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The Egyptian Constitution and Transgender Rights: Judicial Interpretation of Islamic Norms

Dr. Ahmed Ali Saleh Dabash

Abstract

The lack of legislations regulate legal issues of transgenderism, transsexuality and sex reassignment surgery (SRS) in Egypt, has lead to the raise of many questions regarding the legality of conducting the SRS and its consequences. This paper aims to highlight the SRS legal issues which occur in Egypt and determine the approach taken by the judicial authorities in dealing with this matter and provides a critical analysis of the related rulings issued by the Egyptian courts, given that Egypt as an Islamic country and the Islamic principles of sharia is the main source of legislation. Therefore, this paper provides a comparative study of the views of Muslim jurists (Islamic fatwas) on the Transsexualism matters, whereas previous studies have discussed legal cases and Islamic legal opinions (fatwas) related to transsexualism. For example, J. Skovgaard-Petersen has analyzed Tantawy's and Khumani's fatwas, and Serena Tolino has discussed other Islamic fatwas. In this paper, the 2016 "Noraan" case is discussed, where I critically analyze the ruling in the case and explain both the relation between the Egyptian Constitution and the Supreme Constitutional Court (SCC) and the impact of Islamic norms interpretation on transsexuals and human rights. Among the findings, that Muslim jurists have different opinions about SRS, so there is no consensus in favor or against transgender surgery, human dignity and the preservation of life and family (hifdhu al-nafs wa al-nasl) are Islamic norms in favor of permitting the SRS. The Egyptian Supreme Constitutional Court respects Human Rights and International law by its ruling on explaining Islamic principles as the undebatable issues, and the courts might deal with SRS in means of the correction of material mistake.

Keywords

Transgender, Egyptian Constitution, transsexual surgery, sex-reassignment surgery, Sharia principles, Islamic norms, Islamic law, Muslim sexual ethics

الدستور المصري وحقوق المتحولين جنسياً: التفسير القضائي لمبادئ الشريعة الإسلامية

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الملخص:

فيما يسمى باضطراب الهوية الجنسية، يظل المريض (أو المريضة) حبيس معالم جسده المخالف لشعوره الداخلي بهويته الجنسية، وقد أجازت بعض الفتاوى جراحات تصحيح الجنس بضوابط وشروط وتحت رعاية طبية وموافقات رسمية، ووضعت نقابة الأطباء بمصر بروتوكولا معيناً لهذه الجراحات المتقدمة، لكن المريض بعد إجراء الجراحة يحتاج إلى تغييرات في الأوراق الرسمية كتغيير الاسم والنوع، وأحياناً ترفض الجهة التنفيذية إجراء هذا التغيير، مما يضطر المتحول جنسياً (أو المتحولة) إلى اللجوء للقضاء. يبين هذا البحث الإجراءات الطبية والقانونية لهذه العمليات الجراحية في مصر، ثم يبين أنه في ظل الوضع القانوني الحالي، وتفسير المحكمة الدستورية العليا لمبادئ الشريعة الإسلامية بأنها الأحكام قطعية الثبوت والدلالة ووجود فتاوى تبيح هذه الجراحات، لا يمكن الاحتجاج بالفقه الإسلامي لتبرير منع تعديل الأوراق الرسمية لهؤلاء المتحولين جنسياً بالإضافة إلى أن ذلك قد يؤدي بهم إلى ما يتنافى مع مبادئ الشريعة كالكرامة الإنسانية وحفظ النفس والعرض.

الكلمات الرئيسية: التحول الجنسي، مبادئ الشريعة الإسلامية، الجراحات

المتقدمة، جراحات تصحيح الجنس، الفتاوى الشرعية، أحكام القضاء الإداري.

I. Transsexualism: Medical and Legal Processes in Egypt

Transsexualism is “controversially classified as a mental health condition under the term gender identity disorder.”⁽¹⁾ Simply put, it is when a man or a woman “feel[s] trapped in the body of the opposite sex.”⁽²⁾ Transsexual persons are those “whose gender identity is different from their assigned gender at birth.”⁽³⁾ They are also defined under the umbrella term “transgender people.”⁽⁴⁾ Transsexual people often undergo sex-reassignment surgery (SRS) to match their external appearance and their anatomy with their psychological identity.⁽⁵⁾

