

Trans Inheritance Roundtable

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Introduction

This Roundtable emerges through the first piece submitted for publication by Muneer Abduroaf. Given that the discussion on inheritance for trans individuals is still limited, and the importance of opening this area for discussion, with Abduroaf's permission, the editors sought responses to the original piece. The responses received reflect a range of perspectives and methodological approaches including the philological and experiential, and South African civil and constitutional law.

Islamic laws of inheritance derive from an evolution of pre-Islamic practice through Quranic injunctions (mainly Q4:11), and prophetic guidance. Commonly accepted norms include the shares prescribed in the Quran to designated heirs, referred to variously as 'the compulsory estate' or the 'divinely decreed shares' divided in stipulated portions. The remainder of the estate is referred to as the *wasiyyat*, bequest or will, and there is various argument on the nature and form of its distribution, primary amongst which is the matter of it also being directed to the designated heirs. They are characterised by their filial or genealogical relationship, being spouses, parents, grandparents, children or siblings, further specified by their gender identity. The shift from pre-Islamic practice of inheritance based on 'defence of the tribe or honour', to family and genealogical filiation, allowed the inclusion of otherwise excluded women family members, but did not also result in equal shares amongst the inheritance received by brothers and sisters or mothers and fathers, in their various generations. Thus there remained a gender disparity in inherited shares, which persists in much contemporary Muslim practice.

Abduroaf's paper presents a hypothetical situation where the parent of a trans child chooses not to recognise their child's chosen identity and insists on apportioning the compulsory estate according to the child's identity assigned at birth. The limitations on the freedom of testation in South African law have allowed for discriminatory provisions to be successfully challenged.

To avoid the potential constitutional challenge that may arise should a transgender heir question the gender discriminatory allocation of shares to designated heirs, Abduroaaf offers the parent a way out. Rather than an indication that the legator leaves different shares to male and female children, Abduroaaf suggests a legal stratagem that names the children instead of their assigned genders; this stratagem allows the parent to deny the trans child both their preferred identity and the inheritance rights that accrue with it, and so too also avoid legal challenges under South African law.

The focus of Abduroaaf's work is primarily the legator's view that gender reassignment is not acceptable, despite historical and contemporary Islamic legal opinions otherwise. Accordingly, the argument pays little attention to the consequences for the transgender heir, and the focuses instead on the freedom of the parent to testate according to a traditional reading of Islamic law. Amongst the questions raised by Abduroaaf's paper are the competing constitutional guarantees of equality and freedom of religion, and Abduroaaf indicates how to circumvent the former while exercising the latter.

This is where Seehaam Samaai and Charlene May of the Women's Legal Centre (WLC) begins, in the South African legal context, arguing that the right to freedom of religion may not be allowed to overshadow the right to equality. To meet constitutional muster the unequal treatment of different genders in law would need to be justified; the refusal of the testator to acknowledge the heirs' preferred gender on cultural grounds would be found offensive to the Constitution. While the courts may want to avoid doctrinal entanglement, given that the right to religious freedom is not absolute, the courts may declare the testators conduct "constitutionally impermissible". While Section 31(1) of the Constitution provides for people to practise their religion with other members of their religious community, 31(2) specifically limits that rights to ensure that "such rights may not be practised in a manner inconsistent with any provision of the Bill of Rights". Amongst Samaai and May's concerns are the objectives of the Shariah; they argue for the necessity of working within the public interest, which in their assessment does not permit gender-based discrimination in inheritance law in contemporary contexts; social norms having evolved, the application of

Islamic law must also adapt accordingly. Their goal is equal inheritance regardless of gender identity.

This is also an area of concern for Asif Iftikhar, who extends the South African focus of the discussion to the global Muslim community applying the theoretical frameworks developed by Pakistani scholar Javed Ahmed Gamidi. While Gamidi privileges the traditionally designated shares, Iftikhar offers an analysis of relational benefit to argue for potentially equal inheritance to all heirs; more specifically in his analysis, a greater share may accrue to those from whom the testator found more benefit. Motivated by a similar though not equal interest as Samaai and May, Iftikhar offers a philological route toward potentially equal inheritance for heirs in Islamic law. Arguing that only the testator knows who is of more benefit to them, he suggests that the testator may therefore make a bequest apportioning more to those heirs who benefited them. Remaining with the idea of relationship which the classical Islamic tradition prioritises through genealogy, Iftikhar offers instead the idea of relationship through affective-benefit. This allows the testator to divide their estate in equal proportions amongst designated heirs and further to also include them amongst those who may receive a portion of the willed estate; in both instances the criteria would be the relationship of the heir with the testator, not their gender or genealogical affiliation.

