

Same-Sex Unions in Islam

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Abstract

The objective of this paper is to streamline the case for Muslim same-sex unions that was comprehensively made in Jahangir and Abdullatif (2016). Additionally, we try to address same-sex unions on the basis of non-binary gender, gender expression and sexual orientation. Based on our work, we argue that the case for Muslim same-sex unions can be made on the basis of broad principles of human dignity and affection and therefore through marriage or through the specific arguments of repelling harm and legal authority. In this regard, going beyond the overarching Islamic value of human dignity, we specifically argue that the case for same-sex unions can be anchored on verse 4:28 on facilitating a legal outlet for sexual expression.

Keywords: Islam and LGBTQ Muslims, Muslim same-sex unions, permanent celibacy, non-binary in Islam, homosexuality in Islam, Muslim gay marriage

Same-Sex Unions in Islam

Introduction

There are three main works on same-sex unions in Islam, namely Kugle (2010), El-Menyawī (2012) and Jahangir and Abdullatif (2016). Each work builds on the previous edifice. In her review of our book, Wadud expressed that it is “the best English reference work on the subject of Islam and sexual diversity.”¹ However, she also critiqued that more attention is required on the relationships of lesbians, trans, intersex and other sexual nonconforming persons. Additionally she emphasized a more thorough grounding of same-sex unions beyond love, mercy, compassion and dignity. We expressly concede that the Islamic tradition emphasized male homosexual conduct and dealt with female sexuality in a limited fashion. However, we feel that capturing detail and nuance may have overshadowed our specific arguments.

Therefore, the objective of this paper is to streamline the case for Muslim same-sex unions that was comprehensively made in Jahangir and Abdullatif (2016). Additionally, we try to address same-sex unions on the basis of non-binary gender, gender expression and sexual orientation. Based on our work, we argue that the case for Muslim same-sex unions can be made on the basis of broad principles of human dignity and affection and therefore through marriage or through the specific arguments of repelling harm and legal authority. In this regard, going beyond the overarching Islamic value of human dignity, we specifically argue that the case for same-sex unions can be anchored on verse 4:28 on facilitating a legal outlet for sexual expression.

The paper is divided into seven sections. The first section initiates with the observation that the position on same-sex unions is not based on express texts but derived on the basis of analogy and alleged consensus, both of which are contested branches of Islamic knowledge. The second section indicates that it is imperative to recognize bias that shapes textual analysis and how past medical knowledge, social mores and other extra-textual reasoning shaped the traditional position on the prohibition of anal intercourse between men. This sets the stage for the third section that delineates the Qur’anic texts that can be marshaled to affirm gender and sexual diversity, as a prelude to the texts on Lut’s people, so as to distinguish the representation of the gender and sexual non-binary from the people of Lut.

Based on the stage set by the first three sections, the fourth presents a renewed textual analysis on the verses on Lut’s people. It shows how the analogy between Lut’s people and the gender and sexual non-binary LGBTQ Muslims fails on multiple grounds. It also suggests that it would be fallacious to project the prohibition of same-sex unions as a clear position especially when such a view is not based on express texts but derived from a story of exploitation and coercion. The fifth section complements the textual analysis in the previous section to show the absence of reliable Hadith texts on Lut’s people and the associated issue of anal

intercourse between men. It also suggests that the terse rulings in juristic manuals should be viewed in the context of the commentary literature shaped by the knowledge base and social mores of the times. The section concludes with the depiction of permanent celibacy as an unIslamic value, which sets the stage for the affirmation of Muslim same-sex unions.

On the basis of having no express position on same-sex unions in the tradition, the sixth section indicates that the case for Muslim same-sex unions can be justified on the basis of juristic principle of repelling harm and also by extending from the precedent of the marriage of the *khuntha mushkil* (indeterminate gender) to the non-binary case where sexual orientation traverses anatomy. The form of same-sex unions can be set on the argument that the purpose of marriage rests on realizing *mawadda* (affection) or on the basis of a renewed understanding of establishing contracts defined by legally sanctioned consent. The seventh section concludes with reiterating verse 4:28, which acknowledges human sexual need and the facility that must be offered to meet that need through a legal contract. Finally, an appendix at the end offers translations of the many Qur'anic verses and Hadith texts alluded to throughout the paper.

1. The limits of *qiyas* (analogy) and *ijma* (consensus)

The two principal sources of knowledge in Islam, the Qur'an and the Sunnah do not offer an express position on same-sex unions and therefore are silent on Muslim same-sex unions. Any position on same-sex unions is derived through *qiyas* (analogical deduction) and/or alleged *ijma* (consensus). However, challenges to both of these branches of Islamic jurisprudence appeared in early Islamic History. The jurist Shafi (d. 820) advocated for the primacy of Hadith in response to the problematic overuse of consensus. Likewise, Ibn Hanbal (d. 855) compiled the biggest collection of Hadith, including the not strong texts, in order to avoid analogy as much as possible. He was quoted as saying that scholars make most of their errors in *qiyas*.² The Zahiri and the Shia schools of thought were so suspicious of *qiyas* that they avoided it altogether.

Specifically, any position derived through *qiyas* leads to *zanni* (probabilistic) but not *qati* (certain) knowledge.³ Likewise, the concern with *ijma* lies in the fact that there is no consensus on the definition of *ijma*. Indeed, if one went by Shafi's definition of *ijma*, that is, one based on all Muslims, then it is impossible to have *ijma*. This leads to the point that if there are 1.6 billion Muslims, then there are 1.6 billion Islams. This also indicates that the contemporary neo-traditionalist opinion on same-sex unions rests on probabilistic knowledge and is therefore highly contested.

