

Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmic Theology of A Third Gender

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Abstract

Although in the late 1980s, transgender sex-reassignment surgery was legalized (made *halāl*) in *sharī'a* and/or in state law by the *Fatwās* of Āyatullāh Khomeini in Iran and Shaykh al-Ṭanṭāwī in Egypt, the issue of whether Islamic theology accepts transgender people as third gender remains underdeveloped. The traditional Islamic line on gender divisions has been criticised for being established on the basis of the binary logic of male and female gender which leaves no capacity to accept a third gender in traditional Islāmic theology. Therefore, the *fatwās* of both Khomeini and al-Ṭanṭāwī were issued on the basis of the binary logic of male and female gender. However, this article argues that although al-Ṭanṭāwī's *fatwā* was vague and clearly built on a gender binary logic, Khomeini's *fatwā* was issued on other grounds that may allow for a discussion on transgender Muslims as third gender. Moreover, the article argues that there is a discursive space within Muslim juridical texts which one may justifiably use to underpin an interpretation of a third gender in Islāmic legal and theological debates.

Keywords

Transgender; sex-reassignment surgery' fatwās; Khomeini; al-Ṭanṭāwī; Islāmic theology; third gender.

Introduction

The attitude of Islāmic scholarship with regard to transgender identity was and still is a challenging issue for Muslim transgender people. For instance, transgender sex-reassignment surgery (SRS) was mostly regarded as sinful (*harām*), and hence prohibited in Islam by traditional Muslim scholars (both Sunnī and Shī'a) (Al-Jīzānī 2006; Al-Qaraḍāwī 1980; Kanān 2000; Kātūziyān 1993; Madanī

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1997; Tabrīzī 1999). But in the late 1980s, SRS was legalized (made *halāl*) in *sharī'a* law¹ and/or in state law by the *fatwās* of Āyatullāh Khomeini (a grand Shī'ī Āyatullāh and the leader of the 1979 Iranian Revolution) in Iran and Shaykh al-Ṭanṭāwī (Mufti of the Arab Republic of Egypt and Shaykh of al-Aḏhar in 1996–2010) in Egypt. Elsewhere (Alipour 2017) I have explained how the situation of transgender Muslims triggered the sex-reassignment surgery *fatwās*. By studying al-Ṭanṭāwī and Khomeini's *fatwās*, I have also explored the main juridical reasons for issuing these *fatwās* through the classical method of *Ijtihād*.² However, over the last decade, transgender Muslims, along with their international allies, have increasingly asserted a need to live outside the binary, or as a third gender (and not as male or female). This demand has raised the question of whether Islām accepts transgender persons as a third gender. From this perspective, both the *fatwās* of Khomeini and al-Ṭanṭāwī have been criticised for being issued on the basis of the binary logic of male and female gender. Therefore, the *fatwās* cannot be used to defend the transgender Muslims who wish to live as other gender. However, this article argues that although al-Ṭanṭāwī's *fatwā* was vague and clearly built on a gender binary logic, Khomeini's *fatwā* was issued on other grounds that may leave room for a discussion on transgender Muslims as a third gender. Moreover, the article shall argue that there is a discursive space in Islāmic textual context which could justifiably underpin an interpretation of third gender within Islāmic juridical and theological debate. It seems that this discussion is still open within Muslim scholarship and needs to be explored more.

Gender Ambiguity in Muslim Societies

In the Pre-modern period, Muslim societies appear to have culturally recognised gender ambiguity which can be seen through figures such as the *khāsī*, the *hijra*,

¹ *Sharī'a* law in Islam is a title for divine law based on Qur'ān and Sunna (sayings, deeds and endorsements of Muḥammad in Sunnī Islam and Muḥammad and the Twelve Imams in Shī'a' Islam). In other words, Sharī'a law is the Islāmic ritual and legal system(s) developed by Muslim jurists through interpretation of Islāmic sources such as Qur'ān and *hadīths* (oral reports of Muḥammad's sayings, deeds and endorsements in Sunnī Islam and oral reports of Muḥammad's and the Twelve Imams' sayings, deeds and endorsements in Shī'a' Islam).

² It has largely been accepted by traditional, Neo-traditional, and even some reformist Muslim scholars that the most reliable way to understand Islamic perspectives on all issues (both new and old) is the methodology of '*ijtihād*'. It should be noted that there are at least two different analyses of *ijtihād* among Muslim scholars. In the first analysis, *ijtihād* is seen as a tool to extract Islāmic *Sharī'a* laws from reliable sources such as the Qur'ān, *sunna*, *ijmā'* (consensus), and '*aql* (rational reasoning). In the second analysis, *ijtihād* is seen as a way to draw on personal opinion (*ra'y*) or analogy (*qiyās*) for those cases that are not covered by the Qur'ān and *sunna*. Shī'a scholars do not believe in this second analysis of *ijtihād* (Sadr 2003). Sunnī scholars, on the other hand, do believe in both views but rely more on the second analysis of *ijtihād*: i.e. analogy or personal opinion (see Al-Jaṣṣāṣ 1994, Vol. 4, 23 and 273; Ibn Qudāmiḥ al-Maqdasī, 2002, Vol. 2, 333–334 and 338–341).

