

Inheritance Rights of Hermaphrodites/ Khuntha

Rizwana Gulⁱ Muhammad Naeemⁱⁱ

Abstract

Hermaphrodite in Pakistan are unable to lead a normal life, most of them are close to men but they still prefer to be identified as females instead of men due to their, inclination towards women and that's the reason they want to lead a life of women. Sociologists define hermaphrodite as man minus maleness, male plus women or male with dominant features of women or women with dominant male orientation in her sex.

The meaning of the term hermaphrodite has varied and their issues are still a topic of sometimes heated discussion. Although doctors and activists debate exactly what conditions qualify as to be called hermaphrodite and over here I am using the word in its wide sense includes those sexually abnormal individuals whose gonads or external or internal sexual anatomy does not fix in male or female norm.

Islam treats the hermaphrodites as equal members of society, and considers them as a Sign from Creator. The people who are born hermaphrodites are not to be blamed or shunned by society, as it is Allah who has created them the way they are, as a test for the rest of mankind. Islam demands that we be extra polite and tolerant to these physically and mentally challenged slaves of Allah, for hermaphrodites there are separate laws in Islam. In Pakistan unfortunately they do not enjoy equal rights and are shunned to periphery of society due to biased and prejudiced attitude of people towards them.

Key words; hermaphrodite, sexually abnormal, male, female, abnormal individuals.

INTRODUCTION

There has been wide media interest over hermaphrodites and their problems over the past decade. Stories about them have been the focus of dozens of books, documentaries and movies. Similarly hermaphrodites once been marginalized have now become central theme of many books and articles in a variety of disciplines, including psychology, history, anthropology medical ethics and law. In legal circle hermaphrodites is now becoming the most debated topic and in the past ten years more than hundred articles and books have included discussion on their problems. Most of the publications do not focus on their legal and social status and many such issues have direct effect on society. It is this gap that I want to address through this research i.e. inheritance rights of hermaphrodites has to be addressed so that the state and hermaphrodites perspective pertaining to their basic individual rights could be understood thoroughly. The selection of my research topic is motivated by the decision of Supreme Court of Pakistan that announced that hermaphrodites were to be registered as a “third sex”.¹

The aim of my research is to grasp the understanding of the processes that led to the decision of the Supreme Court of Pakistan. The objective is to explore the complexity that revolves around the impact of the decision on hermaphrodites and their family settings. While the decision made by Supreme Court of Pakistan was highly endorsed among the hermaphrodites community, Also, I want to explore the understanding and perceptions of such a decision in a strictly Islamic country.

ⁱ Assistant professor, Department of law Abdul Wali khan University

ⁱⁱ Assistant Professor Shariah, Abdul Wali Khan University Mardan

Hermaphrodites are ostracized and marginalized in our society. This research is an attempt to make them acceptable as respected human beings in bias and intolerant society; it also aims at deepening the insight, and broadening the vision of society by giving them a chance to look at these unfortunate human beings living on the periphery as who they actually are not as how they are commonly perceived.

DEFINITION OF HERMAPHRODITE

A person whose gender does not fix with his/her assigned gender role is a hermaphrodite. This term is applicable to variety of individuals whose behaviours involved tendencies varying from conventional gender roles. This term is also applicable to those people who are born to one sex but they think they belong to opposite sex. From childhood to their adulthood they don't accept to what they are born with and rejects their gender. It is state of gender complexity not fixing to one's own assigned gender. Those born with abnormal genitalia also fall in this category where it is difficult to determine whether it is male or female.²

Those who have undergone castration process are also hermaphrodite, they do not imply to any specific sexual orientation they may be identified as heterosexual, bisexual or asexual.³

There is no precise definition for hermaphrodites it remains in flux but includes some;

“Person whose identity does not conform to conventional notions of male or female gender roles but moves between these”⁴

“People who are born to sex usually at birth but they feel that this is false or incomplete description of them”⁵

LEGAL DEFINITION OF HERMAPHRODITE

A male whose organs of generation have been disorganized or removed that he is rendered incapable of reproducing his species is known as hermaphrodite.⁶

MEDICAL DEFINITION OF HERMAPRODITE

A male who doesn't have testes or external genitals specially one castrated before puberty. So that male secondary sex characteristics fail to develop.⁷ Male who is not born with testicles or his testicles has been removed; secondary sex characters fails to develop and symptoms such as feminine voice and absence of facial hairs can result from the low level male hormones in the blood.⁸