In essence, since the current neo-traditionalist Muslim position on same-sex unions does not stem from express texts but derived through analogy, which yields

probabilistic knowledge, and alleged consensus, which is contested, it facilitates revisiting and developing a renewed perspective on Muslim same-sex unions.

2. Acknowledging bias – affection versus disgust

Any textual analysis needs to be checked for the bias that is either manifest or concealed. According to al-Ghazali (d. 1111), human beings are socially conditioned. However, this means that we are all informed by bias, which rests on social norms and medical knowledge of contemporary society or those of the past. Therefore, Muslim scholars often conclude that certainty lies with Allah, which is manifest when they end their opinions with the quintessential phrase “And Allah knows best.” This means formulating opinions on Muslim same-sex unions can lead us to either preservation of human dignity or subjugation of the soul. However, Ibn Qayyim asserted that if any opinion led to injustice even if reached by literal meaning of the text then it should be discarded.⁴ Additionally, in order to ensure that any Muslim opinion preserves human dignity, it is important to take into account the breadth of Islamic knowledge instead of deriving judgments based on decontextualized phrases.

Ibn Taymiyyah (d. 1328) was quoted as saying that many opinions, including a scholar’s opinion, are often tainted by *hawa* (desire or bias).⁵ The knowledge component is further divided to knowledge of the texts of Islam and how to navigate them, as well as knowledge of the question being asked and its nuances and varieties. Ibn Taymiyyah and other scholars aim for knowledge and God consciousness to put restraints on bias that colours our views. This means it is important to check one’s biases and also pay attention to the nuances of the question being addressed in Islamic jurisprudence. In the present context, nuance allows us to distinguish between exploitative sex outside a legal contract and same-sex unions that rest on *mawadda* (affection).

As such, before engaging with the primary sources of Islamic knowledge, it is important to recognize one’s bias. The bias of the authors rests on an Islam that accommodates LGBTQ persons by affirming their genuine human need for intimacy, affection and companionship. The authors acknowledge that the neo- traditionalists may be motivated by an opposite bias guided by many different factors, including but not limited to, a hesitation to restudy in depth the perceived opinions of past scholars. Those same ancient scholars were guided by an observation of anal intercourse between men that was clearly and predominantly exploitative, coercive or pedophilic in nature.

However, the taboo against anal intercourse did not solely develop due to concerns on exploitation and pedophilia. Indeed, with past positions sanctioning marriage with minors, such concerns may not have been relevant. The position against anal intercourse in general may have risen because of the interpretation that verse 2:223 likened sex with tillage and hence the permissibility of vaginal intercourse to the exclusion of anal intercourse. However, minority Sunni and

majority Shia jurists contest this interpretation. The taboo may be explained through the prohibition of vaginal intercourse during menstruation based on verse 2:222, as it was reasoned that whereas noxiousness due to menstruation was temporary it was permanent in the case of anal intercourse. However, this position is based on analogical deduction and contested by jurists who did not find the act of anal intercourse as prohibited. In a similar vein, the taboo against anal intercourse cannot be explained through the arguments of disruption of procreation or waste of semen, as masturbation is not necessarily prohibited and sexual intercourse for enjoyment without the objective of procreation is permissible.

Given the limitations of concerns on exploitation, pedophilia, textual prohibition, analogy with sex during menstruation, disruption of procreation or waste of semen, a better explanation behind the taboo against anal intercourse would be the understanding of gender constructed on the basis of penetration. Thus, a male is viewed as the active or insertive partner and the female as the passive or receptive partner. Sexual roles that traverse this paradigm were viewed as disrupting nature, as in the case of a female penetrating a man with a dildo. Men who willingly submit to be penetrated were viewed through the lens of affliction or disease of the anus. Since beardless youth had characteristics in common with females on account of not having facial hair, their penetration did not merit as much strong a reaction as in the case of the penetration of adult men, which was viewed as a major perversion.

As such, the bias of neo-traditionalists is based on the desire to retain the social mores and medical knowledge of the distant past. This allows them to view the concerns of LGBTQ Muslims through the lens of desires, urges, whims and addiction instead of constitutional orientation towards members of the same gender. Alternatively, they view LGBTQ Muslims through the lens of *ubna* (anal itch)⁶ instead of sexual orientation. Unfortunately, such an approach leads towards *zulm* (oppression) for it allows neo-traditionalists to make the unreasonable prescription of permanent celibacy. This test-based argument is unIslamic for the law does not impose *asar* (undue hardship) that is *abth* (useless)⁷ or solely for the purpose of *bi-l-isti'bād* (subjugation).⁸

In essence, any textual analysis on the subject of same-sex unions has to be preceded with the recognition of implicit bias shaped by social mores, gender construction and medical knowledge of the past that shaped the formation of the juristic rulings on anal intercourse between men. It is this contested paradigm of the past that the neo-traditionalists seek to foist on the lives of LGBTQ Muslims. However, morality is not based on our capacity for disgust and a renewed perspective warrants viewing same-sex unions through affection.

3. Textual analysis on non-binary gender, gender expression and sexual orientation

The starting point for textual analysis is to acknowledge that the non-binary nature of Islam manifests in many applications. This is in contrast to a binary understanding where the choice is relegated to two options and there is no room for a third choice. As an example, a vast majority of Muslim scholars agree that faith is not a binary issue in that one is not a *mumin* (faithful) or not. In other words, faith cannot be reduced to having or not having it. As another example, Ibn Taymiyyah broke the binary between the state of Islam and state of animosity in his famous opinion on the city state of Mardin.⁹ This non-binary also applies to both gender and sexuality, which is substantiated by the Qur'an, the Hadith and the legal opinions of Muslim scholars.

