

The MENA Trans Archives Series: Understanding Modern Fiqh on Intersex and Transgender People in the Middle East and North Africa Region

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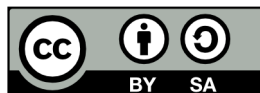
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Abstract



Islamic Fiqh (Jurisprudence) largely governs the lives of transgender and intersex individuals in the Middle East and North Africa region. Since early Islamic times, scholars have developed distinct Fiqh on non-binary gender/sex identities, categorising them into social identities such as Mukhannathun and biological identities such as Khuntha. The treatment of these identities differed, as most scholars agree that social identities should not be accepted and that individuals belonging to them should be called upon to repent and return to their binary assigned sex at birth. Meanwhile, biological identities were seen as a creation of Allah that humans should not object to. Therefore, biological identities were somewhat more accepted, with specific Fiqh rules developed for them. However, this acceptance was limited, as individuals were still expected to adhere socially to one of the two binary sexes. In modern times, the issue of non-binary gender/sex identities resurfaced with advancements in medical treatments that allow individuals to transition to a sex other than the one assigned at birth. Scholars aiming to maintain the social-religious binary sought to regulate the matter by examining the medical necessity for both social identities (i.e., transgender) and biological identities (i.e., intersex). All scholars treated both identities as individuals with illnesses, whether mental (for transgender people) or biological (for intersex people). As Muslims must seek cures for their illnesses, scholars began examining potential treatments. In the end, the majority concluded that transgender individuals, who are already biologically within the binary, do not have a medical necessity to undergo gender-affirming healthcare and should instead be directed towards therapy to address their mental disorder. For intersex individuals, sex reassignment surgeries were seen as an ideal way to align them with the binary and assign them their actual socio-religious sex role. This modern Fiqh, with its various interpretations, serves as the basis for how laws and policies interact with transgender and intersex individuals. Many countries have banned gender-affirming healthcare and promoted conversion therapy for transgender individuals while forcing intersex individuals into sex reassignment surgeries to assign them binary sex medically. This paper investigates the development of modern Fiqh through the analysis of 17 Fatwas issued from the 1980s to the present day. It aims to establish the Fiqh principles scholars used to reach these judgments and outlines how these Fatwas are reflected in practice through codified law and policy or legal precedents in the region's case law on legal gender recognition.

Introduction



In the 1980s, Islamic scholars had the opportunity to engage in the practice of Ijtihad¹, which involved the development of new Fiqh² (Islamic jurisprudence) surrounding the relatively new concept of gender-affirming healthcare or sex reassignment surgeries³. Traditionally, Islamic Fiqh has emphasised the heteronormative binary as the foundation for many of its rules about inheritance, warfare, prayer, fasting, marriage, divorce, and other matters. This binary framework has been significant as each of these rules varies based on an individual's assigned sex at birth (male or female). However, it is essential to recognize that non-binary identities were not wholly absent from early Fiqh. Some identities, such as the Mukhannathun⁴ (effeminate men), studied intensively by scholars, along with Khuntha⁵ (intersex individuals), existed during the time of the Prophet and continued to exist throughout Islamic history⁶. Early Fiqh provided a fundamental distinction between social and biological non-binary identities. Social identities, such as the Mukhannathun and others like Mustrijlat⁷, were categorised as social. At the same time, Khuntha, referring to what is now referred to as intersex people, fell under the biological category. This distinction was crucial in the development of Fiqh, as many scholars interpreted primary sources of Sharia (Qur'an and Hadith) to imply that social non-binary identities are Haram (forbidden) since they are seen as people who were assigned a particular binary sex at birth but choose, against societal norms, to imitate the opposite sex. On the other hand, biological non-binary identities were met with greater acceptance, as Allah's creation is something that Allah's servants should always accept and appreciate. Furthermore, since intersex is a biological condition beyond an individual's control, they cannot be condemned for it⁸.

Over the centuries, differing interpretations of Fiqh emerged, with the primary objective being the preservation of the heteronormative binary. Consequently, when addressing social non-binary identities, scholars adopted a more advisory approach, aiming to guide them towards accepting and conforming to their assigned binary sex rather than imposing explicit punishments, as seen in cases of sodomy, for instance. Concerning intersex individuals, scholars attempted to find ways to fit them into the binary framework. This involved waiting until puberty to determine which sex characteristics would develop, examining various indicators such as the individual's urinary orifice, or even counting their ribs⁹. All these methods were devised under the belief that it was the duty of scholars to assist intersex individuals in attaining binary sex, which would enable them to fulfil their religious obligations, according to Fiqh. Hence, fundamentally, Islamic scholars aimed to erase both social and biological non-binary identities by employing different means to convince individuals to align themselves with the binary system. When practising Ijtihad in the 1980s, modern scholars held concerns about the potential effects of new medical treatments on society. Specifically, there was apprehension that these treatments would lead to individuals changing their assigned sex at birth without regulation, thereby disrupting the established binary Fiqh and societal foundations. Consequently, numerous Fatwas (religious rulings) were issued during this time to address the question of which criteria should be met for individuals to access such treatments or, in other words, who should be considered eligible

1 The process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalizes law on the basis of the Qur'an and the Sunna.

2 Fiqh is Islamic jurisprudence. Fiqh is often described as the human understanding and practices of the sharia, that is human understanding of the divine Islamic law as revealed in the Quran and the sunnah.

3 Tolino, Serena. "(g) Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas". *Journal of Arabic and Islamic Studies* 17 (2018):223-46. <https://doi.org/10.5617/jais.6116>

4 Mukhannath (Pl. Mukhannathun), defined as «men who take on the role of women»; or «men who imitate women in their dressing, talking and attitude.»

5 Khuntha (Pl. Ahnāt) encompasses a range of definitions as presented in Arabic dictionaries, thereby highlighting the intricate nature of the term. These definitions encompass individuals who are born with both male and female reproductive organs, individuals who possess ambiguous sexual characteristics regarding their reproductive origins, and individuals who lack male or female genitalia and urinate through a distinct opening.

6 «دكتور بادشاه رحمن سيد مقصود الرحمن.» *Al-Idah* 31, no. 2 (2015): 303-325.

<http://www.al-idah.pk/index.php/al-idah/article/view/176>

7 Mustrijla (Pl. Mustrijlat), the female version of the Mukhannath. Mustrijlat are «women who take on male clothing, talk, and attitude.»

8 Almarri, Saqer. «Identities of a single root: The triad of the khuntha, mukhannath, and khanith.» *Women & Language* 41, no. 1 (2018): 97-109.

9 Uddin, M. Inheritance of Hermaphrodite (Khuntha) under the Muslim Law: An Overview. *Beijing Law Review*, 8 (2017): 226-237.

<https://doi.org/10.4236/blr.2017.82013>

for these treatments¹⁰.

Considering the longstanding tradition in Fiqh of distinguishing between social and biological non-binary identities, scholars welcomed these new surgeries with excitement for intersex individuals. These surgeries offered a means for intersex individuals to physically and biologically obtain their “true binary biological sex” instead of relying on outdated methods. However, transgender individuals who were seen as mentally ill did not qualify to access these treatments. The rationale behind this distinction is that mental illness does not justify changing one’s assigned sex at birth. Unlike intersex individuals, transgender individuals do not have a biological necessity to transition and thus should seek therapy rather than surgery to find ways to revert to their assigned sex¹¹.

While this reasoning became dominant in the emerging Fiqh, there were a few scholars, most notably Iran’s Khomeini (d. 1989¹²), who followed a similar logic but disagreed on the treatment of transgender individuals. This camp acknowledged gender identity disorder as a mental illness that cannot be cured through therapy alone, requiring surgical intervention as well. Therefore, if a competent doctor determines the necessity of surgery and the individual is expected to successfully transition into their new binary sex while fulfilling all social and religious duties and roles, gender-affirming healthcare should be permitted for them¹³. Nevertheless, the newly established Fiqh from the 1980s until now did not recognize the existence of transgender or intersex identities outside the binary. Instead, these identities were pathologized, whether through therapy or surgery, reflecting a desire among scholars to uphold the heteronormative binary above all else.

