

# Inherence and Inheritance: A Roundtable Discussion on Inheritance for Transgender Muslim Men

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## **SHORT BIO**

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## **Introduction**

In Muneer Abduroaaf's hypothetical case study that examines the possibilities of inheritance afforded to a transgender Muslim man in which his to-be-deceased father may split the share equally between him and his cisgender brother, the argument that Islamic law does not allow for such a ruling is proposed. Abduroaaf posits the rationale that South Africa's enshrined constitutional commitment to protecting the rights of both Muslims and transgender individuals, allow that either party's interest be justified; in this analysis, the "right to religious freedom" takes precedence over the right of the trans man to inherit an equivalent share. However, Abduroaaf does not provide an alternative to this conclusion and does not interrogate the rationale informing such a discriminatory ruling. Subsequently, despite acknowledging the transgender man's identity as a man, he implicitly suggests biological sex as inherent and immutable, rendering the Islamic law around inheritance inherent and immutable as well. In a roundtable response to this article, I would like to complicate, critique, and challenge Abduroaaf's assumption(s) that a cisheteropatriarchal Islamic ruling outweighs the sustenance and prosperity of a transgender individual's

humanity. As such, we must examine the scholarly rationale for why inheritance exists in Islamic law in the first place. In this argument, it becomes an Islamic imperative to provide the son with the financial means necessary to survive and thrive in a world that is already antagonistic to the existence of transness.

## **Inheritance in the Islamic texts**

Inheritance, at its core, ensures that once a guardian or parent has passed the child under their care should receive their remaining wealth; any opposition to this is framed as unjust.<sup>1</sup> The Qur’anic verses that mention inheritance can be found in *Surah Al-Nisa*, translated as *The Women*, in verses 11–12 and 176.<sup>2</sup> Before delving into the specific verse that articulates a distinction in inheritance between male and female subjects, it is important to contextualize the moments in which these verses were divinely revealed to the Muslim prophet, Muhammad (PBUH)<sup>3</sup>. In the context of revelation, a woman, Om Kaha, and her three girls approached the Prophet (PBUH) and pleaded with him:

[my husband] . . . died and left daughters . . . and I am a wom[a]n without resources to spend . . . their father left good property held by [his cousins] who did not give [us] anything . . . not food [n]or drink.<sup>4</sup>

The Prophet approached the two cousins, who both responded,

[The girls] do not mount a horse . . . carry grass, or defeat an enemy.

At this point, the following verse 4:10 from the Qur’an is revealed to him, which states that “those who devour the [wealth] of the orphans unjustly,

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<sup>1</sup> Adnan Salloum, *Reasons and Occasions of Revelation of the Holy Quran* (Beirut: Dar al-Katob al-Ilmiyah, 1999), 160.

<sup>2</sup> Abdurraghiem Hassan Sallie, “Section Two: The Verses Explaining the Law of Inheritance,” in *A Comparative Study on Inheritance in Islamic Law*, ed. Abdurraghiem Hassan Sallie ([s.l.]: FA Print cc, 2000), 53–55.

<sup>3</sup> Peace Be Upon Him.

<sup>4</sup> Salloum, *Reasons and Occasions*, 160.

shall swallow only [the] fire[s of hell] into their bellies”.<sup>5</sup> In this case, one’s core survival is contingent upon inheritance and any opposition to such a right is deemed a grand injustice. The men’s justification for unlawfully claiming themselves as heirs relies on a narrative that women, “do not do the things that men like us do”. Such is their claimed vocation that it renders Om Kaha and her girls unworthy of being heirs. However, despite the assumptions around their gendered social roles as women, Qur’anic revelation suggests that it is imperative that they are compensated financially.

