a congenital impairment where an infant cannot be identified upon birth as male or female. The reason is that he or she has both female and male sexual organs, or has no sexual organs whatsoever (Verdit, 2003, p. 69). According to Ani Amelia, in 2005, a meeting has been convened in Chicago by 50 members of medical experts in this field and came up with a medical name for intersex, namely DSD (Disorder Sex Development). The reason is that to call them hermaphrodite or intersex is insulting/ offensive to them.

In scientific paradigm, intersex is a complex biological birth defect with perplexing outcomes even when it grows up and reaches adulthood. There are mainly three categories of them: those born with abnormal genitals; those with apparently normal genital but having the internal reproductive system of another sex; and those with abnormal chromosomes which cause them to be infertile even if they possess normal genital as male or female (Judith *et al*, 2009, p. 49-65). To assign them a sex particularly while still infants, medical interference in the form of hormonal therapy and corrective surgery on top of continued psychological therapy are regarded as medical solutions to this phenomenon. Nevertheless, science still does not claim finality

on eliminating the problem of intersexuality even after the necessary procedures mainly due to complex nature of such conditions. For instance, it is acknowledged that there are incidents where an infant with Congenital Adrenal Hyperplasia (CAH) condition after undergoing genital normalisation surgery as a boy during early childhood, develops a feminine personality (Haneef and Zuhdi 2015, Vol.50, 4, pp. 809-829). However, Muslim legists still seem to be more optimistic about this medical achievement to which we turn now.

1. Juridical rulings in General

Medical technology was welcomed by medical experts as well as some scholars as a magical means of resolving an old fiqhi problem. For example, al-Bār says that science can detect such birth Disorders of Sex Development (DSD) at an earlier stage which jurists had no means to uncover, such as urogenital sinus abnormalities (birth defect that causes the urethra and vagina to become one) as raised by Ibn Qudāmah (Al-Bār, n.d: Vol.6, p. 354; al-Khaqānī, 2016).

Modern medicine is now able to identify and differentiate between true hermaphrodite (*kunthā mushkil*) and pseudo-hermaphrodite (*kunthā ghair mushkil*) at birth, although not with definite accuracy. With this, doctors are able to recommend the appropriate medical intervention such as chromosomal management, corrective surgery and hormone therapy. However, Muslim jurists implemented a gradual approach in the determination of both hermaphrodites (*kunthā*) (Al-Farādī, 2016). Medical measures for sex determination goes beyond the physiological function of genitals. Instead, medical practitioners examine the composition of testosterone, supernal glands, sex chromosomes, sex gonads, wombs and fallopian tubes. Considering this scientific accomplishment as a positive development, al-Bār further maintains that with the progress of modern technology in medical science, the problem of *kunthā mushkil* would be resolved once and for all (Haneef and Zuhdi, 2015, p. 810).

Joining him Kazīmī also held that better equipment from today's medical science will help the medical doctor to easily differentiate between a real female *kunthā* with the appearance of a man (female pseudo-hermaphrodite) and a real male *kunthā* with the external signs of a woman (male pseudo hermaphrodite). At that point, the jurist will

play the role to determine their socio-legal undertaking (Al-AmĒn, 2016; Haneef and Zuhi, 2015, p. 811).

