

UAI JOURNAL OF ARTS, HUMANITIES AND SOCIAL SCIENCES (UAJAHSS)



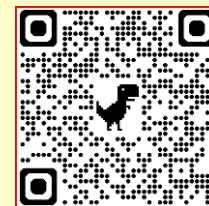
Abbreviated Key Title: UAI J Arts Humanit Soc Sci

ISSN: 3048-7692 (Online)

Journal Homepage: <https://uaipublisher.com/uaijahss/>

Volume- 1 Issue- 5 (December) 2024

Frequency: Monthly



THE ESTABLISHMENT OF THE SEX OF A HERMAPHRODITE HEIR FOR THE PURPOSE OF INHERITANCE; THE POSITION OF ISLAMIC AND SCIENTIFIC PERSPECTIVES

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ABSTRACT

A hermaphrodite is not a third gender but rather an individual born with a reproductive organs abnormality. This research seeks to examine the ground upon which a hermaphrodite heir will be eligible to inherit. The procedure for the establishment of the sex based on the tradition of the prophet and medical technology. The shares to be inherited by the hermaphrodite as opined by the four Sunni school of jurisprudence. And finally the juristic ruling upon the adoption of such medical technology to establish the sex of the hermaphrodite. Data are drawn from interview, books, articles, scholarly journals, magazines and others.

KEY WORDS: Establishment; Hermaphrodite; Inheritance; Islamic; Scientific

Introduction

The Islamic law of inheritance or ilm al-fara`id is one of the most important branches of Islamic jurisprudence. It's so important to the extent that Allah the law-giver has made a clear provision in the holy Qur'an as to the allocation of the deceased estate to the surviving heirs. And the Prophet (P.B.U.H) also emphasizes Muslim Ummah to learn ilm al-fara`id in the Hadith below

"Learn inheritance (Al-fara`id) and teach it, indeed it is the half of the knowledge. And it would be forgotten. And it (inheritance) will be the first thing to be raised up from my ummah"¹

The prophet was also reported to have said:

¹ Ibn maja, Al-darqutni, and Nail Al-autar vol. 6 pg.57.

"Learn Qur'an and teach it to the people, and learn (the knowledge) of inheritance (Al-fara`id) and teach it to the people. Indeed I will be taking away, the knowledge of (Qur'an and inheritance) will be raised up, and very soon there will be an argument between two people in inheritance and (other) cases. And they will find no one to settle them."²

Prior to the advent of Islam that is during jahiliyyah period, inheritance was on the ground of blood relationship, mutual agreement backed by oath, and adoption. Women and children were denied inheritances because they are weak and cannot hold arms and defend the family. More so women were regarded as among the chattel.

² Imam Ahmed, Al-tirmizi and Al-hakim vol.6 pg.58.

There are certain rights associated to the estate of the deceased that should be settled before the final distribution thereof. For a person to be eligible to inherit under Islamic law such person has to be related to the deceased either through blood relationship, marital tie or emancipation and so also be free from any legal impediment that will disqualify or bar him from inheritance.

Allah (S.W.A) has created two kinds of human being; males and females. And among such couple sexes some are being born with an abnormal reproductive organs, who are being referred to hermaphrodites. Islamic law has made a provision with respect to the procedure for determining the original sex of such hermaphrodite. And it can also be determined, due to the advancement of medical technology, through medical science. There are divergent views regarding the share of a problematic hermaphrodite (khunsa mushkil) as far as Islamic law of inheritance is concerned. The four Islamic school of jurisprudence are not in agreement on such regard.

Prof. Umar S. Abbo Jimeta in his paper titled The eligibility code of special heirs to inherit in Islamic law of inheritance; The challenge of modern science technology and the 1999 Nigerian constitution,³ elaborated on the grounds conditions and impediments of inheritance, and also the means of determining the gender of a hermaphrodite under Islamic and the share to be allocated thereto. He furthermore discussed the issue of acceptability of modern medical science, in Islam, with respect to the change of the sex of a hermaphrodite heir to the one he chooses at the age of minority.

Statement of the Problem

This research has been carried out in order to discover the means of establishing the sex of a hermaphrodite based on Nass and modern sciences. Although there is a Nass on the means of determining the sex of a hermaphrodite, however, the problem lies on the procedure for establishment of the sex based on modern science and the juristic ruling on the use thereof.

Theoretical framework

Brief History of Inheritance before and at the Early Stage of Islam

The prevailing custom among Arabs at the age of ignorance was determined by person's capability to wage a war against the enemies to defend or protect the honor of the family. Women, minors, and old persons were denied inheritance due to their inability to ride horse, hold arms to protect the honor of the family. They stated that "how are we going to give a share to a person who does not ride horse, hold sword and fight against the enemies"⁴. Women were regarded as among the chattels capable of being inherited. Such oppressive custom was subsequently prohibited in the verse below.

"O you who believe, it is not lawful for you to inherit women by compulsion..."⁵

Inheritance prior to the advent of Islam was based on blood relationship, adoption and Hilaf.

After the emergence of Islam, at the early period thereof, a new ground of inheritance was founded based on Islamic brotherhood (Al-mu`aakhah). It's a relationship established by the prophet

(P.B.U.H) between Muhajirun and Ansaar, which gives them the right to inherit each other in the event of death. A non-emigrant was not eligible to inherit his emigrant Muslim relation under the ground in question. This practice was abolished afterwards, nevertheless a person is allowed to make a will in their favor

The Concept of Inheritance

Islamic law of Inheritance is the process of transfer of ownership of the property/estate or right which include that of pre-emption, retribution etc. of the deceased person to his/her surviving heirs in line with the dictate of Islamic law. Special heirs, are heirs other than the normal heirs, they include: inheritance of pregnant wife, child in the womb and that of a hermaphrodite⁶.

Pillars of Inheritance (Arkanul-Miirath)

Pillars of inheritance are those important elements, if any of them is missing in a given case then there is no inheritance, as they are the integral part of inheritance. These are:

1. **The deceased (Al-muwarriith).**
2. **The successor(s) or heir(s) (Al-waarith or Al-waarithuun):** This is a person whose relation to the deceased legally entitles him to inherit part of the deceased property depending on factors such as his relation to the deceased and presence of other heir(s). Put it differently, is a living individual (s) who is going to inherit the property of the deceased. Such heir may be a hermaphrodite or otherwise. As far as shares of heirs is concern it's unequal. There are heirs with higher share for instance male heirs. This is due to the financial liability shouldered upon them. A male share is always higher than that of a female, save in the case of a uterine siblings. The total number of heirs is twenty five, fifteen male and ten females.

