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Since 2004, the Journal has published research papers, which are relevant to gender, religion, and theology in Africa. The editorial committee considers for publication submissions of a scholarly standard from any of the social science and theological disciplines or related fields of inquiry, which provide useful perspectives at the intersections of gender, religion, and theology in Africa. Particular areas of interest include the gendered analysis of religion; theology and the study of religion; innovations in contextual theological education; theological and ethical reflection on social transformation; the significance of new religious movements and African-initiated forms of religion; the role of women in religion and society; interfaith dialogue; peace-making and reconciliation; normative and non-normative sexualities; and queer politics.

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Written submissions to the *African Journal of Gender and Religion* may take the form of researched scholarly articles or essays. Book reviews, brief responses to articles, conference reports, and summaries of research projects are also welcome. Articles submitted for the section called “praxis” must show evidence of how sound theoretical reflections are brought to bear on practical action. Within the section on “praxis” we will publish essays that are not considered “mainstream academic” but nonetheless point to theories of gender justice in action. Submissions are evaluated through an editorial committee screening process. Further, the articles are also sent for peer review to a minimum of two competent scholars working in a similar field of interest. Prospective contributors of scholarly articles should send a typed copy of their article via e-mail to the submissions editor at [submissions@ajgr.org](mailto:submissions@ajgr.org). All submissions must

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<i>Article</i>	<i>Pages</i>
<b>Colette Saldanha &amp; Elina Hankela</b> An Emerging Framework of Inclusion: Listening to the Voices of Non-Ordained Anglican Women	1-24
<b>Ashwyn Afrikanus Thyssen</b> Reimagining Christianity and Sexual Diversity in Africa: A Queer Theologian's Appraisal	25-43
<b>Roundtable Discussion</b> <b>Fatima Seedat</b> Introduction: Trans Inheritance Roundtable	44-48
<b>Muneer Abduroaaf</b> A Brief Analysis of the Status of a Transgender Beneficiary for Purposes of an Islamic Will within the South African Context	49-61
<b>Seehaam Samaai &amp; Charlene May</b> A Feminist Response to Address Inheritance Discrimination in South Africa	62-75
<b>Suhail Kapdi</b> Inherence and Inheritance: A Roundtable Discussion on Inheritance for Transgender Muslim Men	76-87
<b>Asif Iftikhar</b> Interpretive Possibilities in Islamic Inheritance Law: Rethinking Daughters' Shares	88-97

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**Praxis**

**Henni Alava & Megan Robertson**

Family, Failure and Fatigue in the Field: A Patchwork of  
Omissions

98-107



# An Emerging Framework of Inclusion: Listening to the Voices of Non-Ordained Anglican Women<sup>1</sup>

Colette Saldanha<sup>i</sup> and Elina Hankela<sup>ii</sup>

## SHORT BIO

<sup>i</sup>Colette Saldanha completed her MA in the Department of Religion Studies at the University of Johannesburg. This article reports on the findings of her dissertation. She is an Anglican priest and works in Clinical Research.

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## ABSTRACT

The article outlines a grounded framework for considering and working towards inclusion in ecclesial contexts in and beyond South Africa. This framework is based on stories gathered through a qualitative study among non-ordained women in two parishes of the Anglican Church in Southern Africa in the Diocese of Johannesburg. Five elements of inclusion that make up the framework emerged in the analysis of the data: acceptance, community, choice, voice, and support. As these elements are discussed using an intersectional lens, attention is drawn to factors that strengthen or weaken the sense of inclusion in this particular context. The use of this lens further highlights the need to read the framework in context, focusing on factors that are important to the people themselves but also those factors that, for some reason, are not engaged by the community in question.

**KEYWORDS:** Anglican church, COVID-19, inclusion, intersectionality, lay women, non-ordained women

## Introduction

Churches, while collectively referred to as the body of Christ, are human institutions and often complicit in upholding dominant paradigms that hinder the opportunities of less socially privileged groups of people.<sup>2</sup> From a gender perspective, an androcentric worldview has centred men as bearers of power while women's experience have been informed by invisibility.<sup>3</sup> Within many denominations, women's position has improved over the last few

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<sup>1</sup> This article is an adaptation of parts of Saldanha's MA dissertation (see Saldanha 2021). Hankela served as Saldanha's MA supervisor. The article includes sections from the dissertation but these are not cited in text, nor are quotation marks used for direct quotations from the dissertation, as the article as a whole is an adaptation of the dissertation.

<sup>2</sup> Denise Ackermann, "Meaning and power: some key terms in feminist liberation theology," *Scriptura* 44 (1993): 19–33.

<sup>3</sup> Fran Porter, *It will not be taken away from her: a feminist engagement with women's Christian experience* (London: Darton, Longman and Todd, 2004), 7–8.



decades, in particular when it comes to ordination. Consequently, issues related to ordination and experiences of ordained women have dominated the academic debate on women and inclusion in churches.<sup>4</sup> In this context, the Anglican Church in Southern Africa (henceforth, ACSA) provides an interesting case study. The Anglican communion intends to be inclusive<sup>5</sup> and in ACSA women have been part of the ordained leadership for three decades. Yet, the majority of women members of the ACSA are not in the ordained ministry. While experiences of ordained and non-ordained women overlap, they also differ. To date, research into the experiences of non-ordained women's sense of inclusion in the Anglican church is limited overall, even more so in South Africa.<sup>6</sup>

This article explores what inclusion looks like from the standpoint of non-ordained Anglican women and, more specifically, how these non-ordained women in the Johannesburg Diocese of the ACSA can contribute to the conceptualisation of inclusion so that the emerging framework may assist churches in embracing diversity, specifically as it relates to women. By examining the thinking, experiences, and perceptions shared by eighteen non-ordained Anglican women who participated in this study, the article presents a framework of inclusion that consists of five notions: acceptance, community, choice, voice, and support. When brought together, these

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<sup>4</sup> See e.g. Emma Percy, "Women, ordination and the Church of England: An ambiguous welcome," *Feminist Theology: The Journal of the Britain & Ireland School of Feminist Theology* 26, no. 1 (2017): 90–100; Ursula Froschauer, "South African Women Ministers' Experiences of Gender Discrimination in the Lutheran Church: A Discourse Analysis," *Feminist Theology* 22, no.2 (2014): 133–43; Ian Jones, "Earrings behind the altar? Anglican expectations of the ordination of women as priests," *Dutch review of church history/Nederlands archief voor kerkgeschiedenis* 83, no.1 (2003): 462–47; Paul Sullins, "The stained glass ceiling: Career attainment for women clergy," *Sociology of Religion* 61, no.3 (2000): 243.

<sup>5</sup> Altigracia Perez, "Living into multicultural inclusive ministry," *Anglican Theological Review* 93, no.4 (2011): 659–667.

<sup>6</sup> Gabrielle Tucker, "Power dynamics within the Anglican Mothers Union in the Diocese of Johannesburg" (MA diss., University of Johannesburg, 2018); Peter Sherlock, "Leave it to the women: The exclusion of women from Anglican Church government in Australia," *Australian Historical Studies* 39, no. 3 (2008): 288–304; Isabel Sparrow, "Fighting male supremacy in a church context," *Agenda* 27, no. 71 (2007): 131–37; Deborah Gaitskell, "Crossing boundaries and building bridges: The Anglican Women's Fellowship in Post-apartheid South Africa," *Journal of Religion in Africa* 34, no. 3 (2004): 266–297.

notions provide a tool for thinking about the demands for and implications of being an inclusive church. Since this research was conducted during the COVID-19 pandemic, the research participants' perceptions on the impact of the pandemic on their respective parishes provide further insight into the grounded meanings of inclusion presented in the article.

The choice of constructing a framework based on what non-ordained women in the Johannesburg Diocese of the ACSA shared is motivated by the work of the Circle of Concerned African Women Theologians (henceforth, the Circle). The Circle is known for creating a platform for the voices of women in various African contexts<sup>7</sup> and has emphasized, since its inception in the late 1980s, that African women should own their "histories, lives and stories".<sup>8</sup>

Unless scholars and churches listen to diverse voices, a supposedly universal definition of inclusion will be described by the most outspoken group or those who hold most power within church hierarchies. In line with this, we do not use inclusion as a term that calls for minorities to be included in the majority world, or marginalized groups into the world of the dominant culture, but rather seek an understanding of inclusion that is defined by all included and in particular by those who find themselves excluded in different ways. To this end, we turn to non-ordained women while acknowledging that there are many other groups who also deserve a place at the common table.

## Locating the argument

The history of Christianity reveals contradictory behaviors towards women, where women feel "included, called, graced, inspired and canonised" but also "patronised, undervalued and trivialised by church leaders".<sup>9</sup> On the one hand, the Bible has been interpreted as advocating for equality between men

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<sup>7</sup> Hazel Ayanga, "Voice of the voiceless: The legacy of the Circle of Concerned African Women Theologians," *Verbum et Ecclesia* 37, no. 2, a1580. doi:10.4102/ve.v37i2.1580:1.

<sup>8</sup> Helen Labeodan, "Revisiting the legacy of the Circle of Concerned African Women Theologians today: A lesson in strength and perseverance," *Verbum et Ecclesia* 37, no. 2 (2016): 1–2.

<sup>9</sup> Mary Malone, *Women & Christianity – volume 1: The first thousand years* (New York: Orbis Books, 2001).

and women.<sup>10</sup> On the other hand, lived experiences attest to women having been excluded in the church context in relation to both living out their calling to serve the church, in general, and entering ordained ministry, in particular.<sup>11</sup>

As noted above, the ordination of women has been a key area of scholarly interest in academic debates regarding the inclusion of women in Christian communities. Scholars have highlighted that even if the ordination of women takes place, it does not necessarily mean that women and men clergy are treated equally, which, indeed, has not been the case in many instances.<sup>12</sup> For example, the ACSA celebrated the 25<sup>th</sup> anniversary of the ordination of women in 2017. However, in that same year it was highlighted during the Provincial Standing Committee meeting that very few women were represented in the leadership and decision-making structures at provincial or diocese levels.<sup>13</sup>

Compared to scholarship on women's ordination, non-ordained women's sense of inclusion is less studied, also within the Anglican church.<sup>14</sup>

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<sup>10</sup> Richard Burrige, "Imitating Mark's Jesus: Imagination, scripture, and inclusion in Biblical ethics today," *Sewanee Theological Review* 50, no. 1 (2006): 29; Florence Matsveru and Simon Gillham, "In God's image: A Biblical theological survey of the dignity of women and men," In *Living with dignity: African perspectives on gender equality*, ed. Elna Mouton, Gertrude Kapuma, Len Hansen, and Thomas Togom (Stellenbosch: Sun Press, 2015).

<sup>11</sup> Susan Rakoczy, *In her name: Women doing theology* (Pietermaritzburg: Cluster Publications, 2004).

<sup>12</sup> Miranda Pillay, "Women, priests and patriarchal ecclesial spaces in the Anglican Church of Southern Africa: On 'interruption' as a transformative rhetorical strategy," *HTS Teologiese Studies/Theological Studies* 76, no.1: a5820 (2020); Pheobe Chifungo, "Women and the church: A case study of the CCAP, Nkhoma Synod, Malawi," In *Living with dignity: African perspectives on gender equality*, ed. Elna Mouton, Gertrude Kapuma, Len Hansen, and Thomas Togom (Stellenbosch: Sun Press, 2015), 147-58; Jones, "Earrings behind the altar?", 463; Sullins, "The stained glass ceiling", 244.

<sup>13</sup> ACSA, "25th anniversary conference of Anglican women's ordination to the priesthood," accessed July 31, 2020, <https://anglicanchurchsa.org/mission/women-and-gender/25th-anniversary/>.

<sup>14</sup> Justice R.K.O. Kyei, Elizabeth N.M.K. Yalley, and Emmanuel K.E. Antwi, "Negotiating Gendered Leadership Positions within African Initiated Christian Churches in Amsterdam," *African Journal of Gender and Religion* 27 (2018): 22-44; Tucker, "Power dynamics"; Sherlock, "Leave it to the women"; Sparrow, "Fighting male supremacy"; Gaitskill, "Crossing boundaries"; Onnicah Selokela, "African women overcoming

Interestingly, the overarching finding in Sparrow's research conducted in a parish in the Anglican Diocese of Cape Town with eight non-ordained women from different socio-economic and racial backgrounds was that being part of the community had little to do with the leadership of said community and was, instead, due to a divine calling.<sup>15</sup> In addition, the research participants felt that they played a key role in managing the church despite their non-ordained status.<sup>16</sup> In the context of women's organizations within the ACSA, namely the Mothers' Union and the Anglican Women's Fellowship, experiences of exclusion have been argued to not only be related to male domination over women but also relationships among women.<sup>17</sup> These studies suggest that continuing to learn about and from non-ordained women's perspectives is crucial to gain a holistic picture of women's experiences in the ACSA.

While the focus is on women's first-hand experiences, the broader context should also be acknowledged with specific reference to recent official responses to women's status in the ACSA. The ACSA has explicitly addressed the issue of patriarchy, clearly acknowledging the influence of patriarchal traditions within its structures. In his opening speech at the 2019 Provincial Synod, the Archbishop of the ACSA, Thabo Makgoba, addressed the exclusion of women highlighting the need to see family as "neither male-headed nor patriarchal" and pointing out the tendency within churches to not recognize "the other", encouraging exclusion.<sup>18</sup> At this same Provincial Synod, the Safe and Inclusive Church Commission was formalized as a space where those who have experienced any form of abuse in the ACSA,

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patriarchy: a study of women in Apostolic Faith Mission (AFM) Church in Rustenburg, South Africa" (MA diss., University of KwaZulu-Natal, 2005).

<sup>15</sup> Isabel Sparrow, "An exploratory study of women's experiences and place in the church: A case study of a parish in the Church of the Province of Southern Africa (CPSA), Diocese of Cape Town" (MA diss., University of the Western Cape, 2006); Sparrow, "Fighting male supremacy".

<sup>16</sup> Sparrow, "An exploratory study", iv, 99.

<sup>17</sup> Tucker, "Power dynamics"; Gaitskell, "Crossing boundaries".

<sup>18</sup> Thabo Makgoba, "Review, renew and restore: Reconnecting faith to daily life inside and outside the stained glass windows." Charge of the Archbishop and Metropolitan, the Most Revd Dr Thabo Makgoba to Provincial Synod 2019, <https://archbishop.anglicanchurchsa.org/2019/09/archbishops-charge-to-provincial-synod.html:3>.

including gender-based violence, can be heard.<sup>19</sup> On an official level, these measures suggest that the ACSA is interested in addressing issues related to women's exclusion and inclusion. Thus, we anticipate that this study will not only be of interest to academics, but also useful for the ACSA as it navigates its way towards being a more inclusive community and institution.

## **On methodological and conceptual choices**

Faith in the power of a story to produce “data with soul”<sup>20</sup> underpins the methodological choices in this article. Sarojini Nadar uses the word “story” as an acronym that refers to: “Suspicion of master narratives of knowledge; Tool of knowledge gathering as well as knowledge sharing; Objecting to objectivity by privileging subjectivity; Reflexive of our positioning as researchers; Yearning for and working for change.”<sup>21</sup> These emphases inform the design of this qualitative study that listen to and engage with the stories of non-ordained women, a group of people that do not have formal power in the ACSA, as opposed to approaching the question of inclusion of women through church policy or the views of the leadership. We did not aim to portray the truth about the matter, but consciously opted for a subjective perspective that in its subjectivity could add to the collective conversation and inspire change.

