

PERFECTION OF SEX FOR THE INTERSEX (KHUNṢA) TO GET MARRIED

Maqāṣid Syarīah Perspective on Corrective Surgery

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Abstract

This paper sheds light on the reasons for performing corrective surgery for intersex person to get married. The data were collected through the examination of works on intersex. The results of this study reveal that Islamic law, following the maqāṣid syarīah approach, allows the intersex person to perform corrective surgery with/without the intention of marriage. The choice to conduct corrective surgery does not violate the five principles of maqāṣid syarīah: the principle of religion (ḥifẓ ad-dīn), the principle of the soul (ḥifẓ an-nafs), the principle of mind (ḥifẓ al-'aql), the principle of descent (ḥifẓ an-nasl), and the principle of property (ḥifẓ al-māl). However, corrective surgery is limited to the people who biologically have sexual disorders and the surgery must be safe according to medical science.

Artikel ini menjelaskan alasan melakukan operasi kelamin bagi orang interseks untuk menikah. Data dalam penelitian ini dikumpulkan dengan cara menelaah berbagai literatur yang membahas interseks. Hasil penelitian ini mengungkapkan bahwa berdasarkan pendekatan maqāṣid syarīah, hukum Islam membolehkan orang interseks melakukan operasi penyempurnaan kelamin, baik disertai niat untuk menikah maupun tidak terlebih dahulu. Pilihan untuk melakukan operasi penyempurnaan kelamin tidak melanggar kelima prinsip maqāṣid syarīah, yakni prinsip agama (ḥifẓ ad-dīn), prinsip jiwa (ḥifẓ an-nafs), prinsip akal (ḥifẓ al-'aql), prinsip keturunan (ḥifẓ an-nasl), dan prinsip harta (ḥifẓ al-māl). Namun, operasi penyempurnaan kelamin hanya dapat dilakukan bagi orang yang memang benar-benar secara biologis mengalami kelainan seksual. Dan operasi yang dilakukan harus memenuhi standar ilmu kedokteran.

Keywords: *Corrective Surgery, Interseks, Khunṣa, Maqāṣid Syarīah*

A. Introduction

It is a fact that there are humans who experience problems with their sex, the 'uncommon'. True, it is a gift that some humans are born with sex ambiguity. We refer it to as intersexuality. It means the condition of either having both male and female gonadal tissue in one individual or of having the gonads of one sex and external genitalia that is of the other sex or is ambiguous.¹ In Islamic Law, it is called *khunṣa*. Simply, it is defined

as people who have two sexes (*ẓakar* and *farj*) or have unclear sex.² In Islam again, it could be said that most of the topics of Islamic Law (*fiqh*) are divided into the frame of binary sex paradigm, man and women.³ This leads to the humans with the 'third' sex being somewhat left unregulated in any rules. At least, in the horizon of Islamic legal discourse, their legal status is remaining a debatable issue. For example, the share of *khunṣa* in inheritance has long been a subject of discussion, mainly in

¹ <https://www.merriam-webster.com/dictionary/intersexuality>

² Wahbah Al-Zuhayli, *Al-Fiqh al-Islami wa-Adillatuh* (Damaskus: Dar al-Fikr, 2008).

³ Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Application* (New York: OUP USA, 2009).

Hanafi's *mazhab*,⁴ but until the contemporary era, there are not many Muslim countries recognizing 'third' sex in their positive law. Research conducted by Gesink shows that the premodern Islamic experts largely pose intersex toward gender issues other than biological debate, such as ambiguous and mutable when addressing inheritance, and marriage.⁵ Recently, even in the modern era, some countries have a different policy toward this 'third' sex.

In Malaysia, Intersex and transgender are brought into different notions. Transgender people (who are born with perfect genitals) are prohibited from sex-change surgery in any form, but it is different from the intersex individual. Malaysia allows corrective surgery for the intersex but under specific conditions and categories. Malaysia in the latest fatwa 2006, the National Council of Islamic Religious Affairs Malaysia (JAKIM) put a medical assessment in performing corrective surgery. In the fatwa, the Malaysian Islamic religious authority seems to be concerned about the health care of the intersex person. This means that as long as the surgery does not endanger the person, it is permissible based on the expert doctor's recommendation.⁶

Not much different from Malaysia, Iran and Egypt once had a fatwa that allowed sex reassignment surgery for intersex people.⁷ In Iran, Khomeini issued the fatwa which stated that sex reassignment surgery is generally not prohibited (by Allah) as long as it is performed on the recommendation of a qualified physician, both transgender, and *khunṣa*. For *khunṣa*, sex reassignment surgery is not an obligation, but an eligible choice.⁸ In

Egypt, a fatwa on sex reassignment surgery was issued by al-Tantawi. Slightly more traditional, Tantawi's fatwa does not mention the permissibility of sex change, but the permissibility of performing surgery based on medication and the intention of finding out the truth of gender. The permissibility of performing sex reassignment surgery is not because of the intention to change sex but because of biological needs, or health and it should not be interpreted as sex change.⁹