I.A. The Medical Process of SRS in Egypt

SRS, or gender-reassignment surgery (GRS), is a surgical procedure that “entails removing the genitalia of one sex and constructing genital organs of the opposite sex.”⁽⁶⁾ In 2013, the Egyptian Medical Syndicate (EMS) adopted a new code of ethics in dealing with transsexualism and SRS to regulate both the medical and the legal process involved. Under the heading “Gender Correction Procedure,” Article 43 states:

The physician shall be prohibited from carrying out gender change operations. As regards gender correction operations, it is conditional that the approval of the competent committee at the syndicate would be obtained. The correction operations shall be carried out after carrying out the hormonal analyses and inspecting the chromosomal map after spending the

(1) R Oliver and M Davies, *Man into Woman: A History of Male-to-Female (MtF) Sex Reassignment Surgery* (2018 edn, EUROPEAN UROLOGY SUPPLEMENTS 2018) 256

(2) Sayed Sikandar Shah Haneef, ‘Sex Reassignment in Islamic Law: The Dilemma of Transsexuals’ [2011] 1(1) INTERNATIONAL JOURNAL OF BUSINESS, HUMANITIES AND TECHNOLOGY <http://www.ijbhtnet.com/journals/Vol._1_No.1_July_2011/10.pdf> accessed 7 February 2023

(3) Genny Beenyn, ‘Transgender Terminology’ (University of Massachusetts, 2020) <https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/transgender_terminology.pdf> accessed 7 February 2023

(4) *Ibid.*

(5) *Ibid.*

(6) Sayed Sikandar Shah Haneef, ‘Sex Reassignment in Islamic Law: The Dilemma of Transsexuals’ [2011] 1(1) INTERNATIONAL JOURNAL OF BUSINESS, HUMANITIES AND TECHNOLOGY <http://www.ijbhtnet.com/journals/Vol._1_No.1_July_2011/10.pdf> accessed 7 February 2023.

accompanying psychiatric and hormonal treatment for a period not less than two years.⁽¹⁾

Transsexual people are required to begin the medical process before SRS with psychiatric and hormonal treatment. The psychiatric treatment involves a consultation that discusses the sacrifices transsexuals will have to make “in order to become the gender they identify with (e.g., opting for a surgery they know will prevent them from having children or normal sexual relationships). Most transsexuals resort to suicide if they fail to undergo gender reassignment surgery, and some will commit suicide if the operation itself is not successful.”⁽²⁾

The hormonal treatment or therapy may be in the form of pills or injections. In the case of man-to-women transitioning, the hormone estrogen is used to enhance feminine features and desires, whereas in the case of women-to-man transitioning, testosterone is the hormone of choice.⁽³⁾ After a period of not less than two years of both psychiatric and hormonal treatment and with the approval of the syndicate committee, the surgeon could proceed with the operation. At this point, the trans person is ready to undergo the surgery to obtain the anatomical appearance that matches the gender he/she identifies with. The surgery differs from case to case.⁽⁴⁾ SRSs are divided into two categories—above the belt (top surgery) and below the belt (bottom surgery)—and may involve one or more of the following procedures, which is decided based on the specific case at hand⁽⁵⁾:

- (1) Ahmed Refat, «Medical Research Ethics in the Egyptian Profession Ethics Regulations» (Slide Share, 30 November 2009) <<https://www.slideshare.net/AhmedRefat/medical-research-ethics-in-the-egyptian-regulation>> accessed 7 February 2023
- (2) Inas a Mazen, «Clinical Management of Gender in Egypt: Intersexuality and Transsexualism» [2017] 2(24) Arch Sex Behav <<http://dx.doi.org/10.1007/s10508-016-0842-z>. Epub 2016 Sep 20.> accessed 7 February 2023
- (3) Elaine M F Costa and Berenice B Mendonca, «Clinical management of transsexual subjects» [2014] 2(58) Arq Bras Endocrinol Metabol <DOI: 10.1590/0004-2730000003091> accessed 7 February 2023
- (4) Serena Tolino, «Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas» [2017] 2(17) JOURNAL OF ARABIC AND ISLAMIC STUDIES <DOI: <https://doi.org/10.5617/jais.6116>> accessed 7 February 2023
- (5) Millicent Odunze, «Preparation and Procedures Involved in Gender Affirmation Surgeries» (VeryWellHealth, 08 October 2021) <<https://www.verywellhealth.com/gender-affirmation-surgery-2710288>> accessed 07 February 2023

Top surgery procedures:

- Breast augmentation
- Facial feminization
- Nose surgery—rhinoplasty may be done to change the shape of the nose.
- Eyebrows—a brow lift may be done to feminize the curvature and position of the eyebrows
- Jaw surgery—the jawbone may be shaved down to make it look more feminine
- Chin reduction—female chin structure is often more delicate and therefore chin reduction may be performed
- Cheekbones—may be enhanced, often via collagen injections as well as other plastic surgery techniques
- Lips—a lift lip may be done
- Creation of female hairline
- Male pattern hair removal
- Reduction of Adam’s apple
- Voice change surgery

Bottom surgery procedures:

- Removal of the penis (penectomy) and scrotum (orchiectomy)
- Creation of a vagina and labia (feminizing genitoplasty)⁽¹⁾

I.B. The Legal Process of SRS in Egypt

Since the EMS adopted the new code of ethics in 2013, 21 Egyptians have

(1) Ibid.

received approval from the competent committee to undergo SRS.⁽¹⁾ The code regulates the approval of SRS according to the following steps. First, the trans person has to undergo psychotherapy for a period of two years, following which a psychiatric report, explaining that the person has been diagnosed with gender identity disorder (GID) or gender dysphoria, will be generated. Using this report, the trans person can apply to the EMS committee requesting approval for surgery. The committee consists of five to seven members: two psychiatrists, an andrologist and/or a gynecologist, a specialist in chromosomes, a legal representative, and a representative from Dar Al-Eftaa,⁽²⁾ literally, “the house of edicts,” the Egyptian official department for legal opinions regarding Islamic law, headed by the grand mufti of Egypt. The president of the EMS committee explains the presence of an Islamic legal opinion expert in the committee by saying, “It is an ethical committee, and this is an ethical issue.”⁽³⁾

Furthermore, the president of the committee has emphasized that whoever wants to undergo SRS should first have the approval of the committee and then have the surgery done in one of the government hospitals, failing which he/she will face problems in modifying the official government documents.^[4] Dalia Abdel Hameed, Head of the Gender Program at the Egyptian Initiative for Personal Rights (EIPR), stated: “We have encountered this so many times over the past few months. We find a trans person who has completed all the surgery and once they want to change their papers there is refusal.”⁽⁵⁾

(1) Salma Islam, ‘Transsexual and Egyptian: Defying the Odds’ (Middle East Eye, 28 April 2016) <<https://www.middleeasteye.net/in-depth/features/transsexual-and-egyptian-defying-odds-648626093>> accessed 08 December 2018

(2) Ehab Barakat, ‘Sex Reassignment Committee is back: We Have a Deal with the Grand Mufti’ (Almasry Alyoum, 28 August 2017) <<https://www.almasryalyoum.com/news/details/1183931>> accessed 7 February 2023

(3) Salma Islam, ‘The Untold Stories of Egypt’s Transgender Community’ (The Egyptian Streets, 12 July 2015) <<https://egyptianstreets.com/2015/07/12/the-untold-stories-of-egypt-transgender-community/>> accessed 08 December 2018

(4) Ehab Barakat, ‘Sex Reassignment Committee is back: We Have a Deal with the Grand Mufti’ (Almasry Alyoum, 28 August 2017) <<https://www.almasryalyoum.com/news/details/1183931>> accessed 7 February 2023

(5) Salma Islam, ‘Transsexual and Egyptian: Defying the Odds’ (Middle East Eye, 28 April 2016) <<https://www.middleeasteye.net/in-depth/features/transsexual-and-egyptian-defying-odds-648626093>> accessed 08 December 2018

Once the SRS process is completed, the trans person has to contact the Civil Status Service responsible for official government documents such as birth certificates and national identity cards and submit the EMS report and the final medical report. If the Civil Status Service refuses to make changes to the trans person's official government documents, he/she will have to file a legal case in the administrative court, where people-versus-government disputes take place.

I.C. The Structure of the Egyptian Judicial System

Article 15 of the Egyptian Judicial Authority Law states that “except for the administrative disputers allocated to the state council[,] the courts rule in all disputes and crimes, unless otherwise stated by a specific text.”⁽¹⁾

There are two major judicial bodies in Egypt for different types of disputes: the Ordinary System and the Administrative System (the State Council), both established in 1946 by Law 112 and amended in 1984 by Law 47. The ordinary courts have jurisdiction over civil, commercial, and personal status issues, whereas the administrative courts are for settling administrative disputes⁽²⁾ Each body has two stages of litigation: courts of first instance and appellate courts, in addition to a supreme court for each system. The supreme court for the Ordinary System is called the Court of Cassation, whereas the administrative court is called the Supreme Administrative Court.⁽³⁾ Above both these courts is the Supreme Constitutional Court (SCC), responsible for all constitutional questions.