However, in view of life-changing effect of the technology (Ani & Zaleha, 2016), *fatwā* issuing institutions and jurists adopted a conditional approach for its approval. For instance, DĒr al-Ifta of Egypt and Fiqh Academy in Makkah, and contemporary jurists like Nasr Farīd Wāṣil and Muhammad Raʿfāt Fawzān, welcome this medical technology and have endorsed in their practice to overcome sex indeterminacy. To consolidate their argument, they use the authority based on the Prophet's (S.A.W.) *ḥadīth* on medical treatment: "God has not created ailments except that He has anticipated by His will a cure for it". Another *ḥadīth* also states: "O Servants of God seek medical treatment for your ailments" (Ibn Majah, 1987, Number 1245). Additionally, the Prophet also ordered the removal of the harms and their aftereffects when he said: "Harm shall neither be inflicted nor reciprocated" (Ibid). Consequently, removing the genital anomaly is like removing the additional finger from one's hand, which is known in the old juristic example of two sex organs. If one organ is potent and another is not, then removing the impotent one is allowed as it serves no function. Nonetheless, if the type of anomaly is complex and cannot be distinguished by the naked eye, then, the medical profession can help determine its sex. According to Bushiah, since such a person has no ulterior intention to hide his or her real identity, attempts to recover it by such actions provide more moral reason for seeking medical assistance to determine whether or not one of the organs need to be removed (Bushiah, 2008, p. 45). Nevertheless, such procedure has to be governed by some juridical stipulations including: First, the outcome of the determination of intersex must be certain. Second, medical intervention is the only remedy. Third, the real sex of the intersex can be predicted with meticulousness. Fourth, the procedure of genital normalising surgery is carried out based on the consent from the legal guardians. Lastly, the procedure is managed and carried out by competent physicians (Haneef and Zuhi, 2015, p. 813).

Al Jurayyān, a Professor of Paediatrics at King Saud University, Saudi Arabia, when presenting a set of guiding principles on this issue based on the current Islamic *fatwās* put forward by the senior 'Ulamā' council in Saudi Arabia and the practices of medical physicians in Saudi Arabia. (Al-Jurayyan, 2010, vol.5, pp. 3-20). These *fatwās* are translated as follows:

1. A sex alteration surgery on a person with non-DSD condition is totally prohibited and considered to be illicit in accordance with the Holy *Qur'ān* and the Prophet's *ḥadīth*.
2. Those who have both male and female organs require further examination from medical experts and, if the signs are more suggestive of either male or female gender, then it is allowed to treat the individual medically via hormone therapy or sex normalisation surgery in order to eliminate the ambiguity and to nurture the person as one gender.

According to Dessouky, a paediatric surgeon from Egypt, “All *fatwā* regarding the alteration of sex’s organ in a typical male and female human being without physical abnormalities in his body (transgender), state that it is a religious doctrinal crime, as it is the alterations of ‘what God has created’.” He continues that these *fatwās* decreed that if both masculine and feminine characters are detected in a person such as in a person with a DSD (intersex), the physicians should decide the gender due to the dominant signs and remove any other signs that may cause “suspicion” to achieve the best outcome for the person. Dessouky points out additional important issues in the management of Muslim patients with DSD that still requires assessment from the religious authorities, including determining whether a person is a male or female are the functions of the external genitalia, chromosomes, gonads, phenotype or appearance (Dessouky, 2001, Vol.20, pp. 499–515)

The medical rationale for *fatwā* on the prohibition of sex reassignment for transsex was delineated by Dessouky as:

If his sex-change operation from a man to a woman was real in all observable considerations, including the genitals – and not merely a vanity operation – and the characteristics of a woman are more apparent on him now than masculine characteristics, then there is no problem with him remaining as he now is. In this case, it is wrong for his female relatives and other women to distance themselves from him or to oppose him as long as the visible signs of womanhood are clearly manifest: including the presence of breasts, the absence of the testicles and penis, and the presence in their stead of what is effectively a functioning vagina. His unique situation can be juristically compared to that of a physical hermaphrodite in Islamic Law. Once a physical hermaphrodite’s dominant sexual orientation becomes clear, the hermaphrodite is,

thereafter, considered to be of that gender. His situation is comparable to that of a hermaphrodite whose female gender has been determined. He becomes a woman and should be treated like a woman. And Allah knows best (Ibid, p. 505)

The above medical opinion illustrates the complexity of drawing distinction between intersex and transsex particularly when one finds example from classical *fiqh* on sexual orientations as one of the indicators in the case of adult *khuthāmushkil* or when a minor *khunthā* after going through sex corrective surgery exhibits opposite sexual orientations upon puberty.

2. The *Fatwā* in Malaysia

In Malaysia, the National *Fatwā* Council of Malaysia differentiates between the transgender and the intersex. They issued a *fatwā* saying that transgender behaviour, where a girl behaves or dresses in what is seen as a boyish style, or vice versa, is forbidden in Islam (Ani and Zaleha, 2016).