This study aims to delve into this Fiqh further by analysing key Fatwas from the 1980s to the present day. It seeks to elucidate the fundamental Fiqh principles that have emerged from these Fatwas and the fundamental principles that scholars have employed or investigated through the practice of Ijtihad to arrive at their conclusions.

10 Alipour, M. « Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmīc Theology of a Third Gender», *Religion and Gender* 7, 2 (2017): 164-179, doi: <https://doi.org/10.18352/rg.10170>

11 Noralla, Nora. ‘Gender Trouble in the Land of the Nile: Transgender Identities, the Judiciary and Islam in Egypt’. *Yearbook of Islamic and Middle Eastern Law Online* 1, no. aop (2023): 1–37. <https://doi.org/10.1163/22112987-20230052>

12 Ayatollah Ruhollah Musavi Khomeini was an Iranian Islamic revolutionary, politician and religious leader who served as the first supreme leader of Iran from 1979 until his death.

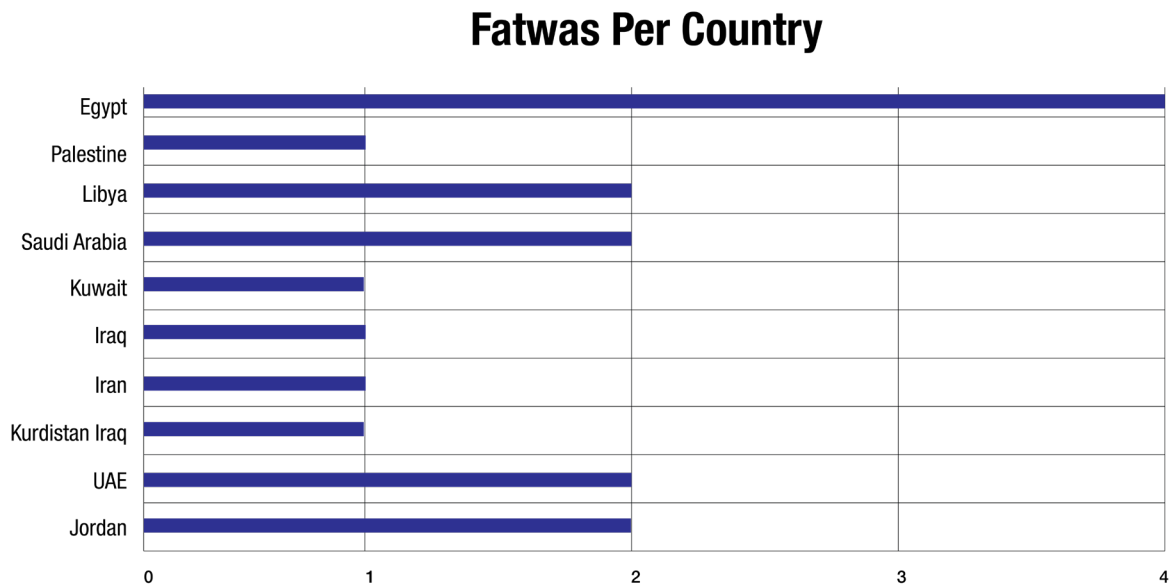
13 Saeidzadeh, Zara. ‘Transsexuality in Contemporary Iran: Legal and Social Misrecognition’. *Feminist Legal Studies* 24, no. 3 (1 November 2016): 249–72.

Methodology and Visualisation of Data



The research being presented here constitutes a significant aspect of the MENA Trans Archive project, which stands as the inaugural open-access database dedicated to the examination of transgender law, Fatwas, policies, and case law within the Middle East and North Africa (MENA) region¹⁴. [The Cairo 52 website](#) affords access to all of the Fatwas discussed throughout this research. The author of this study relied upon a variety of resources in order to identify the Fatwas that have been presented, including the websites of Islamic authorities from various countries within the region, Fiqh books, media outlets, and the websites of esteemed scholars. In total, a sum of 17 Fatwas has been successfully identified, with their distribution as follows:

Figure 1: Distribution of Fatwas Per Country N= (17)



Sunni Islam and Shia Islam, each consisting of various schools of thought known as Madhabs. Considering that most countries in the MENA region have a Sunni majority, it is not surprising that 15 out of the 17 identified Fatwas were issued by Sunni scholars. The entity responsible for publishing the Fatwas plays a crucial role in how they are perceived. The level of reverence and respect accorded to the scholar or institution determines the extent to which the Fatwa is accepted by the public. While each country in the region has its own local Islamic authority, commonly referred to as Dar Al-Ifta, there are also local Islamic authorities or scholars whose Fatwas have a broader impact beyond their respective countries. For example, Egypt's Al-Azhar¹⁵ and its scholars are widely regarded as a great source of Sunni scholarship, and their Fatwas often serve as guidance for scholars in other Sunni countries when addressing particular issues. Saudi Arabia's Islamic Fiqh Council¹⁶ also fulfils a similar role, with the difference being that this entity is pan-Islamic, comprising scholars from various Sunni countries responsible for issuing Fatwas. On the other hand, for the Shia community, Iran's Khemoini's Fatwas can be considered a scholarly reference for many, both within Iran and in countries with significant Shia populations.

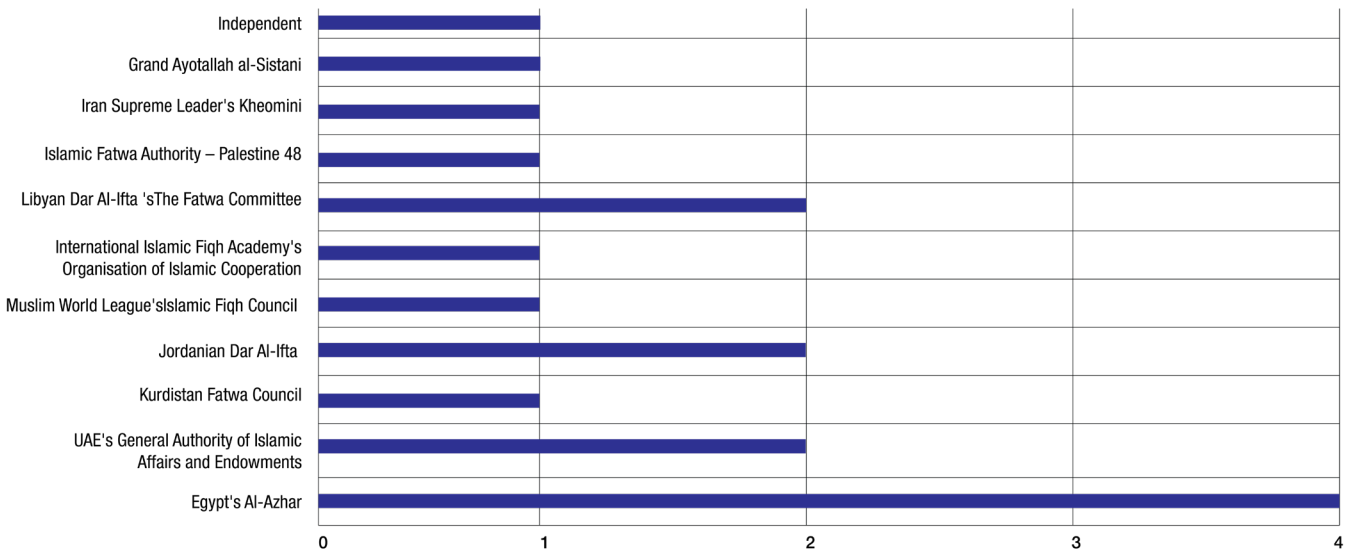
Figure 2: Distribution of Fatwas by Issuer's Affiliation:

¹⁴ The focus of this study is Muslim majority Arabic speaking countries within the MENA

¹⁵ Al-Azhar Al-Sharif is an Islamic scientific body and the largest religious institution in Egypt. It was founded in 972 A.D. and is considered to be one of the oldest Islamic schools of Fiqh and holds a great religious position within the Sunni world.

