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Method of Determination of Double Gender and Marriage in Islamic Law

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Abstract: Double gender or khunsa is someone who has two genitals, besides having a penis or penis, khunsa also has a vagina or vagina. In the Qur'an, God created humans with male and female sexes. Namu, Some problems that occur are people who have male genitalia (dzakar) while having female genitalia (farji) or none at all. In this case, Islamic scholars determine several methods to determine the specific sex through literary research studies using primary, secondary and tertiary resources. However, if the method has not been able to determine the sex of the khunsa then it should be further investigated and determined from the existing instinct in khunsa. The legal requirement of marriage in Islam should be marriage contracts (Ijab-qabul) which include: (1) the presence of male and female couple, (2) the presence of guardians, (3) the presence of 2 witnesses and (4) the existence of marriage contracts. All requirements for marriage should be fulfilled. The implication of this research is that the government or Islamic scholars need to make legal status of the existence of khunsa both in marriage and inheritance arranged in separate articles in the form of laws and compilations of Islamic law.

Keywords: Khunsa Education, Marriage Law, Double Gender, Islamic Law, Transgender.

Introduction: In this era, transgender is in a group called LGBT (lesbian, gay, bisexual, and transsexual). LGBT apparently is not small and has unity in Indonesia. However, its existence raises pro- contra, not yet recognized and not a few who look at it with cynicism (Adawiyah & Zamaluddin, 2016; Guy, 2003; Johnson, 2019; Tumoutou, 2018).

The question is, are they really given? (Given since he was born). Not a few people who believe that they are nature, but there are some writings that explain some research that not all of them are nature. That is, some of them were formed due to environmental and

social influences. However the social environment has a role in the formation of the private community and social norms around it (Rohmana, 2015; Zainuddin & Mahdy, 2017). A person as an adult may experience changes in their sexual orientation, for example because they have been victims of social norms that are already permissive to LGBT or because of the influence of drugs. This phenomenon shows that not all LGBT given (nature). Marriage is an absolute thing to do in all religions (Kholis, 2014). Marriage is an inner bond between a man and a woman as a husband and a wife with the aim of forming a happy and eternal family based on the Almighty God (Peraturan Pemerintah Republik Indonesia, 1974). In Indonesia, the only legally acknowledged marriage is between male and female (Aldy, 2011; Hartanto, 2016).

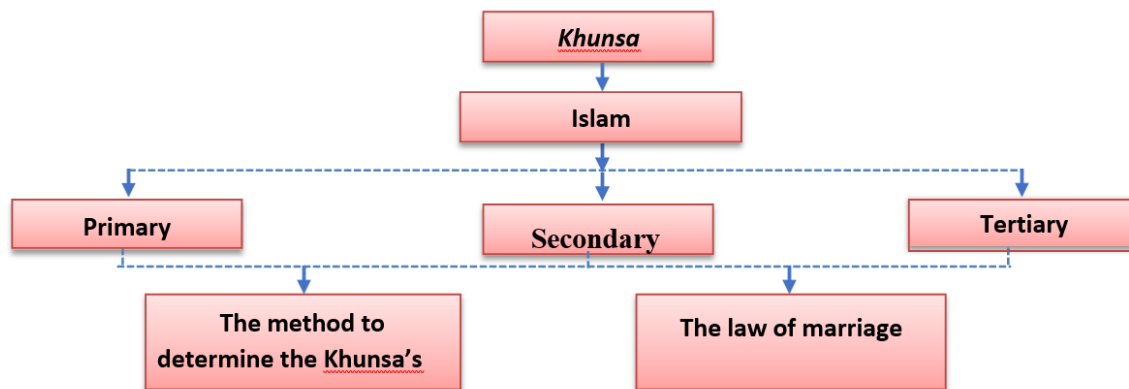
In Islam, if the replacement of sex was in order to treat abnormalities in the patient, including eliminating things that obscure his status, then this is not why. Because God only creates humans in one of two sexes, namely male or female, and there is no third type. If someone has zhahir male and female organs (intersexual / khun-tsa abstruse), then in essence he is only male or female only. Therefore, if the diagnosis shows one of the more dominant traits, then that is the real sex (Wekke & Hamid, 2013). Each religion has a different holy book (Nurlidiawati, 2015).

