

# The Lived Experience of Inheritance for Muslim Widows in Contemporary South Africa

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## COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## Contents

Abstract.....	3
Chapter One: Introduction .....	4
Chapter Two: Muslims in South Africa.....	9
2.1 Introduction.....	9
2.2 Muslim Personal Law in South Africa: colonial, apartheid and post-apartheid periods.....	9
2.3 Muslims in Cape Town.....	12
2.4 Muslim Women in Cape Town.....	14
2.5 Conclusion .....	15
Chapter Three: Methodology .....	16
3.1 Introduction.....	16
3.2 Research Problem .....	16
3.3 Research Objective .....	16
3.4 Research Design.....	17
3.5 Theoretical Orientations.....	18
3.5.1 Transformative Justice .....	19
3.5.2 Embedded Agency .....	20
3.6 Data Collection .....	21
3.6.1 Semi-Structured In-depth Interviews on Multiple Occasions .....	22
3.6.2 Archival Documentary Data .....	25
3.6.3 Case Law.....	27
3.7 Data Analysis .....	28
3.8 Ethical Considerations .....	30
3.8.1 Ethical Challenges.....	30
3.10 Conclusion .....	32
Chapter Four: Inheritance .....	33
4.1 Introduction.....	33
4.2 Families and Inheritance .....	33
4.3 Inheritance Laws.....	34
4.3.1 Succession Law in South Africa .....	34
4.3.2 Islamic Inheritance Laws .....	34
4.3.3 At the intersection of the Intestate Succession Act and Islamic Inheritance Laws: South African Case Law .....	37
4.4 Inheritance Practices in South African /Cape Town Muslim Families.....	39
4.5 Conclusion .....	40

Chapter Five: Findings.....	41
5.1 Introduction.....	41
5.2 Gendered Inheritance Conditionalities.....	42
5.3 Gifting While Alive .....	48
5.4 Conclusion .....	55
Chapter Six: Discussion and Conclusion .....	56
References.....	60
Appendices.....	65
Appendix A – Interview Schedule .....	65
Appendix B- Participant Summaries.....	68
Appendix C – Participant Information Sheet .....	82
Appendix D – Participant Consent Form .....	84

## Abstract

*This empirical research explores experiences of inheritance in Muslim families, drawing upon case law, archival research and in-depth interviews with 6 Muslim widows in Cape Town. I examine women's experience of and attitudes towards inheritance in middle class Muslim families around Cape Town. This research aims to document Muslim widow's experiences of inheritance, furthermore, explore their attitudes towards these practices among their wider family. In particular, I investigate the experience of inheritance for Muslim widows, and interpret how these experiences relate to the governing principles of equality and diversity in the South African Constitution.*

*This research has found that fairness and reciprocity serve as guiding principles of inheritance practices in middle class Muslim families around Cape Town. This is evidenced by two prominent practices of inheritance identified in the data, namely gendered conditionalities of inheritance shares, secondly the practice of gifting while alive. These findings indicate that to a large extent, on the micro level, the experiences of inheritance practices for Muslim women are in fact aligned with the principles of equality and diversity in the Constitution. However, these patterns of inheritance do occur in a context of gendered family practices. It is therefore argued that the challenge arises from the informality of inheritance practices among middle class Muslim families in Cape Town, characteristically occurring in the private sphere. In instances where fairness and reciprocity are not given primacy as guiding principles of inheritance practices, women tend to experience downward social mobility. Weak legal protection for Muslim widows during instances of discriminatory inheritances practices is resultant of the lack of a transformative mandate in the public sphere.*

*Embedded within social forces, Muslim women's agency is conceptualised as proactively and strategically shaping their lives and the lives of female family members. Bringing the findings into conversation with transformative justice, there has been a stratification of rights and the realisation thereof, therefore resulting weak legal protection for Muslim widows in instances of discriminatory inheritance practices. It is further noted that existing international discourse regarding family law reform on a state level is relatable in this instance as gender-sensitive reforms do not in fact erode the foundations of religion and family, but merely challenge the tenuous balance of power. This research contributes to the developing body of literature on Muslim family practices in South Africa and acts as a lens in which to understand links between wider family history, and established social and institutional systems; therefore, leading to an evaluation of the role of transformative justice in this instance.*

## Chapter One: Introduction

The purpose of this research is to better understand the experience of inheritance for Muslim widows and interpret how these experiences relate to the governing principles of equality and diversity in the South African Constitution<sup>1</sup> (*Constitution of the Republic of South Africa, 1996*). Muslim personal law is not yet recognised by the South African state, resultantly Muslim marriage is not afforded the same legal status and protection as civil or customary marriages (*Marriage Act, No. 25 of 1961, 1961*). The Western Cape High Court has until October 2020 to pass MPL specific legalisation, failing to do so, provisions of the Marriage Act will apply to all Muslim marriages. A consequence of such is a lack of recognition and regulation of inheritance practices in Muslim families. Case law indicates this problem adversely affects Muslim women, rendering them a precariat position in society after the passing of their spouse. The main objective of the thesis is to understand the lived experience of inheritance for widows in middle class Muslim families in South Africa, focusing specifically on perspectives of Muslim widows in Cape Town. This research aims to document Muslim widow's experiences of inheritance, furthermore, investigate their attitudes towards these practices among their wider family. As follows, the research aims to determine ways in which patterns of inheritance are tied to gendered family practices. Simultaneously, I will examine how experiences of inheritance and practices thereof relate to Constitutional principles of equality and diversity within a legal pluralist society. Grounded on interpretivist philosophical assumptions, this study employed qualitative research methodology whereby a case study design was utilized. Guided by theoretical orientations of transformative justice and embedded agency, triangulation of three sets of data was performed. Data collected included semi-structured in-depth interviews with six widows from middle-class Muslim families in Cape Town, archival documentary data of specific wills from family networks and case law documentary data. Convergence of data was achieved through an intersectional multi-level analysis.

This research found that fairness and reciprocity serve as guiding principles of inheritance practices in middle class Muslim families around Cape Town. Evidenced by two prominent practices of inheritance identified in the data; gendered inheritance conditionalities and gifting while alive. Although mentioned in existing literature, the extent to which gendered inheritance conditionalities is practices has been largely underestimated and therefore lacking appropriate academic and political acknowledgment. Furthermore, although the religious responsibility of Muslim men to "take care of" Muslim women through their inheritance shares is widely known, thin empirical evidence exists as to how this is actually taking place. This research provides empirical and theoretical contributions in these regards. Findings indicate that to a large extent, on the micro level, experiences of inheritance practices for Muslim women are in fact aligned with Constitutional principles of equality and diversity. However, these patterns of inheritance occur in a context of gendered family practices. It is therefore argued that

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<sup>1</sup> The *Constitution of the Republic of South Africa* (1996) is referred to as the 'Constitution' from here on out.

challenges arise from the informality of inheritance practices among middle class Muslim families, characteristically occurring in the private sphere. In instances where fairness and reciprocity are not given primacy as guiding principles of inheritance practices, women tend to experience downward social mobility. Weak legal protection for Muslim widows during instances of discriminatory inheritance practices is resultant of the lack of a transformative mandate in the public sphere.

Embedded within social forces, Muslim women's agency is conceptualised as proactively and strategically shaping their lives and the lives of female family members. Bringing findings into discussion with transformative justice, there is a stratification of rights and the realisation thereof, resulting in weak legal protection for Muslim widows during discriminatory inheritance practices. Furthermore, international discourse concerning family law reform on a state level is relatable here as gender-sensitive reforms do not erode foundations of religion and family, but merely challenge the tenuous balance of power. This research contributes to the growing body of literature regarding Muslim family practices in South Africa, and serves to empirically highlight Muslim widow's experiences, expectations and challenges of inheritance in contemporary South Africa. Key to the contributions is an account of intersecting forces among institutional systems, social systems and family relations. Most importantly this empirical investigation contributes to scarce social research focusing on experiences, opinions and perspectives of Muslim women in South Africa. It is anticipated that this research may be a contributing voice to the transformation of legal policy in South Africa, so that it may become more relevant to the lives of those whom it is meant to serve.

The first Muslims in South Africa were brought to the Cape in the seventeenth century from the Malayan Archipelagos when the Western Cape and East Indies were under Dutch military control (Jones-Pauly and Tuqan, 2011:301). Brought into a context characterised by white Christian domination, the first group of Muslims held tightly to their faith by continuing Islamic practices in the private sphere (Cachalia, 1993:397). The second Muslim population entered South Africa towards the end of the nineteenth century travelling from British occupied south India, this group were indentured laborers sent to work on the sugar cane plantations in Natal (Cachalia, 1993:397). Hindu and Muslim merchants from Gujarat, Surat and Porbandar followed. Execution of racial and colonial implications on Muslim communities was accelerated with the introduction of the formal apartheid regime in 1948. Under the Apartheid Regime, the Muslim population were racially classified under the *Population Registration Act No. 30 of 1950* (1950) as either 'Indian' or 'coloured', with further subcategories of 'Cape Malay', 'other coloureds' and 'Khoisan' (Vahed & Jeppe, 2005:254). In accordance with discriminatory Apartheid practices, Indian and coloured Muslims were concentrated into urban residential areas, with proximity to mosques and madrassahs (Vahed & Jeppe, 2005: 253). It is within this context of social restrictions and political discrimination that Muslim communities "established a dense network of autonomous organisations, mosques, educational institutions (*Madrassas*) and judicial structures within 'civil society'" (Cachalia, 1993:397-398).

In a democratic South Africa Omar (2004:2) locates majority of the South African Muslim community in the Western Cape Province. He distinguishes this minority community further according to the 2001 national census, whereby majority of the Muslim community were classified “under the amorphous apartheid category of “coloured”. An additional major ‘ethnic’ category of Muslims in South Africa is the Indian/Asian population concentrated on the east coast. Within the democratic South Africa, Muslim communities represent the largest religious minority. Despite comprising only 1.5% of the total population, Vahed and Jeppe (2005:277) point out the strong political participation of the Muslim community post-apartheid, highlighting the high number of political representation since 1994. Lines of diversification continue in this contemporary context, with the strong traditional leadership of the *‘ulama*<sup>2</sup>, Amein (2006:731) points to the emergence of progressive-minded Muslims. Creating fractions within the contemporary South African Muslim population, these differences mirror the socio-political environment of decades before.

Significantly, the South African Muslim population should be characterised by its complexity. This religious group is “divided along lines of race, class, gender, ethnicity, language and beliefs, and it is highly simplistic to collapse them into a monolith on the basis of their being Muslim” (Vahed & Jeppe, 2005:279). Majority of the Muslim population follow the *Sunni* school of law, with a divide between the *Hanafi* and *Sa’fari* schools of thought (Moosa, 1998: 200) (Manjoo, 2007:9). Amein (2006:731) pays recognition to the smaller Muslim community following the *Sa’fari* school of thought within the Shi’a tradition. Amein (2006: 731) understands such heterogeneity stemming from the colonial legacy, nature in which one practices Islam reflecting centuries of Indian, Malaysian and Indonesian customs. Additionally, the interaction between different cultural communities further influencing religious practice.

Amien (2013:359) indicates that most Muslim communities are still located in historically disadvantaged contexts curated from colonisation and apartheid. These facts observable in the South African population through clear power relations, distribution of wealth and status of privilege which exist along racial lines fashioned by the apartheid regime. Mutua (1997:68) supports the assertion of a continued racial inequality by stating that a critical element within the democratic era is its almost exclusive reliance on a human rights discourse “as the new engine of change”. Indicating that the new *Constitution* (1996) has in turn, through this reliance, “frozen the hierarchies of apartheid by preserving the social and economic status quo”.

Constitutionalism in democratic South Africa is understood as a vanguard with regards to the incorporation of all categories of human rights, however at the same time the lived reality of the society speaks to something different. Arbour (2007:22) commends the *Constitution* (1996) as she recognizes its notable incorporation of economic, social and cultural rights, such rights which had been

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<sup>2</sup> Muslim quasi-judicial bodies

institutionally devastated by the apartheid regime. This incorporation lends itself to the prevention of systematic discrimination and the promotions of a wider conceptualization of justice. Mutua (1997:66) illustrates this operationalization by reminding us that the *Constitution* (1996) took a step further than the traditional structural protection of human rights by establishing Chapter 9 institutions: multiple bodies which are mandated to protect an overlapping plethora of human rights which aims to aid “state institutions supporting constitutional democracy”.

This allows us to see that South Africa is aiming towards transformation through judicial mechanisms that were established post-apartheid and because of this further engagement with economic, social and cultural rights is encouraged to redress frozen racial hierarchy. The experiences of Muslim women provide a particular instance whereby we are able to witness the shortcomings of the *Constitution* (1996) in its attempt to redress past injustices. Although there is a notable presence of debates around Muslim women and their socio-legal rights within different societies (Boswell, 2011), these debates have historically been foregrounded by politicians, activists, academics and religious leaders. I argue that a fundamental gap within these popular, political and academic discourses is an account of the lived experiences of Muslim women in South Africa and globally (Mathee, 2000, Bangstad, 2007). Hoel, Shaikh and Kagee, (2011:96) take this argument further by indicating that there have only been seven empirical studies focusing on the experiences, opinions and perspectives of Muslim women in South Africa. The perspectives of Muslim women with regards to inheritance practices provides a unique lens to which we are better able to understand their lived experiences and how inheritance patterns are tied to gendered family practices (Amein, 2006). The navigation of Muslim communities in a legal pluralist society is illuminated through an empirical investigation into inheritance patterns. Elements of a precarious socio-political position for Muslims in Cape Town is compounded for women in this instance as recognition for Muslim Personal Law lingers twenty-five years post Democracy (Amein, 2010).

Foregrounding the importance of inheritance practices as a lens in which to understand structural forces, family practices and caring networks Finch, Mason, Hayes, Masson and Wallis (1996), Izuhara (2008), and Finch and Mason (2013) have indicated the need for further investigation into patterns of succession planning, of which inheritance is an element. In England Finch et al. (1996) highlight how socio-economic changes have shifted the importance of social science research on inheritance. Whereas in the past inheritance in England was largely concerned with a small number of families in the bourgeoisie class, towards the end of the twentieth century inheritance became a matter of concern for majority of the population as the society shifted towards individual property ownership through neo-liberal economics. Transferring this to the South African setting, the shift towards neo-liberal economics in the later 1900s increased individual property ownership and wealth accumulation, however this was to a large extent influence by the racial ideology of the ruling white minority. A further expansion is witnessed in the democratic era as there is an enhanced opportunity for people of colour to individually

own substantial property through the removal of race restrictions. Finch et al. (1996, 4) highlight how social changes, like the shift towards democracy, result in economic and political consequences. Although not immediate, the difference in the racial nature of property ownership opens legal means for people of colour to become property owners. This aspect of democracy constitutes an adjustment to the social significance of inheritance as the changes in patterns of inheritance cannot be taken for granted. The importance of an investigation of inheritance may be conceptualised along three interrelated lines. Firstly, inheritance is at the core of transmissions of wealth. Secondly, inheritance is critical for the preservation of the family as a central figure in controlling wealth, and finally inheritance provides a unique perspective on families and wider kin, more specifically the function of money underpinning family relations (Finch et al., 1996). By investigating inheritance patterns in Muslim families, from the perspective of widows, the South African context is inserted into the limited conversations of inheritance practices globally, which has previously centred on contexts such as England and Japan. What is noteworthy, previous studies on inheritance have neglected to pay specific attention to the gendered and religious nature of such practices.

Taking this into consideration, this project set out to understand the experience of inheritance for Muslim widows and provide an interpretation of the relation between these experiences and the governing principles of equality and diversity in the *Constitution* (1996). Chapter Two provides an explanation of the methodological approach. Chapter Three conceptualises the history of Muslims from the colonial, apartheid and post-apartheid eras, focusing on developments of Muslim Personal Law (MPL) and Muslims in Cape Town. Chapter Four concentrates on inheritance, reviewing existing literature of intergenerational wealth transfers globally, followed by an explanation of succession, Islamic Inheritance Laws and how these have manifested in case law and family practices. Chapter Five presents the analysis of the findings. Followed by a discussion and conclusion in Chapter Six drawing connections between the theoretical orientations and the empirical evidence.

## Chapter Two: Muslims in South Africa

### 2.1 Introduction

The perception of Muslims in South Africa as a monolithic group, characterised by the unificatory symbols of Islam, “is an oversimplification of a complex and highly diverse people, marked by social diversities and cultural pluralism” (Dangor, 2001:109). This chapter aims to historically contextualise Muslim communities in relation to colonial, apartheid and post-apartheid eras and the development of MPL in the country. Setting the context for Chapter Three which provides an extensive methodological overview of the project.

### 2.2 Muslim Personal Law in South Africa: colonial, apartheid and post-apartheid periods

Investigating the deeper meaning of legal change within a diverse society, according to Moosa (1996:131), necessitates an inquiry into the legal history, inclusive of the relevant cultural developments, political landscape and the social function of specific laws. In the case of MPL, this legal history stems from the socio-political context of the first Muslims in the Cape, throughout the apartheid regime into the contemporary democracy. This historical trajectory is pertinent to understanding current developments of MPL and how these impact upon the experience of inheritance for Muslim women today.

Distinct from Muslim family law, MPL was developed during the British colonial rule to permit a following of religious personal law within the constraints of colonial criminal and commercial law, “yet, Muslim personal law and Muslim family law are distinguishable from each other because while the former encompasses all the aforementioned aspects of Muslim family law (*Shari'a* based marriage, divorce and guardianship, custody and access to minor children), it additionally includes inheritance” (Amein, 2010:362). The first evidence of MPL surfaces in the early eighteenth century when the Statutes of Batavia were applied in the Cape, this included the code of Muslim law which was approved by the Council of India (Moosa, 1996: 132). Followed by the formal recognition to practice Islam in 1804 (Jones-Pauly and Tuqan, 2011: 305). It is in this context that family law matters were increasingly regulated by imams. Hence, the early 1800’s saw the emergence of informal community judicial structures. Informal Islamic judicial organisations asserted authority over religious-legal matters (Moosa, 1996:133). With the establishment of secular courts and informal Islamic judicial organisations in the nineteenth century, the way MPL is practiced in contemporary South Africa begins to emerge. We come to find several cases reported to the Cape Supreme Court between 1866 and 1900 relating to mosque leadership and property (Moosa, 1996:134). With only a few cases relating to inheritance, custody or divorce on the secular court level, it has been argued that informal Islamic judicial organisations were able to resolve matters relating to family and religious law.

At the introduction of the apartheid regime the need for Islamic autonomous organisations and judicial structures was witnessed within a system which sought to discriminate along racial lines, substantiated

by the denial of the recognition of marriages in accordance with Muslim rites in terms of the *Marriages Act, No. 25 of 1961* (1961) due to the potentially polygamous nature of such (Cachalia, 1993:398). Consequences of non-recognition of Muslim marriages greatly impacted upon inheritance practices, rendering wives and children illegitimate heirs of a Muslim husband's estate therefore estates would be devolved onto distant relatives or the apartheid state itself (Jones-Pauly and Tuqan, 2011:388-389) In the twentieth century informal judicial organisations began to organize themselves into official bodies headed by the Muslim clergy. Presiding over religious and legal Islamic matters the three dominant bodies were established: Jamiatul '*Ulama* of Transvaal established in 1935, Muslim Judicial Council (MJC) established in 1945 and Jamiatul '*Ulama* of Natal' established in 1955 (Moosa, 1996:134). Followed by several others, community forms of justice relating to personal law have a history stemming several centuries within South African Muslim communities. State recognition in this case was steered by the *Juridical* ideology of the apartheid state whereby access to rights was differentiated along racial groupings while participation in the political community was monopolised by whites (Cachalia, 1993:393). Not only were Muslim communities relegated to the racialised ideology of apartheid, Hoel and Shaikh (2013: 72) point towards the patriarchal religious narrative pervasive throughout the discourse of Islamic judicial bodies, a narrative which grew out of the advent of Islam in South Africa which is resistant to 'Western' modernity, therefore often derailing strides towards gender justice within the community.

By 1987 a state of emergency and the power of the apartheid regime was challenged. At the same time there was a shift in the states response to affording recognition to Islamic Law. The South African Law Commission (SALC) began an enquiry into MPL involving Muslim organisations and key individuals. Developments such as these were often met with suspicion from Muslim communities as some viewed these attitudinal shifts by the state a bid to muster legitimacy for the National Party government. Elaborating on the volatile and fractioned political context at the time Moosa (1996:136) notes, "in an ongoing interaction between the apartheid state and one section of South African society, one can discern the texture of colonial and racial discourses which run concurrently with the variety of Muslim discourses". Highlighting the heterogeneity of Muslim discourses regarding the recognition of Islamic laws by the state at the time Moosa (1996:138) adds, "exploiting the social needs of communities, under the guise of winning over the hearts and minds of people was a familiar strategy employed by the apartheid state which was also aware of the intra-Muslim differences and the fractious nature of this community." Although argued that conflicts surrounding the recognition of MPL at the time had served to exacerbate intra-community fractions, a commonality that could be found between the '*ulama* and Muslim political activists was the idea that recognition of Muslim law would serve to ease the daily pressures of Muslim communities. Pressures which included the illegitimacy of children born within a non-state-recognized Muslim marriage, lack of patrimonial support for female spouses after divorce and lack of security under intestate succession (Moosa, 1996:138). Amidst the dramatic political period

of the 1900s, the initiative by SALC dissipated and the call for the recognition of MPL was subsequently integrated in the pursuit of liberation.

Entering the democratic era, both the interim and final South African *Constitution* (1996) protected the freedom of religion and belief, furthermore there was provision within the Bill of Rights for legislative recognition of any religious personal law, as well as the potential for the recognition of Muslim marriages (Moosa, 1998:200). Key Muslim organisations lobbied the multiparty Conference for a Democratic South Africa (CODESA) for the recognition of MPL in the interim constitution. This fruitful exercise resulted in the implementation of MPL as an electoral pledge in 1994. Soon to follow was the establishment of the Muslim Personal Law Board (MPLB). With the intention of an inclusive working structure, MPLB saw the resurfacing of intra-Muslim conflicts as traditional and progressive Muslim bodies clashed. The emergence of key contemporary debates surrounding the recognition of MPL in began to manifest: traditional *'ulama* found it difficult to negotiate between their interpretation of Islamic law and the new gender-sensitive constitutional dispensation, while more progressive Muslim parties found security within this new international human rights framework as their understanding of Islamic law was harmonious. These interpretational discrepancies led to the dissolution of MPLB in 1995 (Moosa, 1996:141).

