

A Feminist Response to Address Inheritance Discrimination in South Africa

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SHORT BIO

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Introduction

Consider the following scenario: where a testator (X) executes an Islamic will and leaves behind a son (Y) and a transgender son (Z) (whose birth assigned sex was female and identifies as male) as his only relatives. When providing a lens to the scenario as outlined, it is important to be cognisant of the constitutional aspirations of equality and dignity through which we, as people, seek social cohesion amongst the diverse persons who occupy South Africa. The South African Constitution is aspirational both in the recognition and realization of rights but also because of the values that it seeks to entrench within our society. Much work is needed to address the injustices of the past and to ensure that day-to-day injustices and forms of discrimination are addressed.

Section 9¹ of the Constitution clearly recognizes the right to equality and non-discrimination by the state as well as private actors (whoever they may be). Moreover, it specifies specific grounds under which discrimination cannot be tolerated. Gender (which includes gender identity) and sex are such grounds.

Given the state's past and the struggles to address it, equality and the right to equality forms the bedrock on which we seek to build South Africa. It is the foundation from which other rights spring forth and are realized. Moreover, it is the standard that must inform all laws and their subsequent interpretations and against which all laws must be tested for constitutional consonance:²

[25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for the past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

The scenario outlined above raises the question of the rights of a transgender man under the law, as well as presenting an opportunity to

¹ Section 9:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds, in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

² Similar sentiments were echoed by the Minister of Finance and Others v Van Heerden [2004] (6) SA 121 (CC)

engage in broader conversations about gender identity and how persons with diverse sexual orientations, gender identities, and sexual characteristics are viewed and treated within the intersection of religion and their rights. Commonly, in South African and beyond, lesbian women, gay men, bisexual persons, transgender persons, non-binary persons, queer persons, intersex persons, and other individuals whose sexuality, gender, or bodies that differ from the cultural heteronormativity of society are referred to as LGBTQI+. The utilisation of this acronym can, in certain instances, create the impression that only the classes of persons mentioned in acronym are recognized and protected. Consequently, the term “SOGIESC” is often used in human rights discourses to signify that all people have rights, including LGBTQI+ persons as well as those not listed explicitly, but implied, under the plus sign.

SOGIESC is derived from the understanding that everyone has a sexual orientation (SO); a gender identity (GI), a gender expression (E), and sex characteristics (SC). Referring to classes of people who have diverse sexual orientations, gender identities, expressions, and sex characteristics obviates the perpetuation of language that may render certain identities, bodies, and individuals as invisible through the relegation of their identity to a plus sign.³ As such, we view it as an inclusive term.

The question we seek to address in our response is whether discrimination on the basis of gender identity can place a justifiable limitation on the rights to equality and dignity of a beneficiary of an Islamic will? In doing so, we provide a summary of the right to freedom of testation and how, in the application of religious belief and doctrine on the issue, it intersects with the South African Constitution. What follows is our response to the scenario

³ For various definitions and their meaning of the *Yogyakarta Principles*, see International Commission of Jurists (ICJ), “Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity,” March 2007 and ICJ, “The Yogyakarta Principles Plus 10 - Additional principles and state obligation on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics to complement the Yogyakarta Principles,” November 2017.

where we present the facts, the relevant legal framework, and our analysis conducted through an intersectional feminist lens.⁴

Freedom of Testation

Freedom of testation is a legal concept in South African succession law that permits a testator (or testatrix) to bequeath assets in their will in whatever way they deem fit. The freedom is not completely unrestrained and limitations are based on social and economic concerns that are included in statutes and concepts of common law. Freedom of testation is rooted in Section 25(1) of the Constitution that guarantees a person the right to own private property.⁵ The freedom to hold private property is guaranteed under Section 25(1) and a person may sell their property either during their lifetime or after death (according to Islamic law).⁶

Freedom of testation allows an individual who prescribes to the Islamic faith to draft a will stating that their estate must be distributed in terms of their faith. In practice, the will is often drafted based on the Islamic law of succession and, upon the death of the testator, an institution like the Muslim Judicial Council (SA) will issue an Islamic distribution certificate stating how the estate should devolve. It should be noted that freedom of testation (within the South African context) is limited and is subject to the South African Constitution that prohibits unfair discrimination. As a result, conflict may arise between the two legal systems. The authors argue that a synergy and essence can be found between the higher principles of Islam (Maqasid al Sharia)⁷ and the public interest (Maslahah) given the diversity of South African society.