The advancement of science and technology in the field of medicine on the one hand and the progress of human rights on the other have brought debates on the newest quest of sex reassignment surgery. It can be said that medical science has advanced to the point where it can perform corrective surgery on intersex individuals. However, the human rights perspective views it differently. Non-consensual corrective surgery, for example, may be considered a violation of human rights in Europe, and victims may pursue legal action.¹⁰ Furthermore, this genital enhancement surgery is also accompanied by a reason for marriage. Sexual perfection for the purpose of marriage can be classified as a matter of human rights. Considering the use of progressive perspective, as was the case in Iran following Khomeini's fatwa, we can say that sex reassignment surgery is not a problem, but it will be a dilemma if we take into consideration Tantawi's fatwa where the crux of the matter is not the change of genitals but curing sexual disorders. Marriage as a reason for undergoing sex reassignment surgery must be carefully examined to ensure that it does not conflict with more

⁴ Indira Falk Gesink, 'Intersex in Islamic Medicine, Law, and Activism', in *The Routledge Handbook of Islam and Gender*, ed. by Justine Howe (London and New York: Routledge, 2020), pp. 116–29.

⁵ Indira Falk Gesink, 'Intersex Bodies in Premodern Islamic Discourse: Complicating the Binary', *Journal of Middle East Women's Studies*, vol. 14, no. 2 (Duke University Press, 2018), pp. 152–73.

⁶ Muhammad Afif Bin Mohd Badrol et al., 'The Gaps in Fatwā on Intersex Corrective Surgery: Some Reflections in the Context of Malaysia', *Intellectual Discourse*, vol. 26, no. 1 (2018), pp. 75–89.

⁷ Mehrdad Alipour, 'Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: a Case Study of Ayatollah Khomeini's and Sheikh Al-Tantawi's Fatwas', *International Journal of Transgenderism*, vol. 18, no. 1 (Taylor & Francis, 2017), pp. 91–103.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Susannah Cornwall, 'Bodily Rights and Gifts: Intersex, Abrahamic Religions and Human Rights', *Culture, Health & Sexuality*, vol. 23, no. 4 (Taylor & Francis, 2021), pp. 533–47.; Sayed Sikandar Shah Haneef and Mahmood Zuhdi Haji Abd Majid, 'Medical Management of Infant Intersex: the Juridico-Ethical Dilemma of Contemporary Islamic Legal Response', *Zygon*, vol. 50, no. 4 (Wiley Online Library, 2015), pp. 809–29.; Selma Öztürk-Pinar, 'Intersexuality (khunṥā): The Third Gender in Islamic and German Legal Conceptions', *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*, vol. 8, no. 1, (2020), pp. 86–95.

traditionalist principles, like Tantawi's. This is the foundation upon which this paper will be written.

Research on sex reassignment surgery for the intersex in the perspective of Islamic Law is not a new tone. Haneef,¹¹ Alipour,¹² Fahimeh and Mohsen,¹³ Polat et al,¹⁴ Zainuddin and Mahdy,¹⁵ Zahra et al,¹⁶ and Hammad¹⁷ are several authors who have discussed intersex from various perspectives. Haneef and Alipour, for example, look at the development of intersex from the perspective of the Islamic law discourse.¹⁸ Polat photographs the empirical experience of intersex life in a modern Muslim country, namely Turkey.¹⁹ Hammad dissected *fiqh* related to intersex but in the perspective of modern legal science, especially in the context of continental European jurisprudence.²⁰

Although it has been extensively discussed by the experts above, intersex continues to be an enticing subject of debate. This is because, in some countries, the absence of clear legal rules governing intersex

contributes to social misconceptions. The works above have discussed intersex from the perspective of Islamic law, but not specifically from the perspective of *maqāṣid syarīah* as a series of principles in Islamic law. This article is classified as a library study, which gathers the data by reviewing literature related to the topic. This article departs from a normative approach, which intends to explain the problem of corrective surgery according to *maqāṣid syarīah*. After the researcher obtained data, it is then prescribed into the principle of *maqāṣid syarīah*.

B. The Definition of Intersex

Intersex is a general term used for a variety of conditions in which a person is born with reproductive or sexual anatomy that does not seem to fit the typical definition of female or male.²¹ According to Rossellini, intersex is an individual who has genetic, hormonal, and innate features that are considered to be characteristics of both men and women at the same time. This means that it can be considered

¹¹ Sayed Sikandar Shah Haneef, 'Sex Reassignment in Islamic Law: The Dilemma of Transsexuals', *International Journal of Business, Humanities and Technology*, vol. 1, no. 1 (2011), pp. 98-107.; Sayed Sikandar Shah Haneef and Ali Ahmed Zahir, 'Gender Categorization between Islam and Science: The Problem of Integration from Islamic Jurisprudence Perspective', *Revelation and Science*, vol. 6, no. 1 (2016).; and Haneef and Majid, 'Medical Management of Infant Intersex: the Juridico-Ethical Dilemma of Contemporary Islamic Legal Response'.