In the context of gender, the famous commentator of the Qur'an, Qurtubi (d. 1273), responded to those who ignorantly referenced verses 42:49-50 to deny the existence of intersex individuals.¹⁰ He argued that verse 28:68, which mentions that Allah creates whatsoever He wills, includes all variations of intersex individuals. Therefore, Qurtubi accepted a non-binary designation of human gender beyond the binaries of *dhakar* and *untha* (male and female). Indeed, Islamic scholarly works show that past Muslim scholars accommodated intersex individuals in a very non-binary fashion. These scholars acknowledged that some men are born "soft" and some women are born "masculine" in demeanour and movement. They accepted such individuals as long as they "did not exaggerate their natural features."¹¹ Contemporary Muslim scholars around the Muslim world also accept transgender individuals and have facilitated their re-assignment to "the gender of their identity" rather than "the gender of their birth."¹²

While Muslim scholars have accepted gender identity and expression, the issue of sexual orientation challenges them. However, Hashim Kamali has asserted that both *fiqh* and science confirm that sexual orientation is largely inherent.¹³ Moreover, the framework of *khuntha nafsiyya* (psychological intersexuality), used to address the concerns of transgender Muslims, allows us to recognize the permutation of gender and sexuality. A fresh understanding of Qur'anic verses, guided by Qurtubi's navigation of verses 42:49-50 and 28:68, also allows us to substantiate a non-binary understanding of gender and sexuality. Specifically, verse 42:50 can be grammatically construed to indicate both male and female characteristics in one person and those with *aqim* (non-procreative) attributes. This line of thought can be substantiated from verses 24:31 and 24:60 that respectively acknowledge the *ghayr uli al irba* (men without desire for women) and the *qawaid* (women not reproducing).¹⁴ This substantiates the truth asserted by Muslim sexual minorities that Allah creates whatsoever He wills and that Allah loves us all, a point which is generally not contested by traditionalist Muslim scholars.

In essence, it is important to recognize that any analysis of the verses on Lut's people that informs the position on same-sex unions must be undertaken after

the recognition that the Qur'an affirms gender and sexual non-binary through language that is different from the one it uses to address the people of Lut. This allows for the distinction between LGBTQ Muslims, who are subsumed into the gender and sexual non-binary, and Lut's people, who, as will be seen in the next section, are depicted through the lens of gender constructed on the basis of penetration and hence in contemporary parlance, as straight men.

4. Textual analysis – Lut's people

Recognizing the non-binary nature of gender and sexuality on a Qur'anic basis allows us to recognize the limitations of the *qiyas* between Lut's people and LGBTQ Muslims, often made by contemporary Muslim scholars and lay Muslims, on the basis of the shared feature of anal intercourse. This simplistic analogy fails under scrutiny because for any analogy to work, it must have common elements in the absence of other factors that prevent it from holding. Additionally, the challenge to this analogy is not recent and has been well documented by past Muslim scholars including Ibn Hazm (d. 1064).¹⁵

Any equation between Lut's people and LGBTQ Muslims fails on multiple grounds when verses 7:81, 26:165-166 and 27:55 are viewed in the context shaped by verses 7:80, 15:70 and 29:28-29, or even when plucked out of that context.¹⁶ Contextually, the background of forbidding hospitality, cutting the highway, ambushing travellers, evil deeds in public assemblies and demanding guests does not apply to LGBTQ Muslims. Linguistically, the verses do not depict people with non-binary attributes but men who pursue other *dhakr* (non-receptive entities) instead of *untha* (receptive entities), who would have been partial to their overtures. Additionally, Lut's people are depicted as those acting out of *shahwa* (desire) that is *musrif* (exaggerated) instead of those who pursue a relationship based on *mawadda* (affection).

In contemporary parlance, the verses criticise Lut's people for anally penetrating binary-men, that is, straight, non-effeminate men, because gender binary is generally the predominant framework. This reading is consistent with the Qur'anic depiction of how Lut's people aimed to rape his guests. The alternative thesis that Lut's people wanted to anally penetrate willing men, that is, non-binary persons, would suggest that the vast majority of Lut's people were sexually exploiting a very small minority of their local men. Indeed, commentaries on these Qur'anic verses, as well as the opinions of the classical Islamic scholars, indicate that Lut's people, collectively depicted as active partners, targeted strangers and travelers. As such, the analogy between Lut's people and LGBTQ Muslims fails because the former never claimed to be married to the men they penetrated nor do the books of commentary of the Qur'an allude to this possibility. A plain reading of the relevant verses points to the collective penetration of other men and not individual relationships in a legally regulated manner through marriage or civil union.

The verses on Lut's people do not offer a commentary on the anachronistic issue of same-sex unions in 7th century Mecca. This is especially so, as there is no text that meets the *sahih* (authentic) or *mutawatir* (constant and continuous) standard in Hadith analysis that shows that the Prophet ever addressed the issue. In fact, according to *tafsir* (commentary) literature, the verses are comforting the Prophet against Meccan oppression.¹⁷ Like Lut, whose daughters, Ritha and Ra'raba,¹⁸ were married in the town, his daughters, Zaynab, Ruqayyah and Umm Kulthum, were married amongst the Meccans. The verses are informing the Prophet that just as Lut's town was turned upside down, so too would the Meccan social order. Indeed, by the time the Prophet took over Mecca, the poor Muslims rose to eminence and the arrogant Meccans slid down the social order. As such the verses are not about same-sex unions, but about a social commentary, which is lost in the mindless obsession with anal intercourse.

