

**UNIVERSITY OF WESTERN CAPE**

**FACULTY OF LAW**

**CONSTITUTIONAL LEGITIMACY OF THE ISLAMIC LAW OF COMPULSORY  
SUCCESSION WITHIN THE SOUTH AFRICAN CONTEXT**



**UNIVERSITY *of the*  
WESTERN CAPE**

**By Mohamed Hoosain Sungay**

**Student Number: 3837537**

**Supervisor: Dr Muneer Abdurooaf**

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## DECLARATION

I declare that 'Constitutional Legitimacy of The Islamic Law of Compulsory Succession Within the South African Context' is my own work, that it has not been submitted before for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



## DEDICATION

I dedicate this paper to two people who have greatly influenced my life and encouraged me to further myself in everything that I did – namely my late uncle Mynodien Sharief Parker and late grandfather Dr Yusuf Allie. May God almighty grant them peace in their resting place and the highest of places in heaven.



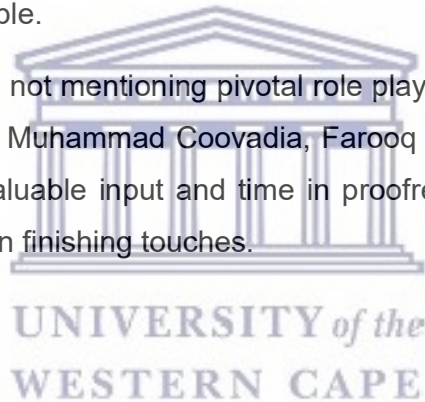
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## GLOSSARY<sup>1</sup>

The following table is a list of the technical Islamic Law terms that are used in this mini-thesis. The table can be used for easy reference.

Gross estate	Estate left behind by a deceased prior to any deductions
Hadith	Teachings of the Holy Prophet Muhammad (pbuh)
Islamic law of succession	A holistic view on the Islamic Law mode of distribution incorporating both testate and intestate/compulsory succession principles
Intestate beneficiary	A beneficiary who inherits from the intestate estate
Intestate estate	Net estate less testate succession claims to be distributed according to Quranic formula
Net estate	Estate left behind by a deceased after estate liability claims have been deducted
PBUH	Peace Be Upon Him
Quraan	The central religious text of Islam
Sharee'ah Law	An incorporation of four primary sources: The Holy Quraan, the Prophetic teachings (Sunnah), consensus of juristic opinions (Ijma) and reasoning by analogy (Qiyas). These four primary sources are the basis

<sup>1</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at pages 15 -19.

	upon which all legal rules are drawn from.
Sunnah	Recorded practices of the Holy Prophet Muhammad (pbuh)
Testate beneficiary	A beneficiary who inherits from the testate estate
Testate estate	Generally, up to 1/3 of the net estate from which testate succession claims are deducted



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## ABSTRACT

The Constitutional legitimacy of the Islamic Law of compulsory succession remains a heavily contested issue since the enactment of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). South African law allows a deceased person freedom of testation subject to common law and statutory limitations. This freedom of testation principle is defined as the “[t]he right of an individual to dispose of his or her property on death as he or she pleases”. Furthermore, the Supreme Court of Appeal stated in the *BoE Trust Ltd NO and Others* case that this principle is perfectly balanced against constitutional imperatives regarding non-discrimination and equality. It was furthermore stated that this principle subtly forms part of section 25(1) of the Constitution, in that it protects a person’s right to dispose of their assets, upon death, as they wish. The principle of testation is thus at the heart of testate succession and cloaked in constitutional protection by virtue of the rights to property, dignity, and privacy. In contrast, the Islamic law of compulsory succession as regulated by Islamic Law (finding its primary basis in the *Holy Quraan* and Prophetic teachings), prescribes a formula/extensive distributive scheme dictating how the assets in a deceased persons estate should devolve, with individual freedom of testation limited to only a third of their net estate. Due to the Bill of Rights being enshrined in the Constitution, all citizens of South Africa are protected against direct or indirect unfair discrimination in both the public and private spheres. The focus of this mini-thesis thus focuses on the constitutionality of the Islamic law of compulsory succession (commonly referred to as the Islamic Law of intestate succession), with its focus on the following three *prima facie* South African Law ‘unconstitutional’ areas found in Islamic Law: the non-existence of the right to claim intestate inheritance of the adopted child as per the Islamic law of intestate succession, the disqualification of the child born out of wedlock from the Islamic law of intestate succession, and the Islamic Law general rule asserting that the male is to inherit double the share of their female counterpart as per Islamic law of intestate succession. The mini-thesis concludes by providing an overall analysis of the research findings as well as recommendations for those individuals wanting to lawfully include these individuals to inherit from their deceased estate or create an ‘equitable distribution’.

## KEY WORDS

- Bill of Rights
- Born Out of Wedlock
- Equality
- Freedom of Testation
- Islamic Law
- Islamic law of Compulsory Succession
- Law of Succession
- The Constitution
- Unconstitutional Provisions
- Unfair Discrimination



## CHAPTER ONE:

### INTRODUCTION

#### 1.1. OVERVIEW OF THE RESEARCH

Person X, a South African Muslim male executed a written will on the 15 May 2022 in which all requirements of South African law were met.<sup>2</sup> Upon his passing in June of 2022, he was survived by his wife(A), 2 daughters (B being born out of wedlock and C born in wedlock) son Y (born in wedlock) and an adopted son (Z). The will contained that person X had bequeathed 7/64 of his net estate (estate remaining after all liabilities<sup>3</sup> have been paid) to his daughter B (born out of wedlock) and 7/64 of his net estate to his adopted son (Z). This will (hereafter referred to as an Islamic will or will) further stated that the remainder of his estate shall be distributed in terms of the Islamic law of compulsory/intestate succession,<sup>4</sup> and was thus also valid and enforceable in terms of the Islamic law of succession.<sup>5</sup>

South African law grants an individual freedom of testation with regards to the drawing up of a will. This principle is defined as “the right of an individual to dispose of his or her property on death as he or she pleases”.<sup>6</sup> The principle of freedom of testation enforces an almost absolute rule for courts to practice on the provisions stipulated in a will according to the maxim: *voluntas testatoris servanda est*, which translates to: “the will of the testator has to be complied with”.<sup>7</sup> It is held in such high ranking within the South African legal system that courts are only to intervene in very select instances i.e. Common law and statutory law limitations.<sup>8</sup> The founding provisions contained within section 1 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) states that the basis upon which all other rights in the Constitution are envisaged is based off of 4 principles i.e. human dignity, equality and advancing

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<sup>2</sup> The requirements of the South African law of succession are expanded on within chapter 2.3 of this mini-thesis.

<sup>3</sup> Amounting to R100 000.

<sup>4</sup> The words compulsory succession and intestate succession are interlinked at many points within this mini-thesis. See 2.2.2.3 for an elaboration on why the interlinking of these words are appropriate.

<sup>5</sup> The requirements of drafting a valid Islamic will are expanded on within chapter 2.2 of this mini-thesis.

<sup>6</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* (2017) at p128.

<sup>7</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* (2017) at p128.