¹² Mehrdad Alipour, 'Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmīc Theology of A Third Gender', *Religion and Gender*, vol. 7, no. 2 (Brill, 2017), pp. 164-79.; Alipour, 'Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: a Case Study of Ayatollah Khomeini's and Sheikh Al-Tantawi's Fatwas'.

¹³ Fahimeh Kalbasi-Isfahani and Mohsen Deleer, 'Sex-Reassignment Rules in Shiite Jurisprudence', *Journal of Reproduction & Infertility*, vol. 17, no. 3 (2016), p. 169.

¹⁴ Aslihan Polat et al., 'Family Attitudes toward Transgendered People in Turkey: Experience from a Secular Islamic Country', *The International Journal of Psychiatry in Medicine*, vol. 35, no. 4 (SAGE Publications Sage CA: Los Angeles, CA, 2005), pp. 383-93.

¹⁵ Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, 'The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development', *Archives of Sexual Behavior*, vol. 46, no. 2 (Springer, 2017), pp. 353-60.

¹⁶ Zahra Sarcheshmehpour, Raihanah Abdullah, and Muhammad Bashir Alkali, 'Gender Change of Transsexuals in Shariah: An Analysis', *Journal of Shariah Law Research*, vol. 3, no. 1 (2018), pp. 139-56.

¹⁷ Hamza Abed Al-Karim Hammad, 'Sex Change in Islamic Jurisprudence (fiqh) UAE Law: a Juristic Analysis', *Medicine, Law & Society*, vol. 12, no. 2 (2019), pp. 79-88.

¹⁸ Haneef and Zahir, 'Gender Categorization between Islam and Science: The Problem of Integration from Islamic Jurisprudence Perspective'.; Muhammad Afif Mohd Badrol, Abdul Bari Awang, and Sayed Sikandar Shah Haneef, 'Intersex Gender Determination in Classical Islamic Law and Modern Medicine: an Analysis for Integration', *Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC)*, vol. 23, no. 2 (2018), pp. 469-96.; Haneef, 'Sex Reassignment in Islamic Law: The Dilemma of Transsexuals'.; Haneef and Majid, 'Medical Management of Infant Intersex: the Juridico-Ethical Dilemma of Contemporary Islamic Legal Response'.; Alipour, 'Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: a Case Study of Ayatollah Khomeini's and Sheikh Al-Tantawi's Fatwas'.; and Alipour, 'Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmīc Theology of A Third Gender'.

¹⁹ Polat et al., 'Family Attitudes toward Transgendered People in Turkey: Experience from a Secular Islamic Country'.

²⁰ Hammad, 'Sex Change in Islamic Jurisprudence (fiqh) UAE Law: a Juristic Analysis'.

²¹ Taqwa Zabidi, 'Analytical Review of Contemporary Fatwas in Resolving Biomedical Issues Over Gender Ambiguity', *Journal of religion and health*, vol. 58, no. 1 (Springer, 2019), pp. 153-67.

as male with female characteristics, or as female with male characteristics, or having sexual characteristics that are not at all clear or ambiguous (it is not clear whether the gender is male or female).²²

The medical term for intersex is ambiguous genitalia or sex ambiguity, a disorder in which the patient has doubtful genetic, anatomical, and or physiological characteristics between men and women.²³ Also called double sex because sometimes the clitoris is large looked like two sexes.²⁴ In addition to the above, intersex is also known in other scientific terms as hermaphrodites, a term that refers to the notion that sex is divided into two poles, namely male or female, so the questionable sex form is between the two.²⁵ However, in its development, endocrinologists often use the term Disorders of Sexual Development (DSD).²⁶

In Islam, the term intersex is called *al-khunṣa*. *Al-khunṣa* in the discussion of Islamic law is divided into two types, namely *al-khunṣa al-musykil* and *al-khunṣa gairu al-musykil*, both of which have different definitions.²⁷ The classifications of *khunṣa* depend on the level of difficulty in assigning the gender.²⁸

Al-khunṣa al-musykil is an intersex whose status is difficult to determine, that is, a human whose body has an oddity, it cannot be known whether he is male or female. In the case of *al-khunṣa al-musykil*, a person is destined to have two sexes, namely male and female. It is impossible to distinguish which one is more dominant in his personality. Medically, *al-khunṣa al-musykil* can be proven that on the outside his genitals are not the same as the inside of his genitals. For example, the inner sex is female and has a uterus, but the outer sex is male and has a penis or has both, and

vice versa. There are also *al-khunṣa al-musykil* who do not have genitals at all but only have a hole for urine. Therein lies the problem. Thus, *al-khunṣa al-musykil* dominance cannot be examined and determined with certainty the law that can be assigned to him, because obscurity of his two genitals (both male and female sexes are equally problematic).

Research conducted by Solekhan and Mubarak,²⁹ it is known that because the condition of *al-khunṣa al-musykil* cannot be determined by gender, the affairs of status also become unclear, whether male or female. Meanwhile, men and women each have their own rights and obligations as well as their own laws. However, this can sometimes become clear when he is an adult by looking at which genital functions play a role, but many are still abstruse until adulthood. It can also be seen when entering puberty, changes in voice, mustache, and other secondary sex signs that appear at the age of 14-21 years.