The aforementioned suggests that the supposed prohibition of same-sex unions based on the verses on Lut's people is not warranted based on both a contextual and linguistic analysis. As such, despite neo-traditionalist claims to the contrary, the position on same-sex unions is not *hukm qati* (absolute injunction), that is, it is not based on *qati al thubut* (indisputable evidence) and nor is it *qati al dilala* (unquestionable in purport) or *malum min al din bil darura* (religious teaching known by necessity).¹⁹ Indeed, if the issue were of such import then there would have been an express injunction instead of a derived implication from a story. Therefore, the neo-traditionalist strategy to project their opinion of same-sex unions as part of the five pillars of Islam or the six articles of faith is unreasonable and unjustified.

5. Analysing the Hadith, commentary and juristic discourse

Deriving the prohibition of same-sex unions from the Hadith, the commentary and juristic literature is also not sustainable. The Hadith of the Prophet are split between the legal and ethical and between legal and biological, which means that we cannot assume that his decision, although based on Islamic texts, is exactly the decree of God. Moreover, like the Qur'an, the Hadith literature is silent on same-sex unions, as the most authentic books, *Sahih Bukhari*, *Sahih Muslim* and *Malik's Muwatta*, do not contain any injunction pertaining to the issue. There are texts outside this canon that prescribe the death punishment for *liwat*, which is defined for legal purposes as *ityan bil dhukur* (inserting the tip of the penis in the anus of the male).²⁰ However, Hadith scholars have discredited such texts as they do not meet reliability standards. Additionally, such texts contradict the Qur'an when it restricts the capital punishment in verse 5:32 to murder and *fisad fil ardh* (spreading mischief on land). There are eschatological Hadiths that depict *liwat* as one of the omens of Judgment Day and texts that equate *liwat* and *sihaq* (rubbing vulvae between women) with *zina* (fornication). However, such texts are deemed even less reliable than those on the capital punishment for *liwat*.²¹ Additionally, they contradict verses like 46:9 that limit the Prophet's ability on premonitions and also the juristic discourse that restricts the definition of *zina* to vaginal intercourse, as

homosexual acts were deemed to be less widespread, lacking mutual inclination and non-procreative in nature.

Just as the Hadith literature is silent on the issue, so too is the *tafsir* (commentary) literature. If anything, the commentaries depict the conduct of Lut's people as coercive and bereft of any affection. They depict Lut's people as ambushing travellers on the highway, robbing them of their possessions and committing evil deeds with them in public assemblies, which included shortening on a procrustean bed that resulted in the death of the travellers. Likewise, the juristic discourse is silent on same-sex unions. Like the Hadith texts, they address *liwat*, which the writings of al-Razi²² and Ibn Taymiyyah²³ confirm as lacking mutual consent. The active partner was viewed as one with exaggerated desire and the receptive partner was deemed as afflicted with *ubna* (anal itch) disease or as one who was coerced or participated out of financial considerations. Given the social mores and medical knowledge of the jurists, they could not possibly rule on same-sex unions. At best, some addressed the legal contract for intercourse between a master and his male slave, which some deemed permissible on the basis of verse 4:24 but others prohibited,²⁴ as male slaves by virtue of being men, in contrast to female slaves, were deemed as non-receptive entities.

Some Muslims cite Hadith literature that they construe as prohibiting anal intercourse between two men. Diminishing a same-sex relationship to the mechanics of anal intercourse, they deduce the prohibition of same-sex unions. However, the prohibition is not sustained on the basis of any *sahih* Hadith text and nor is it upheld on the basis of verses 2:222-223, whose meaning is contested in the *tafsir* (commentary) literature. Past Hadith scholars and many contemporary Muslim scholars have criticized such Hadith texts.²⁵ In fact, not a single Hadith has been reported on this matter in the books of Bukhari or Muslim. On the contrary, Sahih Bukhari actually alludes to the permissibility of anal intercourse with wives, as an opinion attributed to Ibn Umar (d. 693).²⁶ While the text does not name the act, the context and other Hadith in lesser books confirm that opinion. Moreover, sexual acts are not considered *qabih* (evil), even if some find them distasteful, as they do not contain elements of falsehood and oppression.²⁷ Therefore, the prohibition of anal intercourse cannot rest on the extra-textual reasoning of noxiousness. Additionally, the argument of harm to wife does not translate to the context of males as pleasure is derived from prostate stimulation. Furthermore, the act is irrelevant for lesbians and many gay men, which also confirms that the issue at hand is not one of the legality of anal intercourse but one of a legal contract that would allow a sexual relationship to a same-sex couple, who lie outside the gender binary of the *dhakar* and *untha* (male and female).

Deducing the prohibition of same-sex unions from the *awrah* (nakedness) texts²⁸ is also unwarranted. Acknowledging that members of the same gender can get sexually attracted to each other, the texts forbid looking at private parts of members of the same gender. However, such texts cannot be used against same-sex unions because that would imply that straight marriage should also be prohibited,

as the prohibition is much stronger between members of the opposite sex. In essence, the texts are about upholding modest conduct and not preventing marriage. Additionally, banning same-sex unions on the basis of *fitra* (nature) does not hold, as such arguments are usually made in the context of monotheism and personal hygiene. Additionally, the Qur'an is clear as verse 17:84 indicates how people act according to their *shakila* (inner disposition).²⁹ Finally, invoking the test-based argument to counter same-sex unions is unreasonable as the verse 24:33 usually quoted to counsel patience connotes a temporary injunction, as permanent celibacy is not an Islamic value. Moreover, the test-based argument rests on the blanket assumption that somehow LGBTQ Muslims are imbued with a much stronger faith to merit a harsher trial in life compared to their heterosexual co-religionists.