the *mukhannath*, the *mutarajjul*, the *Khunthā* and the *mamsūh*. I will briefly outline what was meant by these six representations of gender ambiguity:

1. *Khāsīs* (eunuchs) were castrated human males. They were people who had male sex organs and developed as boys until castrated – usually by cutting off the testicles. This operation did not change them to female; but left them in an in-between position legally and socially belonging to neither gender (Kugle 2010; Marmon 1995; Nolen 2009).
2. *Hijras* are people who are born with male sex organs and raised as boys, but after becoming adults they assume a female identity. In the South Asian countries, such as Pakistan, India and Bangladesh, many voluntarily undergo ritual castration to remove their testicles and penis. They are conceived as ‘third gender’ (neither male nor female) in their societies (Nanda 1999; O’Brien 2008).
3. *Mukhannaths* are effeminate men who are physically male but like to dress and act as female (Rowson 1991: 673).
4. *Mutarajjulas* are women who try to resemble men in clothing and speech (Bouhdiba 2012; Kugle 2010)
5. *khunthās* (intersexed individuals) are people who possess both or ambiguous male and female sex organs or genitals. Muslim jurists have distinguished between two types of *Khunthā* (Al-Khu’ī 2006: 113; Al-Sarakhsī 1993, Vol. 30: 91–92). The first group of *khunthā* includes individuals identified as *al-khunthā ġair mushkil* (determinate/unambiguous intersex). According to the Muslim jurists, this first group have a ‘true gender or sex’ as male or female, which can be determined through physical signs³, particularly after puberty. The second group of *khunthā* includes people who have physical features which, according to the Muslim jurists, cannot be distinguished within the gender binary as male or female, before or after puberty. This second group is called *al-khunthā mushkil* (indeterminate/ambiguous intersex).
6. And finally, *Mamsūhs* are persons who have neither male nor female genitals (al-Ḥusainī 1997, Vol. 1: 38). While most Shī’a scholars called this group as *mamsūh*, some such as Ibn Idrīs (2006, Vol. 3: 277), categorized these people as *khunthā mushkil*. In Sunnī scholarship, to my knowledge, the term *mamsūh* is not used at all, and this group is always categorized within *khunthā* (Al-Qazwīnī 1997, Vol. 6: 532; Al-Sarakhsī 1993, Vol. 30: 92).

Of the six groups, pre-modern Muslim jurists have only discussed *khunthā* and *mamsūh* because, according to their point of view, these two groups, unlike the other four, are biologically ambiguous. Scholars discussed them because

³ Although some Muslim jurists currently try to apply more modern medical terms to determine the gender or sex of *khunthā* (Zainuddin and Abdullah Mahdy, 2017: 358), traditional scholars mostly identify *khunthā*’s gender or sex through biological signs such as by looking at which genitalia the *khunthā* urinates from or the one the urine initiates from or ends from (during childhood and before puberty) or by observing the facial hair and semen for males and the growth of breasts and menstruation for females (after puberty). For a comprehensive discussion on this issue, see: Sanders, Paula. 1991. Gendering the Ungendered Body: Hermaphrodites in Medieval Islamic Law. In *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, Beth Baron & Nikki Keddie (eds). New Haven, CT: Yale University Press, 74–95.

they felt their ambiguous nature had to be defined in relation to Islāmīc duties. Therefore, Muslim jurists mostly discuss the legal rules that apply to individuals who are considered *khunthā* or *mamsūh* in different contexts of Islāmīc jurisprudence (*fiqh*), such as purity, prayer, pilgrimage, marriage, inheritance, and penalty. However, even though they were discussed by traditional Muslim scholars, this did not necessarily mean that *khunthā* and *mamsūh* could live in Islāmīc societies with honour and without suffering from discrimination and oppression.

The Issue of Transgenderism

The term transgender describes both women and men who feel that they are trapped in the wrong bodies and may decide to change their bodies through sex-reassignment surgeries. However, some gender experts, transgender activists and transgender people (Beemyn and Rankin 2011) do not fully agree with this description. They tend to categorize the group mentioned above as *transsexual* people. In this more recent perspective, the term transgender defines people whose gender identities do not correspond with the sex identified at birth (see the entry of this word at Oxford Dictionary Online and Merriam Webster Online).⁴ In both cases, the identity of transgender people is not easy to transpose onto historical Muslim societies. The contemporary understanding of what it means to be transgender therefore has potentially little exact manifestation in historical sources. We can however trace back, through the historical sources, a manifestation of ambiguous or non-conforming gender identities which offer insights into the historical treatment of alternative gender identities.

In recent decades, transgender people have become more visible as they openly struggle to achieve their rights. They have begun to protest against the marginalization, violence, and discrimination entrenched in patriarchal culture. Elsewhere (Alipour 2017) I have given examples of two transgender persons struggling with their change to being female: Sally 'Abd Allah from Egypt and Maryam Khatoon Mulkara from Iran. Their plight led two important neo-traditional jurists to issue *fatwās* to legalize SRS within *sharī'a* law. These *fatwās* can be seen as the first step towards giving transgender Muslims the right to live out their Islāmīc ideals.