HERMAPHRODITE UNDER ISLAMIC JURISPRUDENCE

In Islam “dimorphic gender classification” includes, general rule male and females.⁹ In Islam religious rules of conduct whether moral or legal are gender based. All Muslims must be content with what Allah has created in them and must not alter their primary and natural characteristics. The Quran declares;

لِلَّهِ مُلْكُ السَّمَاوَاتِ وَالْأَرْضِ يَخْلُقُ مَا يَشَاءُ يَهَبُ لِمَنْ يَشَاءُ إِنَاثًا وَيَهَبُ لِمَنْ يَشَاءُ الذَّكَوَرِ

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.¹⁰

أَوْ يَزُوجُهُمْ ذُكْرَانًا وَإِنَاثًا وَيَجْعَلُ مَنْ يَشَاءُ عَقِيمًا إِنَّهُ عَلِيمٌ قَدِيرٌ

Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent.¹¹

Following is the explanation /tafsir of above ayah:

That is, if the people who are involved in disbelief and polytheism do not believe even after the admonition, they may not, for the truth is the truth. The kingdom of the earth and heavens has not been entrusted to the so-called kings and despots and chiefs of the world nor has any prophet, saint, god or goddess any share in it, but its Master is One Allah alone. His rebel can neither succeed by his own power, nor can any of the beings whom the people look upon as owners of divine powers by their own folly, come to their rescue and aid.

This is a manifest proof of Allah's Sovereignty being absolute. No man, whether he be posing as owner of the highest worldly authority, or regarded as owner of great spiritual powers, has ever been able to produce children for himself according to his own choice and desire, not to speak of providing children for others. The one whom Allah made barren could not have children through any medicine, any treatment, any amulet or charm. The one whom Allah gave only daughters could not get a single son by any device, and the one whom Allah gave only sons could not have a single daughter by any means. In this matter everyone is absolutely helpless. Even after seeing all this if someone posed to be all-powerful in God's kingdom, or regarded another as a possessor of the powers, it would be his own short sightedness for which he himself will suffer, and the truth will not change at all.¹²

The Quran do recognizes those who are born with abnormality or handicapped and Sunnah categorizes this category born with physical abnormality. While depicting women's code of ethics for social encounter with opposite sex, The Quran orders them to guard their Chastity from all males except those with in law full family circle.

وَقُلْ لِلْمُؤْمِنَاتِ بَعْضُضَنْ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلَىٰ جُيُوبِهِنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا لِبُعُولَتِهِنَّ أَوْ آبَائِهِنَّ أَوْ آبَائِهِنَّ أَوْ أَبْنَائِهِنَّ أَوْ بُعُولَتِهِنَّ أَوْ إِخْوَانِهِنَّ أَوْ بَنِي إِخْوَانِهِنَّ أَوْ أَخَوَاتِهِنَّ أَوْ نِسَائِهِنَّ أَوْ مَا مَلَكَتْ أَيْمَانُهُنَّ أَوْ التَّابِعِينَ غَيْرِ أُولِي الْإِرْبَةِ مِنَ الرِّجَالِ أَوِ الطِّفْلِ الَّذِينَ لَمْ يَظْهَرُوا عَلَىٰ عَوْرَاتِ النِّسَاءِ وَلَا يَضْرِبْنَ بِأَرْجُلِهِنَّ لِيُعْلَمَ مَا يُخْفِينَ مِنْ زِينَتِهِنَّ وَتَوْبُوا إِلَى اللَّهِ جَمِيعًا أَيُّهُ الْمُؤْمِنُونَ لَعَلَّكُمْ تُفْلِحُونَ

And tell the believing women to reduce some of their vision and guard their private parts and not expose their adornment except that which necessarily appears thereof and to wrap [a portion of their head covers over their chests 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. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers that you might succeed.¹³

Explanation of following ayahs is as given;