<sup>8</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* (2017) at p129.

human rights and freedoms.<sup>9</sup> Furthermore section 2 of the Constitution, also known as the supremacy clause, holds that the Constitution is the supreme law of the land and anything, be it conduct or legislation, inconsistent with its values should be declared invalid and unconstitutional.<sup>10</sup> In taking the aforementioned sections into consideration, it is clear that the values contained within the Constitution are put on a pedestal in that they override all actions conducted by the state and individuals. Moreover, in the infamous case of *President of the Republic of South Africa and Another v Hugo*<sup>11</sup> (Hereafter *Hugo*), the court placed human dignity at the heart of its equality enquiry.<sup>12</sup> On the basis of this, human dignity will thus be deemed impaired whenever a legally relevant differentiation treats people as ‘second-class citizens’, ‘demeans them’, ‘treats them as less capable for no good reason’, otherwise offends ‘fundamental human dignity’ or where it violates an individual’s self-esteem and personal integrity.<sup>13</sup> This rationale embodies the powers of sections 1 and 2 of the Constitution respectfully. These values and Constitutional principles play a big part in the application of the right to freedom of testation, particularly in the context whereby a person drafts a will and even more so when an Islamic will is executed.<sup>14</sup>

Succession laws are of great significance amongst Muslim’s. It has a religious character and stands as a vital aspect of religion of Islam.<sup>15</sup> The *Holy Quraan* and the teachings (*hadiths*) of the Holy Prophet Muhammad peace be upon him (pbuh)<sup>16</sup>, both of which serves as the primary foundation of Islamic law, places a great deal of emphasis on the necessity of making sure that an individual's estate is distributed in accordance with Islamic law of inheritance.<sup>17</sup> This is extremely important in our South African context, as the South African law of intestate succession are intrinsically different from that of the Islamic law of intestate succession.<sup>18</sup> Islamic law allows each

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<sup>9</sup> s 1 of the Constitution of the Republic of South Africa, 1996. (Hereafter the Constitution)

<sup>10</sup> s 2 of the Constitution.

<sup>11</sup> *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997]. (Hereafter *Hugo*)

<sup>12</sup> *Hugo* at para 41. (Hereafter *Hugo*)

<sup>13</sup> De Vos and Freedman *South African Constitutional Law in Context* (2014) at p427.

<sup>14</sup> See 4.1 of this mini-thesis for a further elaboration on this statement.

<sup>15</sup> Mzee M ‘Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study’ (2016) 45 *Journal of Law, Policy and Globalization* at p55. (Hereafter Mzee M (2016))

<sup>16</sup> An abbreviation used by Muslims as a sign of respect.

<sup>17</sup> Sungay MH ‘Constitutional Legitimacy of the South African Law of Wills’ (2022) 18(1) *Manchester Journal of Transnational Islamic Law and Practice* at p59. (Hereafter Sungay MH (2022))

<sup>18</sup> See Chapter 2 of this mini-thesis for a further elaboration on this observation.

individual freedom of testation up to one third of their net estate.<sup>19</sup> This one third portion will be referred to here on forth in this mini-thesis as the testate/optional estate with the remaining two thirds of the individual's estate i.e. the focus area of this mini-thesis, referred to as the intestate/compulsory estate due to its distribution being dictated by Islamic Law.<sup>20</sup> The sections and the chapters to follow in this mini-thesis continuously utilize the male and female genders and accompanying pronouns 'he' and 'she' (or 'their' for a collective reference), due to the Islamic law of inheritance containing specific rules for each of these genders.<sup>21</sup>

When looking at the scenario of person X, three potential Constitutional and statutory problematic areas can be found i.e., daughter C (born in wedlock) inheriting half share of the son Y (born in wedlock) as per the Islamic law of intestate succession<sup>22</sup>, daughter B (born out of wedlock) being disqualified from inheriting from the intestate inheritance equation according to Islamic law,<sup>23</sup> and finally the adopted son Z being omitted from the intestate inheritance equation according to Islamic law.<sup>24</sup> When examining these three *prima facie* unconstitutional areas within the Islamic law of Intestate succession, the following can be said:

In essence, daughter C's (Born in wedlock) constitutional right to equality<sup>25</sup> and dignity<sup>26</sup> could be construed to be impeded on the basis that her share is reduced purely based on her gender and the presence of her male counterpart (Son Y).

The Islamic Law of intestate succession further disqualifying daughter B (Born out of wedlock) from the intestate inheritance equation can also be considered a violation of the rights to equality<sup>27</sup> and dignity<sup>28</sup> contained within the Constitution in addition to being in conflict with section 1(2) of the Intestate Succession Act.<sup>29</sup> In contrast to South

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<sup>19</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p107 (hereafter Essop F (2022)).

<sup>20</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at p39-40.

<sup>21</sup> See Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) at 4:11, 4:12 and 4:176 (hereafter referred to as Al-Quraan).

<sup>22</sup> See Al-Quraan chapter 4 verse 11 where it states: 'Allah commands you as regard to your Children (Descendant Intestate Beneficiaries); to the male, a share equal to that of two females...'.<sup>23</sup>

<sup>23</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at p74.

<sup>24</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at p43.

<sup>25</sup> See s 9 of the Constitution.

<sup>26</sup> See s 10 of the Constitution.

<sup>27</sup> See s 9 of the Constitution.

<sup>28</sup> See s 10 of the Constitution.

<sup>29</sup> s 1(2): '[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children's Act, 2005 (Act No. 38 of

African law, the Islamic law of intestate succession places more emphasis on the child's conception status than birth status. This in essence means that a child born within wedlock does not always infer that they were conceived in wedlock and thereby maintain the right to inherit.<sup>30</sup> A further explanation of this difference and its application is provided for in chapter 2.2.3.3 of this mini-thesis.

Finally, when dealing with adopted son Z, due to an absence of a physical blood tie to the deceased, adopted children are not considered by Islamic law as descendants of the deceased for intestate inheritance purposes, and are thereby omitted from the intestate inheritance equation.<sup>31</sup> The aforementioned rule could be held to be in contradiction with both sections 1(4)(e) of the Intestate Succession Act<sup>32</sup> in addition to s 242(3) of the Children's Act 38 of 2005<sup>33</sup> wherein these legislation lay a basis for which adopted children, is to be regarded as the child of the adoptive parent and vice versa, for intestate inheritance purposes.<sup>34</sup> The main question in this regard therefore explores whether Islamic Law's omission of adopted children from the intestate inheritance equation could be viewed as in conflict with the aforementioned Acts and their underlying constitutional foundations.

This mini-thesis will thus inspect the constitutional legitimacy of the aforementioned three issues which have the potential of undermining and breaching several constitutional and statutory law principles as briefly demonstrated. In addition, if the previous query is answered positively, the following line of inquiry would be to query how these behaviours continue unhindered in our constitutional regime.

## 1.2. RESEARCH QUESTION

How does the Islamic Law of compulsory succession remain unimpeded in our current constitutional dispensation considering the number of provisions incompatible with the

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2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.'

<sup>30</sup> Mzee M (2016) at p57.

<sup>31</sup> Abduroaf M *The Impact of South African on the Islamic Law of Succession* (Unpublished LLD thesis, University of the Western Cape, 2018) at p34-36.

<sup>32</sup> s 1(4)(e): 'An adopted child shall be deemed –

(i) To be a descendant of his adoptive parent or parents.'

<sup>33</sup> s 242(3): 'An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.'

<sup>34</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* (2017) at p46.



Constitution and accompanying statutory law principles? The three focus areas of this incompatibility and provisional unconstitutionality will be fixated on the Islamic Law of compulsory successions principles concerning the reduction in the share of a female descendant, the exclusion of children being born out of wedlock and the omittance of adopted child from the intestate inheritance equation.

### 1.3. LITERATURE REVIEW

No cases have (to date) been heard by the Constitutional Court concerning the constitutionality of the Islamic law of succession. Many authors who have written on the topic of the Islamic law of compulsory succession and the South African Law of Succession respectively, have done so in general terms.<sup>35</sup> What can be derived from these readings are a general understanding of the Islamic Law system of distribution along with its applicability within the context of the South African Constitution. Majority of these sources lay the foundation upon which this mini-thesis is written with the addition of supplementary readings in the answering of the research question.

Very few authors have written about the application of the Islamic law of compulsory succession in South Africa after the promulgation of our Constitution.<sup>36</sup> Of the 4 published papers listed written over the years on the said topic, two have been written over two decades ago and consequently prior to the enactment of the current Constitution of South Africa. This shows that in the recent years, gaps concerning recent developments in the law in light of succession laws could remain unaccounted for.