Muslim theologians and jurists were faced with many questions in relation to the issue of transgenderism as the demand for SRS grew. The first question was whether SRS is permissible in Islām at all. Moreover, if it is permissible for transgender people to undergo SRS, it should be examined whether it is a mandatory duty for them under *Sharī'a* law to undergo such an operation or they can choose whether to undergo surgery or not. And if a transgender person decides not to undergo surgery, if the transgender person is allowed to live as a third gender or she/he must decide to be male or female based on her/his genitals as assigned at birth. And, finally, it needs to be explored that what stance *Sharī'a*

⁴ Beemyn and Rankin (2011: 6) describe the term transgender as 'all individuals whose gender histories cannot be described as simply male or female, even if they now identify and express themselves as strictly female or male.'

law does take on transgender Muslims with respect to the mandatory practice of different contexts of Islāmic jurisprudence (*fiqh*), such as Purity, prayer, pilgrimage, marriage, kinship, inheritance, and penalty.

Theology of Opponents

Muslim jurists who oppose sex-reassignment surgery take the easy route by simply forbidding the SRS procedure. They believe that transgender Muslims must be identified as female or male based on their sex organs, and consequently have to perform the Islāmic mandatory practices as a male or female based on their sex organs. These theologians have tried to enlist a variety of arguments to support the prohibition of SRS (Kanaan 2000; Kariminia 2010), but their most important argument, as the Islāmic Fiqh Council of the Muslim World League in 1989 (session 11, resolution 6) stated, is that of 'wrongly interfering in God's creation'. Briefly explained, this means God has created everything as it is, including human beings, and God does not make mistakes. Therefore, what a person is, in fact, is her or his God-given nature. If SRS is performed then God's Own creation is interfered with, a creation no one in existence has any right to alter. There is a verse in the Qur'ān (4: 119) that says: '*And I will mislead them, and I will arouse in them [sinful] desires, and I will command them so they will slit the ears of cattle, and I will command them so they will change the creation of Allāh and whoever takes Satan as an ally instead of Allah has certainly sustained a clear loss*'.⁵

Some Muslim scholars use this verse to argue that God commands us not to change the creation of Allāh. Otherwise, *Satan* will take shape instead of Allāh and we will be acting against God's intrinsic nature. But based on some *ahādīth* (*sing. hadīth*) and according to many commentators of the Qur'ān (Kariminia 2010: 124–131), in this verse changing '*the creation of Allāh*' does not refer to the body change or to SRS but refers to changing religion, namely Islām, and God's commands.

Theology of Defenders

Unlike many traditional Sunnī and Shī'a scholars, Khomeini and al-Ṭanṭāwī seem to believe that all the arguments presented against SRS cannot justifiably forbid SRS. In their opinion, the argument of 'wrongly interfering in God's creation', which is based on the Qur'ānic verse, does not apply to SRS. As mentioned, these scholars believe that there is enough evidence in the Qur'ān itself and the *hadīths* from the prophet which show that changing '*the creation of Allāh*' as mentioned in the Qur'ān refers to the other issues, such as changing Islam and *sharī'a* law, not operations on the human body. Khomeini and al-Ṭanṭāwī therefore applied new *ijtihād* to the case of transgenderism and issued new *fatwās* which stated that SRS is permissible in Islam. We will take a look at both fatwas.

⁵ The translation of the verse is by the Sahih International translation of the Qur'ān.

Al-Ṭanṭāwī's Fatwā on Sex-Reassignment Surgery Issued on June 8, 1988

I use here a summarized version of the *fatwā* translated by Skovgaard-Peterson (Skovgaard-Peterson 1995).