The State Council, responsible for administrative disputes, consists of the Administrative Judicial Court (a panel of three judges), which is a first instance court with jurisdiction over administrative matters such as contracts with the

(1) Nathalie Bernard-Maugiron and Baudouin Dupret, *Egypt and Its Laws* (Brill 2002) 186, The law in Arabic is found at: <https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/556f520fe4b0c8c1042043b6/1433358863323/Egypt+Judicial+Authotities+Law.pdf>.

(2) Nathalie Bernard-Maugiron and Baudouin Dupret, *Egypt and Its Laws* (Brill 2002)184 –185

(3) *Ibid.*, 183.

government and decrees issued by government services and ministries. The Supreme Administrative Court (a panel of five judges) is an appellate court responsible for reviewing the rulings issued by lower administrative courts.⁽¹⁾ The State Council also contains non-court entities such as the commissioners' committee, which has a very important role represented in giving legal advices in reports. A case file is not completed until the report of this committee is written and added to the file.⁽²⁾

II. The Nuraan/Eiden Case

Nuraan, an Egyptian girl, suffered for years from sexual identity disorder or GID, according to the report of the competent committee at the EMS. She filed a request before the EMS to provide approval for her SRS. After the medical investigation, the EMS approved her SRS through its competent committee to correct her sex from female to male and issued a report supporting the request on May 11, 2013. Thereafter, Nuraan proceeded with the surgery.

Nuraan's true challenge was, and still is, with the Civil Status Service, which refused to change her official record: "Changing official records is still a major obstacle for many transsexuals as highlighted by the ... case of Eiden, who completed the reassignment surgery, but whose document changes were blocked."⁽³⁾ She requested that her name be changed from Nuraan to Eiden (a male name) as also her gender on her national identity card.⁽⁴⁾ After being refused by the Civil Status Service, Eiden filed a lawsuit to fight for his right to change his name and gender to his current status. As mentioned earlier,

(1) Library of Congress 'Guide to Law Online: Egypt' (Library of Congress) <<https://www.loc.gov/law/help/legal-research-guide/egypt.php#court>>

(2) Ahmed Abou-Zeid, 'Egypt Legal System' [2016] (Static 1) <<https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/55745fefe4b07ff6e578906b/1433690095035/Egyptian+Legal+System--Ahmed+Abou-Zeid+2.pdf>>

(3) Salma Islam, 'Transsexual and Egyptian: Defying the Odds' (Middle East Eye, 28 April 2016) <<https://www.middleeasteye.net/in-depth/features/transsexual-and-egyptian-defying-odds-648626093>> accessed 08 December 2018

(4) Heba Showsha, 'The commissioners' committee recommend the change of official data for a transgender person' (Akhbaraknet, 1 September 2015) <<http://www.akhbarak.net/news/2015/09/01/7147049/articles/19672357/المفوضين-توصي-بتعديل-نوع-واسم-متحول-جنسيا/>> accessed 08 December 2018

the lawsuit filed is not complete until the commissioners' committee report is included.

The commissioners' committee report was in favor of Eiden, and it held that

the fact we found through the papers is that the surgical operation was carried out for the applicant as an unavoidable necessity based on the opinions of the specialists in this field. The decision of the Interior Ministry^[1] to not amend Eidan's governmental documents was in violation of the provisions of the law, especially that it is not correct that a citizen is subjected to disorders and physical and psychological changes up to the extent of the process of correcting his sex from female to male according to the certificate issued by the Egyptian Doctors Syndicate.⁽²⁾

From this, it is clear that the committee recommended that the judge should rule in favor of Eiden.

II.A. The Nuraan/Eiden Case Ruling

The case is on appeal no. 80419 of judicial year 68, court of administrative justice, ruling on January 24, 2016. The second chamber of the court of administrative justice, rejected the lawsuit demanding that the Interior Ministry amend the name of "Nuraan Majd El-Din" to "Eiden" and her gender from female to male in the national identity card after conducting a sex correction operation and held that

human freedom is not absolute in changing its sex in light of the current legal situation in Egypt, which is without existence of a legislation for the processes of sex change, which defines the cases with medical therapeutic

(1) The Civil Status Service falls under the Interior Ministry.

