Gendering the Ungendered Body:

Hermaphrodites in Medieval Islamic Law

PAULA SANDERS

No aspect of life in medieval Islamic societies was free from considerations of sex.¹ The boundary between male and female was drawn firmly and was deeply embedded both in views of the cosmos and in social structures. The most visible expression of this boundary, the social segregation of men and women, was only a particularly concrete demonstration of the notion that male and female were opposites, and that an ordered human society depended on maintaining boundaries that had been ordained by God.

Men and women not related by blood or marriage lived in separate, but intersecting, spheres. Interaction between them was understood to be both necessary and inevitable, but it was permissible and desirable only under carefully controlled and rigidly prescribed circumstances. The most desirable of these circumstances is expressed by the institution of nikah, often narrowly translated as “marriage.” Nikah and zina (unlawful intercourse) constitute the two fundamental categories of possible interaction between unrelated men and women in the social world. These categories rest upon the existence of the male-female boundary, and therefore even zina, in some sense, affirms that boundary while threatening others.²

Violation of those permitted relationships promised not only social disruption, but disorder on a much larger (and perhaps unseen) scale. Those disruptions could be caused not only by actual violations of taboos, but even by the suggestion that such violations had occurred. The false accusation of adultery (qadhif, often translated simply as “slander”), for example, is one of only five crimes for which the Quran prescribes punishment.³ The broad Quranic concepts concerning licit and illicit relationships, as well as modesty,ertain equally to men and to women, but they were interpreted primarily in terms of the dangers that women’s disruptive sexuality present to an ordered society.

Men and women were socialized into this world of relations, which assumed that men and women must interact, that they must interact in prescribed ways, and that interaction in other ways threatened the social order and had to be guarded against at all costs. The question of one’s maleness or femaleness was a crucial factor in determining what kinds of protection against social disorder needed to be employed. Although men and women presumably bore equal responsibility for such illicit relations, that responsibility was construed in terms of certain assumptions about the natures of men and women. Men were considered susceptible to seduction and the actors, whereas women were considered to be both seducers and the recipients of the men’s acts.⁴

Furthermore, the relations and dangerous possibilities rested on assumptions about the responsibilities of men to prescribe behaviors and set limits for women, who were considered to be their inferiors. If the spheres of men and women intersected, they were also established in a clear hierarchy that placed men above women. Although women were considered to be the equals of men before God, this spiritual egalitarianism did not imply a similar egalitarianism in the social world. This was the social context in which the Quranic verses stating that “men are a degree above women” and that “men are the managers of the affairs of women” were to be understood.⁵

Women were presumed to be the major site of social disorder (fitna) by medieval jurists and commentators as well as in popular literature. But even the notion of the potentially dangerous sexuality of women, of the ever-present threat of fitna, was relational. Although the danger was located among women, it was not their being that represented disorder, but the possibilities of their illicit relationships with men.⁶

Under these circumstances, a person who fit neither of the available categories presented a serious dilemma in a society where the boundary between male and female was drawn so clearly and was so impenetrable. In this respect, medieval Islam differed from medieval and early modern European societies, where the boundary between male and female was
more permeable and where the troubling possibility of the mixing of sexes did exist.  

Not all boundaries in medieval Islamic societies were as impermeable as that between male and female. There were other, equally fundamental boundaries in Islamic societies that also involved hierarchies: Muslim and non-Muslim, free and slave. But these boundaries could be crossed. One's fundamental category could be changed by conversion or manumission. The sexual boundary was different, since it could not be crossed legitimately simply by an act of will.  

What did medieval Muslims do when confronted with a person whose sex was unknown? In societies that took for granted that everyone was either male or female, what place was there for the hermaphrodite, who seemed to fit neither category? For occasionally children were born or individuals encountered who did not fall into these two categories, whose anomalies in sexual physiology made it impossible to determine whether the person was male or female.  

The biological process of sex determination, according to medieval Muslim natural philosophers and physicians, required the domination or precedence of the semen of one parent over the other. Whereas it was assumed that women were created from man (that is, from Adam's rib) and inferior in most respects, they were considered biologically equal in human reproduction. Both male and female shared equally the power of generation, because both were believed to contribute semen to the reproduction of the child. Semen was regarded as a complex substance that came from all parts of the body, which explained why children resembled their parents. The child would have the sex of the parent whose semen dominated. Ibn al-Qayyim al-Jauziyya attributed this domination to conditions of heat or cold in the womb, as well as to the relative strength or weakness of the semen contributed by each parent.  

This theory of generation as advanced in medical texts intersected with Quranic doctrines of creation. There was a deep coherence between Quran, commentary, and scientific literature on this subject. In particular, the preference for the Hippocratic-Galenic over the Aristotelian tradition seems to have been due largely to its consistency with the classical Islamic understanding of the Quranic doctrine of creation. Similarly, the medical assumption that there were two sexes was consistent with the interpretation of the Quranic verse "we have created of everything a pair" (51:49), which was clearly understood by the commentators to refer to male and female.  