¹⁶ The Islamic Fiqh Council is an affiliate of the MWL with an independent legal personality. It was founded by a resolution of the Constituent Council in the year 1398H, and is made up of a select group of Muslim jurists and scholars who meet periodically to consider serious issues concerning the Muslim Ummah and issue appropriate rulings based on the texts of the Holy Qur'an and the immaculate Sunnah.

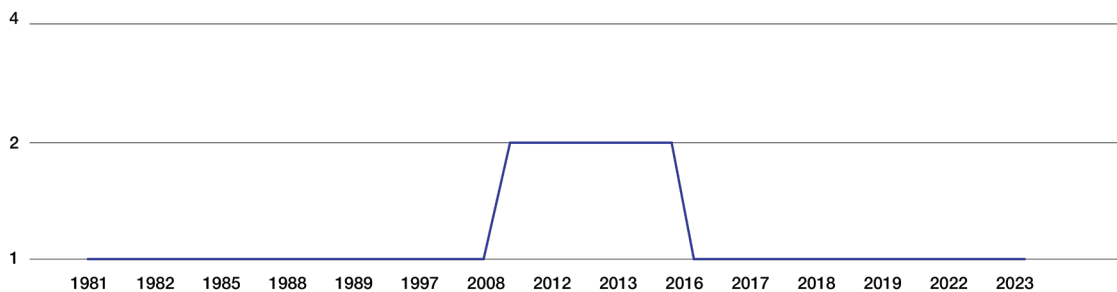
Affiliation of Fatwas Issuer



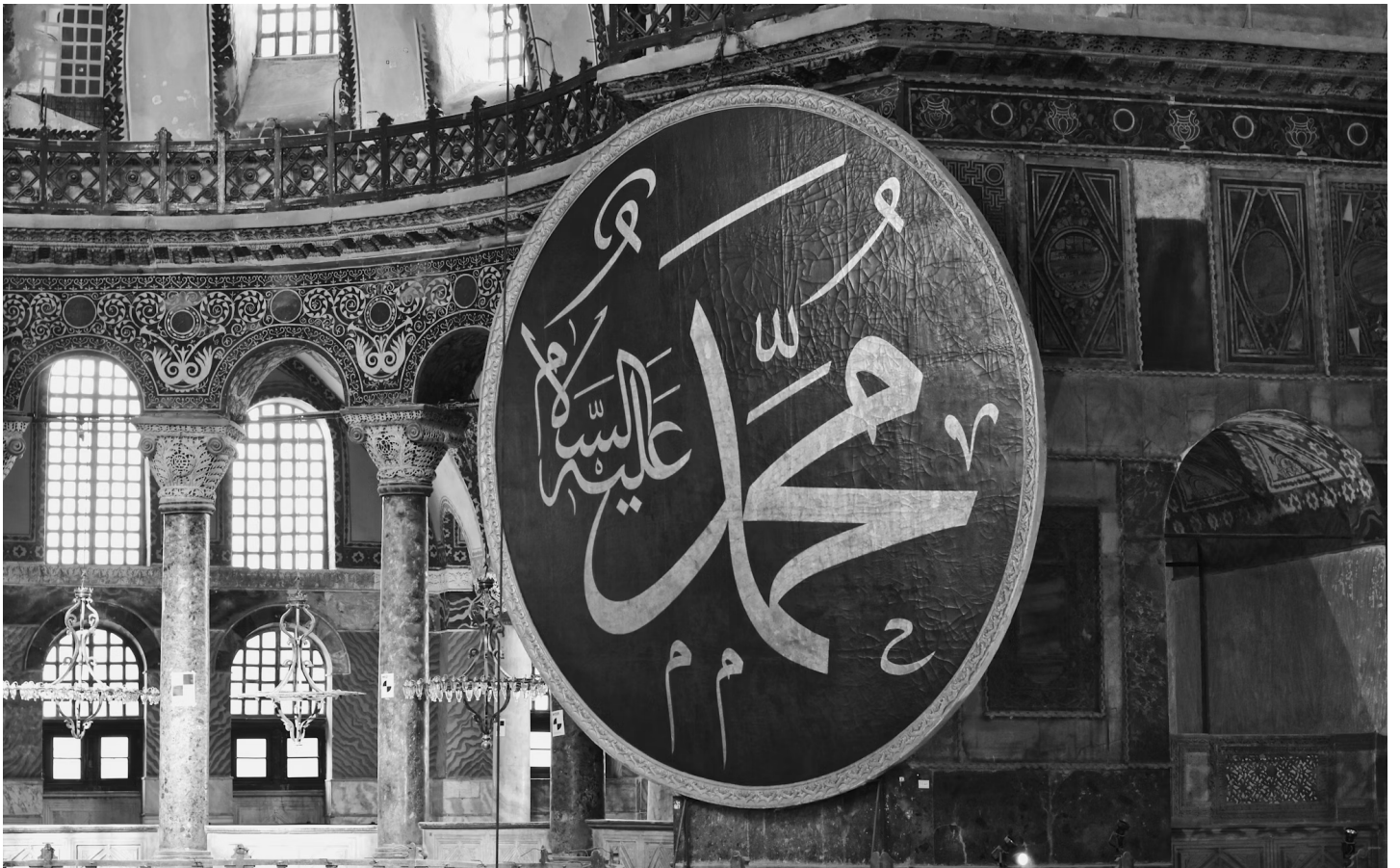
As mentioned previously, the emergence of Fatwas on gender-affirming healthcare or sex reassignment surgeries can be traced back to the 1980s, with 25% (N=4) being issued during that period. However, there has been a resurgence in Fatwas in the past decade, with 62.5% (N=10) being issued from 2010 onwards. During the 1980s, these Fatwas were exclusively issued by three entities: the Saudi Arabia Islamic Fiqh Council, Egypt’s Al-Azhar, and Iran’s Khomeini. The resurgence can be attributed to the increasing visibility of transgender individuals globally, which prompted local Islamic authorities, who had not issued their own Fatwas on this matter in the 1980s and 90s, to reexamine the issue and issue new Fatwas that aligned with the older ones, rather than challenging the established Fiqh narrative. Except for two Fatwas (2 out of 17), all others do not recognize gender identity as a valid reason for transitioning. Instead, they advocate for forcing transgender individuals into conversion therapy and prohibit them from accessing gender-affirming healthcare while obligating intersex individuals to do so.

Figure 3: The Year Fatwas Were Issued (N=16)

Fatwas Per Year



Examples of the Fatwas



To further elucidate the linguistic aspects of Fatwas, the author provides four specific Fatwas (two Sunni and two Shia) that serve as authoritative sources for scholars interested in exploring the subject matter.

3.1. Sunni Jurisprudence: Gad Al-Haq's Fatwa 1981:

The first Fatwa is attributed to Gad Al-Haq (d. 1996)¹⁷, former grand Imam of Al-Azhar in Egypt. This Fatwa, which was issued in 1981, can be regarded as the inaugural modern Sunni Fatwa on the aforementioned topic. It was solicited by a Malaysian citizen seeking guidance on transitioning and was initially addressed to The Islamic Centre of Research in Malaysia. However, due to the centre's lack of expertise in issuing Fatwas on this particular matter, they directed the individual to Al-Azhar. The Fatwa itself stipulates:

Usama ibn Sharik says: "A bedouin came to the Prophet (ﷺ) and said: 'O, Messenger of Allah, can you cure?'" The Prophet (ﷺ) replied, 'Yes, for Allah did not send a disease without sending a cure for it, knowing it from His knowledge.'" This [Hadith] is told by Ahmad [ibn Hanbal]. Another version of the Hadith: "Some Bedouins said: "O, Messenger of Allah, can you cure?". The Prophet (ﷺ) replied: "Yes. Allah's servants can cure themselves, for Allah never gave a disease without providing a cure or medicine for it, except for one disease." They asked, "O, Prophet of Allah, what disease is that?" He replied, "old age." Told and authenticated by Ibn Magueh, Abou Dawood, and Al-Tormuthey (Muntaqi I-Akhbar Wa Sharhan by Neel Al-Awtar by Al-Shawkani L.8 P.200). Another Hadith told by Gaber who said: "The holy prophet of Allah sent a doctor to Ubayy ibn Ka'bKa'b to treat him. The doctor cut off a vein from him, then cauterised it" This [Hadith] is told by Ahmed [ibn Hanbal] and Muslim [ibn al-Hajjaj] (Previous reference P.204)

Another [Hadith] from Arfaga who lost his nose in Al-Kulab War: "My nose was injured in Al-Kulab War, so I made a new nose from paper (sliver), but it became stinky. So, the holy Prophet (ﷺ) ordered me to replace it with a nose made from gold" (Authenticated by Al-Tormuthey and explained by Ibn Al-Arabi Al-Maleki L.7 P.269-270 first edition. The Egyptian Bahia Press in Al-Azhar in the year 1350 AH - 1931 A.D.). Ibn' Arabi explained this Hadith, saying that what is forbidden (gold) can be permitted when necessary for medical treatment.