Data was collected by Saldanha in 2019 and 2020, mainly through qualitative interviews and, to a lesser extent, participant observation. A total of 18 interviewees were selected from two parishes in the Johannesburg Diocese of the ACSA using purposive sampling. Several participants were interviewed twice, with a total of 32 interviews conducted. The follow-up interviews helped both to clarify the emerging themes and explore additional dimensions that surfaced in the interviews, such as the impact of spoken language on inclusion. The two parishes were chosen based on their location in areas with different socioeconomic status, one being in an affluent residential suburb and the other representing a middle-income, relatively new, residential area. A third parish in a township was originally part of the

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<sup>19</sup> ACSA. “Safe church guide,” accessed October 20, 2020, <https://anglicanchurchsa.org/safe-church-guide/>

<sup>20</sup> Sarojini Nadar, “Stories are data with soul – lessons from black feminist epistemology,” *Agenda* 28, no. 1 (2014).

<sup>21</sup> Nadar, “Stories are data with soul”, 18.

study but could not be included due to challenges related to securing access. To maintain confidentiality and protect the identity of the participants, the names of the parishes and participants have been replaced by pseudonyms. The selected research participants played different roles in the church at the time of the fieldwork, from being members of the parish leadership (Parish Council) to simply attending Sunday services. Initially, potential research participants were identified by Saldanha at parish events. However, snowballing had to be introduced as the main sampling method due to the 2020 COVID-19 lockdown that interrupted the fieldwork. The move to snowballing during the early stages of data collection affected the sample. Specifically, the recruitment of younger women and women from racial backgrounds other than Black African became challenging. This is reflected in the makeup of the final sample (see Table 1). Moreover, most of the interviews had to be conducted online. The combination of the move to interviewing online and the use of snowball sampling likely led to the sample including more people from a somewhat higher socioeconomic bracket (people who had easy access to either WiFi or mobile data) than what may have otherwise been the case.

Table 1: Participant summary

<b>Racial background</b>	Black African: 16 White: 2
<b>Age</b>	30–39 years olds: 4 40–55 years olds: 8 Above the age of 55: 6
<b>First language</b>	Sesotho: 6 Xhosa: 5 Setswana: 3 English: 2 Zulu: 1 Shangaan: 1

The notion of intersectionality forms the conceptual framework used in the data analysis and discussion. While first conceptualized by Kimberlé Crenshaw in the 1980s in relation to the experience of African-American women that differed starkly from that of White women due to their racial location in the American society, the notion of intersectionality has also been central to the work of the Circle for quite some time; the idea that we cannot speak of women in Africa as a homogenous group underpins the scholarship of many Circle theologians.<sup>22</sup> Intersectionality challenges us to look beyond gender in understanding women's experiences of inclusion, taking into consideration the manner in which race, class, gender, and other social categories interconnect and shape people's experiences of inclusion or lack thereof.<sup>23</sup> It proved to be a fruitful tool with the research participants, many of whom highlighted barriers formed by issues other than gender. Notably, the findings of this study highlight the importance of spoken language when considering the inclusion of women in the research churches and, thus, tentatively more broadly, in South Africa.

## **Inclusion through the eyes and experiences of research participants**

The next five sections introduce five broad categories that emerged in the analysis of the research participants' narratives: inclusion as acceptance, community, support, voice, and choice. Each participant's personal and religious experiences and context clearly impacted how they described and discussed inclusion, something the study hopes to do justice to. While the study mainly focused on the similarities in the narratives that allowed for the construction of a conceptual framework, it is important to acknowledge this variance. Hence, instead of attempting to present the views of these women

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<sup>22</sup> See e.g. Mercy Oduyoye, *African women's theologies, spirituality, and healing: theological perspectives from the Circle of Concerned African Women Theologians* (New York: Paulist Press, 2019); Isabel Phiri et al. (eds.), *Her-stories: hidden histories of women of faith in Africa* (Pietermaritzburg: Cluster Publications, 2002).

<sup>23</sup> Namita Goswami, Maeve O'Donovan, and Lisa Yount (eds.), *Why race and gender still matter: An intersectional approach* (New York: Routledge, Taylor and Francis Group, 2014), 2; Helma Lutz, Maria Vivar and Linda Supik (eds.), *Framing intersectionality – debates on a multi-faceted concept in gender studies* (Farnham: Ashgate, 2011), 8.

in 'one voice', this section aims to celebrate different voices to make sense of inclusion at the level of the local church that is often beautifully messy.

It is noteworthy that, in the interviews, participants presented an overwhelmingly positive experience of inclusion in their current parishes. This could be partly affected by Saldanha's positionality as an Anglican priest (though not in either of the study parishes), even if the general sense she had was that the women appeared to be free to share their views with her. Importantly, that the interviewed women primarily spoke of experiences of feeling included and not excluded in their current parishes does not take away from the understanding of inclusion that emerges in the analysis. Moreover, some women recounted experiences of exclusion in churches they attended or belonged to in the past, which contributed to a better understanding of inclusion.

Lastly, as noted in the introduction, a major part of the data gathering period coincided with the COVID-19 pandemic that resulted in a national lockdown and church closures in 2020. The interviewees' reflection regarding these exceptional circumstances adds an additional layer in the analysis and sheds light on how inclusion was viewed and understood under the COVID-19 regulations. More importantly, this pandemic layer helps us bring the different facets of inclusion into clearer focus.

### **Inclusion as acceptance**

Acceptance was a widely shared and central component to how the research participants understood inclusion. The idea of acceptance was reflected in how the women spoke of the importance of being free to come as one is and not being discriminated against based on social location or social norms. Being accepted means that "anyone can be included, there are no barriers", Judith explained. Echoing this, Charity indicated that inclusion meant "not looking at race, not looking at ability or disability; respecting the human dignity". Lerato spoke of being "inclusive of any person from all walks of life" – which she experiences at her current parish – and being free to "come to Jesus as you are", irrespective of what is going on in one's life.

The importance of feeling comfortable, recognized, valued, and welcome, irrespective of they are was a central notion in the interviews. In line with existing scholarship, inclusion then becomes a locus to acknowledge that



labels may exist but instead of using these to build barriers they should rather be used to build bridges.<sup>24</sup> Being accepted as one is resonates, in particular, with theologies that center on the inclusive and welcoming love of God, such as Desmond Tutu's ubuntu theology: "It is marvelous when you come to understand that you are accepted for who you are, apart from any achievements".<sup>25</sup>

Interviewees did not aim to describe women's universal church experience. Instead, the idea of full acceptance in a church community was addressed through their own life experiences. For example, Judith returned to the Anglican church after being a member of a church that belonged to a different denomination, which clearly informed her views on what being accepted looks like as she juxtaposed her current and past experiences. Speaking of her former church, she identified issues such as homosexuality, alcoholism, female ordination, lack of marital status, and lack of children as social barriers that excluded people from being able to fully participate in that church community. Considering this contextual nature of the narratives, it is important to remember that the data we use is one with soul, to use Nadar's metaphor. Hence, as we construct a normative, even if fluid, framework based on these stories, it should be understood as a flexible tool, not as the last word.

Relating to Judith's experience, some interviewees reflected explicitly on how culture, religion, race, or other learned ways of being were used to deny women the right to "come as they are" in both the workplace and churches. Dineo opined that "sometimes religion is used to justify cultural garbage, particularly the bits of culture that don't serve women". This comment acknowledges the different ways in which culture impacts women and men. As such, Dineo would likely agree with Mercy Amba Oduyoye that there is a need to explore "'woman's culture' within the general cultural experience of Africans".<sup>26</sup> Dineo continued to argue that, at times, people choose not to take context into consideration "in order to suit their narrative". She asserted

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<sup>24</sup> Miroslav Volf, *Exclusion & embrace: A Theological Exploration of Identity, Otherness, and Reconciliation* (Nashville: Abingdon Press, 1996), 66.

<sup>25</sup> Desmond Tutu, *God has a dream* (London: Penguin Books, 2005), 31-32.

<sup>26</sup> Mercy Oduyoye, *Introducing African women's theology* (England: Sheffield Academic Press, 2001), 24.

that culture and religion compounded to define women instead of women being allowed to define themselves in the church environment.

While socioeconomic status was not a central feature in the interviews, some women did associate socioeconomic status with the level of feeling accepted in their church communities. They assumed that their fellow parishioners from low-income contexts might feel less accepted in a parish they perceived to be of a middle to high socioeconomic status. This was apparent particularly in relation to the COVID-19 pandemic when online platforms became the main form of contact for parishioners. In this context, Joyce stressed how bridging the socioeconomic gap was an enormous challenge for those who do not have phones, let alone *smart* phones, or the required finances to buy mobile data that would allow them to remain connected with their parishes. They simply could not come as they were – or at all.

### **Inclusion as community**

The second lens to thinking of inclusion provided by the data was that of community, reflected in ideas such as togetherness and connectedness. Togetherness related to a sense of belonging and featured particularly in relation to small groups, such as Bible study groups. Connectedness referred to a feeling of being connected to the church community and was spoken of in relation to how languages were used in the parishes. The way women spoke of community (and acceptance) as central to inclusion finds strong resonance in the academic discourse on inclusion. Frederick Miller and Judith Katz, for instance, define inclusion as creating a sense of belonging for people in which their differences are embraced so that they experience a feeling of being respected and valued.<sup>27</sup>

Unsurprisingly, the meaning of togetherness was well illustrated in the context of small group settings within the parish.<sup>28</sup> For some, relationships built through small groups enhanced the sense of belonging to the parish

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<sup>27</sup> Frederick Miller and Judith Katz, *Inclusion breakthrough: Unleashing the real power of diversity* (California: Berrett-Koehler, 2002), 8, 17.

<sup>28</sup> Also see e.g. Mia Lövheim, "The religious lives of older laywomen. The last active Anglican generation," *Nordic Journal of Religion & Society* 31, no.1 (2018): 81; Perez, "Living into multicultural inclusive ministry," 5; Denise Ackermann, "Living with difference and otherness: A response to the stories from Canada, Spain and Italy," *Regreso y Encuentro – Reflexiones teológicas* (2007): 4.

community. Palesa, who had been at her parish of Holy Family for nearly 30 years, spoke of a Bible challenge initiative as a lifeline. It allowed her to connect with other parishioners, creating a greater sense of belonging. Likewise, for Boitumelo, her small Bible study group at Christ the Redeemer parish allowed her to build social connections. As a self-confessed “notorious introvert”, connecting with people was not easy, but her small group provided a comfortable space to do so.

Yet, small groups do not exclusively promote inclusion. Joyce, a member of the Mothers’ Union (MU), mentioned language differences as a contributing factor to some not experiencing a sense of belonging within church groupings. Indeed, while the idea that we cannot speak of women’s experience in general is often discussed primarily in relation to race and class differences,<sup>29</sup> this study recalls the importance of taking spoken language into consideration as well, at least in the South African context.<sup>30</sup> Joyce commented that “If you are not Zulu or Xhosa or Pedi and cannot speak the language, then you also feel excluded because you cannot fully participate”, despite Xhosa being her first language and also one of the commonly spoken languages among the mainly Black membership of the MU. If a sense of community is enhanced by connectedness, then not understanding or speaking the language forms an obstacle to this.

The COVID-19 pandemic both weakened and strengthened the sense of community. In relation to small groups, Palesa’s comparison of the coronavirus to apartheid makes sense as it interrupted the life of these groups:

And you know that apartheid system if I can go back there, they had a policy that said divide and rule and this is what this coronavirus is basically doing to us, it is dividing us into bits and pieces and then rules us.

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<sup>29</sup> Oduyoye, *African women’s theologies*; Lutz et al. (eds.), *Framing intersectionality*; Phiri et al., *Her-stories*; Ackermann, “Meaning and power”.

<sup>30</sup> Elina Hankela, “Towards liberationist engagement with ethnicity: A case study of the politics of ethnicity in a Methodist church,” *HTS Teologiese Studies/Theological Studies* 72, no. 1 (2016): a3475.

However, some informal small groups, or cliques, seemed to work against inclusion. The upside of the COVID-19 lockdown was that it created an “opportunity for some of those cliques to break away before we come back”, Dineo argued. Additionally, from the perspective of the power of spoken language to create connection, the use of technology in churches during the lockdown provided a way for Boitumelo to reconnect with her old parish outside South Africa and worship in her first language:

It has uplifted me and it is of value that I could not articulate before [the lockdown]. I realised that I wanted to get a Bible in my language since attending these services. I am only realising now in the COVID crisis period that my own language is valued.

Yet, while the pandemic nurtured a sense of belonging for Boitumelo, albeit outside her current parish, Kgomoitso felt that “options of worship have closed in some way” in the Holy Family parish due to the hard COVID-19 lockdown when the online service was conducted in English only.

While interviewees recognised that gender difference also affected inclusivity, there were no stories like those relating to language that implied personal feelings or experiences of exclusion based on gender in the interviewees’ current parishes. Nevertheless, some interviewees felt deeply moved by the stories of exclusion shared by female priests elsewhere. This silence, coupled with the hurt and empathy expressed on behalf of other women, raises the possibility of women not being able or willing to recognize or verbalize their own discrimination if there has been limited conscientization to it.

## **Inclusion as choice**

In the narratives of some women, personal choice comprised of inclusion, something that does not appear central to the academic discourse on inclusion. While the first two categories of acceptance and community were clearly informed by structural obstacles to inclusion, the category of choice centers on the individual. The way the women spoke of choosing to be included, or excluded, can be seen as empowering for women who have previously been bound by social norms or exclusionary biblical interpretation. Yet, this kind of talk about choice could also further exclude women who, for any given reason, do not or cannot make such a choice.

As some of the participants indicated, making the choice to be included could be thought of as one's personal responsibility. Lerato posed a rhetorical question to emphasize this: "How are you going to feel like you belong when you do not participate?". Additionally, Joyce was clear about participation being voluntary and not necessarily requiring others to initiate it. She reflected on her own decision to participate as a volunteer providing counselling to the Christ the Redeemer parish long ago. This took her from being a "benchwarmer" to an active participant. She also mentioned her choice to not engage in negative group dynamics in the parish. Similarly, in the parish of Holy Family, Palesa identified the need for a choir and then made a decision to start one.

The choice to be included could also be an ambiguous one. Boitumelo pointed out that sometimes one needs to make compromises to manage one's own sense of inclusion: "I am not Anglican – I go to an Anglican church". She wanted to participate in the church in which she grew up but could not because it is located outside of South Africa. The denomination that closely resembled her "home" denomination in South Africa did not offer services in a language she could understand. Thus, her choice to join the Anglican church was based on a need to feel connected in the area where she lived.

Inasmuch as inclusion is portrayed as a choice, so is exclusion in both its negative and positive forms. Some spoke of the choice to exclude themselves as a negative act, linking it to people who constantly complain about the way things are done, but when given the opportunity to participate do not make the effort to do so. Others focused on exclusion as a positive act of self-empowerment. To this end, Palesa and Lily, both professional women from different age groups and racial backgrounds, described exclusion or withdrawal from a specific situation or group as their personal choice and stated that in this way they never allowed themselves to feel excluded. Likewise, at the age of eleven, Kgomotso left the church she attended with her family. She did not feel excluded by others but rather left because she felt restricted. For her, leaving was a form of freedom to experience church and spirituality in a way that did not hold her captive.

During the COVID-19 lockdown, an information overload on virtual platforms occasionally led to technology fatigue where people became overwhelmed

and withdrew from any form of communication. This acted as is a form of positive self-exclusion to retreat and recharge. Kgomotso felt that the lockdown was testing on many levels and the church had not been immune to this. She realized that churches were trying to be inclusive through the use of online platforms but felt that “it gets too much...Feeling too much love...Inclusion is becoming overwhelming”. While her remark was specifically about the pandemic context, it speaks to church life more broadly as well.