The insistence on the two sexes of male and female and the articulation of this assumption in the theory of generation found its way even into lexicography. The medieval lexicon Lisän al-'Arab's discussion of the term dhakar (meaning, among other things, "male" and "penis") states: "If the seminal fluid of the man dominates the seminal fluid of the woman, they will produce a male child. If the seminal fluid of the male precludes the seminal fluid of the female, she will bear a male child, if God wills." If the semen of neither parent dominated, the child would be a hermaphrodite. Although the jurists were confident that every person had a true sex—known at least, or perhaps only, to God—discovering what that sex was remained a human dilemma subject to the limitations of human knowledge. The first concern of the jurists was to assign sex to such a person, usually an infant born with ambiguous genitalia.  

One jurist stated simply, "If the child has a vulva (jari) and a penis (dhakar) then it is a hermaphrodite (khuntha)." Other lawyers and medieval lexicographers defined the khuntha as one who has "what is proper to both men and to women," "what is proper to both the male and the female," or "neither what is proper to the male or to the female." This last condition, according to al-Sarakhsi, was the gravest form of dubiousness (ishtibah); he was describing a child who was neither male nor female, excreting from its navel (surratihu).  

Al-Sarakhsi told his readers further that "the two characteristics having what is male and female are not combined in one person, because they are dissimilar by way of being contradictory." Nowhere in these texts is there even the slightest suggestion that a khuntha is both a man and a woman. Human beings had to be either male or female; sometimes they seemed to be neither, but they could not be both. The difficulty lay in establishing a place for the hermaphrodite until its primary set of organs could be determined, that is, the set of organs that had legal value and to which sex would be attributed.  

The basic rule in establishing the sex of the child was al-hukm bi'-mabal (the judgment is attributed to the urinary orifice). This principle can be traced to pre-Islamic Arabian custom. It was also established in hadith that "the inheritance is awarded to the urinary orifice" (al-mirath bi'-mabal), that is, the sex of the child was determined by the mabal. Al-Sarakhsi explained further:  

The division between male and female at birth is manifest in the urinary organ ['ala], at the time of separation of the child from the mother, the use [manfa'at] of that organ is urination; other uses of the organ occur after that but the primary use [al-manfa'at al-astilyuq] of the organ is that it is the urinary orifice [mabal, lit. "place of urination"]). So if it urinates from the mabal of men, the organ of division is in its [the male urinary orifice] jurisdiction [that is, the child is male], this being so even if the other has a larger aperture in the body. And if it urinates from the mabal of women, then that is the [primary] organ [the one to which sex is attributed].
If the distinction could be made on this basis at birth, the sex of the child was determined and the additional organs accorded the status of "defect" (‘aib). In other words, the presence of the extra organs was recognized as an objective reality, but these extra organs were assigned no legal value. Once relegated to the status of ‘aib or defect, they could be removed surgically.17

If, however, the child urinated from both of the orifices, then the one from which the urine proceeded first was primary.18 If it urinated from both simultaneously, some said that primacy would be awarded to the organ from which the greater quantity of urine proceeded.19 Abu Ja'far al-Tusi, the Shi'i jurist, added another criterion: "If the onset of urination from [the mabals] is simultaneous, then [the sex of the child] is considered on the basis of the one that urinates last."

Other alternatives were offered: "Some say to count the ribs, and if they are equal in number then it is a woman; if they are unequal, it is a man. And some say to consider it on the basis of the inclination of its nature." This is the only instance where anything other than strictly biological measures were suggested to determine the sex of a khuntha; it does not reflect the conventional juridical wisdom on such matters.

If the sex of the child could not be determined by these conventional methods, it remained in a state of dubiousness (ishbah) or ambiguity (ishkal) until the onset of puberty. Puberty (batali, idruk) in Islam is determined by the appearance of signs (‘alamat) that indicate sexual maturity. For a man, these are intercourse using the penis, the appearance of facial hair, and nocturnal emissions; for a woman, they are the growth of the breasts, the onset of menstruation, vaginal intercourse, conception, and lactation.20

For a khuntha, the appearance of any one of these signs would nullify the dubiousness or ambiguity. Such a sign determined both sex and the attainment of sexual majority. Furthermore, the hermaphrodite was not disabled by the ambiguity surrounding its sex in reporting the appearance of these signs. Its claims of puberty were accepted just like those of a normal child, because no one else could know about it. In this sense, the hermaphrodite benefited from the general ambiguity surrounding childhood. Since children are not considered to be sexual beings in Islam, the rules of modesty or other precautions aimed at preventing illicit sex between adults do not apply to them. Their sex is known, but they are not part of the social-sexual world of adults. They are, in a word, unsocialized.

But Islamic jurists recognized that the period immediately preceding puberty was different. The prepubescent adolescent (murahiya) was neither child nor adult; it hovered around the frontier of sexuality in a way that was troubling because of this ambiguity. Jurists were often unsure whether particular precautions regarding modesty, for example, ought to be imposed on the adolescent. Reaching puberty lifted the cloud of ambiguity that covered all children and adolescents. It was a small step to exploit and extend this ambiguity to the khuntha.