⁴ See Kimberlé Crenshaw, "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics," *University of Chicago Legal Forum* 1 (1989): 139 – 167.

⁵ See *BOE Trust Ltd 2013 3 SA 236 (SCA) 26 I & 27* it was argued in this case that section 25(1) of the Constitution guarantees the right to freedom of testation. The court held that freedom of testation is linked to the constitutionally guaranteed right to human dignity.

⁶ See Muneer Abdurooaf, "A constitutional analysis of an Islamic will within the South African context," *De Jure Law Journal* 52, no.1 (2019): 321-366, <http://dx.doi.org/10.17159/2225-7160/2019/v52a16>.

⁷ The term 'Maqasid' (plural: of Maqasad) refers to a purpose, objective, principle, intent, goal, end. Maqasid Al-Shariah revolves around five principles or objectives, namely protection of faith (al-din), protection of life (al-'nafs), protection of intellect (al-

The essence of Maqasid al-Shariah is to avoid evil and uphold public interest.⁸ Maqasid al-Shariah is important as laws or rules (hukm) are only effective among Muslims and acceptable in the eyes of God if they are made within the purview of Maqasid al-Shariah.⁹ The consideration of the public interest (*Maslahah*) is a promising reflection of the Shariah and provides a basis on how to address new challenges within Muslim Society. The concept of *Maslahah*, developed as a source of law to accommodate “natural developments and social changes and needs”, provides an analytical lens to assess an ever-developing society within the parameters of the Sharia¹⁰. Furthermore, it ensures that there is no contradiction within the legal reasoning (*ijtihad*). As South Africa is neither a religious nor Islamic state but rather a constitutional democracy, those who follow various religions and seek to give effect to their religion in their everyday life are required to find a balance between their religious expression and the rule of law.

'aql), protection of lineage (an-nasl), and protection of property (al-mal/wealth). See Muhammad al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqasid Al-Shariah*, trans. Mohamed El- Tahir El-Mesawi (London-Washington: International Institute of Islamic Thought (HIT), 2006), 1: ii; Jasser Auda, *Maqasid Al-Shariah An Introductory Guide*, (Herndon, VA: IIIT, 2008); Muhammad Adil Khan Afridi, “Maqasid Al-Shari’ah and preservation of basic rights: Under the theme ‘Islam and its perspectives on global & local contemporary challenges’,” *Journal of Education and Social Sciences* 4 (2016): 274 – 285.

⁸ “When there is a plurality of conflicting interests and none appears to be clearly preferable, then prevention of evil takes priority over the realisation of benefit. This is because the Shari’ah is more emphatic on the prevention of evil, as can be seen in the hadith where the Prophet (p.b.u.h) has reportedly said: ‘When I order you to do something, do it to the extent of your ability, but when I forbid you from something, then avoid it’ (Narrated by Al-Bukhari Wa Muslim)” (Afridi, “Maqasid Al-Shari’ah,” 284).

⁹ Mohd Afandi Salleh, Abdul Majid Tahir Mohamed, Mohd Lotpi Mohd Yusob, and Fazidatul Aida Mat Yazid, “Maqasid al-shariah as a parameter in International Treaty,” *Advances in Social Science, Education and Humanities Research* 84 (2017): 170 – 175.