Tell believing women to lower their gaze, away from what is not lawful for them to look at, and to guard their private parts, from what is not lawful for them to do with them, and not to display their And adornment except for what is apparent, namely, the face and the hands, which may be seen by a stranger, when there is no danger of either or both falling into temptation — this being one of two opinions. The second of these is that even this is forbidden because there is a presumption that these parts will cause temptation — and this is the preferred opinion, if one must settle this topic with a definitive opinion and let them draw their veils over their bosoms, that is, let them cover up their heads, necks and chests with veils, and not reveal their, hidden, adornment, namely, all that is other than the face and the hands, except to their husbands (bu'ul is the plural form of ba'l, 'male spouse') or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands own, all of whom are permitted to look thereat, except for the part from the navel down to the knees, which is unlawful for any other than their husbands to see; 'their women', however, excludes disbelieving women, for it is not permitted for Muslim women to reveal themselves to these; 'what their right hands own' comprises slaves; or such men who are dependent, on what food may be left over, not (ghayri, read as an adjective, or read ghayra as an exceptive) possessing any sexual desire, not those men who are in [sexual] need of women, so for example those whose male member cannot become erect; or children who are not yet aware of women's private parts, in the context of sexual intercourse, and so to these they may reveal themselves except for that part from the navel to the knees. And do not let them thump with their feet to make known their hidden ornaments, as in a rattling anklet and the like. And rally to God in repentance, O believers, repenting of the occasions on which you may have looked at what is forbidden to look at of such parts and otherwise, so that you might be prosperous, so that you might be saved from such sinful acts when your repentance thereof is accepted..¹⁴

In the following verses of Quran and in the interpretation "Male attendant's free of sexual desires" are categorized as ghayr uli al ibrah.

According to some learned critics ghayr uli al ibrah, were those ineffective men with no feelings or desire for women?¹⁵ Intersex on other hand was given recognition in the Sunnah where the Prophet SAW to a question answered as to determination of the sex of a child born with two opposite sex organs the deciding factor in such case would be by looking at the organ from which it urinates.¹⁶

Narated By 'Aisha, Ummul Mu'minin : A mukhannath (eunuch) used to enter upon the wives of Prophet (p.b.u.h). They (the people) counted him among those who were free of physical needs. One day the Prophet (p.b.u.h) entered upon us when he was with one of his wives, and was describing the qualities of a woman, saying: When she comes forward, she comes forward with four (folds in her stomach), and when she goes backward, she goes backward with eight (folds in her stomach). The Prophet

(p.b.u.h) said: Do I not see that this (man) knows what here lies. Then they (the wives) observed veil from him.¹⁷

CLASSIFICATION OF HERMAPHRODITE UNDER TRADITIONAL MUSLIM JURISTS;

According to traditional Muslim jurists these abnormal genders are classified such as effeminate men mukhannath and the second hermaphrodite khuntha.

MUKHANNAT

Mukhannath literally means a man whose voice resembles with woman's voice.¹⁸

Technically jurists define mukhannath as;

To Hanblis and Hanafis there are two types of mukhannath one who has tender effeminate voice and does not possess any desires for women and also they show no anti-social behavior they are free to enter women quarter as well. The other kind though physically is same but morally they are corrupt and therefore forbidden from interaction with women.¹⁹

To Shafis and Malikis they characterizes mukhannath as those who has effeminate features in looking, thinking, talking and judgement, thus as long as he does not possess sexual feelings towards women they are regarded as acceptable type of mukhannath who can have social encounter with women.²⁰

The jurists has formulated set of different laws for the mukhannath of erotic type based on tradition of Holy Prophet SAW, "God cursed the males who appear like females and the females who appear like males."²¹

Islamic tradition does not rebuke mukhannath as it features. Stressing this Ibn Hajar maintained that the Prophetic criticism is limited to those who intentionally changes their norm of their born genders. It does not include those who are inborn with behavioral abnormality and suffers from sexual and psychological disorder. They need to be supported and should be adjusted to their assigned gender roles.²²

On the other hand erotic mukhannath are subjected to several legal restrictions which includes;

- a) He is prohibited from homosexuality and if he commits homosexuality he would be subjected to Islamic punishments.
- b) He is not preceding Muslim prayers because he lacks moral virtues.
- c) He is not allowed to mix with women.
- d) According to some Maliki's he is not encouraged to work at slaughter houses and at cooking jobs.
- e) He is not regarded as credible witness for the testifying before the court of law.²³

In Islamic tradition, erotic foppish is morally so repugnant that if a person calls a normal Muslim a Mukhannath, he will be punished and will be charged libel by flogging amounting to 20 lashes at the order of the judge.²⁴

KHUNTHA

Khuntha is an individual who has an intersex condition or by birth his gender stands ambiguous i.e. difficult to determine whether he is born male or female.