(2) Heba Showsha, <The commissioners' committee recommend the change of official data for a transgender person> (Akhbaraknet, 1 September 2015) <<http://www.akhbaraknet.net/news/2015/09/01/7147049/articles/19672357/المفوضين-توصي-بتعديل-نوع-واسم-متحول-جنسيا>> accessed 08 December 2018 (my translation).

necessity ...

As the principles of Islamic law are the main source of legislation, the Islamic perception of the freedom of sex change has made a distinction between gender correction and gender change. The majority of Muslim jurists have allowed to legitimately correct sex as a treatment for patients with physical disorders ...

The processes of sex change for patients who suffer from disorders of sexual identity which is the internal sense of femininity or masculinity, or what is called the mental gender, which is really a change from the right to wrong, made the consensus of scholars on the prohibition of sex change, from changing the creation of God.⁽¹⁾

It is obvious that the court has rejected the appellate, but the reasoning is interesting because it did not consider the current statues of the trans person; instead, it focused on the Islamic norms and Muslim jurist opinions, emphasizing that what happened was a mistake (changing the creation of God), and alleged that the SRS is against the consensus of Muslim scholars and Islamic law norms.⁽²⁾

II.B. Interpretation of Islamic Norms

The court brought Islamic law or Islamic sharia norms in its ruling due to Article 2 of the 2014 constitution, which states: “Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principal source of legislation.”⁽³⁾

(1) Abdu Al-jouhainy, «Reasons for rejecting the change of official data for a transgender person» (Veto, 25 January 2016)

<<https://www.vetogate.com/2015510>> accessed 07 February 2023 (my translation).

(2) Muhammed Napoleon , «Reasons for refusing to oblige the Ministry of Interior to change the data of a transgender person» (Al-Shorouk, 25 January 2016)

<<https://www.shorouknews.com/news/view.aspx?cdate=25012016&id=0c74458a-206e-4c63-869b-b1755e383cc3>> accessed 7 February 2023

(3) David Risley, «SCC on Article 2 (Islamic Law)» (Egypt Justice, 10 June 2015) <<https://egyptjustice.com/analysis/2015/6/10/scc-jurisprudence-on-article-2-islamic-law>> accessed 7 February 2023

The most critical questions in this context are regarding the meaning of the term “principles of Islamic sharia” and who decides what it is.

The preamble of the 2014 Egyptian Constitution states: “We are drafting a constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings.”⁽¹⁾

II.C. The SCC and Article 2 Jurisprudence

The SCC is located in Cairo and consists of a general assembly and commissioners and is presided over by a president. It has exclusive jurisdiction over the constitutionality of laws and regulations, interpreting legislative provisions, and adjudicating jurisdictional disputes and contradictory judgments. “Judgments and decisions of the Supreme Constitutional Court are published in the Official Gazette.”⁽²⁾

The SCC in Its Article 2 Jurisprudence

As summarized by Clark Lombardi:

The SCC in its Article 2 jurisprudence has explicitly adopted several theses common to theories of Sunni Islamic law: a government in power is permitted to enact whatever statutes it chooses, so long as it satisfies two tests. First its legislation must not force Muslims to violate universally applicable rulings of Islamic law, which it defines as rulings that are certain “with respect to authenticity and meaning.” Second, its legislation must advance the “goals of the sharia.”⁽³⁾

The SCC clearly states that “legislation will be struck down if it contradicts

(1) Ibid.

(2) The Tahrir Institute, <Egypt’s Court System 101> (The Tahrir Institute for Middle East Policy, 22 October) <<https://timep.org/transitional-justice-project/egypts-court-system-101/>> accessed 7 February 2023.

(3) Clark Lombardi, *State Law as Islamic Law in Modern Egypt* (1st edn, Brill 2006) 256

absolutely certain rulings in Islamic law based on authentic and clear sources of authority, coupled with a lengthy exposition of the binding nature of such accepted and authentic rulings.”⁽¹⁾

The court, however, chose a “pastiche of modernist approaches,”⁽²⁾ an effective way to address the well-known rules and purposes of sharia that have a Muslim consensus and that state law must respect.