Nevertheless, there is still a disparity in the quantity of inheritance distributed across boundaries of sex and gender. In Q4:11, for example, it states that, “for the male there is a double share against that of a female’s single share”.<sup>6</sup> In this verse, it is interpreted that a male individual (adult son), receives two thirds of the inheritance of a deceased parent, while the remaining third is delegated to the female counterpart (adult daughter). In the Arabic lexicon used in the Qur’an, descriptors of “man” and “woman”, and “male” and “female”, are distinguished respectively as *rajul*<sup>7</sup> and *nisa’*, and *dhakr*<sup>8</sup> and *’unthaa*<sup>9</sup>. In *Surah Al-Nisa’* 4:7, it is proposed that all offspring (regardless of gender) must be bequeathed an inheritance share from their deceased parents.<sup>10</sup> On one hand, the Q4:7 uses gendered categories instead of sex categories and no disparity in shares is stipulated. On the other hand, Q4:1 makes a clear distinction in the quantity allocated for each sex and, here, gendered categories do not feature.<sup>11</sup> Notably, although there are instances where binary sex and gender categories are used interchangeably, sex here becomes the basis for determining one’s gendered future. In other words,

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<sup>5</sup> Mervyn Hiskett, “The ‘Song of Bagauda’: A Hausa King List and Homily in Verse—II,” *Bulletin of the School of Oriental and African Studies* 28, no.1 (1965): 129.

<sup>6</sup> Sallie, “Section Two,” 68.

<sup>7</sup> Edward William Lane, *An Arabic-English Lexicon* (London: Williams & Norgate, 1863), 1045.

<sup>8</sup> Lane, *An Arabic-English Lexicon*, 970.

<sup>9</sup> Lane, *An Arabic-English Lexicon*, 970.

<sup>10</sup> Sallie, “Section Two,” 60.

<sup>11</sup> Sallie, “Section Two,” 68.

“biology is destiny” and the category of sex is made to appear inherent in the way it attempts to regulate one’s social role as a (binary) gendered being.<sup>12</sup>

## **The female subject in Islamic texts**

In Islamic jurisprudence, some contend that women receive a smaller portion because they are not burdened by the need to financially maintain and support a family. In turn, they are cared for by their appropriate male counterparts.<sup>13</sup> However, not only does this not account for the unpaid reproductive labor that is exercised by many married Muslim women, it also ignores the possibility of women who perform both reproductive and productive labor.<sup>14</sup> The rationale behind such a legal practice of inheritance, despite being identified according to one’s biological sex, takes into account the gendered social roles assumed to be taken on by a “naturally” corresponding sex; that is male/man, and female/woman.

Additionally, in other spheres of Islamic jurisprudence, Muslim women’s legal capacity in contemporary discourse is rendered categorically as “imperfect”.<sup>15</sup> In comparison, the normative subject of the law is a free man (male) who, as a legal subject, gains complete legal capacity by puberty.<sup>16</sup> This capacity denotes both the legal capacity for obligations due to oneself, by the very nature of being human, and the capacity to make mature decisions and, in turn, rationally execute them.<sup>17</sup> Hence, male-bodied men are legal subjects in so far as they are inhered with knowledge and intelligence. Female-bodied women, as we will see, are reduced to bodily vessels, devoid of such intellect.

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<sup>12</sup> Nayereh Tohidi, “An Interview on Feminist Ethics and Theory with Judith Butler,” *Journal of Middle East Women’s Studies* 13, no.3 (2017): 463. <https://doi.org/10.1215/15525864-4179122>.

<sup>13</sup> Sallie, “Section Two,” 61–62.

<sup>14</sup> Ayşe Arslan, “Relations of Production and Social Reproduction, the State and the Everyday: Women’s Labour in Turkey,” *Review of International Political Economy* (2021): 18. <https://doi.org/10.1080/09692290.2020.1864756>.

<sup>15</sup> Fatima Seedat, “Sex and the Legal Subject: Women and Legal Capacity in Ḥanafī Law” (PhD diss., McGill University, 2013), 50.

<sup>16</sup> Seedat, “Sex and the Legal Subject”, 5.

<sup>17</sup> Seedat, “Sex and the Legal Subject”, 47.