According to the Malaysian Islamic Development Department (JAKIM),

“Complaints of human rights abuses against Malaysia are not genuine, and are part of a masquerade to push the lesbian, bisexual, gay and transgender (LBGT) agenda to undermine Islam”(Zahiid, 2016).

On the other hand, management of patients with Disorders of Sex Development (DSD) or the intersex is undoubtedly another issue. Physicians are required to explain to the child’s parents or guardians the outcome of the medical examinations and whether the evidence points to the child’s gender in order to keep them well informed.

There has been a number of *fatwās* made by the *Fatwā* Committee of the National Council of Islamic Religious Affairs Malaysia (JAKIM) concerning the permissibility of genital alteration surgery in patients with DSD. The latest one is from November 2006 that formulated as follows (Ani & Zaleha, 2016; JAKIM, 2016):

1. For those with 46, XX CAH reared male, gender reassignment surgery to return to being female is permitted in Islam because it can be treated by hormone treatment therapy and surgery;

2. For those with 46, XY AIS reared female, returning to the male gender through surgery or hormone treatment therapy is quite difficult. If the patient intends to undergo surgery, it is permitted, provided that the surgery does not harm the patient psychologically or biologically;
3. For those with 46, XY AIS reared female, but diagnosed only after the person has already grown up, the person can continue a normal life as the gender is recognized from his/her body builds and the appearance of the genitalia. Surgery to remove the testes (if any) is permissible to prevent the risk of cancer. The marriage of a man with a female spouse who suffers from 46, XY AIS does not need to be dissolved; and
4. Medical specialists should provide enlightenment and guidance to Muslim individuals who are affected by CAH and AIS and their parents to undergo treatment in any way that avoids any difficulty with religious regulations.

As above, JAKIM's *fatwā* focuses more on two of the most common type of DSD, which are Congenital Adrenal Hyperplasia (CAH) and Androgen Insensitivity Syndrome (AIS). Their *fatwā* allows for surgery and hormonal treatment to neutralise the effect of CAH, but it states that to revert the effects of AIS was much more difficult. This means that medical treatment could erase male characteristics in a woman with DSD, but to erase female characteristics in a male affected by AIS is almost impossible (Al-Bakri, Interview 21 December 2016). The permissibility of removing the dysfunctional testis (if any) to avoid the occurrence of cancer shows that the strongest reflection of Malaysia's acknowledgment of the existence of a third gender, or *kunthā*, is reflected in the *fatwā* (Jamin, *The New Straits Times*, Sunday, May 29, 2011).

Ethical Gaps in the Fatwās

However, the less ethically restricted juridical pronouncements and their application in practice, are subjected to some ethical queries, including:

1. Imprudence in the early interference

As to the intersex's complexity, the assistance of medical experts is helpful to determine the status of the intersex. Nevertheless, it is still not sufficient because empirical studies point to paradoxical

outcomes (Zaharuddin, Interview, December 26, 2016). This situation raises the question whether all intersex conditions should be treated as early as infancy or some should be waited and postponed until patients reach puberty to see clearer signs. Taking this issue with jurists, muftis also need to be acquainted with the subject matter of *tahqīq al-manāt* (confirming the legal cause) in Islamic legal theory. According to Dessouky, "... cosmetic appearance is not an adequate indication of a child's real sex." Other factors and layers of the sexuality are also in an account as Dessouky states that, "the chromosomal sex, the gonadal sex, the phenotype, the appearance and function capability of the external genitalia" (Dessouky, Vol.20,2, p. 513). Additionally, when handling cases of females with PAIS and miss assigned male with CAH, especially when they are diagnosed in old age, they need to be thorough when it comes to legalising the removal of the gonads or the uterus (Ibid).