The male heirs are:		The female heirs are:	
i.	Son	i.	Daughter
ii.	Son's son	ii.	sons daughter
iii.	Father	iii.	Mother
iv.	Paternal grandfather	iv.	maternal grandmother
v.	Germane brother	v.	paternal grandmother
vi.	Consanguine brother	vi.	Germane sister
vii.	Uterine brother	vii.	Consanguine sister
viii.	Son of germane brother hls	viii.	Uterine sister
ix.	Son of consanguine brother hls	ix.	Wife
x.	Germane paternal uncle	x.	Female emancipator
xi.	Consanguine paternal uncle		
xii.	Son of germane paternal uncle hls		
xiii.	Son of consanguine paternal uncle hls		
xiv.	Husband, and		
xv.	Male emancipator.		

³ University of Maiduguri Journal of Islamic Law and Comparative Law (Unimaidjicol) 2023, vol.8 no.1

⁴ Al-mawarith fi-shari'atul islamiyyah, fi-dau'il kitaabi was-sunnah. P.21

⁵ Ch 4: V

⁶ Prof. U.S Abbo Jimeta, University Of Maiduguri Journal of Islamic and Comparative Laws (Unimaidjicol) 2023, V.8.No.1.

Legal heirs are classified into:

- a. **Ashabul furud:** These are heirs with a specified share, stipulated in the Qur'an or Sunnah. They are as follows:
 - i. Husband
 - ii. Wife
 - iii. Father
 - iv. Mother
 - v. Daughter
 - vi. Son's daughter
 - vii. Germane sister
 - viii. Consanguine sister
 - ix. Uterine sister
 - x. Uterine brother
 - xi. Grandmother
 - xii. True grandfather
- b. **Asabah:** The term Asabah, in legal parlance referred to the heirs entitle to the residue. They are heirs without specified share in the Qur'an or Sunnah. Asabah have been divided into three:
 - i. **Asabah in their own right (Asabah bin-nafs):** these refers to the male relatives in the line of their relationship with deceased no female enter. They are the paternal male relations who inherit the residue as they have no specified shares in the Qur'an or the Sunnah. This does not mean that they are less important than the Qur'anic heirs. It is interesting to know that some of the Asabah can even exclude some of the Qur'anic heirs from their specified share completely or partially. For instance collaterals are being excluded by the presence of a son, despite the fact that they are Qur'anic heir (have specified shares). The authority for this is the Hadith of the Prophet who was reported to have said

*"Attach the specified shares to their owners. And whatever remains shall be for the nearest male blood relation"*⁷.

An Aaseeb, that is one agnatic heir, in his own right inherit the whole estate when there are no other heirs, but where he co-exists with other Qur'anic heirs he inherits the residue. Asabah on their own right are subdivided into four classes according to priorities:

- i. **Bunuwwah:** these are the male children of the praepositus such as son, son's son hls.
- ii. **Ubuwwah:** these consist a father, father's father hls.
- iii. **Ukhuwwah:** it embodies germane and consanguine brothers. Sons of germane and consanguine brothers' hls. Uterine brother and his son are not among Asabah, as they are connected to the deceased through a female, that is a mother.

- iv. **Umumah:** this includes germane and consanguine paternal uncles. Sons of germane or consanguine paternal uncles' hls.

And finally where the heir share the same class and degree, the priority is based on strength of blood relationship. This exists only among collaterals. For example a deceased left a germane and consanguine

brother, or a germane and a consanguine brother's son. Here germane brother or germane brother's son is entitle to the whole estate, as his relationship with the deceased is stronger.

- ii. **Asabah by another (Asabah bil-ghair):** there are female heirs with a specified share. Although they are Qur'anic heirs, but yet are being agnatised by the presence of their brothers of the same class, degree and strength (strength of blood relations). The four female heirs that fall within this sub-division are daughter, son's daughter, germane sister and consanguine sister. It means a Daughter in the presence of a son, son's daughter in the presence of a son's son, germane sister in the presence of a germane brother and consanguine sister in the presence of a consanguine brother. This is based upon the saying of the Almighty Allah that;

*"...if there are brothers and sisters, the male shall have the share of two female..."*⁸

The Muslim jurists are in agreement that the siblings referred to in the above verse are the germane and consanguine siblings only. The germane siblings or consanguine siblings inherit the residue in accordance with the principle of double share i.e. that the male takes double share of a female.

- iii. **Asabah with another (Asabah ma'al ghair):** these are germane sister and consanguine sister. They are Qur'anic heirs entitle to a half or two-third but yet are being agnatised in the presence of another female heirs, i.e. daughters or a daughter and a son's daughter and therefore inherit the residue after daughters or a daughter and a son's daughter have taken their shares.

The authority on this is the Hadith of the Prophet narrated by Huzail Bin Shurahbil that

*Abu Musa was asked regarding the inheritance of a daughter, son's daughter, and a sister. He said "the daughter and the sister will take one-half. If you go to Ibn Mas'ud (R.A) he will tell you the same". Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said "if I give the same verdict I would be stray and would not be of the rightly-guided. The verdict I will give in this case will be the same as the Prophet (S.A.W) did, a half is for the daughter, and a sixth for the son's daughter, both shares make two-third of the total property, and the residue is for the sister". Afterwards, we come to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "so do not asked me for verdicts, as long as this learned man is among you"*⁹.

And also Muslim Jurists formulated a rule that;

*"Make sisters with daughters Asabah"*¹⁰

⁷ Sahih Muslim V.3 Hadith No.1615. Sunan Ibn Majah V.2 Hadith No.2740. Sunan Abi Dawud V.3 Hadith No.2898. Sunan At-tirmidhi V.3 Hadith No.2098.