¹⁰ “Maslahah is one of the juristic devices that have always been used in Islamic legal theory to promote public benefit and prevent social evils or corruption. The plural of the Arabic word maslahah is ‘masalih’ which means welfare, interest or benefit. Literally, maslahah is defined as seeking the benefit and repelling harm. The plural of the Arabic word maslahah is ‘masalih’ which means welfare, interest or benefit. Literally, maslahah is defined as seeking the benefit and repelling harm.” (Abdulazeem Abozaid and Asyraf Wajidi Dusuki, “The challenges of realizing Maqasid al-Shari’ah in Islamic banking and finance” (paper presented at the IIUM International Conference on Islamic Banking and Finance, IIUM Institute of Islamic Banking and Finance, Kuala Lumpur, 23-25 April 2007), <https://iaif.ir/images/khareji/articles/other/60.pdf>.

An analysis of gender identity in Islam

As the will in the aforementioned scenario deals with issues of gender identity and equality, it is important to note that Islam holds that Allah (SWT) created man and woman from a single source and overturned all prior unjust rules that saw women as inferior in nature and quality¹¹. In regards to rewards and punishments, as well as money dealings and property ownership, Islam maintains equality between the sexes. Therefore, for many academics and scholars, this higher purpose of an equal society conflicts with the right of inheritance as the Qur'an declares (4: 11): "Allah command you as regards to your children's inheritance; to the male a portion equal to that of two females." On the basis of this verse, many argue that women are denied equal rights of inheritance, a clear case of injustice.¹²

This inequality in distribution is reflected in the scenario and gives credence to arguments that the unequal distribution of shares within the Islamic law of intestate succession discriminates based on gender identity as shares are distributed unequally in favour of one gender over another.¹³ Indeed, this will be the case both if Z is recognized as female or recognized as male.

Those who advocate that such inequality is justified within Islam argue that an individual may accumulate property in a variety of ways. In such instances, they claim that men and women are treated substantively equally.¹⁴ The rationale behind the inheritance law needs to be contextualized within the historical context, understanding that pre-Islam, women had no rights. Indeed, Islam liberated women from humiliating situations and granted them full rights, including the right to inherit. With its egalitarian philosophy, Islam ensured women's legal rights to inherit

¹¹ Kazi Arshadul Hoque, Muhammad Jalal Uddin, and Mohammad Saidul Islam, "Inheritance rights of women in Islamic law: An assessment," *International Journal of Islamic Thoughts* 2 (2013): 45 – 58.

¹² See Hoque, Uddin, and Islam, "Inheritance Rights,".

¹³ It is the authors experience that daughters will inherit lesser portions (or are left without property) of their fathers' estates and that their brothers are often made their financial protectors, having to provide for them financially. These situations place women in extremely precarious and vulnerable circumstances.

¹⁴ See Surat al-nisa', Verse 11 and 12, which should be read in conjunction with other relevant verses to see the balance and value behind the regulations outlined. See Hoque, Uddin, and Islam, "Inheritance Rights,".

property. The Islamic system is a comprehensive one in which inheritance is distributed based on liabilities. As a result of their increased liabilities, men receive a larger portion of the inheritance. Therefore, the purpose is to maintain fairness and balance within the family between male and female obligations. Islam protects women by exempting them from all obligations¹⁵ and ensuring their independent ownership.

South Africa is a deeply patriarchal society where people with diverse SOGIESC have historically been discriminated against. They experience not only one form of discrimination, but multiple forms of intersecting discrimination based on their sex, gender, race, and religion. This patriarchy permeates everyday life at work, home, and within religious communities. It is, therefore, important to question whether limitations of rights to inheritance is relevant to the lives of those who subscribe to the Islamic faith within our context and ever-evolving society.