When it comes to understanding women's "imperfect capacity", the scholar Ihsan Ahmad Nyazee presents what it *does* and avoids explaining what it *is*.<sup>18</sup> In this vein, the obscurity around the category of "imperfect legal capacity" limits Muslim women in various ways. Particularly in ways that pertain to the laws that dictate the boundaries of women's performance and involvement in terms of sexuality, leadership, inheritance, and testifying as a legal witness, for example.<sup>19</sup> Nyazee implies the state of being female (and in turn woman) becomes synonymous with a seemingly "inherent" imperfect legal capacity, one that is, arguably, not "inherent" per se but, rather, socially imposed.<sup>20</sup> According to another scholar, Mahdi Zahraa, women have full legal capacity yet the biological characteristics that constitute "femaleness" impede the performance of certain religious practices. This includes post-partum bleeding and menstruation, as the blood "contaminates" one's ritual cleanliness.<sup>21</sup> Hence, a Muslim woman, who is sexed as perpetually female, and a female Muslim, who is gendered as a perpetual woman, are burdened by patriarchal and cis-normative legal constructions of womanhood and femaleness. Consequently, femaleness and the femininity associated with it are articulated as a "defect" in contrast to the normative masculine and male legal subject.<sup>22</sup> In this way, it is through the reduction of women's social roles to that of the biological female sex that a patriarchal and cis-normative interpretation of Islamic law renders anyone who is not a free, cisgender, Muslim man as legally "other".

## The trans and intersex subjects in Islamic texts

Since women are collectively sexed as "female" and men are collectively sexed as "male", trans men, who are assigned female at birth, are sometimes limited by these very impediments too. Abduroaf states that in Islam, there is no general legal consensus that pertains to trans individuals. However, immediately thereafter he presents Quranic verse :19, in which Satan announces that, "I will mislead them, and . . . arouse . . . false desires . . . **I . . . order them to change the nature created by Allah**" (emphasis added by Abduroaf).<sup>23</sup> Here, he suggests that this verse outlaws sex

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<sup>18</sup> Seedat, "Sex and the Legal Subject", 51.

<sup>19</sup> Seedat, "Sex and the Legal Subject", 21.

<sup>20</sup> Seedat, "Sex and the Legal Subject", 6.

<sup>21</sup> Seedat, "Sex and the Legal Subject", 73.

<sup>22</sup> Seedat, "Sex and the Legal Subject", 221.

<sup>23</sup> Abduroaf, "A Brief Analysis," 3.

reassignment surgery (SRS) in Islam and that the surgery goes against the tenets of divine law. Although there is no mention of gender or sex as “naturally and divinely inherent” or a clarification of what “changes in nature” entails, he assumes that it refers to transgender persons who undergo medical/surgical transition.

Despite this interpretation of Islamic law that favors the cis-normative, male-bodied, Muslim man, we can also look to the Islamic scholars who engage with the intersex subject in Islamic legal texts. The term that often arises in Islamic law is *khuntha*, deriving from the root *khanatha*, signifying a rupture<sup>24</sup> or doubling/folding (of sex categories).<sup>25</sup> Legal scholars divide them into the following classifications: “non-problematic/discernible” and “problematic/intractable”.<sup>26</sup> The former identifies the intersex individual who has both male and female characteristics yet one set appears to dominate over the other so that one is able to visually “pass” as either man or woman.<sup>27</sup> The latter, however, does not allow for such a simple process; its ambiguity troubles the coherence of a sex binary.<sup>28</sup> This becomes important as Islamic legal texts rest upon its development to determine the individual’s gendered status in the law and, if the ambivalence remains after puberty, some scholars suggest that the individual is free to select the sex/gender they align with best.<sup>29</sup>

Abduroaaf then makes mention of Sally, an Egyptian transgender woman, and Sheikh Mohammed Sayyid Tantawi (the Grand Mufti of Egypt in the eighties). Tantawi was said to have consulted the Islamic legal texts that spoke of *khuntha* and *mukhannath* to sanction a fatwa that would bolster

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<sup>24</sup> Abdurraghiem Hassan Sallie, “Section Fourteen: The Inheritance of the Khuntha,” in *A Comparative Study on Inheritance in Islamic Law*, ed. Abdurraghiem Hassan Sallie ([s.l.]: FA Print cc, 2000), 315–363.

<sup>25</sup> Indira N. Gesink, “Intersex Bodies in Premodern Islamic Discourse: Complicating the Binary,” *Journal of Middle East Women’s Studies* 14, no.2 (2018): 157. <https://doi.org/10.1215/15525864-6680205>.

<sup>26</sup> Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, “The Islamic Perspectives of Gender-related Issues in the Management of Patients with Disorders of Sex Development,” *Archives of Sexual Behavior* 46, no.2 (2017): 353–360.