With the establishment of the Constitutional Court in 1995 South Africa was able to put to practice the *Constitution's* foundational values of human dignity, equality and non-sexism (1996:3). The new constitutional dispensation allowed for a resurgence in the quest for the recognition of MPL. In 1996 SALC renewed this investigation on a high priority basis with a new project committee (Rautenbach, 2004:3). Project 59, an enquiry into Islamic Marriages and Related Matters, released the first proposed Draft Bill on Islamic Marriages in 2001 (*Muslim Marriages Bill*, 2001), with the amended version presented to the Minister of Justice and Constitutional Development in 2003 (South African Law Reform Commission, Project 59: Islamic Marriages and Related Matters [SALC Project 59], 2003). Situating the want for MPL recognition within a global context, Manjoo (2007:4) points out similarities between *Muslim Marriages Bill* (2001) and codified provisions within MPL in other countries such as India, Malaysia, Nigeria, Uganda, Tanzania, Sri Lanka and Pakistan. Although there are provision parallels between the different modes of codification, Manjoo points towards the differentiation of the models of multiculturalism within each context.

Without the constitutionalisation of equal rights and recognition afforded to Muslim marriages, individual parties continued to engage legislation on a case to case basis. Moosa (1998:202), however, argued that the failure to constitutionalise the right to recognize MPL had left women in a disadvantageous position where there would be a continuation of MPL practised privately and independently from the law. Highlighting contemporary MPL debates of the perceived dichotomy between religious practice and gender inequality Moosa (1998:202-203) states, "Reform of personal

(private) law must interact with and take cognizance of public law in order that they be able to accommodate each other”. Moosa’s urge for an accommodation between personal law and public law manifested in the constitutional power afforded to courts through sections 8(3) and 39(2) to further develop common law in accordance with the Bill of Rights (Rautenbach, 2004: 6). However, Moosa rightfully points out the limitations accompanying this approach, “at the very least, non-recognition of MPL would enable a few privileged Muslim women who are educated and informed to theoretically exercise choice between MPL and South African law in regulating their personal affairs. However, for the clear majority of Muslim women there is no such choice (1998:203)”.

### 2.3 Muslims in Cape Town

There is a lack of research regarding the Muslim population in Cape Town post 1994. Resultantly the rise in upward social mobility of the oldest Muslim constituency is so far undocumented. As a distinctive element of the history in Cape Town, the Cape Muslim community position their religious identity before other identifying characteristics, such as race or class. However, all intersecting identity characteristics have been, and continue to be, heavily impacted by the shifts in the political climate. Noting the primacy of faith based identity for Muslim’s in Cape Town, Motala (2013:18-19) notes that “they maintain a sense of solidarity with other Muslims, which supersedes race and physical location”, elaborating on the strong sense of community membership, Motala takes note of the “observable manifestations of their religious belief such as names, greetings and house decoration.”

As the oldest population of Muslims in South Africa, the Cape Muslim community has from its inception a “tradition of resisting injustice” (Jones-Pauly and Tuqan, 2011:302). The first of those who constituted this group were either those brought by the Dutch from the East-Indies or political leaders exiled for expressing anti-European sentiments globally. It is in this context where family law matters were relegated to religious figures and political leaders who were exiled to the Cape, matters including marriage, divorce and most importantly inheritance. The first mosque was then established in 1805 by Imam ‘Abd Allah bin Qadi ‘Abd al-Salam and known as the Drop Street Mosque in Bo-Kapp. In 1806 the British empire took over the Cape and made applicable English law alongside Roman-Dutch Law. Three decades later the British abolished all forms of slavery regardless of religious affiliation. As a result, the Cape witnessed high levels of urban migration of the Muslim population into areas such as District 6, the Malay quarter (Bo-Kaap) and Signal Hill. The mid-nineteenth century saw the Cape Muslim community constituting a third of the population and majority of the low-income earning labourers (Jones-Pauly and Tuqan, 2011:303). Although enjoying a greater freedom than before, Muslims in Cape Town experienced a distinct form of prejudice. In accordance with *Law No 3 of 1885*, citizenship and property ownership were denied based on classification into a native Asia ‘subgroup’ such as Coloured, Arab, Malay and Mohammedan subjects: Muslims understood as distinctive. Islam in the Cape was impacted significantly with the arrival of Abubakr Affendi in 1863. As a consul for the Ottoman sultan at the Cape as well as a member for the Cape legislative assembly, Effendi, a jurist-

theologian of Kurdish descent developed a legal treatise relating to devotional rituals aiming to resolve religious and legal conflicts among the diasporic Cape Muslim community (Moosa, 1996:133). It was Shaykh ‘Abd al-Rahim ibn Muhammad al-‘Iraqi in the early twentieth century who wrote specifically on MPL in South Africa: the first instance whereby Islamic personal law matters such as marriage, divorce and inheritance had been widely distributed by written means, in this case in Arabic-Afrikaans (Moosa, 1996:134). The continued state identification of Muslims as racially distinct in 1882 condensed the Muslim population into a distinct residential distinct (Bo-Kaap) following a smallpox break out. Faith based solidarity formerly superseding all class, race or area distinctions, was soon engineered out of the foundations of Cape Muslim community by means of the *Population Registration Act, No.30 of 1950* (1950) followed by the *Group Areas Act, No. 41 of 1950* (1950). By means of ‘formal’ racial classification, the apartheid regime was able to enforce “racial demarcation of urban residential areas” according to ‘white’, ‘coloured’ and ‘Indian’ areas, while the ‘black’ population was ushered to the outskirts of the city (Motala, 2013: 74). Some significant features of this the project were that whites were allocated most desirable inner city suburbs, those classified as ‘Indian’ were relegated distant and isolated areas in order to curb their recent economic prosperity, and although most ‘coloureds’ were removed to buffer zones between the metropole and ‘black’ townships, Bo-Kaap was kept intact as to allow for the Commissioner of Coloured Affairs to fulfil his personal research objectives. In the 1970s the apartheid regime had to a large extent successfully completed the forced removal of all non-whites into their respective ‘controlled’ areas, Motala (2013: 108) describes the regimes success in relation to the Cape Muslim population as “what was once a racially and socio-economically diverse and united community, was now divided into separate ethnic and socio-economic units”. Originating from the era of cohesion and unity, the strong presence of community judicial structures and the Cape Muslim community began lobbying in support of formal recognition for MPL in 1975 with call for the recognition of Islamic laws relating to inheritance, marriage, divorce and custody by the Institute of Islamic Shari’a Studies (Moosa, 1996:135) (Cachalia, 1993:396).

The post-apartheid Muslim population in Cape Town comprises ten percent of the city’s population (Hoel and Shaikh, 2013:73), however continuities of the racialised and gendered social engineering of apartheid renders Muslims subject to poverty, lack of education and poor health. A unifying source of authority among the democratic Muslim community in Cape Town is the MJC. Adherence to Islamic practice among communities and families varies across a spectrum, provided there is a certain degree of parameters (Motala, 2013:24). Most Muslim families still live in areas classified as ‘non-white’ during apartheid, however a shift in recent years is witnessed as more Muslims move into formerly ‘white’ areas, to this Motala (2013:90) adds that a significant portion of Muslim movement is within the ‘buffer zones’ between the metropole and informal settlements. As it stands, the effects of the apartheid regime linger in a democratic South Africa as the Cape Muslim community is arguably “less cohesive than any other point in Cape history” (Motala, 2013:130).

## 2.4 Muslim Women in Cape Town

In line with the prominent role in government, education and politics which women have played throughout the history of Islam (Dangor, 2001:109), Muslim women in Cape Town are no exception. Muslim women in Cape Town have been noted to “enjoy relative freedom and equality”. While contributing to the family income, being able to move freely within their communities (Mandivenga, 2000:348), Muslim women are however also defined according to religious norms of conduct and the socio-economic constraints stemming from the apartheid era. Diversity among the Muslim community in Cape Town is further depicted in how Muslim women dress. Motala (2013:23) explains how some women “don the *niqab*”, while others assimilate the dress of non-Muslims in the area.

Jones-Pauly and Tuqan (2011:316) argue the status of Muslim women in Cape Town during the apartheid years as positive, basing this assessment on the review of case law. They highlight the preference of Muslim women towards monogamy, their presence within the economic sphere as income earners and their push for custody of their children. There is a noted inconsistency regarding the judgments passed by courts on family disputes in Muslim communities. This inconsistency is best understood through the indecisive nature of the state towards Muslim women seeking justice. The judicial practice of supporting Muslim women’s independence was often hindered by the overarching political ideology of the apartheid state whereby there was an imposition of Christian monogamy and an engineered racial division between the European community and the ‘other’.

Although Muslim women in Cape Town have played critical roles in the public spheres across the varying socio-political eras, Dangor (2001: 113) brings to the foreground the intra-personal contestations among Muslims regarding gender equality. Although it was widely believed that Islam understood men and women as equal, Muslim women reported that in South African Muslim societies, they were in fact not treated as equal. This discrepancies between interpretation and practice was attributed to factors such as “men are culturally conditioned to believe women are inferior”, “men are accorded higher status due to the impact of ‘Western’ values”, “independent women are not looked upon with favour by Muslim society” (Dangor, 2001:113). The presence of conflict and contradiction between understandings of Islam and the daily practices of Muslim’s in South Africa is supported by Hoel, Shaikh, and Kagee’s (2011) empirical enquiry of the lived realities of Muslim women. It is argued that even though traditional Islamic gendered roles still inform women’s understandings of their rights and societal position, their lived realities and relationships do not necessarily mirror these ‘prescribed’ notions of being. Describing the nuanced and heterogeneous experience and perception of Muslim women, Hoel, Shaikh, and Kagee (2011:123) conclude “the diverse, complex and dynamic lived realities of South African Muslim women”.

As Muslim women experience, challenge and construct the fluctuations between gender neutral practices and traditional religious understandings, the cultural, social, political and economic landscapes influence and interact alongside such shifts in perception and lived gender realities. These

transformations occur in a context which is both critically aware of the presence of oppressive systems but at the same time complicit in the maintenance thereof. With a historically rooted however increasing participation of Muslim women in both the private and public socio-economic sphere, accompanied by the Qur'anic recognition of the rights of women to obtain and maintain personal wealth and assets (such as inheritance), Jouirou (2017, 22) rejects the perseverance of "a traditional system that no longer reflects the need of contemporary societies". Specifically rooting her argument in the celebration of equality in Islam which recognises the individual capacity of women.

## 2.5 Conclusion

By historically contextualising Muslim communities in South Africa, the continuities and fluctuations between the colonial, apartheid and post-apartheid eras are illustrated. This sets the context for the following chapter which provides an extensive overview of the methodology employed for this research.

## Chapter Three: Methodology

### 3.1 Introduction

This chapter defines the research problem and clarifies research objectives. Interpretivism grounds the philosophical paradigm for this study. A qualitative case study methodology was conducted, and the triangulation of data was analysed through an intersectional multi-level approach. Although thoroughly planned out, this research was met with challenges at the level of research design and is accounted for in the ethical considerations section below.

### 3.2 Research Problem

Muslim personal law is not legally recognised as a result Muslim marriage is not afforded the same legal status and protection as civil or customary marriages. One of the consequences of the lack of legal protection afforded to Muslim marriages is a lack of recognition and regulation of inheritance practices in Muslim families. Case law indicates that this problem adversely affects Muslim women, rendering them a precariat position in society after the passing of their spouse. There is a gap in academic literature with regards to how Muslim women experience, perceive and interpret inheritance practices in South Africa. While most research has centred on the legality of inheritance practices in South African Muslim families, the few which seek to ascertain the voices of the women involved have predominately focused on women who have been conceptualised as vulnerable.

There exists a thin understanding of how the non-recognition of Muslim marriages affects the experience of inheritance for the broader middle-class Muslim women in South Africa. Without this knowledge, as informed by the women themselves, we are not able to discover what women's attitudes are towards inheritance practices in South African Muslim families. Moreover, in light of the little information gathered from case law relating to Muslim family inheritance disputes, we do not know if in fact patterns of inheritance are tied to gendered family practices. A significant portion of these inheritance practices occur informally in the private setting, in a wider context which is governed by the constitutional principles of equality and diversity. It is therefore imperative that we discover the meaning of the lived experiences of inheritance for Muslim widows in order to understand whether or not these values are being upheld on the familial level and/or on the institutional level.

### 3.3 Research Objective

The main objective of the thesis is to understand women's lived experience of inheritance in South African Muslim families, focusing specifically on the perspectives of Muslim widows in Cape Town. Subsidiary objectives, which are designed to attend to the primary objective, include the following:

- Document women's experiences of inheritance in Muslim families.
- Investigate women's attitudes towards inheritance in South African Muslim families.
- Determine the ways in which patterns of inheritance are tied to gendered family practices.

- Examine how this relates to the principles of equality and diversity in the *Constitution* (1996) within a legal pluralist society.

### 3.4 Research Design

An interpretivist approach informs the philosophical paradigm of this research because the purpose is to better understand the experience of inheritance for Muslim widows and interpret how these experiences relate to Constitutional principles of equality and diversity (*Constitution*, 1996). Grounded on the ontological belief of multiple realities, an interpretivist paradigm highlights the need to understand how Muslim widows make sense of the South African legal system and MPL, and what this means for their experience of inheritance. An interpretivist paradigm addresses the research problem as it brings forward multiple social realities governed by the *Constitution* (1996). More specifically, varying experiences of constitutional governance which constitutes our interpretations and experiences of phenomena such as inheritance practices. From an epistemic perspective, the interpretivist paradigm is justified through the gap in current literature which neglects actual voices of Muslim women. Through the researcher's interaction with Muslim widows, in their social context, their experiences of inheritance may be understood through interpretation. Knowledge produced is then socially constructed by agents in the research process. Hence, the researcher is an active agent in knowledge production relying on moments of collaboration and engagement as a methodological approach.

Due to the nature of the naturalistic enquiry required by the interpretivist paradigm qualitative research methodology is employed. Intended to investigate social and cultural phenomena, a qualitative approach is necessitated as the lived experiences of inheritance for Muslim women is bound in social and cultural spheres of reality. It is proposed that the ability for qualitative methodologies to evolve throughout the course of the research, due to the uncertainty of the outcome, is suitable for this specific research as there are few studies on which to base the predicted outcome upon. The specific research objectives are best addressed through this method as both seek to understand the meaning a participant forms of their lived experience, and to understand the broader context participants operate and are influenced in. Critical for this research is interpretations of the experiences of inheritance analysed through theoretical orientations of transformative justice and embedded agency. The inclusion of a theoretical orientation into this interpretivist qualitative methodology is crucial for the experiences of inheritance to be incorporated into knowledge of the realisation of principles of equality and diversity. Transformative justice and embedded agency aim to demonstrate the contribution of Muslim widows' voices in expanding the realisation of an inclusive rights framework.

This project is based on a case study research design. In line with the interpretivist paradigm a case study research design advances understanding of humans in social contexts by interpreting their actions as a collective or in an event. The positionality of researcher as a white woman is an important aspect of the research process as I am understood as an 'outsider', this was beneficial as it allowed for the participants to speak beyond their community ties. However, the researcher's positionality could also

have had influence on the access to a specific sample willing to share certain information. Due to the nature of inheritance practices being deeply embedded and produced through the contextual conditions of slavery during colonisation, racial segregation during apartheid and a lack of religious and cultural recognition in the democratic era, a case study approach allows for these critical elements to be accounted for. The case study strategy therefore allows for the voices of multiple perspectives to be heard within one context, achievable through multiple techniques available in a case study strategy. I argue that a qualitative, case study methodology is the most applicable strategy in this instance on the basis of three main assumptions: enables perspective heterogeneity, ability to rely on diverse data collection techniques and most importantly experiences of inheritance for Muslim women are understood in context.

Data collection techniques have been operationalised through the triangulation of data, Flick (2004:178) describes this as the act of a researcher who “combines data drawn from different sources and at different times, in different places or from different people”. The three data sources triangulated are semi-structured in-depth interviews, archived documentary data in the form of wills and case law. Triangulation of these three data sets elicits thick descriptions encompassing changing and composite interpretations of inheritance by Muslim widows. The analytic latitude afforded by the case study approach is constrained to an intersectional multi-level analysis performed through the orientation of transformative justice and embedded agency. The product of the analysis does not claim to be representative, but rather claims to expand our knowledge range of interpretations of constitutional governance through a case study of Muslim widow’s experiences of inheritance. Furthermore, it is not the intention of this study to produce generalisations across the population, the research aimed to achieve transferability, in this way and considering the context and research setting one may apply knowledge gained in this instance selectively to another context (Lincoln and Guba, 1985).

The research design is subject to criticism based on strategic design. Commonly, the inability to produce representativeness as well as generalisability are forwarded as potential weaknesses. A second potential objectification is grounded on the subjective nature of the inquiry. Following from an interpretivist philosophical paradigm, the research design may be charged with alternative interpretations and researcher bias potentiality. The research design can therefore not be free from potential weaknesses: however, it becomes clear that there is no homogenous understanding of one ‘true’ strategic methodological approach in which to employ in this instance. The proven ability to advance unique perceptions descriptively and uncover the voices of each participant is key to advancing the case study as most suitable when addressing the research objectives.

### 3.5 Theoretical Orientations

An attractive element of grounding research on interpretivism as identified by Walsham (1995) is the potential to rely on theory during the preliminary research design or the data collection stages. I employ theory in this sense during the iterative phases of data collection and data analysis. The inclusion of

theoretical orientations is crucial for the incorporation of discussions of the experiences of Muslim women into existing knowledge regarding the realisation of Constitutional principles of equality and diversity (*Constitution*, 1996). As a theoretical orientation, transformative justice aims to position the experiences of inheritance for Muslim widows in a context where understandings of socio, economic and cultural rights are translated into indicators of equality. While embedded agency aims to operationalise understandings of diversity in different levels of society in relation to the experiences of Muslim widows.

### 3.5.1 Transformative Justice

Drawing from Arbour's (2007) critique of transitional justice mechanisms to better engage with economic, social and cultural rights, the theoretical orientation guiding the data collection and analysis cyclical phases is transformative justice. Due to the limitations transitional justice presents when faced with addressing economic, social and cultural rights I argue that transformative justice is better suited as a theoretical orientation when investigating the lived experiences of inheritance for Muslim women in contemporary South Africa. Arbour (2007:2) illustrates the limitations of transitional justice, this stems from a framework which was conceived of in relation to the criminal justice system and mainstream justice. This framework is “necessary but insufficient” when dealing with the complexities of post-conflict and post-authoritarian societies, such as contemporary South Africa (Arbour, 2007:2). This insufficiency can be substantiated by the severity of economic, social and cultural rights disparate realisation in South Africa. Transitional justice mechanisms and their subsequent reliance on a human rights framework, have not been able to sufficiently address economic, social and cultural injustices stemming from colonialism and apartheid.

Transforming a post conflict/authoritarian society into a society whereby freedoms enshrined to citizens through international human rights and constitutions are enjoyed, produces a more equitable society. Mamdani (2017:373) supports this by highlighting the criticality of both the political history of countries and the social history of people when wanting to realize group rights (which in its own right is transformative as it moves away from an individualistic focus that is imbedded in international criminal justice towards an understanding of rights as embedded in communal relations). Aligned with interpretivist assumptions, the context in which a phenomenon occurs is foregrounded. Therefore, I forward Evans' (2016) conceptualization of transformative justice, this approach towards addressing injustices within a society is more fitting as we begin to see the need for deep seated redress in order to begin to dismantle decades of marginalization.

The most notable and contextually radical transitional justice mechanism was the Truth and Reconciliation Commission, viewing this alongside the *Constitution* (1996) through the lens of transformative justice we can begin to see shortcomings of this with regards to sufficiently transforming the unjust societal structures from the Apartheid regime. Subsequently, political changes within democratic South Africa had become an international human rights project (Mutua, 1997:64),

Mamdani (2017:363) critiques this by illustrating how a shift towards a human rights paradigm was contextually an attempt to replace discourse of ‘power’ to ‘rights’, thereby replacing the discourse which led to action from ‘revolution’ with ‘reform’. Mamdani substantiates this claim by stating, “for the fact is that apartheid can be dismantled, and the agenda for human rights realized in South Africa, without a transfer of power from the minority to the majority” (2017:363).

In effect, Mamdani (2017:374) expands our conceptualization of transformative justice, “the fact is that the question of rights and the rule of law needs to be approached in the same manner as that of nationalism and democracy – that is contextually”. Although the *Constitution* (1996) offers institutional protection for a plethora of human rights, it struggles to bring about the agenda of transformative justice because of this heavy reliance on a human rights discourse. This aided in the solidification of social injustices in contemporary South Africa and has been charged with perhaps enhancing inequality as these rights are still to be contextually operationalized. However, we can see the possibilities of realizing Mamdani’s (2017:374) call for contextualizing rights and the rule of law within the South African judicial system through cases such as *Hassam v Jacobs NO others* (1990) and *Daniels v Campbell NO Others* (2004). Here the Constitutional Court can be seen as a transformative justice mechanism in so far as it ‘stretched’ its judicial reach and enforced the contextual relevancy of rights which were lacking in applicability to the lived realities of the society it is meant to serve.

Transformative Justice’s mandate is therefore understood as the transformation of socio-economic and structural violence, critical to this is the importance of processes of transformative justice not just being a means to an end but assigning moral value to them. In this way bringing forward the underlying principles of hermeneutics and phenomenology, assigning meaning to the subjective interpretations of phenomena and our analysis thereof. This conceptualization of justice broadens the focus of mechanisms in which we might address human rights violations in post-conflict societies in order to promote a holistic realization of justice (Evans, 2016:5). Focusing on a holistic realization of justice, Evans (2016:5) underscores the need to incorporate economic, social and cultural rights by conceptualizing the agenda of transformative justice as, “focusing upon socio-economic structures, the ways in which inequalities may produce structural violence and a focus upon how this structural violence may effectively be addressed”.