A rights-based analysis of gender identity

The rights contained in the Constitution must find expression in the lived realities of South Africans for it to have value. South African courts have acknowledged that our particular history has subjected people with diverse SOGIESC to unfair discrimination, prejudice, and violence. The prohibited grounds for discrimination listed in Section 9 provides recognition of the fact that South Africa is comprised of individuals that differ in a variety of ways and that both the state and private parties must not subject any individual to prejudicial treatment on account of their differences (particularly where such differences have led to discrimination in the past).

International human rights mechanisms have also provided clarity and guidance on the rights of persons with diverse SOGIESC. The current United Nations Special Rapporteur on Freedom of Religion, Dr Ahmed Shaheed, engages with the intersection of freedom of religion and gender equality, including SOGIESC rights, in his March 2020 report.¹⁶ He writes that there

¹⁵ These obligations include the payment of the dowry prior to marriage and taking financial responsibility for the family and children. It is, therefore, understood that men have more financial obligations than women.

¹⁶ See United Nations, Human Rights Council, *Gender-based violence and discrimination in the name of religion or belief: Report of the Special rapporteur on freedom of religion or belief*, A/HRC/43/48 (24 February -20 March 2020), available

is evidence that all regions have used belief to deny reproductive health and sexual rights, criminalize protected conduct and deny equal personhoods to people with diverse SOGIESC, or undermine the right to freedom of religion or belief to women, girls, and persons with diverse SOGIESC. Furthermore, the laws identified as intended to protect the right of all individuals to manifest their religion or belief have been applied in ways that, ironically, result in discrimination on the same bases.

Specifically, in relation to discrimination and violence linked to religion by private actors, the Special Rapporteur expressed deep concern that religious interest groups or actors are invoking religious tenets to support their arguments in the “defence of traditional values rooted in interpretations of religious teachings about the social roles for men and women in accordance with their alleged naturally different physical and mental capacities; often calling on governments to enact discriminatory policies”.

Environments are, therefore, created in our society that seek to pit religious freedom and rights against the rights of persons with diverse SOGIESC. Areas of personal life, such as succession, are not exempt from what can be best described as a zero-sum approach. The relationship between these rights often results in “tense” discussions and debates in our society, where some have construed the rights as a zero-sum conflict. Utilized in this manner, the zero-sum approach seeks to undermine constitutionally enshrined rights and is at odds with not only the principles underlying international human rights jurisprudence but also our Constitution.

Freedom of religion and SOGIESC rights form part of the broader human rights context. As such, these rights must necessarily be balanced. The failure to consider the rights in context allows detractors of SOGIESC rights to cast their cases as a normative dichotomy (i.e. they are defined in opposition and a loss necessarily results in a breach of the right to freedom of religion when this is not so). The right to religion does not empower any person to discriminate or to engage in conduct that is unconstitutional. Indeed, that their belief may be founded in religious doctrine does not mean that it is constitutionally permissible. The fact that the Constitution requires

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F43%2F48&Language=E&DeviceType=Desktop>.

a balanced rights approach ultimately disposes of a zero-sum conception of the right to freedom of religion.

Within the given scenario then, the constitutional democracy accepts that a male son would be entitled to inherit double the share of a female daughter in terms of Islamic law of compulsory succession. We argue that though this may be so, the unequal treatment in law between gender identities needs to be justified in order for it to meet constitutional muster. Whether Islamic law recognizes that Z is a transgender man for the purpose of inheritance is irrelevant as the distinction drawn between genders is an irrelevant consideration assessing the value of each share. Therefore, when an intersectional feminist lens is applied to the facts, the discrimination between the genders, where one has benefitted above another on no other grounds or basis but their perceived gender identity and the cultural values assigned to them, is offensive to the Constitution.