⁸ Chapter 4: V.176

⁹ Ibn qudamah, Al-mughni, mas'alah no 4821, V.6 Pg 273

¹⁰ It's a juristic principle

The reason behind making a sister or sisters Asabah in the presence of the female heirs in question is that there must be an adjustment on the base, by applying the doctrine of "Awl" if a sister/sisters is/are to be giving her/their Qur`anic share of a half/two-third. And as a result of that, there will be a reduction of the share of the daughters or of a daughter and a son`s daughter which is not desirable.

- c. **Zawul-Arham (Distant uterine relations):** these are those relations of the deceased who are neither Qur`anic heirs nor Asabah. There are two divergent views with respect to the inheritance of Zawul Arhaam. Majority of the companions of the Prophet (S.A.W) among them are caliph Umar Bin Khaddab (R.A), caliph Ali Bin Abi Talib (R.A), Ibn Mas`ud, Mu`az Bin Jabal, and Ibn Abbas hold the view that Zawul Arhaam are entitle to inherit in the absence of Qur`anic heirs and Asabah. This view has been adopted by Imam Abu Hanifa and Imam Ahmad Bin Hambal. They based their view on the following verse of the Qur`an, Allah (S.W.T) in the Holy Qur`an says:

*"And the blood relatives are closer to one another in the book of Allah"*¹¹

The expression blood relatives is construed to embodied all categories of relations, irrespective of whether they are Qur`anic heirs, Asabah or otherwise. In was narrated that Abu Ubaidah Bin Al-jarrah wrote a letter to Umar Bin Al-Khaddab asking him regarding Sahal Bin Hunaif, who was shot by an arrow. And the victim left no heir except his maternal uncle. Umar replied to him saying that the Prophet (S.A.W) said:

*"Uncle (maternal) is the heir of someone who does not have heirs"*¹².

While the other group are of the opinion that Zawul-Arham are not entitle to inherit, and the estate goes to the public treasury, where there is neither Qur`anic heirs nor Asabah. This is the view of Zaid Bin Thabit, Ibn Abbas (in his second view), Sa`id Bin Jubair, Sa`id Bin Al-Musayyab, Sufyan Ath-thouri and Ibn Hazam. This view has been adopted by Imam Malik and Imam Shafi`i. This view is based on the fact that there is no any nass concerning the inheritance of Zawul-Arham.

Furthermore, if the estate is giving out to public treasury, it will benefit the Muslims society, which is not the case with Zawul-Arham, as it will benefit them alone. Such view is based on the *Qaa`idah Fiqh-hiyyah* which says

*"The public interest takes precedence over private interest"*¹³.

Based on the afore-mentioned, it`s clear that the strongest view is that Zawul-Arham are entitle to inherit, due to the absence of Islamic Public Treasury in some countries and the misuse of it. Therefore giving such estate to them is preferred to taking it to Baitul-Maal; more especially in the present time people are in much need.

Imam Malik and Shafi`I who have an opposite view, changed their view and followed that of Imam Hanbal and Imam Abu Hanifa. Therefore all Sunni schools unanimously agreed upon the

inheritance of Zawul-Arham.

Exclusion (Hajb) does exist among the legal heirs. Exclusion as far as inheritance is concern, denotes prevention of an heir from his right to inherit due to the presence of another heir either permanently or partially.

3. **The estate (Al-mauruth or Tarikah):** Estate/Tarikah denotes what a deceased left behind after his death. And it shall be something valuable in the eyes of the law (*mutaqawwim*). It encompasses moveable (*Manqool*) or immoveable (*Aqar*), corporeal or incorporeal, *Qiyami* or *Mithli*. The jurists have classified what constitute the estate of a praepositus into the following:
- i. **Money and Money`s worth:** This entails any denomination of money be it coins or notes, considered to be a legal tender. Similarly all transferable money`s worth document, such as cheques, company`s share certificate etc, and all other moveable and immoveable properties, are all brought under money`s worth. The jurists unanimously agreed that these are inheritable.
 - ii. **Usufruct (Manfa`ah):** It is any benefit or enjoyment derivable from hire, mortgage, pledge, loan or debt. Majority of the jurists considered usufruct a property and is therefore subject of inheritance. However Imam Abu Hanifa holds the opposite view. He opined that usufruct is not a tangible property and is therefore not inheritable.
 - iii. **Right (Huquq):** Jurists have classified rights into two:
 - a. **Monetary Rights:** these are rights attached to a monetary interest such as debts, securities etc. According to the majority of jurists these rights are inheritable.
 - b. **Personal Rights:** these personal legal rights are exclusively reserved to the deceased personally during his life and are never in law inheritable, because they become void upon his death. For instance right to divorce, of guardianship, of suckling etc¹⁴.

There are certain rights, associated with the estate of the deceased which shall be settle in the following order before distribution thereof:

- i. **Funeral Expenses:** funeral expenses are deducted from the deceased estate. The preparation entails washing of the corpse, kafan (shrouding); three pieces of cloth for men and five for women, transportation and burial of the corpse. Such expenses should neither be extravagant nor deficient.
- ii. **Settlement of Debts:** Debts have been categorized into two:
 - a. **Debts of People:** these are debts owed to individuals. The debts may be either secured debts (Ainiyyah) or unsecured debts (Shaksiyyah).
 - b. **Debts of Allah:** These are debts owed to Allah for instance zakaat, kaffarah, nuzr etc. According to Ahnaaf, such debts are unenforceable unless a bequest was made on its regard. Their justification is, they are acts of worship that requires intention. It`s a spiritual act that needs to be performed personally and such person is being

¹¹ Ch 8:V.75

¹² Sunan Ibn Majah V.2 Hadith no.2737-2738. Sunan Abi Dawud V.3 Hadith no.2901. Sunan At-tirmidhi V. 3 Hadith no.2103-2104.

¹³ It`s a qa`idah fiq`hiyyah

¹⁴ Barrister Usman El-Hammad Pindiga, The Law of Succession in the Shari`ah, P.11-12.

considered to have been absolved from such obligations if he passed away. Whereas majority of the jurist hold the opposite view. Their view is based on the fact that the debts are attached to the estate, therefore are enforceable.

