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FORENSIC MEDICINE AND ITS LEGAL IMPLICATION ON SELECTED MATTERS IN ISLAMIC LAW OF INHERITANCE

Nafiu Ahmed Arikewuyo*

Abstract: One of the driving forces behind the use of a reason-based approach in Islamic law is the evolution of a new occurrence that needs religious verdicts. The modern era is highly characterised by new developments in technology that have reshaped the face of many disciplines, including medicine. Because *ijtihad* (independent reasoning) has played a major role in the development of the Islamic law of succession across ages, this study focuses on the legal implications of medical forensic evidence on some issues under the Islamic law of inheritance. The research adopts a qualitative approach through content analysis of literature on the subject. Some of the medical-related matters sampled by the study are the establishment of lineage through DNA, murder through contagious disease and transgender surgery. The legal implications of these medical matters are discussed as they relate to kinship as one of the causes of inheritance, killing the deceased as one of the impediments to inheritance, and the gender-based sharing formula in inheritance. The study recommends further study into other medical aspects with legal implications of the Islamic law of inheritance.

Keywords: *medical, forensic, legal, Islamic, inheritance*

INTRODUCTION

Islamic jurisprudence has developed a sophisticated methodology centred around revealed sources and interpretative principles to derive rulings on all aspects of human life. This ingenious legal theory equips jurists with intellectual tools to engage in juristic reasoning (*ijtihad*) to address new challenges. One of the challenges thrown by modern technology, most especially in the Islamic legal system of justice administration, is scientific forensic evidence, which has attracted significant academic attention. The polemics over the admissibility of documentary evidence in the Islamic legal system has, according to Ismail et al., been extended to forensic science.¹ According to Baharudden, Ruskam and Yakub, forensic science is part of

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¹ Wan Abdulfattah Ismail et al., "A Preliminary Analysis on the Admissibility of Documentary Evidence via Forensic Science Method According to Islamic Syariah Law," *Turkish Online Journal of Qualitative Inquiry* 12, no. 4 (2022), 4.

qarīnah (circumstantial evidence), which has been discussed by the early Muslim jurists in their legal works.² It is not farfetched, going by the sophistication and non-equivocation inherent in the results generated through modern forensic science, that the latter is more reliable than the former in terms of speculation and clarity, respectively. Hence, the likelihood of varying religious verdicts is expected to be given when the ancient concepts of expert opinion and modern forensic science are taken side by side.

Previous studies have vested academic interest in the admissibility of modern forensic science, especially forensic medicine, as evidence on which a legal judgment can be premised. Mahmud and Mainiyo have made a case for the admissibility of technology in the Islamic criminal justice system.³ Korbatiéh assesses the possibility of accepting DNA as an evidence to prove adultery with a submission that “accepting DNA will reduce the procedural burden of proving the crime of adultery and will also achieve the administration of justice.”⁴ Omar examines the recognition of forensic medicine in Egyptian Sharia courts, concluding that “the subject cannot be studied without reference to documentary evidence, and proper attention to its social, institutional, and intellectual contexts.”⁵ Alkahtani et al. trace the historical development of forensic medicine and explore how the Islamic legal system can benefit from it.⁶ Ismail et al. assert that forensic science is part of documentary evidence with a conclusion that “Islam allows the use of forensic science methods in a legal matter.”⁷ Baharuddin, Ruskum and Yacob submit that accepting forensic science realises the attainment of *maqāsid* Sharia.⁸ In another article, Baharuddin et al. coin the term *fiqh forensics* to emphasise the need for the Islamic legal system to fully integrate modern forensic science in its system of administration of justice.⁹

The above shows that the discussion of modern forensic science generally and forensic medicine particularly in the Islamic legal system has been exhausted. This article, therefore, focuses on an area that has not been addressed. The submissions of previous researchers are yet to be applied to specific matters, including the Islamic law of inheritance. Issues such as establishing kinship through blood relationships, transgender surgery and murder through contagious disease are related to and have legal implications on the Islamic law of inheritance. Hence, this study addresses them using the general discourse of the issue.

² Ahmad Baharuddin, Aminuddin Ruskam and Abdul Rahim Yacob, “The Role of Forensic Biology in Realising Maqāsid al-Shariah (The Objectives of Islamic Law),” *Sains Humanika* 4, no. 1 (2015), 11.

³ Muawiya Dahiru Mahmud and Attahir Shehu Mainiyo, “Islamic Law in Modern World: Using Technology in Islamic Criminal Justice System,” *Journal of Research in Humanities and Social Science* 3, no. 8 (2015), 6.

⁴ Souha Korbatiéh, “Evidence Rules in Sharia and the Impact of Modern Technology and DNA Testing,” *Australian Journal of Islamic Studies* 5, no. 3 (2020), 5.