### 3.5.2 Embedded Agency

In addition to transformative justice as a theoretical orientation, I proposed a dual theoretical approach whereby Korteweg’s (2008) conceptualisation of embedded agency is utilized in collaboration with transformative justice when guiding the data collection and data analysis phases. The ease of collaboration between transformative justice and embedded agency, I argue, can be found in the critique of individualistic understandings of human rights frameworks in favour of communal understandings of rights and responsibilities as proposed by Mamdani (2017:373). What is similar between Korteweg

(2008) and Mamdani (2017) is that both authors identify the harm of an individualistic understanding of the agent and their corresponding rights as rooted in notions of liberty and freedom which seek to conceptually remove a person from their context. Consequently, debates regarding agency and the realisation of rights is severely narrowed by this decontextualization, and this implicates the quality of information informing policy (Korteweg, 2008:448). As stated above, Mamdani (2017: 363) would argue this ultimately manifests in the solidification of social hierarchies rooted in the inability to account for the individual contextually. Similarly, Korteweg (2008:435) argues this decontextualized understanding of agency leads to discussions of Muslim women's agency as reduced to resistance against gendered religious practices and the homogenisation of the Muslim community.

In response to this dominant discourse Korteweg (2008:434) proposes an understanding of Muslim women's agency as "embedded in intersecting social forces of domination and subordination". Therefore, instead of agency as either 'oppressed' or 'resistant', Muslim women are understood as both religious and agentic. Following from the interpretivist proposition that experience can only be understood contextually, agency is embedded in religious, cultural, social, economic and ethnic contexts. Agency in this way does not exhibit an explicit aim, however, is motivated towards shaping the individual's life. Embedded agency guides research towards richer understandings about how the influence of forms of domination and subordination construct the subjectivity enabling the "capacity to act" (Korteweg: 2008, 137). The revolutionary nature of embedded agency is therefore proposed as shifting traditional understandings of agency from stifled through social forces, to agency as embedded within these social forces. Ultimately, detaching the "capacity to act" from subjectivity as "free will" or "free choice".

The criticality of embedded agency as a theoretical framework in conjunction with transformative justice is therefore similarly grounded contextually as one can only interpret Muslim widow's subjective experiences and corresponding agency as shaped by contestations in South Africa and globally, and on a culturally, social and political level. In this way the intersecting forces of family, Islam and colonisation, apartheid or democracy informs the agential experience of Muslim women. When addressing the purpose of this research embedded agency as a theoretical orientation expands our interpretations of the experience of inherence for Muslim women because "conceptualising Muslim women's agency as embedded enables an analysis that does not predicate women's capacity to act on liberal freedom, but rather carefully situates agency in the context which informs it" (Korteweg, 2008:450)

### 3.6 Data Collection

I argued that reaching a deeper understanding and contextualising an interpretation of the research objectives may only be achieved through multiple avenues. As part of the breath of research techniques available when conducting an interpretivist, qualitative case-study methodology, triangulation of data is applied. Three sets of data identified and obtained for this project are semi-structured in-depth

interviews with six Muslim widows on multiple occasions, archival documentary data in the form of wills from the participants wider family and documentary data in the form of eight legal cases regarding inheritance disputes among Muslim families. The choice of these data sets is grounded on their direct yet alternative relation to inheritance practices in South African Muslim families. Data sets operate on different levels of formality, legality and privacy across different time periods in the South African context. Data was collected concurrently as information gathered from interviews informed data collected in the form of wills. Aware that triangulation in qualitative research does not enhance validity or ensure objectivity of interpretation, this application should be understood as a “strategy leading to a deeper understanding of the issue under investigation but not for the purpose of pursuing ‘objective’ truth” (Flick, 2004:179). This data is triangulated and converges during the data analysis phase (Oppermann, 2000:142).

### 3.6.1 Semi-Structured In-depth Interviews on Multiple Occasions

The lack of incorporating Muslim women’s experiences into processes of knowledge production relegated discussions about Muslim women’s rights and societal positions to male dominated platforms. The absence of Muslim women’s experiences, opinions and perspectives leaves accounts of Muslim women’s lived realities wanting. Although we do find few empirical accounts of the lived experiences of Muslim women, these studies focused on samples of women who are especially vulnerable in society (Hoel, Shaikh, and Kagee, 2011:96). This minimal inclusion of Muslim women’s perspectives is insufficient and cannot substantially redress racially informed and patriarchally bias narratives of justice and Islam in South Africa. A fundamental gap within these popular, political and academic discourses is an account of the lived experiences of Muslim women (Hoel, Shaikh, and Kagee, 2011). I therefore conducted semi-structured in-depth interviews with six Muslim widows on multiple occasions to not only address the above-mentioned epistemic negligence, but also to account for the phenomenological tenants of the interpretivism.

With very few empirical studies focusing on Muslim women, drawing a sample of Muslim widows is vital for understanding of their experience of inheritance and interpreting this in relation to democratic governance. Punch (2014:144) notes the prominence of interviews as a data collection method in qualitative research, specifically for this project he would argue that interviews are critical for “accessing people’s perceptions, meanings, definitions of situations and constructions of reality”. Semi-structured and in-depth interviews were conducted. Prior to data collection, general questions were formulated to guide the conversation between the interviewer and participant (Appendix A – Interview Schedule). The subjective and open-ended nature of this interview strategy necessitated a creative approach by the interviewer, directed by the various categories of responses specific follow up questions would emerge (Punch, 2014:145). In light of the epistemic negligence mentioned above this interview strategy was critical because it opens doors to “understanding the complex behaviour of people without imposing any a priori categorisation which might limit the field of inquiry. It is also used to explore

people's interpretations and meanings of events and situations, and their symbolic and cultural significance" (Punch, 2014:147). Expanding on this ability to collect rich data through semi-structured in-depth interviews, Read's (2018) "serial interview" technique was utilized. Accounting for Read's (2018: 1-2) critiques of once-off interviews I employed the technique of "serial interviews" whereby the participant is interviewed on multiple occasions with various time gaps in-between each encounter. This strategy is important for the research when considering the benefits thereof, "the researcher builds familiarity and trust, probes a range of key topics from multiple angles, explores different facets of participants experiences" (Read, 2018:1).

The question of who to conduct interviews with was informed by the research question which necessitated a deliberately sample keeping with the research purpose. The sample was therefore selected purposely and directed by the research objective. Ensuring a interview sample which is relevant to the purpose, only Muslim widows would be selected. Triangulation of data allowed for a narrow scope of interview participants as 'voices' of those actors relevant to experiences of inheritance for participants would be indirectly accounted for through data collected in the other two strategies. However, this assumption was challenged during the data collection phase and is analytically addressed when considering ethical challenges. Although it is problematic to construct a general description of the sample, a simple sampling frame guided the selection of participants in the sample (Punch, 2014:161). The sampling parameter included woman who identified religiously as Muslim, had been married and during her marriage her husband had passed away. Ensuring to a certain degree that each participant would have some experience in matters of inheritance, however the research does not focus solely on inheritance relating to their late husbands. The types of marriages were not specified as a sample criterion, rather taken into account during the analysis phase. Due to sensitivity of the topic, sample parameter was a minimum of two years since the passing of spouses. An additional sample parameter would be that the sample constitute lower-middle to middle class participants, ensuring data regarding inheritance be substantial as the probability of having a significant estate would be higher than what would be the case for a lower-class sample. Sample selection entailed long periods of socialising in middle-class residential areas with a high density of Muslim families, this allowed for the snowball technique to progress. The sample was thereafter based on personal, familial or marital property ownership in middle-class residential areas. Table one outlines the sample characteristics. Interviews proceeded with the full sample of six participants in their homes or at locations of their choosing. Over a period of nine months I met with the participants between two to three occasions each. The first interviews focused on the participant's life story, mapping their wider family relations. Subsequent interviews drew on information from the preliminary interview, focusing on significant events or experiences in relation to inheritance. All interviews were recorded and transcribed.

Pseudonym	Years Married	Years Widowed	Age at Muslim Marriage	Age at Civil Law Marriage	Deceased Spouse Testate/Intestate?	If Testate: Stipulation of Islamic Inheritance Laws?	No. of Children	Socio-Economic Position
Sunshine	36	5	19	21 (Antenuptial non-accrual)	Intestate	-	5	Upper-middle
Zulpha	24	7	19	25	Intestate	-	4*	Lower-middle
Anna	52	5	23	28 (in community of property)	Intestate	-	2**	Lower-middle
Maryam	5	4***	31	-	Intestate	-	4****	Middle
Didi	26	2	20	-	Testate	Yes	3	Middle
Fahiema	1*****	2	38*****	-	Intestate	-	3	Middle

**Table 1: Characteristics of Participants**

\* Zulpha's two daughters (eldest and youngest children) are adopted.

\*\* Anna's eldest son was born before her marriage and is not her late husband's biological son.

\*\*\*Maryam is remarried.

\*\*\*\*Maryam's two eldest children were born before her marriage and are not her late husband's biological children.

\*\*\*\*\*Fahiema was previously married by Civil Law and Islamic Rights for twenty-three years and had gotten a divorce prior to the marriage in which she was widowed.

\*\*\*\*\*Fahiema entered a polygamous marriage whereby she was the second wife.

\*\*\*\*\* Fahiema's three children were fathered by her first husband, however her eldest son was born out of wedlock.

In addition to religious beliefs and experience of being widowed, several other unifying factors existed across the sample. Firstly, all participants had more than one child. All participants were born and raised in the wider Cape area, older generations in their family resided in Bo-Kaap and experienced numerous accounts of forced removals during apartheid. All participants worked to varying degrees in the formal sector and experienced periods of being stay at home mothers. None of the participants had formal education further than matric. All six participants were married according to Muslim rites, while only three participants engaged in a civil marriage as well. Five of the participants were in and had only ever been in monogamous marriages, while one participant, Fahiemma, was widowed from a polygamous marriage. Three women had experienced divorce either before or after the marriage in which they were widowed. Marriages in which participants were widowed varied in duration from one year to fifty-two years. One participant had adopted children as well as biological children. Two of the participants had children out of wedlock, and two participants entered their marriage with children from a previous marriage. Biographies and family maps of each participant are provided in Appendix B – Participant Summaries. It can be seen in each biography that participants had all received a form of an inheritance share while the giver was still alive, these gifts are motivated through a variety of reasons. In the wider network of their families, there had been some form of experience whereby inheritance shares had been accompanied with conditions for the recipient. Very often, these conditions were gender related as recipients were often men while conditions were stipulated in relation to women in the family network. These patterns of inheritance practices are expanded upon in Chapter Five. Amongst the various inheritance practices at play within each family, a strong sense of religious conformity was perceived to be upheld by each participant's family. Families were strategically shaping their own inheritance practices, while at the same time abiding by Islamic regulations.

### 3.6.2 Archival Documentary Data

The second data source collected was documentary data in the form of archived wills. Drawing from information gathering through interviews, and with permission of the participant, archived wills were purposively selected based on familial relation to the participant. Wills are of important social and economic significance because they are a mechanism to transfer property between generations and/or spouses, and they contain unique communication between the living and dead in regard to how individuals chose to dispose of their property when practising the right of testation (Finch et al., 1996:2-3). In a context characterised by the neo-liberal tenant of individual property ownership, the transferal of property after one's death is critical for the reproduction of social and economic order. Contributing to the reproduction of social and economic hierarchies by means of retaining and enhancing wealth accumulation within families (Finch et al., 1996). The validity of a will is determined by the *Wills Act, No. 7 of 1953* (1953), specifically section 2(1)(a). When a will is proven invalid or an individual forgoes

the right of testation, The *Intestate Succession Act, No. 81 of 1987* (1987) prescribes the distribution of such and this is expanded on in Chapter Five.

Incorporating wills as a data source is important because it offers a specific perspective on inheritance practices. Wills demonstrate what an individual decides to do when determining the transferal of their property through testation. Furthermore, wills allow researchers “to explore how people might conceptualise the claims of different individuals upon them, in the context of their own family circumstances and in light of the public expectations about such claims” (Finch et al., 1996:7). Deviating from the nature of semi-structured interviews, wills are understood as fixed and free from research influence. However, I am reminded that “researchers who use documentary data must take considerable care to understand the context in which these data were created, and their purpose as intended by those who participated in the production of the documents” (Finch et al. 1996:8). Wills as social documents are understood as a class of documents which are at the same time personal and official. Personal in that it articulates an individual’s conceptualisation of private relationships and official in that once validity is determined, a will is a vehicle of legality. An additional distinguishable feature of wills is the nature of access status shifting over time from closed during one’s life to open once validity is secured upon death. The value of wills as a data source rests in the potential of what they may tell us. Firstly, we can ascertain types of bequests which were deemed suitable from the testator to various individuals, varying from land, housing, money or personal objects. Secondly, when the estate is proportionally divided a will can tell us which proportions the testator found suitable for specific individuals.

Seven wills were sampled from the participants family networks, these were identified as key in relation to their experience of inheritance and ascertained at The Western Cape Archives and Records Services. Through the interviewing process specific family members from the participants birth family or martial family were collaboratively identified as having significant influence on the participants experiences of inheritance. Collaboratively identifying key family members to purposively sample was done through mapping out family networks. The sample was chosen on the basis that the family member was a key stakeholder in relation to the wealth accumulation of the family, the family member had left an estate and through direct or indirect inheritance shares there was significant influence on the participant’s life. I gathered information such as the key members name, surname, or year they passed away. From this information I identified file numbers in estate registers at The Western Cape Archives and Records Services. Minimal administrative duties are performed to gain access the actual file. I transcribed the contents of each file; this information was analysed and at times used in subsequent interviews for follow up questions.

In relation to the purpose of analysis, my principle aim was to combine data from other sources to achieve a deeper understanding of participants’ experiences of inheritance. Ultimately expanding our

knowledge on Muslim women's experiences of inheritance and not towards achieving objectivity of interpretation. Focus of extracting data from the wills focused on the characteristics of the testator. Did the testator stipulate devolution according to Islamic Laws of Inheritance? Who were the beneficiaries? What are the characteristics of the beneficiaries? What type of bequeaths were given to who? Details on conditions attached to inheritance shares. Characteristics of those mentioned in the will but did not receive anything of monetary value. Specific attention was paid to the gendered nature of these aspects.

Drawing from Finch et al.'s (1996:17) examination of the quality of documentary data it is argued that wills have a high degree of authenticity because of the process of probate. In relation to the credibility it is argued that as a legal document a will's credibility is upheld. However, credibility is undermined when considering professional assistance some employ when drafting a will and the degree to which this influences an individual's conceptualisation of appropriate bequeathing. Influence of professional opinion on patterns of bequeathing, and the credibility of wills as documentary data, is important as it is a common practice for the Muslim community to solicit advice from religious leaders when drafting a will. The potential this introduces regarding data 'distortion' has a minimal influence on the analysis because the meaning attributed to wills of this kind is significant for the research objectives. The sample was selected purposively therefore does not intend to represent a larger population, rather the sample intends to represent the full population of key family members who significantly influenced experiences of inheritance. When evaluating meaning, the dual function of a will as both a private and official is forwarded. A will in an official function is conceptualised as a legal document, therefore has a technical meaning. For the purpose of this research, in line with that of Finch et al. (1996:17), the technical meaning of the will was less important than the personal meaning held by the testator at the time which it was produced. Specifically, what this meaning elicits about the testator's conceptualisation of patterns and practices of bequeathing.

### 3.6.3 Case Law

Perspectives and responses from the state allow for interpretations of how principles of equality and diversity relate to experiences of inheritance for Muslim widows. Perspectives and responses of the state towards the experience of inheritance for Muslim women is operationalised in this study through specific legal cases. Case law is understood as a vehicle of legality in this instance and the most direct way the state may bring to life democratic principles in the lives of Muslim widows. Collecting data in the form of specific legal cases renders a second source of documentary data in this study. Documentary data collected here is categorised according to authorship as official and produced by the state and characterised as 'open-archival' when identifying the nature of accessibility. Eight legal cases were sampled during the data collection phases. Aiming for a homogenous sample, sample parameters included legal cases which involved Muslim families. The legal dispute in question had to relate to inheritance specifically. Although the non-recognition of Muslim marriages influences a widow's experience of inheritance to a large extent, legal disputes which centred solely on marriage or divorce

were excluded from the sample as the focus was on disputes closely related to inheritance in Muslim families. Cases were selected through an extensive review of legal, sociological and political literature. The eight legal cases selected are as followed: *Oeslodien Estate v Estate Mustapha and Others* (1908), *Ismail v Ismail and Others, 1983* (2007), *Ryland v Edros*(1997), *Amod v Multilateral Motor Vehicle Fund* (1998), *Daniels v Campbell and Others* (2004), *Hassam v Jacobs No and Others* (2009), *Faro v Bingham No and Others* (2013) and *Moosa No and Others v Harnaker and Others* (2018). Information gathered focused on; states response to the claims made by Muslim women in relation to inheritance, the continuity between different responses and well as variations, who was claiming what, who was resisting claims made, specific attention was paid to the gendered nature of agents.

When evaluating the quality of this documentary data the same criteria is applied as was with the evaluation of wills (Punch, 2014: 159). Regarding authenticity it is argued that case law is of a high degree of authenticity as these legal judgements are produced in the court of law, therefore legally attested. Creditably of the data is argued to be accurate as the digital copies of legal judgements are sourced from the South African Legal Information Institute database. Weaknesses arise when evaluating representativeness of the sample collected in this instance as the sample was selected indirectly through a literature review. Time and resource constraints rendered this selection technique suitable, the purposive section of the sample in this manner aligned with the scope of the project. Finally, data collected here has the intended meaning of an official function, enforcing the rule of law. Legal cases are conceptualised as legal documents which serve a technical meaning critical for the interpretation of how principles of diversity and equality relate to the lived experiences of inheritance for Muslim widows.

### 3.7 Data Analysis

In line with the philosophical assumptions of interpretivism, the case study approach affords the researcher substantial analytic latitude. The freedom of research design in this instance was exercised broadly in the data collection process as the incorporation of multiple perspectives is argued as critical. However, the analysis was purposively been restricted to the use of one analytic methodological approach. Keeping in mind the purpose of the research, the analysis is performed with the theoretical guidance of transformative justice and embedded agency. Drawing from Winker and Degele (2011), data analysis was informed by an intersectional multi-level analysis. Intersectionality was understood as a “system of interactions between inequality-creating social structures, symbolic representations and identity constructions that are context specific, topic-orientated and inextricably linked to social praxis” (Winker & Degele, 2011:54). Analysis and data collection occurred simultaneously, beginning with the case law sample, reoccurring practices and themes were categorised at the macro, meso and micro level. These initial categories informed key areas of inquiry during the interviews and the interview schedule. The lack of empirical enquiry into matters of inheritance among Muslim families informed the necessity of this approach as there was a thin base of literature in which to rely on. The analysis continued

throughout the next phase of data collection as information gathered from interviews informed the collection of wills as documentary data. Drawing on information gathered from the wills, subsequent interviews were then informed by key practices and themes from the documentary data. The triangulation of data was therefore operationalised in this instance because the analysis is negotiated as a platform in which all three data sets converge.

Key to this investigation was the identification of “differentiation and inequality on the levels of representation, identity and structure” (Winker and Degele, 2011:53). In this way, categories were premised on differentiation between institutions, symbols and agency. Categories were operationalised through instances of social practice. By identifying different moments of social practice differentiation was brought to the fore as patterns and themes were categorised. Practice as the empirical point of entry is key here as actions allow an individual to delineate themselves within the specific social context, therefore constructing social identities, processes of symbolic representations which in turn can support or challenge social structures (Winker & Degele, 2011:56). For example, by identifying moments of inheritance practices, differentiation is illuminated through categorisations such as ‘gifted while alive’, ‘conditionalized’, understanding these actions on a deeper level further categorisations were identified such as ‘gender specific’, ‘religiously premised’, ‘state influence’, ‘woman to woman’ or ‘man to woman’. Categories such as these allowed for an account of social structures at the macro and meso level (such as institutions and organizations), micro level (constructions of identity) and at the level of representation (cultural symbols) (Winker and Degele, 2011: 25). Winker and Degele (2011:58) explain,

The identity constructs of actors and their representations are connected with each other through their performativity and subsequently generate structures. Structures generated in this way can only be active in their execution. Identities and representations are therefore factors which create and maintain structures as well

Informing the analysis in this way allowed for an investigation of the embedded agent, on the level of identity and representation. Taking this further by linking the embedded agent’s ‘capacity to act’ to the maintenance or deconstruction of inequality creating structures through performances of social practice. What is critical in this instance was understanding the link between the micro and the macro structure, performativity, as the link between embedded agency and transformative justice. Operationalising the analysis through performance as social practice, and codifying in this way, subsequently informs the presentation of the findings. By forwarding specific moments of social practice the intersectional nature of the various inequality creating social structures is brought to light, furthermore, by detailing the performances of agents involved the nuances of the corresponding identity constructions and symbolic representations are contextualised and documented.

### 3.8 Ethical Considerations

Ethical considerations informing the entirety of this project run along two lines of thought concurrently. The ‘formal’ strand of ethical considerations is informed by and upheld through the University of Cape Town’s ethical conduct requirements. The subjective strand of ethical considerations is informed by interpretivism and decolonial feminism.

Formal ethical requirements were drafted, presented and approved by the Department of Political Science Ethics committee prior to data collection. Requirements of fulfilling the institutional ethical minimum included ensuring that participants were sufficiently informed about the research and what it aims to achieve, aided by a Participant Information Sheet (Appendix B). Participants were given a Consent Form (Appendix D). The signing of the consent form by the participants indicates an understanding the research study and willingness to participate. Consent was continuously negotiated at each point of contact during the interview process. Participants were made clear that their identity will be anonymised by replacing their names with pseudonyms. Interestingly, participants who opted to choose their own pseudonym requested non-traditionally Muslim names, this is significant as Motala (2013:9) explains a distinctive feature of the Muslim community in Cape Town is the continuity of Arabic names. The choice of more western names as a pseudonym indicates the participants active engagement in anonymising their identity while voicing their experiences, opinions and perspectives. Any information which may be traceable to the participant was redacted, including names of suburbs, occupations and mosques affiliation. Participants were assured data confidentiality. Signed consent forms and information sheets containing the participants names is protected in a locked cupboard.