In essence, the prohibition of same-sex unions cannot be justified on the basis of the Hadith texts on *liwat* or those prohibiting anal intercourse, as all such texts are weak, which means that when juristic manuals provide terse rulings (without mentioning texts or commentaries) on the prohibition of *liwat* they cannot be accepted as offering clear evidence. This is perhaps why neo-traditionalists complement referencing such texts with *fitra* and *awrah* based arguments, which actually are about monotheism and hygiene and modesty respectively. Based on absence of clear evidence, the counsel to permanent celibacy, an unIslamic value for it causes undue hardship, is unreasonable and unjustified and therefore all of this sets the stage for the case to affirm Muslim same-sex unions.

6. Affirming Muslim same-sex unions

The above analysis indicates that there exists no text that clearly addresses Muslim same-sex unions, an issue that has been addressed through contested analogy and alleged consensus, and therefore the claim that the tradition is silent on same-sex unions should not be surprising. In general, marriage in Islam is different from the Judeo-Christian institution of marriage, as there is no concept of "holy matrimony." In Islam, marriage is one of the two ways through which sexual intercourse is legalized and while procreation is a consequence of marriage, it is not a limiting factor, as based on many Qur'anic verses including 30:21 and 7:189 the purpose of marriage is for souls to find tenderness and peace within each other. In essence, while marriage is not deemed "holy," sex within the confines of marriage is viewed as a beautiful act of worship that is rewarded by Allah just as sex outside marriage is deemed sinful. This indicates that since the benefits of finding tenderness and peace with a spouse are achievable in a same-sex relationship, there is a strong case to affirm same-sex unions.

Any prohibition of same-sex unions is a derived position that does not hold on the basis of the analogy used between Lut's people and LGBTQ Muslims. Therefore, just as the prohibition case is a derived opinion, the case for same-sex unions is also a derived position. There are multiple implied cases for Muslim same-sex unions. The starting point in building a case is to recognize that neither the

Qur'an nor the Hadith ever limit marriage to a relationship between men and women. Past scholars defined marriage, outside the primary texts, as between men and women, mainly based on their social mores and the absence of the demand for same-sex unions. Therefore, one approach is to justify same-sex unions on the basis of the over-arching values of *adl* (justice) and *ird* (human dignity). This approach is substantiated on recognizing that scholars like al-Juwaynī (d. 1085) and al-Sam'ānī (1096) justified *istidlāl* (legal reasoning) by arguing that the Companions used reason without turning to the foundational sources of legal authority.³⁰ Likewise, jurists like al-Ṭūfī (d. 1316), 'Abduh (d. 1905), and Riḍā (1935) advocated deriving rules even if they were not directly confirmed by the texts.³¹ Whereas, this line of argument is broad, specific arguments can be made on the basis of the principles of alleviation of harm and on the precedent of the legal contract where gender is viewed beyond the binary.

According to Ibn Ḥazm, and many other scholars of Islam, nothing in Islam is forbidden without there being a legitimate substitute for the prohibited act.³² This principle fails in the case of same-sex unions where there is no alternative. Prescribing LGBTQ Muslims to marry the opposite gender is like asking them to cover their need for drinking water by eating salt as a substitute. Therefore, both permanent celibacy and sham marriages cause unnecessary *asar* (undue hardship) and are the making of human beings when they ignore *al-ṭarīq al-waṣaṭ* (the middle path). Such human prescriptions generally lead to *taklīf mā lā yuṭāq* (creation of obligations that cannot be met and are a result of not taking a reasonable approach to understanding the texts in light of the fact, as recognized by Shāṭibī (d. 1388), that some human dispositions are so inherent that to deny them would be to harm human beings irreparably.³³ These prescriptions can be challenged on the basis of Ibn Taymiyyah's suggestion that when the scholars discover that their decisions are causing suffering (as in the case of permanent celibacy) or that people are seeking worse loopholes (as in the case of sham marriages) or that people end up living in the *haram* (as in the case of many who are unable to live without intimacy) then it is time for scholars to revisit their conclusions.³⁴

One way to challenge scholarly prescriptions that cause suffering is through the juristic principle of *raf' al-ḥarj* (repelling harm), which has its variant in the maxims *daf' al-ḍarar* (prevention of harm), *al-mashaqqā tajlub al-taysīr* (hardship begets facility), *al-dārru yuzāl* (harm must be eliminated), *idhā dāq al-amru ittasa'* (an opening must be found where matters become exceedingly difficult), and Shāfi'ī's saying *mā dāqa al-shay'u illā ittasa'* (there is an exception for something extremely restrictive).³⁵ Some may claim that this is akin to the framework where *darura* (extreme necessity) trumps prohibitions, and restrict it to extreme cases of life and death, but this ignores the fact that such principles also apply to *haja* (need). Indeed variant verses 2:185, 22:78 and 5:6 with a similar message that Allah does not intend hardship and intends ease can be marshaled in support of the *raf' al-ḥarj* principle. In the context of same-sex unions, verse 4:28 can be specifically referenced, as it was revealed in the context of legitimizing a legal contract other than a *Nikah* (marriage). The verse acknowledges that Allah wants to lighten your

difficulties, as humanity was made weak, especially sexually. In the context of this verse, Ibn Taymiyyah opined in his book “Straight path” that since man is too weak to fight his sexual urges, then there has to be a legal avenue to meet that need.³⁶ As such, it is unreasonable of Muslims to inflict permanent celibacy on LGBTQ Muslims, especially when they acknowledge their own sexual weakness.