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<sup>35</sup> Examples of these texts include Omar MS *the Islamic Law of Succession and its Application in South Africa* (1988), Abduroaf M 'A Constitutional Analysis of an Islamic Will within the South African Context' (2019) 52(2) *De Jure Law Journal*, Gabru N 'The Applicability of the Islamic Law of Succession in South Africa' (2005) 26(2) *Obiter*, Abduroaf M 'Application of the Islamic Law of Succession in South Africa' (2020) 41(2) *Obiter*, Abduroaf M 'An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession' (2020) 53 *De Jure Law Journal*, Aziz MZ *The Islamic Law of Bequest* (1986) and Moosa N 'A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women' (Unpublished LLM thesis, University of the Western Cape, 1991).

<sup>36</sup> See Abduroaf M 'The Impact of South African Law on the Islamic Law of Succession' (Unpublished LLD Thesis, University of the Western Cape, 2018), Moosa N 'A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women' (Unpublished LLM thesis, University of the Western Cape, 1991), Omar MS *the Islamic Law of Succession and its Application in South Africa* (1988) and Gabru N 'The Applicability of the Islamic Law of Succession in South Africa' (2005) 26(2) *Obiter*.

Ms. Naeema Gabru's paper on succession law in 2005 gave a broad overview of the applicability of the Islamic law of succession in South Africa.<sup>37</sup> Within this paper, the author deliberates as to how a testator can use their right to freedom of testation to ensure their will is drawn up in a manner that is in conformity with their religious mandate.<sup>38</sup> The main aim of this publication is, as mentioned by the author, to create awareness to the Muslim population within South Africa that there are lawful grounds upon which this religious mandate can be fulfilled.<sup>39</sup> The purpose of this paper, however, is different from that of this mini-thesis because, despite the fact that this mini-thesis also explores these ideas holistically, it extends its discussion and reach beyond the mere mention of applicability in our South African context, and delves into additional matters i.e. the 'problematic scenarios' evident in Islamic law, the solutions to these scenarios as well as how the issue of modernity affects the fixed ratios apportioned within the Quraan in relation to inheritance of family members, specifically females.

Some authors have reviewed Constitutional Court cases and decisions of the court concerning the laws of succession.<sup>40</sup> These cases include claims made by spouses that were married in terms of Islamic law. The authors of the texts generally see the judgments as victorious for the South African Muslim community. The problem found when reading into these cases was that the applicants were granted relief in terms of the South African law of intestate succession as opposed to the Islamic law of succession and its underlying principles. A comparative study written by Professor N Moosa has shown how the result of one of these predicaments would have differed had the court utilised the Islamic Law of Succession to rectify the predicaments found and not in terms of South African Law.<sup>41</sup> This mini-thesis

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<sup>37</sup> See Gabru N 'The Applicability of the Islamic Law of Succession in South Africa' (2005) 26(2) *Obiter* at p356 (hereafter Gabru N (2005)).

<sup>38</sup> Gabru N (2005) at p356.

<sup>39</sup> Gabru N (2005) at p342.

<sup>40</sup> These texts include Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' (2014) *Acta Juridica*, De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) and Hyder M.O 'The Impact and Consequences of *Hassam v Jacobs* No on Polygynous Muslim Marriages [a Discussion of the *Hassam v Jacobs* NO 2009 11 BCLR 1148 (CC)]' (2011) 2 *Stellenbosch Law Review*.

<sup>41</sup> See Moosa N 'Unveiling the Mind: The Legal Position of Women in Islam - A South African Context' (2011) at p153.

further investigates more recent Constitutional Court and High Court judgements<sup>42</sup> that have yet to be discussed in any publication concerning the Islamic law of successions applicability in our South African context.

The latest LLD writings on this topic can be said to be the writings of Dr M Abduroaf<sup>43</sup> and Dr F Essop.<sup>44</sup> Both these authors explore the Islamic Law of succession in many facets, including an in-depth study of the disparities between different schools of thought within Islamic Law itself.<sup>45</sup> In addition, these authors look at how the Islamic law of compulsory succession is applied in another comparable country to South Africa wherein Muslim's constitute the minority, thereby comparing whether there is a need for restructuring our systems. Dr M Abduroaf however only delves into one problematic condition (whilst touching on the other issues in passing) found within the Islamic law of intestate succession i.e., the unequal distribution of shares on the basis of gender. Dr F Essop's LLD thesis on the other hand focuses on various areas within Islamic law i.e., divorce, marriage as well as Islamic inheritance laws and its practical application in our current day South Africa. While this mini-thesis delves into similar issues, it expands upon the scope of the previous studies by exploring problematic scenarios and examining their impact upon society in our time.

The *King N.O. and Others v De Jager and Others case*<sup>46</sup> (hereafter *De Jager*) represents the latest Constitutional Court ruling concerning succession laws. The Constitutional Court herein made noteworthy findings alluding to and coinciding with the infamous 2013 *BoE Trust Ltd NO and Others SCA (Hereafter BoE Trust)*<sup>47</sup> cases remarks on the principle of freedom of testation. These findings represent the latest development in our law concerning the highly enshrined common law principle of freedom of testation and could possibly have a substantial impact on the ability of a

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<sup>42</sup> *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 (28 June 2022) and *LB and Another v FNB Trust Services (Pty) Ltd N.O. and Others* (22013/2015) [2022] ZAWCHC 190 (27 September 2022).

<sup>43</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018).

<sup>44</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022).

<sup>45</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (Unpublished LLD Thesis, University of the Western Cape, 2018) at chapter 2.

<sup>46</sup> *King N.O. and Others v De Jager and Others* (CCT 315/18) [2021] (hereafter *King N.O.*).

<sup>47</sup> *BoE Trust Ltd NO and Others SCA* 2013 (3) SA 236 (2013) (hereafter *BoE Trust*).

Muslim individual to practice their religious right as freely as they previously have. This possible impact is yet to be discussed in any academic piece and is explored within chapter 4 of this mini-thesis.

#### **1.4. RESEARCH METHODOLOGY**

This study makes use of a desktop study and does not employ any data collection techniques based on empirical research. It makes use of both primary and secondary sources of law. The primary sources include the Constitution, the *Holy Quraan*, *Hadeeth* (teachings of the Holy Prophet Muhammad (peace be upon him)) including other non-binding legal and policy instruments relevant to the topic. Secondary sources, such as scholarly journal articles and academic books are also utilized to substantiate the study.

#### **1.5. CHAPTER OUTLINE**

Chapter 1 forms the introduction to this mini-thesis. It illustrates a practical scenario involving 'person X', wherein the Islamic law of intestate succession can be seen to impede the Constitutions principles, values and accompanying statutory law legislation. It further demonstrates the research questions and methodology in giving the reader an overview of the upcoming chapters.

Chapter 2 discusses the importance and application of each system of law, and shows where these distinct legal systems overlap in many respects whilst constantly alluding to the scenario of 'person X' placed in the introduction. An illustration is done to demonstrate how the South African Law of intestate succession would have differed in the scenario of 'person X'. This chapter concludes by exhibiting a case law analysis of 5 landmark Islamic law of succession matters that went to our South African courts and the results thereof being contrary to what the religious principles hold.

Chapter 3 delves into potential constitutional musters that the Islamic law of intestate succession can *prima facie* be perceived to breach in our Constitutional dispensation. Case law is thereafter examined to show how various long standing succession

principles have been held to be in contention within our courts and how these court cases could prove problematic in future Islamic law of succession matters.

Chapter 4 discusses how the Islamic Law of intestate succession has passed and whether it will continue to pass a constitutional muster considering the latest *De Jager* case Constitutional Court judgement. Furthermore, this chapter expands on paths by which the Islamic Law of Succession, as a whole, provides remedies to its own 'flaws'. This chapter thereafter concludes by providing a different perspective on these 'problematic aspects' in deciphering whether rectifications were still needed, thus once again linking this to the scenario of 'person X' scenario.