⁵ Omar Anchassi, “In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt (by Khaled Fahmy),” *The American Journal of Islamic Social Sciences* 36, no. 3 (2019), 73.

⁶ Theeb Alkahtani et al., “Forensic Science in the Context of Islamic Law: A Review,” *Journal of Forensic and Legal Medicine* 34 (2015), 180.

⁷ Ismail et al., “A Preliminary Analysis on the Admissibility of Documentary Evidence,” 2032.

⁸ Baharuddin et al., “The Role of Forensic Biology in Realising Maqāsid al-Shariah,” 13.

⁹ Ahmad Syukran Baharuddina et al., “Fiqh Forensics: Integration between Sciences and Islamic Law for Autopsies and Identification of Deceased,” *Sains Humanika* 4, no. 2 (2015), 2.

AN OVERVIEW OF MEDICAL FORENSIC EVIDENCE IN ISLAMIC LAW

Etymologically, the noun forensic derives from the Latin word ‘forensis,’ which means ‘of the forum.’ Here, ‘forum’ is recorded from the ancient times of the Roman Empire, as the Senate used to have open public discussions and conduct its meetings in a place with this name.¹⁰ As in Webster’s dictionary, it can be defined as solving legal problems through scientific analysis of physical evidence. Metwally defines forensic science as “the application of scientific or technical practices to the identification, collection, evaluation, and interpretation of evidence for civil and criminal law or administrative issues.”¹¹

According to Alkahtani et al., forensic medicine is “a branch of medicine that specializes in gathering and presenting medical evidence in legal disputes.”¹² “The evidence can be gathered from live and deceased subjects depending on what is trying to be established, be it the degree of injury sustained in an assault or cause of death in a murder.”¹³

The history of forensic medicine is difficult to ascertain. Although the study of the human body has been documented since ancient Egypt, evidence of its use in legal proceedings is scanty or absent.¹⁴ The first clear sign of forensics in Europe arrives at the end of the Roman Empire with the Justinian Laws, in which the validity of a medical expert as a witness is briefly alluded to. With the advent of the Dark Ages, forensic medicine became twisted and lost by religious dogma and only resurfaced in the mid-16th century. At this time, the Caroline Code was published in which it was stated that all judges must seek the opinion of a medical expert in cases involving murder, poisoning or any other form of personal injury. From this point onwards, forensic medicine evolved rapidly and, in the last century, has become a staple of most legal proceedings in Europe and America.¹⁵

Generally, what is later known as forensics had a similitude in the history of Islam. Muslim jurists have termed any expert’s witness that can aid a Muslim judge in ascertaining the truth, as *qarā’in* (circumstantial evidences). *Al-qarinah* has not been defined precisely in the classical books of Islamic penal law with other methods of proof.¹⁶ Perhaps, al-Jurjāni (d. 1078) could be considered as the first jurist who made an effort to define *qarinah* in the juridical sense. According to him, *qarinah* means a matter that indicates what is searched for.¹⁷ Having considered that the definition given by Zaydan is more consistent with an overall view of Islamic jurisprudence, *qarinah* is defined as whatever signs or attributes show or indicate the

¹⁰ Ibid., 3.

¹¹ Mohamed Metwally, “Forensic Organizational Psychology: Shedding Light on the Positive Repercussions of Ethical Leadership in Forensic Medicine,” *Egyptian Journal of Forensic Sciences* 9, no. 1 (2019), 3.

¹² Alkahtani et al., “Forensic Science in the Context of Islamic Law,” 180.

¹³ Ibid.

¹⁴ Ibid, 180.

¹⁵ Ibid.

¹⁶ Ramlee Zulfakar, “The Role of Qarinah (Circumstantial Evidence) in Islamic Law of Evidence: A Study of the Law in Malaysia, with Reference to the Rules and Principles of English Law” (Master’s diss., Glasgow Caledonian University, 1997), 46.

¹⁷ Ali Al-Jurjani, *At-Ta’rifat* [The Definitions] (Dar Al-Kutub Al-’lmiyyah, 2000), 175.

existence or non-existence of something.¹⁸ Daud, in his research, says that this definition is supported, agreed and approved by numerous scholars to be complied with.

They relied on the Qur'ānic and Sunnatic provisions in admitting such evidence. Among such provisions include:

He said: "It was she that sought to seduce me – from my (true) self." One of Her household saw (this) and bore witness (thus): "If it be that his shirt is rent from the front, then is her tale true, and he is a liar! But if it be that his shirt is torn from the back, then is she the liar, and he is telling the truth!" So when he saw his shirt – that it was torn at the back – (her husband) said: "Behold! It is a snare of you women! Truly, mighty is your snare! O Joseph, pass this over! (O wife), ask forgiveness for thy sin, for truly thou hast been at fault!"¹⁹

Azziz, quoting Mawardi (d. 1058), a prominent exegete of the Qur'ān, asserts that these verses support the admission of testimony from an expert as circumstantial evidence, particularly when there is no alternative evidence on which to rely.²⁰ Another verse is "And pursue not that of which Thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning)."²¹ Qurtubi explains this verse as meaning that one should follow the dictate of what is clear and unambiguous.²² Undoubtedly, modern forensic medicine belongs to the category of what is clear.