So, in this condition, both the patient and the doctor are allowed to perform genital repair, even by removing a part of the body that needs to be removed. They are not considered sinful, and after the operation the patient is exposed to all legal consequences related to his new sex. However, 22 countries from 204 countries have been acknowledged (de facto) by the United Nations to legalize same-sex marriage throughout their territories. It has become a controversy in various Religions (Setiawan & Sukmadewi, 2017), one of which is Islam (Fathonah, 2015; Rohmawati, 2016). Although same-sex marriage has become controversial (Muttaqin, 2016; Qomarauzzaman, 2017) basically, the marriage of different sex and same-sex entails a definite gender that is either male or female (Rucirisyanti, Panuju, & Susilo, 2017). However, in reality, there is a very small group of people who do not have a clear gender status, neither male nor female, they are often referred to as Khunsa.

Khunsa is very rarely studied by the public and even the khunsa itself is difficult to determine in terms of which sex is dominant and which has not received special attention. In addition, the khunsa has not been touched by the government. Some research discusses the law of inheritance and marriage for khunsa (Wirawati & Kelib, 2017; Yuliasri, 2019), the difference between khunsa and mukhannath (Yama & Dehis, 2018) and the difference between Khunsa and transsexual and transgender (Gibtiah, 2014), the focus of this study is the method for gender determination and marriage law in an Islamic perspective.

Methodology: This study uses a theoretical research base. Data sources in this study include primary, secondary, and tertiary resources. Primary sources are derived from the holy Quran, secondary sources are derived from books and Sunna, and tertiary sources are derived from journals, books, and the internet. The data is analyzed descriptively and qualitatively from the various references obtained.

The design of this research is shown in figure 1 (Neuman, 2013; Taquette & Minayo, 2017):



Findings and Discussion:

Methodology Determination of Khunsa Gender: During this physical genital, in the form of reproductive organs, often considered the only determinant of the type of behavior of a person. In fact, there are still other variables, namely gender identity (sex identity) or gender identity, which was discovered in 1972 by Money and Erhardt after examining hundreds of individuals. According to Kessler and McKeena, in *Gender: An Ethnomethodological Approach* (1978), gender identity is a deep feeling or belief in a person's heart that makes him feel as a man or woman. In other words, gender identity is a deep belief in someone about whether he is male or female. In the explained holy book in QS. Al-Hujurat (49): 13 says: "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the noblest of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted" (Departemen Agama Republik Indonesia, 2018). There is no sex other than male and female, but in reality, there is a small number of people who have multiple genders as well as people who are genderless or often called khunsa (Yuliasri, 2019). The law of marriage for khunsa is not explained in the Quran and Hadith. In Quran Surah Yasin, Allah the Almighty states "His command is only when He intends a thing that He says to it, "Be," and it is" (QS. Yāsīn: (36):82) (Departemen Agama Republik Indonesia, 2018). In that verse, it is quite possible that one of the events is khunsa. Khunsa comes from the Arabic khanasa meaning soft or softened (Yuliasri, 2019). Lately, the term khunsa has been discussed on many occasions (Gibtiah, 2014; Yama & Dehis, 2018; Yuliasri, 2019).

A book called *Syarah Kasyifatussaja Ala Safinatun-naja Fi Usuliddin Wal-Fiqh* by As-Syekh Al-Imam Al-Fadhil Abi Abdi Al-Mu'ti Muhammad Nawawi Al-Jawi mentions a number of criteria of khunsa that include: (1) someone who has two genitals (penis and vagina); (2) someone who has only one discharge organ (for urine, feces, and has no male or female genitalia); (3) someone with separate anus and the urine is not released through penis or vagina but seeps out like sweat; and (4) someone who has no anus, penis, or vagina, therefore, everything he eats will come out in the form of vomit or is absorbed by the body (Imam Al Fadhil Abi Abdi Al- Mu'ti Muhammad Nawawi Al-Jawi, 2017). A human being

with one of these four conditions is called a khunsa. However, khunsa finds it difficult to determine his/her gender (Yama & Dehis, 2018).