#### 3.8.1 Ethical Challenges

The research was morally bound to a ‘feminist ethical practice’ as a lens in which to expand understandings of religion and gender (Lugones, 2010:473). There was a need to operationalize the deconstruction of power dynamics between the researcher and the participant (as much as possible). The researcher drew on understandings of decolonial feminism to account for subalternity of Muslim women in a context characterised as “modern capitalist colonial modernity” (Lugones, 2010:743). Focusing on what this non-modern positionality means for the convergence of Islam and feminism (Seedat, 2013:404). A significant ethical challenge was encountered during the research process whereby the researcher was met with resistance by family members regarding the participation of their family member. Adding to the nuances, the resistance towards participation of the family member could have been subsided through a review of raw data by the family members, a breach of formal ethical conduct. This ethical challenge arose out of the lack of proactive engagement by the researcher with the families involved to nurture some form of research buy-in where necessary. Failing to take seriously the potential perspectives of family members during initial phases of the research design can be critiqued through the lens transformative justice and embedded agency. As argued above, a key intersection of these theoretical orientations is their corroborative celebration of communal

understandings of rights and responsibilities. It becomes clear that the initial research design in practice relied on an individualistic understanding of rights and an individualised conceptualisation of agency. Mamdani (2017) and Korteweg (2008) could recognize such circumstance as a manifestation of the harm they identified as a consequence of removing an individual from their context by understanding the agent and their rights as rooted in notions of liberty and freedom.

Moore (2015) highlights the importance of taking seriously the family unit when investigating family matters through her experience of researching intergenerational relations among Xhosa women in South Africa. Moore (2015) indicates the criticality of developing a 'feminist ethical practice' in reference to the power relations (not only between the researcher and participant) embedded in the process of data collection. The importance of conceptualising a 'feminist ethical practice' when conducting gender-based research within Muslim families is flagged through an understanding of Seedat's (2013) engagement with the convergence of Islam and feminism. The convergence of Islam and feminism requires a 'feminist ethical practice' because it highlights the multiplicity in which Muslim women themselves understand this convergence. Multiplicity stemming from the "political subtext" of the tension between the global colonial imposition and the Islamic world (Seedat, 2013:405). The family's resistance towards this specific research project speaks directly to Seedat's (2013) observation of this tension, the 'political subtext' of Muslims in South Africa served as a catalyst for the resistance of the family's participation in research which was perceived of as a reminder of colonial imposition. This brings forward Korteweg's (2008:484) explanation of Muslim women's agency as "embedded in intersecting social forces of domination and subordination". The criticality of conceptualising a 'feminist ethical practice' lies in the need to morally approach the fractured understandings and meanings behind the two intellectual traditions and how this influences the organisation and implementation of the research strategy.

Focusing on a lack of operationalising a 'feminist ethical practice' when conducting research in South Africa, there is a continuous need for exploration into the "implications of the intersection of the social context of the researched, the positionality of the researcher and the research project" (Moore, 2015:149). Committed to perspectives and experiences of women, especially within the South African context, feminist research is situated in the private sphere of society. Due to the legacy of colonialism and Apartheid, South African society is stratified according to the "categorical, dichotomous, hierarchical logic as central to modern colonial, capitalist thinking about race, gender, and sexuality" (Lugones, 2010:743). As a result, privacy, informed consent, confidentiality, gaining access, involuntary disclosure and building rapport become highly problematic ethical considerations (Moore, 2015:149). Witnessed in the interaction of the researcher and the participants family mentioned above. The experience of inheritance for Muslim women is bound to the family set which encompasses multiple agent's experiences in the specific context. Although constrained by the project parameters, it would be valuable to return to the strategic plan of 'accounting' for other voices indirectly through

documentary data. As a result of this lack of proactive familial engagement by the researcher, the participant, as an embedded agent, is met with forces of domination and subordination, this in turn constructing her subjectivity and as well as her “capacity to act” further in the research (Kortweg, 2008: 137).

We come to see the circumstance as a “system of interactions between inequality-creating social structures” (Winker and Degele, 2011: 54) such as neo-coloniality and patriarchy, symbolically represented by agents and institutions involved, in term constructing context specific identities deeply embedded in the social praxis of Islam, family and academic inquest. Through strategic oversight the challenge required a deeper engagement of a ‘feminist ethic of care’ to find resolve. A collaborative and prolonged deconstruction of perceived representations of the embedded agents, the participant and her embedded context was prioritized by all involved. Through a reiterative and reflective process, the researcher and research project fostered a deeper engagement with the conceptualisation and operationalisation of a ‘feminist ethical practice’, ultimately highlighting the importance of “theoretical as immediately practical” (Lugones, 2010:755).

### 3.10 Conclusion

This chapter has elaborated on the methodological strategies undertaken throughout this research project. Aligned with the research problem and research objectives, interpretivism grounds the philosophical paradigm for this study. Through a qualitative case study methodology, the triangulation of data was analysed through an intersectional multi-level approach. An expansion of the ethical challenges was presented. Following this, Chapter Four provides an in-depth review of inheritance in South Africa and among Muslim families.

## Chapter Four: Inheritance

### 4.1 Introduction

This chapter examines intergenerational wealth transfers, and regulations dictating these practices, specifically succession laws and Islamic inheritance laws. Analysing the intersection of these contradictory systems of governance through an investigation of South African case law. Provided is an overview of understandings of inheritance practices in South African Muslim families. I argue that micro-level generational contracts within Muslim families have been subject to external restructuring by means of colonial and apartheid discrimination which continues to have an adverse effect on women in the constitutional dispensation.

### 4.2 Families and Inheritance

Normative ideological and practical understandings of intergenerational relationships is increasingly questioned as socioeconomic and demographic changes enforce variations within and between generational relations. Key aspects of the “micro-level generational contract” includes exchanges of goods and services across generations in families (Izuhara, 2008:1). Reciprocity has been argued a noteworthy characteristic of the generational contract which serves as a regulator for flows of support and the respective rights and responsibilities involved. However, Izuhara (2008) argues a more complex interpretation of regulation of support provision in the generational contract, as reciprocity alone cannot capture nuanced interpersonal relations. Understandings of micro-level generational contracts must be contextualised within forces of more macro orientated social structures. This contextualisation forwards the role of the state, through public policy and law, as a facilitator of family behaviour when creating and maintaining behavioural boundaries. Furthermore, the state may also maintain shifting familial boundaries through support. Izuhara (2008:2) argues that the degree one may exercise agency on interpersonal levels is significantly influenced by society on the macro level and varying jurisdictions among societies. Through this understanding of micro-level intergenerational contracts, the connections between housing assets, care provision and inheritance perspectives may be conceptualised.

The importance of family asset accumulation and preservation lies in the potentiality to transform one’s interaction with and position within a society, as opposed to income which is limited to maintenance of consumption, assets enable families to envision a previously unattainable future unattainable. Resultant social stratification has historically been informed by asset-building policies which aim to reach those more affluent in society, this being especially true for home-ownership policy directives (Izuhara, 2008: 3). As societal aging occurs, individual asset accumulation is critically linked to issues of long-term care. Older generations within family networks rely on their accumulation of wealth to negotiate care and support, however this is historically influenced across societies through various ways in which the

state responds to and perceives individual asset accumulation in relation to long-term care (Izuhara, 2008:4). With an increasing presence of contestation and negotiation in family and social contexts, the intersection of inheritance and care is brought to the foreground of the intergenerational contract.

### 4.3 Inheritance Laws

#### 4.3.1 Succession Law in South Africa

Inheritance is governed by succession law which comprises seven Acts: *Wills Act, No.7 of 1953* (1953), *Intestate Succession Act, No. 81 of 1987* (1987), *Estate Duty Act, No. 45 of 1955* (1955), *Administration of Estates Act, No. 66 of 1965* (1965), *Administration of Estates Laws Interim Rationalisation Act, No. 20 of 2001* (2001), *Maintenance of Surviving Spouses Act, No. 27 of 1990* (1990), *Reform of Customary Law of Succession and Regulation of Related Matters Act, No. 11 of 2009* (2009) and the *Trust Property Control Act, No. 57 of 1988* (1988). Succession law originates from the arrival of the Dutch in the Cape, employees of the Dutch East India Company and Dutch settlers formalised Roman-Dutch Law in the Cape. At the arrival of the British, English law was to be practiced concurrently. The privileging of the application of English Law resulted in a mixed legal system between civil law and common law (Albertus, 2014:278). Through judicial intervention South Africa witnessed the “extension, limitation or adaptation” of such laws, ultimately highlighting the flexibility of “norms of conduct or policy considerations” (Hofmeyr, 2014:1). *Wills Act, No.7 of 1953* (1953) and *Intestate Succession Act, No. 81 of 1987* (1987) are of most significance in this instance. Inheritance is understood as practiced either through freedom of testation where wills are legally attested, alternatively the devolution of an estate through the norms of *Intestate Succession Act, No. 81 of 1987* (1987).

The *Intestate Succession Act, No. 81 of 1987* (1987) stipulates in the event that the deceased is survived by their spouse, and the deceased has not established a will, the surviving spouse is then the sole heir of the deceased estate when there are no descendants (Amien, 2014:203). Cases where the deceased has no surviving spouse, but has a surviving descendant, the descendent will inherit the estate. Contrasting Islamic inheritance law, adopted children and those born out of wedlock are considered descendants. The cases whereby there are multiple descendants, each will inherit equal shares of the deceased’s estate (Amien, 2014:204). It is further stipulated that if the deceased is survived by a spouse and descendant(s), the spouse will inherit either a child’s share of the estate, or “as much of the deceased’s estate that does not exceed the amount that is fixed from time to time by the Minister of Justice and Constitutional Development, whichever is greater” (Amien, 2014:204).

#### 4.3.2 Islamic Inheritance Laws

Islamic laws of inheritance were born out of a cultural context in which these laws are considered revolutionary. During the early years of Islam, inheritance was understood not only in terms of kinship, but also as security agreements between individuals. Islam allowed for the insertion of a fixed shares system whereby blood relatives and spouses would inherit, at the same time allowing continuity of

existing customs by permitting bequests of one third (Jouirou, 2017:20). Prescribed shares were negotiated through conciliation and mutual agreement.

The revolutionary nature of the insertion of fixed shares by Islam lies in the allocation of shares for daughters and sisters, this gendered innovation in inheritance practices was brought about through the women in Islam. However, these shares were notably limited. This transformation was soon politicized as agnates challenged those favouring a more gender sensitive Islamic inheritance framework. Consequently, “a highly complex mathematical system for calculating shares based on these basic rules evolved” (Jones-Pauly and Tuqan, 2011:401). This system was developed by jurists favouring agnatic interpretations of Islamic inheritance rules, grounding their bias on the belief that inheritance should be understood in reciprocal terms: women were discriminated against on the basis of agnatic degrees of relationship towards the deceased (Jouirou, 2017:20). Contestation between customary practices and political rewards begins to emerge, Islamic inheritance laws highlighting the manner in which ideological tendencies influence interpretations of Quranic text. Understanding the personal and societal power which is maintained through agentic interpretations of inheritance, customary practices are preserved for the benefit of patriarchal political rewards.

Stemming from cultural and political contexts Amien (2014:195-196) outlines the process in which a deceased’s estate may dissolve in accordance with *Mīrāth* (Islamic inheritance laws):

1. Deceased’s estate first allocates funds for funeral costs.
2. Debts should then be settled through the estate.
3. Where the deceased established a will (*wasiyyah*), related testamentary bequests should be administered. The deceased may only allocate up to one-third of the estate via the will.
4. *Ashāb al-farāid*<sup>3</sup> (fixed heirs) payments are administered as determined by the *Qur’ān*, the *Sunnah* and consensus of Muslim scholars.
5. In the absence of *ashāb al-farāid* the residue is dissolved along agnatic lines whereby the nearest living male relative to the deceased inherits (*ashāb*).

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<sup>3</sup> These beneficiaries may not be omitted by means of a will. In this way it is ensured that specific family members of the deceased will not be deprived (Amien, 2014:196). Children who were born out of wedlock as well as adopted children are not incorporated here and may only inherit up to one-third through the will (Amien, 2014:197). Spouses, children and parents of the deceased are primary beneficiaries. In the absence of these fixed heirs may secondary beneficiaries inherit.

6. In the absence of male agnates, the residue is distributed in accordance with *al-radd*. This is the cyclical process of *ashāb al-farāid* inheriting the residue in proportion to their fixed shares until the residue is depleted.
7. In the absence of both *ashāb al-farāid* and *ashāb*, *Hanafī* and *Hanbali* schools of thought allocate the remaining deceased estate to the deceased mother's family. However, the *Shāfi'ī* and *Māliki* schools of thought allocate this remainder to the state.

In accordance with *Mīrāth*, females are incorporated as fixed heirs. However, they are only permitted to half of what a male would inherit due to the persistence of the social expectation that females would have been 'taken care of' financially by surviving male relatives, therefore male relatives needing greater proportions of the deceased's estate (Amien, 2014:199). Amien (2014:200) points out that this tradition is not applicable in contemporary South Africa because frequently male relatives do not take care of female relatives. Explaining further how wives are left financially destitute after the passing of their husband, Amien (2014:200) fails to empirically substantiate such claim.

Amien (2014:200-202) explores ways gender equity may be ensured in accordance with Islamic inheritance laws:

1. Through provisions within a will inheritance may be equalized. However, this is problematic as most South African Muslims abide by *Sunni* law which prohibits provisions for *Qur'ānic* heirs in wills.
2. Through *wāqaf ahli*<sup>4</sup> (family trust) the deceased may designate heirs as beneficiaries and specify shares in the trust property.
3. Reforming certain aspects of Islamic inheritance laws. This is problematic in contemporary South Africa as *Sunni* followers believe Islamic laws have been fully developed. Therefore, the South African *ulamā* (Muslim clergy) are against deviating from the stipulated *Qur'ānic* shares (Amien, 2014:204).

The irresponsibility of de-historicising a women's disparate share of inheritance allows for rigidity of patriarchal interpretations of Islamic fundamentals, this is evidenced below through the responses of the MJC, Imam's and the state in case law. Born out of the motivation to enhance gender justice in relation to inheritance, Quranic texts have endured cultural contexts of patriarchy since the seventh century preservation of male privilege. Jouirou (2017:23) states that through this examination of Islamic

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<sup>4</sup> "The *waqf* is an unincorporated charitable trust that is created upon the declaration by the owner that the income of the property is to be permanently reserved for a specific purpose, provided that the purpose is in accordance with Islamic law. It arose as a device to accommodate certain Islamic restrictions concerning the passage of property to heirs" Albertus (2014:274).

provisions of inheritance for women we can understand that although there is presence of a lesser share, the contextualisation of Qur'anic texts in conjunction with fundamentals of Islam presents the intention to eliminate distribution disparity. However, perpetuation of discrimination is maintained by ideologically led interpretations which do not reflect realities of Muslim women today. Furthermore, she locates misused privilege of interpretation falling short in recognising the instance in which the Quran refers to wealth distribution rules as responses to specific questions in a specific socio-historical condition. Therefore, these provisions do not reflect the intention of maintaining an ahistorical framework of inheritance, but rather the intention to be responsive towards human and social elements. In this way we come to know there would be no contradiction of the greater principles of Islam when creating new ways of understanding Quranic texts which aligns with contemporary contexts, this "in fact, supports the intention of justice and equality carried in the Eternal Text" (Jouirou, 2017:23).

#### 4.3.3 At the intersection of the Intestate Succession Act and Islamic Inheritance Laws: South African Case Law

As early as 1908 inheritance in South African Muslim families has been contested in secular courts. Beginning with the *Oeslodien Estate v Estate Mustapha and Others* (1908), legitimacy of Muslim marriages was raised in relation to inheritance (Jones-Pauly and Tuqan, 2011:311). Through the process of descendants contesting divisions of inheritance shares, all descendants were declared descendants of 'illegitimate' marriages. However, the courts privileged the freedom of testation and declared the intention of the testator satisfactory, noting his position as a religious leader in the community. Persisting non-recognition of Muslim marriages, ideologically rooted in Christian monogamous values and racial discrimination, endures from colonialism into apartheid. Indicative of this, *Ismail v Ismail and Others* (2007) in 1983 whereby "the marriage was de jure polygamous, it was contrary to the South African order and morality to enforce polygamous arrangements" (Jones-Pauly and Tuqan, 2011:345).

New constitutional values present themselves in *Ryland v Edros*, (1997). whereby we witness a breakthrough for the rights of South African Muslims. This 1996 case afforded recognition to contractual obligations of Muslim marriage contracts, thereby furthering the protection of Muslim wives' post-divorce. Ensuring the separation of courts from religious doctrinal disputes arose, it was found that Islamic law may be applied in cases where an agreed upon Islamic contract was accepted. Furthermore, an assessment of whether these laws were consistent with the Constitution and Bill of Rights was required. Manjoo (2007:18) highlights the centrality of the freedom of religion in this case. Lacking in this decision was applicability to polygamous marriages as well as the recognition of validity of Muslim marriages (Rautenbach, 2004: 10).

In the 1997 case of *Amod v Multilateral Motor Vehicle Accidents Fund* (1998) Mrs Amod approached the court for compensation against Multilateral Motor Vehicle Accidents Fund for loss of support after the death of her husband. Her status as a Muslim spouse was regarded invalid, following the denial of their claim on these grounds, the case was elevated to the Constitutional Court. The Constitutional

Court, aided by the Supreme Court, found the deceased had a legally enforceable duty to support. Grounded on values of tolerance, pluralism and religious freedom (*Constitution*, 1996:94), the court found it appropriate to “extend the claim of a surviving spouse (married in terms of the common law) for loss of support to surviving spouses married in terms of unrecognised Muslim personal law” (Rautenbach, 2004: 15). Once again, no assessment of the applicability to polygamous Muslim marriages nor full recognition to Muslim Marriages.

In the case of *Daniels v Campbell and Others* (2004) in 2003 the *Intestate Succession Act, No. 81 of 1987* (1957) and the *Maintenance of Surviving Spouses Act, No. 27 of 1990* (1990) was challenged on the grounds of Constitutionally enshrined values of “equality, tolerance and respect for diversity” in relation to understanding of “spouse” (Rautenbach, 2004:19). Contextualising the historically racialized foundation which South African law developed, the Constitutional Court noted the ‘linguistically strained’ interpretation of ‘spouse’ and the exclusionary function it historically served. Foregrounding the functionality of Acts, the Constitutional Court found it contextually fitting to include those married under Muslim rites as ‘spouses’ in terms of the *Intestate Succession Act, No. 81 of 1987* (1957) and as survivors in terms of the *Maintenance of Surviving Spouses Act, No. 27 of 1990* (1990), as their function is to offer legislative protection, not recognition of Muslim marriages. Manjoo (2007:5) reminding us that “South Africa’s courts have stressed that this history of discrimination and the push to remedy the real-world impact of such wrongs must inform any interpretation of the *Constitution* (1996), especially on the provisions of equality”. This case allowed only the avoidance of financial impoverishment of monogamous Muslim spouses. Five years later, Muslim women within polygamous marriages were recognized as spouses under the *Maintenance of Surviving Spouses Act, No. 27 of 1990* (1990) through *Hassam v Jacobs No and Others* (2009).

2013 saw *Faro v Bingham No and Others* (2013) calling out the obligation of the government to provide socio, economic and cultural protection of women. This judgement, in which the question of if Ms Faro was in fact still married according to Muslim rites at the time of her husband’s death, was steeped in traditionally agnatic and patriarchal practises by the MJC. Amein (2014:214-216) highlights three instances which call for further attention here, firstly the court highlights the invalidity of the MJC as a statutory or religious body when determining the legitimacy of the termination of a Muslim marriage. The courts readiness to intervene in religious doctrine by determining (ill)legitimacy of the termination of Ms Faro’s marriage, departing from the usual avoidance of entanglement. Finally, the authority of the court exercised over the Master of the High Court when reprimanding their improper performance by failing to access relevant material, rather turning to the MJC as a supposedly ‘statutory’ body.

The hardship in which Muslim wives face because the incompatibilities between succession law and Islamic inheritance laws is reflected in *Moosa No and Others v Harnaker and Others* (2017), highlighting the continued exclusion of wives from legislation which is yet to be transformed (Amien,

2019:115-119). The case involved the two wives of the deceased in a polygamous marriage, and their nine children. The first wife had been married to the deceased by civil law for the family to purchase a matrimonial property in 1982. The deceased died testate, stipulating Islamic Inheritance Laws. The children unilaterally relinquished their inheritance shares in favour of their mothers sharing the estate and property. Although accepted by the Master of the High Court, the Registrar of Deeds rejected such in favour of registering only the first wife as she entered a civil marriage. On appeal, the Western Cape High Court overturned the decision of the Registrar of Deeds and declared both wives eligible as “surviving spouses” for the purpose of section 2C (1) of the *Wills Act, No. 7 of 1953* (1953), ensuring shared property rights between both wives (Amien,2019:124). This highlighting the threat non-recognition of Muslim marriages poses towards those marginalised in society, exposing the multiplicity of discrimination Muslim women in South African encounter.

These cases bring to light the link between transformative justice and the realities of inheritance for Muslim women. Encouraging the institutionalization of economic, social and cultural rights Arbour (2007:24) calls for the evaluation and revision of key legislation in ensuring state accountability, which would address Evans' (2016) transformative concern of structural violence. In line with Arbour's (2007:24) calls for legislative reform, these cases signify the ability of judicial activism post-apartheid to draw from “the guidance of the constitutional values of equality and appreciation of diversity” to curb the marginalization of Muslim spouses (Amien, 2014:205).