Another Hadith from Urwa ibn al-Zubayr, says that Zainab bint Abi Salama told him that: "Umm Salamah told her that the Holy Prophet came into her house while a Mukhannath (effeminate man) was inside the house. The Holy Prophet says there is no sin on those who are naturally born Mukhannath. However, they are obligated to attempt to remove themselves from such status. Those who insist on being in the Mukhannath status are reprehensible." (Authenticated by Al-Bukhari, with the explanation of Irshad Al-Sari, by Al-Qastalani, vol. 7, p. 1460. sixth edition. The Amiri Press in Bulaq 1305 AH with Al-Nawawi's commentary on Sahih Muslim in the chapter on expelling imitating women from homes).

From Fath Al-Bari explained from Al-Bukhari (L.9 P.273. Edition printed in 1348. The Egyptian Bahia Press in Al-Azhar in Al-Azhar) from Ibn Hagar Al-Asqalani's Chapter on effeminate men: "Men who adopt feminine talking and walking are only cursed when they intentionally do it out of enjoyment and insist on such behaviour, although being obligated to abandon this cursed behaviour. If they are naturally born with this behaviour, they must leave this addiction gradually. Those born Khuntha are not blamed for their behaviour, although they should attempt to leave their effeminate ways of walking and talking after receiving treatment, even if gradually. If they do not do so without an excuse, then they are to blame." Al-Tubri inferred that the Holy Prophet (ﷺ) did not ban the Mukhannath from entering women's rooms until he heard a Mukhannath describe the women's looks and bodies to men in detail; then, he forbade him from entering. This means there is no blame

¹⁷ Gad al-Haq Ali Gad al-Haq also spelled Jadd al-Haqq was Grand Imam of Al-Azhar from 1982 to 1996.

on those born this way.

The jurisprudence evolving from these [Ahadith] and others that talked about medication allows for sex change surgery for a man to transition into a woman and vice versa, only when a doctor concludes that there are biological necessities to do so to reveal what is hidden from female or male organs. These surgeries are permissible as they uncover hidden organs to treat a physical ailment, which can only be treated with this kind of surgery, as mentioned in Ubayy ibn Ka'ba's [Hadith], where a part of his body was cut to treat him.

This is also supported when reading the explanations from Al-Qastalani and Al-Asqalani, who concluded that the Mukhannath should seek treatments to remove their feminine behaviour.

Furthermore, what came in the words of Fath Al-Bari proves that there is an obligation on Mukhannath to get treated to remove his femininity; this treatment may be with surgery, as it might be the best solution. However, surgery is not allowed out of mere wish but only out of medical and physical necessity. Those who do the surgery without these conditions are subject to the [Hadith] told by Al-Bukhari from Anas, who said: "The Prophet cursed those men who are effeminate (Muhkannathen), and women who imitate men (Mustrijlat) and ordered them to be expelled from your homes. The Prophet removed one person, and Omar removed another." Told by Ahmad [ibn Hanbal] and Al-Bukhari (Muntaqi l-Akhbar Wa Sharhan by Neel Al-Awtar by Al-Shawkani L.6 P.192)

To sum it up, it is permissible to do the surgery to reveal what is hidden from the male or female organs, and it is even an obligation once the doctor concludes that this is the best treatment to reveal those organs. However, the surgeries are forbidden if performed out of a mere desire to change one's sex from female to male or male to female. And praise Allah who created and equated and destined and guided. The holy Allah is the all-knower¹⁸.

3.2. Sunni Jurisprudence: Islamic Fiqh Council Fatwa in 1989

The second Sunni Fatwa was issued by the Islamic Fiqh Council of the Muslim World League, an organization that, despite claiming independence, is often regarded as a proxy of the Saudi government. It is frequently utilized to counterbalance the influential Al-Azhar Sunni scholars in Egypt. In 1989, the Council released its Fatwa specifically addressing the topic of Transgenderism. This Fatwa was issued in response to Sally Mursi's case, which has generated considerable controversy not only in Egypt but also within the broader Sunni Muslim community. The Fatwa, titled Resolution Number 6, was promulgated during the Council's 11th session¹⁹:

Praise be to Allah and may the peace and blessings of Allah be upon whom there is not a prophet after, our messenger and prophet peace upon him, Muhammed (ﷺ), and his companions and people. Now then:

At its eleventh session, held in Makkah from Sunday 13 Rajab 1409 A.H., the 19th of February 1989, to Sunday 20 Rajab 1409 A.H., the 26th of February 1989, the Islāmic Fiqh Council of the Muslim World League met to investigate the subject of male to female transition and vice versa, and after research and discussion amongst its members has decided the following:

Firstly, males who have fully grown male organs and females who have fully grown female organs are not allowed to transition to one another. Attempting this transition is a crime that deserves punishment as it is an attempt to change Allah's creation. Allah made it sinful to make such a change, as is pointed out in Satan's words: "I shall order them to alter the creation of Allah."²⁰ "

¹⁸ Fatwa 1288 – Egypt." Cairo 52 Legal Research Institute. Accessed April 17, 2024. <https://cairo52.com/map-posts/fatwa-1288/>

¹⁹ "Fatwa 06 – Saudi." Cairo 52 Legal Research Institute . Accessed April 17, 2024. <https://cairo52.com/map-posts/fatwa-06-saudi/>

²⁰ سورة النساء الآية ١١٩

In the Sahih Muslim book, according to Ibn Masud, “Allah has cursed those women who practice tattooing and those women who have themselves tattooed, and those women who get their hair removed from their eyebrows and faces (except the beard and the moustache), and those who make artificial spaces between their teeth for beauty, whereby they change Allah’s creation.²¹” He added, “Why should I not curse those whom the Messenger of Allah (ﷺ) cursed and who are cursed in Allah’s Book? Allah, the Exalted, has said in His Book” meaning the verse, “And whatsoever the Messenger Muhammad (ﷺ) gives you, take it; and whatsoever he forbids you, abstain (from it).²²”

Secondly, those whose organs have both signs of masculinity and femininity shall be decided on according to what is dominant in their case. If their masculinity is dominant, then it is permissible for them to be treated to eliminate what creates suspicion around their masculinity. If their femininity is dominant, then it is permissible for them to be medically treated to remove what causes supposing around their femininity. Hormonal or surgical treatment is allowed, as this is an illness, and the treatment here is used to cure the disease and not to change Allah’s creation.

Peace upon our Prophet Muhammed (ﷺ) and his companions and people, And Praise be to Allah.

3.3. Shia Jurisprudence: Khomeini’s Fatwas in 1964 & 1986

For the Shia community, Ayatollah Khomeini issued two fatwas regarding “sex reassignment surgeries,” one in 1964 and another in 1986. The interpretation of the first fatwa issued in 1964 remains subject to scholarly debate, as some argue whether it was intended for transgender individuals specifically or if Khomeini’s intention was solely to address intersex individuals. The Fatwa reads:

“It seems that sex-reassignment surgery from male-to-female is not forbidden (harām) [in Islām] and vice versa, and it is also not forbidden for a khunthā under-going it to be attached to one of the sexes [female or male]; and does sex-reassignment surgery become obligatory if a woman finds in herself [sensual] desires similar to man’s desires or some evidence of masculinity in herself—or a man finds in himself [sensual] desires similar to the opposite sex or some evidence of femininity in himself? It seems that [in such a case] if a person really [physically] belongs to a [determined] sex, a sex-reassignment surgery is not obligatory (wājib), but the person is still eligible to change her/his sex into the opposite gender.²³”

The second Fatwa was a concise document issued to Maryam Khatoon, an activist for transgender rights. She had been imprisoned following the Iranian revolution and was subjected to male hormone treatment. However, through her connections, she managed to secure her release and eventually met with Khomeini. Khomeini was deeply moved by her personal account and decided to consult with doctors in order to understand her condition better.