<sup>27</sup> Zainuddin and Mahdy, “The Islamic Perspectives of Gender-related Issues,” 355.

<sup>28</sup> Zainuddin and Mahdy, “The Islamic Perspectives of Gender-related Issues,” 355.

<sup>29</sup> Gesink, “Intersex Bodies in Premodern Islamic Discourse,” 157–160.

state recognition.<sup>30</sup> Although there is a distinction between being intersex and transgender, Tantawi identifies a connection between the two. Unsurprisingly then, those who were categorized as “hermaphrodites” were able to undergo SRS since interpretations of Islamic law swayed in their favor.<sup>31</sup> Although the legal texts from which these rulings were made address intersex subjects and *not* transgender subjects, such discussions around sex and gender as fluid categories alongside the recognition of self-determination and agency for the legal subject suggests that destabilizing the binary is not a foreign concept to Islam, even in pre-modern contexts.

Nevertheless, when it comes to the topic of inheritance, the intersex subject, depending on whether they appear significantly more female or male, will inherit according to the traditional methods of dividing inheritance shares.<sup>32</sup> However, in most cases where ambiguity persists, the amount is also determined by considering the intersex subject as simultaneously male and female.<sup>33</sup> The amount that the “problematic” intersex subject receives is equivalent to whatever is the lesser of the two gendered shares.<sup>34</sup> Scholars stress that their position, although not one of religious condemnation, confounds the supposedly “natural” social order that is organized by gendered relations, especially as it concerns ritual practice since its performance relies on particular boundaries of sex/gender.<sup>35</sup> Regardless, intersex subjects are still constructed against a masculine, cisgendered, and androcentric norm, such that their unique social position is rendered insignificant.

## The law of the state

Abduroaaf makes references to the *Alteration of Sex Description and Sex Status Act* in order to briefly acknowledge that the South African state legally accommodates gender transition processes.<sup>36</sup> Thereafter, he explains the protocol regarding inheritance: either the to-be-deceased declares in a will which shares go to whom and the amounts that constitute each share, or a

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<sup>30</sup> Alipour, “Islamic Shari’a Law,” 96-97.

<sup>31</sup> Gesink, “Intersex Bodies in Premodern Islamic Discourse,” 152.

<sup>32</sup> A. Husain, *The Islamic Law of Succession* (Riyadh: Maktaba Dar-us-Salam, 2005), 263.

<sup>33</sup> Husain, *The Islamic Law*, 263

<sup>34</sup> Husain, *The Islamic Law*, 263–265.

<sup>35</sup> Sallie, “Section Fourteen,” 316.

<sup>36</sup> Abduroaaf, “A Brief Analysis,” 2-3.

will is drawn up in accordance to Islamic law and must then be authorized by a state-recognized Islamic institution, in which a certificate legally binds which shares go to whom and their amounts.<sup>37</sup> If the institution is aware of the transgender man's assigned sex, Abduroaaf argues that he "should" receive his inheritance as a female according to Islamic law.<sup>38</sup> While he recognizes that such a legal decision can be challenged on the basis of protection from transphobia,<sup>39</sup> he provides a counterargument. Supposedly, the to-be-deceased father has the constitutional right to religious practice and freedom that, in this case, is weaponized to frame his son's resistance to transphobia as an infringement upon his own religious freedom.

Such displays of interpersonal and institutional power in local Muslim communities are not new and many marginalized Muslims have resisted such religious authorities. When disputes have occurred, the state has prioritized religious authorities' "right to religious freedom" in a secular state, when in reality they are as complicit in the marginalization of these Muslim minorities.<sup>40</sup> Besides the state's fear of infringing upon the rights of Muslim authorities, the state also allows them to maintain a hegemonic hold over Muslim minorities, since any intervention on their part goes against the legal concern around doctrinal entanglement: that the state either becomes too immersed in the affairs of a particular religious community or their excessive immersion becomes indicative of putting said religion on a pedestal in a supposedly secular society.<sup>41</sup> In this way, the state appears politically "neutral" in its attempt to guarantee religious freedom. Yet, this religious freedom is only guaranteed for *some*.