2. Legitimacy of procedure

To date, genital normalising surgery is still debatable either it is classified as a case of "medical emergency" among medical experts. However, this matter should be observed to see or not whether it is justified in Islamic law resort to it in the first place. Hence, Islamic law has to address various jurisprudential and ethical issues such as the legitimacy of removing and reforming of human genitals, amputation of other body parts, transplantation to reform human genitals, repeating the same protocol until it recreates almost new functioning external and internal sex organs aside from the application of hormone therapy. These procedures are without a doubt essential and necessary to be reviewed as it involves mutilation of inviolable human body parts or known as *muthlah* of protected human soul (Shomali, 2016). According to Humaish, this act is prohibited by the Prophetic tradition (*Sunnah*) as human genitals are considered as privileges and are private in Islam. Thus, doing it more than one time leads to torture, shame and emotional scars (*ÖarÉr adÉbÊ* and *jasÉdÊ*) to the child (Haneef and Zuhdi, 2015, p. 818). Additionally, early surgery and constant hormonal therapy traumatises the child psychologically (Ani, Interview: December 30, 2016). Thus, Islam prohibits such assaults on children and considers it as a kind of harm due to surgery normalisation. This is supported by two Islamic legal maxims namely, "harm must be

avoided” and “certainty cannot be removed by doubt”. However, the situation of *ḍarūrah* (medical necessity) to the infants makes it tolerable. This is supported by the maxim, “*al-ḍarūrāt tubīḥ al-mahdhūrāt*” which means “necessity overrides prohibition”.

3. Paradoxical and uncertain outcomes

The documented outcomes from the success rate of sexual alteration surgery of intersex conditions are still debatable and subject to controversy. Allowing it in Islamic law unintentionally opens a room for its approval for the transgendered to do sex alteration surgery, which jurists in principle so vehemently oppose (Haneef and Zuhdi, 2015, p. 819). The scenario arises in a situation when they may advise a non-professional that his new-born child with male genitalia is a boy and allows for him to undergo genital alteration surgery. However, when he reaches puberty, the outcome becomes the reverse and he yields into feminine characteristics (Ani, Interview: December 30, 2016). In fact, the reversal surgery is technically sex alteration for a transgender. The studies suggest that this will become a clinical reality in the cases like intersex with 5-ARD and CAH conditions. Hence, according to Ani and Zaleha, in Malaysia the surgeries are performed in accordance with the *fatwās* issued in Malaysia (2016). Nevertheless, there is no real ethical basis to govern intersex surgery and hence, in the case of the paradoxical outcomes, it can condone sex reassignment surgery for transsexuals.

4. Opens avenue for sex selection

In view of cultural preference of male gender as a sociological variable in most Muslim societies, gender selection with its negative demographic consequences for society in terms of imbalance in gender ratio is another ethical issues needs to be carefully examined. Even in a multicultural society like Malaysia, gender preference is a reality in the case of some sections. For instances, Kuhnle and Krahl state that, “it was never difficult to persuade a Muslim family to assign a severely masculinize girl or a feminized boy to the female gender. This was not the case for Chinese and Indian families, who on several occurrences took off with their ambiguously born child when female sex alteration was suggested” (Kuhnle and Krahl, 2002, Vol.45, p. 85–103). According to Ani and

Zaleha, “the reason is that in Malaysia, Malay Muslim women are allowed to inherit and control their own money, when divorced, or widowed, a woman’s fortune remains under her control, allowing her to be a liberated woman. It was their notion that within the Chinese and Indian’s racial communities of Malaysia, much more prestige is connected with the male role and greater position to the male descendants in family lineage, akin to the circumstances in India and China”(2016).

Male-bias on the part of Muslims is a general phenomenon in countries like Saudi Arabia, Turkey, and Egypt ((Taha, 1994, Vol.43, pp. 370–374; Ozbey *et al*, 2004: Vol. 94, 3, p. 388-91). Most prefer alteration of their intersex baby to the male gender regardless of gonadal makeup, karyotype and fertility potential due to dominant role of males in society. In India and Pakistan, a child with an intersex condition is more likely to be nurtured as a male simply in order to guarantee a better future for him when he grows up (Warne & Raza, 2016). Thus, culture plays an important role in the gender determination of patients with intersex development. In managing Muslim patients with intersex conditions, it is important not to focus solely on the medical and psychological angle, but also to acknowledge the culture and religious aspects in communities where religion plays a large part in the daily lives of the individual and the family(Al Jurayyān, 2011; Dessouky, 2001; Warne and Raza, 2008).