While our courts have sought to avoid becoming entangled in religious doctrine, a court is empowered to declare that conduct, which may be informed by such doctrine is constitutionally impermissible. Section 15(1) of the Constitution protects the individual right to “practise his or her religion”. Notably, while Section 15(1) does not expressly refer to the protection of religious practices, the courts accept that this is an essential component of religious freedom. Even so, this right is not absolute. Section 31(1) entitles persons belonging to a religious community not to be denied the right, by other members of the community, to practise their religion. Thus, while Section 15(1) protects the individual right to freedom of religion, Section 31(1) protects the associational aspect, to practice with others. The rights in Sections 15(1) and 31(1) complement and strengthen each other, accentuating the importance of protecting the practice of religion.¹⁷ There is, however, no credence to the assumption that a court is not entitled to interrogate the invocation of the right to freedom of religion. Section 31(2)

¹⁷ The inter-relationship between these two rights is dealt with in *Prince v President, Cape Law Society and others* 2002 (2) SA 794 (CC) where the constitutional court cited with approval the approach of the Canadian Supreme Court in the case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321; [1985] 1 SCR 295, stating “[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”.

expressly limits the rights in Section 31(1) and provides that such rights may not be practiced in a manner inconsistent with any provision in the Bill of Rights.

Were any of the various religious texts to be analysed constitutionally, large portions of a number of them would not meet the constitutional standard. This notwithstanding, the Constitution protects the right to believe while simultaneously assessing whether or not actions taken in accordance with the belief are constitutionally permissible.

The constitutional court has explained that limitations on constitutional rights can pass constitutional muster only if the court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance, and effect of the provision that results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.¹⁸ The underlying problem in any open and democratic society based on human dignity, equality, and freedom in which conscientious and religious freedom is regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will or will not obey. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Believers cannot claim an automatic right to be exempt from the laws of the land due to their beliefs.

Religious groups and individuals, therefore, cannot claim that the practice of their religion is exempt from legislative or constitutional protections, or from constitutional scrutiny. The Islamic will in our scenario is, therefore, open to constitutional scrutiny and the courts will not protect religious practices that infringe upon or cause harm to other rights and individuals under the Constitution. It is our opinion that the Islamic will falls short of what is required in terms of the Constitution on the basis of gender discrimination and an infringement on the right to dignity.

¹⁸ See *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) available at [http://www.saflii.org/za/cases/ZACC/1997/12.html#:~:text=In%20the%20case%20of%20discrimination.8\(2\)%20has%20occurred](http://www.saflii.org/za/cases/ZACC/1997/12.html#:~:text=In%20the%20case%20of%20discrimination.8(2)%20has%20occurred).

Conclusion

The authors wish to point out that there is a growing movement in South Africa that seeks to promote a position of religious rights enjoying supremacy in our society. This position would undermine Section 1 of the Constitution that states that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism, and the supremacy of the Constitution and the rule of law.

Discrimination, bias, and violence are present in everyday life. Historically, Muslim personal law, which includes inheritance, has been interpreted and implemented in strict, patriarchal manners, which, we argue, are not in line with the higher principles of the Sharia (Maqasid) or the public interest. This includes the principles of gender equality, fairness, and dignity.¹⁹ These are values and rights enshrined in the Constitution. We, therefore, do not support a position as set out in the original scenario which seeks to provide avenues for those who hold religious views to circumvent their constitutional and religious obligations to equality and dignity by obscuring the discrimination²⁰ in vague or neutral language.

Vital to social cohesion is the understanding that the Constitution attempts to create a society where people live together with one another with mutual respect. While certain individuals may reject this perspective on the basis that they are acting on a sincerely held religious view, in a constitutional state they are required to concede that not everyone can be expected to accept or be compelled to act in accordance with their religious view.

Respect for diversity is one of the key reasons underlying the protection of both freedom of religion and right to equality.

¹⁹ Mohamad Akram Laldin, "Understanding the concept of Maslahah and its parameters when used in financial transactions," *ISRA International Journal of Islamic Finance* 2, no.1 (2010): 61 – 84. <https://doi.org/10.55188/ijif.v1i2>

²⁰ A brief analysis of the status of a transgender beneficiary for the purposes of an Islamic will within the South African context see pages 8 – 9

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