After discussing the matter with medical professionals, it was concluded that transgender individuals suffer from a genuine mental illness that requires both psychological and surgical interventions in order for them to transition and find healing. As a result, Khomeini issued a Fatwa in 1986, which has been widely recognized as the authoritative source that established Iran as one of the few Muslim-majority countries offering subsidised gender-affirming healthcare. However, it is important to note that this healthcare system has its flaws and appears to prioritise the maintenance of a heteronormative socio-religious binary rather than fully recognizing and accepting transgender individuals. The 1986 Fatwa states:

صحيح البخاري تفسير القرآن (٤٨٨٦)، صحيح مسلم اللباس والزينة (٢١٢٥)، سنن الترمذي الأدب (٣٧٨٢)، سنن النسائي الزينة (٥١٠٢)، سنن أبو داود الترجل (٤١٦٩)، سنن ابن ماجه النكاح (١٩٨٩)، مسند أحمد بن حنبل (٣٦٤٧/١)، سنن الدارمي الاستئذان (٤١٦/١).

سورة الحشر الآية ٧

23 Alipour, M. «Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmīc Theology of A Third Gender», Religion and Gender 7, 2 (2017): 164-179, doi: <https://doi.org/10.18352/rg.10170>

“In the Name of God. Sex-reassignment surgery is not prohibited in shari’a law if reliable medical doctors recommend it. Inshāllāh you will be safe and hopefully the people whom you had mentioned might take care of your situation.²⁴”

3.4. Shia Jurisprudence: Al-Sistani Fatwa

The other Shia Fatwa is attributed to the Iraqi-Iranian Grand Ayatollah al-Sayyid ‘Ali al-Husayni al-Sistani²⁵, who, similar to Khomeini, possesses significant religious authority as a prominent scholarly reference for Shia Muslims. On his website, he has issued a Fatwa addressing the topic of “sex change,” although the exact date of issuance remains undisclosed. The Fatwa in question states:

If the intention behind male-to-female conversion is to undergo surgery to remove the penis and create two openings - one for the urethra and the other for sexual purposes - while also administering doses of female hormones to affect the individual’s physical appearance, such as developing breasts and inhibiting beard growth, among other changes, and if the intention behind female-to-male conversion is to grow a prosthetic penis and administer doses of male hormones to achieve a masculine appearance, such as the absence of breasts and beard growth, etc., it should be noted that these methods are ineffective in truly transforming a female into a male or vice versa. Moreover, the necessity for the surgeons involved to examine and handle the private parts without legitimate justification raises ethical concerns.

On the other hand, if male-to-female conversion is accepted as a transformation based on the internal and external reproductive organs that differentiate the sexes, it appears that such sex determination has not yet been achieved, as this is typically the primary distinguishing factor.

It is possible that certain surgeries are performed for individuals with genital deformities. For instance, if someone has a fantasy of being female due to the absence of a visible penis and testicles, a medical examination may reveal the absence of female reproductive organs while possessing an atypical penis and testicles. In such cases, a surgeon might perform a surgery to reveal them or remove excess tissue that resembles a penis, for example. However, it is important to differentiate between this type of surgical intervention and actual male-to-female or female-to-male conversion. Moreover, the importance of preserving bodily integrity should take precedence over superficial considerations and comparisons with secondary aspects, such as societal expectations and discomfort.

Individuals who suffer from psychiatric disorders related to gender identity, such as those assigned male at birth but identify as female (or vice versa), without any physical abnormalities in their genitals, cannot change their outward sexual appearance to that of the opposite sex. Any perceived change would not have a legitimate effect, as legal provisions regarding one’s sex are maintained based on biological criteria.

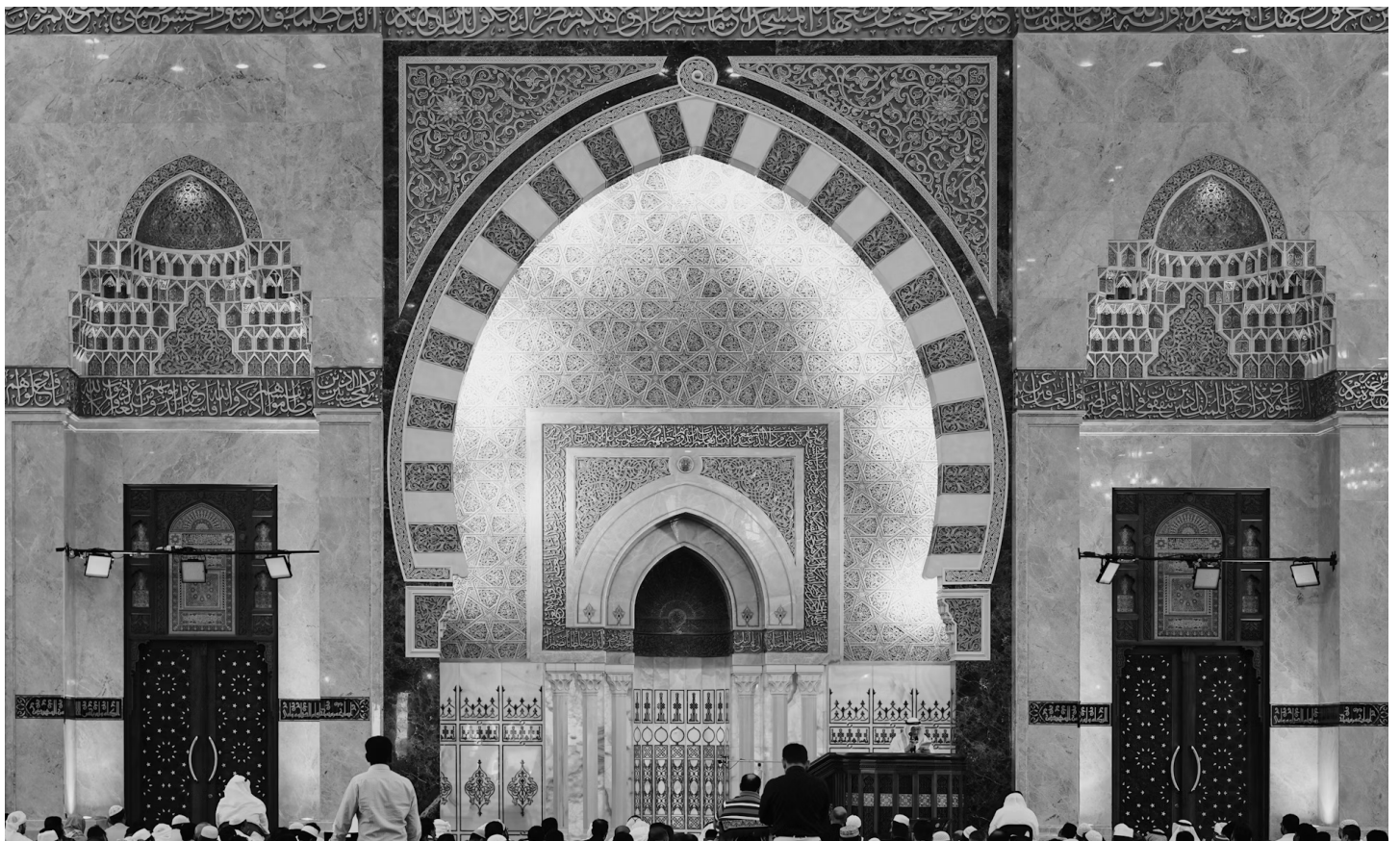
However, experts and specialists can provide assistance to address the psychiatric disorder and alleviate the distress caused by a mismatch between an individual’s gender identity and their assigned sex at birth. Such support should be provided in the same way as for any other medical condition.²⁶