Ibn Qudamah defines khuntha as “a person with both male and female opening in place of sexual organ from which it urinates”,²⁵

Classical jurists divide khuntha in to two sub categories;

a) non problematic hermaphrodite (khuntha ghayr muskil)

b) problematic hermaphrodite (khuntha mushkil)

CLASSIFICATION OF HERMAPHRODITE BY CLASSICAL JURISTS:

Hermaphrodite have been discussed and identified in every age and era but here classical jurists has identified and classified them as under;

NON- PROBLEMATIC HERMAPHRODITE (KHUNTHA GHAYR MUSHKIL)

Khuntha ghyr mushkil or non-problematic hermaphrodite is person who has both male and female genitals which can be assigned with any of the sex whichever is dominant function. For example if she shows female signs such as urinates from female sexual organ having uterus, ovaries would be regarded as female and if he shows male bio- physical characters would be classified as man.²⁶

PROBLEMATIC HERMAPHRODITE (KHUNTHA MUSHKIL)

Problematic hermaphrodite or khuntha mushkil is a person who cannot be assigned to any of the sexes for example if he continues to urinate from both male and female organ.²⁷ Modern technology in medical science has solved many such issues specifically people with intersex condition of second type. Instead of the composition of sex chromosomes medical criteria goes beyond sex determination that’s the reason medical science is capable to differentiate between real male and female hermaphrodite.

PORTRYAL OF HERMAPHRODTE IDENTITY

Gender is pivotal in determining our identity and when it is determine who we are they interpret everything according to that perspective. Sex is biological factor and gender is the psychological and social unit.²⁸ Yet, there are various circumstances where the biological aspects are contradictory with social and psychological aspects of gender. Such situations dominate the anatomy in identifying and influencing gender role. Thus people may swerves from any of the normal pattern about sex/gender is considered to be abnormal. An individual who is labelled as such starts finding outlets for expressing abnormal behaviour, urges or inclinations as family, friends and society try to find the ways to stop it forcibly. This lead in formation of small organized support groups where they may get acceptance and recognition for their identities and behaviours. Such type of small groups can be found all over the different with different names or titles.

The Quran recognizes that some men are “without the defining skill of males”²⁹ Eunuch is categorized in to three types by Muslim Scholars;³⁰

1. Biologically and the physical appearance of one which is closer to the males than to the females; such hermaphrodite will be considered a male.
2. Biologically and bodily appearance of one who is closer to the females than to the males; such hermaphrodite will be considered a female.

3. One whose gender is difficult to ascertain and they are termed as “khunsa mushkil” in Islamic jurisprudence.

HERMAPHRODITES UNDER CRIMINAL TRIBES ACT, 1871 AND PAKISTAN PENAL CODE PPC

It can be drawn from the history of modern law in Colonial Pakistan that violence and cruelty against hermaphrodites community has occurred. Criminal tribes Act, 1871 which was an extra ordinary legislation on which Pakistan Penal Code is based. An offence to be proved against accused has to be proved in court of law.

Some of communities and tribes are considered criminals by birth where crimes are being passed from generation to generations where some communities are considered unclean from birth.

Relation between sexual non conformity and criminality was made more explained in 1897 amendment to the Criminal tribe’s act 1871. Which was given subtitled, as “an act for the Registration of Criminal Tribes and Eunuchs.”³¹

Under this law local administrative bodies are required to keep the record of hermaphrodites their names and addresses to be noted down who were suspected too involved in kidnapping or castrating children on committing offences under section 377 of PPC, any hermaphrodite registered could be arrested without any warrant and punished with imprisonment up to two years or with fine or with both. This law also says hermaphrodite are not capable of making a gift or will, adopting a son and cannot act in capacity of a guardian.

Pakistan recognizes only two genders male or female in respect of civil law they don’t have proper rights this means that hermaphrodites don’t have right to marry, claim health benefits or employment. They are facing a lot of legal challenges. Most of the laws enforcing agencies miss use the law and threats the hermaphrodite’s community.