## **Inclusion as a voice**

The idea of having a voice is linked both to the need to have an audible voice and the confidence to contribute and not feel silenced. Feeling that one's voice is heard and that others listen to what one has to say seems to strengthen a sense of inclusion. This fourth facet of inclusion is in line with the Circle theologians' emphasis on the need to listen to the voices of women and, in doing so, provide a safe space for each person to feel that their opinion is valued.<sup>31</sup>

Several women felt that within their current parish they were at liberty to contribute ideas and this in turn gave them a feeling of being included and appreciated. “I feel included and I feel that my ideas are appreciated, whether they agree with them or not but I feel that I am being listened to, I am heard”, says Bongzi. Kgomotso illustrated how her voice was heard in her parish when she was given an opportunity to explore her suggestion of providing space for teenagers to learn and grow in the parish. Despite the anxiety she experienced in making this a workable project, she gained confidence knowing that the parish was open to different voices. The idea of a voice contributing to a sense of inclusion was also highlighted by Judith's description of exclusion in her former church. She spoke of women having been silenced in church gatherings when a man was present and only having had a voice with other women. She revealed, “You could have a prayer group or a Bible study as long as there was [*sic*] no men present”.

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<sup>31</sup> Anastasie Maconda, “The impact of the Circle of Concerned African Women Theologians: French zone on church and African theology issues,” *Verbum et Ecclesia* 37, no. 2 (2016): a1597: 1; Labeodan, “Revisiting the legacy of the Circle of Concerned African Women Theologians today”, 3.

As already evident in Judith's account, societal and communal structures can form powerful barriers to an individual's voice. The courage to speak up does not always result in feeling valued but can also exclude people if the response prevents people from expressing themselves fully, as Lindiwe cautioned. A male priest's response to a suggestion she made in the parish she attended in the past kept her from attending services for two years. She shared that she was able to overcome this experience by separating the person causing the hurt from her relationship with God and found a different parish to worship in. However, the kind of experience Lindiwe described, especially at a structural level, can contribute to a sense of inclusion in the long run if read in light of Nyambura Njoroge's emphasis on the need for women to assert their voices to restore wholeness.<sup>32</sup> There is no guarantee that hurt will not be part of the process. Yet, Njoroge reveals that "In my quest for self-affirmation and wholeness the language of lamentation has led me to hear my inner voice when I wrestle with God, which has become the wellspring of my theological voice".<sup>33</sup>

Resonating with Njoroge, inclusion as a voice is one of the more challenging forms of inclusion due to the level of discomfort and anxiety it presents to the person raising his or her voice. Nonetheless, the stories of the respondents reveal a freedom that comes from being courageous enough to speak up, irrespective of the outcome.

## **Inclusion as support**

Even though support as an aspect of inclusion was not a central theme in the interview conversations, we included it based on a few interviews. In these interviews, support provided to others within the parish was considered a means to partner with individuals and help them feel less alone. Including this category in the framework ensures that the category of choice is not stretched too far when it comes to personal responsibility of one's inclusion.

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<sup>32</sup> Nyambura Njoroge, "Reclaiming our heritage of power: Discovering our theological voices," in *Her-stories: hidden histories of women of faith in Africa*, eds. Isabel Phiri, Devarakshanam Govinden, and Sarojini Nadar (Pietermaritzburg: Cluster Publications, 2002), 49.

<sup>33</sup> Njoroge, "Reclaiming our heritage of power," 51.

Another facet of support is the person receiving it, who also needs to make the choice to take on the journey to inclusion. The interviewees spoke of support as guiding someone to act. In this regard, Charity recalled that being present for people means “doing things with the people and not doing it for the people”. Similarly, Palesa mentioned walking alongside someone and, in some cases, even “dragging them along” when they chose not to see their worth. This speaks to Palesa’s strength of supporting others in their spiritual and academic journeys, as an academic herself, so that they could feel included. She realized that a sense of not being supported can lead to a perception of being unintentionally excluded. Consequently, it was suggested that being supportive of others who are willing to learn and grow is one way of developing a more inclusive space.

Notably, the interviewees further established that while support is important in the context of these Anglican parishes, the low numbers of young people in the church indicated that they needed special attention. According to Mpho, young people seem to “get lost in the whole process” in the Anglican church. In the same vein, Lerato and Palesa referred to a special need for the parish leadership (non-ordained and ordained) to find ways to encourage the involvement of young people in the parishes.

## **Conclusion: towards an ecclesial framework of inclusion**

Based on the views and experiences of the research participants, a framework of inclusion is proposed thinking of inclusion in ecclesial contexts. The framework comprises five elements: acceptance, community, choice, voice, and support.

Acceptance was summed up as feeling welcomed as one is, and in the stories relating to acceptance, the interviewees referred to various social identities, from race and gender to sexuality and ability, from the perspective of ensuring that these identities are not frowned upon and used as tools of exclusion. Likewise, culture and religion were considered social constructs that should not be turned against people, particularly women. In the COVID-19 context, socioeconomic status emerged as a social marker with regard to acceptance, though here we rely on the assumptions of relatively privileged members of the community to determine how lacking resources can become a barrier to feeling accepted.



The notion of community focuses on relationships within the parish and the effect on inclusion. Much of the narratives relevant to making sense of inclusion as community stemmed from the context of small groups within the church. It is noteworthy that in contrast to what the literature reveals regarding inclusion of ordained women discrimination based on gender was hardly mentioned in interviewees' responses in the context of their parishes. Thinking with an intersectional lens, spoken language instead emerged as a strong factor of belonging. This cautions us, at least in South Africa, to actively involve language in our reflection of and work towards inclusion. Interestingly, it was in relation to language that interviewees also reflected on the positive impact of the pandemic on their sense of belonging, with technology allowing them to connect in multiple languages and, importantly, their own first language. This underscores the importance of reading this framework of inclusion in context, interrogating the social layers most important to the process of inclusion in any given space.

The next two elements, choice and support, comprise two sides of one coin. Choice highlights one's responsibility to choose inclusion for oneself, while support cautions members of the church to support others, especially those who might not feel included, and encourage them to choose inclusion. Regarding choice, the analysis points to the impact of one's social status on inclusion. Making a choice for inclusion might be easier for professional women, like some of the research participants cited above. With respect to support, research participants drew attention to age in the church context, indicating that the youth, in particular, needed the support of other members.

Finally, voice as the fifth element of the framework speaks to the need for the church to be a safe space for people to raise their voices. It should be a space where people are heard, regardless of whether others agree or disagree with the speaker. Similar to the other four elements, the personal and structural levels of existence also interact here in the construction of inclusion and exclusion. Drawing on the discussion above, the audibility of an individual's voice is influenced by the structures. Simultaneously, however, voice is a tool that the individual can use to push back at an exclusionary system. When it comes to voice, interviewees from different backgrounds spoke first and foremost as women, which suggests that women having a voice in the church is not a given.

Inclusion in the church, when imagined with a group of non-ordained South Africa Anglican women, entails feeling accepted and having a sense of belonging to the community, feeling heard and valued and practicing their agency in the community while also supporting others in doing so. As the framework is formed on the basis of selected participants' experiences in particular contexts, this research only offers a limited perspective on the matter of inclusion in the church. Future research in diverse ecclesial spaces could help further evaluate and define the framework. The work on inclusion is a process, one that requires continuous self-reflection, conscientization and, perhaps most importantly, action to move from a theoretical ideal to a lived reality. Despite its limitations, the emerging framework described and discussed in this article is intended as a tool to assist churches in imagining and becoming inclusive communities.

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# Reimagining Christianity and Sexual Diversity in Africa: A Queer Theologian's Appraisal

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## SHORT BIO

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## ABSTRACT

The recent publication by Adriaan van Klinken and Ezra Chitando, titled *Reimagining Christianity and Sexual Diversity in Africa* (2021), continues to garner much attention from the theological community. This publication is important on numerous fronts. At least two are noteworthy and inform the present appraisal. First, van Klinken and Chitando's work speaks to the religious, particularly Christian, realities that beset contemporary Africa. Second, their work takes seriously the ways in which the lives of Africans are being rendered precarious because of the limited socio-political progress with regard to LGBT+ rights. This review article is offered taking seriously the ways in which LGBT+ lives are rendered precarious by the oppressive logic of forms of Christianity. This article has three movements. First, it offers an appraisal of the publication by van Klinken and Chitando. Second, the article critically considers the moment in which the publication was produced. Here an investigation into a particular Christian conservatism, which has led to fundamentalism, is provided. This reality, it is argued, renders this publication quite important. Third, it offers contemplation on the method that three queer theologians in South Africa are employing in their scholarship. Making this third move, the article responds to what is considered a limitation in the publication. This review article attempts to contribute and continue the work of re-imagining that van Klinken and Chitando invite readers to. Through their publication van Klinken and Chitando offer an invitation. This invitation is most clear: we are requested to re-imagine Africans who are LGBT+ as humans—fully human, and thus creatures of God. It is this invitation to which this review article responds.

## KEYWORDS

LGBT+, queer theology, sexual ethics

## Introduction

The recent publication by Adriaan van Klinken and Ezra Chitando, titled *Reimagining Christianity and Sexual Diversity in Africa* (2021), continues to garner much attention from the theological community. At the time of publication of this review in AJGR, the book had already been reviewed by Kevin Ward (2021)<sup>1</sup> and Michael Battle (2021)<sup>2</sup>. Within the present African

<sup>1</sup> Kevin Ward, "Reimagining Christianity and Sexual Diversity in Africa," accessed May 16, 2021, <https://www.eupublishing.com/doi/full/10.3366/swc.2022.0378>

<sup>2</sup> Michael Battle. "Reimagining Christianity and Sexual Diversity in Africa," accessed May 16, 2021 <https://www.churchtimes.co.uk/articles/2022/11-march/books-arts/book->



discourse on religion and human sexuality, the importance of this publication by van Klinken and Chitando's cannot be overstated. It is therefore pertinent to offer an appraisal of this work focusing on its promise and noting further work that may be required considering its limits.

Attempting to contribute to the intellectual dialogue to which van Klinken and Chitando invite readers—who I take to be people of Christian faith in Africa—like Ward and Battle, I offer a consideration of van Klinken and Chitando's work. Unlike more concise reviews, this review article formulates four points worth reflection when engaging van Klinken and Chitando.

First, it offers an appraisal of the publication. Second, as a church historian I am intrigued by the historical dimensions that shape this moment. For this reason attention is afforded to global and local developments regarding LGBT+ rights.<sup>3</sup> Third, writing as a South African, I consider contemporary queer theologians who are contributing to the growing body of literature.

## **An Appraisal**

Of the numerous fronts on which van Klinken's and Chitando's publication is important, at least two are noteworthy and these inform the present appraisal. First, van Klinken and Chitando's work speaks to the religious, particularly Christian, realities that beset contemporary Africa. Second, their work takes seriously the ways in which the lives of Africans are being rendered precarious because of the limited socio-political progress with regard to LGBT+ rights. Taking seriously the invitation to reimagining that the authors extend, this appraisal is divided into two parts: first, it attempts to outline the contours of the work; and second, it considers the framing of the invitation to re-imagine.

## **Coming to Terms with the Contours**

To come to terms with the contours of the work, we must consider the people and processes that seem to be at the centre of the publication. This part of

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[reviews/reimagining-christianity-and-sexual-diversity-in-africa-by-adriaan-van-klinken-and-ezra-chitando](#)

<sup>3</sup> Following van Klinken (2019:x) I use the term LGBT+ "as an indication of the unstable and unfixed nature of these categories." However, I do so with difference by including the '+' to denote those categories in human sexuality that are yet to be defined.

the review first discusses the people (theologians) on whom the authors draw on for reimagining, and second it outlines the processes that LGBT+ are employing in the pursuit of reimagining.

Quite interestingly the authors draw on the work of four pioneering African theologians: Desmond Tutu, Mercy Oduyoye, Jean-Blaise Kenmogne, and Musa Dube. This is perhaps quite unorthodox for a publication focused on sexuality, a topic which remains side-lined by African Christian theological discourses. Utilising the insights of these important theologians the authors set forth not only a liberatory theological trajectory for Africa's gender and sexual imagination, but quite significantly, they allow these theologians to speak on their own terms. In varying degrees each of the four theologians have articulated a vision for society and the church which affirms the lives and loves of LGBT+ Africans. However, to the question, who are the LGBT+ theologians who are currently writing and imagining this affirmation of life and love? the authors van Klinken and Chitandao provide no clear response. This is perhaps the publication's greatest limitation. I offer a reflection as response to this question that the book has failed to answer, in the third part of this review article that contemplates method,

Part two of the book is perhaps a more practical section of the book outlining how communities are directly impacted by the project of reimagining. By looking at what was previously done and is being done now throughout Africa, the authors note two organisations doing important work. First, readers are called to consider the World Council of Churches' Ecumenical HIV and AIDS Initiatives and Advocacy, previously known as the Ecumenical HIV/ AIDS Initiative in Africa. The project sought to focus attention on the epidemic of HIV and AIDS in the continent, which, in time, became a vehicle to address violence directed at LGBT+ people. The second institution is the Fellowship of Affirming Ministries. Regarding this organisation, van Klinken and Chitandao<sup>4</sup> write: "The Fellowship of Affirming Ministries is an African American organisation that in recent years has become active in Africa, aiming to build a pan-African progressive Christian, LGBT-affirming movement." Both organisations highlight the work already underway in Africa preparing faith communities to re-imagine how gender and sexuality

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<sup>4</sup> Adriaan van Klinken and Ezra Chitandao, *Reimagining Christianity and Sexual Diversity in Africa*, (London: Hurst Publishers, 2021), 113.

are being configured, challenging, and nudging the faithful to commit to an affirming theology that dignifies the lives of LGBT+ people.

Alongside these important institutions, van Klinken and Chitando suggest that art is, in fact, the lifeblood to recognise the dignity and rights of those who are LGBT+. In part three of the publication no less than four chapters are devoted to art produced by LGBT+ activists, claiming their sexuality and re-claiming their spirituality. Their art ranges from storytelling to poetry to visual arts. This appeal to the arts draws out the very imagination to which the authors invite readers. In these varied art forms, van Klinken and Chitando contend<sup>5</sup> that “Stories of struggle become testimonies of affirmation and liberation.” The artwork of LGBT+ people communicate not only their hurt and harm but also, more importantly, their hope and healing.

## Reimagining Bodies and the Body

What form, then, does our reimagining take? Quite simply, this reimagining is embodied and en fleshed. This requires a recognition of the importance of bodies and the Body (*Corpus Christi*, Body of Christ). Briefly outlining the history of Christianity in Africa, van Klinken and Chitando<sup>6</sup> note that the Body of Christ as well as understanding of body must be understood in terms of European colonial expansion. In the present, discussions in Africa, given the religious influence on sexuality (especially homosexuality), the impact of colonialism must not be understated. However, in the attempt to offer a decolonial alternative, the authors are quite clear that what is required now is a break from the colonising forms of sexual socialisation.

It is here that the authors challenge us to take the task of reimagining seriously. van Klinken and Chitando write<sup>7</sup>,

The African queer body—that is, the bodies of lesbian, gay, bisexual, transgender and other people perceived to be deviant because of their gender and sexuality—is too often stigmatised and silenced, discriminated against and excluded from the community.

