

ISLAMIC INHERITANCE OF HERMAPHRODITE

Written by *Keerthana R*

2nd Year BBA LLB Student, Christ (Deemed to Be) University, Bangalore, India

ABSTRACT

Islamic law refers to men and women differently and assigns rights and duties based on the sex of the individual however, the *Khuntha* (the person that cannot be recognised as either male or female due to the presence of both genital organs or due to the lack of both genital organs) is a person who is treated as a person with a congenital disability. The *Khuntha*'s role and status with regards to classification and inheritance will be discussed in detail in this paper. The difference between the *Khuntha*, *Khanith* and the *Mukhannath* as well as the ambiguous nature of the 'obvious disability' with regards to the *Khuntha* shall also be addressed by this paper. The different Juristic opinions and the various enactments and laws promulgated with regards to the Inheritance of the Hermaphrodite have also been described. The paper also seeks to clarify the exact position of the Hermaphrodite in Islamic society answering the question as to where exactly the *khuntha* belongs in the Islamic Inheritance system.

Keywords: Islamic Inheritance, Khuntha, Hermaphrodite, Khuntha Muskila.

INTRODUCTION

Under the Islamic *fiqh* (jurisprudence), it has been stated that those individuals that possess both the male and female multiplicative organs shall be referred to as a Hermaphrodite or a *Khuntha*. Hermaphrodites have not been accounted for under the Quran and so Islamic jurists rely heavily on the Hadith and the Qiyas to ascertain their rights and liabilities in society. In order to ascertain rights of a Hermaphrodite, it is mandated that all the behaviour of the *Khuntha* shall be observed in order to assign them a specific gender after which classification can occur and inheritance can be dealt with.

In order to classify the Hermaphrodite as male or female, the characteristics that are looked into consist of first, the organ used to urinate. If the individual uses both organs to do so then the first organ used will be taken into account and this must be determined at birth or soon after in order to assign the Hermaphrodite a gender.¹ Further, if it was not possible to assign the Hermaphrodite a particular gender, then they shall be deemed to be a *Khuntha Mushkil* or a Hermaphrodite Difficult.

With regards to inheritance of the *Khuntha Mushkil*, it has been decided that the Hermaphrodite will be treated as both a male and a female in all societal aspects however, they will inherit as whichever gender receives the lesser share. The individual gets assigned the sex that receives the lesser share automatically. Although gender dimorphism has been encouraged and followed strictly until now, the status of Hermaphrodites in society is still ignored to a large extent and this is clearly noted in their rights to inheritance.

CATEGORISATION AS MALE

In order to be classified as male, the Hermaphrodite should show one or more of the features which include having sexual relations with the male genitalia, having an inclination towards women, producing facial hair, having nocturnal discharge and the most important, the individual's testimony of his inner self.

If the Hermaphrodite has been decided to be male, the pronouns used for the individual would

be 'he' and 'him' as he would be deemed a son, brother and uncle.

Once the Khuntha is accepted as a son and a male of the family, his share of inheritance will be double of his sister's as is prescribed under the rules of Islamic Inheritance. The Hermaphrodite's status will also be elevated to that of a natural son's and this status will also be twice that of a natural daughter as has been stated by Allah in the Quran: 'Man has double the share of Women.' For example, if a person passes away and has one natural son and one Hermaphrodite son, both of the sons would be entitled to the same amount of property.

As a brother, the Hermaphrodite would be entitled to the entire property if the father (deceased) does not have any other male lineal ascendants or descendants, how high-soever and how low-soever respectively.

CATEGORISATION AS FEMALE

In order for the Hermaphrodite to be classified as a female, the individual must show one or more of the characteristics that include having sexual relations with female genitalia, having regular cycles of menstruation, growth of female secondary sexual characters, becoming pregnant or lactating. All these aforementioned symbols account for the individual being female and hence any Hermaphrodite that displays these signs can be categorised as female as per Islamic law.

Once the individual is decidedly female, the pronouns affixed to the Hermaphrodite are 'her' and 'she'. She then assumes the status and role of a female in Islamic society. Similarly, she inherits in the capacity of a female as well. The female Hermaphrodite is considered a daughter, sister and aunt. Khuntha as a sole daughter will receive $\frac{1}{2}$ of the father's property. If the deceased has a son and a Hermaphrodite daughter, she will receive $\frac{1}{3}$ rd of the property whereas her brother will receive $\frac{2}{3}$ rds as is mandated under Muslim Inheritance laws.