'...As for the condemnation of those who by word and deed resemble women, it must be confined to one who does it deliberately (*tacahhada dhalika*), while one who is like this out of a natural disposition must be ordered to abandon it, even if this can only be achieved step by step. Should he then not comply, but persist [in his manners], the blame shall include him, as well – especially if he displays any pleasure in doing so. The person who is by nature a hermaphrodite (*[khunthāʿi] mukhannath khalqī*) is not to be blamed. This is based on [the consideration that] if he is not capable of abandoning the female, swinging his hips in walking and speaking in a feminine way, after having been subjected to treatment against it, [he is at least willing to accept that] it is still possible for him to abandon it, if only gradually. But if he gives up the cure with no good excuse, then he deserves blame. *Al-Tabari* took it as an example that the Prophet ... did not forbid the hermaphrodite from entering the women's quarters until he heard him giving a description of the woman in great detail. Then he prohibited it. This proves that no blame is on the hermaphrodite for simply being created that way. That being so, the rulings derived from these and other noble hadiths on treatment grant permission to perform an operation changing a man into a woman, or vice versa, as long as a reliable doctor concludes that there are innate causes in the body itself, indicating a buried (*matmura*) female nature, or a covered (*maghmura*) male nature, because the operation will disclose these buried or covered organs, thereby curing a corporal disease which cannot be removed, except by this operation. This is also dealt with in a hadith about cutting a vein, which is related through Jabir: 'The Messenger of God sent a physician to *abu ibn Kacb*. The physician cut a vein and burned it.' This hadith is related by *Ahmad [ibn Hanbal]* and *Muslim*. What supports this view is what *al-Qastallani* and *al-Asqalani* say in their commentaries on it: 'This means that it is incumbent upon the hermaphrodite to remove the symptoms of femininity.' And this is further sustained by the author of *Fath al-Bari* who says '...having given him treatment in order to abandon it...' This is a clear proof that the duty prescribed for the hermaphrodite can take the form of a treatment. The operation is such a treatment, perhaps even the best treatment. This operation cannot be granted at the mere wish to change sex with no clear and convincing corporal motives. In that case it would fall under that noble Hadith which *al-Bukhari* relates through *Anas*: 'The Messenger of God cursed the hermaphrodites among the men and the over-masculine women, saying 'expel them from their houses', whereupon the Prophet himself... expelled one, and Umar expelled another one.' This Hadith is related by Ahmad and *al-Bukhari*. To sum up: It is permissible to perform the operation in order to reveal what was hidden of male or female organs. Indeed, it is obligatory to do so on the grounds that it must be considered a treatment, when a trustworthy doctor advises it. It is, however, not permissible to do it at the mere wish to change sex from woman to man, or vice versa....'

⁶ This term has been added by the author.

Khomeini's *Fatwā* On Sex-Reassignment Surgery Issued in 1987

'In the Name of God. Sex-reassignment surgery is not prohibited⁷ in *sharī'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.'⁸

It is also necessary to mention that there is another *fatwā* from Khomeini on this case issued in 1964 in his book 'Taḥrīr al-Wasīla' (1970, Vol. 2, P. 626):

'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* undergoing 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.'⁹

This earlier *fatwā* of Khomeini is part of a section devoted to 'The Changing of Gender/Sex'. This section includes ten problems. Problem 1 explicitly discusses the permissibility of SRS for every individual, including transgender and *khunthā* people.¹⁰ Subsequent problems deal with the specific results of a sex change, such as the status of a person's marriage and kinship following surgery.

The Islāmic government of Iran followed the *fatwā* and changed the state law. Under current state law, transgender SRS is allowed and supported by the Iranian government. Transgender people have the security of a new birth certificate, a new identity card, and a new passport, as well as access to a few other facilities for their operations, such as through a loan provided by the government.¹¹ However, the Iranian transgender community has remained active, establishing an organization to counsel and help transgender persons. Though the efforts of the community led to changes which ensured an embedded Islāmic tolerance in *sharī'a* law and, subsequently, state law, it would take much longer for people who have undergone SRS to be accepted by the patriarchal society and culture of Iran.

⁷ It should be noted that when a Muftī says something is not prohibited, it means the case is permissible or lawful in Islām, but it does not necessarily mean it is obligatory.

⁸ Translation of the *fatwā* is by the author. An image of the original *fatwā* in Farsi can be seen on this website: <http://www.iranhrdc.org/english/publications/reports/1000000398-denied-identity-human-rights-abuses-against-irans-lgbt-community.html>.

⁹ Translation of the *fatwā* is by the author.

¹⁰ In his second problem, Khomeini discusses another group of intersex people whose 'true sex/gender' has already been determined before the sex-reassignment surgery (*khunthā ġair mushkil*) which I will not talk about this group in this paper. Karimina discussed this group in detail in his work *Taghīr-i jinsiyat az manzar-i fiqh wa huqūq* (sex-change from the perspective of fiqh and law) published in Farsi in 2010 in Iran.

¹¹ Even though Khomeini's *fatwā*, as I am explaining in this article, should be considered as a positive step on transgender issue in Iran, unfortunately, according to some reports (Hamadani 2014), the Iranian authorities misuse the *fatwā* by pushing sexual minorities who are not transgender, such as homosexual and bisexual people, to undergo SRS.

The *Fatwās* and A Discursive Space on Third Gender

Khomeini's and al-Ṭanṭāwī's *fatwās* were both criticized for being based on gender binary logic and considering transgenderism as a mental disorder¹² (Najmabadi 2014; Skovagaard-Peterson 1995; Veneuse 2010). Since al-Ṭanṭāwī's *fatwā* was not completely clear, both opponents and defenders of SRS could refer to it to support their views (Alipour 2017). Moreover, the case of Sally 'Abd Allāh in Egypt was about a transgender person, but the *fatwā* was more about intersex people or, at least, it has been reduced to this group. In addition, according to al-Ṭanṭāwī, people cannot choose to undergo surgery 'at the mere wish to change [their] sex'. From his Islāmic perspective, nobody can change their God-given gender, but they can find that their bodily structures are at best ambiguous. Therefore, based on al-Ṭanṭāwī's binary logic, they may obtain specific male or female anatomy through medical therapy. The important point is that the whole process, including the operation, must be regarded as treatment. Given that, in effect, an operation is the best treatment or the only way to be cured, the person must undergo medical intervention 'in order to reveal what was hidden by male or female organs.' All these points have led scholars, who have studied this case in detail, to critique the *fatwā* and its vagueness in relation to transgender Muslims (Kugle 2010; Skovagaard-Peterson 1995; Veneuse 2010). Skovagaard-Peterson, one of these scholars, explicitly cited that 'far from legalizing a sex-reassignment surgery, Tantawi's *fatwa* denied the possibility of performing one altogether' (Skovagaard-Peterson 1995).