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<sup>5</sup> van Klinken and Chitando, *Reimagining Christianity*, 145.

<sup>6</sup> van Klinken and Chitando, *Reimagining Christianity*, 17.

<sup>7</sup> van Klinken and Chitando, *Reimagining Christianity*, 129.

Given that the bodies of Africa's LGBT+ people are rendered precarious, our undertaking to re-imagine must seek ways to recognise their dignity. We are to take seriously the affirmation that gender and sexual minorities are made in the image of God, and affirm their inherent sacredness.<sup>8</sup>

This is an area in which the Church has abysmally fallen short. Throughout Africa, Christian faith communities remain sites of unconscionable violence for LGBT+ people. By calling readers to re-imagine the queer body, the authors also claim that ecclesiology must re-conceived—that the life of the church must be considered as profoundly enriched by the diversity of sexualities and genders. This reimagining of the Body—yes, the *Copus Christi*—is best seen in the chapters in parts one and two of the publication. Throughout these chapters the church is presented, perhaps even reimagined, as the vehicle of God's compassionate justice for LGBT+ by dignifying their lives and loves. The invitation to which the authors call the readers is clear: "This call for an African queer reimagination is not just about a reimagining of 'African sexuality' but of 'Africa' much more generally, highlighting the interconnectedness of sexual, social, economic and political spheres of life on the continent"<sup>9</sup> It is a call to re-imagine our bodies and the Body.

## Considering the Moment

In the past twenty years of the twenty-first century the global community has been pushed to ever increasing levels of polarisation. More pointedly, this polarisation is heightened by a reified far-right politics – which often facilitates the conditions for forms of religious fundamentalism. This, then, is the moment into which van Klinken and Chitando's publication has been born – a time of pervasive social regression as it concerns the recognition of LGBTI+ rights. The rise in far-right politics, with the sustenance of religious fundamentalism, directly affects not only the Africa of and to which van Klinken and Chitando write, but it is also a global reality. Reflecting on this, Ashby writes,<sup>10</sup> "From Brazil to the United States, Hungary to New Zealand,

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<sup>8</sup> van Klinken and Chitando, *Reimagining Christianity*, 74.

<sup>9</sup> van Klinken and Chitando, *Reimagining Christianity*, 7.

<sup>10</sup> Heather Ashby, *Far-Right Extremism Is a Global Problem*, last modified January 15, 2021, accessed May 18, 2022, <https://foreignpolicy.com/2021/01/15/far-right-extremism-global-problem-worldwide-solutions/>

right-wing extremist ideas and groups are posing a grave threat to democratic societies.” She continues this analysis, by offering a stern warning: many sectors of progressive society have incorporated the logic of right-wing populism into its political imagination; therefore, this moment calls for an ideational struggle for the re-claiming of “democracy, equality, rule of law, and human rights.”

Without falling into the temptation of homogenising Africa, one is able to note the influence of evangelicalism throughout various parts of the continents. For Forster the rise in the African reception of one form of evangelicalism, with its profound social conservatism, is linked to the ascendancy to power by the former American president Donald Trump. He writes,

Religion, politics and money are deeply intertwined among Trump-supporting African evangelicals – and dangerously so. American evangelicalism is part of the “software” that allows the “hardware” of American exceptionalism to spread throughout the world... Many African evangelical leaders receive funding from US bodies. Many fall in line with the Trump government's views on abortion, homosexuality, science and Christian Zionism.<sup>11</sup>

It is within this context that van Klinken and Chitando are responding to the challenges that the West, at times, impose on the African continent – especially the development of its religious communities. Yet, interestingly, the West's perception of Africa is “as a homophobic continent in which gay and lesbian people are marginalised and discriminated against, becoming victims of a deeply ingrained homophobia that illustrates the ‘backward’ nature of African cultures and societies.”<sup>12</sup> Ironically, in general, the conservative forms of Christianity in the West, is blamed for the homophobia rampant on the continent. However, this analysis stops short of locating the origin and continued facilitation of such conservatism (which itself leads to religious fundamentalism).

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<sup>11</sup> Dion Forster, “Trump is Out, but US evangelicalism remains alive and well in Africa,” last modified January 17, 2021, accessed May 18, 2022, <https://theconversation.com/trump-is-out-but-us-evangelicalism-remains-alive-and-well-in-africa-151117>

<sup>12</sup> van Klinken and Chitando, *Reimagining Christianity*, 1.

## Confronting Conservative Evangelicalism

At present it would seem that a specific form of evangelicalism is operative in the conservatism that has taken hold of various parts of Africa. Of course, the argument here proffered is not that that evangelical Christianity in its totality is the source of homophobia, transphobia, and queerphobia in the continent. Rather, one specific strand of this tradition is considered influential in the present rise of conservatism, and this strand is woven into the political imagination of far-right politics – such as has been observed regarding Trump.

Setting out to take this analysis further, it is necessary to offer a definition of evangelicalism. Balcomb offers the following definition:

Evangelicalism is that aspect of the Christian faith that emphasizes the good news of the gospel of Jesus Christ, which is proclaimed as an invitation to whoever believes and receives it into a personal encounter with God through Christ that leads to the transformation and renewal of the lives of its recipients.”<sup>13</sup>

The notions of the good news, its proclamation, a sequential personal encounter, and one’s transformation is thus foundational to understanding the theology of evangelicalism. For African evangelicals the theology of this tradition draws together both African spirituality and contemporary conceptions of materialism and individualism.<sup>14</sup> Evangelicalism understood in this fashion, practiced by Africans, is not a problem.

In order to come to terms with the regressive impact of the more conservative strand of evangelicalism it is helpful to see its links to culture. This may be observed in two forms: funding and political commitments. First, there can be no doubt that the global evangelical project, particularly in Africa, is largely dependent on the beneficence of the Global North – here the United States of America is of particular importance. Kaoma helpfully notes, “conservatives’ dominance in Africa is extending to social services—

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<sup>13</sup> Anthony Balcomb, “Evangelicalism in Africa: What it is and What it does” in *Missionalia* 44, no. 2. (2016) 117.

<sup>14</sup> Balcomb, “Evangelicalism in Africa,” 120.

although they are opposed to supporting the U.S. poor in their own backyard.”<sup>15</sup> The funding received by African faith-based organisations is predicated on the acquiescence to the theological commitments of the funder, which in this case is conservative evangelicalism. Van Klinken already gestured toward this in *Kenyan, Christian, Queer*, noting the influential role Christian formations play in the politics of Kenya, when funded by evangelical conservatives.<sup>16</sup>

The second form of influence the US funders have on the development of African evangelicalism is related to politics. Given the priority evangelicalism affords the experience of a personal encounter and its leading to transformation, there is no doubt that the tradition does directly seek to impact broader society. Because of this, Hutchinson and Wolffe argue that this undoubtedly leads to these faith-based organisations' influence on electoral results. They observe regarding evangelicals, that they:

act as interpreters of meaning for rising cultures in need of a greater sense of meaning than that provided by the programmatic political rationality traditionally offered as the pathway to modernisation. Evangelicalism in the developing world provides political actors with 'symbolic effectiveness.'<sup>17</sup>

Considering the work of the conservative formation, the Institute on Religion and Development, Kaoma argues that their goal is a total takeover, he notes the institute's own wording:

“Conservatives have won surprising victories on key theological and sexuality issues at recent church conventions. Now is the time to translate those victories into real influence for conservatives within the permanent governing structures of these churches, so they can help renew the wider culture of our nation.”<sup>18</sup>

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<sup>15</sup> Kapya Kaoma, “Globalizing the Culture Wars: U.S. Conservatives, Africa Churches and Homophobia,” (Somerville: Political Research Associates, 2009), 9.

<sup>16</sup> Adriaan van Klinken, *Kenyan, Christian, Queer: Religion, LGBT Activism and Arts of Resistance in Africa* (Pennsylvania: Pennsylvania State University, 2019), 42.

<sup>17</sup> Mark Hutchinson & John Wolffe, *A Short History of Evangelicalism* (Cambridge: Cambridge University Press, 2012), 256.

<sup>18</sup> Kaoma, “Globalizing the Culture Wars”, 17.

The reality that international formations are funding a conservatively regressive social agenda in Africa should not go by unnoticed.<sup>19</sup> In fact, it should be called into question, and the cultural imperialism it denotes should be interrogated. Further, these formations, such as the Institute on Religion and Development, play a paramount role in determining the development of evangelicalism in Africa. For this reason, it is essential to consider this strand of evangelicalism as profoundly fundamentalist.

## Faith to Fundamentalism

Without critical interrogation this strand of evangelicalism could easily lead to a form of religious fundamentalism. While not explicitly articulating this, van Klinken and Chitando do consider this. They write, “A major part of the problem is the history of colonial imaginations of ‘African sexuality’ which continue to shape perceptions and attitudes today.”<sup>20</sup> A cursory reading of evangelicalism, as a contemporary faith tradition in Africa, is showing ties to a particular conception of neo-colonialism – which I relate to the colonisation of Africa.

What, then, is fundamentalism? Offering a definition, Herriot notes:

The first and most basic distinguishing feature of fundamentalist movements is that they are reactive. Fundamentalists believe that their religion is under mortal threat from the secularism of the modern world, and they are fighting back. They may resist in different ways, but they are all essentially oppositional; they have to have an enemy.<sup>21</sup>

Still, there are three other characteristics linked to this foundational claim, first of which is a fundamentalists’ fixation on an enemy which requires a reaction. Second, in order to cement the need for an enemy, fundamentalist logic is predicated on a dualism, and religion is conceived through binarized thought. Third, fundamentalists draw their inspiration from a holy book –

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<sup>19</sup> Carl Collison, “US Conservatism Funds Churches in Africa, Stifling Queer Rights,” Last modified April 13, 2017, accessed May 18, 2022, <https://mg.co.za/article/2017-04-13-00-us-conservatism-funds-churches-in-africa-stifling-queer-rights/>

<sup>20</sup> van Klinken and Chitando, *Reimagining Christianity*, 4.

<sup>21</sup> Peter Herriot, *Religious Fundamentalism: Global, Local and Personal* (New York: Routledge, 2009), 2.



which serves in the role of supreme authority. However, their interpretation and application of this holy text is profoundly selective. Fourth, having its origin in the previous century, fundamentalists affirm millennialism, the view that God would in an expected period erect God's rule over the world. In each of these characteristics, second to fourth, the imagined enemy (fundamentalism's foundational claim) is the cause for reacting. Yet, Herriot offers a reminder: fundamentalism, in the form here observed, is a modern invention, that arose in the twentieth century.<sup>22</sup> This strand of evangelicalism, given its social conservatism, may thus be argued to be fundamentalistic – precisely because it antagonises LGBT+ people, rendering them enemies. I posit that it is this reality of fundamentalism, as produced by one form of African evangelicalism, that van Klinken and Chitando respond to with their publication.

An analysis of fundamentalism, as it relates to this strand of evangelicalism in Africa, requires a consideration of how culture is conceptualised. I agree with Balcomb (as previously stated), that this form of evangelicalism is at home in Africa because of the priority it affords to indigenous spirituality. This, however, does not mean that fundamentalist evangelicals are not engineering culture in the manner they see fit; for this discussion, their aspired culture is anti-LGBT+. Offering a glimpse into this desired culture, van Klinken and Chitando write:

The critical role of Christian religious leaders and of Christian-inspired political speech in fuelling homophobic campaigns in countries across the African continent has now been widely documented. Thus, Christianity has been a key part of colonial and postcolonial imaginations of Africa as a heterosexual continent, and of African nationhood and citizenship as excluding LGBT[+] people.<sup>23</sup>

Having to reify itself, and create legitimacy for its existence, fundamentalist evangelicals in Africa have made LGBT+ people their sworn enemy. Doing so, fundamentalists are constantly required to point out the behaviours and acts of this enemy. Herriot posits, "Fundamentalists are indeed different;

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<sup>22</sup> Herriot, *Religious Fundamentalism*, 2.

<sup>23</sup> van Klinken and Chitando, *Reimagining Christianity*, 11.

they seek to establish their difference at every available opportunity.”<sup>24</sup> Of course, when read in relation to evangelicalism in Africa, the difference between fundamentalists and their enemy is primarily sexual and gender identity. The desired culture is thus heteronormative, rendering LGBT+ people as “others,” truly enemies. Rejecting this desired culture, van Klinken and Chitando take issue with the notion that being LGBT+ is un-African. Instead, they put forth a “call for an African queer reimagination (that) is not just about a reimagining of ‘African sexuality’ but of ‘Africa’ much more generally, highlighting the interconnectedness of sexual, social, economic and political spheres of life on the continent.”<sup>25</sup> In short, the conservative strand of evangelicals in Africa may be argued to be fundamentalist, by virtue of the antagonising of LGBT+ people.

In this second part of the review, I have attempted to grapple with the moment in which Klinken and Chitando birthed their work. This reading of contemporary history has highlighted the fact that far-right politics is impacting the world in a rather pronounced way. Related to this, we are witnessing a rise in a rather conservative strand of evangelicalism, which is gaining traction in the African continent, and, quite importantly, this strand has direct links to right-wing politics in America. Finally, I posit that this strand of evangelicalism should be regarded as fundamentalist in nature, and doing so it offers us the tools to make sense of this moment.

## Contemplating Method

Informed by this discussion of the moment in which Klinken and Chitando’s publication was produced, it is well worth considering the method employed by scholars who are reflecting on sexuality and religion in South Africa. By drawing on authoritative theologians in Africa who have impacted religious reflection in telling ways, van Klinken and Chitando invite readers to consider human sexuality alongside other liberatory modes of theologising – such as those that grapple with race, gender, and economic inequality. In this section, then, attention is afforded to the meaning and method with which LGBT+ people are approaching the development of Christian theology in

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<sup>24</sup> Peter Herriot, *Religious Fundamentalism*, 4.

<sup>25</sup> van Klinken and Chitando, *Reimagining Christianity*, 7.

South Africa. This is presented as a case study, aimed to shed light on the ongoing work by LGBT+ activists and academics.

Responding to the limitation previously noted, I argue that it may be helpful to read *Reimagining Christianity and Sexual Diversity in Africa* alongside the works of scholars who present themselves as queer theologians. It is well worth noting that queer theology has, in recent years, gained traction in the South African academy, by both early career academics and more senior researchers at various institutions. These scholars offer their work as response to the reality of queerphobia practiced in Africa, especially when informed by Christian observance.

### **Charlene van der Walt**

In recent years various works reflecting on queer theology—that is, theological reflection by LGBT+ people—have been produced in South Africa. One important contributor to this body of works is Charlene van der Walt, an associate professor at the University of KwaZulu-Natal's School of Religion, Philosophy and Classics. Since completing her doctoral studies in the Biblical Sciences, van der Walt has continually contributed to the ever-growing body of literature of queer theology. Through the publication of numerous journal articles van der Walt has advanced the work of her doctoral dissertation, which was focused on unravelling the ideologies at work in biblical interpretation.<sup>26</sup>

In one key text, the journal article titled 'Wording oneself into being: Lesbian musings on discovering the queer insistence of Joan Hambidge,' van der Walt reflexively offers a meditation on how she has made sense of herself and her work as a queer theologian, who is also an ordained minister in the Dutch Reformed Church by drawing on the artistic work of Joan Hambidge. Thinking through how she has had to navigate the world, van der Walt) writes:

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<sup>26</sup> The dissertation, originally completed in Afrikaans is titled *Ideologie en mag in Bybelinterpretasie: op weg na'n kommunale lees van 2 Samuel 13*. It was later reworked into an English monograph with the title *Toward a Communal Reading of 2 Samuel 13: Ideology and Power within the Intercultural Bible Reading Process* (Indiana: Institute of Mennonite Studies, 2014)

Within the heteronormative there is only space for heterosexual experiences, constructions and realities and no other alternatives are tolerated... Heteronormativity, and the resulting intolerance of sexual diversity, often gives rise to homophobic attitudes, hate crimes and violence... LGBTIQ+ bodies, like my own, experience surveillance and violence because they embody their sex, gender, and sexuality differently than what is dictated within the heteronormative ideal.<sup>27</sup>

For van der Walt, then, queer theology—which is always transgressive—must grapple with the heteronormative world within which LGBT+ people must exist. Further, linked to this, such queering transgression requires an interrogation into the ideologies that give rise to various homophobic and transphobic modes of biblical interpretation.