²⁴ Iran Human Rights Documentation Center. (2014, July 30). Denied identity: Human rights abuses against Iran’s LGBT community. Retrieved November 30, 2022, from <https://iranhrdc.org/denied-identity-human-rights-abuses-against-irans-lgbt-community/>

²⁵ Ali al-Husayni al-Sistani is an Iraqi Islamic scholar. One of the most senior scholars of Twelver Shia with the rank of Grand Ayatollah and marja’

²⁶ “Fatwa Ali al-Husayni al-Sistani – Iraq.” Cairo 52 Legal Research Institute . Accessed April 17, 2024. <https://cairo52.com/map-posts/ali-al-husayni-al-sistani-iraq/>

Understanding the Fatwas



The presented Fatwas in this collection and others stored in the database all adhere to a similar logical framework. Firstly, it is essential to note that there is no explicit recognition of transgender or intersex individuals as separate categories in some of these Fatwas. Instead, specific “Western” terminologies are substituted by Islamic alternatives. Transgender individuals are referred to as “Mukhannathun” and “Mustrijlat,” while intersex individuals are referred to as “Khuntha.”²⁷

In some other instances, scholars chose to use descriptions on what they believed “transgender” and “intersex” is. Consequently, transgender individuals are defined as “males with fully developed male reproductive organs and females with fully developed female organs who desire to transition to the opposite sex.” They are also described as “individuals suffering from psychiatric disorders related to sexual identity” or “individuals who imitate the opposite sex and strive to undergo artificial transformation rather than genuine transformation.” As for intersex individuals, scholars employ descriptions such as “individuals with genital deformities”, “those displaying both masculine and feminine characteristics in their reproductive organs”, or “individuals with concealed male or female reproductive organs.” The absence of what scholars consider “Western” or foreign terminology signifies their intention to align with the enduring nature of Fiqh throughout centuries since the emergence of Islam. Thus, the utilisation of Islamic terminology indicates that these scholars recognize that, despite being a relatively new issue, non-binary gender and sex identities have consistently been recognized within Islamic Fiqh.

Regarding the language employed in the Fatwas, most scholars have opted for plain and non-scholarly language to enhance the general public’s readability. However, there are a few exceptions where Fiqh language employing Ahadith (sayings of the Prophet Muhammad) and Quranic verses were more prevalent, such as in the case of Gad Al-Haq’s Fatwa. More straightforward language can be attributed to scholars’ desire to ensure that their Fatwas are comprehensible and not subject to misinterpretation by the general public or non-Islamic scholars. Notably, the early Fatwas issued by Al-Azhar in 1981 and 1988 by Gad Al-Haq and Sheikh Tantawi (d. 2010)²⁸ engendered significant debate within the media, society, and among policymakers due to their highly scholarly language. Some argued that these Fatwas advocated for providing access to gender-affirming healthcare for transgender individuals, contrary to the prevailing understanding.

As a result, subsequent scholars adopted a more straightforward language in their Fatwas, explicitly rejecting the notion of gender transition based on “mental disorder,” i.e., being transgender. As for the Fiqh employed by the scholars in those Fatwas, two main Fiqh principles are being investigated: “Allah created us in our best form and changing Allah’s creation is Haram” and “Necessities allow what is otherwise prohibited.” Therefore, when considering these two principles together, one can understand that, as a general rule, we should refrain from attempting to change Allah’s creation. Some more conservative schools of thought even view women putting on makeup or doing their eyebrows as violating this rule. The second principle is evident in its wording. However, in this case, it can be understood that medical necessity can provide an exception to the general prohibition on changing Allah’s creation²⁹.

About transgender and intersex individuals, scholars applied these two rules by examining the medical necessities that dictate whether they can access treatments that result in changing their sex. The initial Fatwas for transgender people were issued in the 1980s, a time when “Transsexualism” was recognized and accepted as a mental disorder with potential cures by the international medical community. There were primarily two camps: one camp viewed it as a mental disorder that could be cured through therapy alone. In contrast, the other camp believed that therapy alone may not

27 Al-Wer, Enam. «Language and gender in the Middle East and North Africa.» The handbook of language, gender, and sexuality (2014): 396-411.

28 Muhammad Sayyid Tantawy (referred to as Shaikh Tantawy) was Egypt’s grand Mufti between 1986 and 1996.

29 Jean Veneuse, Mohamed. «The Body of the Condemned Sally: Paths to Queering anarca-Islam». Anarchist Developments in Cultural Studies, Volume 2010.1 (2010).
<http://theanarchistlibrary.org/library/mohamed-jean-veneuse-the-body-of-the-condemned-sally-paths-to-queering-anarca-islam.html>.

be effective and that gender-affirming healthcare should be provided to individuals diagnosed with transsexualism³⁰.

Scholars, therefore, began to investigate what they perceived as a mental disorder and relied on the old Fiqh principles of “Mukhannathun” and “Mustrijlat” in the process. First, transgender individuals were seen as entirely male or female, so they were already assigned their correct religious binary role at birth. Secondly, given that the issue here is mental, it would not make sense to treat it with surgeries instead of therapy, as the mental problems only require therapy in their view. These two main reasons, along with the belief held by some scholars that these surgeries are only cosmetic and artificial and do not truly recreate the reproductive system of the opposite sex (preventing them from procreating, for example), led scholars to view a transgender person’s transition as invalid. According to this perspective, they would be changing Allah’s creation without medical necessity, and they should instead seek therapy to heal and revert to their true binary identity rather than undergoing superficial changes.

Meanwhile, intersex individuals were previously regarded by scholars as individuals with a biological condition known as hermaphroditism. Scholars believed that this condition hindered intersex individuals from fulfilling their predetermined religious roles within the gender binary and should, therefore, be rectified to enable better alignment with socio-religious norms. To reflect the notion that surgeries for intersex individuals did not violate the prohibition of altering Allah’s creation, scholars commonly employed the term “correction” rather than “change.” The purpose of these procedures, as perceived by scholars, was to facilitate conformity to the binary construct. Consequently, certain scholars not only permitted but considered it obligatory for intersex individuals to undergo these surgeries, as failure to do so would prevent them from attaining their ideal religious role within the gender binary³¹.

While the aforementioned legal viewpoints prevail in the MENA region, there exist alternative scholarly narratives, as evidenced by Khomeini’s Fatwa, which posits that in cases where therapy alone fails to alleviate the mental distress associated with being transgender, transgender individuals may be compelled to pursue gender-affirming healthcare for the preservation of their spiritual well-being. The allowance for such medical interventions is justified by the belief that denying transgender individuals the opportunity to undergo medical transition could result in significant confusion and disruption, not only for the individuals themselves but also for society at large, as they would continue presenting as a gender incongruent with their assigned sex without having undergone surgeries³².

Similarly, a minority scholarly camp opposes the notion that intersex individuals should be obligated to undergo surgeries to change their sex effectively. According to their perspective, individuals with intersex traits were intentionally created by Allah in this manner, and any interference with their innate sexual characteristics constitutes an intervention against Allah’s will. Therefore, these scholars argue that intersex individuals should be permitted to exist as independent third sex whilst assuming the societal role that most closely aligns with their sexual traits. However, it is essential to note that these contrasting opinions represent the minority viewpoint, as the prevailing legal interpretations within the MENA region mandate surgical intervention for intersex individuals in order to facilitate the attainment of their actual binary sex. Moreover, transgender individuals are denied access to gender-affirming healthcare, instead being encouraged to pursue therapy to uphold their assigned binary sex at birth. Perhaps interestingly, most fatwas do not extensively address punishments for individuals who are intersex or transgender. Instead, pathologization narratives are employed in both cases, often with sympathy, portraying those individuals as “afflicted with an uncontrollable illness³³.”

30 Muhsin, Sayyed Mohamed, Firdaus Yahya, Rasheed Parachottil, Sirajuddin Shaikh, and Alexis Heng Boon Chin. «Sex Reassignment Surgery, Marriage, and Reproductive Rights of Intersex and Transgender People in Sunni Islam.» *Archives of Sexual Behavior* (2024): 1-14.