Unlike al-Ṭanṭāwī, Khomeini, particularly in his *fatwā* in *Tahrīr al-Wasīla*, leaves more discursive space to reflect on whether transgender people belong to other gender or if they must be identified as either male or female.¹³ As has been considered, in his 1964 *fatwā* Khomeini explicitly discusses the permissibility of SRS in Islām and it should be considered as his definite *fatwā*. Moreover, unlike Najmabadi's understanding (2014: 175),¹⁴ there is no caution (*iḥtiyāt*) in

¹² In the International Classification of Diseases (ICD), the understanding of transgenderism is based on classical understanding of gender and still categorized as mental disorder or 'gender identity disorder'. More recently, it is classed as 'gender dysphoria' by the American Psychiatric Association (APA). Issuing *fatwas* in the 1980s considering transgenderism as gender identity disorder by (neo)traditional Muslim scholars should be understandable, though it is not justified.

¹³ Moreover, Khomeini, in this earlier *fatwā*, does not mention that it is necessary for transgender persons to get permission from medical doctors or psychiatrists in order to undergo SRS. Based on this, one might argue that Khomeini did not consider transgender people as individuals who suffer from a mental disorder. However, if we accept this argument, we then need to provide another interpretation for the Khomeini's statement in his later *fatwā* in which he does suggest that a transgender person needs recommendation from doctors to undergo SRS. One interpretation of Khomeini's later condition would be that Khomeini was aware of the great impact of this kind of surgery on the life of a transgender person (especially with the knowledge that it is a non-reversible surgery). Therefore, a transgender individual needs to make sure that s/he is making a right decision to undergo SRS. Thus, perhaps Khomeini is suggesting that a transgender person should consult with experts, such as psychiatrists and medical doctors before making the decision.

¹⁴ Based on her understanding of Khomeini's word '*al-zāhir*', Najmabadi comes to the conclusion that Khomeini was not sure enough about his idea of the permissibility of

Khomeini's *fatwā*. In fact, in his first sentence Khomeini issues the *fatwā* of the permissibility of SRS generally for every individual who wishes to change his/her body.¹⁵ In the second and third statements, he particularly distinguishes *khunthā* and transgender individuals, as people who are definitely allowed to undergo SRS. Finally, he mentions that this surgery is not mandatory for these groups which means they can choose to live as they are without performing sex-change. As a result, Khomeini's *fatwā* lean to leave a space for discussion of a third gender in Islāmic theology.

To support this idea, it is important to know that Maryam Khatoon, who received Khomeini's *fatwā* in 1987, was gifted *Chador* (Islamic *hijab*) from the president of Iran at the time. This allowed Maryam to wear Islamic *hijāb* and take an active part in society, wearing female clothes and make up even before the SRS procedure was started. In contrast to Kariminia's and Saberi's understanding of Khomeini's *fatwā* (Najmabadi 2014: 176), Maryam Khatoon, who had been in contact with Āyatullāh for almost two decades until her visit to him in 1987, had a different interpretation of the *fatwā*. Based on her different perspective, she was able to officially marry men twice before her SRS procedure was started. It seems that she was legally permitted to perform Islāmic marriage (*nikāh*) with a man while she was physically (or bodily) still a man.¹⁶

SRS in Islām. As a result, Khomeini, as Najmabadi claims, took a cautionary position in his *fatwā*. By translating the term '*al-zāhir*' into 'prima facie', Najmabadi tries to describe the cautionary position in Khomeini's *fatwā*. However, this translation and understanding of Khomeini's term '*al-zāhir*' is not correct. In traditional Shī'ī scholarship, '*al-zāhir*' does not imply '*iḥtiyāt*' (caution) at all. Whenever a Shī'a Muslim jurist uses the technical term '*al-zāhir*' (or some similar terms, such as '*al-aẓhar*', '*al-aqrab*', and '*al-aqwā*'), in a certain case, it simply means the scholar is issuing his *fatwā* without caution on that case based on evidence founded on deep study of the Islāmic original sources. In the context of traditional Muslim scholars, if a given scholar deeply examined Islāmic sources but could not come to a certain conclusion, and thus the case is still dubious for him, he must use the term '*iḥtiyāt*' (caution) (with the different origins of the word, such as *al-aḥwaṭ*, *iḥtiyātan*, etc.). In this way, the scholar shows that he could not find enough evidence from Islāmic sources to determine the verdict of that specific case (See Makārim Shirāzī and 'Aliyān Nizād, 2009). In contrast, the term '*al-zāhir*', which I translated as 'it seems that', is more comparable with what modern analytic philosophers, in particular epistemologists, mostly tend to apply in their discussions. Experts of modern epistemology realize that the term 'it seems that' in this context does not mean that epistemologists who use the term do not have enough evidence for the theories offered by them. Conversely, this way of writing and proposing ideas are closer to epistemic modesty. In Islāmic theological-juridical context, this way of using the term '*al-zāhir*' mostly shows a modesty toward 'Allāh who absolutely knows everything compare to human beings. This is because usually after such a sentence they emphasize on the term 'Allāh al-A'lam' which means God knows the best.

