

# MOHAMMAD HASHIM KAMALI: Transgenders, from Islam's perspective

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ISLAMIC jurisprudence provides only some detail on the treatment of persons who combine the characteristics of both sexes: transgenders and hermaphrodites (khuntha), and men with innate effeminate tendencies (mukhannath). Issues of concern over their inheritance rights, qualification as witnesses, and rules of female privacy (sitr) are discussed.

I shall review some of these, but then also pose the larger question of fairness over the stigma and prejudice that such persons face in our midst. Some of these were highlighted in a New Straits Times editorial (Dec 20), and several interviews and responses given by religious leaders and others on the subject.

Both khuntha and mukhannath are qualified to be witnesses if they are upright ('adl) and do not actively exhibit or exaggerate their masculine or feminine tendencies, but not so if they do, as that would undermine their rectitude.

Yet the leading schools of Islamic law have differed due to a renowned hadith proclaiming that "Muslims are upright in relationship to one another", which means that people are presumed to be upright unless proven otherwise.

Innate tendencies beyond a person's control do not disqualify a witness -- as is understood from the Quranic verse that "every soul is accountable for its own (deliberate) deeds" (52:21, also 14:21 and 74:38).

Hadith also indicate that the mukhannath and herma-phrodite are treated like other men with regard to rules of privacy (sitr), especially of women in the household. The Prophet Muhammad discouraged the entry of mukhannath with no known desire for women into his household. This restriction may, however, be relaxed in cases of evident need and circumstances such as age and reliability of the person involved.

The Islamic inheritance laws only address the position of khuntha or hermaphrodite. This is a person who has both male and female organs, or one who may have neither. Khuntha are of two types: intractable (khuntha mushkil) and discernible (khuntha ghayr mushkil). The latter is one whose gender can be determined through investigation, but the former presents a dilemma as to entitlement to a share, whether of a male or female, in inheritance. It is suggested that two distributions of the estate should be attempted, one assuming the beneficiary as male and the other as female.

If the share turns out to be equal in both cases, there is no issue, but if they differ, the schools of law provide different answers: khuntha is to be given the lesser of the two shares (Hanafi school); one half of the male and one half of the female shares combined is to be given (Maliki); the khuntha and all existing heirs should receive the

lesser of the two distributions with the remainder to be held in reserve until his or her condition becomes known and then distributed accordingly (Shafi'i and Hanbali schools).

Yet the issue before us is not as much legal as cultural. Many Malaysians have spoken compassionately on the issue to say that "transgenders face stigma and discrimination from a very young age"; that "most transsexuals never get past the job interview"; that "those who wish to practise their faith are ostracised from most churches and mosques"; and that "most are unable to change their sex assignment in their birth certificates, identity cards, driving licences and passports".

In the absence of specific responses to such questions in Islamic jurisprudence, I refer to some of the general guidelines of the Quran and hadith -- an approach in line with the Islamic methodology of juristic reasoning (ijtihad).

Islam identifies itself as *din al-fitrah*, a religion that manifests harmony with human nature (Quran, 30:30), which implies that it seeks to respond positively to the legitimate needs of people. Our natural need and reason, informed by the available guidelines of Islam, should thus lead us in our quest for answers.

God's affirmation in the Quran that "we have bestowed dignity on the children of Adam" (17:70) is unqualified and absolute in that human dignity is divinely ordained and inheres in all individuals by virtue of their humanity.

It is also a governing principle of Islam that should duly be reflected in all human relations, laws and governance, social and cultural affairs. Even criminals are not excepted. Although some jurists have argued that crime compromises the dignity of its perpetrator, the general position remains that Islam does not permit undignified and inhumane treatment of criminals and prisoners, apart from what the due course of justice may determine for them.

The Prophet is reported to have said in a hadith that "people are God's children and those most beloved to God are the ones who treat His children kindly". Each and every one of us partakes in a sparkle of the Divine (38:72), and deserves to be treated with fairness (*ihsan*) and justice, such that it is becoming of the grace and dignity that human beings, too, must practise in relationship to one another.

The Quran further provides: "there shall be no hostility except against the oppressors" (2:193). Everyone's life, property and honour is immune against aggression, humiliation and ridicule, except for those who commit acts of injustice. Issues of accountability, reward and punishment in Islam, as in other major traditions, are inextricably linked with moral autonomy and intent.

No one must be made to suffer without guilt and due process that necessitates proof of intentional behaviour.

Finally, fraternity (*ukhuwwah*; 49:10) and cooperation in good works (*ta'awun*; 5:20) are among the leading, yet often neglected, guidelines of Islam that must duly be reflected, especially at a time when all of us are called upon to strengthen the spirit of

unity under 1Malaysia.

Most of this will remain empty preaching unless measures are taken by the authorities, religious leaders -- indeed all Malaysians -- to translate them into appropriate action.

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