Article 2 and Human Rights

The SCC has respected both human rights and international law, and as Clark Lombardi said, “The Supreme Constitutional Court of Egypt has over the last twenty years developed a creative new theory of Islamic law. Employing this method, the Court has interpreted Sharia norms to be consistent with international human rights norms.”⁽³⁾

III. Islamic Law and Transgenderism

The administrative court ruling in the Nuraan/Eiden case should have taken the current status of Eiden as a man into consideration and ruled in his favor under the legal institute of correction of factual errors (or material misstatement). Instead, the ruling has highlighted many points, the most important being the allegation that Muslim scholars have consensus on prohibiting SRS and the second being the argument that SRS is against Islamic legal norms.

III.A. Opinions of Muslim Scholars

Islamic consensus is a critical concept, and if all scholars agree to a ruling, it becomes a principle that the SCC follows in its future rulings. The court had alleged consensus of Muslim scholars to prohibit SRS. However, Islamic

(1) Ibid.

(2) Clark B. Lombardi and Nathan J. Brown, ‘Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law’ [2006] 3(21) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 379–435

(3) Ibid.

consensus is not considered present even if one scholar disagrees. Among previous transsexual cases is the famous 1981 case of Sayyid/Sally in which Sheikh Muhammad Sayyid Tantawy, the Grand Mufti of Egypt, issued his Islamic opinion on transsexualism and SRS.

Sayyid Abd Allah was a student at Al-Azhar University. He was suffering from “psychological hermaphroditism,” and, therefore, his psychologist “treated him for three years, making all possible effort to restore male sexual identity to him, but eventually ... [the psychologist] had to give up.”⁽¹⁾ Sayyid underwent an SRS and took on the female name of Sally. She applied to the Administration of Civil Matters (Maslahat al-Ahwal al-Madaniya) to have her name formally changed from Sayyid to Sally.

On May 14, 1988, the EMS sent a letter to Sayyid Tantawy, the mufti of the republic, asking him for a fatwa on the matter. He said:

As for the condemnation of those who by word and deed resemble women, it must be confined to one who does it deliberately ..., 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 (mukhannath khalqi) 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.

(1) Jakob Skovgaard-Petersen, «Sex Change in Cairo: Gender and Islamic Law» [1995] 2(3) JOURNAL OF THE INTERNATIONAL INSTITUTE <<https://quod.lib.umich.edu/j/jii/4750978.0002.302?view=text;rgn=main>> accessed 7 February 2023; and Serena Tolino, «Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas» [2017] 2(17) JOURNAL OF ARABIC AND ISLAMIC STUDIES <<https://doi.org/10.5617/jais.6116>> accessed 7 February 2023

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 women 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 disorder 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 (a famous companion of the Prophet): "The Messenger of God sent a physician to abu ibn Kacb (one follower of the Prophet). The physician cut a vein and burned it." This hadith is related by Ahmad [b. 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 ..." is 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.⁽¹⁾

This unofficial legal opinion “concluded that if the doctor testified that this was the only cure against the disorder, then this treatment was permissible.”⁽²⁾

On December 29, 1988, the Public Prosecutor acquitted the surgeon Asham Allah Jibra'il of the charge of inflicting a permanent disease. The final report confirmed that the operation had been performed properly according to the standards of these operations. Almost a year passed before he closed the Sally case in October 1989, and in November Sally finally received the certificate stating that she was a woman, almost two years after the operation.⁽³⁾

Another fatwa in favor of transsexual people and SRS was issued in 1981 by Shaeikh Gād al-Ḥaqq (d. 1996). At the time the grand mufti of Egypt had issued a fatwa against SRS in response to a request from the Malaysian Centre for Islamic Research, entitled (The surgery to change a man into a woman and vice versa is allowed in case of necessity), which is almost identical to the one that Tantawy would release in 1988.

Gād al-Ḥaqq starts mentioning a hadith transmitted by Usāma b. Surayk, according to which God did not send any illness without sending also a cure for it. After this hadith, Gād al-Ḥaqq mentions another hadith according to which the Prophet Muḥammad authorized Arfagah Ibn As,ad, who lost his nose

(1) Jakob Skovgaard-Petersen <Sex Change in Cairo: Gender and Islamic Law> [1995] 2(3) JOURNAL OF THE INTERNATIONAL INSTITUTE <<https://quod.lib.umich.edu/jii/4750978.0002.302?view=text;rgn=main>> accessed 7 February 2023.

(2) Ibid.