- iii. **Execution of Will (Wasiyyah):** The declaration of the testator allowed to be executed, is one not in excess of one-third. Similarly, unless with the consent of other heirs, Wasiyyah made in favor of a legal heir is invalid. Because the prophet was reported to have said

“Allah has appointed for everyone his entitled share; thus no bequest in favour of a legal heir...”¹⁵

- iv. **Distribution of the net estate to the legal heirs:** This is the final right relating to the estate. It refers to the distribution of the residue of the gross estate among the legal heirs in accordance by the Sharia

Grounds of Inheritance (Asbaabul-Miirath)

The grounds upon which a person becomes eligible for inheritance under Islamic law are blood relationship, marital tie and emancipation. But as far as a hermaphrodite heir is concern precisely problematic hermaphrodite, the grounds for his eligibility, as he is not allowed to contract a marriage¹⁶, are limited to:

1. **Blood relationship (Nasab):** Blood relations are the descendants, ascendants and collaterals. They includes children of the deceased both male and female, parents, siblings of the deceased, and paternal uncles of the deceased. It should be noted at this juncture that even among the blood relations of the deceased, there are heirs that can never be a hermaphrodite such as father, mother, grandfather and a grandmother. Because by being a father or a grandfather among others, is no longer hermaphrodite, because his sex has been determined, even if he/she was born as a hermaphrodite.
2. **Emancipation (wala al-itaq or Wala al-Ni`imah):** A hermaphrodite master who emancipated his slave is entitled to inherit the latter in the absence of any of his (the freed slave) legal heirs. The hermaphrodite master inherits his freed slave but not vice versa.

Conditions of Inheritance (Shuruudul-Miirath)

The following conditions must be establish before one can have share in the estate of the deceased, irrespective of whether such person is a hermaphrodite or not:

1. Death.

This denotes the death of the prepositus, either real death or by a decree of a court. Every person has the capacity to deal with his properties provided he is not under any interdiction. However there is a point that a person is said to have lacked that *Ahliyyah*, that is when he dies. Therefore after his demise the ownership of his properties passes to his successors.

2. Survival of an heir.

It implies the survival of a person after the death of the prepositus. A person who survived the deceased, is eligible to inherit him. However, where potential heirs died in a common disaster

simultaneously for instance a father and a hermaphrodite/son, and it is not possible to ascertain who predecease another. In such a situation there is no inheritance between them. More so where an heir dies before the distribution of an estate, his share will be re-distributed among his living heirs.

3. A ground of inheritance.

Before a person can claim a share from the estate of the deceased, he must established that he falls under one of the grounds of inheritance, that is either he is related to deceased because of Nasab, Zawaj or Wala`a.

Impediments to Inheritance

The general principle is that any heir, either a hermaphrodite or a normal heir, who survived the deceased, is eligible to inherit the latter. However there are factors that may debar such heir from inheritance, such as:

1. **Slavery:** A hermaphrodite slave is bar from inheriting his relations, and vice versa. Because what he inherits goes directly to his master (who is a stranger to his relations). More so he was debarred from inheritance, for he lacks the capacity to own a property. The Muslim jurists formulated a principle that:

“The slave and whatever his hand possesses are for his master”¹⁷.

2. **Homicide:** Homicide is the act of killing a human being by another human being. The prophet was reported to have said:

“A killer inherits nothing”¹⁸

Furthermore, the jurists formulated a principle supporting the above Hadith of the prophet. The principle says:

“Whoever hastens to cause something to happen before its date of materialization, will be punished by a prohibition to gain thereof”.

Homicide as far as Islamic law is concerned is categorized into:

- i. **Intentional homicide (Qatl-amd):** it’s a homicide that embodies both elements of an offence (*actus reus and mens rea*) as such punishable by *Qisas*, or *Diyyah*. Where such offence has been committed, the relations of the victim have three options against the murderer: to get him punished by *Qisas*, or pardon him, or accept *Diyyah* in lieu of *Qisas*.
- ii. **Quasi-intentional homicide (Qatl al-shubh Al-amd):** this is an intentional homicide with an object that does not normally kill. It’s viewed as intentional, for he puts his intention into execution by hitting the victim. This type of homicide is punishable by *kaffarah*, that’s to free a slave or fast for two month consecutively, and the payment of *Diyyah*.
- iii. **Mistaken homicide (Qatl Al-khada`):** This is a homicide committed without *mens rea*. A mistaken homicide may either be by conduct through mistake of fact or where the homicide was committed by a minor or an insane. The consequence of such offence is payment of *Diyyah* by the

¹⁵ Ibn majah, V.2, Hadith no 2712

¹⁶ Shamsudden Abu Abdullah Muhammad Bn Muhammad, “Mawahib Al-jalil Fi Sharh Mukhtasar Khalil”, 3rd edition, 1992 (1412), Dar Al-fikr.pg 427. Ahmad bn Yusuf bn Muhammad Al-ahdal, “Taanatu Ad-daalibu fi Bidaayatu Ilm Al-fara`id”, Dar Touq Al-najaat, 4th edition (2007), pg. 165.

¹⁷ Qa`idah fiq`hiyyah

¹⁸ Sunan ibn majah, v.2, Hadith no 2735

*Aaqilah*¹⁹ of the perpetrator and performance of kaffarah by the perpetrator himself.

According to Ahnaaf, any homicide punishable by Qisas or kaffarah bars the perpetrator from inheriting the victim. However, homicide committed by a minor or insane, or in execution of court sentence or in a self-defense does not bars them. Maliki School is of the view that, the homicide which bars one from inheritance is the intentional homicide. Shafi'i opined that all kinds of homicide are impediments to inheritance. Hanaabilah hold the view that any homicide punishable by Qisas, kaffarah or Diyyah is an impediment to inheritance.

- 3. Difference of Religion:** This is because the prophet was reported to have said

*“Never shall a Muslim inherit a non-Muslim, nor shall a non-Muslim inherit a Muslim”*²⁰.

However, a person is allowed to make a will in favor of his Christian relations or a wife.

- 4. Apostasy:** Muslim jurist unanimously agreed that an apostate does not inherit his Muslim relations. However, the area of divergence is whether his relations can inherit him or not. Majority of the jurist opined that, a Muslim does not inherit an Apostate, his property becomes a booty, hence goes to baitul- maal. Whereas Hanafi School of thought hold the opposite view, that is the property of the apostate goes to his Muslim relations as inheritance. The latter, is also the view of Abu-Bakr, Ali and Ibn Mas'ud.