#### 4.4 Inheritance Practices in South African /Cape Town Muslim Families

“One of the most serious problems which non-recognition of Muslim marriages imposes on Muslims relates to inheritance” (2011:388), at the intersection of the above-mentioned legal systems, Jones-Pauly and Tuqan encourage the investigation of the nature in which Muslim family's transverse these incompatibilities. Responding to socio-political landscapes of colonialism, apartheid and democracy, South African Muslim families have relied on the privileging of testation through the creation of wills and the practice of giving gifts while one is alive (*inter vivos*). In South Africa, the gender distribution of those who devolve property tends to be equal, this has been attributed towards the tendency of women inheriting property from their blood line. Jones-Pauly and Tuqan (2011:389) further state that Muslim's in Cape Town rely mainly on religious leaders when drafting wills and testaments, while Muslim's in Durban rely on community lawyers.

Jones-Pauly and Tuqan (2011:391) highlight the frequency of the use of a usufruct in order to equalize shares between sons and daughters. In this way two strategies are employed, either the creation of a trust (*waaf*) or gift (*hiba*). Relying on freedom of testation, they argue Muslim families create wills in which family trusts are stipulated, here children over the age of fifteen are entitled to the trust funds, it is stated that the revenues from a trust are usually inherited and “regarded as usufruct under Islamic rules, therefore sons and daughters inherit equal shares”. Additionally, South African Muslim families equalise shares through the practice of gifting while alive (*hiba*). Jones-Pauly and Tuqan (2011:392)

state the validity of an *inter vivos* gifts rests in the delivery of the gift during the lifetime of the testator. When estate open for inheritance, female family members have already been compensated therefore equalising inheritance shares despite sons inheriting twice as much from the actual estate. The judicial reliance common in Muslim communities in Durban results in gift *inter vivos* legally stipulated and justified as ‘services rendered’ to testator. Jones-Pauly and Tuqan (2011:392) point to an additional inheritance practice among Muslim families, moving away from a gendered motivation of equalising shares, motivated through need or agreement within families. By an evaluation of social circumstances, the principle of need and the status and gender of the heir is taken into account when equalizing shares by means of a trust or gifts *inter vivos*.

The myriad of practices undertaken by Muslims when approaching inheritance reflects the multitude of perceptions regarding the intersection between Islam, South Africa and inheritance. Muslim community’s values are aligned with Jones-Pauly and Tuqan’s (2011:393) argument that “methods of removing gender discrimination and equalizing the inheritance shares of daughters are not regarded as an evasion of traditional Islamic rules”. Further supported by Dangor (2001:115), whereby 92% of their sample of South African Muslim women did not regard inheritance laws as discriminatory, highlighting the differentiated nature which one gains access to inheritance shares as their justification.

#### 4.5 Conclusion

This chapter has provided an overview of intergenerational wealth transfers, and the laws and rules dictating these practices. Intergenerational relationships within Muslim families have been ideologically and practically informed by political contexts, alongside the changing socioeconomic and demographic landscapes. This chapter has provided an understanding of the micro-level intergenerational contract, focussing specifically on Muslim families, these connections between housing assets, care provision and inheritance perspectives will be empirically investigated in Chapter Five.

## Chapter Five: Findings

### 5.1 Introduction

This research set out to better understand the experience of inheritance for Muslim widows and interpret how these experiences relate to the governing principles of equality and diversity in the South African *Constitution* (1996). This occurring in a context whereby a Muslim marriage is not afforded the same legal status and protection as civil or customary marriages. Literature indicates the consequence of the lack of legal protection afforded to Muslim marriages is a deficient recognition and regulation of inheritance practices in Muslim families, this problem adversely affecting Muslim women. The research therefore had the objective to better understand the lived experience of inheritance for Muslim widows in middle class Muslim families in Cape Town. By documenting Muslim widow's experiences of inheritance, attitudes towards these practices are investigated. Specific attention is afforded to the ways in which these patterns of inheritance are tied to gendered family practices. Simultaneously, how the experiences of inheritance and the practices thereof related to the principles of equality and diversity in the *Constitution* (1996).

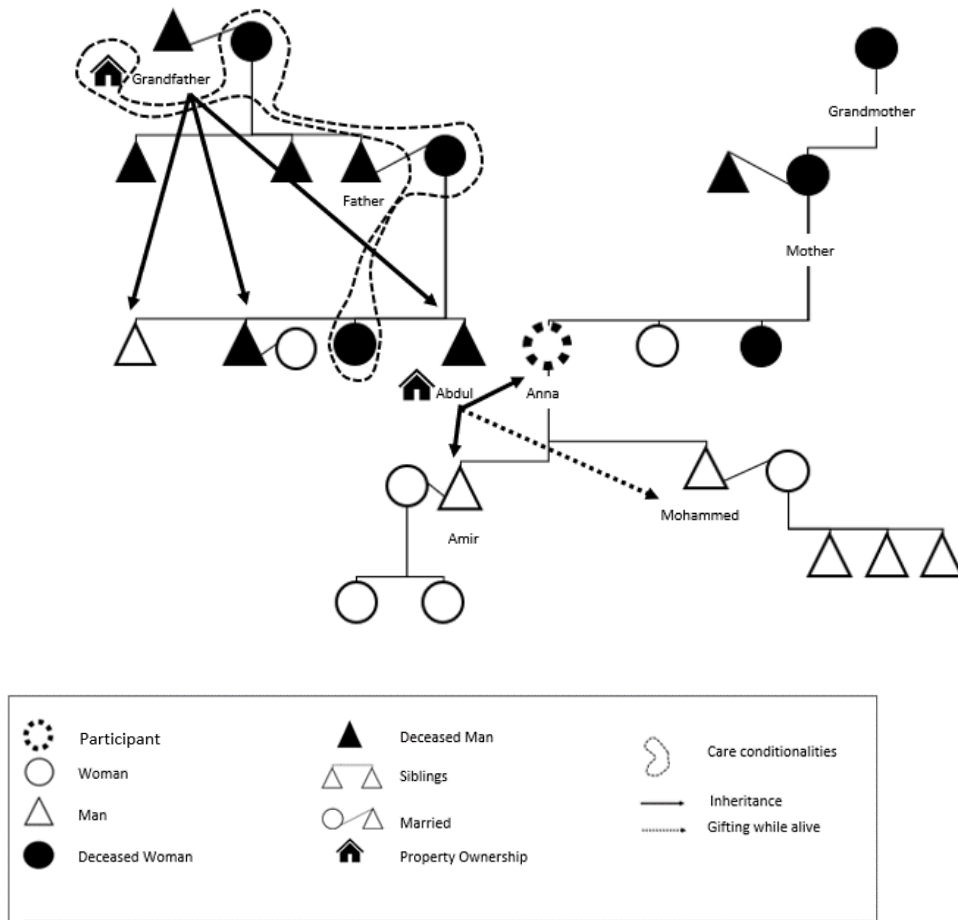
This research has found that fairness and reciprocity serve as guiding principles of inheritance practices in middle class Muslim families around Cape Town. This is evidenced by two prominent practices of inheritance identified in the data, namely gendered conditionalities of inheritance shares, and secondly the practice of gifting while alive. These findings indicate that to a large extent, on the micro level, the experiences of inheritance practices for Muslim women are in fact aligned with the principle of equality in the *Constitution* (1996). However, these patterns of inheritance do occur in a context of gendered family practices. It is therefore argued that the challenge arises from the informality of inheritance practices among middle class Muslim families in Cape Town, characteristically occurring in the private sphere. In instances where fairness and reciprocity are not given primacy as guiding principles of inheritance practices, women tend to experience downward social mobility. Weak legal protection for Muslim widows during instances of discriminatory inheritances practices is resultant of the lack of a transformative mandate in the public sphere.

This chapter provides a descriptive expansion of the notion that fairness and reciprocity are guiding principles of inheritance practices in middle class Muslim families in Cape Town. Findings are presented through the documentation of social practice, and moments of performativity within instances of social practice. Specific moments of inheritance as a social practice are presented, this allowing for the identification of the intersectional nature of various inequality creating social structures. Furthermore, by detailing the performances of agents involved, nuances of the corresponding identity constructions and symbolic representations are contextualised and documented. This is done so by exploring further the practises of gendered inheritance conditionalities and gifting while alive. In doing so it will become

clear that fairness and reciprocity serve as regulators of support and the respective rights and responsibilities of inheritance. On an institutional level, transformative justice will expose occurrences of institutional influence and shortcomings among patterns of inheritance. These legal weaknesses are introduced through the lived experiences of inheritance for Muslim women whereby understandings of socio, economic and cultural rights are translated into indicators of equality.

## 5.2 Gendered Inheritance Conditionalities

I explore the case of Anna in depth to establish a more layered and complex construction of the experience of gendered inheritance conditionalities as a prominent inheritance practice within middle class Muslim families in Cape Town. I draw on one participant's experience extensively as it allows for the preservation of a nuanced, ambiguous and complex comprehension of one's life (Moore, 2013). Anna's life story explores the colonial, apartheid and democratic eras therefore allowing for a deeper understanding of the intersection between macro and micro forces and the influence this has on inheritance practices particularly in South Africa. As outlined in Table 1, Anna shares similar characteristics with the rest of the sample, furthering the choice of highlighting her experiences to illustrate trends of practices, perceptions and attitudes towards inheritance for Muslim widows in Cape Town. By documenting Anna's life story in detail, the corresponding accounts of other participants are brought into conversation. The practice of assigning gendered conditionalities to inheritance shares highlights the links between understandings of fairness and intergenerational reciprocity as support and responsibility regulators. Although religiously conceptualised, there is a significant gap within the literature detailing the actual practice of how women are 'taken care of' through disparate inheritance shares. What is known is that it is a religious responsibility for men to financially provide for women through their inheritance gains, however thin empirical evidence exists as to how this is actual taking place. It is not clear how families ensure these responsibilities are fulfilled, nor to what extent they are being fulfilled. This research empirically contributes to this significant gap in the literature. Contextualising this inheritance practice within the socio, political and economic contexts of colonialism, apartheid and democracy, what becomes apparent is the links between wider family history and established social and institutional systems. It is evidenced that there is a greater need for transformative justice as a judicial intervention as families alone cannot redress colonial and apartheid disenfranchisement. I begin by providing an account of Anna's life history (Refer to Figure 1 below and Appendix B – Participant Summaries) focusing specifically on her experiences of inheritance by mapping out some of the instances in which intergenerational wealth transfers occurred within her wider family network. Through Anna's life story the role of systemic violence as a regulator for wealth transfers among Muslim family networks is exposed.



**Figure 1:** Anna’s Family Tree

Understanding Anna’s experience of and attitudes towards inheritance as embedded in her life story necessitates a broader understanding of her family in the historical context of South Africa, Anna was born in 1939 and was raised by her mother and grandmother both of whom were live-in domestic workers. Gaitskell, Kimble, Maconachie and Unterhalter (1983: 86) highlight the manner in which domestic work in South Africa brings to the fore the intersection of triple oppression on the basis of race, class and gender, emphasising the intricate complexity of these social categories they allow us to understand the extent to which Anna’s mother and grandmother were marginalised, “sexual subordination when one is a wage labourer in a racist society”. The resulting precarity of the family’s socio-economic position left Anna and her brothers shifting between the households in which her grandmother and mother worked. In her early twenties Anna unexpectedly fell pregnant and gave birth to her first son Mohammed. Mohammed’s father was never involved in his upbringing, therefore Anna’s grandmother helped raise Mohammed while Anna worked as a young woman in the retail industry. At the age of twenty-eight Anna marries Abdul under Muslim rites. Anna then moved into Abul’s family property. The property was owned by Abul’s grandfather, who came from India and owned a business in the same area. Under the apartheid era the area in which Abdul’s grandfather owned property and operated out of was classified under the *Group Areas Act, No. 41 of 1950* (1950) as a coloured area.

The property consisted of two semi-detached houses, the grandparents, Abdul, his parents, brothers and Anna all lived on the property. Abdul and his two brothers worked for his grandfather's business. During this time Anna gave birth to her second son, Amir who is Abdul's first son. The shifts in the political landscape of the time become central in Anna's experience of inheritance in her family network, in addition to this her gender plays a prominent role too.

Changes in political ideology and attitudinal shifts in the historical context enhance our understandings of the state and institutions as regulators of patterns of inheritance in families. In this context the state served as a primary force of socio-economic discrimination, therefore resisting a supportive framework in which to govern inheritance patterns on the intergenerational level. In 1966 Abdul's grandfather passed away. Abdul's grandfather dies testate and stipulates in his will that he has excluded his three biological sons, in favour of his wife and three grandsons born of his one son, Abduls' father

*Give and bequeath the whole of my estate and effects to my wife on subject to the following conditions: That the whole of my estate shall after the death of my aforesaid wife, devolve upon my three grand-children, the children of my son X in equal shares.*

This is significant as not only is all three of his sons disinherited, only three of his fourteen grandchildren shall inherit. Forty days after the passing of Abdul's grandfather, his grandmother passes too. Leaving Abdul and his two brothers the heirs of their grandfathers' estate. Izuhara, (2008:24) argues that "changing families and the development of public policy play a significant part in changing the patterns of intergenerational reciprocity", through this lens we can understand the choice of testation on the grounds of intergenerational reciprocity as Anna recalls her husband and brother-in-law's devoting most of their lives to the family business owned by the grandfather. However, in line with Izuhara's recognition of the role of structural forces as regulators of intergenerational wealth transfer, archival research suggests the political ideology of the time influenced the grandfather's choice of testation. In accordance with the *Group Areas Act, No. 41 of 1950* (1950), Abdul's grandfather was in defiance of the state in that he was part of the 'Indian' racial group remaining in his house which was consequently classified as a coloured area only. This defiance subsequently became noticeable to the state on his death,

*An account was lodged in 1966 but the estate was not finalised as the Master raised certain queries and the question of transfer was a problem in that members of the Indian Group were involved, the property being in a Coloured Group area.*

In this instance, the interference of the institutionalisation of racial discrimination begins to threaten the socio-economic position of Anna's entire marital family. It is proposed that the grandfather bestowed the property onto his grandchildren not only in accordance with Izuhara's notion of intergenerational

reciprocity, but also as an attempt in which to avoid the dispossession of the only property owned by the family at that time. Property dispossession and relocation emerges as a prominent feature in all participants family networks as forced removals by means of the *Group Areas Act, No. 41 of 1950*. (1950) was commonly experienced by older generations in Muslim family, another participant Didi reflects on her families experiences thereof, “they grew up in Kensington...first obviously most of the family lived in Bo-Kapp and then District Six...and then thereafter were scattered around and they ended up in Kensington”. This trend of public policy playing a significant role in changing patterns of intergenerational wealth transfers continues as the political landscape begins to shift.

In 1990, as South Africa began to plant the roots of democracy, the institutionalisation of discrimination emerges in Anna’s experience of inheritance. Evolving from a tone of racial discrimination towards marginalisation based on cultural difference, Anna and her husband’s marriage is rendered illegitimate. Since the opening of the grandfather’s estate, Abdul and his brothers had decided to rent out the property to a ‘coloured’ family and delay the transfer of the property deeds. Abdul and Anna decided to contribute together towards buying the property out of the estate from the brothers. Anna recalls the obstacles her and her husband faced,

*At that time, I was only married by Muslim rites, and he (Abdul) said to me that the lawyers said ‘well you are only married by Muslim rites, but now if you are going to buy the houses you must get married by civil law, and I went there and we got married.*

As a consequence of the non-recognition of Muslim marriages, the nature of Anna and Abdul’s relationship is legally transformed. Through the denial of their cultural rights, Anna’s access to justice in this instance as a spouse of the heir to the grandfather’s property was barred, only through institutional conformity was she able to enjoy her full rights as the wife of Abdul. The occurrence of entering a civil marriage for practical and legal purposes is demonstrated in each case of civil marriages within the sample, “*After I think we were married for the two years and then because of business we felt it safer to get married legally, then there is no repercussion. So we got married and we signed an anti-nuptial.*”, Sunshine, another participant, elaborates on her civil union. Those of the sample who are entered into a Muslim marriage and a civil marriage, had no intention to marry in recognition of the state at the onset of their marriage. Only through instances of hindered access to justice and protection of wealth accumulation did these partners engage in a civil union.

The ability to accumulate wealth for Muslim families has been met with structural violence motivated in both racial and cultural discrimination, as in the case of property dispossession on the basis of race and non-recognition of Muslim marriages. Although the intersection of race, religion and class marginalization has been experienced by the majority of the Muslim population, this marginalization is compounded specifically for Muslim women on the grounds of their gender. This is evident from

the beginning of Anna's life story through the understanding of her mother and grandmother's position in society, although Anna was able to improve her class status in comparison to her forebearers, she was still met with lack of access to justice through the deprivation of her social, cultural and economic rights.

Enmeshed among the stratification of wealth accumulation through institutional mechanisms are the patterns of practices at an inter-personal level. Highlighting the interplay between structure and agency, Izhara (2003) introduces the practices of the changing family among systemic violence. As highlighted by Jones-Pauly and Tuqan (2011) we understand that intergenerational wealth transfers at the micro level do not solely conform to ideologically led perceptions of Islamic inheritance laws, therefore enforcing Izhara's (2003) proposition of the divorce between perception and practice regarding intergenerational reciprocity. This juncture between traditional interpretations of Islam and the lived realities of Muslims is not only present among patterns of inheritance but also in women's daily lives (Dangor, 2001) and modern re-interpretations of Muslim personal law (Jouirou, 2017).

Expanding on the transfer of wealth accumulated by Abdul's grandfather and inherited by his grandsons, through practicing his right of testation Abdul's grandfather ensured the maintenance of care for the women in his family, by introducing conditionalities of inheritance shares,

*That my aforesaid grand-children shall provide my aforesaid wife, and their mother, with residential quarters, food & clothing during their lifetime and provide their sister with living quarters whilst unmarried.*

This instance of a gendered conditionality protecting Muslim women's socio-economic position is significant because it departs from the grandfather's decision to skip a generation in relation to the men of his family, instead he incorporates all generations of women in the family at that time. This indicates that reciprocity is the underling regulator for patterns of inheritance for Abdul's grandfather as the women in the family performed reproductive labor, consistent with the productive labor supplied by his grandsons, therefore bringing these members of the family to fore in his intergenerational wealth transfer. What is more, this practice deviates from Islamic inheritance laws as it does not conform to the stipulated fixed shares promoted by quasi-judicial Islamic institutions in the Cape. What can be highlighted, is that although the grandfather's choice to disinherit his sons defies interpretations of Muslim personal law, the assurance of his female family counterpart's socio-economic position it is in accordance with what Jouirou (2017:23) explains as "intention of justice and equality in the eternal text" with regards to gendered differences. This gendered family practice emerges in multiple accounts throughout the sample,

*I think that my dad during his life had sold it to my youngest sister because at the time she didn't have a home of her own yet and they were married...we all*

*had our own homes... so the condition was that my mom lives there until she passes on.*

The above quote by Sunshine reinforces the understanding of reciprocity as a guiding principle of inheritance practices and as a result the responsibility of assuring the socio-economic protection of Muslim women within family network. This is evidenced on a recurring basis between generations of each family within the sample. For example, after the passing of Sunshine's husband, their family business is handed over to her three sons, she explains how her two sons know that the inheritance of the business is premised on the responsibility to ensure the care of herself and her two daughters, a condition which was openly discussed,

*Look it is a verbal agreement with them which they (her three sons) will understand...look if they don't do it they will be punished, you are not only living here forever, you are going to go somewhere and there you are going to be punished, so if you want to be punished you carry on*

However, understanding this practice in the context of a democratic society and the supposed realization of a full rights framework, the assurance of one's socio and economic rights by proxy of familial relations can be charged with a lack of true security. While men are assured their socio-economic rights and protection of their socio-economic position by means of direct intergenerational wealth transfers, women tend to only benefit from this indirectly. A demonstrable example of the lack of full access to security and justice through this gendered family practice is demonstrated in the case of Fahima's stepmother. She explains how it has been nineteen years since the passing of her father. His second wife married only by Muslim rites was 'protected' in the same way as the women above, through a gendered conditionality of a man's inheritance share, however conflict within the family has arisen on account of the council urging the family to transfer the property into an heir's name (either Fahima or her siblings). Unwilling to finance the transfer the siblings have argued that their stepmother must either pay for the fees herself and transfer the property into her own name, or she must move out. Unable to afford the financing of the property transfer, the stepmother is left in a precariat position of homelessness and 'conditional protection' in relation to her extended family.

It becomes clear that although racially marginalized by the stratification of wealth accumulation through institutional mechanisms, Muslim men are ensured better socio-economic protection through both the legacy of systemic violence and agnatic interpretations of Islamic inheritance laws when compared to Muslim women, especially widows in this case. It can be argued however, at the familial level, Muslim women are afforded a higher degree of assurance of their socio-economic position through the gendered conditionality of a man's inheritance share based on fairness and reciprocity. However, in stances where fairness and reciprocity are not upheld as guiding principles of inheritance, and where the corresponding responsibility of an inheritance share is not fulfilled, women tend to

experience downward social mobility. This juncture between traditional interpretations of Islam and the lived realities of Muslim women under South African law, constrains a widow's 'capacity to act'. It is argued that this stems from weak legal protection for Muslim widows during instances of discriminatory inheritance practices. These legal weaknesses are embedded in the failings of the state to realize the socio, economic and cultural rights of Muslim women. By understanding that on the micro-level there is a greater operationalization of the principle of equality, this however, is not translating to the realization of rights on the macro level. It is evidenced that there has been an insufficient attempt at the institutional and state level to transform the reality of Muslim women. In effect, while Muslim women may enjoy civil and political rights, their socio, economic and cultural rights have been left wanting, rendering them a precariat position in society which rests on their relation to others in the family network.