Al-khunṣa gairu al-musykil is intersex but it is easy to determine whether the status is male or female. This intersex can clearly be punished both as men and women. Scholars agree that the guideline in determining the legal status of *al-khunṣa gairu al-musykil* is the physical indication that is more dominant, not the psychological symptoms. For example, before puberty, it can be seen from the way out in which urine is more dominant. Conditions for repeated discharge of the same sex. But after puberty can be seen in the development of the physical body with the emergence of secondary sex signs. If she has breasts and her period comes out, then she is a woman. Childbirth is the most obvious sign and is more important than the other signs. Imam Asnawi said that the sign of pregnancy was

²² Chandra Rossellini, 'Problematika Individu Interseks Dalam Drawing Dengan Metode Autoetnografi', *Journal of Contemporary Indonesian Art*, vol. VI, no. 1 (2020), pp. 1-12.

²³ Julia Spencer Barthold, 'Disorders of Sex Differentiation: a Pediatric Urologist's Perspective of New Terminology and Recommendations', *The Journal of urology*, vol. 185, no. 2 (Elsevier, 2011), pp. 393-400.

²⁴ Martha Few, "'That Monster of Nature': Gender, Sexuality, and the Medicalization of a "Hermaphrodite" in Late Colonial Guatemala', *Ethnohistory*, vol. 54, no. 1 (Duke University Press, 2007), pp. 159-76.

²⁵ Stephanie S. Turner, 'Intersex Identities: Locating New Intersections of Sex and Gender', *Gender & society*, vol. 13, no. 4 (SAGE Publications, Inc., 1999), pp. 457-79.

²⁶ Ineike Pramestiya, 'Analisis Framing Berita Interseks Studi Komparatif Media Online Tirto.ID dan Deutsche Welle Indonesia', *Skripsi*, (Jakarta: UIN Syarif Hidayatullah, 2020), hlm. 1.

²⁷ Ilham Ghoftar Solekhan and Maulidi Dhuha Yaum Mubarak, 'Khunṣa dan Penetapan Statusnya Dalam Pandangan Fiqh Kontemporer', *ALHIJRIYYAH Jurnal Hukum Islam*, vol. 5, no. 2 (2020), hlm. 114-29.

²⁸ Zabidi, 'Analytical Review of Contemporary Fatwas in Resolving Biomedical Issues Over Gender Ambiguity'.

²⁹ Solekhan and Mubarak, 'Khunṣa dan Penetapan Statusnya Dalam Pandangan Fiqh Kontemporer'.

enough to prove that the law was imposed on him by a woman. But if his voice changes, does not have breasts, does not menstruate, grow a mustache, beard, etc., it means he is a man. Obviously, this kind of thing is not *al-khunsa al-musykil* (difficult), because, in fact, she is a woman who has additional limbs (sex) or vice versa.³⁰

From another reference, intersex is an extreme state of intersexuality with developmental disorders in the process of sex differentiation, whether to be made female or male. For people who are *intersex*, the main difficulty is when they have to choose to determine their gender, whether it is male or female.³¹ This phenomenon is also termed *ambiguous genitalia*, *hermaphrodite*, and *Disorders of Sexual Development (DSD)*.³² Apart from the various terms mentioned, they all refer to the same phenomenon, namely someone who experiences a discrepancy between his physical and psychological.

As quoted by Widhiatmoko and Suyanto, Faradz divides intersex into 4 types.³³ *First*, male pseudo-hermaphroditism is someone born with a Y chromosome or a male chromosome but the external genitalia fails to grow into male genitalia. *Androgen resistance insensitivity syndrome* or *testicular feminization syndrome* is the most common symptom *hermaphrodite* of male pseudo. This syndrome is caused by the unresponsiveness of androgen receptors or target cells to the stimulation of the hormone testosterone. This syndrome can occur in form, *complete* namely *complete androgen insensitivity syndrome* and form *incomplete partial*, namely *partial androgen insensitivity syndrome*. *second*, Female pseudo-hermaphroditism is someone who is born with

46XX chromosomes or female chromosomes and normal ovaries. Abnormalities are limited to the external appearance of the genitals caused by exposure to androgen hormones. *Third*, True Hermaphrodite, which is a rare disorder. If on microscopic examination of the tissue, found *gonads* consisting of ovarian tissue (female) and testes (male), it can be diagnosed as *true hermaphroditism*. The two tissues gonadal are more often found united to form the ovotestis tissue, although each of these tissues can also be found separately. *Fourth*, *gonad dysgenesis* is characterized by the absence of *oocytes* or ovaries, or the gonads look like lines (steaky). Patients are phenotypically female but can have various chromosomal complements including XY (male).³⁴

A study stated that perfect or imperfect humans can be seen physically or non-physically. Perfect in the sense that humans are born normally, that is, their gender identity is perfectly clear without any defects. Meanwhile, humans who are created imperfectly (disabled), either physically, spiritually, or both, or whose identity is difficult to distinguish.³⁵

Medically, the sex of an intersex person can be proven by examining the differences on the outside and the inside of the body. For example, someone who has the inner sex as a man but on the outside as a woman who has a vagina. And vice versa, someone who has the inner sex as a woman but on the outside as a man who has a penis.³⁶ There are also cases of an intersex person who has two sexes (penis and vagina) and or does not have perfect genitals at all. That is, an intersex person looks like a woman but does not have a vaginal

³⁰ *Ibid.*

³¹ Michelle M. Ernst, Barry A. Kogan, and Peter A. Lee, 'Gender identity: A psychosocial primer for providing care to patients with a disorder/difference of sex development and their families [individualized care for patients with intersex (Disorders/ differences of sex development)]', *Journal of Pediatric Urology* (2020), pp. 1-6.