## Hanzline Davids

Another important interpreter of queer theology in South Africa is Hanzline Davids, a researcher at the Institute for Gender Studies, in the College of Human Sciences (University of South Africa). Prior to this, Davids served as a minister in the Uniting Reformed Church in Southern Africa (URCSA) and later as process coordinator for the non-governmental organisation “Inclusive and Affirming Ministries.” While being an early career academic, most of Davids’ publications focused on Christian ethics and human sexuality. His contribution to the development of queer theology in South Africa, then, cannot be overstated.

In an article published in the Stellenbosch Theological Journal, titled ‘Recognition of LGBTIQ bodies in the Uniting Reformed Church in Southern Africa: An indecent proposal?’ Davids touches the very heart of the project of queer theology. Centring himself, his body and his lived experience, Davids reflects on how URCSA has conceived human sexuality, and the resultant continued forms of sexual oppression.<sup>28</sup> Taking the doctrinal

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<sup>27</sup> Charlene van der Walt, “Wording Oneself Into Being: Lesbian Musings on Discovering the Queer Insistence of Joan Hambidge,” *Stilet*, 32, no. 1 & 2, (2020): 141.

<sup>28</sup> ‘Hanzline Davids, “Recognition of LGBTIQ Bodies in the Uniting Reformed Church in Southern Africa: An Indecent Proposal?’ Stellenbosch Theological Journal 6, no. 4 (2020) 303.

confessions of Christianity seriously, quite similar to van Klinken and Chitando, Davids draws on the very tradition of URCSA's doctrine to offer an alternative queer possibility, which he terms "an indecent proposal." Reflecting on the Belhar Confession, Davids notes:

This confession talks about the 'suffering, despair and humiliation' of black people in South Africa... LGBTIQ people whose SOGIESC [sexual orientation, gender identity, expressions and sex characteristics] is deemed deviant do not fit into the anthropological dualism of heteropatriarchy and therefore experience "suffering, despair and humiliation" on a continuous basis in the URCSA. Confessions, as statements of faith are not documents that are dead.<sup>29</sup>

This text, in addition to Davids' other works, uncover the promise of queer theology in South Africa. This promise lies in its grappling with the violence directed at LGBT+ people and its transgressive courage to imagine a different reality, all while drawing on the faith that inspires and informs the community.

## **Megan Robertson**

Another pioneer contributing tremendously to the field of queer theology in South Africa is Megan Robertson, a senior researcher at the Desmond Tutu Centre for Religion and Social Justice (University of the Western Cape). Robertson's approach to Christian theology may be observed as intentionally more transgressive, and I suspect this may be because of her sociological background. Throughout her work, Robertson has been concerned with both social construction and the implications of gender and human sexuality, reading them through a religious lens.

In her doctoral dissertation Robertson investigated the way in which her denomination reflects on ministry and human sexuality. In it she "explored the lived experiences of six queer clergy (one of whom was discontinued) in the Methodist Church of Southern Africa (MCSA), in order to understand the complex relationship between institutional power and the ordinary lived

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<sup>29</sup> Davids, "Recognition of LGBTIQ Bodies," 311.

realities of clergy”<sup>30</sup> This, of course, is a ground-breaking contribution to the theological study of human sexuality in South Africa for two reasons: first, it affirms the call to ministry of LGBT+ people amid the continued violence; and second, the MCSA is the largest denomination in South Africa (with the largest cohort of members of parliament in office).

Following her doctoral studies, while also advancing its focus, Robertson has set out to consider the mode in which LGBT+ people are theorising their own subjectivity. In an article for *Religion Compass*, Robertson locates the focus of her study in Southern Africa. She does so while also recognising that:

The complexity of a region which juxtaposes conservative ‘Christian nations’ with constitutionally progressive and pluralistic ones, with experiences of both violence as well as liberation for queer people, provides fertile ground to examine the various African and queer subjectivities and embodiments emerging from scholarship.<sup>31</sup>

In this work Robertson notes the invaluable contributions of numerous individuals and institutions who are reimagining human sexuality within the African Christian space in rather profound ways. Taking note of the evolving queer scholarship in Southern Africa, Robertson concludes,

It provides a site for challenging imagined universalised ideas of queer rights and the secularisation of queer freedoms. It is a site where anti-colonial sentiment, decolonial commitments and queer possibilities intersect. In response to calls for theory and theology to proceed from the epistemological starting point of lived experience, scholars have begun to generate more complex and nuanced pictures of queer Christian subjectivities within this regional and political terrain.<sup>32</sup>

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<sup>30</sup> Megan Robertson, *Called and Queer: Exploring the Lived Experiences of Queer Clergy in the Methodist Church of Southern Africa* (Belville: University of the Western Cape, 2020), ii.

<sup>31</sup> Megan Robertson, “Queer Studies and Religion in Southern Africa: The Production of Queer Christian Subjects,” *Religion Compass* 15, no. 1. 2021:4.

<sup>32</sup> Megan Robertson, “Queer Studies and Religion”, 8.

Employing a more sociological approach to the study of the Christian faith, Robertson is able to offer a more intentionally transgressive analysis. Given this approach, this analysis helpfully acknowledges the historical developments that have given rise to the present while also challenging readers to imagine something new.

Recognising van Klinken and Chitando's limitation, the prioritising of African theologians who do not self-identify as LGBT+, opens the space for advancing theological reflection by those who do. For this reason, the reimagining van Klinken and Chitando invite readers to is being witnessed to in van der Walt's approach to biblical interpretation, Davids' querying of Christian dogmatics, and Robertson's transgressive queering of Christian theological reflection. Of course, these three scholars are not the only ones writing on queer theology in South Africa, much less the broader African continent, however, by noting their important contributions one is better able to set out on the work of reimagining alongside van Klinken and Chitando.

## Conclusion

Through their publication van Klinken and Chitando offer an invitation. This invitation is most clear: we are requested to re-imagine Africans who are LGBT+ as humans—fully human—and thus creatures of God. Perhaps what is most striking about the publication is not the argument set forth in its chapters, but the form of its conclusion. The authors do not offer an open-ended conclusion,<sup>33</sup> they do leave it inconclusive—it requires the reader to come to terms with the realities of the present, and thereby to re-imagine what sexuality may yet be and become in Africa. In an un-concluding fashion, van Klinken and Chitando offer these words of invitation: "Only the future will tell what will become of this."<sup>34</sup> In search of that future, the reader is bid to re-imagine here and now.

This review article has sought to consider this publication by providing an appraisal. This appraisal was offered by one who identifies as a queer theologian, who, in reading the publication, was filled with hope for the future of this emerging discipline. Further, attention was also afforded to the

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<sup>33</sup> van Klinken and Chitando, *Reimagining Christianity*, 197.

<sup>34</sup> van Klinken and Chitando, *Reimagining Christianity*, 203.

shaping of this global and local moment, in which global Christian fundamentalism is directly impacting the African continent—reading van Klinken and Chitando’s work this should be reflected on critically. Finally, by contemplating on the method employed by practitioners of queer theology, this article responded to the most noteworthy limitation of the publication. A brief discussion was provided of pioneering queer theologians in South Africa who are pre-emptively responding to van Klinken and Chitando’s invitation to re-imagine.



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## Trans Inheritance Roundtable

Fatima Seedat

### 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."<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

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.

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<sup>2</sup> 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).

# A Brief Analysis of the Status of a Transgender Beneficiary for Purposes of an Islamic Will within the South African Context

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## SHORT BIO

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## ABSTRACT

A Muslim within the South African context can ensure that his or her compulsory estate devolves in terms of the Islamic law of compulsory succession by virtue of executing a will, that includes a clause to this degree. This article looks at a fictitious 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. This article looks at the right of Z to inherit in terms of the Islamic will.

## KEYWORDS

inheritance, Islamic law, South African Law, Constitutional Law, Transgender

## Introduction

A Muslim within the South African context is able to ensure that his or her compulsory estate (estate after all liability claims and testate succession claims have been deducted) devolves in terms of the Islamic law of compulsory succession by virtue of executing a will which includes a clause stating this.<sup>1</sup>

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<sup>1</sup> The claims against a deceased estate in terms of Islamic law are (in order of priority) liability claims, testate succession claims, and compulsory succession claims. Liability claims are deducted from the gross estate (estate prior to any deductions). Testate succession claims are deducted from the net estate (estate after all liability claims have been deducted). Compulsory succession claims are deducted from the compulsory estate (estate after all liability claims and testate succession claims have been deducted). It should be noted that there will always be a compulsory estate in terms of Islamic law (in the event where the liability claims are not equal or more than the gross estate) as the testate succession claims are limited to a maximum of one third of the net estate. The remainder of the net estate (compulsory estate) would then devolve in terms of the Islamic law of compulsory succession, as deemed in the primary sources of Islamic law. Liability



This article looks at a fictitious scenario where a testator (X) executes an Islamic will on 04 October 2021 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. It should be noted that Z has undergone sex reassignment surgery and has changed his gender identity from 'female' to 'male' at the Department of Home Affairs.<sup>2</sup> The testator (X) did not approve of the surgery and deemed it to be contrary to Islamic law. The testator (X) died on 04 October 2021 due to a COVID 19 related illness. In the Islamic law of compulsory succession, a son inherits double the share of a daughter.<sup>3</sup> The share of inheritance that Z is entitled to is, thus, dependent on whether Islamic law regards Z as a son or as a daughter for the purposes of inheriting from X. This article looks at the position of Z in terms of the above fictitious scenario. The rights of transgender persons within the South African context are looked at by way of introduction. The status of a transgender person in terms of Islamic law is then examined. Potential challenges that could be made by a transgender beneficiary in the situation of Z with regard to an Islamic will are considered. The article concludes with findings and a recommendation.

## **The status of a transgender persons within the South African context**

Transgender is an umbrella term to describe people whose gender expression or gender identity differs from the sex or gender assigned at

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claims are governed by the Islamic law of liabilities, testate succession claims are governed by the Islamic law of testate succession, and compulsory succession claims are governed by the Islamic law of compulsory succession. See Muneer Abduroof and Najma Moosa, "Islamic law Mode of Estate Distribution in South Africa," *International Survey of Family Law* (2016): 457 – 480, for a further discussion on the claims against a deceased estate in terms of Islamic law.

<sup>2</sup> In this article, Z will be referred to as male, as this is the legal position within the South African context, even though the status might differ in terms of Islamic law.

<sup>3</sup> See Muhammad Muhsin Khan and Muhammad Taqi-ud-Din al-Hilali, *The Noble Qur'an - English Translation of the Meanings and Commentary* (Madinah K.S.A: King Fahd Complex for the Printing of the Holy Quran) 1404H, 4:11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females".

birth.<sup>4</sup> The umbrella term is used to describe a wide range of identities and experiences – including transsexuals, people who transition from female to male, people who transition from male to female, transvestites, cross-dressers, two-spirit individuals, queer, and many more.<sup>5</sup>

A transman is a “transgender man or female-to-male (FTM) who is assigned female at birth, but his gender identity is male”<sup>6</sup>. Z, in the scenario looked at in this article, could be referred to as a transman due to him having been assigned female biological characteristics at birth. However, a transgender person, within the South African context, may apply to have his or her gender identity altered in the birth register according to the Alteration of Sex Description and Sex Status Act.<sup>7</sup>

Section 2(1) of the Act states that,

[a]ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.<sup>8</sup>

It is interesting to note that section 2(1) does not require that the applicant undergo gender reassignment surgery. For the purpose of the Act, undergoing hormonal treatment is sufficient.

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<sup>4</sup> Note that a transgender person (as is discussed in this article) is different to a person who is intersexed (*khuntha*). See Salih Bin Abd Allah Fawzan, *Al Tahqeeqaat Al Mardiyyah Fee Al Mabaahith Al Fardiyyah* (Al-Ma'aarif, Riyadh, 1999), 4: 207-218 for a further discussion on this issue.

<sup>5</sup> See Southern Africa Litigation Centre, *Laws and Policies Affecting Transgender Persons in Southern Africa* (Johannesburg: Southern African Litigation Centre, 2016): viii. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>.

<sup>6</sup> See Southern Africa Litigation Centre, *Laws and Policies*, viii.

<sup>7</sup> Alteration of Sex Description and Sex Status Act 49, 2003.

<sup>8</sup> See Alteration of Sex Description and Sex Status Act 49, 2003, sec. 2(1).

Section 3 of the Alteration of Sex Description and Sex Status Act provides that:

(2) A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration. (3) Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.<sup>9</sup>

The rights of transgendered persons in this regard within the South African context are further investigated in Part IV of this article.

### **The status of a transgender person in terms of Islamic law**

There is no consensus within the Islamic law jurisprudence concerning whether or not a transgender person is allowed to change their sex via sex reassignment surgery. Al Qur'an 4, 118 and 119 state that,

Allah cursed him. And he [Shaitan (Satan)] said: 'I will take an appointed portion of your slaves; Verily, I will mislead them, and surely, I will arouse in them false desires; and certainly, I will order them to slit the ears of cattle, and indeed I will order them to **change the nature created by Allah**. And whoever takes Shaitan (Satan) as a Wali (protector or helper) instead of Allah, has surely suffered a manifest loss'. (emphasis my own)<sup>10</sup>

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<sup>9</sup> See Alteration of Sex Description and Sex Status Act 49, 2003, sec. 2(A).

<sup>10</sup> See Khan and Hilali, *The Noble Qur'an*, 4:118 -119. See also Serena Tolino, "Transgenderism, Transsexuality and Sex - Reassignment Surgery in Contemporary Sunni Fatwas," *Journal of Arabic and Islamic Studies* 17 (2017): 229 – 230, where it states that "[t]he majority of Quranic exegetes interpreted the verses [4:118 -119 above] on 'changing the creation of God' as a reference to God's religion, considering that God created all people as naturally inclined to the correct religion. However, others have interpreted these verses as referring to an alteration in the physical appearance of human beings and animals. In this sense, these verses are also relevant for SRS [Sex – Reassignment Surgery], because it would be considered a change in what God created".

It could be argued that sex reassignment surgery falls within the category of wanting to change the nature created by Allah (God Almighty) and that a person who wants the change the nature in which he or she was created is being misled by Shaitan (Satan).