Chapter 5 concludes by summarising the respective chapters findings and highlights the lessons learnt as well as possible recommendations to future constitutional challenges.



## CHAPTER TWO:

### COMPARING THE ISLAMIC LAW AND SOUTH AFRICAN LAW OF SUCCESSION WITH REGARDS TO PERSON X'S ESTATE, INCLUDING A BRIEF OVERVIEW OF HOW OUR SOUTH AFRICAN COURTS HAVE RULED IN SUCCESSION MATTERS

#### 2.1. INTRODUCTION

This chapter discusses the significance of the laws of succession with a fixated view on South African citizens and Muslim's. In this context, the term "South African citizens" refers to the general non-Muslim citizens who predominantly follow South African law principles as opposed to Muslim's who, despite also being South African citizens, adhere to Sharee'ah law.<sup>48</sup> The specific type of Muslim that is referred to in this mini-thesis refer to the two main Islamic *Sunnee* based schools of thought i.e., the Shaafi'ee and Hanafee schools of law in South Africa.<sup>49</sup> This chapter will demonstrate that inheritance laws in both legal systems i.e., South African law and Islamic law, have a great importance, even more so in the religious context. Both the South African law and Islamic law of succession will be applied to the scenario of person X in demonstrating the stark inequalities in asset distribution and possible constitutional challenges that exist when comparing these systems. These *prima facie* constitutional challenges will be the central enquiry of chapter 3 of this mini-thesis. This chapter then concludes by conducting a case law analysis of five landmark inheritance cases involving Muslim parties, in showing how the decisions made by our judiciary, conflict with the Islamic law of succession principles explained.

The term 'estate' is used in succession laws and in this mini-thesis to refer to the assets and liabilities of a deceased individual. Furthermore, the term 'gross estate' refers the sum of assets within an estate, with the term 'net estate' being used in this

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<sup>48</sup> See Mzee M 'Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study' (2016) 45 *Journal of Law, Policy and Globalization* at p55 wherein Sharee'ah Law is defined as: 'An incorporation of four primary sources: The Holy Quraan, the Prophetic teachings (Sunnah), consensus of juristic opinions (Ijma) and reasoning by analogy (Qiyas). These four primary sources are the basis upon which all legal rules are drawn from.'

<sup>49</sup> See Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) at p151 where the author states that the South African Muslim population essentially follows two of the four (consisting of the Hanafi, Maliki, Shafi'i and Hanbali) Sunnee based schools of law called the Shaafi'ee and Hanafee schools of law.

to refer to the remainder of the gross estate, after all liability claims have been deducted. The net estate is thereafter further divided into the 'testate estate' and 'intestate estate' (if applicable)<sup>50</sup>.

## **2.2. AN OVERVIEW OF SUCCESSION IN TERMS OF ISLAMIC LAW**

It is stated that the Muslim population in South Africa constitutes 3% of the total population of 60 million people.<sup>51</sup> Although at face value, this may seem a small percentage, this percentage represents roughly 1.8 million people within the country. Given this, the Islamic Law of Succession cannot be disregarded within the legal framework of our nation. The following section will expand on the importance succession laws play in a Muslim's life (and afterlife).<sup>52</sup> It will also reveal that the lack of a drafted will not only contains serious ramifications in our South African legal system, but even more negative religious consequences for Muslim's. Following on from this, a demonstration will be provided displaying how Person X's estate will be distributed in accordance with the rules of the Islamic law of compulsory succession principles.

### **2.2.1. THE IMPORTANCE OF DRAFTING A WILL FROM A MUSLIMS PERSPECTIVE**

Succession laws is of a great importance amongst Muslim's. It has a religious character and indeed is a vital aspect of the religion of Islam.<sup>53</sup> In the South African context, should a Muslim individual die intestate, the Intestate Succession Act 81 of 1987 (hereafter Intestate Succession Act) will apply to the distribution of their assets. As will be shown in 2.3.3 of this mini-thesis, the measures laid down by the Intestate Succession Act are inherently different to the Islamic Law of compulsory succession. The Islamic law of succession imposes an absolute essential religious duty upon all Muslim's ensure their wealth is distributed in agreement with Islamic principles, and

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<sup>50</sup> See 2.2.2.3 and 2.3.2.3 of this mini-thesis for an explanation on when an intestate estate is applicable in the different normative systems.

<sup>51</sup> Isilow H 'Islam has rich, proud history in South Africa: President' available at <https://www.aa.com.tr/en/africa/islam-has-rich-proud-history-in-south-africa-president/2232044> (accessed 28 May 2022).

<sup>52</sup> Muslims are among the most adherent believers in the afterlife among the world's major religious groups. The Holy Quraan describes this life as a test and the afterlife as the outcome of that test. See Al-Issa R, Krauss SE, Roslan S and Abdullah H 'The Relationship Between Afterlife Beliefs and Mental Wellbeing Among Jordanian Muslim Youth' (2021) 15(1) *Journal of Muslim Mental Health* for further reading on this belief.

<sup>53</sup> Mzee M (2016) at p56.

that all liabilities incurred by the testator during his/her lifetime is settled from his/her estate.<sup>54</sup> In our South African context, this religious liability requires every Muslim to draft a will expressly stating that they want their estate to be distributed according to the principles of the Islamic law of Succession. An Islamic will would therefore ensure that all religious liabilities are settled from the estate, and that the remainder of the estate is distributed according to the principles of the Islamic law of succession. On this basis, allegations of wrongdoing and negligence can be placed on an individual for failing to uphold *Allah* and His Messenger's pbuh prohibitions regarding the distribution of assets as outlined in the *Holy Quraan*.<sup>55</sup>

The Islamic law of intestate succession (as regulated by the Islamic law) prescribes a formula dictating how every Muslim's estate should be distributed, with individual freedom of testation limited to only a third of the net estate.<sup>56</sup> The *Holy Quraan* places an obligation on every Muslim individual to have a valid final will and testament drafted to allow for this distribution to occur according to the principles of Islamic Law.<sup>57</sup> The Holy Prophet Muhammad (pbuh) is reported to have said:

*"A man may do good deeds for seventy years but if he acts unjustly when he leaves his last testament, the wickedness of his deed will be sealed upon him, and he will enter the Fire. If, (on the other hand), a man acts wickedly for seventy years but is just in his last will and testament, the goodness of his deed will be sealed upon him, and he will enter the garden."*<sup>58</sup>

This *hadith* (Prophetic teaching) refers to 2 aspects: towards the payment of liabilities incurred during one's lifetime and the afterlife punishment attached to failure to meet this responsibility. To this extent, the *hadeeth* does not indicate that a person is free

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<sup>54</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p30-31.

<sup>55</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p30.

<sup>56</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p232.

<sup>57</sup> See Al-Quraan chapter 4 verse 13 where it states: '[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad [pbuh]) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success. And whosoever disobeys Allah and His Messenger (Muhammad [pbuh]), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.'

<sup>58</sup> Sunnah.com 'Sunan Ibn Majah 2704' available at <https://sunnah.com/ibnmajah:2704> (accessed 27 May 2022).



to live his/her life as he pleases and that his/her wicked activities will still be forgiven. Scholars and Islamic jurists mention on the study of this text, that the important aspect that should be highlighted from this, is the high status having a valid will in accordance with Islamic law principles can have on an individual's life (and afterlife).

## **2.2.2. THE PRINCIPLES OF THE LAW OF COMPULSORY SUCCESSION**

An Islamic estate is broadly divided into three deductible claims: liabilities being the first, followed by testate bequests, and finally intestate estate subtractions.<sup>59</sup> The differences between these deductible categories and the manner of claims under South African law will be discussed in more detail in 2.2.2 and 2.3.2 of this mini-thesis.