³² Nur Kholis, 'Fiqh Pernikahan Waria, Telaah Harapan Pernikahan Waria dalam Buku Jangan Lepas Jilbabku Karya Shunniya Ruhama Habibullah', *ISTI'DAL: Jurnal Studi Hukum Islam*, vol. 1, no. 2 (2014), hlm. 121-32.

³³ Ari Wibowo, *Persistent Controversy of Intersex: Science, Human Right and Islamic Bioethics Perspective* (Yogyakarta, 2018).

³⁴ Bambang Widhiatmoko and Edy Suyanto, 'Legalitas Perubahan Jenis Kelamin Pada Penderita Ambiguous Genitalia di Indonesia', *Jurnal Kedokteran Forensik Indonesia*, vol. 15, no. 1 (2013), hlm. 15.

³⁵ Nina Callens, Baudewijntje P.C. Kreukels, and Tim C. van de Grift, 'Young Voices: Sexual Health and Transition Care Needs in Adolescents with Intersex/Differences of Sex Development: A Pilot Study', *Journal of Pediatric and Adolescent Gynecology* (2020), pp. 176-89.

³⁶ Mauro Cabral Grinspan, 'Torture in Medical Healthcare Settings: An Intersex Approach', *Journal of Sexual Medicine*, vol. 14, no. 5 (2017).

opening and only has a urinary opening or looks like a man but does not have a penis.³⁷

C. Corrective Surgery for the Intersex According to *Maqāṣid Syarīah*

In Islamic law, marriage must be carried out by a man with a woman (who is different in gender both from her genitals and physically) for which there is no prohibition against marriage.³⁸ But the problem is for an intersex person should be given attention. Therefore, regarding sex determination intersex, Islamic law offers an intersex person to perform sex surgery,³⁹ and it is not a must. About genital surgery, the *syarīah* is divided into two laws, *first*, genital surgery is forbidden for someone who has a normal body composition. *Second*, genital surgery is allowed for someone who has a disorder in his body, especially in his genitals. It is recommended as an effort to cure defects or diseases contained in that part of the body.⁴⁰

The law of genital surgery is not directly condemned as *haram*, because in Islamic law there are also criteria, which is called *illat*, or the factors underlying an act can be classified as *haram* or permissible.⁴¹ Especially in contemporary cases, such as changing sex by surgery and so on.⁴² For example, gender changes in case intersex that place these changes are repair or refinement. This is indicated because intersex can be ascertained to have the dominant sex of both, although in the case of *al-khunṣa al-musykil* it is very difficult to be identified. This change can be made and allowed by Islamic law as long it is possible to change.

In line with this, the Indonesian Ulama Council (MUI) states that an operation for sex

replacement or enhancement can be justified for an intersex person, as long as it has gone through an in-depth study, meaning that it is permissible to perform a corrective surgery if it is carried out to clarify the function of the genitals. But if it is done to just follow the wishes and the doctor or health expert judges that there is no need for sex reassignment surgery, then the MUI does not justify and does not allow this action.⁴³

Changes that lead to perfection or improvement follow the genital organs inside the body. For example, the presence or absence of ovaries and uterus, or testicles, so that the direction of the operation is not misguided. In addition, it is also permissible for the condition of the genitals to be less than perfect in shape, for example, the person has a vagina that does not have a hole, but he has a uterus and ovaries, then he may perfect the genitals by adding a hole in his vagina. Vice versa, a person who has a penis, but the hole is not at the tip but at the bottom, it is permissible to make a hole in the front of his penis.

In a study, discussing some of the permissibility of replacing or perfecting the human body according to Islamic law, namely with several conditions; a) the material used to patch or cover defects, such as skin, bones, or other organs, must come from his own body or from someone who has died. Indonesian ulema has given restrictions on the harvesting of organs or tissues of a recently deceased person based on analogy (*qiyās*). The analogy is from the opinion of the majority of scholars regarding the permissibility of eating corpse meat in an emergency; b) the doctor or specialist who handles the surgery must feel confident that the procedure will

³⁷ Raymond Smith and Toni Wright, 'Older lesbian, gay, bisexual, transgender, queer and intersex peoples' experiences and perceptions of receiving home care services in the community: A systematic review', *International Journal of Nursing Studies*, vol. 118 (2021), pp. 1–11.