The condition of ambiguity was presumed to be temporary. Manifestation of any one of the signs of puberty removed the ambiguity permanently. Once the sex of a person had been established, that judgment was irreversible, regardless of any evidence that might be produced to the contrary.21 The system aimed at providing every possible opportunity for establishing the true sex of the child. Nonetheless, it was possible that none of the signs of puberty (‘alamat) would appear. In this case, said al-Quduri, the khuntha was ambiguous (mushkil).22

Khuntha mushkil was the technical legal term for a hermaphrodite who had passed the age at which puberty normally occurs without manifesting any of its signs.23 Its sex could not be determined. The mushkil label was a difficult one to contest, once applied, because of the same legal principle of precedence that allowed the jurists to insist on the permanence of sex once it had been assigned. In that case, after the determination of male sex based on a nocturnal emission, the appearance of such contradictory evidence as the growth of breasts had no legal consequence. By the same reasoning, the admission that one was unable to determine sex prevented the hermaphrodite from asserting later that it had reached puberty. Now jurists had to contend with the tension between their desire to determine the sex of every human being with certainty, and the caution that was demanded in attributing sex.

Although Islamic jurists could not establish the true sex of the khuntha mushkil, they nonetheless had to incorporate it into the adult social world in which everyone was either male or female. They had to assign the khuntha mushkil to one of these categories in order to either prescribe or proscribe, because the rules for men and women were different.

This process, as opposed to establishing true sex, I would call gen dering. I have invoked this most modern of terms with the full awareness that it is anachronistic. But feminist scholarship has created new meanings for what was once simply a grammatical term. Gender goes beyond biological definitions of sex (although these are also cultural constructions). It is embedded in the social understanding of what constitutes maleness or femaleness, as well as the social implications and consequences of being male or female.24 I use the word gendering to describe the strategies by which medieval Muslim jurists constructed the khuntha mushkil—an unsexed, ungendered, and therefore unsocialized being—as a social person in terms of traditional categories of sex.

In doing this, they changed their focus from the true sex of the individual to the prescriptions for whole categories (male and female). This
process, in turn, reaffirmed those categories and maintained the boundary between male and female while retaining the emphasis on male and female in relation to one another. This strategy was possible not because new categories were invented, but by virtue of the structure of Islamic law itself. If sex was not arranged on a continuum for medieval Muslims, the moral universe encoded in Islamic law was. There were only two poles for sex: male and female. But all behavior fell somewhere on a scale of religious qualifications that included five categories: obligatory, recommended, neutral, reprehensible, and forbidden. Under certain circumstances, reprehensible behavior might be preferred when the alternative was committing a forbidden act. In determining which course of action to take, jurists employed another fundamental principle of law: precaution (ihtiyat), denoting the choice of a course of action that is founded on certainty rather than uncertainty.

The possibilities of the khuntha being a man or a woman had to be considered with respect to every variation that is tied to sex. Decisions were often based on procedural rules not directly related to sex. Depending on the situation, jurists might be informed by a different hierarchy of concerns in negotiating the gender of the hermaphrodite. The negotiation of gender was not invariably difficult or complicated. Gendering seems to have been least problematic when it involved segregation and where spatial relations clearly reflected sexual hierarchy. In these circumstances, the simple arrangement of male above female could be exploited to grant the hermaphrodite an intermediary position.

These concerns informed the discussions of where the hermaphrodite should stand in prayer (salat). Prayer is a daily obligation. Numerous occurrences can invalidate a person’s prayer, in which case the prayer must be repeated, just as missed prayer must be made up at another time. Men and women may pray in the same room, but the rows of men must always precede the rows of women. This is a clear case of segregation and the spatial expression of male supremacy. Where should the khuntha mushkil stand in prayer? In Friday prayer, between the rows of men and the rows of women:

It should stand behind the men and in front of the women as a precaution, because if it is a man standing among the rows of women, his own prayer is invalid; and if it is a woman standing among the rows of men, then the prayers of those men on her right, her left, and behind her will be invalid. An adolescent is, in this, like a mature adult. But if the khuntha is in the rows of men, in front of the women, we are certain of the validity of its [own] prayer. If it stands among the women, however, we prefer that it repeat the prayers, because the obligatory nature of prayer for [a man] is well-established, while the non-fulfillment of this duty is doubtful.

This is a perfect example of the way the boundary and the hierarchy were preserved: the validity of the hermaphrodite’s own prayer and of those of the other congregants was assured by its segregation, and by standing between the rows of men and women, it neither threatened the superior status of men nor was it threatened with an inferior position. Should it turn out to be a man, he would simply constitute the last row of men; should it turn out to be a woman, she would be the first row of women. The hierarchy expressed in the spatial relation of men and women in prayer also applied to the dead:

When a khuntha mushkil dies and is prayed over with a man and a woman; the man is placed right next to the imam [prayer leader]; the khuntha next, and the woman following the khuntha, in consideration of their position in life . . . and if they are buried in a common grave due to some extenuating circumstance, there is no objection [provided that] a partition of dirt is made between the bodies. The man faces the qibla [direction of Mecca], followed by the khuntha, and then the woman, because facing the qibla is an honor, so the man should be closest to it.