Prophetic precedence also supports recognition of forensics, as shown in the following incident:

Narrated 'Abdur-Rahmān bin 'Auf: While I was standing in the row on the day (of the battle) of Badr, I looked to my right and my left and saw two young Ansari boys, and I wished if I were between some stronger (men) than they. One of them called my attention saying, "O Uncle! Do you know Abu Jahl?" I said, "Yes, what do you want from him, O my nephew?" He said, "I have been informed that he abuses Allah's Messenger. By Him in Whose Hands my soul is, if I should see him, then my body will not leave his body till either of us meet his death." I was astonished at that talk. Then the other boy called my attention saying the same as the other had said. After a while, I saw Abu Jahl walking amongst the people. I said (to the boys), "Look! This is the man you asked me about." So, both of them attacked him with their swords struck him to death and returned to Allah's Messenger to inform him of that. Allah's Messenger asked, "Which of you has killed him?" Each of them said, "I have killed him." Allah's Messenger asked, "Have you cleaned your swords?" They said, "No." He then looked at their swords and said, "No doubt, you both have killed him and the spoils of the deceased will be given to Mu'adh bin 'Amr bin M-Jamuh." The two boys were Mu'adh bin 'Afrā' and Mu'adh bin 'Amr bin AlJamuh.²³

Another Prophetic tradition with more connection to forensic medicine is narrated by Abu Hurayrah:

¹⁸ Mohd Noor Daud, *Qarinah Dan Pemakaiannya Dalam Kehakiman Islam* [Circumstantial Evidence in Islamic Law] (Universiti Malaya, 2003), 78.

¹⁹ Qur'ān 12:26-29.

²⁰ Azziz Bashir Rawan, "Al-Khibrat at-Tibbiyyah wa Atharuha fi al-Fiqh" [Forensics and its Implications on Islamic Jurisprudence] (PhD diss., Islamic Science University of Malaysia, 2022), 33.

²¹ Qur'ān 17:36.

²² Muhammad bin Ahmad Qurtubi, *Tafsīr al-Qurtubi* (Darul Qutub al-Misriyyah, 1964), vol. 5, 432.

²³ Muhammad bin Isma'īl Bukhāri, *Ṣaḥīḥ al-Bukhāri* (Dar ibn Hazm, 2008), no. 3141.

A man came to the Prophet; and said, “O Allah’s Messenger! A black child has been born for me.” The Prophet asked him, “Have you got camels?” The man said, “Yes.” The Prophet asked him, “What color are they?” The man replied, “Red.” The Prophet said, “Is there a grey one among them?” The man replied, “Yes.” The Prophet said, “Whence comes that?” He said, “May be it is because of heredity.” The Prophet, said, “Maybe your (latest) son has this color because of heredity.”²⁴

Forensic medicine is also relied on in the following *hadīth*, narrated by the wife of the Prophet, Aishah:

Once Allah’s Messenger entered upon me and he was in a very happy mood and said, “O ‘Aishah: Don’t you know that Mujazziz AlMudliji entered and saw Usama and Zaid with a velvet covering on them and their heads were covered while their feet were uncovered.” He said: “These feet belong to each other.”²⁵

Azziz argues that these two quoted *hadīth* imply that the Prophet guides his followers to recognise the result of DNA and genetic sciences.²⁶ The Prophet was so considerate of medical forensics that he would cease from giving a legal directive based on medical information. This is what happened in the narration: “I was thinking of forbidding *Ghail*, until I was told that the Romans and Persians do that, and it does not harm their children.” Mālik said, “*Al-Ghail* refers to a man having intercourse with his wife when she is breastfeeding.”²⁷ The Companions also recognised the legitimacy of expert testimony and the extent of forensic sciences. For example, a woman who claimed rape produced a cloth with what she maintained was semen, so Ali soaked traces of the stain in boiling water, turning them to solid white, and on smelling it was found to be egg white not semen.²⁸

Meanwhile, Ismail et al. classify medical forensics under documentary evidence rather than circumstantial evidence.²⁹ They submit that the admissibility of documentary evidence is based on a *hadīth*:

Anas bin Malik has said: “When the Prophet wanted to send a letter to the Roman government, they said that they would definitely not read the letter unless there was an official stamp, so *Rasulullah* took a silver stamp engraved with the words of *muhammad rasulullah* and stamped on the letter to be sent to the Roman government.”³⁰

Based on this *hadīth*, they conclude that it shows the official stamp is one of the forensic science methods in documentary evidence to ensure a document’s authenticity.