(3) Ibid.

during a battle and used a nose of silver, to substitute it with one of gold when the silver one started to smell of corruption, to demonstrate how something which is generally forbidden, in this case the use of a gold item on a man, can be allowed in case of necessity (ḍarūra) Gād al-Ḥaqq then refers to the above mentioned hadith of the muhannat living with Umm Salama, and also states that according to Ibn Ḥagar al-Asqalānī's (d. 852/1449) commentary on the Ṣaḥīḥ of al-Buhārī, the muhannat who is so because of an innate disposition (min aṣl halqatihi) cannot be blamed, but has 'to abandon his softness and his flaccidness in walking and talking', even if gradually. Gād al-Ḥaqq also mentions that according to the historian al-Ṭabarī (d. 310/923), if the Prophet Muḥammad allowed the muhannat to live with his wife until he heard him giving a precise description of a woman, then the Prophet Muhammad had no prejudice against muhannatūn, nor did he blame them for being created as such.

A surgery to uncover organs of the masculinity or the femininity that are hidden is allowed and becomes even recommended because it should be considered a treatment, whenever suggested by trusted doctors. However, it is not licit in a case if it is only based on the desire to change the human being's sex from a woman to a man or from a man to a woman.⁽¹⁾

I used these two fatwas to clearly state that SRS prohibition does not enjoy consensus among Muslim scholars. Besides, there are other opinions and fatwas in favor of SRS for Shaikh Faisal Mawlawi on his website, Shaikh Rashid Al Ulimi and Shaikh Ali Gomaa⁽²⁾.

(1) Serena Tolino, <Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas> [2017] 2(17) JOURNAL OF ARABIC AND ISLAMIC STUDIES <DOI: <https://doi.org/10.5617/jais.6116>> accessed 7 February 2023

(2) [Shaikh Ali Gomaa, <The Transformation of Sex to Cure the Sexual Identity Disorder> (Dr Ali Gomaa, 7th November) <<https://www.draligomaa.com/index.php/%D8%A7%D9%84%D9%81%D8%AA%D8%A7%D9%88%D9%89/item/2005-%D8%AA%D8%BA%D9%8A%D9%8A%D8%B1-%D8%A7%D9%84%D8%AC%D9%86%D8%B3-%D9%84%D8%B9%D9%84%D8%A7%D8%AC-%D8%A7%D8%B6%D8%B7%D8%B1%D8%A7%D8%A8-%D8%A7%D9%84%D9%87%D9%88%D9%8A%D8%A9-%D8%A7%D9%84%D8%AC%D9%86%D8%B3%D9%8A%D8%A9>> accessed 7 February 2023

III.B. Islamic Norms

The second important point the administrative court highlighted in its ruling in the Nuraan/Eiden case is that SRS is the changing of the creation of God, which is forbidden by Islamic principles of sharia. To clarify this, we turn to the Quranic verse 30:30 (“So direct your face toward the religion, inclining to truth. [Adhere to] the *fiṭrah* of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of the people do not know.”) and verse 4:119: (“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 Allah. And whoever takes Satan as an ally instead of Allah has certainly sustained a clear loss.”). As Sayed Sikandar Shah Haneef said, “The majority of Quranic exegetes interpreted the verses on ‘changing the creation of God’ as a reference to God’s religion, considering that God created all people as naturally inclined to the correct religion. However, others have interpreted these verses as referring to an alteration in the physical appearance of human beings and animals.”⁽¹⁾

The counterargument is that SRS is a remedy or a treatment to make the outer creation (biological sex) look like the internal creation (gender).⁽²⁾

For instance, one anonymous medical doctor protagonist strongly believes that transsexual tendency is biological in nature and a sickness when she said: “the psycho-sociological theories attributing transsexual tendencies to social factors and family upbringing are mere myths.” To her, instead it is a biologically mandated phenomenon, namely, these individuals’ sex brain region is responsible for generating sexual feelings which are contrary to their anatomical makeup. As a matter of fact these abnormalities in a fetus develop

(1) Sayed Sikandar Shah Haneef, «Sex Reassignment in Islamic Law: The Dilemma of Transsexuals» [2011] 1(1) INTERNATIONAL JOURNAL OF BUSINESS, HUMANITIES AND TECHNOLOGY <http://www.ijbhtnet.com/journals/Vol._1_No.1_July_2011/10.pdf> accessed 7 February 2023

(2) Ibid.

due to some hormonal abnormalities which affect its genes and consequently its sex brain cells before birth. Accordingly, after the birth such a child starts to display the feelings of reverse gender from the age of three. Therefore, to her, this is a kind of inborn defect with which a child is born and no other remedies can work for him/her except a sex-change medical intervention.