In Islam, the religious figures of each Islamic sect have the same way and view in determining the tendency of the physical characteristics of a khunsa. Many criteria and standards are proposed by doctors and psychologists. Some criteria include: (1) a person's chromosome condition; (2) the criteria of male or female hormones; (3) psychological and mental factors; and (4) reproductive organs. Actually, the sexes are determined based on the reproductive organs each person has. Therefore, the signs to determine the sex of the khunsa are more about the reproductive organs. Seen from the medical point of view, the gender of the khunsa can be determined that the outside form is not the same as the inside; for example, the inner sex organ is that of a woman, and a womb is present but on the outside is the male genitalia and having a penis or having both (penis and vagina). There is also someone with the inner sex organ is that of a man but on the outside is a vagina or both. Someone even does not have the genitals at all. It means that a person looks like a woman although she does not possess a vagina only a urinary tract or who looks like a man but does not have a penis (Dja'far Abdul Muchit: 2). So, the affair of deciding the status of a man or woman becomes vague. Islamic scholars divide the khunsa into several categories. Most scholars divide the khunsa into two categories, namely khunsa ghairu musykil and khunsa musykil (Hasbi Ash Shiddieqy, 2003).

Khunsa Ghairu Musykil: Khunsha ghairu musykil is a khunsa that is not difficult to determine based on the dominant physical characteristics (YD, 2004). Khunsa of this category is clear and real and can be judged as a man or woman because of sex, traits, and behavior, i.e. before puberty and after puberty, the gender can be known. Before puberty, If the urine is secreted using male genitalia, then he is treated as a man, and if the urine is secreted using female genitalia, then she is treated as a woman. After puberty, when someone grows a beard and can secrete sperm, then he is treated as a man. When someone could breastfeed, get menstruation, or get pregnant, then she is treated as a woman.

Khunsa Musykil: Khunsa musykil is a type of Khunsa that after being examined, it is still difficult to determine the gender because physical characteristics do not show a certain sex tendency. If the Khunsa has no specific characteristics that can be attributed to a particular gender, male or female, or it has distinctive contradictory indications, then it is called Khunsa musykil. Indicators of khunsa musykil include:

1

Someone who has multiple genitalia (having male and female genitalia).

2

Someone who has no genitalia at all.

3

Someone who has a male genital but the hormones is more of a woman so that the characters and habits are like a woman.

4

Someone who has female genitalia, but the hormones are more of a man so that the characters and habits are like a man.

5

Someone who looks like a man in his childhood but after puberty, the characteristics appear to be more feminine or vice versa.

Based on the variation of the type of khunsa, there is a method of determining the status of a khunsa whether as a male or female. According to the fiqh, it can be determined based on the most powerful tendency, as a woman or a man, but cannot be both. Basically, to determine a khunsa, if possible is to seek clarity of the sex, but if it is difficult to be determined, the scholars agree to determine the gender based on the physical indications but not psychiatric indications. However, to establish Khunasha ghairu musykil, the scholars have explained the method although it has not been commonly agreed on. At least, it can be an initial guideline in determining the status of a particular person, amongst the method is:

Seeing how the Urine is Secreted: If the urine passes through the penis, it means that the khunsa could be treated as a man. On the other hand, if the urine passes through a vagina, it means that the khunsa could be treated as a woman. If the urine passes through both organs, then it can be determined by which organ it passes through first. If the urine passes through the penis first, then the khunsa could be treated as a man and vice versa. If the urine passes through both organs at the same time, it is determined based on which organ

secrets the urine longer than the other. If the urine passes through both genitals simultaneously and concurrently, then the Khunsa can be classified as Khunsa musykil, and a more specialized observation is required.