¹⁵ Therefore, as I have discussed elsewhere (Alipur 2017: 99), it is not a correct understanding of Khomeini's *fatwā* to reduce it to the cases of absolute necessity (*iḍṭirār/ḡarūrat*).

¹⁶ Based on Najmabadi, when a reporter, Hamīd Riza Khālidī, asked Maryam that if she has been married before her operation and, if yes, how could it be while she was still a man, Mulkara responds: 'yes, twice... [l]ook, the *sharī'a* rule for us in this respect is exactly similar to the rule for a woman who may face some difficulty concerning her marriage, but doesn't say anything to her fiancé or spouse until the wedding night.

Moreover, in an interview (May 2017), Saman Arastoo (an Iranian actor and a FTM transsexual person) stated that:

[before my SRS procedure was started] everybody knew that I was different. In fact, whenever I was going to the ministry of [Culture and Islamic] Guidance I was shaking hand with men but Hirāsāt (representative of the religious security forces) would not criticize me for doing so. After [my sex-reassignment] surgery [the head of] Hirāsāt told me that we already knew that you are different than other people. Therefore, we were not stopping you from your behaviour.¹⁷

Regarding this point. It seems that the religious police and security forces have been told or even perhaps trained to treat transgender and transsexual people differently and not as male or female.

Although the State law of Iran is not specific or completely clear in relation to transgender as the third gender or sex, Iranian transgender people who are not yet undergoing SRS are legally eligible to ask for a birth certificate and permission to trans-dressing. Therefore, by state law, transgender people, at least temporarily, are allowed to live transgender lives. Although the authority in Iran only offers certified transgender people temporary permissions to dress as their own gender, irrespective of assigned sex, Khomeini's *fatwā* itself, where he emphasizes that SRS is not obligatory for transgender people, implicitly admits that transgender Muslims are allowed to live out their transgender identity as their permanent lifestyle.

The Issue of Third Gender in Islāmic Theological-Juridical Texts

As some studies explain (Kariminia 2010; Sanders 1991), traditional Muslim scholars mostly determine gender within a binary, and on the basis of biological characteristics, mostly believing that, based on the Qur'ānic teachings, human beings are either male or female. Nonetheless, here is still space for gender fluidity in Islāmic juridical and theological texts. Therefore, the subject of the third gender has always been an issue in Muslim scholarship. Muslim jurists discussed this issue regarding cases where they had to deal with gender ambiguities, for example with intersex people, in particular what they called *khunthā mushkil* and *mamsūh*. There always has been a controversial discussion on whether *khunthā mushkil* and *mamsūh* should be considered as male or female or as a third gender.

In Sunnī scholarship, the gender ambiguities of some groups of people, in particular *khunthā mushkil*, perhaps led Abū Ḥanīfa (d. 767, founder of the Islāmic Ḥanafī Legal School) and some of his students such as Abū Yūsuf (d. 798) and al-Shaibānī (749–805) to avoid issuing Islāmic verdicts on these groups and they even claimed an ambiguous position toward them in some cases (al-Jaṣṣāṣ

When on the wedding night, the husband finds out, he could divorce her or accept and live with it. We had the same situation. My first spouse knew about my situation about a year before my operation. We performed the [Islamic] marriage contract ...' (Najmabadi 2014: 176).

¹⁷ Translation of this part of the interview is by the author.

2010, Vol. 4: 148; Ibn Qudāmih al-Maqdasī 1968, Vol. 3: 114; al-Shaibānī 2012, Vol. 9: 322). Moreover, in his article 'Gendering the ungendered body: hermaphrodites in medieval Islamic law', Sanders paraphrases his understanding of al-Sarakhsī's view (a Ḥanafī jurist of 11th century) about human beings division as following: '[h]uman beings had to be either male or female; sometimes they seemed to be *neither*,¹⁸ but they could not be both.' (Sanders 1991: 77). Sanders, then, objectively mentions that al-Sarakhsī never suggested that *Khunthā* can be both male and female. It seems that for Sanders, *Khunthā* could be considered as a third gender in al-Sarakhsī's view if they were seen as both male and female. However, what Sanders did not discuss is that *khunthā* can also be categorized as individuals who are neither male nor female but a third gender. And al-Sarakhsī's statement that 'sometimes they seemed to be *neither*' perhaps refers to *khunthā* as people whom seemed to be *neither* male *nor* female, but rather a third gender.

To sum up, although Sunnī scholars mostly preferred not to discuss *kunthā mushkil* from a gender/sex categorical perspective and instead tended to label these groups as either male or female, it seems that some Sunnī scholars such as al-Sarakhsī were at least aware of individuals whose sex and gender could not be definitively determined, and thus opened the discursive possibilities for recognizing individuals who featured outside the gender binary.