### 5.3 Gifting While Alive

As is witnessed above, micro-generational contract within Muslim families have been subject to external restructuring by means of colonial and apartheid marginalisation; effects thereof continue to have adverse implications for Muslim women. By contextualising the experience of inheritance for Muslim widows embedded in wider family relations, it became apparent that Muslim families are to a large extent relying on the practice of gifting while alive (*inter vivos*) to navigate the diverse social institutions to which they are subject. Although mentioned in existing literature, the extent to which this practice occurs has largely been underestimated, therefore lacking appropriate academic and political acknowledgment. These instances of intergenerational wealth transfers are conceptualised in the broader sense as an inheritance practice because the 'gifts' / *hiba* are perceived by participants as legitimate inheritance shares. Jones-Pauly and Tuqan (2011:392) state the judicial validity of an *inter vivos* gift rests in the delivery of the gift to the recipient during the lifetime of the testator. While operating as less gender specific compared to inheritance share conditionalities, gifting while alive occurred multiple times in wider family networks of each participant. Data indicates three primary motivations for Muslim families when practicing gifting while alive as an inheritance pattern. Supporting the main findings, reciprocity is argued as a primary motivation for gifting while alive; families conceptualise the transfer of property between generations as 'payments for goods or services rendered' after the fact or future assurance thereof. Secondly, harbouring the tenants of reciprocity and fairness, gifting while alive to equalise inheritance shares between daughters and sons is another primary motivation for inheritance pattern. Another key motivation behind equalising shares by gifting while alive was to ensure the fairness of shares for those children born out of wedlock. Understandings of embedded agency are operationalised through the diverse levels of society in which the participants experienced inheritance, furthermore, highlighting the navigation of different social institutions by the wider family network.



Reciprocity as a form of ‘payment’ reiterated itself throughout her wider family network. Embedded deeply in the colonial history, the Bo-Kaap council property in which Zulpha inherits came to her family by means of her grandparents as indentured labourers. Two generations later, the apartheid state once again plays a crucial role in her story by delegitimizing her aunts right to inherit the property because of her being unmarried. With Zulpha’s parents married by civil and Muslim rites this allows the trajectory of the council property rights to flow to Zulpha. The larger context of marginalisation of Muslim women is then witnessed in the life of Adila, Zulpha’s mother’s cousin. Facing domestic violence and financial instability, Adila and her children often take refuge in Zulpha’s family home at the request of her mother. Decades later, with Zulpha now the head of the house, the democratic council begins to apply pressure on Zulpha to buy the property as she is entitled to do so, however her financial position renders her unable to do so. Adila, now in her eighties, tells her children that her last wish would be that they would pay for the council property on behalf of Zulpha in order to secure her family’s future. Adila, through her children, gifts the payment of the property as a sign of appreciation for the periods in her life when Zulpha’s mother accommodated her and her children in their times of need.

*Just before she (Adila) passed on, it was about two to three weeks before she passed on she made them promise this is her last wish that she wants them as her children to buy the property on behalf of me for my kids because my mother did a lot for them and that is a token of appreciation.*

This act of gifting while alive, perceived of as inheritance by Zulpha, is guided by the principle of reciprocity on the behalf of Adila. However, this micro-generational contract is deeply intertwined with the workings of the colonial, apartheid and democratic states at different moments in her life story: restructuring familial behavioural boundaries. Each political era significantly influencing flows of inheritance for her wider family network. As ‘payment’ for goods and services, the inheritance practice of gifting while alive not only occurred in retrospect, many of the elder generations ‘gifted while alive’ with the intended responsibility for the recipients to provide reciprocal care during their later years of life. Maryam explains this intergenerational transfer of wealth as such,

*So what they do is, like say they have three properties they will give them to each of the kids but they will live with one of the kids until they pass on. Because we also don’t believe in putting parents in nursing homes and things like that we will take care of them*

Fahiema reiterates this sentiment, however she highlights that it is not only immovable property, which is gifted,

*She gave me, my brother and sister she gave us our inheritance before she passed away and then left the house to her husband (Avel) so there was no*

*way we could fight for the house because she was married on court to him and the house just legally went to him after.*

What is more, the perception of gifting while alive as a legitimate form of inheritance practices is further substantiated by Fahima whereby she explains how the gendered nature of Islamic Inheritance Laws began to dictate share portions of gifts *inter vivos*,

*Didi: I think they (Natheer's parents) gifted all their kids during their living days, so they didn't really have a will.*

*Researcher: When they sold their house and divided the money up...how did they divide the shares?*

*Didi: well obviously the daughters get one third*

*Researcher: So they distributed it according to Islamic shares even while they were alive?*

*Didi: Yes, I think they would have done that in all fairness. The boys get equal shares and the girls gets less. Because in Shariah the brothers is supposed to look after the sisters.*

Secondly, interpretations of Islam, alongside state intervention are continuously witnessed in instances of equalising shares through gifting while alive. In agreement with the findings of Jones-Pauly and Tuqan (2011: 392) South African Muslim families equalise shares through the practice of gifting while alive (*hiba*). In this way when the estate opens for inheritance, female family members such as daughters and surviving wives have already been compensated therefore equalising inheritance shares despite sons inheriting twice as much from the actual estate. When commenting on the familiarity of the practice within her community Didi adds, "*Shariah is there...and you must just follow through. But there is a kind of loophole...and what applies to me and my family doesn't always apply to others*". In practise, Sunshine explains her interpretation of gifting while alive as crucial to her succession planning,

*In our Islamic believe boys get double than that of girls but I can in my life time already donate to whoever I want so if I feel that I want my house to go to maybe my two daughters, I can do that now while I am alive but if I should die then that would fall away and the boys will get twice that of the girls.*

When asked about the specificities of the matter, Sunshine reiterated her perception of gifting while alive as her responsibility to equalize the inheritance shares of her sons and daughters, "*I have already drawn up a will according to Shariah but it is my duty while I am alive I should distribute so by the time I should pass on there isn't any disputes*".

Equalizing shares *inter vivos* did not only manifest in relation to gender directly, the practise of gifting while alive became prominent in succession planning of parents with children born out of wedlock. What is significant here, the importance of the principle of equality was not only extended to ensure all

children inherited in some form but even in some cases where wives came into the marriage with a child from a previous relationship they too were ensured a fair ‘inheritance’ share *inter vivos*. Grappling with the nuances of the circumstance, Anna explains how her eldest son from a previous relationship according to Islam could not technically inherit,

*And I mean I say I love my children both the same, and I like to give to them the same, if I give to the one I give to the other one, I am like that. But where it comes to inheritance...it is entirely different. Like I said to you, he is not my husband's child so he can't inherit from me and he can't inherit, even though he said to his father "daddy" but he can't inherit from him.*

Anna goes on to explain how her husband understood the responsibility of maintaining the generational contract and in doing so he navigated Sharia law by means of gifting while alive to ensure the intergenerational transfer of wealth,

*...because that is why I say making a will isn't like a sharia law, I can do with my life what I want but I must think of him (her youngest son), because the eldest one (Mohammed) got such a lot from my husband when he was alive.*

Anna and her husband clearly depict the importance of fairness as a guiding principle for inheritance practices among Muslim families in the sample, they too demonstrate how these patterns of inheritance are often aligned with the principle of equality in the case of her son Mohammed. Fahiemma reiterates the perception of fairness as a guiding principle of her family's inheritance practices, while at the same time holding close to their Islamic faith,

*He was born out of wedlock so the law says, Shariah says he (Fahiemma's husband) can give him while he is alive. So what his dad did was he paid half of his house, he paid a massive deposit towards his house so that was like his inheritance.*

A consensus throughout the sample was an interpretation of gifting while alive as necessary when navigating the intersecting social institutions, while at the same time guided by the principles of fairness and reciprocity when experiences of inheritance practices are encountered. When understanding the necessity of gifting while alive in relation to family cohesion and continuity Maryam explains,

*I think it (giving while alive) is a more peaceful solution to be honest with you. I have seen it happen many times when somebody passes away and they fight over the money and they fight over the properties and for years nobody speaks to each other. So it think to save that, while you are alive just give it.*

What is evidenced through these experiences of gifting while alive, is that on the micro level patterns of inheritance do align with the principle of equality. What is significant here, is that this has been maintained through generations despite the harsh socio-political context in which the Cape Muslim community has had to endure:

*I even look at when his (Sunshine's late husband) parents died, they lived their life but there was nothing really to pass on, everything they had they gave in their lifetime. And my dad too, in his life time he handed over already whatever needed to be given. So you don't have to stress about the will and who is going to fight for what, and I hope to do the same. - Sunshine*

However, as argued before, it is important to keep in mind that patterns of inheritance do occur in a context of gendered family practices. The challenge arises here through the character of these practices being predominantly informal and most often occurring in the private sphere. Fahiemma's experience of inheritance after the passing of her husband best depicts instances whereby fairness and reciprocity are not given primacy, and in many instance results in downward social mobility for Muslim widows. Keeping in mind Fahiemma's marriage was polygamous she explains her perception of her husband's succession plan before his passing,

*Because he (Fahad) was still living he was intitled to give gifts, so whether or not it was going to be shariah wise I really don't know. It wasn't an inheritance at the time, he was still alive so shariah only kicks in after the person is dead and then sharia law kicks in regarding their inheritance. But I think while you are alive you are allowed to give gifts.*

Further elaborating on the specificities, she later adds,

*He did tell me that he was going to give me a portion and his other wife (Yusra) a portion and for his children something and he was going to do other little stuff with the money. That was his plan*

When elaborating on Fahad's motivation to do such Fahiemma explained,

*I think he (Fahad) knew the controversy that was going to come with it because he knew that there was going to be a controversy in splitting that money. Because we were only married eleven months and I was not accepted by his first wife (Yusra) really so I think he knew that there was going to be problems there and I think that is what he wanted to avoid.*

Fahiema's position as the second wife in a polygamous marriage unrecognised by the state and unaccepted by Yusra became more vulnerable when Fahad had passed away before ensuring the fulfilment of his initial succession plan. Fahiema received no inheritance share, *inter vivos* or testate,

*Researcher: When he passed away did he leave a will?*

*Fahiema: No...can you believe it! Somebody of that stature, and somebody who preaches 'will, will, will', and he had no will.*

The precarity of her socio and economic position as a Muslim widow becomes evident in this moment. Unaccepted by Fahad's first wife, she is unable to turn to the established quasi-judicial Islamic institutions for help. While at the same time, unrecognised by the state she is faced with weak legal protection. Fahiema is left in a position whereby two years since the passing of her husband she does not know the particularities of Fahad's estate, nor has she received anything.

*I would have to go and ask his other wife (Yusra) if she had access to that (his estate) or... so I just thought I am not going to. And I think that is the other thing...who do I ask? Is there a line to follow? Is there rules and stuff? So I think I will just leave it as that.*

What is clear is that the legal weakness introduced through Fahiema's experience of inheritance elicits an understanding of her socio, economic and cultural rights that indicate a lack of operationalising the principles of equality and diversity. The inability of the legal system to translate the full spectrum of her rights into her lived experience of inheritance is resultant of the lack of a transformative mandate in the public sphere. This experience is reiterated in *Daniels v Campbell and Others* (2004) whereby the husband's oral contract to gift his wife their marital home was barred by the court due to the verbal nature of this contract and its lack of fulfilment in relation to the South African judicial system (Jones-Pauly and Tuqan, 2011:393). As argued in *Daniels v Campbell and Others* (2004), and supported by the data, *inter vivos* gifts are clearly understood within Cape Town Muslim communities as an implied term of a Muslim marriage contract. It is therefore argued that by understanding the agent as embedded, the operationalisation of a transformative justice mandate would allow for the judicial system to "apply themselves to the interpretation of *inter vivos* gifts as valid due to the legitimacy it holds within Muslim communities" (Jones-Pauly and Tuqan, 2011:393).

Through an analysis of gifting while alive as a pattern of Muslim family inheritance practices, Izuhara's (2008:2) assertion that the degree to which one may exercise agency on the interpersonal level is significantly influenced by society on the macro level and the varying jurisdictions among societies is application in this instance. In experiences of inheritance for Muslim widows in Cape Town, religion, gender and political shifts have to a large extent influenced different agent's 'capacity to act'. Through this understanding of the micro-level intergenerational contract, connections between housing assets,

care provision and inheritance perspectives are conceptualised in context, eliciting a better understanding of the shifting familial boundaries through support.

#### 5.4 Conclusion

By providing an expansion of argument that fairness and reciprocity have acted as guiding principles of inheritance practices, this chapter has explored two dominant inheritance patterns: gendered conditionalities of inheritance shares and gifting while alive. These empirical contributions address gaps in the literature by highlighting the frequency in which these practices occur and documenting how these religious and social expectations actually take place. It is concluded that fairness and reciprocity serve as regulators of support and the respective rights and responsibilities thereof. On the macro level, transformative justice as a theoretical orientation has elicited moments of institutional influence and deficiencies within these specific generational contracts. Legal weaknesses were therefor introduced through the experiences of the six Muslim widows. The weaknesses brought to life an evaluation of the principles of equality and diversity through an understanding of each women's socio, economic and cultural rights. The following chapter provides a brief discussion of these findings in relation to the identified theoretical orientations and related global trends.

## Chapter Six: Discussion and Conclusion

Drawing from the findings elucidated in Chapter Five, this chapter provides a brief discussion thereof. It is not the primary objective of this research to critique the context nor stipulate policy recommendations, therefore this chapter aims to bring the data into conversation with existing discourse regarding embedded agency, transformative justice interventions and family law reforms globally. Embedded within inequality-creating social forces, the findings allow us to conceptualise Muslim women's agency as proactively and strategically shaping their lives and the lives of other female family members. Bringing the findings into conversation with transformative justice, it is argued that there has been a stratification of rights and the realisation thereof, resulting weak legal protection for Muslim widows in instances of discriminatory inheritance practices. Existing international discourse regarding family law reform on a state level is relatable here as gender-sensitive reforms do not in fact erode the foundations of religion and family, but merely challenge the tenuous balance of power (Htun and Weldon, 2011:146).

Highlighting the religious and agentic nature of Muslim women, the analysis has foregrounded the religious, cultural, social, economic and racial contexts which participant's agency is embedded. The corresponding rights and responsibilities of these social forces to a large extent influence their 'capacity to act'. However, departing from traditional understandings of agency exhibiting specific aims, the experiences of Muslim women highlight how their agency is to a large extent motivated towards proactively and strategically shaping their lives and the lives of female family members. Within the contextual confines of their 'capacity to act' the practices of Muslim women indicate certain degrees of power in society, this power strategically mobilised by participants through inheritance practices in order to proactively influence the balance of power between different family members, in the Muslim community and broader society. Findings show us how Muslim women actively participate in informal and formal inheritance practices to position themselves and younger female generations in stronger socio-economic positions. Muslim women are agents of change in society as they are negotiating and influencing structural forces on the meso and macro levels of society through their interpersonal relations on the micro level. Informal inheritance practices can be understood as positive in relation to Muslim women as they are still aligned with Islamic practices, they are beneficial to younger female generations and in effect the female 'giver' is held in high esteem. These positive experiences captured throughout the data are however a product of the specific sample attained. This is, however, not the case for all Muslim women and obtaining a sample through a different recruitment technique or sample criteria may illicit different experiences. It is possible that the willingness to participate in the research is attributable to the positive nature of the experiences of these specific Muslim women.

Transformative justice was applied with the intention to position the experience of Muslim widows in a context whereby understandings of socio, economic and cultural rights were translated into indicators

of equality, analysed in the context of diversity in different levels of society and operationalised through embedded agency. Experiences of inheritance for Muslim widows in contemporary South Africa indicate that civil and political rights are prioritized at the expense of economic, social and cultural rights. Categorization and prioritization of rights is deeply problematic for the reality of Muslim women when reminded of the interrelationship between rights discourse, development strategies and security. Arbour (2007:7) highlights connections between the misconception of social justice and the rights dichotomy by illustrating that in fact civil and political, as well as economic, social and cultural rights have been fully integrated and are of equal standing within international and South Africa law. Existing literature indicates that at the core of this misconception civil and political rights are understood as “freedoms in relation to which violations can be found”, while economic, social and cultural rights are understood as privileges which may manifest when the desired resources and political climate are available (Arbour, 2007:11). There is a lack of holding states and international communities accountable for economic, social and cultural rights, and the judicial enforcement of such rights has been actively resisted as is shown in Chapter Two through the intra-group conflict regarding gender sensitive interpretations of MPL among the Cape Muslim community (Arbour, 2007:11).

Keeping in mind the progression of judicial enforcement of such rights and taking note of the ruling in the customary law *Bhe and Others v Khayelitsha Magistrate and Others* (2005) it is witnessed that the Constitutional Court declared ‘traditional’ interpretations of inheritance practices which discriminated based on gender as unconstitutional. This argument can be upheld for reinterpretations of Islamic texts in relation to inheritance laws, as argued in Chapter 4.3.2. As depicted in the findings, the experience of the middle-class Muslim families in Cape Town to a large extent do not perceive the employment of alternative inheritance mechanisms, which serve a more gender sensitive motivation, an “evasion of traditional Islamic rules” (Jones-Pauly and Tuqan, 2011:393). Indicating the potentiality of upholding principles of equality and diversity when exercising the multiple avenues in which inheritance practices may be executed. Jones-Pauly and Tuqan (2011:410) bring into conversation the dangers of rights stratification and discrimination at the hands of religion, race or gender. Forwarding the context of coloniality which *Bhe and Others v Khayelitsha Magistrate and Others* (2005) originates, they remind us of the religious doctrine under which the apartheid regime was executed. Cautioning the role which religious interpretations may play in motivating discriminatory practices, a transformative justice mandate calls for a re-evaluation of specific religious interpretations actively resisting “the spirit of egalitarianism” (Jones-Pauly and Tuqan, 2011:410) and the judicial enforcement thereof. Gender contestations emerge across all cultural and religious domains and are not indigenous to South Africa, furthering the potentiality of addressing inheritance patterns that erode principles of equality which are widely prioritised internationally.

On a global scale Htuh and Weldon (2011:146) demonstrate a correlation between a nations traditional legal system and the “status of women in family law”, thus urging the judicial system to synchronise

the lived experience of inheritance for Muslim widows with the revolutionary nature of the *Constitution* (1996). With the unbundling of the church (and other religious institutions) from the state, the legacy of family law matters being relegated to traditional or religious authorities remains significantly intact (Htuh and Weldon, 2011:146), as is the case for the Cape Muslim Community. Consequently, family law reform in many countries is met with suspicions of the delegitimization of religious autonomy by the state. Htuh and Weldon (2011:165) demonstrate that for Morocco, Brazil and Spain family law reform occurred without the suspected threatened religious autonomy, they conclude;

This raises the question about whether the survival of the family, religion or national identity is really at stake. At issue rather, is the question of who decides how family relations should be structured. Family law reform provokes fierce opposition because it threatens to transfer control from religious authorities to secular bodies and to shift weight in favour of alternative interpretations of religious traditions...Family law reform, like other political conflicts, revolves around the struggle for power.

Bringing into conversation transformative justice and international family law reform literature, the question arises why Muslim family law reform is not reflected in South African jurisprudence to an extent that it is able to translate into the realisation of a full spectrum of rights for Muslim women. This question is situated in a context where data indicates that Muslim families are to a large extent upholding principles which inform South African judicial system.

This research set out to better understand the experience of inheritance for Muslim widows and interpret how these experiences relate to the governing principles of equality and diversity in the *Constitution* (1996). This being in a context whereby a Muslim marriage is not afforded the same legal status and protection as civil or customary marriages. A review of the literature indicates the consequence of the lack of legal protection afforded to Muslim marriages is the deficient recognition and regulation of inheritance practices in Muslim families, this problem adversely affects Muslim women. This research therefore had the objective to better understand the lived experience of inheritance for Muslim widows in middle class Muslim families in Cape Town. By documenting Muslim widow's experiences of inheritance, attitudes towards these practices are investigated. Specific attention was afforded to the ways in which these patterns of inheritance are tied to gendered family practices. Simultaneously, how the experiences of inheritance and the practices thereof relate to the principles of equality and diversity in the *Constitution* (1996). This study employed an interpretivist qualitative research methodology whereby a case study design was utilized. Guided by the theoretical orientation of both transformative justice and embedded agency, this study made use of the triangulation of three sets of data: semi-structured in-depth interviews with six widows from middle-class Muslim families in Cape Town,

archival documentary data in the form of specific wills from their wider families and documentary data in the form of case law. The data converged during the intersectional multi-level analysis.

This research argues that fairness and reciprocity serve as guiding principles of inheritance practices among middle class Muslim families in Cape Town. This has been shown through two prominent patterns of inheritance practices identified in the data, namely gendered conditionalities of inheritance shares and gifting while alive. These findings indicate that to a large extent, on the micro level, experiences of inheritance for Muslim widows are in fact aligned with the principle of equality. However, as depicted in Chapter Five, patterns of inheritance occur in a context of gendered family practices. The challenge therefore establishes itself through the informality of such practices and the private nature thereof. As the data has shown, in instances where fairness and reciprocity are not afforded primacy in the devolution of one's estate, women tend to experience downward social mobility. It is argued that weak legal protection for Muslim widows during instances of discriminatory inheritance practices is resultant of the lack of a transformative mandate in the public sphere.

Embedded within social forces, Muslim women's agency is conceptualised as proactively and strategically shaping their lives and the lives of female family members. Bringing the findings into conversation with transformative justice, it is argued that there has been a stratification of rights and the realisation thereof, therefore resulting weak legal protection for Muslim widows in instances of discriminatory inheritance practices. It is further noted that existing international discourse regarding family law reform on a state level is relatable in this instance as gender-sensitive reforms do not in fact erode the foundations of religion and family, but merely challenge the tenuous balance of power. This research contributes to the growing body of literature regarding Muslim family practices, and serves to highlight Muslim widow's experiences, expectations and challenges with regards to inheritance in contemporary South Africa. Key to the contributions made to the existing body of knowledge is an account of the intersecting forces among institutional systems, social systems and family relations. Most importantly this empirical investigation contributes to the scarce social research focusing on the experiences, opinions and perspectives of Muslim women. In the long term it is anticipated that this research may be a contributing voice to the transformation of public policy in so that it may become more relevant to the lives of those whom it is meant to serve.