According to verse of Quran:

“Son's share is twice compared to the share of daughter. If there are only daughters and no son, then they are all equally entitled to get $\frac{2}{3}$ of the share. But if there is only daughter and no son

then she shall receive 1/2 of the share in the inheritance”.

As a sister, the Hermaphrodite would inherit only in situations where she is the only living relative of the deceased i.e when the deceased has no lineal ascendants, descendants or other siblings, the Hermaphrodite sister would then receive ½ of the deceased brother’s estate. If the deceased has one other sister, the Hermaphrodite and the other sister will equally divide 2/3rd of the property between themselves equally. If the deceased has a living brother and a *Khuntha* sister post death, the brother would receive 2/3rd of the property and the *Khuntha* sister receives 1/3rd of the property since the male must get double the amount a female does as per the Islamic Inheritance laws.

According to the verse of Holy Quran:

“If the deceased has no children, father or mother but has one real sister or paternal sister she will get half of the share in the inheritance and he will also be the heirs of his sister. If his brother is dead and has no children, father or mother but has two or more sisters, then they will get to the extent of 2/3 of the inheritance. But if the heirs include some brothers and sisters, then men will get double the share of women”.

It is also pertinent to note that if the deceased has no brother and his father and mother have also died but daughters and granddaughters are the only legal heirs alive then after deducting their shares, then the sister (*khuntha*) will get the remaining property. If son or grandson how low so ever of the deceased are alive then the sister (*khuntha*) would not be entitled to receive anything.

INHERITANCE OF HERMAPHRODITE DIFFICULT (INDETERMINATE HERMAPHRODITE)

Since the individual has not been identified as either male or female, it becomes impossible to decide how their inheritance must be allocated as per Islamic law. The entire basis of Inheritance as under Muslim Law lays on the difference of the two sexes. If the foundation of the classification cannot be instituted, the division of property cannot even be brought up. Due

to this conflict, several Jurists offer different opinions on the matter some of which include the Jurist Imam Abu Hanifa who states that Indeterminate Hermaphrodites take the share of a female unless he receives a smaller share as a male. Simply put, *Khuntha Mushkil* always receive the smaller or lesser share. For instance, if the deceased is survived by a son and an Indeterminate Hermaphrodite as lineal descendants, the Indeterminate Hermaphrodite is treated as a daughter and receives 1/3rd of the property.

In the statements of Jurist Abu Yusuf and Jurist Al-Sha'bi, indeterminate Hermaphrodites will be entitled to $\frac{1}{2}$ share of the male descendants and $\frac{1}{2}$ share of the female descendants since they classify as both genders. This implies that in case the deceased has a son, a daughter and a *Khuntha Mushkil*, the Indeterminate Hermaphrodite will receive half of the certain share allotted to the daughter and half of the uncertain share allotted to the son which totals to $\frac{3}{4}$ th of the share because as a son, he would receive $\frac{1}{2}$ and as a daughter, she would receive $\frac{1}{4}$ th [$\frac{1}{2} + \frac{1}{4} = \frac{3}{4}$].

With regards to the several theories presented, most of the Jurists concur on the opinion that states that Hermaphrodites would get two shares, one as a male and one as a female. In modern society, though, there is no difficulty and all Jurists agree that Hermaphrodites will take shares of the property with regards to whichever gender they are more dominant in. The difficulty arises only with respect to Indeterminate Hermaphrodites for which different legislations have been introduced.

LAW OF IRAN

Section 939 of the Family Laws of Iran state that if it is not possible to detect a particular gender in an individual, then one-half of the total shares of the son and of the daughter must be allocated to the *Khuntha Mushkil*.

LAW OF EGYPT

Under the Inheritance Laws of Egypt, *Khuntha Mushkila* is defined as a person whose sex could not be identified. Hence, under Section 46 of the Egyptian laws, the *Khuntha Mushkila* is entitled to receive the lesser share.

LAW OF SYRIA

Inheritance Laws in Syria state under Article 305 that the *Khuntha Mushkil* would be entitled only to the lesser share and nothing else. The personal law of Syria is also known as the Qanoon Al-Akhwal Al-Shakhsia.