It should be stressed that modern forensic science generally, and medical forensics particularly, vary with traditional forensics that were recognised by the Qur’ān and Sunna in terms of clarity, empiricism and reliability. Qaradawi submits that modern forensics have reached a level of reliability that cannot be ignored by a Muslim scholar living in the modern

²⁴ Ibid., no. 5302.

²⁵ Ibid., no. 6771

²⁶ Rawan, “Al-Khibrat at-Tibbiyyah wa Atharuha fi al-Fiqh,” 56.

²⁷ Ash’ath Abu Daud, *Sunan Abi Daud* (Dar Ibn Haytham, 2008), no. 3882.

²⁸ Korbatiéh, “Evidence Rules in Sharia,” 10.

²⁹ Ismail et.al., “A Preliminary Analysis on the Admissibility of Documentary Evidence,” 2031.

³⁰ Bukhāri, *Ṣaḥīḥ al-Bukhāri*, no. 7162.

world.³¹ According to Korbatiéh, modern technology, though accepted carefully and slowly, has impacted the Muslim world through areas such as DNA testing and measures are being taken to fit such technologies within traditional Sharia rules and procedures.³²

A minority of scholars regard forensic evidence as analogous to witness testimony or confession, due to the Sharia definition by classical and post-classical scholars. For example, Ibn Qayyim (d. 1350) stated evidence (*bayyina*) is “an umbrella term...for all that...manifests the truth” because *bayyina* in the Qur’ān means clear proof.³³ As such, he regards any type of legal evidence, including circumstantial evidence, as fulfilling the role of *bayyina*. Haneef suggests forensic evidence, consistent with Imam Ali’s egg white case, has a unique ability to prove or disprove a case, and is an improved method of establishing truth, so ignoring it would be tantamount to injustice. Forensic evidence, Haneef contends, fulfils the standard of *bayyina* as a means of ascertaining truth.³⁴

Despite this compelling argument by the minority, the majority of contemporary scholars, jurists and authors have determined forensic evidence under Sharia is circumstantial, or even very strong/conclusive circumstantial evidence, but not decisive evidence, due to the fear of error or tampering, and because “it still rests on probabilities...tainted with doubts and obscurity,” which cannot prove *hudud* (crimes) as these are nullified by doubts.³⁵

DNA AND ITS IMPLICATION ON INHERITANCE

Since discovery of the existence of DNA, which is an abbreviation of deoxyribonucleic acid, Islamic law has experienced heated debate over its implications on criminal and family law aspects. DNA is defined as the molecule inside cells that contains the genetic information responsible for the development and function of an organism.

DNA carries genetic information, a chain of sugar and phosphate elements in organic bases that present in nearly all living organisms DNA profiling also known as DNA typing, DNA testing, or fingerprinting genetic) assists in identifying and providing enough information on individuals by their respective DNA profiles. DNA profiles and outlines sets of numbers that represent a person’s DNA makeup, which is an identification of the person’s.³⁶

DNA was discovered in 1869, though its role in identifying heretic genetics was only detected in 1943.³⁷ Modern DNA is a replica of the traditional *qafah*, i.e. physiognomist, whose testimony in establishing a resemblance between two persons as a basis of kinship has been

³¹ Yusuf Qaradawi, *Al-Ijtihad* (Darul Qalam, 1996), 67.

³² Korbatiéh, “Evidence Rules in Sharia,” 11.

³³ Ibid.

³⁴ Sayed Haneef, “Sex Reassignment in Islamic Law: The Dilemma of Transexuals,” *International Journal of Business, Humanities and Technology* 1, no. 1 (2011), 4.

³⁵ Korbatiéh, “Evidence Rules in Sharia,” 13.

³⁶ Baharuddin et al., “Fiqh Forensics,” 12.

³⁷ Azziz, “Al-Khibrat at-Tibbiyyah wa Atharuha fi al-Fiqh,” 56.

recognised in Prophetic tradition. Scholars such as Qurtubi have used the provision of Q17:36 as the basis for recognition of physiognomy.³⁸

The matter of kinship, which comprises paternity, constitutes one of the five primary essential objectives of Sharia, with the others being faith, soul, intellect and wealth. For the sake of protecting kinship, Islam legislates many laws, including the prohibition of adultery, defamation, seclusion with a non-relative of the opposite gender, child adoption and permission of marriage. Kinship is one of the three major eligibilities of inheritance in Islam. Hence, its establishment is for inheritance and ablution is for prayer.

Traditionally, Muslim scholars agreed on three means of establishing kinship: through the bond of a valid marriage, the claim of a child by someone in a non-disputable circumstance (*istilhaq*), and through *bayyinah* (evidence that requires witnesses in a disputable circumstance).³⁹ This agreement implies that, once kinship has been established through one of the mentioned means, DNA is not fit to counter the status quo. However, it should be noted that DNA belongs to the category of controversial means of establishing kinship.