In the Shī'ī context, scholars have discussed the issue of third gender (*al-ṭabī'a al-thālitha*) explicitly and in more detail (Al-Ḥillī 1993; Al-Yazdī 2000; Ibn Idrīs 2006; Narāqī 1994). The Arabic term '*al-ṭabī'a al-thālitha*' used by the Shī'a scholars literally means 'the third nature (gender or sex)' vis a vis male nature and female nature. It is no wonder that early Shī'a scholars mostly believed that *khunthā mushkil* and *mamsūh* were either male or female, and not a third gender, although they thought it might not always be possible to find a binary gender identity for such people (Al-Ḥillī 1993, Vol. 9: 100; Ibn Idrīs 2006, Vol. 3: 280–281). The most important reason that these scholars cited to refute the idea that *khunthā* and *mamsūh* constituted a third gender is the Qur'ānic verses, such as Q. 4:1; 42:49; 75:39; 92:3. For instance Qur'ān (42: 49) states: '*To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males.*¹⁹' Based on this kind of verses, some Muslim scholars argued that human beings have been categorized in the Qur'ān only as male and female. However, Zain al-Dīn al-Jubā'ī al-Āmilī, an early 16th century Shī'ī jurist, argued that these Qur'ānic verses do not divide human beings into two gender categories of male and female exclusively. In al-Āmilī's view, although Qur'ān only addresses the majority of humankind, that is the two categories of male and female, there is no evidence in the Qur'ān that indicates God did not create other gender(s) (1992, Vol. 2: 332).

In later centuries, Shī'a Scholars also discussed the issue of *khunthā* and *mamsūh* as a third gender with more tolerance and even acceptance. For instance, Mull Ahamad Narāqī, a well-known Iranian jurist of the 18th century, interestingly argued that, since there is no an exclusive gender binary in the Qur'ān and Ḥadīth, it is reasonable to consider *khunthā mushkil* and

¹⁸ The emphasis is from the author.

¹⁹ The translation of the verse is by the Sahih International translation of the Qur'ān.

mamsūh as third gender (1994, Vol. 19: 228). Another, more explicitly opinion came from Muḥammad Kaẓīm al-Yazdī, one of the most distinguished Najaf-based Shī'ī jurist of the 19th century. He discussed the different approaches of Shī'ī jurists toward *mamsūh* and *khunthā*, and discussed whether they are a third gender or, in fact, attached to either the male or female gender. Based on his report, some jurists believed that *khunthā*, in particular *khunthā mushkil*, is a third gender but that *mamsūh* is not. Although al-Yazdī himself could not decide for certain that *khunthā* and *mamsūh* are third gender, he criticized all arguments in favour of the binary model of gender provided by other scholars and believed that none of their arguments can sufficiently and justifiably prove that gender divisions in Islām are based on binary logic which accepts male and female but no other gender(s) (Al-Yazdī 2000, Vol. 1: 16).

Following al-Yazdī's argument, one of his students, Muḥammad Ibrāhīm al-Yazdī, went one step further and came to believe that *khunthā mushkil* and *mamsūh* are certainly a third gender, based on 'a clear view and profound investigation' as he claimed (2005, Vol. 1: 225 & Vol. 2: 320). Ibrāhīm al-Yazdī (2005, Vol. 1: 228) provides two arguments for his view. In the first argument, he relies on a source of reasoning called custom ('urf) in Islamic legal theory ('uṣūl al-fiqh). Based on this argument, there is, he claims, a firmly established custom within humankind's belief system that approves *khunthā mushkil* and *mamsūh* as a third gender vis a vis male and female genders. In his second argument, Ibrāhīm al-Yazdī proposes a lexical argument, so-called *ṣiḥat al-salb* in Islamic legal theory, examining the relationships between the subjects of *khunthā mushkil* and *mamsūh* and the two possible predicates, that is *being male gender* or *female gender*. He argues that both *being male gender* and *being female gender* can be deprived from these two subjects, that are *khunthā mushkil* and *mamsūh*, without contradiction. Therefore, one without contradiction can state 'a *khunthā mushkil* is not a male gender' as well as 'a *khunthā mushkil* is not a female gender', and this is also the case for *mamsūh*. As a result, the two concepts 'male gender' and 'female gender' do not fulfil all or part of the denotation of the concepts *khunthā mushkil* and *mamsūh*. This suggests *khunthā mushkil* and *mamsūh* are not male or female but a third gender.

Following al-Yazdī's view, some contemporary Shī'a jurists also argued for *khunthā* and *mamsūh* to be seen as third gender. For instance, Āyatullāh Sabzawārī, an Iranian *muftī* died in 1993, (2009, Vol. 5: 319), Āyatullāh Muḥammad al-Ṣadr, an Iraqi Shī'ī scholar killed by Ṣaddām Hussain in 1999, (1996) and Āyatullāh Ahmad Madadī, an Iranian scholar who lives in the city of Qom in Iran, (2010) all argued that there is no reason to believe that the Qur'ān or other Islāmīc scriptures divide human beings into two gender categories of male and female exclusively. Addressing modern biological and genetic studies, they believe that *khunthā* and *mamsūh* should be considered as third gender. al-Ṣadr (1996, Vol. 6: 134–135) even tries to explore the mandatory practicing and the rights of *khunthā* and *mamsūh* as third gender in different contexts of Islāmīc jurisprudence (*fiqh*).