### **2.2.2.1. LIABILITY CLAIMS AGAINST THE ESTATE**

When dealing with a Muslim person's estate, there are three different estate liability claims that can be made as per Islamic law: burial expense claims, secured debt claims, and unsecured debt claims (in this order of priority).<sup>60</sup>

Burial expenses include the following: the cost of the virtual preparation before burial, the cost of transport to the cemetery, and the cost incurred with the physical burial. In essence, it includes all costs immediately associated with a deceased person's burial without being exorbitant or wasteful.<sup>61</sup> Regardless of the wife's own resources, the husband has the primary obligation to maintenance (*nafaqah*) during the duration of the marriage.<sup>62</sup> This support responsibility is further expanded to cover the wife's burial costs, which must be covered by her surviving widower rather than her estate.<sup>63</sup> The aforesaid was brought up as a potential topic of interest and no further discussion on this is needed as it is outside the purview of this mini-thesis.

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<sup>59</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p169.

<sup>60</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p38.

<sup>61</sup> Abduroaf M 'Application of the Islamic Law of succession in South Africa' (2020) *Obiter* at p399 (hereafter Abduroaf M (2020)).

<sup>62</sup> Denson R 'A Comparative Exposition of The Law Of Husband And Wife In Terms Of Islamic Law, South African Law and the Law Of England And Wales--Part Two' (2021) 42 *Obiter* at p381 (hereafter Denson R (2021)). Also see Al-Quraan 4:34 where it states: 'Men shall take full care of women with the bounties Allah has bestowed on them, and what they may spend out of their possession as Allah has eschewed each with certain qualities in relation to the other.'

<sup>63</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p38.

In Islam, debt is an obligation that needs to be fulfilled.<sup>64</sup> The Holy Prophet (pbuh) frequently stressed the value of repaying debt during his lifetime.<sup>65</sup> It is said that the soul of a deceased person will not be truly at peace until his/her debt is settled.<sup>66</sup> On this basis, even after one's death, the settling of debts is held in such high esteem that prior to any of the wealth being distributed, the executor has the responsibility to ensure all debts of the deceased are paid. As such, the next category of liability claims is termed secured debt claims. The claims can broadly be explained as debts for which the borrower put up some assets as collateral or surety in order to obtain a loan from a financial institution or lender.<sup>67</sup> Examples of these debts include unpaid mortgage bonds or car loans.<sup>68</sup>

Islamic law divides an unsecured debt claim into two subcategories: a religious responsibility (Debt to *Allah*) and a debt owed to man.<sup>69</sup> Religious liabilities refer to the one incumbent pilgrimage (*Hajj*)<sup>70</sup> and annual charity of 2.5% (*Zakaah*) payable by every Muslim believer.<sup>71</sup> The latter category (Debt payable to man) refers to any other debts owed by the deceased to other individuals at the time of their death. Unpaid dower<sup>72</sup> to their wife, unpaid support claims in arrears, and unpaid personal loans are a few examples.<sup>73</sup> Another noteworthy observation and contentious issue between different systems in this context is the issue of prescription. As shown in the preceding

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<sup>64</sup> Zainol Z, Nizam ANHK and Rashid RA 'Exploring the Concept of Debt from the Perspective of the Objectives of the Shariah' (2016) 6 *International Journal of Economics and Financial Issues* at p311.

<sup>65</sup> See Sunnah.com 'Chapter: Insolvency and Respite - Section 2' available at <https://sunnah.com/mishkat:2921> (accessed 10 October 2022) wherein it states: 'If anyone dies free from pride, unfaithfulness regarding spoil, and debt, he will enter paradise.'

<sup>66</sup> See Sunnah.com 'Chapter: Stern Warning Concerning Debt' available at <https://sunnah.com/ibnmajah:2413> (accessed 10 October 2022) wherein it states: 'The soul of the believer is attached to his debt until it is paid off.'

<sup>67</sup> Majaski C 'Unsecured vs. Secured Debts: What's the Difference?' available at <https://www.investopedia.com/ask/answers/110614/what-difference-between-secured-and-unsecured-debts.asp> (accessed 10 November 2022).

<sup>68</sup> Majaski C 'Unsecured vs. Secured Debts: What's the Difference?' available at <https://www.investopedia.com/ask/answers/110614/what-difference-between-secured-and-unsecured-debts.asp> (accessed 10 November 2022).

<sup>69</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p170.

<sup>70</sup> Performing Hajj is one of the five pillars of Islam obligatory for all adult Muslims who can afford to undertake the journey and are in good health. See Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p170 for further reading on this concept.

<sup>71</sup> Abduroaf M (2020) at p400.

<sup>72</sup> Upon the conclusion of a legal Islamic marriage, every Muslim woman has the ability to request the dower of her choosing. If this sum is not paid before the husband's passing, the dower becomes a debt in the estate. See 4.4.1. of this mini-thesis for further elaboration on this concept.

<sup>73</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p89.

paragraphs, Sharee'ah law holds the payment of debt in the highest of esteem to the extent that it does not prescribe automatically.<sup>74</sup> South African law on the other hand contains a principle of prescription i.e., when an obligation to pay a sum of money extinguishes after a specified period depending on the category of debt involved. This conflict between the two normative systems was brought to light in the 1997 *Ryland v Edros*<sup>75</sup> case. The court in this case, although taking into account the principles of Islamic law as it pertains to maintenance,<sup>76</sup> ruled contrary to this position and opted to follow South African Civil law in applying the Prescription Act 68 of 1969.<sup>77</sup> This resulted in a large portion of the claim of maintenance prescribing, thus allowing the surviving spouse the right to claim only a portion of what was due to her in accordance with Islamic law.<sup>78</sup> This is yet another instance of how the two normative systems i.e. Islamic Law<sup>79</sup> and South African Law, contain conflicting rulings.<sup>80</sup>

### 2.2.2.2 TESTATE SUCCESSION CLAIMS

The second category of claims are referred to as testate succession claims/optional claims (*wasiyyah*). These claims refer to the lawful bequests made of the deceased person upon their wish and are stipulated in their will.<sup>81</sup> As already mentioned, this portion of an Islamic estate is limited a third portion of their net estate.<sup>82</sup> A Muslim testator can herein freely dispose their wealth to whomever they choose, subject to certain limitations.<sup>83</sup> These limitations are three-fold. Firstly, it must be within the stated one-third portion of the net estate. The second limitation on this claim is that it cannot

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<sup>74</sup> Nasir JJ *The Islamic Law of Personal Status* 3 ed (2002) at p84.

<sup>75</sup> 1997(2) Sa 690 (C) (hereafter *Ryland v Edros*).

<sup>76</sup> *Ryland v Edros* at para 711E–H.

<sup>77</sup> Denson R, Carnelley M and Mukheibir A 'The Bastardization of Islamic Law By The South African Courts' (2018) 39(1) *Obiter* at p157 (hereafter Denson R, Carnelley M and Mukheibir A (2018)).

<sup>78</sup> Denson R, Carnelley M and Mukheibir A (2018) at p157.

<sup>79</sup> The Islamic law of succession finds its basis in two primary sources referred to as the Holy Quraan and Prophetic Sunnah. This is also referred to as the Sharee'ah. The Sharee'ah has been interpreted by a number of Islamic scholars. Their opinions can be referred to as Fiqh opinions. The term 'Islamic law is used in this mini thesis to refer to both Sharee'ah and Fiqh. A distinction is made between the two where deemed necessary.

<sup>80</sup> This topic was merely briefly introduced and cannot be discussed further within the confines of this mini-thesis.

<sup>81</sup> Ghul ZH, Yahya MH and Abdullah A 'Wasiyyah (Islamic Will) Adoption and the Barriers in Islamic Inheritance Distribution among Malaysian Muslims' (2015) 2(1) *International Journal of Humanities Social Sciences and Education* at p1.