Seeing the Growth of the Organs: If a khunsa has special signs such as mustache or beard and has a tendency to approach women and be attracted to women, then the khunsa is treated as a man. On the contrary, if the breasts grow and plump and have a tendency and attraction for men, then the khunsa is treated as a woman.

See how the Sperm is Ejaculated: When the Khunsa ejaculates the sperm out of the penis, then the legal status of the khunsa is a man. When it ejaculates through the vagina, then the legal status of the khunsa is a woman. If it is ejaculated inconsistently, sometimes through penis or vagina, then the khunsa is categorized as Khunsa musykil.

Seeing how Blood out the Menstrual (Haidh): When a khunsa bleed through a vagina, then she is categorized as a woman because men would not be able to bleed. If a khunsa menstruate through the vagina, but the urine is secreted through the male genital, then it is categorized as khunsamusykil.

Pregnancy and Birth: When a khunsa is capable of pregnancy and even able to give birth to offsprings, then she is treated as a woman because, throughout history, men have never experienced pregnancy (Maqdisi, 2004). However, other opinions suggest that it is considered to be misleading (undetected) and there is no indication whether it is a man or a woman (Hamidy & Bukhari, 2002; Imam Al Fadhil Abi Abdi Al- Mu'ti Muhammad Nawawi Al-Jawi, 2017; Maqdisi, 2004).

Abu Yahya Muhyiddin bin Syarof An-Nawawi in the book *Al-Majmu'* (Tehrani, 2004) explains that a Khunsa belongs to the man or woman category based on the following explanation:

Khunsa who is Classified as a Woman:

- a. A khunsa who has only one organ (in the form of a hole) but after puberty, she is capable of menstruation or gets pregnant
- b. A khunsa who has only one organ (in the form of a hole) and is not capable of menstruation and pregnant yet attracted to men
- c. A khunsa who has only one organ (in the form of a hole) and is not capable of menstruation, pregnant, not attracted to men but the nature of the women is more prominent than the nature of men
- d. A khunsa who has two organs, but the menstruation, sperm, and urine pass through the vagina
- e. A khunsa who has two organs. The sperm and urine pass through both organs, but they come out of the vagina first
- f. A khunsa who has two organs and secretes simultaneously from both but attracted to men
- g. A khunsa who has two organs, secretes at the same time, and is attracted to both man and woman but the nature of woman is stronger than a man

Khunsa who is Classified as a Man:

- A khunsa who has only one organ (in the form of a hole), do not menstruate or get pregnant but there is a feeling of attraction to women
- A khunsa who has only one organ (in the form of a hole), do not menstruate or get pregnant, there is a sense of attraction to both men and women, but the nature of men is more prominent than the nature of women
- A khunsa who has two organs but ejaculate the sperm or urinate out of the penis
- A khunsa who has two organs ejaculates the sperm and urinates through both organs but through the penis first
- A khunsa who has two organs and performs excretion from both organs but there is an attraction to women
- A khunsa has two organs, performs excretion at the same time, there is a feeling of attraction to both men and women, but the trait of men character is more prominent than women

One opinion about the method of determining the sex of a khunsa is presented in table 1.

Table 1. Determination of the Khunsa Gender

Method	Genital		Description	Results		<i>musykil</i>
	Penis	Vagina		Man	Woman	
Urine	✓		Urinate through the penis	✓		
		✓	Urinate through the vagina		✓	
	✓	✓	Urinate through the penis before the vagina	✓		
	✓	✓	Urinate through the vagina before the penis		✓	
	✓	✓	Urinate at the same time, but the duration is longer on the penis	✓		
	✓	✓	Urinate at the same time, but the duration is longer on the vagina		✓	
	✓	✓	Urinate at the same time			✓
Based on the growth of body parts			Having a mustache, beard, and tend to approach women and is attracted to women	✓		
			breasts grow and plump and have a tendency and attraction to men		✓	
Based on the sperm ejaculation	✓		Ejaculate only through the penis	✓		
		✓	Ejaculate only through the vagina		✓	