Definition of a Hermaphrodite and its Kind

A hermaphrodite or Khunsa literally comes from word *khunuth* which means *layyin* (soft). It's not applied to *mukhannath*, a term used for a man who clearly identifies as a male but chooses to behave or dress like a woman.

Khuntha technically refers to an individual that is completely not male or female, or an individual that has both male and female reproductive system, but cannot be identified as either.

Muslim jurists have also given various definition of *khuntha*. Hanafi jurist, al-kasani, defines *khuntha* as a person born with both male and female external genitalia. *Khuntha* cannot be claimed as both male and female as its identity, but must be identified as either man or woman²¹. As for Zaila'I, *khuntha* is the condition of having a male and female characteristics²².

Maliki jurist, al-khurashi, defines *khuntha* as an individual that has both male and female organs, and also an individual that does not have male or female organs. This person must not be identified as a man or woman. This is because such variations may involve genital ambiguity or vague combination of one's physical characteristics as long as there is no proof to distinguish them²³.

Shafi'i jurist, *al-nawawi*, defines *khuntha* in his book *al-majmu`* as an individual with two sex organs that may not match the gender identity of a man or a woman. The identity of such a *khuntha*

remains undecided on whether he/she is going to be a father or a mother, bride or groom, and grandfather or grandmother when he/she grows up²⁴.

Hanbali jurist, *Ibn qudamah al-maqdisi*, in his book *Al-mughni* defines *khuntha* as those born with both male and female sexual organs. If the person urinates from male sex organs, then the individual can be define as male or vice versa²⁵.

Khunsa is of two kinds, *khunsa mushkil* (problematic hermaphrodite) and *khunsa ghair mushkil* (unproblematic hermaphrodite). The former refers to a person who died at infancy prior to determination of the sex or he reaches the age of puberty without distinguishing signs of either sexes or the signs of both sexes appears such as beard, breast etc²⁶. Regarding *khuntha* who does not has both organs, shafi'iyah are of the view that such *khuntha* will be considered *mushkil* forever²⁷. Whereas the latter refers to a person whose sex can be determine either at infancy or at puberty by appearing any male or female features²⁸.

Some asserted that a hermaphrodite is a third gender of human beings, whereas others contended that it's not a third gender, because the Almighty Allah says:

“He gives a female child to whom He wills, and He gives to whom He wills a male child”²⁹

And also he says in another verse:

“O mankind, fear your lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women...”³⁰ Therefore had it been a hermaphrodite is a third gender, He would have stated it in the Holy Qur'an³¹.

Procedure for the Establishment of the sex of a Hermaphrodite based on Nass.

The first procedure being employed for the determination of the sex of a hermaphrodite as concurred by all the Muslim jurists is the genitalia upon which he urinates³². He is considered to be a male if he urinates through the male organ. And categorize as female if he urinates through the female organ. They based their view upon the hadith of the Prophet (S.A.W) reported by Ibn Abbas (R.A) that the holy prophet (S.A.W) was asked about the share of a child who has both male and female organs, he replied “From where he urinates”

Where the *Khuntha* discharges urine from both organ that is both male and female organs, consideration is being paid to the organ it discharges first, because it implies that organ to be the original. As it is reported in a hadith that a *Khuntha* from Ansaar was brought to the Prophet (S.A.W), he said

²⁴ Al-nawawi, 2003,p.53

²⁵ Ibn-qudamah, n.d:114

²⁶ Salah-Uddin B.H.A, (2011), 5th ed., Al-makhtabah Al-muhammaedia Ghulah Mandi Renala Khurd-okara, Pakistan, p.172

²⁷ Muhammad Bn yusuf Bn Abi Al-qaasim Bn yusuf Al-abdariy Al-garnaadiy :Attaaju wal-ikhliil li-mukhtasar Khalil (1994) 1st ed. Daar Al-kutub Al-alamiyah, pg 424.

²⁸ Salah-Uddin B.H.A, (2011), 5th ed., Al-makhtabah Al-muhammaedia Ghulah Mandi Renala Khurd-okara, Pakistan, p.170.

²⁹ Ch42: v 49

³⁰ Ch 4:v1

³¹ shamsudden Abu Abdullah Muhammad Bn Muhammad: Mawahib Al-jalil Fi Mukhtasar Khalil (1992) 3rd ed. Daar Al-Fikr v.6,pg 424-425

³² Muhammad Bn yusuf Bn Abi Al-qaasim Bn yusuf Al-abdariy Al-garnaadiy :Attaaju Wal-Ikhliil Li-Mukhtasar Khalil (1994) 1st ed.

¹⁹ Aaqilah: they are the paternal male relatives.

²⁰ Sahihul Muslim, v.4, Hadith no: 1614. Ibn majah, V.2, Hadith no: 2729-2731. Sunan At-tirmidhi, V.3, Hadith no: 2107. Sunan Abi Dawud, V.3, Hadith no: 2909.

²¹ Al-kasani, 1986, p.418

²² Al-zaila'I, 1896, p.215

²³ Al-kurashi, n.d, p.227

“He will inherit from which organ he discharges urine first”³³

However if the *Khuntha* discharges the urine from the both organs simultaneously, Abu Yusuf, and Al-shaibani, disciples of Abu Hanifa, held that the organ which discharges more urine than the other will be considered the original organ because it is stronger.³⁴ And where the volume of the urine discharged are equal, then the temperature of each will be taken and the warmer determines the sex.³⁵

The Share of an Unproblematic Hermaphrodite (*Khuntha Ghair al-Mushkil*)

The share of a hermaphrodite whose sex has been identified either at childhood by the first procedure, or at puberty by the second procedure, is akin to the share of a normal heir. Now we are going to look at the hermaphrodites entitle to a share on the ground of *Nasab*, as well as their shares. The Share of a *khunsa ghair Mushkil* as a:

- i. **Son:** the son is entitle to:
 - a. Double share of a female³⁶. In the presence of his sister(s) he share the residue or the net estate with her/them in ratio 2:1.
 - b. The whole estate if alone
 - c. Takes residue in the absence of his sister, after other Qur`anic heirs have taken their shares
- ii. **Daughter:** A daughter is entitled to:
 - a. 1/2 -- where she is the sole heir³⁷.
 - b. 2/3 – when they are two or more³⁸, and in the absence of their brother. They share 2/3 equally.
- iii. **Son`s daughter:** A son`s daughter is entitled to:
 - a. 1/2 - when alone, and in the absence of the deceased male descendant i.e. her father or her uncles, her brother or son of her paternal uncle, and the daughter of the deceased.
 - b. 2/3 – when they are two or more, and in the absence of the deceased descendant (both male and female) and her male counterpart, that is son`s son (her brother), or son of her paternal uncle.
 - c. 1/6 – in the absence of the deceased son or her male counterpart, and when she co-exists with the deceased daughter or with a son`s daughter from a upper class to complete the 2/3 maximum female share.
 - d. Residue – when she co-exists with a son`s son (A residuary, that is he has no specific share, he only takes residue). The presence of the son`s son makes her becomes a residuary. This is because if she is

³³ Al-baihaqi. Al-mabsut v.30.p.91. Al-bahjah v.4.p.423-425. Al-rahbiyyah p.144-149. Jawahir al-iqleel v.2.p.348-349. Al-mughni v.6.p.253.

³⁴ Pindiga U.E. Practical Guide to the Islamic Law of Succession (Mirath) in the shari`ah (2000), Tamaza Publishing co. Ltd Zaria p.139. revelation and science vol.06,no. 01(1437AH/2016) P.2

³⁵ Ibid p.139.

³⁶ Ch.4:v11

³⁷ ibid

³⁸ ibid

given her specific share, it will contradict the principle that a male takes double share of a female, therefore he agnatised her.

- e. Residue – when co-exists with son`s son son (who is in a lower class), and in the presence of two daughter, who have exhausted the 2/3 female maximum share. In this situation, after the deduction of the shares of Ashabul-furood (those who have specific), the residue will be shared among son`s son son and the son`s daughter in ratio 2:1. Here the presence of the son`s son son is lucky or fortune for her, hence he is called Al-akh Al-mubarakh (blessed brother) or Al-Qareeb Al-mubarakh (blessed relation)³⁹.

iv. **Germane sister:** A germane sister is entitled to:

- a. 1/2 -- when she is the sole heir of the deceased⁴⁰.
- b. 2/3 – when they are two or more and in the absence of the deceased descendants and ascendants and her brother⁴¹.
- c. Residue – in the presence of her brother (germane brother), she inherits the residue together with him in ratio 2:1. This is where there is no descendant of the deceased or father of the deceased⁴².
- d. Residue – she inherits residue when co-existing with the daughter of the deceased or son`s daughter, in the absence of father, her brother (germane brother) and male descendant⁴³.

v. **Consanguine sister:** A consanguine sister (a substitute of a germane sister) is entitled to:⁴⁴

- a. 1/2 -- in the absence of the descendant of the deceased, father of the deceased, consanguine brother (her brother), germane sister, and a germane brother.
- b. 1/6 – whether one, two or more, when co-existing with a germane sister, to complete the 2/3 female share, in the absence of the descendant of the deceased, father ,germane brother and consanguine brother (her brother).
- c. Residue – when co-existing with a consanguine (her brother) she inherits the residue together with him in ratio 2:1
- d. Residue – when co-existing with a daughter or son`s daughter, she inherits the residue left by the daughter of the deceased or son`s daughter.

vi. **Uterine sister:** A uterine sister or brother is entitled:

³⁹ Salah-Uddin B.H.A, (2011), 5th ed., Al-makhtabah Al-muhammaedia Ghulah Mandi Renala Khurd-okara, Pakistan, p.53-60

⁴⁰ Ch.4:v176

⁴¹ ibid

⁴² Salah-Uddin B.H.A, (2011), 5th ed., Al-makhtabah Al-muhammaedia Ghulah Mandi Renala Khurd-okara, Pakistan, p.61

⁴³ ibid

⁴⁴ Salah-Uddin B.H.A, (2011), 5th ed., Al-makhtabah Al-muhammaedia Ghulah Mandi Renala Khurd-okara, Pakistan, p.64-66

- a. 1/6 – provided there is no descendants or ascendants of the deceased⁴⁵.
- b. 1/3 – when two or more, either all male or female or mixed, provided there is no descendants of the deceased or ascendant. The 1/3 is shared among the uterine brothers and sisters equally⁴⁶. This is the exception to the general rule that a male takes double share of a female. There is a situation that may warrant uterine siblings to share the 1/3 with germane brothers equally, this is where the Ashabul-furood exhausted the whole estate. As germane brothers are agnatic heirs, that is the heirs that inherit the residue.

vii. Germane brother: a germane brother is entitled to⁴⁷:

- a. Double share of a female if he co-exist with his sister(s) (germane sister) and there are no descendant or father of the deceased. He share the residue or the net estate with her/them in ratio 2:1
- b. He takes the whole estate if alone.

viii. Consanguine brother: a consanguine brother is entitled to:

- a. Double share of a female if he co-exist with his sister(s) (germane sister) and there are no descendants of the deceased, father of the deceased or germane brother. He share the residue or the net estate with her/them in ratio 2:1
- b. The whole estate if alone.

ix. Son of a germane brother: a son of germane brother is entitled to:

- a. The residue in the absence of the deceased descendants, father of the deceased, and his father(germane brother)
- b. The whole estate if alone

x. Son of a consanguine brother: a son of a consanguine brother is entitled to:

- a. The residue in the absence of the deceased descendants, deceased father, his uncle (germane brother of his father), his father (consanguine brother of the deceased) and son of germane brother.
- b. The whole estate if alone

xi. Paternal germane uncle: a paternal germane uncle is entitled to:

- a. Residue if there is no an excluder
- b. The whole estate if alone

xii. Paternal consanguine uncle: a paternal consanguine uncle is entitled to:

- a. Residue if there is no an excluder
- b. The whole estate if alone

xiii. Son of a paternal germane uncle: a son of paternal germane is entitled to:

- a. Residue if there is no an excluder
- b. The whole estate if alone

Hermaphrodite in Modern Science and its types

A hermaphroditism is considered a kind of sexual development disorder which is called intersex condition in science. It broadly encompasses numerous types of sexual anomaly from which an individual may suffer. Beyond the complex mixture of internal sexual anomaly, an intersex more often includes those born with ambiguous genitalia. For instance, a baby boy with an abnormal penis may have ovaries instead of testes, or a baby girl with abnormally large clitoris resembling a penis may not have proper internal sexual organs⁴⁸. The scientific reason as to why this happens is that “it arises when genetic and/or hormonal patterns cause an embryo to exhibit a pattern of sexual differentiation that combines elements of both male and female developmental pathways”⁴⁹. This is referred to as an altered biochemical pathway which causes an intersex condition. The most common types of intersex in science are:

1. Children born with abnormal female genitalia but with no internal female sex organs like uterus or fallopian tubes due to a condition known as Androgen Insensitivity Syndrome (AIS). They are chromosomally male individuals (XY) but are completely or partially unable to process the androgens made by their own testes. If they are Complete AIS (CAIS), they will be born with somewhat female genitalia but their testes still prevent them from having uterus and fallopian tubes. But if they are born with Partial AIS (PAIS) conditions, will have masculinized female external genitalia (e.g., clitorimegaly, or enlarged clitoris) to mildly under-masculinized male external genitalia (e.g., micropenis). They are considered as girls at birth due the shape of their genitalia but at puberty they fail to menstruate⁵⁰.
2. Children born with abnormal external female genitalia but no internal female sex organs like uterus or fallopian tubes due to a condition called 5-Alpha-Reductase Deficiency (5-ARD) and described as male pseudo hermaphrodites. They also have male (XY) chromosomes intact testes but are unable to convert testosterone into dihydrotestosterone in order to develop male genitalia. They are treated as females at birth due to the appearance of their genitalia but at puberty they start to masculinize⁵¹.
3. Children born with external masculine genitalia but internally having normal uterus and ovaries due to a condition known as Congenital Adrenal Hyperplasia (CAH) and described as female pseudo hermaphrodites. They are chromosomally females (XX) but since adrenal

⁴⁸ Ehrenreich, N., & Barr, M. (2005). Intersex surgery, female genital cutting, and the selective condemnation of cultural practices. *Harv. CR-CLL Rev.*, 40, 71.

⁴⁹ *ibid*

⁵⁰ Ehrenreich, N., & Barr, M. (2005). Intersex surgery, female genital cutting, and the selective condemnation of cultural practices. *Harv. CR-CLL Rev.*, 40, 71.

⁵¹ Ehrenreich, N., & Barr, M. (2005). Intersex surgery, female genital cutting, and the selective condemnation of cultural practices. *Harv. CR-CLL Rev.*, 40, 71.

⁴⁵ Ch.4:v11

⁴⁶ Ch.4:v11

gland produces large amounts of androgens, hormones, they develop ambiguous male genitalia. However, at puberty they often exhibit irregular menstrual periods and more body hair than typical for girls of their ethnic and family background⁵².

- Children with micro-penis or undescended testes due to a condition called Klinefelter Syndrome (KS) have two or more X chromosomes and a Y chromosome. Accordingly, at puberty they grow sparse facial hairs and breast. Hormonal therapy may help their masculine pubertal development⁵³.

Establishment of the sex of a hermaphrodite based on modern science

Although Islamic law has clearly makes provisions with respect to the procedure of identifying the sex of khunsa. Yet there is another means of determining it scientifically. Modern science is now able to identify and differentiate between true or problematic hermaphrodite and unproblematic or pseudo-hermaphrodite at birth or childhood. Medical measures for sex determination goes beyond the physiological function of the genitalia. Instead medical practitioners examine the sex chromosomes, sex gonads, uterus and fallopian tubes. With the current medical knowledge and advanced science technology the determination of the sex of khuntha mushkil will be resolve. Kazim and Al-bar asserted that better equipment from today's medical science will help the medical doctors to easily differentiate between a real female khuntha with the appearance of a man (female pseudo-hermaphrodite) and a real male khuntha with the external signs of a woman (male pseudo-hermaphrodite)⁵⁴. And where the sex has been established, the legal heirs co-existing with a khuntha will get their complete share once and for all, rather than reserving the remainder until maturity. The approaches being employed by the medical practitioner for the determination of the sex of a child hermaphrodite includes:

1. Chromosome Analysis (Karyotyping)

Chromosomes analysis or karyotyping is a test which is being conducted to evaluate the number and structure of chromosomes present or found in a person to detect the abnormalities in the sexual development. Karyotyping chromosomes involves classifying and organizing them according to the arrangement, number, size, shape or other characteristics of the chromes. A karyotype examines a person's chromosomes to determine if the right number is present, if each chromosomes appears normal and the sex of an individual.

According to medical experts, humans have a total of 46 chromosomes, 23 from each parent which we can visualize in a karyogram. In karyogram, homologous chromosomes or pairs of chromosomes that are of same size and shape are arranged together. Humans have 22 of these pairs called Autosomes. Autosomes are chromosomes that have genes for everything save the determination of the sex. In humans Autosomes are in pairs, numbered 1 to 22. Chromosomes 1 is the largest and 22 the smallest. The remaining 2 chromosomes are the sex chromosomes, which determines a person's gender. They are placed after Autosomes in a karyogram, and they are not numbered rather given letters X and Y. if someone has 2 X chromosomes is a female, and if having one X and one Y

⁵² Ehrenreich, N., & Barr, M. (2005). Intersex surgery, female genital cutting, and the selective condemnation of cultural practices. *Harv. CR-CLL Rev.*, 40, 71.

⁵³ *ibid*

⁵⁴ Al-Bar, M.A. (2007). *Mushkilat al-khunthabayn al-Tibb wa al-fiqh*. *Majallat al-majama' al-fiqhi al-islami*, 4(6), 345-365.

chromosomes then is a male.⁵⁵

2. Ultrasound or Ultrasonography

Ultrasonography is the primary modality for demonstrating internal organs. Ultrasonography remains the primary modality for establishing the presence or absence of a uterus. It's safe and quickly performed without sedation and it does not expose the patient to radiation⁵⁶. What is a uterus? A uterus (womb) is a hollow, pear-shaped, muscular organ. It is approximately 2.5cm (1 inch) thick, 5cm (2 inch) wide, and 7.5cm (3 inch) long. The functions of uterus includes menstruation, pregnancy, labor and birth.