³⁸ Duman Bahrami and Rad, 'Keeping it in the family: Female inheritance, inmarriage, and the status of women', *Journal of Development Economics*, vol. 153 (2021), pp. 1–14.

³⁹ Gibtiah, 'Studi Perbandingan tentang Khunsa dan Transseksual dan Transgender (Telaah Pemikiran Ulama Klasik dan Ulama Modern)', *Jurnal Intizar*, vol. 20, no. 2 (2014).

⁴⁰ Bagus Prasetyo Purnomo Putro, Liliek Istiqomah, and Yusuf Adiwibowo, *Tinjauan Yuridis Perkawinan al-Khunsa (Kelamin Ganda) Menurut Hukum Islam* (Fakultas Hukum Universitas Jember, 2013).

⁴¹ Galuh Nasrullah, 'Konsep Maqashid Syariah dalam Menentukan Hukum Islam (Perpspektif Asy-syatibi dan Jasser Auda)', *Al-Iqtishadiyah Jurnal Ekonomi Syariah dan Hukum Ekonomi Syariah*, vol. 1, no. 1, hlm. 56.

⁴² R. Akçan and M. Yıldırım, 'Forensic medicine and science applications in Islamic law', *Journal of Forensic and Legal Medicine*, vol. 42 (2016), pp. 11–12.

⁴³ Dewan Fatwa Majelis Ulama Indonesia, *Himpunan Fatwa MUI Sejak 1975* (Jakarta: Erlangga, 2015), hlm. 591.

be successful.⁴⁴

Prior to carrying out the operation, previous scholars have provided responses in terms of determining the sex of an intersex person, namely; a) Hanabilah and one of the Shafi'iyah scholars are of the opinion that the determination is seen from which genitals excrete more urine. The reason for this opinion is because judging by the majority as the whole law is one of the foundations of *syariah*; b) Hanafiyah and one of the Shafi'iyah scholars as well as one of Hanabilah's opinions said that intersex is still punished with someone who has double sex if there are no signs that strengthen one of the genitals. They think that the amount of urine that comes out of one of the genitals is not a clear sign of the original genitals of intersex; c) Ibn Uthaimin has the opinion that it is permissible to use medical methods in determining the sex of intersex, for example by checking the uterus. By examining the uterus, if found in the body there is a uterus and ovaries, then it is not allowed to maintain or function the *zakkar*, if the external genitals have a penis (*zakkar*) and vagina (*farji*). Vice versa, if a person has a penis (*zakkar*) and vagina (*farji*), but his penis can produce sperm and the like, then it is not permissible to use or maintain his vagina.⁴⁵

It is known that the legal basis and considerations used in determining the law of marriage intersex are the arguments of the Qur'an and hadith which are the main sources of Islamic law. The purpose of the revelation of Islamic law (maqasid of sharia) is to consider the *maṣlahah* and the *mafsadah* in a practice. The establishment of Islamic law also has the aim of realizing the benefit of the people. However, *syariah* or law sometimes brings benefits at one time, and at other times it can bring *muḍarah*. At the same time, sometimes a law brings benefits in a certain environment, but it brings *muḍarah* to another

environment.⁴⁶

According to *maqāṣid syarīah* perspective, the purpose of Allah SWT in enforcing the law is to maintain human benefit (*maṣlahah*), as well as to avoid *mafsadah*, both in this world and in the hereafter.⁴⁷ As for the operation to change or perfect the sex for an intersex person based on *maqāṣid syarīah* is to realize the benefit of someone who experiences *intersex* by guaranteeing things *darūriyyah*, *ḥajiyyah*, and *taḥsiniyyah*. This goal can be achieved for someone who has been burdened or *taklif*, whose implementation depends on understanding the main sources of law, namely the Qur'an and hadith. In order to realize the human benefit in the world and the hereafter, there are five main elements that must be maintained and realized (maqasid of sharia). The five main elements are religion (*ḥifẓ ad-dīn*), soul (*ḥifẓ an-nafs*), reason (*ḥifẓ al-'aql*), offspring (*ḥifẓ an-nasl*), and property (*ḥifẓ al-māl*). As for the five main elements, when associated with marriage *intersex*, the explanation is as follows:

1. *The Religious Maintenance (ḥifẓ ad-dīn)*

The maintenance of religion is the first place because religion is a guide for human life. It contains three main components, namely *tauḥid* to Allah or *aqidah*, *akhlak* are the attitude of life a Muslim.⁴⁸ *Syarīah* is the way of life a Muslim in dealing with his Allah and to humans. Included in this is giving every human being the opportunity to marry someone of his choice in accordance with religious guidance. The marriage is carried out to protect his religion, and this is something that is very basic in Islam. Marriage should be done with the intention of worship because then marriage for the sake of maintaining religion will always be realized. On that basis, Islamic law must protect religion from damage and replacement efforts made by

⁴⁴ Zuhroni, Nur Riani, and Nirwan Nazaruddin, *Islam Untuk Disiplin Ilmu Kesehatan dan Kedokteran* (Jakarta: Direktorat Jenderal Kelembagaan Agama Islam Departemen Agama RI, 2003).