As has been discussed, the binary model of gender was not the only firm model proffered by traditional Muslim scholars. Rather, many were entirely familiar with discussion of the third gender and some even argued for the latter model. In terms of the third gender in Islāmīc theology, it is not strange at all to expect Muslim scholars to consider transgender people as members of a third gender based on their inward differences or more recent concept of gender

identity divisions. Modern biological, genetic, sociological and psychiatric studies can provide solid evidence for Muslim scholars to accept transgender persons as a third gender. The modern research on transgender issues specifically may help a group of traditional Muslim scholars, such as, Madadī and followers of Sabzawarī and al-Ṣadr, who already have considered the scientific findings to argue for the case of *khunthā* and *mamsūh* as third gender, to support the same idea for transgender people.

Moreover, although, as mentioned before, the two categories of *khunthā* and transgender are different, there are overlaps. There are some similarities that caused Muslim jurists and scholars, such as al-Ṭanṭāwī, to consider the Islāmīc verdict (*hukm sharīī*) on *khunthā* in order to explore the Islāmīc verdict of transgender SRS. For instance, remember al-Ṭanṭāwī's *fatwā* where he calls a person who is by nature a hermaphrodite *khunthā/mukhannath khalqī*. This implicitly means, a transgender person who is 'suffering from psychological hermaphroditism', based on al-Ṭanṭāwī's view, should be called *khunthā/mukhannath nafsī*. This might cause the psychologist who examined Sally 'Abd Allāh, the famous Egyptian transgender from male to female who has received the al-Ṭanṭāwī's *fatwā* in the 1980s (Alipur 2017; Skovgaard-Petersen 1995), to consider her as *al-khunthā al-nafsīya*. This term has become very common in the Arabic-Islāmīc context over the last three decades.

In addition, although Hujat al-Islām Kariminia, a Shīī cleric who has studied this subject, emphasizes that traditional Muslim scholars determine gender on the basis of biological characteristics and, as Najmabadi reports (2014: 184–185), he clearly states that 'the criterion of sex/gender references sexual/reproductive organ', he nonetheless admits the inward differences of transgender people and leans towards an acceptance of the role of soul (*nafs/ravan*) for determining the gender of individuals by conceptualizing transgender as people who have 'sex/gender discordance between soul and body'.

What has been discussed so far shows that there is respectively a large discursive space on the subject of transgender as third gender within Islāmīc theological context. The feasibility of this project, however, depends on how great an effort transgender Muslim activists and Muslim reformist scholars make to bring the attention of Muslim theologians and jurists to this subject as an urgent case to be resolved.

Conclusion and Further Discussion

This article investigated the issue of transgenderism and the possibility of third gender in Islāmīc theology through studying two tolerant *fatwās* on transgender SRS, issued in the 1980s by Āyatullāh Khomeini and Sheykh al-Ṭanṭāwī, and through reading Muslim jurisprudential texts. The article argued that although al-Ṭanṭāwī's *fatwā* was vague and clearly built on a gender binary logic, Khomeini's *fatwā* was issued on grounds that may leave a discursive space in which it is possible to consider transgender Muslims as third gender. Moreover, the article argued that there is a discursive space in Islāmīc textual context which may justifiably underpin an interpretation of third gender within Islāmīc juridical and theological debate.

Although this discussion in itself is still open within Muslim scholarship and needs to be explored in future research, in the case of considering transgender

people as third gender in Islām, a variety of questions still need to be resolved. These questions relate to the personal and public life of transgender people, and the roles that they could play in their societies. For example: Can transgender people be allowed to become religious or political leaders of the Muslim community and serve in the mosque as Imam (prayer leader), in society as *Muftī* (who are eligible to issue *fatwās* on Islāmīc *sharī'a* laws for followers), in parliament as representatives or heads of parliament, in the cabinet as president or minister, and so on? Since the categorical distinction between genders makes a difference to rights and obligations in Islām, what is the place of transgender people as people who are neither male nor female? For instance: Regarding countries with Islāmīc *Sharī'a* law, if a male-to-female transgender person chooses not to undergo SRS, how must they appear in public in relation to Islāmīc *hijāb* and vice versa (namely female to male)? How should transgender people perform their Islāmīc duties, such as prayer, fasting, pilgrimage (*hajj*), etc.? What is the distribution of inheritance in relation to transgender people? How and whom is a transgender allowed to marry under Islāmīc law (only opposite sex or another transgender person)? And so on.

All these questions are left unanswered so far. Muslim theologians who believe in transgenderism as third gender must consider these questions in their future research and try to explore the Islāmīc *sharī'a* laws in relation to these subjects through their methodology of *ijtihād*.

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