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## Appendices

### Appendix A – Interview Schedule

The main objective of the thesis is to understand women's lived experience of inheritance in South African Muslim families, focusing specifically on the perspectives of Muslim widows in Cape Town. Subsidiary objectives, which are designed to attend to the primary objective, include the following:

- Document women's experiences of inheritance in Muslim families.
- Investigate women's attitudes towards inheritance in South African Muslim families.
- Determine the ways in which patterns of inheritance are tied to gendered family practices.
- Examine how this relates to the principles of equality and diversity in the Constitution within a legal pluralist society.

#### **Data Collection Questions (Points of conversation)**

##### Questions relating to the background and context of the participant

#### 1. BACKGROUND

Tell me a bit about yourself?

- Childhood- Where did you grow up?
- Family of Origin – Can you tell me a bit about your parents and siblings etc.?
- Education- Where did you go to school?
- Employment and Financial status- Income / Savings / Pension etc.
- Marital Status/ Personal Relationship

#### 2. FAMILY (WIDER KIN)

Can you tell me about your family?

- Co-Residence:
  - Can you tell me about your living arrangements (changes over time)
  - Who all lives here? Has this changed over time?
  - How are they related to you?

- Apart from when you were a child, have you ever experienced living in a household with other family members
  
- Looking after children
  - In what ways do you provide childcare / support in looking after children?
  - Why did you provide this help?
  - How was it negotiated?
  - How has this changed overtime?
  
- Tell me a bit about your late husband?
  - Can you tell me about how you and your late husband met?
  - Can you tell me about your wedding?
  - Childhood- Where did he grow up?
  - Family of Origin – Can you tell me a bit about your late husband’s parents and siblings etc.?
  - Education- Where did your husband go to school?
  - Employment and Financial status- Income / Savings / Pension etc.
  - Marital Status- Was your late husband ever married to someone else?
  
- Quality of relationships: What is the relationship with your late husband’s family like?
- Can you tell me about close family who don’t live with you?
- Do you have extended family that you are in contact with? Can you tell me about them?

### 3. RECEIVING SUPPORT

Can you tell me a bit about (financial/practical/etc) support you received from family members?

- Under what circumstances did the need arrive?
- How did you experience asking for help?
- Who did you ask for help and why?

Can you tell me about the ways in which your family members support you?

### 4. INHERITANCE

Can you tell me a bit about the inheritance of your late husband?

- Financial
  - What are your experiences of receiving money?

- What was the purpose for this money given?
- How was this financial inheritance negotiated?
- How did you feel about it?
- Housing
  - Under what circumstances did you come to live here?
  - Under what circumstance did X come to live here?
- Practical: Looking after children
  - In what ways does this inheritance provide childcare / support for looking after children?
  - How was it negotiated?
  - How has this changed overtime?
  -

In receiving this inheritance, did you encounter any challenges?

- Time
- Money
- Jobs, and carers
- Property sales not undertaken
- Relationships
- Relationships with family members
- Conditions of inherence
- Quality of inheritance

Can you tell me a bit more why you think it is important for family members to help each other?

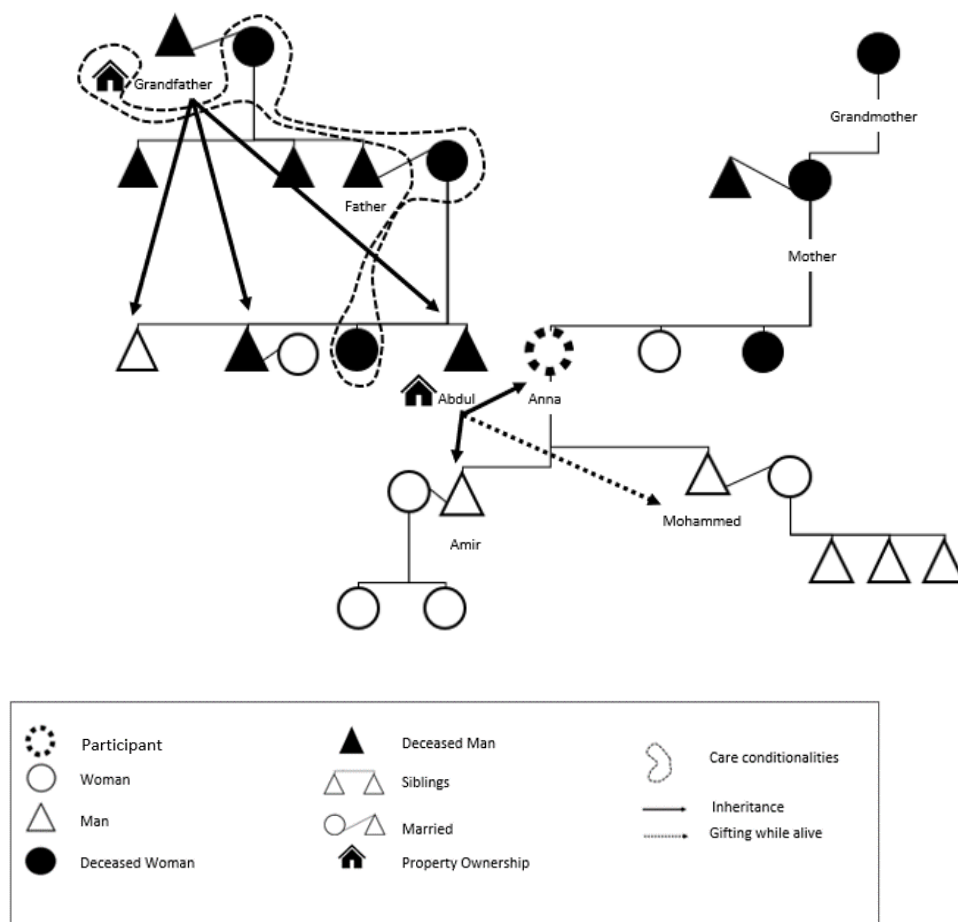
Have you ever refused to support a family member? Can you tell me about it?

## 5. RELIGION

Can you tell me a bit about your experience of Islam?

- Has your experience of being Muslim changed over time?

Appendix B- Participant Summaries  
**Anna**



**Figure 1:** Anna’s Family Tree

Brought into a context of marginalisation Anna, was raised by her mother and grandmother both of whom were live-in domestic workers. Growing up with her two brothers, Anna found herself shifting between the households in which her grandmother and mother worked on the outskirts of the Cape Town area. In her early twenties Anna unexpectedly fell pregnant and gave birth to her first son Mohammed. Mohammed’s father was never involved in his upbringing, therefore Anna’s grandmother

helped raise Mohammed while Anna worked as a young woman. In her late twenties Anna and her husband Abdul, long-time friends, decided to get married according to Muslim rites. Abdul and his brothers worked for his grandfather's businesses. Abdul's grandfather, born in India, was a prominent business owner in an area which subsequently during apartheid was reserved for those who were classified as coloured. Near to the businesses, Abdul's grandfather owned two semi-detached houses which Anna moved into once married, leaving Mohammed with her grandmother. At the time, both Abdul's grandparents and parents resided in the family home.

Anna recalls the first few years of her marriage as filled with conflict between herself and Abdul's parents, Abdul during this time was often out with his friends. Anna explains how she was often treated poorly because she was a 'coloured' woman compared to her husband's family who were of Indian descent. She spoke fondly, however, about her husband's grandparents who would often show her kindness in moments of conflict between herself and Abdul's parents. Soon after Anna gave birth to her second son Amir, Abdul's first child, she decides to leave the family home and move back in with her mother. After nine months of living with her two sons and mother, Anna and her husband reconcile and decide to move into a rented property of their own. As a pillar within the family, the passing of Abdul's grandfather is experienced as a turbulent time within the family. Abdul's grandfather dies testate and stipulates in his will that he has excluded his three biological sons in his will in favour of his wife and three grandsons born of his one son, Abdul's father. This is significant as not only is all three of his sons disinherited, only 3 of his 14 grandchildren shall inherit. Forty days after the passing of Abdul's grandfather, his grandmother passes too. Leaving Abdul and his two brothers the sole heirs of their grandfathers' estate. Four years after their Muslim marriage the couple decides to enter into a civil marriage through recommendation of a lawyer when they begin negotiating the purchase of the brothers' portion of the property. Anna presumes this choice of testation was made on the grounds of involvement in helping the family business grow as well as the strength of relationships between the grandfather, Abdul and his brothers.

Abdul's eldest brother decided to rent the property to another family during this period. In the 1990s, Anna and Abdul enlist the help of lawyers in order to purchase the family property themselves. In order to do so, the couple had to pay Abdul's younger brother his share of the estate as well as his eldest brother's wife her share of the estate as he had passed three years prior. With the property now in Abdul's name, Amir, his wife and two daughters move into one of the two semi-detached houses with Anna and her husband in the other. In 2014 Abdul passes away, leaving no will behind his estate is left to Anna and Amir. Mohammed, Anna's first son stands to inherit nothing as both Intestate laws and Sharia inheritance laws exclude him from a share of his social father's estate.

Zulpha

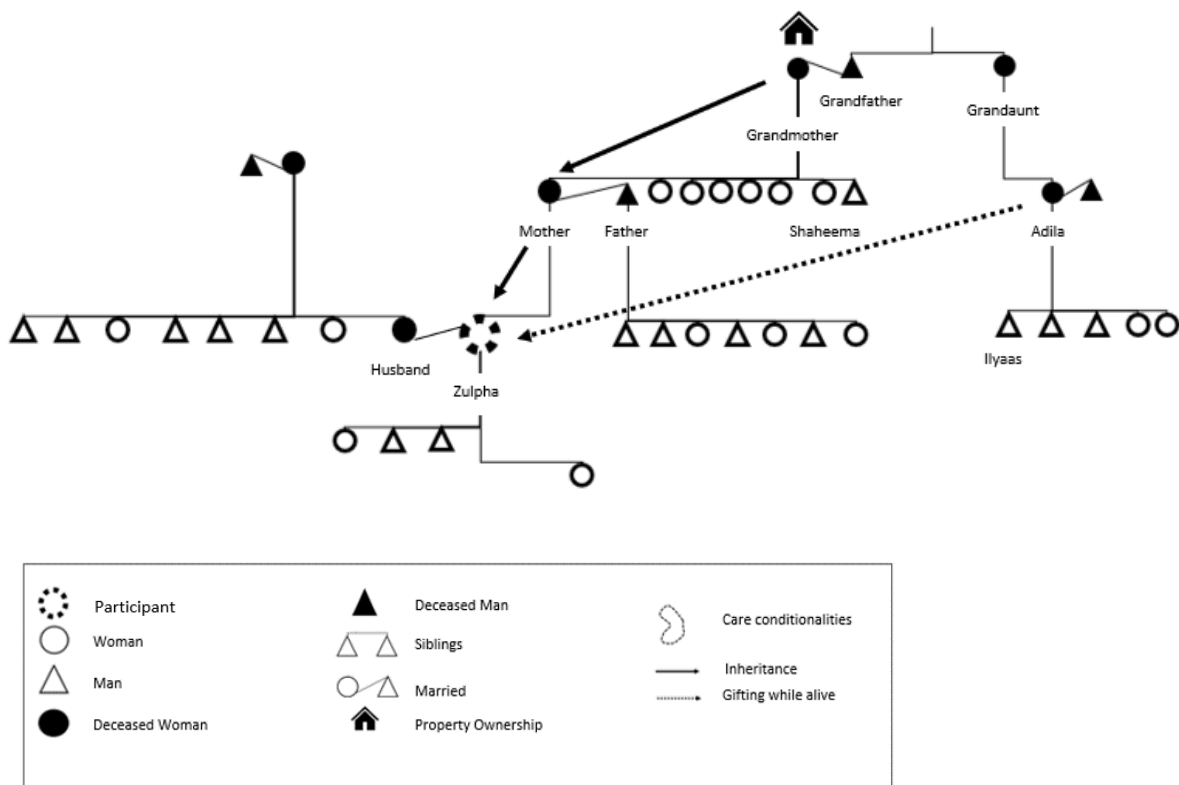


Figure 2: Zulpha’s Family Tree

Zulpha’s experience of succession, when compared to other women in the sample, differs slightly. This deviation is witnessed in her inheritance of property from her mother’s side of the family compared to those of the sample who have come to own property through their marital family. Zulpha’s grandmother and grandfather were brought to South Africa as indentured labourers from India. Her grandparents were boarders at the Quawatul Islam Mosque, within close to the city and Bo-Kaap, this facility was built specifically to cater for the influx of the Indian Muslim Community in the Cape. Later her grandparents were moved into newly built council property in Bo-Kaap. Although owned by the council, this house goes on to be understood as their family property and her grandparents raise seven

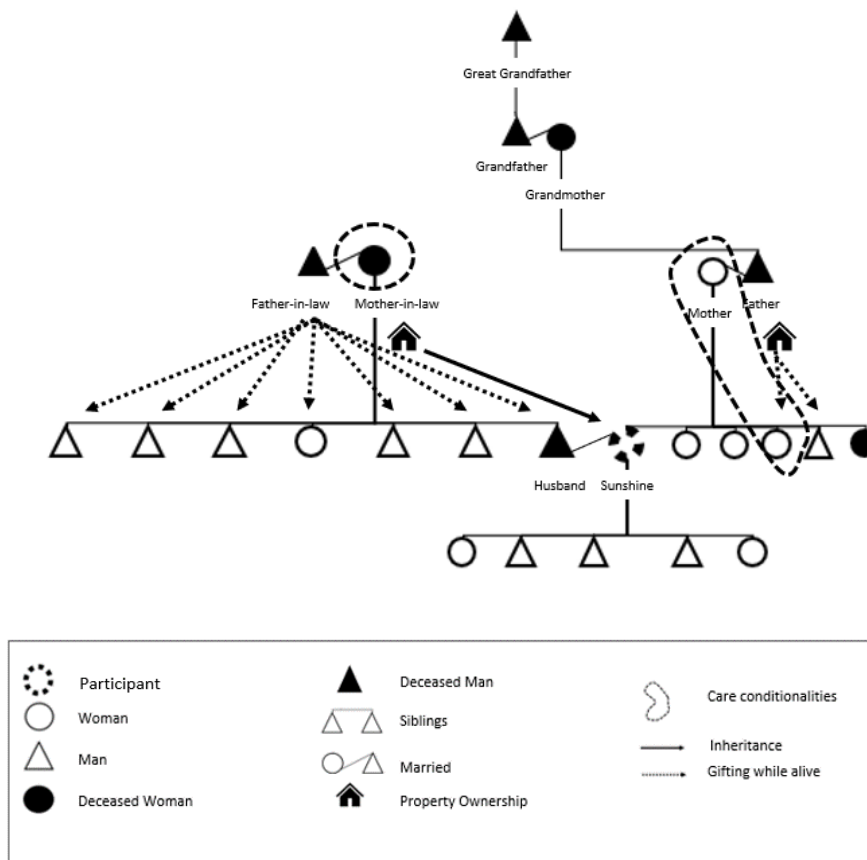
daughters and one son here. As time passes five of the children move out of the property once married. Zulpha's grandparents then live in the family home with two of their daughters: Zulpha's mother and their youngest daughter Shaheema.

Zulpha is then born, her mother unmarried and her father previously married with seven children of his own. Before the passing of her grandfather Zulpha's parents decide to enter into a marriage according to Muslim rites on the grandfathers request. Zulpha's father then moves into her family home with her mother, grandmother and Shaheema. None of his seven children from his previous marriage join him. Before the passing of Zulpha's grandmother, her parents enter into a civil law marriage. This marriage, now recognised by the state, is critical to the life story of Zulpha as it allowed for her mother to inherit the right to continue residing in the family home (still council property) as opposed to Shaheema. Although Shaheema at the time was the main income earner in the household, according to council property laws at the time, she was unable to gain the property rights because she was unmarried. Shaheema moves out, leaving Zulpha and her parents in the family home. Throughout the course of Zulpha's childhood, Adila, Zulpha's mother's cousin, and her five children move in and out of the home. Adila's marriage was unstable due her husband's gambling and alcohol abuse, and this led to periods whereby she and her children had no money for safe housing. During these unstable periods Zulpha's mother would welcome them into her home. As Zulpha leaves school her father passes away, leaving herself and her mother in the house. A few years later at the age of twenty-three Zulpha gets married according to Muslim rites and stops working as her husband then becomes the main breadwinner in the house. Six year later, Zulpha and her husband then enter into a civil law marriage as they decide they want to adopt their first child. Zulpha and her husband adopt a daughter and go on to have two biological sons of their own.

When Zulpha's mother passes away Zulpha inherits the rights to reside in the property as she was her mother's only child and her father's seven children from his previous marriage never resided in the property. When Zulpha's husband passes away, he dies intestate and leaves very little behind as he did not work for a number of years prior to his death due to illness. Zulpha now struggles financially while raising her four children on her own, the fourth which she later adopted by herself. The council begins to apply pressure on Zulpha to buy the property as she is entitled to do so, however her financial position renders her unable to do so. Adila, now in her eighties, hears of Zulpha's financial position and potential to purchase the family home from the council. Her children grow up having recovered from their childhood financial instability, all owning their own property and enjoy stable employment while supporting Adila. Due to old age, Adila falls ill. Two weeks before her passing she tells her children that her last wish would be that they would one day pay for the council property on behalf of Zulpha in order to secure Zulpha's future as well as that of her children's. Adila, through her children, does so as a sign of appreciation for periods in her life when Zulpha's mother accommodated her and her children in their times of need. In 2013 Adila's eldest son, Ilyaa, pays for the property on behalf of Zulpha. The

property in which Zulpha’s family has been staying in for the past seventy-seven years is now in Zulpha’s name and she intends to draw up a will whereby she will leave her entire estate to her four children.

**Sunshine**



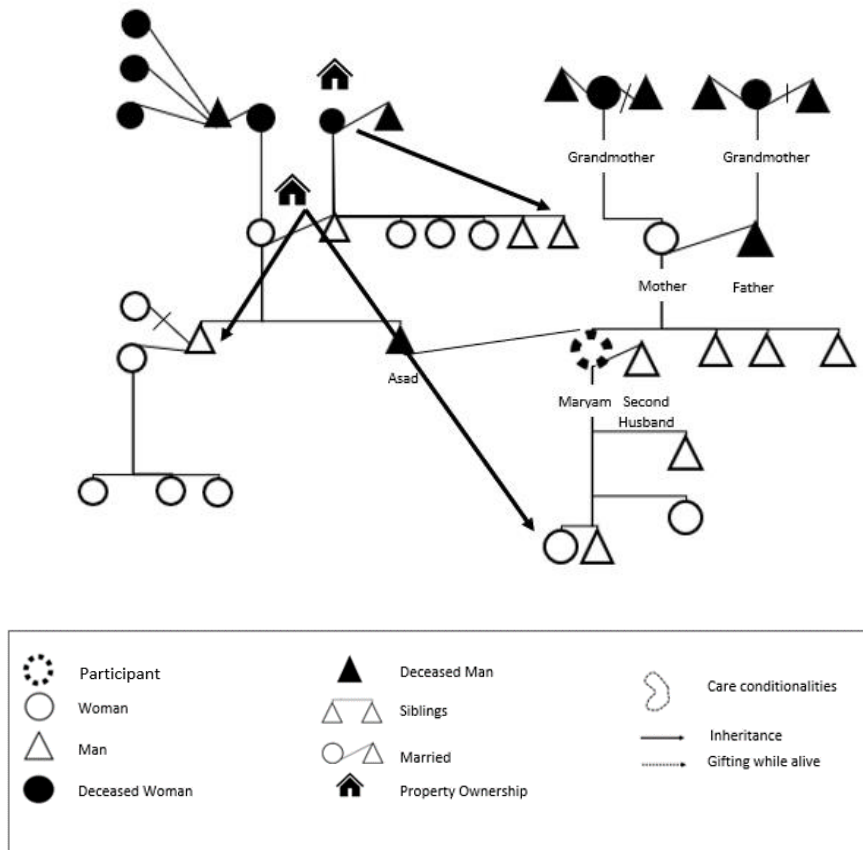
**Figure 3:** Sunshine’s Family Tree

Sunshine, a grandmother, active community member and businesswoman, was born in Cape Town. Her great grandfather was unique in so far as he was not ordered to the Cape as a slave or labourer. Subject to the apartheid regime, Sunshine’s family experienced multiple moments of eviction from their family homes. Beginning in the late 1970’s Sunshine’s grandmother, father and his siblings were forcibly removed from the Bo-Kaap and relocated to District 6. While living in District 6 Sunshine’s parents met and later go on to have six children. Following the evictions of District 6 Sunshine’s father, a teacher, purchases property in the nearby area of Warmer Estate, a home in which Sunshine and her siblings recall most of their childhood. While attending high school Sunshine and her husband met and

enter a marriage under Muslim rites at the ages of 19 and 20 respectfully. They moved into her husband's parent's family home in Rondebosch-East, which constituted two semi-detached houses. One occupied by the couple, the other occupied by his parents, his one brother and his wife. Sunshine began earning an income once she left high school but stopped working while raising her three sons and two daughters. Sunshine and her husband had decided to enter a civil law marriage for business reasons several years after their religious marriage.

Sunshine's husband's parents were both born in India. Her husband's father had started a family business however experienced numerous challenges over the years due to the restrictions of movement placed upon non-whites during the Apartheid Regime. During times of operation the family business was run by her husband's father and his six sons until his passing. Through negotiations between the six brothers Sunshine's husband decided to continue the business in his own name. After the birth of her last daughter Sunshine began working with her husband for their family business. After the death of her husband's mother, Sunshine and her husband decide to purchase the two semi-detached properties out of the family trust left behind by her husband's parents. This was done so by paying the brothers their share of the value of the property, split equally between her husband's five brothers. They transfer the property into Sunshine's name and convert it into one double story house. Sunshine explains that political trends and the benefits thereof in relation to their business during democracy in South Africa grounds their decision to register all of their assets in her name, including her husband's family house. Sunshine's original family home in Warmer Estate which was owned by her father was split into two properties by her father. Her one brother builds his own house on the empty side of the property, while her sister and her husband move into the existing house at the bequest of her father. Sunshine's husband passes away after 36 years of marriage. Together, they had built a financially successful business, raised five children and went on to have eleven grand-children. Her husband died intestate and left very little in his state as most of their assets and the business is registered under Sunshine's name. She now lives in her double story house in Rondebosch-East with her mother and eldest, unmarried daughter. Her three sons are beginning to take over the operations of the family business and intend to ensure that Sunshine and their two sisters continue to benefit financially from the family business through a form of profit shares. Sunshine intends to transfer the business over to the three sons in the near future, a condition of such would be the continued financial care of her daughters and herself.