LAW OF IRAQ

In accordance with Article 188, the Indeterminate Hermaphrodite is entitled to receive the smaller share due to the sex indetermination.

LAW OF YEMEN

Jurist Imam Malik's opinion that the *Khuntha Mushkil* must receive $\frac{1}{2}$ the boy's and $\frac{1}{2}$ the girl's share has been inculcated into the Inheritance laws of Yemen under Article 332 of the same.

DIFFERENCE BETWEEN *KHUNTHA*, *KHANITH* AND *MUKHANNATH*

The word *Khuntha* is derived from a verb '*Khanatha*' indicating gentleness and was previously associated with homosexuality. Now, the word is used universally in Islam to refer to Hermaphrodites. The word *Mukhannath* implies those who behave like women or have homosexual tendencies. The main difference between the two concepts is that a *Mukhannath* does not have any genital abnormalities and are born genetically male whereas *Khuntha* refers to a person who has either both or none of the two genitalia. This distinction is important to note since the inheritance differs for the two individuals. Another concept is that of the *Khanith* which was commonly used to refer to an individual who was 'half-man and half-woman'. The unclear definition of the word is what leads to confusion with respect to the *Khuntha* and the *Khanith*. Due to similar etymology, both words are used interchangeably and this creates ambiguity when reading texts.

Khanith is definitively a term used to colloquially describe a sexual identity that a person may choose to adopt. *Khuntha* refers to genetic Hermaphrodites and the word *Mukhannath* is used

most often to describe homosexuality and male effeminacy. It is pertinent to note that the Khuntha is recognised by their physical body when compared to the other two who are distinguished by the inhabitation of the body.

CONCLUSION

When addressing Islamic Inheritance laws, it is important to note that the shares of an individual are very clear and calculated in nature however, due to the notion of Hermaphrodites being a part of the Hijra Community, very few of their rights are actually recognised and upheld.

The same can be said with regards to matters of Inheritance since many of the Hermaphrodite individuals are constantly shunned and abandoned by their Islamic families as they are regarded to be a burden and this belief must be done away with. The Indeterminate Hermaphrodites suffer the most when it comes to Inheritance matters since, according to several laws, they must receive the lesser share of Inheritance. This opinion, in my regard, must be revisited and revised because the fact is that these individuals cannot be allocated a single sex so if they have to inherit, they must also inherit $\frac{1}{2}$ of the boy's share as well. In this regard, I find that the opinion of the Jurist Abu Yusuf and Jurist Al-Sha'bi is the most sensible and logical method of allocating inheritance shares under Islamic law.

Although laws regarding the inheritance of Hermaphrodites exist, the implementation of these laws is highly questionable since many of the families who have a Hermaphrodite descendant in their family line abandon or reject them completely. There is a severe lack of support from the community due to their unfounded fear and mistrust in these individuals merely because of their physical differences. Due to this, there have been little to no cases filed with regards to inheritance of Hermaphrodites, which proves that they are too scared to stand up for their rights or they have no idea that the law provides for their well-being. Awareness is absolutely vital in this aspect.

The unfortunate Indeterminate Hermaphrodite community suffers various disadvantages including the fact that they will not have the *Ghusl* (Bathing) ceremony performed for them

after they perish because people do not know which gender must perform the *Tayammum* (Dry Ablution). They are socially excluded due to bias and by ignoring their rights, a great injustice is done to them.

The confusion between Homosexuals and Hermaphrodites has led people to believe that all Hermaphrodites must be avoided. Very few individuals are actually accepted in their own families even after the laws stipulate that they are fully legal descendants of the family. The sad plight of the Hermaphrodites should not be ignored and the laws regarding their welfare, rights and inheritance must be corrected insomuch that they must feel secure and encouraged to pursue their life with dignity. Although removal of suspicion and bias from society is difficult to achieve, steps must be taken in order to change gradually, if not drastically and this is what the law must achieve.

ENDNOTE

ⁱ Ali, Amani, M. Ali, “*Simplify inheritance rights in Islamic law Hermaphrodite right to inheritance and Married (khuntha)*” *Australian Journal of Basic and Applied Science*, 10(7) Special 2016, p. 104-110.