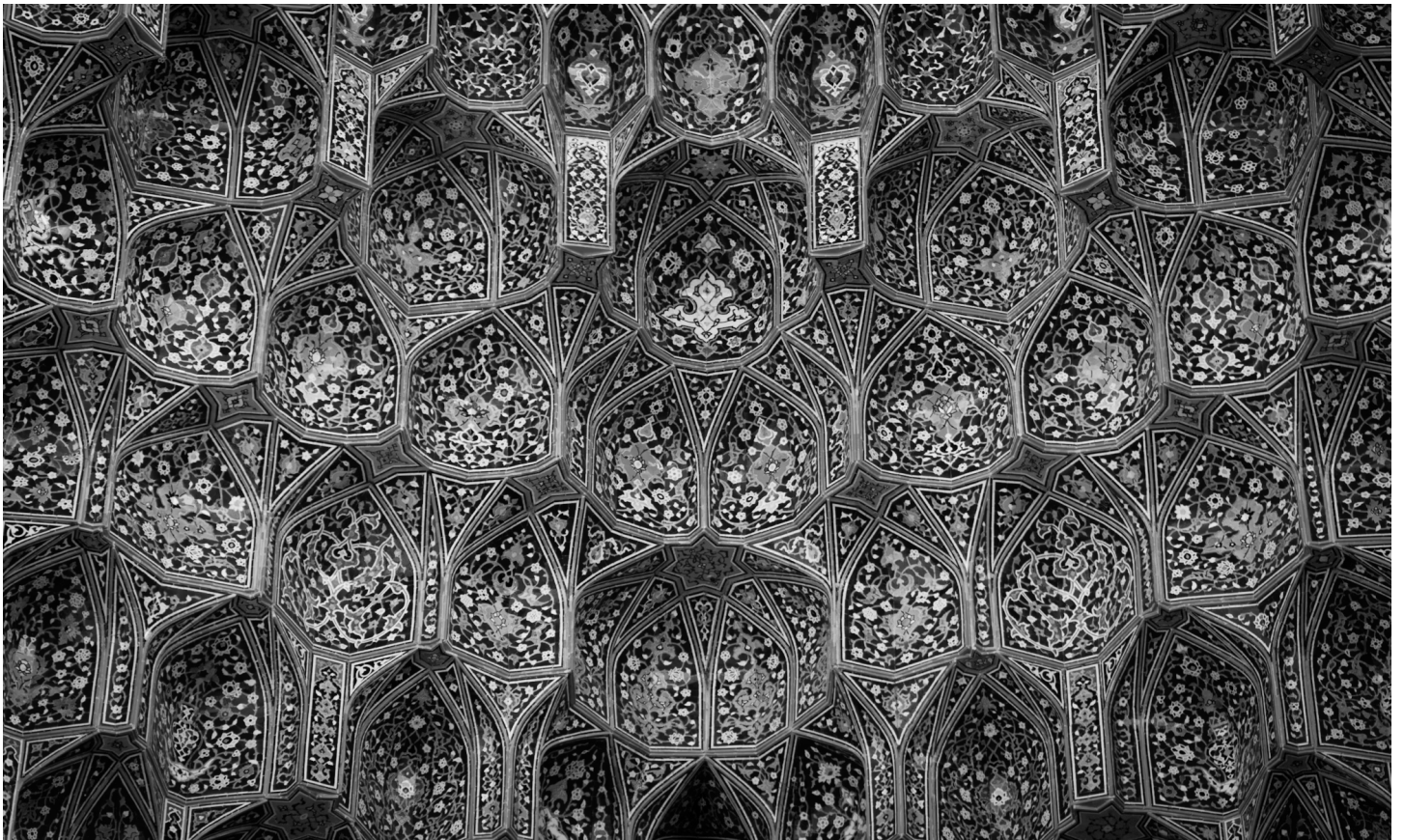
31 Noralla, Nora. «Gender Trouble in the Land of the Nile: Transgender Identities, the Judiciary and Islam in Egypt.» *Yearbook of Islamic and Middle Eastern Law Online* 1, no. aop (2023): 1-37.

32 Ibid

33 Alipour, M. «Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmic Theology of a Third Gender», *Religion and*

Consequently, it is believed that our duty is to guide them towards a cure rather than impose punishments that would hinder their adherence to the prescribed cure, as stated in the fatwas. Nevertheless, even without direct punishment as prescribed in Islamic Fiqh, coercing transgender or intersex individuals into undergoing unwanted “cures” such as forced surgeries or conversion therapy can be considered a form of punishment in and of itself. Furthermore, denying transgender individuals access to gender-affirming healthcare and the potential negative impact it may have on their mental health can also be seen as a punitive measure. Additionally, some fatwas do discuss punishment specifically for transgender individuals who persist in seeking gender-affirming healthcare despite Fiqh’s prohibition, but there are no specific penalties stipulated.

The Fatwas in Practice



In contrast to popular belief, Fatwas primarily hold an advisory role in the contemporary structures of MENA countries rather than serve as binding legislation. For a Fatwa to be effectively enforced by authorities, further codification must be made through legislative measures, policies, or legal precedents. Within MENA policies and laws derived directly from these Fatwas, two key terminologies are frequently encountered: Sex Change/Transition (تغيير الجنس / تحول الجنسي) and Sex Correction (تصحيح الجنس). As previously mentioned, “sex change” commonly refers to gender-affirming healthcare for transgender individuals and is prohibited, whereas “sex correction” generally relates to sex reassignment surgeries for intersex individuals and is deemed permissible within the bounds of this Fiqh³⁴.

Presently, six Arabic-speaking countries within the MENA region, namely Egypt, Kuwait, Oman, the United Arab Emirates (UAE), Jordan, and Saudi Arabia, incorporate this Fiqh into their healthcare policies and laws by utilising various terminologies and imposing restrictions on healthcare providers about gender-affirming healthcare. These restrictions impose both criminal and professional liability on healthcare providers. For instance, the UAE Federal Decree-Law Concerning Medical Liability (2019) provides the following definitions in its article (1):

“Sex Change (Transsexuality): The alteration of an individual’s gender, irrespective of their established gender identity (be it male or female), whose physical sexual attributes align with their physiological, biological, and genetic characteristics, and whose gender identity is not subject to questioning (whether male or female). This definition also implies that undergoing a Sex Reassignment Surgery (SRS) in such cases would be considered an incongruous deviation from the gender classification determined through medical evaluations.

Sex Reassignment (Sex Correction): A medical intervention performed to correct the gender of an individual whose gender identity is ambiguous and suspect (whether they are male or female). For example, this may pertain to a person possessing sexual or physical features inconsistent with their physiological, biological, and genetic characteristics. Furthermore, the individual’s facial characteristics might suggest that they are male when they are, in fact, female, or vice versa.”

Article 5 of this law prohibits healthcare providers from providing “Sex change” treatments, while Article 9 outlines the prerequisites for the implementation of “sex correction.” Similarly, Article (32) of the Royal Decree 75/2019 on Governing the Practice of Medicine & Allied Health Professions stipulates that:

“Medical practitioners and licensed healthcare professionals are not permitted to provide medical treatment or procedures to transition from one biological sex to another unless authorised by a committee established explicitly by the Minister. This committee must consist of three doctors, one specialising in endocrinology.”

In contrast, Saudi Arabia stands out as a country in the region that has implemented Sunni Fiqh practices related to gender and healthcare. In 2006, the Kingdom established the first comprehensive “sex correction centre” at King Abdulaziz University Hospital, making it the singular medical centre of its kind in the region. The centre’s objective is to offer surgical and psychological treatment for intersex individuals, with a focus on early diagnosis during birth or childhood. The centre aims to “prepare” intersex individuals, both medically and psychologically, for their transition to a binary gender role if they choose to undergo surgeries in adolescence or adulthood. The centre has reportedly performed 2000 surgeries on intersex patients since its inception³⁵.

On the other hand, the Ministry of Health of Saudi Arabia has repeatedly issued instructions promoting

34 Noralla, Nora. “Policies of Erasure: How the Mena’s Region Intersex People Are Made Invisible.” The Tahrir Institute for Middle East Policy, April 20, 2023.