## Maryam



**Figure 4:** Maryam's Family Tree

In her late twenties Maryam had a personally calling to revert to Islam. Her religious interest was ignited when she overheard work colleagues debating matters within the Quran, after a few months of researching Islam Maryam decided to profess her faith and began practicing her religion in her every day. Three years after reverting to Islam Maryam entered a Muslim Marriage with Asad. Having already had two children of her own, Asad moves into Maryam's rented property with her eldest son and daughter. Asad worked for his brother's company which was run out of their parents' home situated on a large property in an area previously designated for coloured people under apartheid. Asad's brother, once having been divorced, is now remarried with three children, a daughter and twins. Asad's mother was born into a large polygamous Muslim family who resided in a large house split into two, one for each wife. Her father had four wives in total but no more than two at the same time. Maryam explains

that the families all lived and interacted as one. This family home was lost due to forced removals during apartheid. Asad's father's family home is now owned by his youngest uncle who was given the property as he was the last to marry and lived in the home with his parents until they had passed. Soon after their marriage Maryam and Asad found out that they are expecting twins. With the pregnancy taking a heavy toll on Maryam's body she is instructed to leave work and continue to stay on bed rest from the fourth month of her pregnancy. At the same time, the property which Maryam was renting had been sold and they were instructed to move out. With only Asad's income to rely on, the family decide to move into one of the two cottages on Asad's parent's property.

When Maryam's and Asad's twins, a boy and girl, turn two the couple take the decision to move out of the cottage on Asad's parents house. The family of six then move into a rented property and Maryam begins working again. Two years later the couple purchase a home together, unfortunately five months after moving in Asad passes away tragically. Maryam is now remarried and lives in the property bought by her and Asad with her second husband, her twins and her eldest daughter. Asad's parents, now pensioners, are both retired and earned an income by renting the two sperate cottages on their property. Maryam explains Asad's parents have stipulated that their estate will devolve according to Islamic Laws of Inheritance. Therefore, her youngest son, the male twin, will inherit his father's share of his grandparents estate which includes half of the large property in Lotus River. Maryam does however express her doubt over this happening as her own relationship with his late husband's parents is not as close as it used to be, with the twins only seeing their grandparents a couple times a week.

Didi

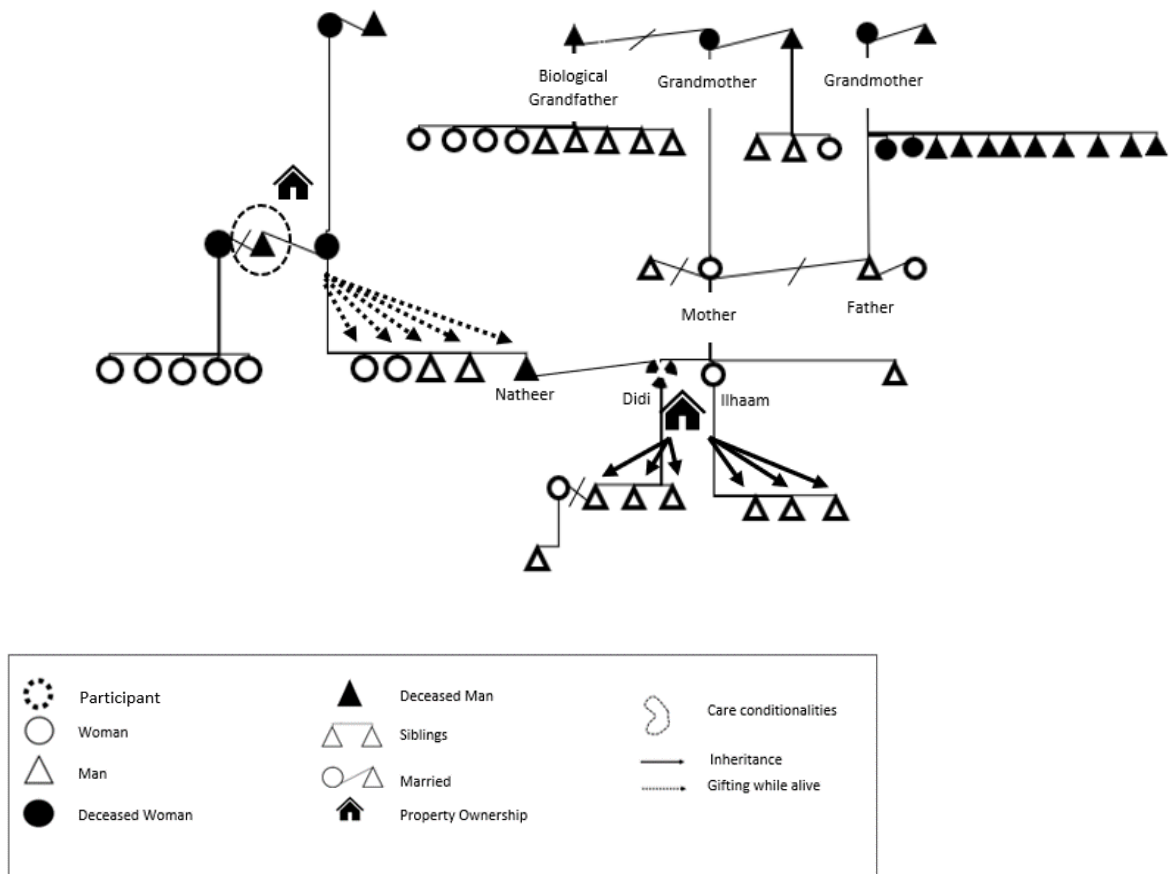


Figure 5: Didi’s Family Tree

Didi, a mother of three young men, lost her husband Natheer two years ago. In their early twenties, Didi and Natheer were married by Muslim rites. Natheer worked as a consultant and owned a small take-away shop, during their marriage Didi would volunteer intermittently at NGOs as there was no need for a second income. Since the passing of Natheer, Didi has had to seek employment as an administrative assistant. She states that her relationship with her mother and sister, Ilhaam, has been a source of strength for her during this phase of adjustment in her life. Both of Didi’s parents grew up in Bo-Kaap. Her father’s parents met in Bo-Kaap, from here they were moved to District 6 and then again to an area designated by the apartheid regime for those classified as coloured. This property was inherited by one of the siblings. Didi explains how she has not been close to her father’s side of the family since her

parent's divorce when she was fourteen. Didi recalls how her parent's divorce impacted upon her mother's life greatly. The abrupt nature of the split forced her mother, sister, brother and herself to leave their family home with only bags of their belongings. Her mother's role within the family changing dramatically as she now had to become the breadwinner and raise three children with no support. Didi explains how this was not the only distinctive phases in her mother's life.

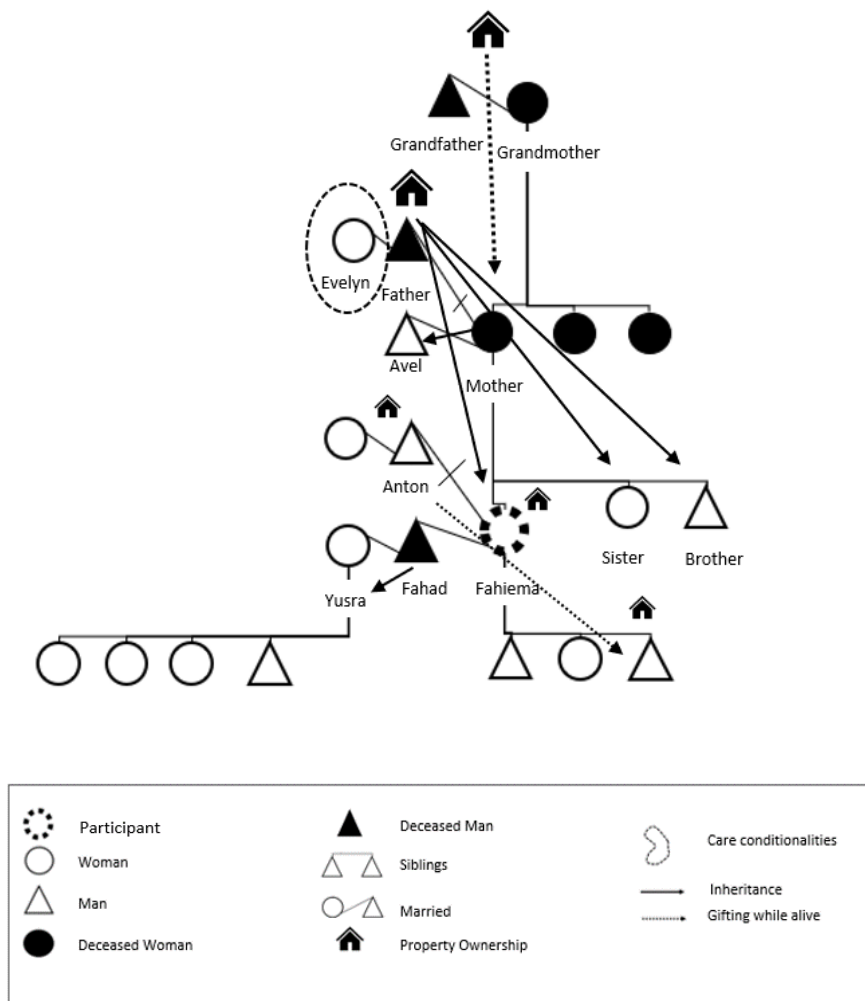
Growing up in Bo-Kaap, Didi's mother was raised by two parents with her three siblings. Soon before her eighteen birthday her reality was shaken as her mother explained to her that her father was in fact not her biological father. When Didi's mother was a few months old, her grandmother divorced her first husband as he had abstained from telling her that he had another wife and family. Not having agreed to a polygamous marriage, her grandmother divorced her biological grandfather and soon married again. Didi's mother grew up not aware of her own mothers' previous marriage and understood the man who raised her as her biological father. When she reached her teens, she unknowingly befriended a few of her biological brothers who lived nearby. It was at this time Didi's mother learnt of her biological father as her grandmother felt compelled to share. Her mother now lives with her unmarried brother in a lower-income area on the outskirts of the city which was once again designated to those classified as coloured under apartheid. Wanting to be close to the family, when Didi and Natheer first married they moved into a rented property in the same area. From here, the couple and their three sons moved into a house on her sister Ilhaam's property. Ilhaam was married and has three sons of her own. Didi explains that because Ilhaam works for the government, she is afforded government subsidies when purchasing property. The sisters and their families then moved to a larger property with two houses in a suburb nearby due to safety reasons. This property was purchased through the government subsidies by Ilhaam and her husband at the time but registered under Ilhaam's name, however the couple have since divorced and he has moved out.

Since living on the property, Natheer's parents have lived with Didi and her family. She explains how Natheer's parents had sold their house once Natheer and Didi married as he was the last of their children to marry. His parents then chose to gift both the money made from selling their house as well as all their belongings to their children according to Shariah shares. They then moved between their children's homes until their passing. A couple of years after the passing of his mother, Natheer became ill. Didi explains how Natheer was ill for a prolonged period and was unable to work. During this time, they had depleted their savings and Didi took the decision to sell Natheer's take-away business as they believed their eldest son was unable to shoulder the responsibility of continuing its profitability.

At his passing Natheer died testate, stipulating his estate devolve according to Islamic Laws of Inheritance. Didi states that in her understanding she first inherits his entire estate and only after her passing shall her sons inherit their shares. Didi speaks of her financial difficulty since the passing of her husband, he had left a small estate as most of their money was used during his final years. She has

now had to enter the labour market doing administration and rents out a portion of her house for extra income. She explains that although her eldest son is twenty-seven and financially stable, she can't rely on him as he recently divorced and now needs to provide for his son. Didi praises her relationship with Ilhaam because as sisters and both single mothers to three young men, they have pooled their resources in order to survive. Although Ilhaam's property is registered as one erf, they have divided the property into two homes whereby they each pay equal shares of the bond and have a written agreement regarding the property allocation. The sisters enlisted the help of a prominent Shaykh to draw up their own wills according to Islam, ensuring their estates uphold this agreement.

## Fahiema



**Figure 6:** Fahiema's Family Tree

Fahiema's experience of succession can be understood as an outlier within the sample as she is the only woman within the sample who had a polygamous marriage. Fahiema was however previously married to Anton and had three children with him. Her second marriage was cut short as Fahad passed away eleven months into their marriage, leaving behind Yusra, his first wife and Fahiema his second. Fahiema and Fahad had no children together, while Fahad and Yusra had four during their thirty-year marriage. The families lived as two separate families in two separate homes. Fahiema, Fahad, her daughter and youngest son lived in her own house which she had acquired through her divorce settlement with Anton.

Fahad and Yusra were married under Islamic rites and civil law, however Fahiemma stated that they had ended their civil law marriage for legal reasons. Fahad's polygamous marriage to Yusra and Fahiemma was not accepted by Yusra, therefore there was no relationship between his two wives. Before marrying Fahad, Fahiemma married Anton at first by civil law and later by Islamic rites as Anton only reverted to Islam a few years into their marriage. Fahiemma and Anton had three children, their first son now in his thirties was born out of wedlock, they then had a daughter and a son who is now in his late teens. Fahiemma and her lawyer were able to negotiate a large divorce settlement when she parted from Anton. Through this she was able to keep their family home which was paid off, and secure lifelong maintenance for herself and her children. However, when Fahiemma remarried her amicable relationship with Anton came to an end as he stopped all form of communication with her.

In contrast to this settlement with her first husband, Fahiemma states that she has not gotten any form of inheritance after the passing of Fahad. She reflects on her shock after his passing when she found out he had died intestate. Being a "very prominent man" within the religious community while advocating for Muslim men to draw up wills according to Sharia, Fahiemma had thought he would have done the same. Fahiemma is therefore not protected by civil law as she was married by Islamic rites and this marriage was polygamous. Fahiemma does not know what could have been in Fahad's estate, she is unwilling to approach Yusra to find out and is unaware of what 'channels' she could potentially follow through the religious community to find out. She argues that Fahad, while ill, had told her that he intended forgo inheritance and rather gift while he was alive in order to avoid contestation between his wives after his passing, she states this would have been done according to Sharia stipulated shares. He had passed before being able to carry this out.

Having still not received any share of Fahad's estate, Fahiemma argues that there is still hope. Fahad had apparently shared his intention of gifting while alive to his boss, who has in turn told Fahiemma that her share of his estate would take a long time to be paid out because in the absence of a will the Master of the court or the executor must first be paid and then it would be split according to Sharia. In Fahiemma's understanding this is how the process is going to unfold. Fahiemma further states that she is due her share of money which was raised by the community for Fahad while he was alive. Although the organisers of this fund raiser had told her she would acquire her Sharia stipulated share of the remaining money raise, she has still not received anything. Fahiemma states that although she interacts with these individuals often, she will not ask them about her share of the money. Having no contact with Yusra since the passing of Fahad, Fahiemma is unaware as to whether this money has been paid out or not.

In addition to her own experience of succession after the passing of Fahad, Fahiemma explains her experience of succession after the passing of both her mother and father. Her parents divorced while she was in her teens and have since remarried. While both of her parents have passed, their surviving spouses are still living. She explains that in 2000 her father passed away testate and had stipulated in

his will that Evelyn, the wife of his second marriage, may live in his property in Woodstock until she remarries or passes away. Recently however her father's lawyers' approach Fahiema and her siblings stating that there is a need to finalise his estate as the property is still in his name nineteen years since his passing. With the question of who is willing to pay the transfer fees in order to acquire the house, Fahiema and her siblings approached Evelyn. They gave Evelyn first option of acquiring the property, alternatively the property is put into a trust whereby Evelyn, Fahiema and her siblings pay the transfer duties together and Evelyn may still reside in the house, or in the event that Evelyn was unable or unwilling to contribute to the transfer fees the siblings would sell the house and split the money according to Sharia. With the latter of the three options being the easiest for the siblings and the most probable as Evelyn is unemployed and unable to contribute financially, these negotiations have been put on hold. Fahiema argues that Evelyn has refused to contribute financially towards the transfer fees and will not move out of the property. The siblings have decided to back off for now until there is a change in circumstances.

Six years after the passing of her father, Fahiema's mother passes away testate leaving behind her three children and her husband of her second marriage Avel. Fahiema's mother owned the property in which she and her siblings (Fahiema's aunt and uncle) grew up in. Fahiema recalls the story of how her mother acquired this property, adding the disclaimer that this was her mother's version of the story. She states that her mother was living in the property as an adult while caring for her elderly parents, when they were nearing their death Fahiema's grandfather gave her mother first option to purchase the property as a token of gratitude for the years in which she had cared for them. During the process of transferring the property to her name, Fahiema's mother offered to buy out her siblings of their shares of the property to ensure fairness. However according to Fahiema's mother they had all refused to take her money as they considered her money not Halaal. Based on Fahiema's mother's employment as a taxi driver whereby she would transport seamen and sex workers during the night, her siblings had forgone the acceptance of their share of their father's property. Fahiema however states that years later after the passing of her grandfather and once her mother had married Avel by civil law, her aunts and uncles began requesting their share of the property value, without success. Fahiema's mother decided to gift her children their shares of inheritance while alive and stipulate in her will that Avel would inherit the property.

Looking towards the future, Fahiema, Anton and their three children have already discussed what would the process of ensuring fairness after the passing of Fahiema and Anton. Anton had decided to contribute a large portion towards the purchasing of their eldest son's first house as he is unable to inherit according to sharia because he was born out of wedlock. This property however still has a bond to be paid. Anton, since his divorce, purchased another house which him and his new wife currently live in. This house will be left to their daughter however it too would still have a large bond repayment. Their youngest son will inherit the house in which Fahiema currently lives. However, because this house is fully paid

off the eldest brother has argued this is unfair. The solution which has been proposed is that their youngest son will take out a bond on the property which he inherits and give each of his siblings a Shariah stipulated portion of this money. The family has agreed this is the fairest solution after the passing of their parents.

## Appendix C – Participant Information Sheet



**UNIVERSITY OF CAPE TOWN**  
 IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

Faculty of Humanities  
 Department of Political Studies

### Information Sheet for Research Participants

**Title of research project:**

The Lived Experience of Inheritance for Muslim Women in Contemporary South Africa

**Nature of the research:**

This research project seeks to advance current understandings of power relations in families when negotiating inheritance for Muslim women in South Africa.

**Name of researcher:**

Vayda Megannon

<b>Telephone</b>	078 665 8045	<b>Email</b>	MGNVAY001@myuct.ac.za
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**Name of researcher's thesis supervisor / course lecturer:**

Prof. Elena Moore

<b>Telephone</b>		<b>Email</b>	Elena.moore@uct.ac.za
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**Department address details:**

Room 5.33, Leslie Social Science Building, Upper Campus, Rondebosch, Cape Town, 7701

<b>Telephone</b>	(021) 6503381 / 3916
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**What are the implications of your involvement in this interview / project?**

\*\*\* The researcher may explain these to you verbally in more detail, if needed \*\*\*

**Purpose of Study:**

You are asked to participate in a study of family relations, inheritance and the experience of being a widow in Cape Town. The research is particularly keen to find out how widows experience the process of inheritance within the context of family relations. The research is interested in finding out what role family, the state and others in your community play in the process of inheritance. It seeks to understand how widowed Muslim women experience succession and inheritance in contemporary South Africa.

The research is being undertaken as part of an MPhil study that seeks to understand family relations and succession within Muslim families in Cape Town. Funded by the NRF Chair in Customary Law.

**Procedure and duration:**

You are being asked to participate in face-to-face in-depth interviews which will be carried out in a minimum of two occasions. The dates will be discussed and decided based on what works best for you.

**Storing of Data:**

The interview will be recorded using a recording device. The interview will then be transcribed, please note that your name and any other information which identifies you will not be included on the transcript. Your identity will be confidential to me as the researcher.

**Voluntary participation:**

Your participation is completely voluntary and you are free to discontinue participation at any time of the research. Further, you can choose to not answer questions.

Information should include: how long it will take, how the information will be used, participants' roles and rights (including the right to skip questions or withdraw without penalty at any time), any anticipated risks/benefits which may arise as a result of participating, any costs or payment involved (stipulate, even if none).

## Appendix D – Participant Consent Form



**UNIVERSITY OF CAPE TOWN**  
 IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

Faculty of Humanities  
 Department of Political Studies

**CONSENT FORM****Name of researcher:**

Vayda Megannon

**Title of research project:****The lived experience of inheritance for Muslim women in contemporary South Africa**

By answering the questions put to me:

- I agree to participate in this research project.
- I have read this consent form and the information it contains and had the opportunity to ask questions about them.
- I agree to my responses being used for education and research on condition my privacy is respected, subject to the following: - *(tick as appropriate)*

	Yes	No
My name may be used in the published research		
My personal details (e.g. age, occupation, position) may be included in the published research		
My responses can only be used in a way that I cannot be personally identifiable		

- I understand that I am under no obligation to take part in this project.
- I understand I have the right to withdraw from this project at any stage.
- I understand that this research might be published in a research journal or book. In the case of dissertation research, the document will be available to readers in a university library in printed form, and possibly in electronic form as well.

**Name of Participant***(or Guardian if participant is under 18)*

:

**Signature of Participant***(or Guardian if participant is under 18)*

:

**Date**

:

The researcher must supply you with an <b>Information sheet</b> which provides his / her contact details, outlines the nature of the research and how the information will be used and explains what your participation in the research involves (e.g. how long it will take, participants' roles and rights (including the right to skip questions or withdraw without penalty at any time), any anticipated risks/benefits which may arise as a result of participating, any costs or payment involved (even if none, these should be stated))			
Has this been provided?	Yes	<input type="checkbox"/>	No
Have your received verbal confirmation/explanations where needed?	Yes	<input type="checkbox"/>	No