⁴⁵ Putro, Istiqomah, and Adiwibowo, *Tinjauan Yuridis Perkawinan al-Khunsa (Kelamin Ganda) Menurut Hukum Islam*, hlm. 2-3.

⁴⁶ Muhammad Daud Ali, *Hukum Islam* (Jakarta: PT. Raja Grafindo Persada, 2013), hlm. 61.

⁴⁷ Husni Kamal and Arina Rahmati, 'The Concept of Maqashid Shariah in Product Development of Islamic Financial Institutions', *AT-TIJARAH: Jurnal Penelitian Keuangan dan Perbankan Syariah*, vol. 2, no. 2 (2020), hlm. 122.

⁴⁸ Sandy Rizki Febriadi, 'Aplikasi Maqashid Syariah dalam Bidang Perbankan Syariah', *Amwaluna*, vol. 1, no. 2 (2017), hlm. 70.

other humans.

2. *The Soul Maintenance (ḥifẓ an-naḥs)*

Islamic law is obliged to protect the soul of every human being,⁴⁹ so it can be said that Islamic law must be able to maintain life. The prohibition of marriage intersex has meaning and wisdom that is very important for efforts to maintain the soul. Marriage is carried out so that women and children in their wombs can earn a lawful living. However, this is hindered when marriage is intersex carried out, which is clearly unlawful, and the soul will not be at peace.

3. *The Mind Maintenance (ḥifẓ al-'aql)*

Islamic law places the protection of mind into the main thing because mind distinguishes humans and animals. With reason, humans can understand God, the universe, and themselves and take lessons from various things. Intellect can also be used to develop science and technology. Thus, things that can damage the mind, are prohibited by religion, including marriage intersex. A household that is overshadowed by sins caused because marriage intersex is haram, will cause pressure, both from external and internal factors. If this pressure continues, it is possible that it will affect the health of the mind. Therefore, the marriage intersex should not be held in order to maintain the mind so that humans remain healthy as prescribed by Islam.

4. *The Descendant Maintenance (ḥifẓ an-nasl)*

Maintaining descendants means maintaining the purity of the blood relationship of an individual because this blood relationship or lineage will affect many things such as inheritance, marriage prohibitions. With a clear relationship, it is easy to track these things. The descendants are gifts given by Allah to his servants by way of legal marriage. As for marriage intersex, it can have implications for the loss of descendants (*nasab*) or will not get descendants. This is due to the ambiguity of the married couple. Thus,

things that damage the clarity of *nasab* must be avoided. The marriage should be carried out by a man and a woman whose gender is clear. Therefore, the existence of descendants must be maintained so that the status of *nasab* can be achieved legally.

5. *The Wealth Maintenance (ḥifẓ al-māl)*

Wealth is a means that humans can live in the world. It is undeniable that without wealth, humans cannot survive in the world. Wealth also needs to be maintained and used properly in domestic life to meet the needs of family life.⁵⁰ In the case of intersex marriage, the right step is if the marriage has already been carried out, then the marriage must be *fasakh* (delegitimate) by the Religious Court, because this is in accordance with the laws and regulations, to avoid the emergence of greater *mafsadah*. However, if the marriage is to be held, then the marriage is annulled in order to maintain the assets spent on the wedding ceremony but the marriage is not valid.

An intersex person who is a *mukallaf* will benefit when he can maintain the five points, and vice versa if the five points cannot be maintained properly, it can certainly bring *mafsadah*. In addition, the values contained in the five main elements of *maqāshid syarīah* are to realize the *maṣlahah*. The benefits include three categories, namely:

Aspects of *maṣlahah ḍarūriyyah*, which has an important purpose, because its absence brings consequences for the destruction of the rules of life, rampant chaos among humans, which will then sideline their benefit.

Aspects of *maṣlahah ḥajiyyah*, namely *maṣlahah* which because of its absence will cause objections and difficulties to humans, the burden of heavy things will cause trouble.

Aspects of *maṣlahah taḥsiniyyah*, namely *maṣlahah* which because of its absence will not cause consequences for the destruction of the rules of life and will not make people fall into trouble.

In terms of its content, *maṣlahah* is divided into: (1) *maṣlahah al-'ammah*, namely the general benefit that concerns the people, (2) *maṣlahah al-khaṣah*, namely the personal

⁴⁹ Jasser Auda, *Memahami Maqashid Syariah* (Selangor: PTS Islamika SDN, 2015).