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<sup>37</sup> Abduroaaf, "A Brief Analysis," 5.

<sup>38</sup> Abduroaaf, "A Brief Analysis," 6.

<sup>39</sup> Abduroaaf, "A Brief Analysis," 7.

<sup>40</sup> Fatima Seedat, "Intersections and Assemblages: South Africans Negotiating Privilege and Marginality through Freedom of Religion and Sexual Difference," in *Freedom of Religion at Stake: Competing Claims Among Faith Traditions, States, and Persons*, ed. Dione Forster, Elisabeth Gerle and Göran Gunner (Oregon: Wipf and Stock Publishers, 2019), 200.

<sup>41</sup> Seedat, "Intersections and Assemblages," 202.



## Inherence and inheritance

In a footnote, Abduroaf makes the following claim, “the sex of the child is important for Islamic inheritance . . . as a male child inherits double the share of a female child”. Here, one’s assigned sex at birth is stressed as integral to inheritance, despite there being no substantial reason as to why. In this case, one’s biological sex category becomes an “inherent” embodiment that cannot be altered or disrupted. Such an assumption leads to the same conclusion around inheritance laws: that it too, inherently cannot be altered or disrupted.

Notably, while there is an “inherent” disposition to one’s sex that some scholars assert, such that sex and gender become completely synonymous, the way gender plays out socially, disrupts the idea of biological destiny. Muslim, transgender individuals (in this case, trans men)—although they defy the norms of sex and gender—may still express an interest in taking on social roles that require a larger sum of inheritance. In this way, some transgender people may conform to the norms of gender yet, by the very nature of being transgender, they radically disrupt essentialist notions of sex. Consequently, being female (whether one is cis or transgender) does not constitute a valid reason for a smaller share. If a man’s Islamic social role is (re)claimed by a transgender man, whereby he cares for his family, his household, and the betterment thereof, is that not him fulfilling an Islamic duty? If so, the larger amount should then be bequeathed to the transgender man.

It is also important to note that many transgender people are burdened financially and struggle to navigate access to important resources, be that gender-affirming, psychological, medical, and social assistance.<sup>42</sup> Notwithstanding the importance of one’s social role, if we are also to understand inheritance as based on a foundation of justice, as proposed earlier in the revelation, then a larger inheritance share ensures that the transgender man has access to care and support that is both gender-affirming and life-sustaining (although, they are intrinsically the same). My argument then is not that the transgender man (as representative of all

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<sup>42</sup> Tamar Klein, “Necessity is the Mother of Invention: Access Inequalities to Medical Technologies Faced by Transgendered South Africans,” *Technology and Innovation* 15, no.1 (2013): 177. <http://dx.doi.org/10.3727/194982413X13650843069077>.

transgender men and people) *should* receive the larger portion of inheritance, nor am I making the argument that anybody who is a man should receive a larger portion over a sibling who is a woman. Rather, since inheritance is predicated on notions of social roles and the financial responsibilities that enable them, or, conversely, are enabled by them, in addition to one's need to survive and prosper in a world defined by neoliberal capitalism—inheritance, regardless of one's sex and/or gender, should consider one's social position within class.

## **Conclusion**

While Abduroaf's article attempts to argue that the right to religious freedom trumps the validity of a transgender man's right to inheritance and, in turn, his prosperity and survival, I have critiqued much of the shortcomings in this hypothetical case study. Generally, there is a lack of consideration regarding what the Islamic texts say and the contexts in which they are revealed. Through this lack, Abduroaf disregards how inheritance is predicated on a foundation of justice. By examining how female and intersex bodies are constructed in areas of Islamic law, I have addressed the ways in which transgender people, and in this case, the hypothetical transgender man, is biologically reduced to his assigned sex at birth rendering him "other" and subjugated against a masculine, cisgender, and male-bodied Muslim legal subject. Furthermore, Abduroaf does not consider the non-entanglement of the state in matters of religious dispute, in that, despite granting recognition, protections and support for trans people, they are most likely to side with religious authorities. Hence, despite an attempt to stabilize the idea of sex as an inherent claim to how one receives inheritance, a perspective of inheritance as a project of justice sees one's class position and social role as a more substantial rationale for a claim to inheritance.

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