<sup>82</sup> Ghul ZH, Yahya MH and Abdullah A 'Wasiyyah (Islamic Will) Adoption and the Barriers in Islamic Inheritance Distribution among Malaysian Muslims' (2015) 2(1) *International Journal of Humanities Social Sciences and Education* at p1.

<sup>83</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p107.

be bequeathed to an unlawful cause i.e., alcohol cannot be bequeathed to another individual, because Muslim's are forbidden from drinking it or sharing it with others.<sup>84</sup> This is labelled an unlawful cause on the basis that Muslim's are not permitted to consume or purchase liquor.<sup>85</sup> The third and final limitation herein is that it cannot be bequeathed to an inheriting compulsory beneficiary inheriting from the intestate estate of the deceased.<sup>86</sup> An allowance however is made for which this can occur i.e. if consent is granted by the remaining compulsory beneficiaries on payment of this bequest.<sup>87</sup> The executor cannot proceed to the next category of claims—intestate succession claims—until this category of claims has been resolved.

### **2.2.2.3. INTESTATE SUCCESSION CLAIMS**

The third and last claim from a Muslim person's estate is intestate succession claims. Only when the two claims described in 2.2.2.1 and 2.2.2.2 have been paid, can the total value for which this claim, as specified, be determined. This portion of the estate is distributed according to the stipulated portions contained in the *Holy Quraan*.<sup>88</sup> For this reason, this portion of the estate is also commonly referred to as the compulsory estate, with the beneficiaries being labelled the compulsory beneficiaries. An intestate beneficiary would inherit only if he or she is neither disqualified from inheriting due to the presence of an intestate succession disqualification, nor totally excluded from inheriting due to the presence of one or more intestate succession exclusions.<sup>89</sup>

### **2.2.3. THE DISTRIBUTION OF PERSON X'S ESTATE ACCORDING TO THE ISLAMIC LAW OF COMPULSORY SUCCESSION**

As provided for in the scenario given within the introduction of this mini-thesis, person X had liabilities totalling R100 000.<sup>90</sup> He furthermore stipulated how he would want his testate estate, to be distributed with his daughter B being the beneficiary of 7/64 of his estate and adopted son Z inheriting 7/64 of his estate. We shall therefore assume for

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<sup>84</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) at p31.

<sup>85</sup> See Al-Quraan chapter 5 verse 90 where it states: 'O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.'

<sup>86</sup> See Sungay MH (2022) at p55 for further reading on this.

<sup>87</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p29.

<sup>88</sup> See Al-Quraan chapter 4, verses 11, 12 and 176.

<sup>89</sup> See Sungay MH (2022) at p55-56 for further reading on this.

<sup>90</sup> These included funeral expenses totalling R5000 and unpaid personal liabilities amounting to R95 000.

the sake of an accurate comparison between the two normative systems that after these liabilities and testate bequests are paid, the net estate equates to R1 000 000.

Person X was survived by his 4 children and one spouse. For the purposes of this completeness, we will assume that daughter B was born 5 months and 15 days after the conclusion of the marriage between person X and her mother A. According to this supposition, only two of person X's children—Daughter C and son Y—were conceived and delivered within the boundaries of a valid Islamic marriage between Person X and wife A.<sup>91</sup> As a result, only they—to the exclusion of daughter B (born out of wedlock) and adoptive son Z—will be included among person X's intestate beneficiaries as per Islamic law. The distribution of Person X's intestate estate to his legal heirs is shown in the sections below.

### **2.2.3.1. WIFE A'S SHARE**

The basis upon which wife A gains a 1/8<sup>th</sup> share of the remainder after all liabilities and testate bequests have been settled, is contained within chapter 4 verse 12 in the *Holy Quraan*.<sup>92</sup> Depending on whether children are inheriting descendant beneficiaries of the deceased present i.e., a biological child of the deceased, a widow is eligible to inherit either a quarter or an eighth of the net estate.<sup>93</sup> Should there be no children inheriting descendant beneficiaries of the deceased present, the widow is to inherit the one quarter share and if children are present, the latter one eighth share is inherited. If the marriage includes more than one wife i.e., a polygynous marriage as is allowed in Islamic law<sup>94</sup>, this portion is then to be divided evenly amongst them.<sup>95</sup> Applying the aforementioned conditions to the case of person X revealed that he had multiple children and only one wife, results in a reduction of wife A's portion of the net intestate estate from one quarter to one eighth.

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<sup>91</sup> The relevance of the birth date after the conclusion of the marriage for inheritance purposes will be discussed in in chapter 2.2.3.3 below.

<sup>92</sup> See Al-Quraan chapter 4 verse 12 wherein it states: '... And to them belongs a fourth of what you leave behind, if you die childless; and if you have any child then to them belongs one-eighth of what you have left behind...'

<sup>93</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p74.

<sup>94</sup> Moosa N 'Polygynous Muslim Marriages in South Africa: Their Potential Impact on The Incidence of HIV/Aids' (2009) 12 *PELJ* at p65.

<sup>95</sup> Kafumbe AL 'Women's Rights to Property in Marriage, Divorce, and Widowhood in Uganda: The Problematic Aspects' (2010) 11 *Human Rights Review* at p208.

### **2.2.3.2. THE 2:1 SHARE APPLYING TO DAUGHTER C AND SON Y**

The *Holy Quraan* links a daughter's and son's inheritance shares in such a way that if the deceased leaves behind both sons and daughters, a son will receive double the share of the daughter.<sup>96</sup> Adopted children and children born out of wedlock are not accounted for in this section; only sons and daughters are (for further information on this, see sections 2.2.3.3 and 2.2.3.4 below.) Chapter 3 of this mini-thesis will demonstrate how this ruling could be construed as problematic in a constitutional sense.

### **2.2.3.3. THE DISQUALIFICATION OF DAUGHTER B (CONCEIVED OUT OF WEDLOCK) FROM THE INTESTATE SUCCESSION EQUATION**

It is important to note from the outset that there is a distinct difference between a child conceived out of wedlock and a child born out of wedlock in relation to the inheritance consequences stemming thereof. The Islamic law of succession looks at the moment of conception and not the moment of birth.<sup>97</sup> The Islamic law of compulsory succession generally prohibits a child from inheriting from the compulsory inheritance equation of the father if the said child was born out of wedlock.<sup>98</sup> This general prohibition only affects the child's right to inheritance from the father's estate to the exclusion of the mothers. Every child, therefore, irrespective of conception or birth status maintains a right to inherit from their birth mother's estate.<sup>99</sup> The Muslim Judicial Council of South Africa (MJC)<sup>100</sup>, encourages Muslim's to adopt an amended approach to this practice.<sup>101</sup> This approach is presented in a minority opinion found within Islamic jurisprudence, where it states that should a child be born 6 months after the conclusion of a valid Islamic marriage between the parents, the child maintains the right to inherit from their biological father's estate.<sup>102</sup> This decision establishes the precedent for conception status being considered the key factor to consider when determining a

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<sup>96</sup> See Al-Quraan chapter 4 verse 11 where it states: 'Allah commands you as regard to your Children (Descendant Intestate Beneficiaries); to the male, a share equal to that of two females...'

<sup>97</sup> Abduroaf M 'An analysis of the right of a Muslim child born out of wedlock to inherit from his or her deceased parent in terms of the law of succession: a South African case study' (2021) 42 *Obiter* at p131 (hereafter Abduroaf M (2021)).

<sup>98</sup> Mzee M (2016) at p57.

<sup>99</sup> Abduroaf M (2021) at p131.

<sup>100</sup> A branch of the Muslim judiciary whose primary duty is to provide religious counsel to South Africa's Muslim community.

<sup>101</sup> Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this mini-thesis.