3. Fluoroscopy-Genitography

Genitography test is used to access whether a uterus or vagina is present in the body or not. It's more invasive and the patient has to bear a significant amount of radiation. Genitography test helps to demonstrate a male or a female type urethral configuration, and also helps in the identification of the exact location where the urethra and the vagina are joined⁵⁷. What is a urethra? The opening to the urethra is just below the clitoris. Although it is not related to sex or reproduction, it is included in the vulva. It's connected to the bladder and actually used for the passage of urine. In females the urethra is 1.5 inches long, compared to males whose urethra is 8 inches long.

4. Magnetic resonance imaging (MRI)

Magnetic resonance imaging (MRI) test is used to assess the internal gonads and genitalia. MRI has been very useful in evaluating ambiguous genitalia with detecting the uterus in 93% of cases, the vagina in 95% of cases, the penis in 100%, the testis in 88%, and ovary in 74%. MRI is more sensitive and provides more accurate results than Ultrasound in the evaluation of the gonads.⁵⁸ All the scientific tests mentioned above helps a lot in the establishment of the sex of a hermaphrodite.

5. Juristic ruling on the adoption of a medical technology

Juridical bodies and jurists, such as Fiqh Academy in Mecca and Dar al-Ifta of Egypt and contemporary jurists like Nasr Farid Wasil and Muhammad Ra'fat Fawzan, to name a few, welcomed the medical technology and approved of its use to overcome sex-indeterminacy.

Findings, Conclusion and Recommendation

Findings

A hermaphrodite is an individual born with abnormal genitalia and not a third gender. And such hermaphrodite is categorize into problematic and non-problematic. The share of a Khuntha, as far as inheritance is concern, is dependent upon whether such Khuntha is a Mushkil or Ghair Mushkil. The share of the former varies, depending on the law of which school or Madhhab the Shari'ah courts of a particular country applies. Whereas the share of the latter does not differ, in anyway, with the share of a normal person, that is,

⁵⁵ Noor hashim isma'il lecturer cancer research department ICCMGR "human karyotype.Mazin.eidan@uomus.edu.ig & zahraa.aqeel@uomus.edu.ig. M.faiyaz-ul-haque,phD,FRCPath, "human chromosomes human karyotype".

⁵⁶ Al-alwan I. Navarro O. Daneman D, Daneman A. *clinical utility of adrenal ultrasonography in the diagnosis of congenital Adrenal Hyperplasia*. *J Pediatr* 1999; 135:71-75.

⁵⁷ Al-jurayyan NA, Patel PJ, Al Herbish AS, Abdullah MA, Abo-BAKR am

⁵⁸ Secaf E, Hricak H, Goodling CA, Ho VW, Gorezyca DP, Ringertz H, et al.*Role of the MRI in the Evaluation of Ambiguous Genitalia*. *Pediatr Radiol*. 1994; 24:231-35.

a person who does not suffer from any abnormality. With respect to the procedure for determination of the gender, the determining factor, based on Nass, is the external genitalia. However it can also be determined through medical sciences. The contemporary Muslim jurists have supported the adoption of modern technology for the determination of the sex of a hermaphrodite heir.

Conclusion and Recommendations

A hermaphrodite (khunsha or khunsa) is a person with both male and female sexual organs. Or who has none of the organs at birth. In determining his/her right to inheritance, here the organ is the determining factor. If the male organ is more active than such a person inherits as a male, but if the female hood is stronger than the organ, then she inherits the share of a female. This is determined from the flow of urine from the two sexual organs. But where both organs release urine simultaneously then such a person is regarded as problematic khunsa (khunsa mushkil) and his case of inheritance has to be suspended until the khunsa reaches maturity when it will be finally determined the sex he belongs to. But the majority including the Maliki are of the view that in such a situation the temperature of each should be taken and the warmer of the two determines the sex of the khunsa. Where the temperature of the urine are same, then the schools are of the view that the right to inheritance of the heir should be suspended until the heir matures then the inheritance should be determined based on the natural distinguishing features seen, which will clearly show through some signs for instance beard, nocturnal dreams, menstruation may appear.

Where still at the point of maturity the sex cannot be determined then jurists are divided on the share to be inherited by the khunsa mushkil. The Maliki and the Hanafi jurists are of the view that the heir should be given the less of the two shares i.e the one in which the heir is regarded to be a male, and that in which the heir is regarded as female. But according to Shafi'i and the Hanbali jurists the average share of the male and female that is half the share of the male and the female combined should be the share of the khunsa mushkil heir.

All schools agreed that the share of khunsa or khunsa mushkil should be calculated twice for instance as a male heir and secondly as a female heir, then the less share out of the two bases should be given to the khunsa and his co-heirs and the remainder should be kept until the sex of the khunsa is determined after maturity.

With the scientific technological advancement, which Islam did not frown at, can be taken advantage of by Muslim parents to determine the sex of their khunsa children, in order to do away with the accepted views of the jurists to reserve the estate till the maturity of the khunsa to determine his/her sex.

The following recommendations are hereby presented:

- (i). There is need for Islamic scholars to enlighten Muslim societies as un-Islamic to consider as taboo the creation of Allah and more so to hide the truth in order to take advantage of it to inherit large portion of inheritance.
- (ii). There is also the need to enlighten Muslim society of the permissibility of sharia to resort their problems to medical experts, especially the problem of khunsa or khunsa mushkil so that it can be corrected. Because Muslim jurists opined that it can be corrected through surgery, on the condition that the outcome of the determination of hermaphrodite would be certain, medical intervention is the only remedy, the real sex of the hermaphrodite can be predicted with meticulousness, the procedure of genital normalizing surgery must be carried out based on the

consent of the legal guardian, and the procedure must be managed and carried out by a competent physician.

- (iii). There is also the need to enlighten Muslim society of the permissibility of the adoption of modern technology to ascertain the gender of a hermaphrodite.

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