	✓	✓	Sometimes ejaculate from the penis or the vagina			✓
Based on the menstruation		✓	Menstruate		✓	
	✓		Menstruate		✓	
	✓	✓	Menstruate through the vagina but urinate through the penis			✓
Based on pregnancy and birth	✓	✓	Capable of pregnancy and able to give birth		✓	
	✓	✓	Capable of pregnancy and able to give birth (opinion of some scholars)			✓

Marriage in Islam: Marriage is the nature of God, common, and applies to all of His creatures; humans, animals, and plants. In addition, marriage is one way that Allah the Almighty chooses as a way for His creatures to multiply and preserve his life (Tihami&Sahrani, 2013). According to the terms of Islamic law, marriage means a contract between a male and a female to legitimate the physical interaction among them (Ayyub, 2004; Surya, 2006). According to Law Number 1 the Year, 1974 Article 1 states that marriage is an inner bond between a man and a woman to form a happy and eternal family based on the God the Almighty. So, the marriage is sunatullah performed on all of His creatures to breed. Humans must perform a marriage contract to legitimate physical interaction. Human marriage in Islamic law is set in detail in the Quran and hadith. In surah An-Nūr (24): 32 regarding marriage:

"And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and Knowing".

The law of marriage is also set in Surah An- Nahl (16): 72; QS. An-Nisā '(4): 1; QS. Ar-Rūm (30): 21; QS. Az-Zāriyāt (51): 49; QS. Ar-Rūm (30): 21 (Departemen Agama Republik Indonesia, 2018). In addition, Prophet Muhammad (PBUH) from Imam Muslim's book of marriage states that "From Abdilllah said, Rasulullah SAW said to us,

" O young men of whom you are able to marry, then marry, indeed the marriage can subdue and guard the vision honor/genitals); while for those who do not have the ability to marry to perform fasting, because fasting can be a bidirectional craving".

A legitimate marriage in Islam should be performed by a marriage contract. Marriage in Islam has several conditions:

1. The presence of male and female couple
2. The presence of guardians
3. The existence of 2 witnesses
4. The existence of Ijab and Qobul. By performing a marriage contract, the marriage becomes valid.

A man and a woman are one of the terms of marriage. This is not a problem for people who have one gender. However, it is one of the obstacles for someone who has not been able to determine the gender. Thus, the gender determination method that has been discussed previously can help to determine the gender in the population. In order to be able to do legal marriage in Islam, men or women must perform it based on their own desires. Marriage is only legitimate if the gender of the bride and the groom is clear. Hence, it is not a legitimate marriage for *Khunsamusykil* (people who are not clear whether they are men or women). This is supported by some previous studies (Rohmawati, 2016). However, if the khunsa has determined the gender by using the discussed method and the gender is clear, then the marriage is legitimate according to Islam.

Conclusion: Someone who has two genitals or not at all in Islam is called a khunsa. Islamic scholars give some methods in determining the sex of the khunsa, including seeing how the urine is secreted, seeing the growth of the organs, seeing how the sperm is secreted, seeing the blood of menstruation (*Haidh*), and seeing pregnancy and birth. However, if the method has not been able to determine the sex of the khunsa then it should be further investigated and determined from the existing instinct. The legal requirements of marriage in Islam include: (1) the presence of a male and a female, (2) presence of guardians, (3) the existence of 2 witnesses and (4) the existence of *ijab* and *qobul*. All requirements for marriage should be fulfilled, but for the determination, gender is a difficult thing to set. The method of determining the sex of the khunsa is one of the easy alternatives. Marriage is legitimate if the gender of a khunsa has been determined to be a man or a woman. However, marriage in Islam is illegitimate if gender is not clear (*khunsamusykil*). From the result of this research, it is hoped that there is law in determining the legal status of the khunsa's existence in marriage and inheritance to be considered in accordance with the article of law and also a compilation of Islamic law.

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