In these two cases, the concern with maintaining both the boundary and the sexual hierarchy intersected with another concern that informed the negotiation of the jurists: protecting the male domain from intrusion. Every precaution was taken to ensure against violating any existing boundaries: the supremacy of male over female was always asserted, and the superior position of the khuntha to women in prayer and burial custom was a way of maintaining the hierarchy in which men were, in relation to women, the superior party. When in doubt, the rule seemed to be to accord the inferior status to hermaphrodites. What was important was that access to the higher status of men be successfully protected. The rules assured that no hermaphrodite would attain the status accorded to men unless it could be demonstrated that he was, indeed, a man.

These same concerns also informed the distribution of inheritance shares. Inheritance in Islam is governed by the rules laid down in the Quran and elaborated by the later jurists. It is basically a modification of agnostic succession, amended to include women and spouses. The Islamic law of inheritance developed and elaborated the principle that a hermaphrodite inherits in the same proportions as the female, because it must accept the lesser status of the two. If a father died leaving a son and also a hermaphrodite, the wealth was divided among them in three
shares: two for the son and one for the khantha, for the khantha was treated as a female.

But the jurists worried that others might try to exploit the ambiguity of the hermaphrodite’s sex for their own advantage. Because of the interdependence of men and women in matters relating to family life (such as marriage and inheritance), the social fact of the khantha’s sex had important implications for other people, particularly relatives. The sex of the khantha would affect the shares of its own blood relations, as in the case of a man who died leaving a wife and two children, one of whom was a khantha. “Then the khantha died after its father, and so the mother claimed this to be a son, urinating from where boys urinate. The accepted opinion is the word of the son, because the mother claims an excess in her inheritance by claiming him [the khantha] to be a son, whereas the [other] son has no excess to gain, so his word is accepted with an oath.”26 Presumption operated in favor of the son’s claim because he had nothing to gain from determining the sex of the child. The mother, however, stood to gain by establishing the khantha as a male child; from whom she could inherit. Determining sex was important because the relationships of the living to the khantha were not altered by the fact of death.

There were other fundamental concerns. Numerous problems in gendering hermaphrodites revolved around the issue of modesty.27 Many prescriptions for dress, demeanor, and segregation are based on this concept of modesty, called in Arabic sitr al-‘aura, literally, “covering [one’s] nakedness.” The exhortation to preserve modesty applies equally to men and women in Islam, but the various law schools have diverging definitions of what constitutes the ‘aura for men and women, and they usually emphasize women’s responsibility. When the concerns of jurists were centered on sitr al-‘aura, the hermaphrodite was almost always gendered as female.

In the absence of any clear hierarchical concerns, and given the complicted matrix of concerns around modesty, the difficulties of negotiating gender often required invoking other frontiers. Jurists might, for example, exploit the recognized category of the adolescent, who is not always required to adhere to prescriptions for adults, to resolve a question about the necessity of veiling in prayer. Al-Sarakhsi concluded that a khantha should be veiled while praying: “If it is a man, his being veiled is not forbidden in prayer, and if it is a woman, she is obliged to be veiled in her prayer.” If it prayed without a veil, the adult khantha was required to repeat the prayer, because of the possibility that it was a woman. But if it prayed without a veil before reaching puberty, it need not repeat the prayer, because an adolescent female (mutahida) is not obliged to wear the veil when praying.

Jurists were not able to exploit another frontier—death—in negotiat-

ing gender around the question of sitr al-‘aura. When discussing the ritual ablutions and burial shrouds of the khantha, they unanimously advocated precautionary veiling in the interests of modesty. Al-Sarakhsi reminds us also that what applied to the khantha in lifetime with respect to sitr al-‘aura applied equally in death. It is clear from this text that the restraints on relationships between men and women that exist in life are neither abolished nor neutralized by death. The boundary remains as firm for the dead as for the living, and the taboos that govern the relationships between men and women while they are alive govern also that between the living and the dead.

If it dies before reaching puberty, but while approaching it, neither a man nor a woman should perform the ghusl [the major ritual ablution, involving a full bath] on it, but rather should perform the tayammum [ritual ablution using clean sand or dust instead of water, to be substituted for the ghusl only under special conditions]. This is because of the principle that gazing upon the ‘aura is forbidden and this prohibition is not lifted in death… If it is muskhi— that is, having no sex or its not being known whether it is a male or female—perform the tayammum. This is an extenuating circumstance because there is no one who can perform the ghusl on it. This is parallel to the case of a woman who dies among men when there is no other woman; in such a case, the tayammum is performed. The case of the khantha is like this. If the person performing the tayammum is a woman, there is no need for a rag [covering her hand]; likewise if it is a man who is related on the mother’s side in the forbidden degree. But if he is unrelated to her, the tayammum must be performed with a rag [wrapped around the hand]. It is permitted to look at the face, and to expose it to the arms only, because it might be a woman and in this case, precautions must be taken with respect to those things that are [ordinarily] founded upon precaution, namely [to prevent] looking at the ‘aura.

Al-Sarakhsi also recommended that the khantha be buried like a girl, because this is closest to the sitr. Women are shrouded in more layers than men, but these excess layers are permitted for men when buried under special circumstances. Doubiousness of sex is one of those.