In view of the above, some suggests that the Malaysian Islamic authority such as muftis and JAKIM should reassess the prime ethical framework for the legitimacy of the management for intersex patients in Malaysia. Hence we agree with the propositions that (Haneef and Zuhdi, 2015, p. 828):

1. Concentrate on prenatal diagnoses and try to find a solution to it with medical intervention, as it is less offensive in the fetal phase.
2. Return to the principled merits of the classical juristic theory of managing hermaphrodites. Parents should be recommended to delay medical intervention their children. Intervention at infancy poses the risk of having children with adult sexual disorder conditions, namely the transgender, which is more challenging

than a *kunthā mushkil* in terms of social commingling in Muslim culture.

3. Decide on the gender of the intersex during infancy to ensure a more the satisfactory outcome and future.

Conclusion

In light of what we discussed, the impression that the existing *fatwās* need to go beyond simplistic use of *hadīth* on permissibility of medical treatment to endorse biomedical issues such as the question of sex alteration medical interference albeit with minimum or generalised legal stipulation. The reason is twofold: first, intersex is a complex human condition; second, clinical diagnoses and the existing medical measures are not full proof for remedying this condition. Without detailed guidelines addressing different dimensions of the issue, clinical decisions on intersex medical management not only results in sex selection but also land the jurists and muftis onto the dilemma of dealing with the aftermath of failed medical interference. The reason is that since as a matter of standard practice, its procedure starts as early as when the baby is three months old, and upon growing up, the intersex would exhibit traits opposite of his/her assigned sex. Consequently, this would blur the line of distinction between *khunthā* and *mukhannath*, for the latter of whom the *Sunni* jurists overwhelmingly oppose sex change surgery (transgender).

References

- Al-Bahūṭī, Maṣṣūr ibn Yūnus. (1997). *Kashhāf Al-Qinā' 'alā Matn Al-Iqna'*. Bayrūt: 'Ālam al-Kutub.
- Al-Bār, M. Ali. (n.d.). *Mushkilāt al-Khunthā bayn al-Ṭibb wa al-Fiqh. Majallāt Majma' al-Fiqhī al-Islāmī*, Vol.6. at www.alkhaghani.com(accessed 28 November, 2016).
- Al-Farāhīdī Abu 'Abd ar-Raḥmān al-Khalīl ibn Aḥmad. (2003). *Al'aīn*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.
- Al-Farādī. (n.d.). *Hal yajūz al-zawāj min al-khunthā Hal yajūz tazwaj al-khunthā?* at <http://alfaradi.com/showthread.php?210>(accessed 3 December , 2016).
- Al-Fayrūzabādī, M. Ya'qub. (1887). *Al-Qāmūs al-Muḥīṭ*. Bayrūt: al-Mu'assasah al-'Arabiyah lil- lil-Dirasāt wa-al-Nashr: Mihwar al-Shi'r.