<https://timep.org/2023/04/20/policies-of-erasure-how-the-menas-region-intersex-people-are-made-invisible/>.

35 ...، كريم طبيب سعودي بعد إجراء أكثر من ٢٠٠٠ عملية تصحيح الجنس، February 18, 2024.

<https://www.alarabiya.net/saudi-today/2024/02/18/تكريم-طبيب-سعودي-بعد-اجراء-اكثر-من-٢٠٠٠-عملية-تصحيح-الجنس>.

conversion therapy as the only viable solution for transgender individuals while prohibiting gender-affirming healthcare. For instance, Article (05) of the Report of the Committee Formed to Study Sex Change Mechanism, an official document from the Saudi Ministry of Health, states:

“The management of gender dysphoria cases presents some of the most complex and challenging medical scenarios. Individuals diagnosed with this condition often express a strong desire for sex reassignment procedures. Nonetheless, such procedures or treatments aimed at changing one’s sex are strictly prohibited. Mental health professionals within the Ministry should develop treatment plans on a case-by-case basis.”

This evidence suggests that several Arabic-speaking countries with a Sunni-majority population have endeavoured to incorporate Fiqh principles into their legal and policy frameworks to eradicate the visibility of intersex and transgender individuals through the enforcement of surgeries or therapy. Interestingly, it is worth noting that Iraq is the only MENA Arabic-speaking country with a policy that explicitly recognizes and supports gender-affirming healthcare for transgender individuals. This is outlined in Article (04) of the 2002 Instructions (4) issued by the Ministry of Health to Correct Human Gender, which stipulates:

“In cases where clinical psychological evaluation confirms the presence of a condition arising from gender identity disorder (transsexualism), the patient is then referred to the primary psychiatric medical committee, followed by the psychological appeals committee. Subsequently, suppose the committee agrees to proceed with the correctional medical process. In that Case, the patient undergoes a rehabilitative treatment program for a duration determined by the committee to facilitate adjustment post-correction.”

This policy was introduced in 2002, a year before the US invasion of Iraq and the toppling of Saddam Hussein’s regime, so it is difficult to assess how effectively it was implemented if implemented at all. However, some scattered media reports indicate that at least a few individuals benefited from this policy by accessing gender-affirming healthcare in Iraqi hospitals.

The second area where religious jurisprudence (Fiqh) holds significant sway is legal gender recognition, which the author extensively discusses in this study’s companion publication, [“The MENA Trans Archives Series: Understanding the Judicial Directions & Practices on Legal Gender Recognition in the Middle East and North Africa Case Law.”](#) In summary, legal gender recognition is generally denied for transgender individuals in Arabic-speaking MENA countries based on this religious jurisprudence, with few exceptions to this rule. Meanwhile, for intersex individuals, only two countries have explicit laws allowing them to access legal gender recognition post-surgeries without needing to go through the lengthy judicial process: Saudi Arabia and Morocco. For instance, in Saudi Arabia, Article 27(39) of the Civil Status Regulations (1986) outlines the requirements for gender recognition of intersex individuals:

“When changing the gender from male to female or vice versa after registering it for medical reasons, the following steps must be taken:

- (a) Submitting a request to change the name and gender of the person concerned or their guardian;*
- (b) Providing proof of gender according to a medical report from a medical committee approved by the Ministry of Health;*
- (c) After a decision is issued by the competent committee approving the amendment procedure, all amendments shall be made in their civil documents through the cancellation of previous documents by inserting the new modification with a new number and date.”*

In some foreign jurisdictions, intersex individuals can change their civil status entries through an administrative process at the civil registry. However, in certain instances where civil registry officials

lack familiarity with intersex individuals or harbour suspicions that the individual is transgender rather than intersex, the individual may be compelled to pursue legal recourse. Case law regarding intersex individuals seeking legal recognition reveals that the judiciary tends to grant such recognition once forensic or other medical reports corroborate their intersex status and history of surgeries. Nevertheless, if the intersex person has not undergone surgeries or if challenges arise in establishing their binary sex characteristics, the courts may choose not to bestow legal recognition until the individual presents predominantly male or female features. A case in point is Case No 38291/2020 in Tunisia, where the Court of First Instance in Medin refused to grant legal recognition to an intersex child upon the request of the child's parents. This decision followed inconclusive determinations regarding the child's binary sex by medical committees, who advised against hastily assigning a male or female gender until the child's actual binary sex characteristics fully manifest.

Conclusion



The significant influence and impact of the Fatwas discussed in this context, as well as others, on the development of modern Fiqh regarding the well-being of transgender and intersex individuals is readily apparent. However, since this Fiqh was primarily formulated in the 1980s and subsequently reaffirmed, its reform is urgently needed. It is worth noting that during the 1980s when this Fiqh was devised, medical perspectives on both transgender and intersex people generally aligned with the scholars' viewpoint. There was a perceived necessity for these two identities to conform to the binary framework for the betterment of society as a whole and for the benefit of individuals. Consequently, the Fiqh was constructed out of sympathy towards individuals whom scholars regarded as afflicted mentally or biologically and who required assistance to find a cure and assimilate into the socio-religious binary construct³⁶.

However, since then, medical opinions have rapidly evolved to deviate from this Fiqh, as a wave of depathologization of transgender and intersex individuals has propelled the recognition of their identities as valid and self-contained beyond the confines of the binary. Consequently, medical interventions are no longer necessary to “cure” their conditions or adapt them to fit within the binary structure. Islamic Fiqh is not a static concept, and numerous scholars concur that both Fiqh and Sharia should consistently undergo updates to reflect the spirit of the present rather than the past. Therefore, it is customary for scholars to reexamine their Fiqh and issue revised Fatwas to align with the modernity of Islam. For instance, many scholars classified the issue of organ donations as Haram in the 1980s and 90s. However, subsequent Fatwas have contradicted these earlier rulings and declared sure or all forms of organ donation to be permissible (Halal)³⁷.

Similarly, the issue of female genital mutilation (FGM) has garnered support within Islamic scholarship, but medical advancements have since demonstrated that such a practice is both abusive and lethal. Consequently, this prompted scholars to reevaluate the matter, ultimately deeming it Haram in recent decades. Therefore, Islamic scholars can reexamine what can be considered as outdated Fiqh. However, given that Islamic Fiqh generally has centuries-old traditions of emphasizing the biological binary, such re-examination can still be limited in recognizing transgender people, especially as independent entities outside the binary. It can, however, recognize gender identity disorder as a valid reason that stipulates a medical necessity, allowing transgender people to access gender-affirming healthcare as a first step towards reforming the Fiqh position on transgender people.

Meanwhile, traditional Fiqh has already recognized intersex people before, especially since medical advancements to align their sex characteristics with the binary are relatively new. Therefore, there are specific Fiqh rules for inheritance, prayer, and marriage for intersex people already in existence. This recognition should not be erased in the quest to maintain the binary. Even though medical advancements now allow for surgeries, intersex people can and should be allowed to exist as independent entities if they wish to, as stipulated in more traditional Fiqh. Therefore, new re-examination can reaffirm this, making surgeries an option rather than an obligation for intersex people.

The route of reforming the existing Fiqh is long but possible. It is essential to lobby influential scholars who hold scholarly positions in the different Islamic institutions in the MENA region, as they are in a position to practise Ijtihad. Only some scholars are allowed to do so, as specific requirements must be met for a scholar to practise it. Therefore, it is not about the Fatwas themselves but who issues them. In the end, some progressive Fatwas exist on the topic. However, those Fatwas are not issued by individuals who can be considered influential scholars capable of effectively reforming the dominant current Fiqh³⁸.

36 Khan, Farah Naz. “A History of Transgender Health Care”, online at: www.blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/. Accessed 18 June 2023.

37 Hamdy, Sherine, ‘The Organ Transplant Debate in Egypt: a Social Anthropological Analysis’, *Droit et cultures* 59 (2010): 357–365.

38 Hussain, Mubasher. «The Continuation of Ijtihād.» *Islamic Studies* 60, no. 1 (2021): 31-52



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**The MENA Trans Archives Series:
Understanding Modern Fiqh on Intersex
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East and North Africa Region**

Nora Noralla