Even insisting that modesty be a priority did not preclude complications in negotiating gender in every situation. The requirements for draw for men and women making the pilgrimage (hajj) are, according to some schools of law, contradictory and raise the specter of committing two equally forbidden acts.28 In the case of a khantha past adolescence, some Hanafi jurists were confounded, because “a man in ihram [a state of ritual purity marked by putting on special clothes at the beginning of the pil-
grimage] may not wear seamed clothing, while a woman in ihram is obliged to wear seamed clothing and is prohibited from going without a waistband and cloak." Had the risk involved a choice between committing a reprehensible act or a forbidden one, the judgment might well have been different. Al-Sarakhsi admitted that he did not know the answer because each possibility is equally forbidden. The hierarchy of human activities manifest in the scale of religious qualifications helps negotiate gender only when the two possibilities are not equally forbidden.

But some jurists resolved the problem by returning to the issue of modesty. They suggested that the khuntha dress a woman because this is closer to the sitr, and her status in a state of ihram is founded on sitr, just as it is at other times. Moreover, al-Shaibani maintained, a man can wear seamed clothing during his ihram when there are extenuating circumstances (judhr, lit. "excuse"), and "dubiousness of the matter of its sex is one of the gravest [extenuating] circumstances."

Protecting against violations of the prescriptions for modesty could create difficulties even in trying to determine the true sex of the khuntha mushkil. Jurists could invoke another boundary to mitigate the complicated circumstances, of slavery. The legal position of the female slave as the sexual property of her master permitted the negotiation of gender without the risk of violating the rules of modesty.

It is reprehensible [makruh] for a man or a woman to inspect [the khuntha] until he reaches puberty and the matter of his sex is cleared up, because the adolescent is in the position of the pubescent with respect to the obligation of sitr al-'aura. A person of one sex looking at a person of the opposite sex is not permitted... Whether a man or a woman examines him, there is [still] the suspicion of looking at [the nakedness] of a person of the opposite sex (nazar khila'f al-jins). Instead, a slave girl who is knowledgeable in these matters is bought for him from his own money to examine him, so that he owns her by means of actual purchase. If the khuntha is a woman, then the person looking is a member of the same sex (nazar al-jins ila al-jins) and if it is a man, then it is a slave [mamluka] looking at her master.

That the determination of sex should have been in the hands of someone who, in every other respect, was a disprivileged person is remarkable. Slaves, for example, could not give testimony in an Islamic court. In spite of its legal implications and importance, the determination of true sex apparently took place outside the formal structures both of law and of medicine. Physicians do not seem to have been participants in this process. Because it was permissible for a slave to look at her master, a khuntha was circumcised by a slave girl purchased for him either from his own funds or, if he was indigent, from the funds of the public treasury.

The notion that the sex of the khuntha was a social concern was reinforced by the commitment of funds from the ba'tt al-mal (public treasury) to buy the slave girl. The funds of the treasury were to be used for the public good, and what could be more in the interests of the public good than the knowledge of whether someone was male or female? The establishment of sex was not only important to determine the legal status of the khuntha, but also had implications for the position of others within the community. Even a single individual whose sex was not known threatened the social order. The sex of one person was inevitably tied to the status of others.

Whereas conditional gendering worked to preserve social order in many instances, establishing the true sex of the khuntha mushkil was the only remedy under other circumstances. This, as we have seen, was often impossible. If the sex of the khuntha could not be determined, some matters, including the status of other people, simply had to be held in abeyance.

If it is said: if the first child you bear is a boy, you are divorced; or, to a slave, if the first child you bear is a girl, you are free, and then they each bear a khuntha mushkil, neither the divorce nor the manumission takes place until the child's sex has been determined, because whatever is contingent upon a condition cannot be carried out as long as the condition does not actually exist. With ishkal, the existence of the condition is not a certainty. This is parallel to the case where someone says: If I don't enter so-and-so's house, then his slave is free, and then he dies without it being known whether or not he entered. [In this case,] the manumission does not take place.

Here, fulfilling the condition depended on establishing the sex of the child. Sometimes, however, the problem could be solved by employing a formula that allowed for both possibilities:

If a man says, "All of my male slaves are free" or "All of my female slaves are free" and he has a slave who is a khuntha, the khuntha is not free until the matter of his sex has been determined. But if the master says the two statements together, then the khuntha is freed, because if they are combined then one of the two must apply to him; if they are pronounced separately, then it is not certain [whether or not it applies to the khuntha], whereas servitude is a certainty. Likewise, if a man says [to his wife], "If I buy a male slave, then you..."
are divorced," and he buys a kuntha, she is not divorced. But if he makes the two statements together ["If I buy a male slave or female slave, then you are divorced"] then she is divorced by the purchase of the kuntha because of the certainty of the condition.

The punishment of crimes like slander (qadha’) and theft was relatively simple, because the penalties did not differ for men and women, so the ambiguity of the kuntha’s condition was irrelevant. But when the kuntha was the object of slander, the situation was quite different. The form of the accusation then depended on the sex of the accused.