Section 377 of the PPC, discourages “carnal intercourse against the order of nature with any man, woman or animal” even if it’s done voluntarily. It criminalizes such forms of sexual acts which are against nature.³²

Law originated from the colonial ideas has this perception that hermaphrodite are engaged in carnal intercourse against the order of the nature, which results in arrest and police harassment.

Traffic Prevention Act ITCPA of 1956 amended in 1986, whose main objective is to criminalize trafficking, soliciting, brothel keeping pimping and castration it in reality targets the visible figure of sex workers allowing police to arrest transgender sex worker.

INHERITANCE RIGHTS OF HERMAPHRODITES UNDER ISLAMIC LAW

The rights of hermaphrodite in property distribution are also in accordance with the category i.e.³³

- a) Hermaphrodite with biological and physical appearance of male will receive his inheritance according to the prescribed share of a male heir.

- b) The organs and the appearance of one who is closer to the females will receive her inheritance according to the prescribed share of a female heir.
- c) However, 'Khunsa Mushkil' in Islamic Jurisprudence will neither be given property share neither according to the prescribed share of the male heirs (2 times), nor the female heirs (1 time), but rather exactly in between the two: i.e. 1½ times.

Islam treats every human being equally irrespective of any ones cast creed and color, if someone is suffering from any type of abnormality it does not effects his equality or the rights that he possess. Hermaphrodite is also human beings and they must not be shunned by their families and society. Allah is the creator of whole universe and of those who are born with any type of abnormality it is a sign and test for whole mankind, so that man may realize his countless bounties bestowed to us. We should be grateful to Allah for whatever way he has created us.³⁴

Islam is a complete religion for whole of humanity it does not look down to any one not even to eunuchs as their creation and state is from Allah not from them. In fact Islam demands to be more careful, kind and patient to these abnormal slaves of Allah.

Islam has defined laws for every one in every capacity. Similarly those close to men in terms of nature and form are to be considered as men and those who are relatively closer to female are to be considered as female. And ultimately laws will be implemented in such a way. But there are some among such hermaphrodite who are neither like men nor like women for them Islamic law determine mid-way. As for instance in inheritance distribution a eunuch who cannot be determined whether closer to man or women will get 1.5 times the distribution rather than 1.0 for woman and 2.0 for male.³⁵

Allah says in the Holy Quran,

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

“O mankind, we created you from one man and one woman, and then divided you into nations and tribes so that you may recognize one another. Indeed, the most honorable amongst you in the sight of Allah is he who is most pious (God Fearing) of you. Surely Allah is All-Knowing, All-Wise”.³⁶

Islam has given the criteria of goodness and honorability. It does not deal with a person gender but one who is most pious and chastise is honorable in front of Allah. If eunuch is God fearing and pious he will be rewarded same as other pious Muslims.

The position and status of the eunuchs in Islam applies to those who are born eunuchs not to those who has altered their selves to get closer to that sex other than that to which they are born. Prophet Saw particularly cursed those men who talks, walks, behave like women and likewise cursed those women following men in her attire and other activities. Similarly Prophet Saw cursed female impersonators who are males and male impersonators who are females.

CONSTITUTION PETITION 43 OF 2009

In the orders of constitution.p.43 Of 2009 initiating process took place to locate the ascendants (parentage) of the hermaphrodites with a view that if the latter have any right of inheritance in moveable and immoveable properties, they should get the same according to law but it seems that no progress has been made in this behalf so far. Secretaries Social Welfare of all the provinces and Commissioner Islamabad who have already registered the hermaphrodites may seriously look into this aspect of the case and make efforts to ensure that their rights in the property as are devolved on them according to law, are fully protected.³⁷

CONCLUSION

Very few of us have knowledge about hermaphrodites. No one knows what reality behind their feminist out-look is. Most of them are suffering from psychological problem or sexually handicapped which is beyond their control we being humans hate some people without knowing them but we still hate them this stands true for hermaphrodites.

We should feel the sufferings of them, their denial from their families in first place and society in second place makes them a burden and nothing else their condition is from Allah but their sufferings is from us we being human should abridge a state of trust among them and society at large. State as well as their families should recognize their fundamental rights weather it comes to inheritance or other basic rights.

Their lives can be productive for their families and society as well if we lessen their sufferings they can also play vital role at society at large.

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