In 1988, a fatwa was issued by the Grand Muftee of Egypt, Sheikh Mohammed Sayyid Tantawi, concerning the status of a person who has undergone sex reassignment surgery. The fatwa was based on an Al-Azhar University medical student (Sayyid) who sought treatment for depression from a psychologist. A brief background to the situation that Sayyid found himself in will now be looked at.<sup>11</sup>

Sayyid was diagnosed with “psychological hermaphroditism” as the cause of his depression. Sayyid was referred by the psychologist to a surgeon for sex reassignment surgery. The surgeon requested the opinion of a second psychologist, who confirmed the diagnosis. Sayyid was initially treated with female hormones and was later operated on in Cairo in 1988. Sayyid's penis was removed and replaced with a urinal orifice and artificial vagina. He then adopted the name ‘Sally’. Sally applied for admission to the women’s section of the Faculty of Medicine at Al-Azhar. The request was rejected by a Special Committee that was set up by Al-Azhar University to examine the case. The Doctors’ Syndicate, which was at that time a professional body dominated

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<sup>11</sup> “In the early 1980s, a young man named Sayyid Abd Allah was studying at the medical faculty of al-Azhar. During his course, Sayyid, while claiming a gender ambiguity problem, contacted a psychologist and acknowledged that he was suffering from extreme depression. After examination, the psychologist found that he was suffering from ‘psychological hermaphroditism’ (al-khunutha alnafsiya). Therefore, the psychologist ‘treated him for three years, making all possible effort to restore male sexual identity to him, but eventually . . . [the psychologist] had to give up. She explained the failure as inevitable in cases like this where treatment is begun after puberty’ (Skovgaard-Petersen, 1995). After that, the psychologist proposed that Sayyid undergo sex-reassignment surgery. Sayyid went to a surgeon, but he referred Sayyid to a second psychologist. The second psychologist eventually concurred that surgery was the only way for Sayyid. Finally, he underwent a sex-reassignment operation in the late 1980s. Soon after Sayyid recovered, he took the name Sally (a female name) and still lives in Egypt”. (Mehrddad Alipour, “Islamic Shari’a law, Neotraditionalist Muslim scholars and Transgender Sex Reassignment Surgery: A Case Study of Ayatollah Khomeini’s and Sheikh al-Tantawi’s Fatwas,” *International Journal of Transgenderism* 18, no.1 (2017): 93–94)

by conservative forces, also examined the case and came to the conclusion that the surgeon, the anesthetist, and the psychologists who approved the surgery had committed a medical error, having operated on Sayyid without there being a disorder and damaging him. It was at this point that the Doctor's Syndicate requested a Fatwaa from the Grand Muftee of Egypt.<sup>12</sup>

Sheikh Mohammed Sayyid Tantawi stated in his Fatwaa that if reliable doctors believe that there are innate causes in the body, then sex reassignment surgery would be allowed. However, he further stated that sex reassignment surgery would not be allowed if the reason is solely based on the desire to change sex.<sup>13</sup> However, the fatwa did not answer the question as to whether a diagnosis of "psychological hermaphroditism" was enough to allow for the surgery to be done in terms of Islamic law. It is also not certain as to what "innate causes in the body" entails. For purposes of the analysis, it is assumed that Z does not meet the requirement of the Fatwaa, but rather that the surgery was done solely based on his desire to change his sex, which is not allowed in Islamic law.<sup>14</sup>

## **Potential challenges by a transgender beneficiary in light of an Islamic will**

An Islamic will within the South African context can be drawn up in two ways. First, a testator or testatrix states what proportions of his or her compulsory estate should be distributed.<sup>15</sup> An example of this would be where a testator states in his will that he bequeaths a third of his compulsory estate in favor of his daughter and two thirds of his compulsory estate to his son.<sup>16</sup> Second,

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<sup>12</sup> Alipour, "Islamic Shari'a law," 93–94.

<sup>13</sup> Alipour, "Islamic Shari'a law," 96–97.

<sup>14</sup> See footnote 11.

<sup>15</sup> See Muneer Abduroaf, "Limitations on the Freedom of Testation [Part 2 of 2]," *Without Prejudice* 20, no. 5 (2020): 47–48. [www.withoutprejudice.co.za/free/article/6977/view](http://www.withoutprejudice.co.za/free/article/6977/view) (accessed 19 October 2021) and Muneer Abduroaf, "Limitations on the Freedom of Testation [Part 1 of 2]," *Without Prejudice* 20, no. 4 (2020a): 25–26. [www.withoutprejudice.co.za/free/article/6926/view](http://www.withoutprejudice.co.za/free/article/6926/view) (accessed 19 October 2021) for a discussion on freedom of testation and its limitations within the South African context.

<sup>16</sup> This would be in line with the Islamic law requirements. See Khan and Hilali, *The Noble Qur'an*, 4:11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females". It could be argued that this unequal distribution of shares unfairly discriminates against females. A further

a testator or testatrix states in their will that their compulsory estate must devolve in terms of the Islamic law of compulsory succession and that an Islamic Distribution Certificate issued by a recognized Islamic institution stating who their lawful beneficiaries are (and the proportions that they are entitled to in terms of Islamic law) at the time of his or her death would be binding upon the executor of his compulsory estate.<sup>17</sup> This article looks at how the compulsory estate would devolved based on the Islamic Distribution certificate as stated above, as this would be where complications regarding transgender persons would emerge.

The Islamic law of compulsory succession requires that Y should inherit two thirds of the compulsory estate while Z inherits a third.<sup>18</sup> This would be on the basis that sex reassignment surgery is not allowed in terms of Islamic law as discussed in Part III. The issue with regard to the position of Z within the South African context, however, is complex. The Islamic institution would generally issue an Islamic Distribution Certificate based on documents placed before it.<sup>19</sup> The identity document of Z would state male due to the

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discussion on this issue is beyond the scope of this article. For a further discussion on this issue, see Muneer Abduroaf, "A Constitutional Analysis of an Islamic Will within the South African Context," *De Jure Law Journal* 52, no.2 (2019): 257–266. <http://dx.doi.org/10.17159/2225-7160/2019/v52a16>, for a discussion on the constitutionality of the unequal distribution of shares based on sex, in terms of an Islamic will. See also Muneer Abduroaf, "An Analysis of the Rationale Behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession," *De Jure Law Journal* 53 (2020b): 115 –122. <http://dx.doi.org/10.17159/2225-7160/2020/v53a8>, where the rationale behind the distribution of shares in terms of the Islamic law of intestate succession is discussed.

<sup>17</sup> There are a number of Islamic Institutions within South Africa that offer drafting services and issuing Islamic Distribution Certificates. An institution of note in the Western Cape that issues these Islamic Distribution Certificates is the Muslim Judicial Council (SA). See Muslim Judicial Council (SA) "Fatwa" available at <https://mjc.org.za/departments/fatwa/> (accessed 19 October 2021), where it states that "[t]he MJC's Fatwa Department consists of a full-time Administrator, a Mufti (Head of the Department), and a Fatwa Panel that consists of 7 learned scholars of Shariah. The Department is responsible for the following activities: Answering Shariah queries telephonically and via email Drafting of Wills Issuing Distribution Certificates Contact the Fatwa department on 021 684 4606 or email: [fatwa@mjc.org.za](mailto:fatwa@mjc.org.za)."

<sup>18</sup> See Khan and Hilali, *The Noble Qur'an*, 4:11, where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females."

<sup>19</sup> See Muslim Judicial Council (SA) "Fatwa" available at <https://mjc.org.za/departments/fatwa/> (accessed 19 October 2021) where it states that "[a] Distribution Certificate is a document listing the heirs of a deceased and the portions

change in sex description based on the Alteration of Sex Description and Sex Status Act application. The Islamic institution would not be aware that Z has undergone sex reassignment surgery. However, it will be assumed for purposes of this article that the Islamic institution has been advised by Y (the son of X) that Z was born female.<sup>20</sup> The Islamic institution should, once verifying the claim, then issue a certificate stating that Y inherit two thirds and Z inherit one third.<sup>21</sup> The certificate would be based on Islamic law, and also on the view that one child is male and the other is female. The rationale behind the unequal distribution of shares in the Islamic Distribution Certificate would be problematic within the South African context, based on the fact that the South African Constitution prohibits discrimination based on sex and/or gender.<sup>22</sup> Z could, therefore, challenge the enforceability of the Islamic Distribution Certificate on the basis of it discriminating based on sex and also based on the fact that he is a male within the South African context.<sup>23</sup>

It is noted that a testator or testatrix may use his or her right to freedom of testation to draft an Islamic will stating that their compulsory estate must be distributed in terms of Islamic law. However, within the South African context, that freedom of testation is not absolute.<sup>24</sup> The freedom is limited and discriminatory provisions found in wills have been challenged in a number of

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each one receives according to the Islamic Laws of Inheritance. The Certificates are issued to clients and attorneys as soon as all relevant documentation is forwarded to the Fatwa Department”.

<sup>20</sup> The motivation behind Y bringing this information to the Islamic institution could be based on full disclosure before the Islamic Distribution Certificate issued. It should be noted that in the absence of the disclosure by Y regarding the sex of Z, Z would be regarded as a male for the purposes of the Islamic Distribution Certificate. This would mean that Y and Z would inherit equal shares as males based on the Islamic Distribution Certificate.

<sup>21</sup> See footnote 19.

<sup>22</sup> The reason why females (at times) inherit less favourably than males is not stated in the primary sources of Islamic law. When one analyses the Islamic law of compulsory succession, it can be seen that males do not always inherit double the share of females. There are instances where males and females inherit equal shares. There are also instances where females inherit to the exclusion of males who are present. For a detailed analysis of this issue, see Abduroaaf, “An Analysis of the Rationale”.

<sup>23</sup> This article is not primarily focused on the constitutionality of the Islamic will. For a detailed analysis on such, see Abduroaaf, “A Constitutional Analysis”.

<sup>24</sup> See Abduroaaf, “Limitations”. Part 1 and 2 for a discussion on freedom of testation and its limitations within the South African context.

court cases based on constitutional principles as well as public policy.<sup>25</sup> Nevertheless, there has been no court case to date where a discriminatory provision in an Islamic will has been challenged.<sup>26</sup>

Section 9(4) of the Constitution of South Africa of 1996 states that,

[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) [race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth . . .] 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.<sup>27</sup>

This section expressly prohibits persons from unfairly discriminating based on sex or gender.

Sex and gender are listed grounds in terms of section 9(3) of the 1996 Constitution of South Africa and discrimination on these grounds is, thus, deemed unfair unless it is established to be fair.<sup>28</sup> The fairness of this type of discrimination would depend on a number of factors, including the right of X to draft an Islamic will based on his religious beliefs that is also constitutionally guaranteed. Section 15 of the Constitution states that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion”. Arguably, X drafted his will based on his religious freedom to do so. An argument would have to be made based on the provisions provided in section 36 of the Constitution that governs the limitation of rights. A further

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<sup>25</sup> See Abduroaf, “Limitations”.

<sup>26</sup> See Abduroaf, “Limitations”.

<sup>27</sup> See Constitution of South Africa, 1996, sec. 9(4).

<sup>28</sup> The fact that section 3 of the Alteration of Sex Description and Sex Status Act provides that “(2)A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration” would be problematic, as the rulings of Islamic law and South African law are not consistent.



discussion of this issue is beyond the scope of this article and the constitutional challenge in the final analysis is left to the courts to decide.<sup>29</sup> Notably, X's will would have been quite different if he drafted a will stating that Y should inherit two thirds and Z should inherit one third. This type of 'will' does not mention the rationale behind the discrimination and a constitutional challenge based on unfair discrimination would be much harder to prove in this regard.<sup>30</sup> The rationale behind the discrimination could, for example, be based upon a greater love for one child over the other. This would not be a listed ground in terms of section 9(3) and would, thus, not automatically be deemed unfair discrimination. There is also nothing in Islamic law that prevents X from stating in his will that Y and Z should inherit equal shares of the compulsory estate on the condition that both Y and Z consent (consent principle) to this distribution after X has died. The excess 1/6 that would be inherited by Y would be deemed a conditional bequest subject to the consent principle.<sup>31</sup> If Y and Z do not consent, then the compulsory estate should be distributed two thirds to Y and one third to Z.

## **Conclusion**

The above discussion has shown the various nuances regarding the status of a transman (Z) within the South African context for purposes of inheriting in terms of Islamic law. The findings have shown that the situation of the transman is quite complex as Islamic law and South African law are different. The constitutionality of an Islamic will that discriminates against a transman is further complicated as the testator makes use of inter alia the right to freedom of testation and the right to freedom of religion to ensure that his compulsory estate is distributed in terms of Islamic law. The transman, however, could inter alia make use of the right not be discriminated against to challenge an Islamic will. The outcome of such a challenge is in the final analysis left up to the South African courts to decide. If a testator or testatrix

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<sup>29</sup> See Abduroaf, "A Constitutional Analysis" for a discussion on the constitutionality of an Islamic will within the South African context.

<sup>30</sup> This is due to the fact that section 9 of the Constitution of South Africa, 1996 deems certain grounds for discrimination to be regarded as automatically unfair, unless it is established to be fair.

<sup>31</sup> The consent principle requires that the inheriting intestate beneficiaries must consent to the bequest. It should be noted that the consent must be given after the testator has died. See Abduroaf, "The Impact of South African Law,"<sup>27</sup> for further discussion.

wishes to ensure that his or her compulsory estate is distributed in terms of Islamic law, he or she should draft a will stating the fractions that each beneficiary inherits (in terms of Islamic law) without stating the rationale behind the distribution. There would then be no basis to challenge the allocation of shares in terms of the Islamic will based on constitutional principles.

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# A Feminist Response to Address Inheritance Discrimination in South Africa

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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 9<sup>1</sup> 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:<sup>2</sup>

[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

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup>

## **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.<sup>5</sup> 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).<sup>6</sup>

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)<sup>7</sup> and the public interest (Maslahah) given the diversity of South African society.

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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>.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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 Sharia<sup>10</sup>. 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.

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'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.

<sup>8</sup> “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).

<sup>9</sup> 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.

<sup>10</sup> “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 quality<sup>11</sup>. 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>11</sup> 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.

<sup>12</sup> See Hoque, Uddin, and Islam, "Inheritance Rights,".

<sup>13</sup> 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.

<sup>14</sup> 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 obligations<sup>15</sup> 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.<sup>16</sup> He writes that there

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<sup>15</sup> 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.

<sup>16</sup> 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

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.<sup>17</sup> 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)

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<sup>17</sup> 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.<sup>18</sup> 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.

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<sup>18</sup> 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.<sup>19</sup> 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 discrimination<sup>20</sup> 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.

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<sup>19</sup> 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>

<sup>20</sup> 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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## **CASES**

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

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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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# Interpretive Possibilities in Islamic Inheritance Law: Rethinking Daughters' Shares

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## SHORT BIO

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Mufti Muneer Abduroaaf's article "An Analysis of the Status of a Transgender Beneficiary for the Purposes of Islamic Will within the South African Context" is of much import in our times, not just in South Africa but throughout the Muslim world. Inter alia, it raises two important issues regarding inheritance laws in Islam: surgical change of sex and its possible impact on inheritance and a daughter's inheritance rights in contrast to that of a son. This paper will focus on a response to the second issue by delving into viewpoints of a contemporary US-based Islamic scholar from Pakistan, Javed Ahmad Ghamidi (born 1952). This paper argues that if a philological revisiting of texts like the Qur'an can offer interpretations in such manner as would, based on benefits received from a daughter or based on her needs, afford her the right to shares equal to or greater than those of the son, there might be no need to argue for the inheritance right of a legatee based on the assertion of newly established identity on the grounds of surgical changes in anatomy. The question of identity of such a person may be of great import but to argue for greater inheritance rights on those grounds might be far more complex and challenging in Islamic discursive tradition. In other words, based on a philological reading of Quranic text, I raise questions regarding the possibility of bequeathing additional property to an heir as a legatee, regardless of gender, based on that heir's needs or the benefit s/he afforded the legator.