A man slandering a kuntha is not subject to the hadd (Qur'anic prescribed punishment) because he is in the position of someone who slanders a lunatic or a nafqa’ (a woman who is physically incapable of having intercourse). The slanderer deserves the punishment by virtue of relating a man to an act that he perpetrates, and by relating a woman to having made possible the perpetration of an act committed by someone other than her. Because of the ambiguity of the sex of the kuntha, the reason [for the punishment] cannot be determined: it is known which of the two acts the slanderer is attributing to the kuntha. If it is attribution of the perpetration of the act, and the kuntha is really a woman, then he has attributed an impossibility to her and thus stands in the position of a person who slanders a lunatic or a nafqa’. If he attributed it to making possible the commission of the act, and the kuntha is a man, it is something in whose domain he is powerless, and this does not call for the hadd. So it is not possible to undertake inflicting the hadd punishment while the matter of the kuntha’s sex is ambiguous.

The analogy between the kuntha and the lunatic or idiot was not intended to reflect on the supposed intellectual capacity of the kuntha, but rather to demonstrate the impossibility of establishing guilt or innocence. The nature of the accusation of zina is determined by the sex of the accused adulterer. Men are accused of perpetrating the act, women of being the parties who allow the action. The structure of these accusations reveals, in fact, that medieval Muslim jurists constructed sexuality differently for men and women. The concern of the jurists was to preserve not only the categories of male and female, but also a particular understanding of what those categories meant and implied. They wanted to preserve biological difference, but they understood that difference to have social meanings.33

This concern about the social implications of sex is nowhere clearer than in the reasoning displayed in a discussion of the legal validity of the marriage of a kuntha.34 The validity of the marriage of a kuntha whose father had married it to a man or a woman could not be determined until its true sex was discovered. This was not, as we might think, because of concerns about inheritance, incest taboos, or modesty. It was because, as al-Sarakhsi states, the male entered marriage as a malik (owner), whereas the female became mamluka (owned) by virtue of marriage. This short statement communicates powerfully not only the necessity of knowing who is male or female, but what it means socially to be male or female. "If it manifests [at puberty] the signs [‘alamat] of men and its father had previously married it to a woman, then [that] nikah is regarded as being valid from the time the father contracted it, because it has become clear that his action coincided with the actual status of the kuntha ... but if the father had married it to a man and it then manifested the signs of male puberty, then it has become clear that the action did not coincide with the kuntha’s actual status; and the nikah is null."35

What does al-Sarakhsi mean when he talks about the action coinciding with the actual status of the kuntha? That “actual status” is not merely the biological fact of one individual’s sex, but the more important categorical fact that all men enter marriage as possessors and all women as possessions. The difficulty thus rests not only in the apparent sexual contradiction and impossibility of two men marrying each other, but also in the related social fact that two people cannot both enter a marriage as owners. One must enter as the malik (owner), one as the mamluka (owned). And this means that one must be male and one female.

With marriage, an institution founded on the fundamentally sexual relationship between men and women, the separate concerns that the jurists dealt with came together. Questions of sexual hierarchy, as we have just seen, of the protection of the male domain, modesty, and incest taboos, all converged. Sometimes, as with a question of modesty, the relationship established by marriage between husband and wife permitted the jurists to negotiate gender without risking violation of any taboo. Although the marriage of a kuntha to a woman, for example, could not be regarded as valid as long as the sex of the kuntha was unknown, it was still considered to be mustaqim, meaning that it did not involve anything forbidden. The jurists reasoned that if the kuntha turned out to be a woman, this meant only that two members of the same sex had seen one another and that the marriage itself was merely a blunder. If it turned out to be a man, this constituted the gaze of a woman upon her husband, and there was no prohibition against that.

The jurists were more concerned, however, that a marriage might violate the incest taboos. The prohibition of affinity could be established by a man kissing an adolescent girl, for example, in which case her
mother and sisters would be forbidden to him in marriage. The rule extended to hermaphrodites, and the jurists were careful not to allow the possibility of contracting a marriage that might violate these taboos. "If a man kisses [the hermaphrodite] with lust, then he may not marry the khuntha’s mother until the status of its sex has been determined. Because if it is female, his kissing her after [she] reaches adolescence establishes the prohibition of their becoming related by marriage, and the mother would be forbidden to him. This is the prevailing opinion, because it is preferable to forgo nikah with a woman who is permitted to him than to engage in nikah with a woman who is forbidden to him."

Yet the continual attempts to normalize the khuntha also intersected with a conservative thrust within Islamic law that attempts to preserve marriages. If a khuntha married a woman and failed to have intercourse with her, the same rules applied as would to an impotent man—that is, no action could be taken to dissolve the marriage until a period of one year had passed. This delay was intended as a waiting period to see whether the impediment to intercourse was temporary or permanent, 36

What is striking about the laws concerning marriage of the hermaphrodite is the complete absence of the anxiety about homosexuality that pervades the European texts on hermaphroditism. Where early modern Europeans agonized over the dangers of homosexual activity in a union involving a hermaphrodite, medieval Muslims had other concerns: incest taboos and modesty. Although homosexuality is disapproved in Islam, it does not seem to have been a part of the hierarchy of concerns informing the negotiation of gender in law. 37

If medieval Muslim jurists had an overriding anxiety, it was not any of the particular concerns—incest taboos, modesty, segregation, or even hierarchy—that organized their negotiation of gender, but maintaining the gendered integrity of their world as a whole. Their received view of the world was as a place with only two sexes, male and female. In this, medieval Muslims were closer to modern Americans than, say, to the ancient Greeks. 38 Their interpretation of the khuntha mushkil was embedded in this bipolar view of the world. A person with ambiguous genitalia or with no apparent sex might have been a biological reality, but it had no gender and, therefore, no point of entry into the social world: it was unsocialized.