<sup>102</sup> Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this mini-thesis.

child's entitlement to inherit in Islamic law as opposed to the old position followed in South African law.<sup>103</sup> In light of the fact that daughter B was born earlier than the six-month mark following the conclusion of the marriage between person X and his wife A, she cannot be regarded as an inheriting intestate beneficiary of her father X in this scenario. Another possible mode to establish a link to the biological father for inheritance purposes would be an acknowledgement done by means of a sworn affidavit (preferably to be attached to the will) made by the biological father, stating that the child is indeed theirs.<sup>104</sup> There is however no mention of this acknowledgement made by person X in the scenario, thus excluding daughter B from inheriting part of the compulsory succession equation. To accommodate this exclusion, person X, has left a testate bequest providing her 7/64 of his net estate. This exemplifies one remedy for this alleged problem that can be found in Islamic law's compulsory succession. Chapter 4 of this mini-thesis provides further remedies to this perceived "predicament."

#### **2.2.3.4. THE OMITTANCE OF SON Z FROM THE COMPULSORY SUCCESSION EQUATION**

Islamic law offers three ways for a person to prove an intestate compulsory succession relationship to the deceased, giving them the right to automatically inherit from the deceased in the absence of an express provision. These refer to relations to the deceased through blood, through marriage or emancipation.<sup>105</sup> Emancipation refers to the release of humans (as individuals and communities) from the social and physical restrictions that prevent them from engaging in their free will.<sup>106</sup> This in essence represents the act of freeing a slave from one's custody and ownership.<sup>107</sup>

As will be demonstrated in 2.3.3 of this mini-thesis, son Z is regarded by South African law as belonging to the first category i.e., related to the deceased through a blood tie. Contrarily, according to the Islamic Law of compulsory succession, a blood connection can only be proven by demonstrating relation in one of three ways, namely by being a

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<sup>103</sup> See 2.3.3 of this mini-thesis for a further explanation on this position.

<sup>104</sup> Abduroaf M (2021) at p131.

<sup>105</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p42.

<sup>106</sup> Booth K 'Security and Emancipation' (1991) 17 *Review of International Studies* at p319.

<sup>107</sup> This topic won't be elaborated on because it is irrelevant in our day and age; it was only mentioned to be thorough.

descendant of the deceased (direct children born of an Islamic marriage<sup>108</sup>), an ascendant of the deceased (parents of the deceased, provided the deceased was born from a legal marriage), or a collateral relative (wherein the same blood parents are shared i.e. siblings).<sup>109</sup> Adopted son Z thus cannot inherit as one of the required beneficiaries under the intestate law avenue since he lacks a valid legal blood connection to the deceased as explained. According to the scenario, person X anticipated this outcome and left a testate bequest to the value of 7/64 of the estate in favour of adopted son Z.

### **2.2.3.5. SUMMARY OF HOW PERSON X'S ESTATE IS DISTRIBUTED AS PER THE ISLAMIC LAW OF SUCCESSION**

In essence, the estate of person X will be distributed as follows:

The testate/optional estate (the first 1/3 of the estate payable after all liabilities settled):

1. Daughter B (born out of wedlock) – 7/64 (R109 375)
2. Adopted son Z – 7/64 (R109 375)

The intestate/compulsory estate (the remainder of the estate after all liabilities and bequests settled (amounting to R781 250<sup>110</sup>):

1. Wife A – 1/8 of the net estate = R97 658.25<sup>111</sup>
2. Daughter C = R227 864.58
3. Son Y = R455 729.17

### **2.3. AN OVERVIEW OF SUCCESSION IN TERMS OF SOUTH AFRICAN LAW**

The following section will expand on the importance succession laws play in an ordinary South African citizen's life. It will demonstrate that the lack of a will has serious ramifications not only for the surviving loved ones of the deceased, but also for the assets contained in the estate. This is because, contrary to the testator's preferences, the distribution of assets will be determined by legislation, specifically the Intestate

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<sup>108</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LL.D. thesis, University of Cape Town, 2022) at p83-88 for further reading on this concept.

<sup>109</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at p44.

<sup>110</sup> This amount is calculated by taking the net estate of R1 000 000 – R109 375 – R109 375.

<sup>111</sup> For the sake of completeness, these totals were rounded off to the nearest cent.



Succession Act. Following on from this, a demonstration will be provided displaying how person X's estate will be distributed in the scenario of him passing away intestate.

### **2.3.1. THE IMPORTANCE OF DRAFTING A WILL IN THE SOUTH AFRICAN CONTEXT.**

Every person owns possessions. These belongings could be expensive ones like a car or house or more common things like clothing, modest appliances, or even the paper you are reading right now. The law of succession, incorporating both intestate and testate succession, establishes the legal framework for deciding who inherits a person's belongings, rights, and obligations in the regrettable but unavoidable event of that person's passing.<sup>112</sup> A will is a legal document that affirms what you, the deceased person (also referred to as the author), would like to happen with your money, belongings, and other assets upon your demise.<sup>113</sup> The aforementioned items can be regarded as an individual's gross estate. A will identifies who you nominated to give your estate to (your beneficiaries) and who you elect to administer your estate (your executor) upon your death.<sup>114</sup> A will can in addition designate a guardian for your children (should you pass away before they reach majority status<sup>115</sup>), leave specific instructions such as arrangements for your funeral procession and even make concessions to allow for a person to be disinherited due to your own personal motives.<sup>116</sup> Among other benefits, having a legitimate will prepared before death allows one to avoid an unwelcome and time-consuming validation process.<sup>117</sup> Among these unwanted processes are the state's designation of the executor/guardian in the absence of the testator's appointment.<sup>118</sup> Another factor to take into account in light of these undesirable processes is estate liabilities and taxes that may have a substantial effect on cash flow.<sup>119</sup> These are just a few instances of how dying intestate can

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<sup>112</sup> Sungay MH (2022) at p58.

<sup>113</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* 3ed (2017) at p23.

<sup>114</sup> Sungay MH (2022) at p58.

<sup>115</sup> See s 17 of the Children's Act 38 of 2005 where it states: 'A child, whether male or female, becomes a major upon reaching the age of 18 years.'

<sup>116</sup> The co—operators 'The importance of making a will' available at <https://www.cooperators.ca/en/Resources/plan-ahead/making-a-will.aspx> (accessed on 23 May 2022).

<sup>117</sup> Sungay MH (2022) at p58.

<sup>118</sup> O'Neill B 'The Purpose and Importance of Wills' available at <https://njaes.rutgers.edu/money/pdfs/lesson-plans/DoE-Lesson-Plan-14-The-Purpose-and-Importance-of-Wills.pdf> (accessed 08 November 2022).

<sup>119</sup> Torr C 'The far-reaching consequences of dying without a will' available at <https://www.moneyweb.co.za/financial-advisor-views/the-far-reaching-consequences-of-dying-without-a>

complicate an estate, and thus make it harder for your loved ones to cope with your passing. The laws governing the drafting of wills have exceptions for situations in which the author cannot physically write down all of their preferences.<sup>120</sup> Every adult over the age of 16 who possesses the essential testamentary capacity (the capacity to understand the nature and effects of the act of drafting a will) is permitted to unilaterally author and determine how their estate is to be dispersed in a will.<sup>121</sup> In essence, succession laws play a significant role as they solve the issue of distribution of property, rights, and responsibilities over time as each holder's death is inevitable.<sup>122</sup> Therefore, in order for a will to accurately reflect the final wishes of the deceased, it is crucial that it be updated on a regular basis.