Assertions about Islamic law in Abduroaif's article seem to be based on an understanding of a few *madhāhib* (schools of law) in Islamic legal and intellectual traditions. Since the paper has a normative part, it does suggest possible stratagems (*hiyyal*) to resolve issues that women and transgender people face in Islamic law in modern times. One of the problems with these approaches is that much modernism in Islamic intellectual traditions relies on "hermeneutics of recovery" to gain credibility in the Muslim world, which, for most part, has traditionally been logocentrically deontological.<sup>1</sup> As Wael Hallaq also argues, primary reliance on utilitarianism in contrast to *Hadith* and *Akhbār* (reports) based traditionalist approaches has never been quite successful in gaining credibility in Muslim intellectual traditions.<sup>2</sup> Even the much talked about and often appropriated "teleological approach", as in 14<sup>th</sup> century *Shatibi's* "*Maqāṣid al-Shariah*", induces philological arguments from texts like the Qur'an and the *Hadith* to establish its credentials.<sup>3</sup>

With primary emphasis on philology in his hermeneutics, Ghamidi argues that the basis for difference in shares in the Qur'an (4:11) is "who among them is closer to you [to the legator] in benefit" (*ayyuhum aqrab lakum al-naf'ā*) and that "Allah enjoins you regarding your children" (*yuṣṭikum Allah fī awlādikum*) is in effect "after the will has been executed" (*min ba'd waṣīyyah*). It cannot be determined which "relationship" in itself (male or female) is more beneficial to the legator (*lā tadrūn ayyuhum aqrab lakum al-naf'ā*) just as after the deceased legator society cannot determine which

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<sup>1</sup> For a brief description of "the hermeneutics of recovery," see Jonathan Culler, *Literary Theory: A Very Short Introduction* (Oxford: Oxford University Press, 1997), 64. By Logocentric deontology, I mean an approach to ethics and morality that is based on the notion that the "rules" are given in the text and "good" is following them regardless of what might seem beneficial otherwise in utilitarian terms.

<sup>2</sup> Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh*. (Cambridge: Cambridge University Press, 1997), 231-254.

<sup>3</sup> For a concise survey of Shāṭibī's approach, see Hallaq, *A History of Islamic Legal Theories*, 163-206; see also Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abū Ishāq al-Shāṭibī's Life and Thought* (Islamabad: Islamic Research Institute, 1995). For an excellent commentary on some recent trends among Muslim intellectuals and scholars to deal with the crises of modernity, see Hallaq, *A History of Islamic Legal Theories*, 207-262. *Hadith* as a collection refers to records of the sayings, teachings, and tacit approvals attributed to Prophet Muḥammad in historical reports judged for authenticity by Muslim scholars in varying degrees of strength of transmission. *Hadith* may also include stories and narrations regarding the Prophet that might not have anything related to religion as such.



“relationship” among the legatees or shareholders was more beneficial to them or to what extent it was beneficial.<sup>4</sup> It is, therefore, for God to decide the shares. However, in this understanding and interpretation a female legatee, as a beneficiary of the will, could receive equal or greater share than her brother depending on her need or “the benefit” received by the legator-testator, which would include love and affection *inter alia*.<sup>5</sup>

Below is the full text of the pertinent Quranic verse and has been translated with Ghamidi’s view in consideration:

Allah enjoins you regarding your children that a male heir’s share is equal to that of two female heirs. And if there are only female heirs among the children and they are more than two, they shall receive two-thirds of the inheritance; and if there is only one female, her share is half. And if the deceased has children, the parents shall inherit a sixth each; and if [s/]he has no children and only the parents are his [or her] heirs, his [or her] mother shall receive a third [and the rest, the father]; and if [s/]he has brothers and sisters, the mother’s share is the same one-sixth [and father’s too, the same one-sixth]. These shares are to be given after the will has been executed and after discharging any debts [s/]he left behind. You know not who among them is closer to you in benefit. [On this basis] This division is God’s decree. Indeed, God is All-Knowing and Wise (4:11).<sup>6</sup>

To appreciate the argumentation behind this view, Islamic law or *fiqh* must be seen as a human attempt at understanding the *Shariah* as contained in the foundational religious sources of the Qur’an and the teachings of Prophet Muḥammad.<sup>7</sup> Certainty of “content(s)” of religion (as opposed to its interpretation or application) is established in Islamic legal traditions through concurrent transmission and perpetual agreement (*tawātur* and *ijmā’*) since the Prophet’s time. *Sunnah* (the Prophet’s way), therefore, in a strictly

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<sup>4</sup> Which is to say “the relationship” not a particular person with that relationship to the legator. Javed Ahmad Ghamidi, *Mizān* (Lahore: al-Mawrid, 2018), 524.

<sup>5</sup> Ghamidi, *Mizān*, 524-525.

<sup>6</sup> Author’s translation.

<sup>7</sup> In contrast to *fiqh* (human understanding of Divine guidance to derive and enact law), *Shariah* is seen by jurists as the infallible Divine guidance itself.

religious sense may be seen as those Abrahamic practices and rituals of religion that the Prophet accepted or modified and then instituted and established in his community.<sup>8</sup> This *Sunnah* was transmitted generation after generation through concurrence (*tawātur*). The Prophet's way transmitted through individual historical reports or a combination of such reports (*akhbār aḥād*) in *Hadith* and, therefore, do not belong to this category on their own. Indeed, they are seen by most schools of Islamic law as singular reports of probable attribution to the Prophet.<sup>9</sup> Hence, unlike the Qur'ān and the *Sunnah*, *akhbār aḥād* may not always be regarded as foundations of law in their independent capacity. Rather, they remain significant as historical sources that reflect interpretations and applications in the Prophet's times.<sup>10</sup> Scholarly approaches in the study of *akhbār aḥād* entail taking into account specificity and generality of a particular narration among aspects.<sup>11</sup> Many modernist Muslim scholars rejected the notion of infallibility granted in traditionalist epistemology to the consensus (*ijmā'*) of early scholarly opinions and interpretations.<sup>12</sup> On the one hand, to such scholars the approaches in hermeneutics that focus more on sources extraneous to the text itself (as *akhbār aḥād*) than on the Qur'an, its language, and its literary aspects remain ancillary and peripheral in attempts to decipher authorial intentionality. On the other hand, Quranic text is assumed to be univocal and equivocal even though human faculty of understanding might remain flawed in instances of interpretation. The *hadith* in reference, which we take up below, is:

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<sup>8</sup> Ghamidi, *Mizān*, 14.

<sup>9</sup> Attribution in varying degrees of strength of transmission, which strength is then used to gauge the level of authenticity. The criteria for estimating the strength are varied and may be based on the number or reliability of narrators as well as on corroborating chains of transmission. Textual and inter-textual analyses are also sometimes used to determine the level of authenticity.

<sup>10</sup> Wael B. Hallaq, "The Authenticity of Prophetic *Hadith*: A Pseudo-Problem", *Studia Islamica*, No. 89 (1999), 75-90.

<sup>11</sup> See for example, Shāh Walī Allāh, *The Conclusive Argument from God: Shāh Walī Allāh of Delhi's Ḥujjat Allāh al-Bālighah*, trans. Marcia K. Hermansen (Leiden: E.J. Brill, 2003), 472-478.

<sup>12</sup> See Asif Iftikhar, "A Note on *Ijmā'*," *Renaissance* 21, no.5 (May, 2011), 5-7.

“No bequeathing whatsoever for an heir [who has already been given his or her share in Divinely decreed distribution] *“Lā waṣīyata liwārith.”*<sup>13</sup>

Based on hermeneutical approaches delineated above, Ghamidi published his first work on Islamic law of inheritance in Arabic around 50 years ago and challenged some long-held notions, particularly those related to the adjustment of proportions in mathematical anomalies that traditional interpretations had caused.<sup>14</sup> The doctrine of proportionate reduction (*‘awl*) was applied in various ways to resolve this issue of over-subscription of property.<sup>15</sup> Ghamidi’s reinterpretation, therefore, offered a philological critique to these aspects of traditional interpretations. His reinterpretation of the verses of the Qur’an pertinent to shares (or possible shares) of daughters is, in a sense, a by-product of his critique. To get a sense of where he parts from tradition, one may take a general look at his views on inheritance law as he understands them from the Qur’an. These views may be summarized as follows: first, outstanding debts from the deceased’s property are to be paid. Second, whatever she or he has bequeathed in his or her will, which should be based on justice but (as opposed to the opinions of traditionalists) may be more than one third. Third, shares to his or her heirs are to be paid. Again, in stark contrast to the opinions of traditionalists, Ghamidi asserts that, “owing to any extra need of an heir or because of any additional

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<sup>13</sup> For example, in Abū ‘Abd Allāh Muḥammad ibn Yazīd ibn Mājāh al-Rab‘ī al-Qazwīnī (d. 887), *Sunan ibn Mājāh*, vol. 4, eds. Shu ‘ayb al-Arnū‘ūṭ, ‘Ādil Murshid, Muḥammad Kāmil Qurrah Balāṭī, & ‘Abd al-Laṭīf Hirz Allāh (Dār al-Rislālāh al-‘Ālamiyyah, 2009), 18, “*Kitāb al-Waṣāyā*”, no. 2714. Several jurists regard Q.2:180 (directing those nearing death to bequeath for parents among others) as abrogated through this *khbar wāḥid*. Ghamidi also regards the verse as abrogated albeit through Q. 4:11. Javed Ahmad Ghamidi, *al-Bayān* vol. 1 (Lahore: al-Mawrid, 2018a), 188-191. Even though discussion on the chain of narrators will not be appropriate for an article of this length and nature, it might be pointed out that, despite corroboration of the narration through other routes (*turuq*), the chain of narrators of this report is deemed as weak owing to ambiguity in a narrator’s identity. Furthermore, since some schools do not accept the notion of *khbar wāḥid* having the capacity to abrogate *mutawātir* Quranic text, the whole argumentation on abrogation in this case might be reviewed. Perhaps, what has happened here is specification (*takhṣiṣ*) not abrogation (*tansikh*). In other words, one might ask if the “Divine decree” is actually for post-*waṣīyah* property left over.

<sup>14</sup> Shehzad Saleem, “Ghamidi’s Life and Work,” *al-Mawrid Archives*, 22.

<sup>15</sup> See for example, N.J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 47-51.

services rendered by him or her, the legator can also include such an heir in his or her will (in addition to the legatee's share as a son or daughter or parent or spouse).” Fourth, this will is executed, spouses and parents shall receive their shares.<sup>16</sup> Finally, the primary legatees, the children, shall receive their shares as decreed by Allah.<sup>17</sup>

It is this part regarding shares of “legatees” that, according to Ghāmidī (and most Muslim scholars), cannot be changed by *ijtihād* (juristic reasoning).<sup>18</sup> Ghamidi asserts that the distribution as he understands it from the Qur’an is primarily based on the idea of the “benefit of relationship in kinship” rather than on “the actual benefit from or need of an heir”. He believes that this benefit in a daughter’s case is quite often transferred to her husband after her marriage. Similarly, a wife gives companionship and care to her husband, but the husband not only provides companionship but also takes up the financial responsibility of providing for her needs. For this reason the share of a son is twice of a daughter and the share of a husband is twice that of a wife.<sup>19</sup>

Whether one agrees with Ghamidi’s understanding of the wisdom (*hikmah*) of what he regards as Divinely decreed distribution, certain aspects of his deviation from traditionalist interpretations allows for considering the possibilities of significant changes in Islamic law. Two of these aspects that pertain to our points of focus are as follows: one, as opposed to the opinions

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<sup>16</sup> Emphasis mine

<sup>17</sup> Ghamidi, *Mizān*, 518-533

<sup>18</sup> In this part, he infers from the Qur’an that if there are only two or more girls among the children, they shall receive two-thirds of the inheritance, and, if there is only one girl, her share is one-half. If the deceased has only male children, all his/her wealth shall be distributed among them. If she or he has boys and girls, the share of each boy shall be equal to that of two girls in his or her full property. If there are no children, the deceased’s brothers and sisters shall take their place. Parents shall receive a sixth each. If parents are the only heirs, one-third of the whole property shall be the mother’s and two-thirds the father’s. The deceased’s wife shall receive one-eighth of what he leaves behind if he has children; if he does not have children, his wife’s shall have one-fourth. If the deceased is a woman, her husband shall receive one-half of what she leaves if she does not have any children; if she has, her husband’s share shall be one-fourth. If there are no heirs, the legator may decree someone an heir. If this person is a relative and has one brother or one sister, they shall be given a sixth of his share and he himself shall receive the remaining five-sixth. If he has more than one brother or sister, they shall be given a third of his share and he himself shall receive the remaining two-thirds.

<sup>19</sup> Ghamidi, *Mizān*, 525.

of traditionalists, a legator's will may be for more than one third (albeit based on justice) as the *hadith* (which is also *khavar wāḥid*) in this regard may be read as a specific example of application (of the principle of justice) rather than a universal principle of the *Shariah*, bearing in mind that a *khavar wāḥid* (as a probable source of history) cannot be placed in a position where it abrogates what has been generalized unequivocally in a concurrent and established (*mutāwatir*) religious source as the Qur'an. Two, Ghāmidī's assertion that, owing to any extra need of an heir or because of any additional services rendered by them, the legator can also include such an heir in their will, an interpretation that would place the *hadith* "No bequeathing whatsoever for an heir [who has already been given his or her share in Divinely decreed distribution]" in consonance with Qura'nic "Allah enjoins you regarding your children". In other words, as "heirs", they would have no right to receive anything further from the shares already bequeathed to them in Divine decree. However, someone from whom the deceased received additional benefit or service or someone in greater need than the rest is in an entirely different category and, as such, could be the beneficiary of the legator's will beyond his or her share. This addition would be in compliance with the directive "after the will has been executed".<sup>20</sup> As corroborative (not primary) evidence for his view that the Divinely decreed distribution is based on who "closer to you [the deceased] is in benefit [of relationship rather than of actual service]" (*aqrab lakum al-naf'ā*), Ghāmidī adduces the *hadith* "A Muslim cannot be an heir of an deliberate denier of faith nor can such denier<sup>21</sup> be a Muslim's" (*La yarīth al-Muslim al-kāfir wa lā kāfir al-Muslim*)<sup>22</sup> as, in Ghāmidī's thought, it is the benefit of relationship not of service that is necessarily severed.

The implications of these interpretive views open the possibility of bequeathing a share beyond the "Divinely decreed" one for a daughter that

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<sup>20</sup> Emphasis mine.

<sup>21</sup> In Ghamidi's thought, "kāfir" as a specific Quranic term refers to deliberate denier of Islam even after the truth of this religion becomes evident to him or her. See Ghamidi, *Mizān*, 600-602. In the context of inheritance inter alia, Ghamidi keeps the term specific to the "deniers" (*kāfirs*; Arabic plural: *kuffār*) during the times of the Prophet as only they, on the authority of the Qur'an, could be said to have denied Islam this way. (Ghamidi, *Mizān*, 525).

<sup>22</sup> Muḥammad ibn Ismā'īl Abū 'Abd Allāh al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, ed. Muḥammad Zuhayr ibn Nāṣir al-Nāṣir, 1st ed., vol.8 (al-Najāh: Dār Ṭawq, 2001), 156, "*Kitāb al-Farā'iq*", no. 6764.

might bring her share equal to or greater than that of her brother based on her additional need or service. The interpretations also raise certain questions vis-à-vis Ghamidi's own approaches. A basic question would be whether "closest to you in benefit" be regarded as "wisdom [of Divine decree]" (*hikmah*) or *ratio legis*: the underlying principle in legislation ('*illāh*) for the "Divine decree". Thus, it would be valid to ask if it might be this principle in *Hadith* that is the foundation for bequeathing the remainders to beneficiaries or relatives. For example, the *hadith* advises giving the remainder to the male relative (instead of a female relative): "Give the heirs their share and whatever remains is for the closest male [relative]" (*alḥiqū al-farā'id li-ahlihā fa-mā tarakat al-farā'id fali-awlā rajul dhakar*).<sup>23</sup> If this principle of benefit had been applied to the two cases mentioned above, why is it not *ratio legis* instead of just "underlying wisdom" of a universal decree for all times?