The controversy over the adoption of DNA as a means of establishing paternity in Islamic law has attracted the attention of modern jurists in their individual and collective capacities. Hence, there are many scholarly resolutions on the issue by various international *fiqh* councils. The majority opinion of scholars maintains paternity verification exclusively as established via marriage or *li'an*, and DNA testing cannot be used to create paternity outside wedlock. The Islamic Fiqh Council and other councils stated that DNA paternity testing should be used with extreme caution, as Sharia texts take precedence over such tests.⁴⁰ Some scholars have further argued that establishing paternity for out-of-wedlock births not only undervalues legal relationships but ignores social repercussions attached to progeny and diminishes the marital bed maxim, which was developed to maintain legal lineage, spare society from moral degeneration and save children from being harmed by paternity disputes. Since there may still be errors with DNA testing based, not on technique, but human action, then, to maintain precaution and privacy, Sharia principles overrule genetic tests for paternity cases. These *fiqh* and Sharia principles evidence that, in Islam, unique notions of modesty and licit sexual relations must be maintained in judicial rulings. While opinions state DNA testing can be used for public welfare issues, such as criminal cases or personal identification, many confine its use in paternity cases to supporting evidence only.⁴¹

There are three positions in this debate over whether DNA testing can be used to prove paternity or whether such moves should be resisted when a couple is unmarried. One position seeks to defend traditional values and concepts, fearing the 'erosion of the marital family' will result in social chaos; the opposing position is willing to incorporate updated methods to traditional Sharia constructs, such as totally supplanting witness testimony with DNA testing.

³⁸ Qurtubi, *Tafsīr al-Qurtubi*, vol. 4, 67.

³⁹ Shams al-Din Muhammad ibn al-Qayyim, *I'lam al-Muwaqī'in 'an Rabb al-'Alamin* [Informing the Speakers in the Name of God] (Dar al-Kutub al-'Ilmiyya, 1992), 167.

⁴⁰ Korbatiéh, "Evidence Rules in Sharia," 15.

⁴¹ Ibid.

The final position is taken by those who look at modern technology and use *ijtihad* principles to introduce its evidence with caution, maintaining Sharia objectives and outcomes. This last category of scholars looks at the marital presumption of paternity critically and considers the benefits of establishing biological paternity, while simultaneously separating *hudud* crimes from allowing the use of DNA testing.⁴²

It is worthy of note that the traditional consensus of Muslim jurists has been established on ignoring any means of paternity verification in “wedlock” circumstances.⁴³ Despite the traditional negative consensus over DNA in wedlock matters, the resolution of the Islamic Fiqh Academy under the Organization of Islamic Cooperation has highlighted the areas where DNA is admissible and relevant to establishing lineage and paternity:

1. An abandoned child whose paternity is being disputed by two different persons.
2. Prevention of a husband from completing the process of denying his paternity over a child (*li'an*).
3. In a situation where there is a mix-up among newborn babies in the hospital.
4. In a situation where there is a mix-up among newborn babies on the battlefield.
5. In a situation where sexual intercourse was made but in a confusing state by other than the husband; there may be a need for paternity verification after delivery.
6. In a situation where there is a need to ascertain the real sperm owner of a child conceived through in vitro fertilisation.⁴⁴

Conclusively, the establishment of lineage or paternity in these situations is admissible in Islamic inheritance. Hence, the adoption of DNA should be limited to these cases.

MURDER THROUGH CONTAGIOUS DISEASE

Another issue from forensic medicine with much legal controversy in inheritance is killing someone through a contagious disease. Murder, otherwise known as *qatl* in Islamic criminal law, is to cause the death of another person deliberately or unintentionally. It is one of the disqualifiers from inheritance in Islam, as mentioned by a *hadīth* that “a killer shall not inherit the victim of his killing.”⁴⁵ Preventing the perpetrator of homicide from inheriting or benefiting from their victim is one of the steps taken by Sharia to protect souls and this legislation attains the purpose of a juristic maxim, which provides that “anyone desperate to achieve a purpose before his required time, will be punished by making the purpose forbidden for him.”⁴⁶

However, there is a contention over such killing that can constitute a disqualifier from inheritance. While the Shafite School of Law sticks to the literal provision of the tradition by maintaining that all manners of homicide, deliberate or not, prevent inheritance, other schools with slight differences contend that it is only a deliberate or semi-intentional killing perpetrated

⁴² Ibid.

⁴³ Islamic Fiqh Academy, “Islamic Rulings on DNA,” *Journal of Islamic Fiqh Academy* 16 (1999).

⁴⁴ Ibid., 34.

⁴⁵ Isa Tirmidhi, *Sunan at-Tirmidhi* (Dar Ibn Haytham, 2008), no. 2109.