While some Muslim scholars are sensitive to the needs of LGBTQ Muslims, they are unable to find a path through the Islamic texts. However, verse 4:28 and by extension the *raf' al-harj* principle help justify the case for a legal contract that would legitimize same-sex unions in Islam. Another avenue to affirm Muslim same-sex unions would be to expressly account for the non-binary nature of gender in such relationships. The Islamic tradition accepts gender and sexual diversity, as it is true for the *mukhannathun* (effeminate men) and the *khuntha mushkil* (indeterminate gender). Discounting reliability issues, and taking the Hadith texts on the *mukhannathun* at face value indicates that any concern with them was on the basis of licentiousness when they described a woman to an unrelated man, and not on account of their gender expression on the basis of which they were allowed in the Prophet's household in the first place.³⁷ Indeed, after the Prophet's death, they guarded his tomb for centuries. In terms of marriage, the gender binary restricted many jurists from allowing marriage of the *mukhannathun* and the *khuntha mushkil*, as for some like al-Raghib, the ultimate reversal of order was when a female penetrated an effeminate man with a dildo.³⁸

Yet, other jurists creatively allowed for the marriage of the *khuntha mushkil* in a manner that accepted the gender non-binary. For instance, while the Hanbali jurist *Khiraqi* subsumed the marriage of the *khuntha mushkil* in the gender binary defined by the *dhakar* and the *untha*, he allowed the *khuntha muskhil* to marry on the basis of their sexual attraction, as for him constitutional orientation had precedence in the decision of marriage.³⁹ The *khuntha muskhil* were given the final authority to determine their ritual gender based on the principle, as captured by al-Amidi that jurists could decide only on the overt and not on hidden matters.⁴⁰ Indeed, it was the inner aspects that held precedence, as based on *khuntha nafsiyya* (psychological intersexuality), contemporary jurists allow for gender reassignment surgeries. In doing so, the jurists implicitly recognized that sometimes gender traverses the binary defined by the *dhakar* and the *untha*. While they prescribe aligning sex with gender through surgeries, they also recognize the validity of constitutional orientation. As such, the case for same-sex unions stems from the recognition that in some cases gender traverses the binary not on the basis of anatomy but on the basis of validly recognized constitutional orientation.

The case of gays, lesbians and bisexuals can be subsumed into the framework of *khuntha nafsiyya* that allows for the recognition of the non-binary nature of gender. In such cases the anatomy is consistent with gender but not constitutional orientation. In such cases, the categories of the *dhakar* (non-receptive) and the *untha* (receptive) entities are too limited to subsume them as they can in the case of transgender persons who identify as heterosexuals. As such, for the purpose of

same-sex unions, a legal contract can be created that traverses the limited categories of the *dhakar* and the *untha*. A specific way to create such a legal contract would be through the avenue of the *malakat aymanukum* (right hand possesses) once it is stripped of its traditional context of slavery. While the term *mā malakat aymanukum* is usually translated to refer to ownership of slaves, it is also used to refer to legal authority over an entity or person, marriage or a legal contract that keeps a relationship firm and intact. According to Ibn Taymiyya, the word *mulk* also means legal authority of a human over others.⁴¹ This allows for Muslim same-sex unions in which a person extends legal authority to another irrespective of gender.

However, one criticism to establishing such a contract where one spouse offers legal authority to another rests on the idea that such a contract would perpetuate unequal power relationship between the spouses. On the other hand, the asymmetrical distribution of power actually arises based on the construction of gender, where the male is deemed as the active partner and the female as the receptive partner. In the context of two willing partners who are not defined or limited by the model of activity and receptivity, legal authority would primarily carry the definition of legally sanctioned consent, where both partners may allow each other sexual access subject to any limitations set by either party.

Such a legal contract is feasible as, at least according to the Ḥanafī jurists, a valid contract requires freedom of *ikhtiyār* (choice) and *riḍā* (consent) defined as real willingness.⁴² Thus, based on a non-binary understanding of gender, which has precedence in juristic discourse, the case of Muslim same-sex unions, unfettered by the limited categories of the *dhakar* and the *untha*, and based on choice and mutual consent can be justified. Yet another avenue to justify same-sex unions would be through a broad based argument in which *Nikah* (marriage), which literally means sexual intercourse, is not restricted to a procreative paradigm. Indeed, in verses 30:21 and 2:187, the Qur'an views marriage as forming the basis of *mawadda* (affection), *raḥma* (compassion), and as an institution through which spouses find tranquility and companionship as they become a *libās* (protective garment) to each other, guarding their dignity and honor. Likewise, the marriage contract can be justified on the basis of verse 9:71 that depicts mutual protectorship and verse 2:187 that depicts cooperation and harmony.⁴³ This allows for the argument that if the realization of affection, compassion, mutual protectorship, cooperation and harmony are allowed in a non-procreative context, as in the case of sterile couples and women past childbirth age, then the same allow for the justification of same-sex unions.

To recapitulate, given the absence of reasonable arguments against Muslim same-sex unions and the precedent of the marriage of the *khuntha mushkil*, the case to affirm same-sex relationships through a legal contract can be justified generally through marriage on the basis of achieving the purpose of tenderness and affection between spouses or alternatively through a legal contract where legally sanctioned consent is exchanged between spouses with any stipulations. The justification for marriage or an alternate legal contract arises from the juristic principles of repelling

hardship and by strong inferences from verse 4:28 that acknowledges human sexual need and the facility to legitimately meet that need, as permanent celibacy is rejected as an unIslamic value.