⁵⁰ Moh Dahlan, 'Paradigma Maqashid Al-Syari'ah Dalam Menjawab Dinamika Ekonomi Kontemporer', *Jurnal Islam Nusantara*, vol. 3, no. 2 (2019), p. 362, www.jurnalnu.com.

benefit. In terms of its existence, *maṣlahah* is divided into: (1) *maṣlahah mu'tabarāh*, namely benefits that are supported by *syarīah*. (2) *maṣlahah mulgah*, namely the benefit that is rejected by the *syara'* because it is contrary to it. (3) *maṣlahah mursalah*, namely benefits whose existence is not supported by *syarīah* nor canceled by *syarīah* through detailed arguments.⁵¹

As for in this life, humans are faced with *maṣlahah* and *mafsadah*. *maṣlahah* must be achieved while *mafsadah* must be avoided. However, if one day you are faced with two choices, between avoiding danger (*mafsadah*) on the one hand reaching for goodness (*maṣlahah*) on the other, then what must be done is to avoid danger (*mafsadah*), even though this choice can lead to some goodness (*maṣlahah*) is neglected. Because the attention of the *syarīah* to the prohibition (which must be abandoned) is greater than the command (which must be carried out).⁵² This is in accordance with the rules of fiqh:

در المفساد مقدم على جلب المصالح

*Rejecting mafsadah takes precedence over taking maṣlahah.*⁵³

Some human actions lead to *maṣlahah* and some cause *mafsadah*. *Maṣlahah* and *mafsadah* nothing for interests *duniawiyah*, *ukhrawiyah*, and at once both. Therefore, the interest for something, in particular, meaning for something that is considered more important, should take precedence. Furthermore, a lighter *mafsadah* must be carried out to avoid or reject a larger *mafsadah*, as in the rules of fiqh:

إذا تعارض مفسدتان روعي أعظمهما ضرر إبارنكأب أخفهما

*If there is a conflict between the two mafsadah, then the largest mafsadah must be protected by doing mafsadah the smaller.*⁵⁴

The rules explain that for the *maṣlahah* of the people, it is necessary to eliminate

mudarah as much as possible, this if it is related to the problem of intersex marriage so that there is no misunderstanding in the general public regarding intersex, it is necessary to explain clearly and in detail so that the benefit is achieved. Thus, when a case of intersex marriage is in the lives of ordinary people, it can be prevented as soon as possible and the community also does not carelessly judge the bad sacred of marriage. The above is also in line with the rules *fiqh*:

الضرر يزال

*Mudarah is should eliminated.*⁵⁵

In the paper of al-Nadawi,⁵⁶ Zaidan cites the opinion of al-Syatibi about this *ka'idah* in the provisions of *syarīah*, either that occurs in all aspects and in part, including the prohibition of doing anything that is harmful to religion, life, property, and honor, as well as deprivation and oppression and all actions that are categorized as *mudarah*, including in this case criminal acts against the soul, mind, and descendants. This is the undoubted general aim of the *syarīah*. The arguments above are aimed at the benefit of human beings, when the impossibility is not removed (operation) it will cause a lot of harm, including the abstinent *khunsa* cannot marry (the sunnah of the prophet) while he has biological needs that must be met, namely developing the descendants.⁵⁷

D. Conclusion

The emergence of intersex brings an impact on how the rules of *syarīah* can be applied, such as the law of marriage in Islam. Intersex is an extreme state of intersexuality with developmental disorders in the process of sex differentiation. Medically, the sex of an intersex person can be proven by examining the differences on the outside and the inside of the body. Regarding sex determination

⁵¹ Aminah, 'Maqāsid Asy-Syari'Ah Pengertian dan Penerapan Dalam Ekonomi Islam', *FITRAH Jurnal Kajian Ilmu-ilmu Keislaman*, vol. 3, no. 1 (2017), hlm. 176, Web: jurnal.iain-padangsidempuan.ac.id/index.php/F.

⁵² A. Djazuli, *Kaidah-kaidah Fiqh (Kaidah-kaidah Hukum Islam Dalam Menyelesaikan Masalah-masalah Praktis)* (Jakarta: Kencana, 2006), hlm. 27.

⁵³ Abdul Karim Zaidan, *al-Wajiz fi Syarhil al-Qawaid al-Fiqhiyyah fi Syariah al-Islamiyyah* (Beirut: Risalah Publisher, 2001).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Ali Ahmad al-Nadawi, *al-Qawaid al-Fiqhiyyah* (Damaskus: Dar al-Qalam, 2000), p. 289.

⁵⁷ Nur YD Khoirin, 'Operasi kelamin dalam Perspektif Hukum Islam', *Al-Ahkam*, vol. XV, no. 1 (2004), p. 100.

intersex, Islamic law gives an offer to intersex persons to perform corrective surgery. Changes in sex in case intersex where the change is in the nature of improvement or refinement, then it is allowed in Islamic law. The legal basis and considerations used in determining the law of marriage intersex are the arguments of the Qur'an and hadith which are the main sources of Islamic law. The marriage intersex studied based on maqasid of sharia is to realize the benefit of someone who has intersex by guaranteeing things *darūriyyah*, *ḥajiyiyah*, and *taḥsiniiyyah*. In order to realize the human benefit, there are five main elements that must be maintained and realized (*maqāṣid al-syarīah*). The five main elements are religion (*ḥifẓ ad-dīn*), soul (*ḥifẓ an-nafs*), mind (*ḥifẓ al-ʿaql*), descendants (*ḥifẓ an-nasl*), and wealth (*ḥifẓ al-māl*). An intersex person will benefit (*maṣlaḥah*) when he can maintain the five points, and vice versa if the five points cannot be maintained properly, it can certainly bring *mafsadah*.

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