The third and final piece, by Suhail Kapdi, addresses concerns of heirs who are trans, arguing first for equality of inheritance amongst people of different genders and then questioning the ethics of ignoring a trans persons chosen identity and reverting to their deadname, and in the case of their gender-based inheritance shares, also their dead identity. Kapdi draws attention to the occasion of revelation associated with Q4:11, highlighting the function of inheritance as the provision of means and care for surviving vulnerable relatives, and extending the function to be inclusive of trans children. This analysis works with legal capacity, doctrinal entanglement and questions of religious freedom to demonstrate the real entanglements of state authorities in religious communities and the consequent encroachment on the rights of minorities within religious communities.

Both Abduroaaf and Kapdi make reference to the fatwa of Sayyid Tantawi, who, as the Mufti of the Egyptian Republic in 1988 permitted gender reassignment surgery under Islamic law for a medical student whom after surgery was subsequently denied re-admission to the women's medical school. Abduroaaf highlights the subsequent reaction to Tantawi's fatwa and arguments against the acceptability of gender reassignment surgery, and Kapdi focuses on intersexuality in Tantawi's argument. In this the two also stand at significantly different positions in the debate; while Abduroaaf's piece is designed to provide the believing testator who objects to the surgery a means of distributing their wealth in ways that match their religious conscience, Kapdi argues for the believing testator to be guided by the broader religious principles of inheritance, namely justice. In this way Kapdi is able to raise questions pertaining for example to a transman adopting 'masculine' responsibilities such as financial maintenance of women family members, and more onerously, having to meet the challenges of living as a trans person survival in the contexts of social heteronormativity. Both incur additional financial responsibilities for the transman, and thus it would be unjust to deny their inheritance. Naturally, this brings Kapdi close to arguing for gender differentiated inheritance, inclusive of trans men; but this is not Kapdi's intention. It is rather to indicate that inheritance ought to be guided by broader principles of justice rather than gender or sex.

The Tunisian legal code is amongst the few to spaces of vigorous advocacy for equal inheritance amongst male and female heirs. Elsewhere Zahia Jouirou has argued that the way "the provisions of female inheritance have been formulated show no indication that the Quranic text was intending to set up absolute and permanent rules about distribution of wealth. Instead, it was providing reasonable answers to specific questions pertaining to specific socio-historical conditions in the past."¹ To demonstrate this she pays attention to the shifting rules of inheritance in the early years of the Muslim community, and the differences that persist currently amongst the existing schools of law. Her further argument rests on the idea that Islamic thought is characteristically progressive, adapting to changed social circumstances, and that amongst the core ethical principles of the Qur'an is

¹ Zahia Jouirou, "Women's Inheritance in Islam: Between Text and interpretation," *SIHA Women in Islam* (2017): 20 – 23.

the idea of equality amongst people. In doing so Jouirou build upon the scholarship of previous advocates for equal inheritance amongst them, Tunisian Tahar Haddad, Sudanese Mahmud Muhammad Taha, Pakistani scholar Muhammad Iqbal, Syrian Muhammad Shahrur, Egyptian Nasr Hamid Abu Zayd.²

While previous advocacy for equal inheritance amongst men and women heirs has rested in part on the argument that gender is an unstable category, easily disrupted by changing social norms, the question of inheritance for trans individuals also questions the stability of sex as an inherent and also unchanging identity for inheritance. Placed alongside the realities of trans Muslim experience, numbers of new and significant questions will be raised; this Roundtable opens a space for that discussion and resistance to discriminatory practices in inheritance rights.

² Zahia Jouirou presentation notes for the Muslim Personal Law Network, Third Roundtable Discussion, online, 5 September 2020. Also see, Lynn Welchman, Zahia Jouirou, and Marwa Sharafeddin, "Muslim Family laws: Trajectories on reform," in *Justice and Beauty in Muslim Marriage: Towards Egalitarian Ethics and Laws*, ed. Ziba Mir-Hosseini, Mulki Al-Sharmani, Jana Rumminger and Sarah Marso (One World Academic Press, London, 2022).