⁴⁶ Nafiu Ahmad al-Jawhari, *Basic Principles of Islamic Law of Succession* (At-Taqwa Centre, 2020), 21.

with the spirit of transgression.⁴⁷ The two ingredients of evidence needed to prove this crime, according to the Hanafites, are intention and transgression, while others have restricted it to transgression as a means of blocking the door of evil.⁴⁸ From this explanation, the summary of the substance of homicide that will prevent inheritance can be understood through the tripartite classification of homicide in Islamic criminal law: intentional, semi-intentional and unintentional. Intentional has been defined as killing with a weapon that normally terminates the existence of a human being, semi-intentional is killing with a weapon capable of harming in a normal circumstance, and unintentional is killing by accident. Except for Shafi'iyah, who did not distinguish between the three classifications when it comes to inheritance matters, others disagree over semi-intentional killing as an impediment to inheritance. The preferred opinion is the consensus taken across all schools over intentional homicide being an impediment to inheritance. This is the take of the Maliki school, while Hanafi and Hanbali extend the ruling to semi-intentional killing.⁴⁹ The basis for the above preference given to Maliki's view is that having the intention of terminating another person's life is the legal reason for retribution, and by extension, stopping the culprit from achieving the purpose for which they committed the crime. Applying the same legal action to a person who did not intend to terminate life is tantamount to injustice. They deserve punishment that is commensurate to their crime, i.e. having the intention to harm. Hence, any modern application must tally with the requirement of traditional intentional homicide.

The validity of contagious disease has been asserted by a Prophetic tradition, as did the medical experts, which was narrated by Usamah bin Zayd that,

Plague was a means of torture sent on a group of Israelites (or on some people before you). So, if you hear of its spread in a land, don't approach it, and if plague should appear in a land where you are present, then don't leave that land to run away from it (i.e., plague).⁵⁰

Ibn Qutaybah quotes two *hadīth* where one reports the Prophet saying that diseases are not contagious and in the other one he says that one should run for their life from a victim of leprosy as one would run from a roaring lion. While attempting to reconcile the two traditions, the author affirms that diseases are transmitted but only with the Divine permission of Allah. Hence, touching a victim of a contagious disease does not necessarily suggest contracting it.⁵¹ While contagious disease might have caused controversy among past jurists of Islam, the modern sophisticated technology that has migrated medicine above its traditional status has made such controversy ineffective among the contemporary scholars of Islam. Recent epidemics such as COVID-19, Ebola disease and others have proven beyond doubt the danger inherent in contagious diseases and how deadly they can be to the human community.

⁴⁷ Muhammad bin 'Ali aṣ-Ṣābūnī, *Al-Mawārīth Fī Ḍaw al-Kitāb Was Sunnah* [Inheritance in the Light of the Qur'an and Sunnah] (Darul Furqan, 2006), 56.

⁴⁸ Azziz, "Al-Khibrat at-Tibbiyyah wa Atharuha fi al-Fiqh," 59.

⁴⁹ Wahbah Zuhayli, *Al-'Uqubat ash-Shar'iyah wal-Aqdiyyah Wa ash-Shahadat* [Islamic Penal Laws and Procedures] (College of Da'wah, 1991), 58.

⁵⁰ Bukhāri, *Ṣaḥīḥ al-Bukhāri*, no. 3473.

⁵¹ Abu Muhammad ibn Qutaybah, *Ta'wīl Mukhtalafil Hadīth* [Reconciling the Contradictory Tradition], 2nd ed. (Muassasat Iqra, 1999), 234.

Moving around the community as a known carrier of contagious disease is regarded as a deliberate attempt to harm society. Islam has prohibited Muslims from harming one another when the Qur'ān provides that, "And those who harm believing men and women undeservedly, bear (on themselves) a calumny and a glaring sin."⁵² Based on this, the International Council for Islamic Jurisprudence resolves that, "...deliberate spreading of epidemics and contagious disease in any form is a forbidden act and a grave atrocity in Islam. It attracts legal penalty based on the implication of the act on individual and society."⁵³

However, killing another person through a contagious disease that has been confirmed by medical experts has not been reported in the classical works on Islamic criminal law. Hence, the need for proper contextualisation of the issue within the framework of traditional provisions on crimes and modern realities. That carrying a contagious disease capable of killing is likened to using a weapon capable of harming is not out of place. Hence, it is accurate to categorise it under the semi-intentional mode of killing, as did Azziz. The previous argument over which type of homicide can legally prevent inheritance is now fit to apply to the discourse. Going by the previous assertion, which says the preferred argument is that of Maliki which adopts only intentional killing as an impediment to inheritance, it follows that killing through contagious disease does not stop an heir inheriting from the victim of their act. This argument is supported by the submission of Ibn Qutaybah that the consent of Allah causes disease to be transmitted, and such transmission is not certain in all circumstances. Having submitted this does not imply that deliberately spreading an epidemic will not attract discretionary punishment. The extent of harm done by the act will determine the severity of the penalty.