7. Conclusion

The aforementioned shows how Muslim same-sex unions can be derived through multiple avenues whether on the basis of the broad principles of human dignity and affection and therefore marriage or through the specific arguments of repelling harm and legal authority. Such arguments to justify same-sex unions cannot be critiqued on the basis of *ta'abbudi* (obedience based) arguments, as according to Shāṭibī (d. 1388), matters that can be rationally understood, and whose goodness and badness can be known include marriage for which the term *bid'a* (innovation) is not applicable.⁴⁴ Other arguments like making the prohibited permissible are also moot given the argument that the primary sources of Islamic knowledge are silent on same-sex unions. This means that opposition to Muslim same-sex unions primarily originate from a personal discomfort and distaste, which explain the Sunni Shia polemics that rest on smearing each others revered personalities with allegations of *liwat*.⁴⁵ However ethics are not based on our capacity for disgust. This suggests that those with cisgender heterosexual privilege will have to recognize that those who have a greater stake in the issue are in a better position to reasonably address the subject of same-sex unions. Nonetheless, given the multiple avenues delineated above and guided by the strong inferences from verse 4:28, Muslim scholars can delve freshly, sensitively and widely into their rich heritage to affirm Muslim same-sex unions. They can further help give potential guidelines that enable Muslim same-sex couples to navigate the spiritual, ethical and legal richness of Islam on an equal footing with their straight brothers and sisters in faith. Indeed, Allah creates whatsoever He wills and Allah loves us all.

Notes

¹ Wadud, "Book Review of Junaid Jahangir and Hussein Abdullatif's book."

² Ibn Taymiyyah, *Majmū' Fatāwā*. Usul Fiqh. Chapter of the primacy in the message and being independent by the Prophet from others than him.

³ Hallaq, *A History of Islamic Legal Theories*, 77.

⁴ Lakdawala, "Muslim Intellectual Inertia and Ijtihad."

⁵ Ibn Taymiyyah, *Majmū' Fatāwā*. Book of Sales. Chapter on guidelines in contracts towards dealings and marriage.

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- ⁶ Nathan, "Medieval Arabic medical views on male homosexuality."
- ⁷ Hourani, *Islamic Rationalism*, 32.
- ⁸ Ibn Qutayba, *Kitāb al-ashriba wa dhikr ikhtilāf al-nās fihā*, 26.
- ⁹ Ibn Taymiyyah, *Majmū' Fatāwā*. Book of Jihad. Opinion on the city state of Mardin.
- ¹⁰ Al-Qurṭubī, *Tafsīr al-Qurṭubī*. Verses 42:49-50.
- ¹¹ Ali, "The Homosexual Challenge to Muslim Ethics."
- ¹² Peterson, "Sex change in Cairo: Gender and Islamic law."
- ¹³ Kamali, "Transgenders and justice in Islam."
- ¹⁴ Hendricks, "Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society."
- ¹⁵ Adang, "Ibn Ḥazm on Homosexuality. A Case-Study of Zahiri Legal Methodology."
- ¹⁶ Shakir's translation is used for the Qur'anic verses.
- ¹⁷ Aḥmad, *The Holy Qur'an with English Translation and Commentary*, 1103-1104.
- ¹⁸ Al-Ṭabarī, *The History of al-Ṭabarī: Prophets and Patriarchs*, 112-118.
- ¹⁹ Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*, 181.
- ²⁰ Islam QA, "Why does Islam forbid lesbianism and homosexuality?"
- ²¹ Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*, 67-72.
- ²² Al-Rāzī, *Tafsīr al-Rāzī*. Commentary on verses 24:2.
- ²³ Ibn Taymiyyah, *Majmū' Fatāwā*, Tafsīr of Chapter 24.
- ²⁴ El-Rouayheb, *Before Homosexuality*, 124.
- ²⁵ Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*, 99-105.
- ²⁶ Ṣaḥīḥ al-Bukhārī, Hadith 4526 and 4527, 51.
- ²⁷ Reinhart, *Before Revelation*, 41.

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- ²⁸ Al-Mizzī, *Tahdhīb al-Kamāl*, Volume 13, 273–274.
- ²⁹ Kugle, “Sexuality, Diversity and Ethics in the Agenda of Progressive Muslims.” 196.
- ³⁰ Emon, *Islamic Natural Law Theories*, 128.
- ³¹ El-Menyawī, “Same-sex marriage in Islamic law,” 419, 421.
- ³² Ibn Ḥazm, “Chapter 28: Of the Vileness of Sinning;” Ibn Qutayba, *Kitāb al-Ashriba wa Dhikr Ikhtilāf al-Nās fihā*, 26.
- ³³ Emon, *Islamic Natural Law Theories*, 175.
- ³⁴ Ibn Taymiyyah, *Majmū‘ Fatāwā*, Book of selling.
- ³⁵ Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*, 231.
- ³⁶ Ibn Taymiyyah, *Majmū‘ Fatāwā*, Volume 10, Book of *Suluk*, Chapter of Straight path.
- ³⁷ Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Bārī*, Volume 12, 160.
- ³⁸ Rowson, “The Categorization of Gender,” 68.
- ³⁹ Kuwaiti Encyclopedia of Fiqh, Entry: *khunthā mushkil*.
- ⁴⁰ Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 193.
- ⁴¹ Ibn Taymiyyah, *Majmū‘ Fatāwā*. Tadmuri letter: statement of Imam Aḥmad; The Chapter of Waqf: the chapter of changing the *hady* and *uḍḥiya*.
- ⁴² El-Hassan, “The Doctrine of Duress.”
- ⁴³ Kamali, “Human Dignity in Islam”; Ali, *Sexual Ethics and Islam*, 183.
- ⁴⁴ Masud, *Shatibi’s Philosophy of Islamic Law*, 222.
- ⁴⁵ Shia Pen, “Chapter Twelve: Nasibis proudly portray their caliphs and scholars to be homosexual and child molesters.”