In this world where everyone had to be gendered, a person without gender could not be socialized. Such a person could not participate in ritual, in itself a profoundly communal and social activity, until it had been artificially gendered. Hermaphrodites were usually gendered in the world of ritual as female.

An ungendered person could not enter into the gendered world of marriage and kinship: one was a son or a daughter, a brother or a sister, a husband or a wife. This is not to say that medieval Muslims denied the biological tie between a hermaphrodite and a blood relation any more than the biological fact of ambiguous sex. Rather, it means that this bond could not be interpreted and could not be invested with social meaning unless it was gendered. The social implications of ties of blood or milk depended on whether one was male or female, just as the very existence of a familial tie could depend on gender. This is why, for example, the jurists insisted that a man who married the mother or sisters of a khuntha he had kissed. If the khuntha was female, that act created a relationship of affinity that prohibited marriage; if it turned out to be male, no such relationship existed. In either case, the man had kissed the khuntha, but the interpretation of that act as having social consequences or not, as constructing a relationship or not, was entirely dependent on gender.

Sex and gender were social matters with implications for whole groups—especially because of the complex familial and household networks that characterized medieval Islamic societies. The presence of one ungendered person, as we have seen, could compel an entire network to hold in abeyance questions of marriage, inheritance, and relation to one another. Even the efforts by the jurists to normalize the hermaphrodite in order to permit the continued formation of marital ties, for example, could not be entirely successful. Ultimately, the interpretation of those relationships was suspended until the sex of the hermaphrodite was known. In this world, the ungendered person was not only unsocialized, but could desocialize everyone else by compelling them to suspend the normal formation of social and familial ties.

I have tried to demonstrate how the ungendered body was unsocialized and the strategies that jurists used to gender and therefore socialize the body in the case of hermaphrodites. By doing this, they permitted them to carry out the daily business of life and death: prayer, pilgrimage, burial, marriage, inheritance; manumission. Even when decisions had to be held in abeyance, the fundamental categories of male and female and the social embodiment of those categories were preserved. What was at stake for medieval Muslims in gendering one ungendered body was, by implication, gendering the most important body: the social body.

Notes


2. On the laws concerning unlawful intercourse, see Joseph Schacht, Introduc-

For an entirely new approach to eunuchs as a distinct social group, see Shaun Elizabeth Marmon, "Eunuchs of the Prophet: Space, Time and Gender in Islamic Society" (Ph.D. diss., Princeton University, 1990).

9. Hermaphroditism is defined medically as a physical condition in which reproductive organs of two sexes are present in a single individual. The true hermaphrodite has both ovarian and testicular tissue; the external genitalia usually have an essentially male or ambiguous appearance. Daston and Park, "Hermaphrodites in Renaissance France," 19 n. 36, cite an estimate of the current incidence of human hermaphroditism as 1:25,000 births.

There is a large medical literature on sexual differentiation and human hermaphroditism and the criteria to be used in sexing hermaphrodites. For two examples of this literature, separated by nearly two decades, see John Money, Joan G. Hampson, and John L. Hampson, "An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism," *Bulletin of the Johns Hopkins Hospital* 97 (1955): 301-19; and John Money and Anke A. Ehrrhardt, *Man and Woman, Boy and Girl* (Baltimore: Johns Hopkins University Press, 1972). The second work is widely regarded in the medical community as the definitive statement on the heredity versus environment question on the development of sexual differentiation and identification. The book, which approaches this problem using studies of hermaphrodites and pseudohermaphrodites, is notable for its absolute insistence on gendering children as either male or female. It is a fascinating document of American bipolar attitudes toward sexual differentiation. Although Money and Ehrrhardt chronicle the powerful influence of environment on sexual differentiation, they do not question the categories of male and female, nor do they analyze the ways in which American culture has constructed these categories. For a different approach that deals with the cultural construction of gender, see n. 24.


14. The legal material for this study is largely drawn from early-eleventh-century sources. One of the longest discussions of hermaphrodites is found in al-Maṣūṣ of al-Sarakhsī (d. 1090), a lengthy encyclopaedic compendium of Hanafi law, one of

15. Edward-Lane, Arabic-English Lexicon, s.v. “khanatha,” Lisan al-‘Arab and Nuh al-Mahdi, s.v. “khanatha”; al-Quduri, al-Mukhtasar; al-Sarakhsi, al-Mabsut. In Nuh al-Mahdi, we find a fascinating use of the term khantha applied to a particular grammatical case: “Some grammarians call [the word] to which the ya‘ al-mutakalim [a grammatical marker of the first person] is added ‘khantha,’ claiming that it is not mu‘nab (desinenally inflected) because it follows the kasra [one of the short vowels of Arabic] before the ya‘ and is not habbin [ending indeclinably] because of the absence of one of the reasons of indeclinability. This is like a person who is neither male nor female.” In Arabic grammar a basic distinction is made between words that can be inflected and those that are indeclinable. Thus the comparison between a word that is neither declinable nor indeclinable and a person who is neither male nor female is apt one.