EFFECT OF TRANSGENDER SURGERY ON INHERITANCE

Transsexualism or transgenderism is a condition where individuals feel a sense of dissatisfaction due to lack of alignment between their physical appearance and gender identity or dissatisfaction with their genitalia. This condition can be expressed through various means, including appearance, makeup and behaviour, and may even result in sex reassignment surgery (SRS).⁵⁴ Tolino contends, while 'transsexuality' is most often used to refer to people who decide to undergo SRS to 'pass' completely to the other sex, 'transgenderism' is a broader concept that is used for anyone with a gender identity different from their assigned sex.⁵⁵

On the medical level, since the 1980s, gender identity disorder has been used as the diagnosis to refer to what a person experiences as a result of the difference between his/her perceived sex and the one he/she was assigned at birth. For example, the tenth edition of the International Statistical Classification of Diseases and Related Health Problems (ICD10), published by the World Health Organization in 1993 and last republished in 2016, includes under the category gender identity disorder 'trans-sexualism, dual role transvestism, gender

⁵² Qur'ān 33:58.

⁵³ Azziz, "Al-Khibrat at-Tibbiyyah wa Atharuha fi al-Fiqh," 99.

⁵⁴ Misbahuddin et al., "The Implementation of MUI's Fatwa on the Position of Transgender Individuals, Gender Reassignment Surgery and Genital Refinement," *Jurnal Adabiyah*, 23, no. 2 (2023), 106.

⁵⁵ Serena Tolino, "Transgenderism, Transsexuality and Sex Reassignment Surgery in Contemporary Sunni Fatwas," *Journal of Arabic and Islamic Studies* 17 (2017), 226.

identity disorder of childhood, other gender identity disorders and unspecified Gender identity disorder'. Trans-sexualism is defined as A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.⁵⁶

The term “transgender” has been used for many different things. Hence, it is instructive to have a classification for things that render their meaning to give an accurate religious outlook for each category and identify the one that this study intends. According to Sultana, Idris and Sarwar, there are three categories of transgender. The first refers to people who choose to dress up and look like men or women (their opposite sex). The characteristic of this category is they feel their gender identity is not compatible but do not undergo SRS. Second is cross-dressers or transvestites, who are satisfied when they are dressed as the opposite sex, but do this as a form of gender expression, not gender identity. Third is transsexuals, who dress up and behave like their opposite sex, even to the point of SRS. This last category is considered the most extreme measure in the transgender phenomenon.⁵⁷ From the above classification, it can be seen that the first and second categories belong to the *takhannus* and *tashabbuh* condemned in the *hadīth*: “Ibn ‘Abbās r.a. said: *Rasūlullāh* (peace be upon him) cursed men who resemble women and women who resemble men.”⁵⁸ In a related tradition, Ibn ‘Abbās said the prophet cursed men who resemble women and women who resemble men. The Prophet said: “Get them out of your house.” Ibn ‘Abbās said: The Prophet got a man out and ‘Umar got a woman out.⁵⁹ Also, Abū Hurairah said that Rasulullah (peace be upon him) cursed men who dressed up in women's clothing and women who dressed up men's clothing.⁶⁰

The Prophet's malediction to the transgender group has a wisdom or lesson. Ibn ‘Abbās said that *hikmah* of malediction to the people who resemble the opposite sex is that their existence contradicts God's provision.⁶¹ Allah created humankind with a perfect form and determined their gender identities based on their sex—male or female—and it is congenital biologically. Allah said in the Qur'ān: “O mankind, indeed we have created you from male and female and made you peoples and tribes that may you know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.”⁶² Hence, people who deliberately resemble their opposite sex—in clothing that especially shows the identity of the opposite sex, gait and speech—including people who helped them too, were considered to deliberately rebel and change what God has given.⁶³

⁵⁶ Ibid.

⁵⁷ Iram Sultana, Hafiz Muhammad Idris and Hafiz Muhammad Sarwar, “Status and Rights of Transgender from Islamic Perspective,” *Al-Qamar* 4, no. 3 (2021).

⁵⁸ Bukhāri, *Ṣaḥīḥ al-Bukhāri*, no. 1485.

⁵⁹ Ibid.

⁶⁰ Abu Daud, *Sunan Abi Daud*, no. 1967.

⁶¹ Ahmad ibnu Hajar, *Fath Al-Bari Sharh Sahih Al-Bukhari* [Commentaries on the Authentic Collections of Bukhari] (Dar Al-Ma'rifat, 2015), vol. 3, 78.

⁶² Qur'ān 49:13.

⁶³ Muh. Bahrul Afif, “Islam and Transgender (A Study of Hadith about Transgender),” *International Journal of Nusantara Islam* 7, no. 2 (2019), 191.