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Appendix

Translations are from Sahih International at quran.com

Gender non-binary

And your Lord creates what He wills and chooses; not for them was the choice. Exalted is Allah and high above what they associate with Him. (28:68)

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. Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent. (42:49-50)

And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment ... except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. ... (24:31)

And women of post-menstrual age who have no desire for marriage - there is no blame upon them for putting aside their outer garments [but] not displaying adornment. But to modestly refrain [from that] is better for them. And Allah is Hearing and Knowing. (24:60)

Say, "Each works according to his manner, but your Lord is most knowing of who is best guided in way." (17:84)

The people of Lut

And [We had sent] Lot when he said to his people, "Do you commit such immorality as no one has preceded you with from among the worlds? (7:80)

Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people." (7:81)

They said, "Have we not forbidden you from [protecting] people?" (15:70)

Do you approach males among the worlds. And leave what your Lord has created for you as mates? But you are a people transgressing. (26:165-166)

Do you indeed approach men with desire instead of women? Rather, you are a people behaving ignorantly. (27:55)

And [mention] Lot, when he said to his people, "Indeed, you commit such immorality as no one has preceded you with from among the worlds. Indeed, you approach men and obstruct the road and commit in your meetings [every] evil." And the answer of his people was not but they said, "Bring us the punishment of Allah, if you should be of the truthful." (29:28-29)

Miscellaneous

Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. ... (5:32)

Say, "I am not something original among the messengers, nor do I know what will be done with me or with you. I only follow that which is revealed to me, and I am not but a clear warner." (46:9)

Sex and marriage

And they ask you about menstruation. Say, "It is harm, so keep away from wives during menstruation. And do not approach them until they are pure. And when they have purified themselves, then come to them from where Allah has ordained for you. ..." (2:222)

Your wives are a place of sowing of seed for you, so come to your place of cultivation however you wish and put forth [righteousness] for yourselves. ... (2:223)

And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. (4:24)

But let them who find not [the means for] marriage abstain [from sexual relations] until Allah enriches them from His bounty. And those who seek a contract [for eventual emancipation] from among whom your right hands possess - then make a contract with them if you know there is within them goodness and give them from the wealth of Allah which He has given you. ... (24:33)

And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought. (30:21)

It has been made permissible for you the night preceding fasting to go to your wives [for sexual relations]. They are clothing for you and you are clothing for them. ... (2:187)

The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give zakah and obey Allah and His Messenger. ... (9:71)

It is He who created you from one soul and created from it its mate that he might dwell in security with her. And when he covers her, she carries a light burden and continues therein. And when it becomes heavy, they both invoke Allah, their Lord, "If You should give us a good [child], we will surely be among the grateful." (7:189)

Facility

... Allah intends for you ease and does not intend for you hardship and [wants] for you to complete the period and to glorify Allah for that [to] which He has guided you; and perhaps you will be grateful. (2:185)

And strive for Allah with the striving due to Him. He has chosen you and has not placed upon you in the religion any difficulty. ... (22:78)

... Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful. (5:6)

And Allah wants to lighten for you [your difficulties]; and mankind was created weak. (4:28)

Select Hadith texts referenced to address homosexuality

Whoever you find doing the deed of the people of Lūṭ, kill the one who does it and the one to whom it is done. (Sunan Abu Dawūd)

Whoever you find doing the deed of the people of Lūṭ, kill the one who does it and the one to whom it is done. And whoever has sex with the animal then kill the man and the animal. (Musnad Ibn Ḥanbal)

Stone the upper and the lower, stone them both. (Ibn Māja)

... and whoever penetrates a woman or a child or a man in their anuses then he comes on the day of judgment smelling worse than the dead animal until he goes to hell. (Musnad al-Ḥārith)

If adultery became widespread, then taking female slaves will become wide-spread and if Lūṭism (having sex with males in the anus) increased, then God will raise his hand from creation and will not care in which valley they meet their end. (Muʿjam Kabīr of Ṭabarānī)

The mukhannath said to the brother of Umm Salama: If God opened Ṭaʿif to you

tomorrow, then I will lead you to daughter of Ghīlān, for she comes forward with four and backwards with eight. The Prophet said: "This man does not enter on you after this."

Ā'isha said to a mukhannath in Medina: "Would you tell us about a woman to get her engaged to Abdullah ibn Abu Bakr?" Upon hearing the mukhannath's description, the Prophet responded: "Get out of Medina to Ḥamrā' al-Asad and in it will be your house."

Select Hadith texts on anal intercourse

[You may enter your women in any style] from front or behind, but keep away from the anus and the menstrual periods (Tirmidhi)

God is not ashamed of the truth [the Prophet said it three times]. Do not enter women in their anuses. (Ibn Maja)

Ibn 'Umar asked: Do you know Nāfi', why this verse (2:223) was revealed to us? ... When people did not like the fact that one of the men of Medina had anal intercourse with his wife, God revealed this verse (Your women are your tilth). Nāfi' asked: Coming to her from the back in the vagina? Ibn 'Umar replied: No, in her anus. (Mālik ibn Anas variant)

Once Ibn 'Umar read chapter 2 until he came to the verse and asked Nāfi': Do you know for what was it revealed? Nāfi' responded in the negative. Ibn 'Umar replied it was revealed for that (anus) and then he continued. (Bukhārī variant)

Ibn 'Umar mentioned about the verse (2:223): He comes to her _____ (anus) (Bukhārī variant)