This should, indeed, be allowed in Islam as: firstly, it does not amount to changing ones inborn nature but restoration of something amiss in him/her. It is analogous to the lawfulness of undergoing surgery to replace one's malfunctioned organ, which in no way is regarded as tampering with one's nature. Secondly, the jurists who oppose it have not adequately pondered over the ensuing immoral consequences of their verdict for transsexuals, namely, who out of no legitimate outlet would express their aberrant feelings by way of homosexuality or lesbianism?⁽¹⁾

Another counterargument is that even if this is an Islamic principle, it is not the only one, as there are other principles mentioned in the Quran, such as human dignity: "We have bestowed dignity on the children of Adam ... and conferred upon them special favors above the greater part of Our creation" (17:70). This verse is self-evident in its recognition of inherent dignity for all human beings without qualification of any kind. The Quran commentator Shihab al-Din al-Alusi (d. 1854) wrote that "everyone and all members of the human race, including the pious and the sinner, are endowed with dignity, nobility and honor, which cannot be made exclusive to any particular group or class of people."⁽²⁾ Therefore, changing the name and gender for trans persons preserves their human dignity.

(1) Sayed Sikandar Shah Haneef, «Sex Reassignment in Islamic Law: The Dilemma of Transsexuals» [2011] 1(1) INTERNATIONAL JOURNAL OF BUSINESS, HUMANITIES AND TECHNOLOGY <http://www.ijbhtnet.com/journals/Vol._1_No.1_July_2011/10.pdf> accessed 7 February 2023

(2) Ibid.; and Mohammad H Kamali, «Human Dignity in Islam and Its Impact on Society» (New Straits Times, 25 October 2017) <<https://www.nst.com.my/opinion/columnists/2017/10/294803/human-dignity-islam-and-its-impact-society>> accessed 7 February 2023

Asifa Qurishi pointed out another Islamic norm when she said: “Every divine rule can be connected to the preservation of at least one of these five: religion, life, mind, family, or property. For example, the Qur’anic prohibition of khamr (wine drinking) promotes the purpose of preservation of intellect, and the prohibition of zina (extramarital sex) promotes the preservation of family.”⁽¹⁾

Therefore, judges presiding over cases of SRS should allow it in order to protect the lives of transsexual humans. Statistics state that

nearly 14% of adolescents reported a previous suicide attempt; disparities by gender identity in suicide attempts were found. Female to male adolescents reported the highest rate of attempted suicide (50.8%), followed by adolescents who identified as not exclusively male or female (41.8%), male to female adolescents (29.9%), questioning adolescents (27.9%), female adolescents (17.6%), and male adolescents (9.8%). Identifying as non-heterosexual exacerbated the risk for all adolescents except for those who did not exclusively identify as male or female (i.e., nonbinary). For transgender adolescents, no other sociodemographic characteristic was associated with suicide attempts.⁽²⁾

Protection of family is one of the major Islamic norms, and transsexuals are drawn into sex work, which destroy the family order, because they cannot find legal employment without a valid national identity card.

(1) Asifa Qurishi, ‘Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence’, [2006] 28(1036) *Cardozo Law Review* 67-123

(2) Russell B. Toomey, Amy K. Syvertsen, and Maura Shramko, ‘Transgender Adolescent Suicide Behavior’ [2018] 142(4) *Pediatrics* < <https://doi.org/10.1542/peds.2017-4218>>

Conclusion

Sharia principles are legal sources in Egypt; however, the Supreme Constitutional Court has held that sharia principles are issues which are not questionable or issues that have Islamic consensus. In this paper we prove that the prohibition of Sex Reassignment Surgery in Islamic law does not join consensus and there are many Islamic edicts (fatwas) that allow SRS, such as fatwa shikh Jad al-Haqq (1981) and fatwa shikh Tantawy (1988), besides that, the principle of human dignity, the preservation of life and the preservation of family (hifdhu al-nafs wa al-nasl) are Islamic norms which are in favor of permitting the SRS. Accordingly, the SRS should not be prohibited by alleging that this is the Islamic point of view, and the trans person has the full right to change the name and gender in their official papers. Moreover, the courts might deal with changing of the name and gender in the ID and official papers after SRS in means of the correction of material mistake.

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