- Al-Jurayyan, Nasir A.M. (2010). "Ambiguous genitalia, two decades of experience: clinical management and sex assignment," *Journal of Taibah University Medical Sciences*, Vol. 5: 13-20.
- Al-Jurjānī, al-Sharīf 'Alī. M.(1988). *Kitāb al ta'rifāt*. Bayrut: Dār al-Kutub al-'Ilmiyyah.
- Al-Kāsānī, 'Alā' al-Dīn Abū Bakr ibn Mas'ūd al-Kāsānī.(1986). *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'i'*. Bayrūt: Dār al-kutĒb al-'lmiyyah.
- Al-Khaqānī. (n.d.). *al-Khunthā bayn al-Ṭibb wa al-Fiqh*." at www.alkhaghani.com(accessed 28 November, 2016).
- Al-Khurasī, Muhammad ibn Abdullah . (n.d.) *Sharh Mukhtasār al-Khalīl*. BayrĒt: Dār Ṣādir.
- Al-Nawawī, Yaḥyā ibn Sharaf. (2003). *Al-majmū'*. Riyād: Dār al-Bayrūt.
- Al-Sarakhsī, Muhammad ibn Aḥmad ibn Abū Sahl. (1989). *Al-Mabsūt*. Bayrūt: Dār al-Ma'rifah.
- Al-Zailā'i, Uthmān ibn 'Ali. (1896). *Tabyīn al-Haqā'iq Sharh Kanz al-Daqā'iq*. Egypt: Bulaq.
- Ani Amelia Zainuddin & Zaleha Abdullah Mahdy. (2016.)."The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development," *U.S. National Library of Medicine*. at <http://www.pubpdf.com/pub/27102604/>(accessed 23 November , 2016).
- Bushiah. M. Shaf'i Miftah .(2008). *Jirāhāt al-Dhukārāh wa al-Unāthah fi daw' al-Ṭibbwī al-Fiqh al-Islāmī*. BayrĒt: Dār al-Falāī.
- Dessouky, Nabil M. (2001). "Gender Assignment for Children with Intersex Problems: An Egyptian Perspective," *Egyptian Journal of Surgery*, 20(2): 499-515 at <http://www.researchgate.net/publication>(accessed 6 October , 2016).
- Haneef, Sayed Sikandar Shah & Zuḥdi, Mahmood Haji Abd Majid. (November 2015). "Medical Management of Infant intersex: Juridico-ethical Dilemma of Contemporary Islamic Legal Response," *Journal of Religion & Science*, 50(4): 801-815.
- Ibn Majah, Muhammad ibn Yazid. (n.d). *Sunnan Ibn Majah*. Beirut: BayrĒt: DĒr iĪya' al-turĒth al-'arabi.
- Ibn Manzūr, Muhammad ibn Mukarram. (1996). *Lisān al-'Arab*. Bayrūt: Dār Ṣādir.
- Ibn Qudāmah, Mawaffaq al-Dīn Abdullah ibn Ahmad. (n.d). *Al-Mughnī*. Riyād: Dār 'Ālim al-kutub
- JAKIM. (n.d.). Penentuan Jantina Bagi Ambiguous Genetalia Dan Testicular Feminisation. *e-fatwā*. at <http://www.e-fatwā.gov.my/fatwā-kebangsaan/>

- penentuan-jantina-bagi-ambiguous-genitalia-dan-testicular-feminisation-syndrome#tabset-tab-3(accessed 3 August , 2015).
- Judith E., Owen Blakemore & Sheri A. (2009). *Gender development*. New York: Psychology Press.
- Kuhnle, U & Wolfgang K. (2002). "The impact of culture on sex assignment and gender development in intersex patients" *Perspectives in Biology and Medicine*, Vol.45,1: 85-103.
- Ozbey H., Darendeliler F, Kayserili H, Korkmazlar U & Salman T. (2004). Gender Assignment in Female Congenital Adrenal Hyperplasia: A Difficult Experience. *National Center for Biotechnology Information*, Vol.94, 3: 388-91.
- Satiman Jamin. (2011). *Some sexual identity disorders untreatable*. *New Straits Times, Sun*. at <https://groups.google.com/forum/#!topic/transgender-news/wXOdU6hx-G4>(accessed 12 October, 2016.).
- Syed Jaymal Zahiid. (n.d.). *Human rights a facade to destroy Islam, says JAKIM in Friday sermon*. *Malay Mail Online*. at <http://www.themalaymailonline.com/malaysia/article/human-rights-a-facade-to-destroy-islam-says-JAKIM-in-friday-sermon#sthash.Rp3MqOYo.dpuf>(accessed 14 November , 2016).
- Taha, S. A. (1994). "Male pseudohermaphroditism: Factors determining the gender of rearing in Saudi Arabia," *Urology*, Vol.43: 370–374.
- Vardit Rispler-Chaim. (2003). *Disability in Islamic Law*. Netherland: Springer Science & Business Media.
- Warne & Raza. (2008). Disorders of sex development (DSDs), their presentation and management in different cultures. *National Center for Biotechnology Information*, Retrieved December 3, 2016. <https://www.ncbi.nlm.nih.gov/pubmed/18633712>

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- Dr. Ani Amelia Zainuddin, a doctor at Department of Obstetrics and Gynaecology of Universiti Kebangsaan Malaysia Medical Center (PPUKM), 30 December 2016
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ISSN 0128-4878 (Print)

ISSN 2289-5639 (Online)