Again, if "closest to you in benefit" is *ratio legis*, in societal setups where norms and mores have altered tribal patriarchy to the extent that daughters take up the primary role of responsibility for their parents, would there be any possibility of change in Islamic law regarding distribution of shares to the heirs as well? Discourse within circles of Muslim scholars may yet respond to some of these questions. Nevertheless, Ghamidi's approach has already opened the possibility of interpreting the verses in a way that might result in equal or greater property afforded to the daughter in comparison to the son's share.

To conclude, modernist scholarship in Islamic intellectual traditions have attempted to revisit texts and look for newer philological interpretations with the objective of recovering what is considered the actual authorial intention. Regardless of whether this objective is always achievable, most of these modernist scholars have also circumvented the confines of scholarly consensus in matters pertaining to interpretation and *ijtihād*. The strength of these scholars in gaining credibility depends on the strength of their philological argumentation. Ghamidi's philological argumentation allows for the possibility for a legator to give their daughter a total share equal to or greater than that of their son. Furthermore, this response also investigates the possibility of creating exceptions to the general principle of "Divinely

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<sup>23</sup> al-Bukhari, *al-Jāmi' al-Ṣaḥīḥ*, 153, 6746.

decreed" shares to the heirs themselves if the *ratio legis* in a modern setup has effectively changed. In both cases, these interpretations also open the logically necessary possibility of equal or greater share to a transgender heir, regardless of whether their preferred identity is legally accepted.

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# Family, Failure and Fatigue in the Field: A Patchwork of Omissions

Henni Alava<sup>i</sup> & Megan Robertson<sup>ii</sup>

## SHORT BIO

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## Introduction

Megan Robertson

Many feminist scholars have, at some point in their careers, received critique that a piece they have written is too narrative, too emotional, or not scholarly enough. Sometimes these critiques are outright dismissive, while at other times they arise from genuine concern for the researcher's reputation, academic credibility, or personal well-being. Whatever the aim behind them, these critiques resonate with what Catherine Belsey<sup>1</sup> (2000: 1157) has called the "coerciveness of masculinist rhetorical codes," which continue to frame coherence, logic, and argument in opposition to intuition, emotion, and passion.

This piece by Henni Alava was originally conceived as a presentation in a webinar on 'Patchwork Ethnography'<sup>2</sup> in June 2021. Since then, it has gone through multiple iterations, including attempts to bend it towards a more

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<sup>1</sup> Catherine Belsey, "Writing as a Feminist", *Signs* 20, no.4 (2000): 1157-1160.

<sup>2</sup> Gökçe Günel, Saiba Varma, and Chika Watanabe, "A Manifesto for Patchwork Ethnography," *Society for Cultural Anthropology*, 2020, <https://culanth.org/fieldsights/a-manifesto-for-patchwork-ethnography>

conventional article format. To Henni, it seemed as if something at the heart of the original spoken text resisted capture, which is why the piece is reproduced here in its original form. In both form and content, it speaks to three key concerns for feminist scholarship: the place of feminist knowledge in the academy, power and positionality in research, and an orientation towards gender justice in all spheres of life.

Henni's writing here clearly occupies the space of emotion, narrative, and feeling, but also conveys the lived logic of a researcher making sense of her experiences. In resisting the coerciveness of dominant academic rhetorical codes, it calls for taking seriously the promise of 'antihero care'<sup>3</sup>; for not just theorizing but transforming the situated lives of researchers. A starting point for such transformation is in recognizing the gendered and racialized ways in which work, care work, precarity, and privilege are distributed within and across societies and the differential risk that differently-placed researchers encounter when choosing to write subversively.

Our academic and private lives are unavoidably intertwined and the need to pretend otherwise can put a great burden on scholars grappling to cope with various demands on their time and energy. There is a need for researchers to be more transparent about the devastating effects of patriarchy and neoliberal academia on their personal and professional lives. The choices we make about what and how we research, what and where we publish, and how we write can and should continue to advocate for justice for all in a world where our rights are continuously challenged.

## **Family, Failure and Fatigue in the Field: A Patchwork of Omissions**

Henni Alava

This piece is published in the original form in which it was given as part of a webinar by the Patchwork Ethnography initiative on 25 June 2021. The

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<sup>3</sup> Emily Yates-Doerr, "Antihero Care: On Fieldwork and Anthropology", *Anthropology and Humanism* 45, no. 2 (2020): 233-244 <https://doi.org/10.1111/anhu.12300>.

webinar, convened by Gökçe Günel, Saiba Varma, and Chika Watanabe, gathered ethnographers to discuss the “ways in which changing living and working conditions are irrevocably transforming knowledge production”<sup>4</sup>. Some additions have been made for clarity. Included in the text, as in the original talk, are descriptions for visually impaired participants.

I am a Finnish woman, with light hair tied up, wearing a white shirt with a blue leafy pattern. I will be showing some slides, which include the quotes I refer to in the text. Only one slide has an image, and I will describe it once we get to it.

How to speak of burned-out fieldwork in a way that doesn’t stink of privileged naval-gazing? How to come to terms with the damage academia has done to loved ones? What to say to seniors who tell you your life is completely separate from your work? What to do when the expectations of academia and well-being are incompatible, when you are too tired, or too needed at home, to ‘go to the field’?

These questions have burned at the edge of my mind for years and I thank the organisers of this event for allowing me to present them to you. In place of clear-cut answers, as any such were pre-empted by the litany of distractions created by care responsibilities, so beautifully analysed by Kate McClellan<sup>5</sup>, what I have to share in response are patches of reflections and a hope that some answers can be collectively found.

## **An endless edit**

Throughout my academic career – particularly during the times I’ve lived in Uganda with my partner and our first two, then three children – my family and my fatigue at grappling with the demands of academic work and care

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<sup>4</sup> Patchwork Ethnography, “Patchwork Ethnography.” Accessed May 2, 2021. [www.patchworkethnography.com](http://www.patchworkethnography.com).

<sup>5</sup> Patchwork Ethnography, “Panel 1: Familial Entanglements.” 2021. Accessed May 15, 2022. [www.youtube.com/watch?v=HvLuWQVuEWA](https://www.youtube.com/watch?v=HvLuWQVuEWA)

work have been marked as hindrances. Not just by peers, supervisors, bosses – some of them at least – but, most importantly, by me.

In a section of my PhD thesis, entitled “Family, failure and fatigue in the field,” I drew particularly from Cerwonka and Malkki’s<sup>6</sup> work to reflect on how realising this marking, and on somehow coming to terms with my vulnerability and my responsibilities of care, mattered. I described how recognizing the ableist masculine yardstick of hero anthropology, against which I deemed myself a failure during my 2012-2013 fieldwork, had shaped the analytical pathways I followed to conceptualize “anyobanyoba,” confusion, in the context of Christianity and politics in the aftermath of the northern Ugandan war.

When I began transforming the thesis into a book<sup>7</sup>, that section was cut. “It’s a different genre,” an anthropologist reviewer and friend told me, before I submitted the manuscript for review. Considering how vital writing that part had been for me; and how much time I have spent furiously raging at such sections being struck out of finished ethnographic products, it is something of an irony that I was relieved. Yes, let’s save it for later. Let’s stick to the genre.

## Fieldwork hurts



On the PowerPoint slide, there is an image of a drip bottle of sodium lactate intravenous infusion. [When I read out this caption for the image, I began unexpectedly crying. I had practiced giving the rest of the talk many times, but only remembered to add the description of the picture right as the webinar started. I did not anticipate how triggering it would be to read it out loud.]

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<sup>6</sup> Allaine Cerwonka and Liisa H. Malkki. *Improvising Theory: Process and Temporality in Ethnographic Fieldwork* (Chicago: University of Chicago Press, 2007).

<sup>7</sup> Henni Alava, *Christianity, Politics and the Afterlives of War in Uganda*. “There Is Confusion,” *New Directions in the Anthropology of Christianity* (Bloomsbury Academic, 2022).

In July 2019, I returned to Uganda with my family for post-doctoral research. Earlier that year, I had been away from work for three months, on doctor's orders, recovering from burnout.

I went back to work too soon, just about a month after the insomnia, panic attacks, and dissociative pain of burnout had relented. I felt I had to because the project and family timeframes were tight. Yet, as it turned out, my own fatigue, which made countless days of fieldwork feel like I was trudging through a heavy greyness with leaden legs, proved to be a minor problem.

Shortly after my children started their new school, one of them started feeling really sick. [At this point in the talk I started gathering myself again after having to take many breaks. I said I was sorry and that I had been unexpectedly triggered by reading out the caption for the image.]

Only a month later, after many doctors and two hospitalizations, and after we had seriously considered flying back home, did I suddenly realise the one thing that connected all the odd dots: Lariam, prescribed to the kids by a paediatric tropical medical expert as “the safest option there is.” After switching the meds, life slowly stabilised. But for weeks on end, the biggest chunk of my time went to doing something completely different than research: taking care of a really sick child and recovering from the shellshock of doing so.

At the end of 2019, we returned to Finland. And then COVID hit. Juggling distance-school and day-care closure alongside my work (luckily for only a short time in Finland) I burnt out again, though less severely since I knew to press the break and go on sick leave earlier this time – a privilege of our Nordic welfare system for which I am infinitely thankful. But again, my burn-out proved to be a minor problem.

As schools reopened, the same child who had been sick in Uganda developed a nasty headache. Some weeks later, it receded, only to come back later like a sledgehammer: persistent, ceaseless, searing, and increasingly debilitating pain. After months of doctors, labs, tests, and scans, and after finally getting referred to the correct public specialist healthcare –

again a privilege without which I don't know how we'd be standing – my child's care team gently laid it out to me and my partner in November 2020:

"We can't know for sure, but we believe the root issue behind your child's persistent pain is the trauma of their illness in Uganda."

My fieldwork, my academic aspirations, made my child sick.

Where in the anthropological record is there space for pondering such a thing?

## **Edited out**

"For this reviewer, the author doesn't get the balance quite right."

This is what an anonymous reviewer said about the reflexivity in my book manuscript, pointing particularly to a section in which I wrote about an incident during fieldwork when a key informant arrived at our door to find me a blubbing exhausted emotional mess – like I am right now [here, I ironically pointed to myself with both hands].

The reviewer's feedback has led me to ponder: is there an absolute, uncontested point of balance for reflexivity, for writing one's vulnerability into the ethnographic account, a sweet point that is quite 'right'?

Right for what? Right for who?

Over the past year, working on my book, I have done a lot of editing out: Sara Ahmed's<sup>8</sup> queer orientations and thinking of theory as orientation rather than scaffolding – out; Tiffany Page's<sup>9</sup> "Vulnerable writing" – primarily, out. I have left them to what I have been envisioning as "another genre," so as to try to claim myself as a serious voice in my field of study.

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<sup>8</sup> Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others*. (Durham: Duke University Press, 2006).

<sup>9</sup> Tiffany Page. "Vulnerable Writing as a Feminist Methodological Practice," *Feminist Review* 115, no. 1, 13–29 (2017): 13–29, <https://doi.org/10.1057/s41305-017-0028-0>

Yet during the past year, and during significant chunks of my life before it, this pursuit of seriousness seems to have taken its toll. While I have been crunching up co-authored articles where none of the vulnerable “me” was left for readers to see, using those parts of my fieldwork diary where there is no mention of my complete exhaustion or of what was happening at home, I was actually in survival mode and my family, my child, were falling apart.

It was in the midst of pondering all this that I came across the work of a dance therapist, Pauliina Jääskeläinen. In the article, written as a dialogue with a colleague – and I cannot recommend this piece warmly enough – Pauliina writes of how the death of her son affected her research.<sup>10</sup>

In her co-author’s words, “Pauliina is longing for . . . an approach to writing based on inclusion rather than exclusion of the ambivalent emotions and experiences that she had encountered.”

Pauliina quotes Pullen to describe how scholars are taught to write properly, to “tidy up our embodied writing which leaks – we edit, cleanse, correct and say what other people want us to say.”<sup>11</sup>

Does patchwork ethnography lead to patchwork writing, where the embodied anthropologists with all their families, failures and fatigues, are not cleansed out, but allowed to leak in somehow, somewhere? If it does not, then I fear that anthropology’s demands of rigour, excellence, and sacrifice will in the end remain intact; seeping out of ethnographies to egg on new generations of aspiring ethnographers to burn themselves out in the pursuit of professional recognition.

## Parenting pain

COVID-19 has shaken the ideal of “the brave anthropologist and her exotic field site” in a way that, at least in my home country of Finland, critical

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<sup>10</sup> Pauliina Jääskeläinen and Jenny Helin, “Writing Embodied Generosity,” *Gender, Work & Organization* 28, no. 4 (2021): 1398–1412, <https://doi.org/10.1111/gwao.12650>.

<sup>11</sup> Alison Pullen, “Writing as Labiaplasty,” *Organization* 25, no.1 (2018): 125, <https://doi.org/10.1177/1350508417735537>

debates about research justice and decolonizing academia have not been able to do.

But I want to be honest. It is not, primarily, the grave ethical critique against “ethnographic presence” that has caused me to seriously consider what my next research project might look like, but rather the simple fact of my life.

Over and over again I have constructed my “expertise” through an exclusion of my vulnerability, and by exclusion of my being-in-the-world, so fundamentally and more than in any other way, as a parent to my children.

I don’t want to perform that exclusion anymore.

My family can no longer up and move. Maintaining stability, including by me not being away all the time, has become a crystal-clear priority, even though my child is doing much better now than they were half a year ago. In addition, I have a mother with late-stage Alzheimer’s, a vulnerable father, and a father-in-law in the late stretches of cancer, each of whom add reason for me to stay rooted right where I am.

So, for the past half-year, I have been envisioning a project where these two things – vulnerability and my life as a parent – be made the starting point and not treated as dirty residue that needs to be edited out. My dream carries the working title “parenting pain,” and jumping into it means letting go of practically all the regional and thematic so-called expertise that I have painstakingly built up for over a decade. For me, the path to embracing patchwork has meant allowing myself to stop trying to stretch into doing fieldwork far away from home, even from a distance over the Internet, at least for now. Rather, I want to envision fieldwork as really starting from home and as weaving a quilt where all the patches are allowed to feature: those of home, those of work, those of strength, and those of failure.

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A colleague in a neighbouring discipline read a recent draft of this paper and said to me, in not quite these words but close to it, “This is hogwash. This



myth of the hero anthropologist,” she insisted, “has been deconstructed decades ago – the problem is in your head.”

Was she right? Are the masculinist yardsticks and monsters of anthropological rigour a fragment of my imagination, conjured by my inner demons and misconceptions of what is expected of an aspiring scholar in this field? Or is there something here that resonates more broadly? Preparing for today, I concluded by stating that I’m probably still too deep in my own quagmires of figuring this all out to answer the question and that I’d leave it to you.

But the other papers given at the webinar suggest I’m not alone in struggling with all this. This realisation makes me feel thankful and a great deal less alone. Thank you.

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