It is apparent that resembling an opposite sex does not change one's natural identity. Hence, there is no legal implication recorded for this act. The category of transgenderism that has generated heated debate culminates in a change of sex. SRS requires the individual to become transsexual, whether from male to female or vice versa. In the first situation, the penis is removed and reconstructed into a vagina (i.e., castration), and the breasts are enlarged. In the second scenario, the breasts are removed, a penis is constructed and the vaginal canal is closed to varying degrees. In both cases, psychiatric and hormonal treatment may be provided.⁶⁴ According to Misbahuddin et al., there are three different categories of gender reassignment surgeries within the medical profession. The first category is corrective or perfection surgeries, which are conducted on individuals who have been born with genital abnormalities such as a non-penetrating penis or vagina. The second category involves the removal of one of dual genitalia and is performed on individuals who are born with both (penis and vagina). The third category pertains to gender reassignment surgeries that are carried out on individuals who have been born with normal genitalia.⁶⁵ While the first and second categories belong to medical therapy encouraged by Islam, the third category, which is the intent of this study, has been condemned by Muslim scholars relying on verses of the Qur'ān that condemn tampering with the creation of Allah (for example Q30:30 and Q4:119).

However, according to Alipour, until the 1980s, SRS was considered forbidden, but by the late 1980s, something had changed, and it was legalised (made halal) by the fatwas of Ayatollah Khomeini and Sheikh al-Tantawi in Iran and Egypt, respectively. The verdict of these two prominent figures attracted condemnation from conservative scholars across every Muslim group, including the Shi'ah.⁶⁶

The implication of gender reassignment surgery on the inheritance of the concerned person is a matter that calls for attention because Islamic law often provides for different shares for each gender. Fadilah et al. hold, if the nature and purpose of sex surgery is to change God's creation from male to female or vice versa, then the status of the sex remains, unchanged.⁶⁷ Their view is supported by a juristic maxim, which says, "Anything built on invalid is also invalid."⁶⁸ Hence, the transgender person will be treated as the sex they were before SRS. This contradicts the legislative provision of some Muslim countries in the contemporary world, which gives the right of inheritance as per the individual's self-perceived gender identity.⁶⁹

⁶⁴ Hamza Hammad, "Sex Change in Islamic Jurisprudence (Fiqh) UAE Law: A Juristic Analysis," *Medicine, Law & Society* 12, no. 2 (2019), 80.

⁶⁵ Misbahuddin et al., "The Implementation of MUI's Fatwa," 109.

⁶⁶ M. Alipour, "Transgender Identity, The Sex-Reassignment Surgery Fatwās and Islāmīc Theology of a Third Gender," *Religion and Gender* 7, no. 2 (2017), 166.

⁶⁷ Sarah Fadilah et al., "Analysis of Legal Position due to Sex Change: A Comparison of Indonesian Civil Law with Islamic Law," in *Proceedings of Malikussaleh International Conference on Law, Legal Studies and Social Science*, vol. 2, ed. Tan Kamello (2022), 3.

⁶⁸ Muhammad bin Uthaymin, *Al-Usul wal Qawa'id al-Jami'ah* [The Principles and Comprehensive Maxims] (Maktabatul Furqan, n.d), 167.

⁶⁹ Ahmed Rana Afrasiab and Muhammad Siddique Hafiz, "The Transgender Persons (Protection of Rights) Act 2018: A Shariah Appraisal of Self-Perceived Gender Identity and Right of Inheritance of the Transgender," *Competitive Educational Research Journal* 2, no. 4 (2021), <https://ssrn.com/abstract=4145921>.

CONCLUSION

Forensic medicine falls under the term “*qarinah*,” i.e. circumstantial evidence, which assists in the administration of justice and fairness. It is traced to the Prophetic era and subsequent generations. However, modern medical forensics is distinguishable from the traditional in terms of certainty, reliability and empiricism. Hence, it deserves more consideration.

DNA results are not admissible as a means of establishing paternity or lineage in “wedlock” cases because doing so will clearly conflict with the Sharia provision that states marriage is sufficient proof of paternity verification. Despite this, there are circumstances, which are characterised by confusion and uncertainty, where the International Council of Islamic Jurisprudence approves of DNA to be the determinant of establishing lineage. One example is an abandoned child whose paternity is being disputed by two persons.

Committing homicide through the spread of contagious disease falls within semi-intentional killing in Islamic law. Based on the best-preferred opinion, which is the Maliki view, such a category cannot prevent one from inheritance, though it attracts discretionary punishment. Similarly, a transgender person who has successfully passed through SRS will be treated as the gender they were before SRS when it comes to the application of Islamic inheritance.

The article recommends further academic probing into other medical forensics and their legal implications on cases of inheritance in Islamic law.

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