17. This was the suggestion of Avicenna in his Canon (al-Qanun), vol. 2, bk. 3, p. 603. I am grateful to Basim Musallam for the reference.

18. Al-Sarakhsi based this on the legal principle of “the preponderance of precedence in the event of opposition or equivalence.” In defining sex, as in determining the proper course of action in any given circumstance, previously established legal principles were applied. No new principles of law were introduced to accommodate the khuntha.

19. The Hanafi jurists Abu Yusuf and Muhammad al-Shaibani accepted this, but Abu Hanifa rejected the argument on two counts: first, because the quantity of urine indicated the width of the makhay (the mabul, the urinary orifice) and no consideration was given to that; second, because large or small quantity would be manifest in the urine itself, not the mabul, which was the distinguishing organ. These opinions were reported also by al-Quduri and al-Marghinani.


21. As al-Sarakhsi said, if sex was attributed to the khuntha on the basis of urination from one of the mabuls and it then urinated from the other one, the judgment “is not changed by urination from the other organ.” He likened this person to a man who presented evidence for his marriage to a woman and was awarded the judgment, or to a judgment made about the lineage of a child on the basis of certain evidence. The presentation of different evidence after the judgment would not reverse it, following from the legal principle of “the preponderance of precedence in the event of opposition or equivalence.”

22. On one occasion, however, al-Sarakhsi mentioned that if none of the signs appeared, the absence of breasts would indicate (legally) that it was a man. This attribution of male sex on the basis of the absence of breasts is unique among these texts.

23. The terms musukil and ishkāl are both derived from the triliteral root sh-k-l. As used in the texts, ishkāl seems to be a general term for ambiguity and is interchangeable with istihbah (dubiousness), whereas musukil seems to be a technical legal term as well as a general term.


25. See Schacht, Islamic Law, 169–75, for a brief introduction to the topic.

26. When no clear evidence could be presented in a case, judges were permitted to extrait oaths from the parties involved. For a clear explanation of legal procedure, including the presentation of testimony by witnesses and the use of oaths, see Schacht, Islamic Law, 188–98, and Encyclopedia of Islam, new ed., s.v. “da‘wa” (action at law), “kadi.” Determining who is the plaintiff and who the defendant in a case is particularly important in Islamic law because the rules of evidence and presumption are different for the two parties. This determination was often the crux of a particular case.


28. When a Muslim pilgrim reaches the point at which he or she crosses over into the territory approaching Mecca, the site of the Ka‘ba, he or she enters a state of ritual purity. No sexual relations are allowed at any time and special attire must be donned by both men and women. See Encyclopedia of Islam, new ed., s.v. “ihram,” for details.

29. For an excellent introduction to the topic of female slavery in Islam, see Shaun Marmion, “Cocubinage, Islamic,” in Dictionary of the Middle Ages. The master's sexual rights over his female slave, although broad, were not unlimited.
The same prohibitions regarding incest applied to the master and female slave as to husband and wife.

Gender difference is fundamental to the different conception in Islamic law of male and female slavery. Unlike the male slave, the female slave’s primary role was sexual. The formula “Your sexual organ is free” thus functioned legally to manumit a female slave, but not a male slave.

30. In medieval and early modern Europe, physicians were integral to the process of determining sex. See Datson and Park, “Hermaphrodites in Renaissance France.”

31. See Ibn al-Qayyim al-Jauziyya, Tuhfat al-naudud bi-ahkam al-naudud, which includes a long chapter on circumcision.


33. This is not to say that they thought, as modern feminism does, that the science of biology itself was socially or culturally constructed, but that they considered the boundary between male and female to be important because it implied a difference in social anatomy.

34. Concluding a marriage contract in the presence of witnesses is the only legal act required in constituting a marriage in Islam. There are impediments to marriage that result from close blood or milk ties, and so marriage is forbidden with any of the incest-forbidden relatives (muharim), with the muharim of one’s wet nurse, or with women who are related to each other in forbidden degrees by consanguinity, affinity, or fosterage.

Marriage contracts may be concluded on behalf of minors by their guardians or fathers, and these marriages are consummated when the children reach puberty. Even without consummation, however, these are valid marriages and establish the rights of inheritance between husband and wife. All of these rules apply equally to the khanun.

35. Determining whether the marriage was defective or null affected the possible inheritance by either spouse.

36. This conservative tendency with respect to marriage must be taken into consideration when trying to understand the divorce laws. The popular conception that divorce by repudiation is accomplished in Islam easily or without consequences is misleading. Although technically possible, it is disapproved of, and numerous Prophetic Traditions (hadiths) denounce the practice.