South African law<sup>123</sup> gives each person the freedom of testation when it comes to making a will. This principle is defined as “[t]he right of an individual to dispose of his or her property on death as he or she pleases”,<sup>124</sup> and is held to such high ranking within the South African legal system, that the court is only allowed to intervene in very select instances i.e. Common Law and legislative limitations.<sup>125</sup> In the absence of a will, or a will that is left which is inoperative or incomplete, the Intestate Succession Act will govern the devolution of their estate.<sup>126</sup> There are a number of disparities between the principles of this Act and the requirements of the Islamic law of intestate/compulsory succession governing the distribution of a person's estate. This mini-thesis demonstrates these disparities - see chapter 2.2.3.5 in comparison chapter 2.3.3.

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[will/#:~:text=Without%20a%20valid%20will%2C%20your,unduly%20benefitting%20from%20your%20estate.&text=One%20of%20the%20first%20factors,property%20regime%20on%20intestate%20succe](#)  
[ssion](#). (Accessed 22 June 2022).

<sup>120</sup> De Waal, Schoeman and Wiechers *Law of Succession* 2 ed (1996) at p42.

<sup>121</sup> See s 4 of the Wills Act 7 of 1953 where it states: 'Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.'

<sup>122</sup> Jensen E *Introduction to the Laws of Timor-Leste* (2013) at p8.

<sup>123</sup> South African law is made up of a hybrid system which draws from a variety of sources, including common law (finding its basis in Roman-Dutch law), customary law (based on traditional customs and practices of South Africa's indigenous communities) and statutory law (consists of legislation passed by the South African parliament with the highest law being the Constitution of the Republic of South Africa, 1996).

<sup>124</sup> Corbett, Hofmeyr and Kahn *the Law of Succession in South Africa* 2 ed (2001) at p39.

<sup>125</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* 3ed (2017) at p129.

<sup>126</sup> De Waal, Schoeman and Wiechers *Law of Succession* 2 ed (1996) at p2.

## 2.3.2. THE PRINCIPLES OF THE LAW OF SUCCESSION IN A SOUTH AFRICAN CONTEXT

A general South African citizens estate is divided in a similar manner as to an Islamic estate with some deviations - with liabilities deducted first, followed by testate bequests, and finally intestate estate subtractions.<sup>127</sup> The distribution of each of these types of claims (in order of priority) will be explained in more detail in the following sections to highlight the parallels and differences between South African law and Islamic law.

### 2.3.2.1. LIABILITY CLAIMS AGAINST THE ESTATE

The two main categories of liability claims are administrative expenses and debt. Administration costs within the South African context include funeral costs, maintenance, and other administration costs.<sup>128</sup> There is an order of priority between these claims in the event where these liability claims exceed the value of the gross estate.<sup>129</sup> Funeral costs are restricted to the expenses that are required to be settled (if any) to have the deceased buried.<sup>130</sup> Maintenance claims include those claims by certain dependants that are in need of it.<sup>131</sup> Debts owed by the testator are also deductible under this segment of the distribution of an estate. These debts can be further broken down into secured (mortgage bonds, car loans etc) and unsecured debts (Credit card debt, utility bills).<sup>132</sup> The remainder (if any) must then be distributed in terms of the law of testate and intestate succession. With the exception of the religious debt and the problem of prescription discharging a debt, these assertions have already been described in 2.2.2.1 above and are essentially the same – hence no further discussion is needed.<sup>133</sup>

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<sup>127</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) at p67.

<sup>128</sup> These include estate duty, bank charges, executors' fees, transfer fees, and Master's fees.

<sup>129</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) at p69.

<sup>130</sup> See s 4(a) of Estate Duty Act 4 of 1955 where it states: 'The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say - (a) so much of the funeral, tombstone, and death-bed expenses of the deceased which the Commissioner considers to be fair and reasonable...'

<sup>131</sup> See s 15(3) of the Maintenance Act 99 of 1998 for further reading on this concept.

<sup>132</sup> Majaski C 'Unsecured vs. Secured Debts: What's the Difference?' available at <https://www.investopedia.com/ask/answers/110614/what-difference-between-secured-and-unsecured-debts.asp> (accessed 10 November 2022).

<sup>133</sup> See 2.2.2.1 of this mini-thesis for a further explanation on these concepts.

### 2.3.2.2. TESTATE SUCCESSION CLAIMS

As mentioned within the introduction to this mini-thesis, South African law grants an individual an almost unfettered freedom of testation.<sup>134</sup> This infers that the deceased may bequeath his/her estate however he/she wishes, including the inclusion of several unreasonable conditions. Though our law places great importance on this principle, it is not absolute and remains subject to certain common law limitations.<sup>135</sup> Of the reasons for this limitation placed on a deceased, is in order to keep the will in line and restricted in terms of the South African Constitution, which prohibits unfair discrimination.<sup>136</sup> The common law limitations to the freedom of testation as referred to above, include provisions of a will that is unlawful, against good morals, too vague or impossible to perform.<sup>137</sup> Any person nominated to inherit from this portion of the estate is referred to as a testate beneficiary and can only inherit in such capacity should they not be prevented from inheriting due to a disqualification.<sup>138</sup>

### 2.3.2.3. INTESTATE SUCCESSION CLAIMS

Intestate succession claims represent the final claim that is to be settled from the estate after the above-mentioned claims have been settled. These claims are prescribed by legislation, specifically the Intestate Succession Act and link an individual's right to inheritance on relation to the deceased person. The relations include affinity, consanguinity, surrogacy, adoption, union and acceptance.<sup>139</sup> The following section will demonstrate how these the relations to a deceased individual affects the share of inheritance gained from an estate.

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<sup>134</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* 3ed (2017) at p143.

<sup>135</sup> De Waal, Schoeman and Wiechers *Law of Succession* 2 ed (1996) at p3.

<sup>136</sup> See s 9 of the Constitution.

<sup>137</sup> Sungay MH (2022) at p57.

<sup>138</sup> These disqualifications include being deemed unworthy in the law i.e., killing the deceased. See Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) at p72-75 for further reading into these disqualifications and exclusions.

<sup>139</sup> Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) at p79.

### 2.3.3. THE DISTRIBUTION OF PERSON X'S ESTATE ACCORDING TO THE INTESTATE SUCCESSION ACT

As provided for in the scenario given within the introduction of this mini-thesis, person X had liabilities totalling R100 000.<sup>140</sup> After all liabilities were paid, we will assume for the sake of an accurate comparison between the two normative systems that the net estate equates to R1 000 000. The will furthermore stipulated that he bequeathed 14/64 of his net estate to his daughter B (born out of wedlock) and adopted son Z – both inheriting equal shares of this bequest.

As indicated in the introduction contained within chapter 1 of this mini-thesis, person X passed away intestate and was survived by his wife (A), 2 daughters (B being born out of wedlock and C born in wedlock) son (Y) and an adopted son (Z). The Intestate Succession Act's laws, as stated in 2.3.2.3, will apply to the distribution of his estate. Section 1(1)(a) - (f) specifies a number of factual situations that regulates how an intestate estate is divided in each situation. The section applicable to person X's situation is s1(1)(c).<sup>141</sup> The amount currently decided upon in this regard by the Minister in the Government Gazette as stated in S1(c)(i) equals R250 000.<sup>142</sup> Furthermore a child's share is calculated by dividing the net estate value by a figure equal to the deceased person's number of *stirpes*<sup>143</sup> plus the deceased person's number of surviving spouses.<sup>144</sup>

Prior to 1988, South African law disqualified a child born out of wedlock from the intestate inheritance equation of their father.<sup>145</sup> Today however, this position has

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<sup>140</sup> These included funeral expenses totalling R5000 and unpaid personal liabilities amounting to R95 000.

<sup>141</sup> See s 1(c) of the Intestate Succession Act 81 of 1987 where it states: '...is survived by a spouse as well as a descendant –

- (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
- (ii) such descendant shall inherit the residue (if any) of the intestate estate;'

<sup>142</sup> The DOJ and CD 'Circular 104 of 2015' available at [https://www.justice.gov.za/master/m\\_docs/2015-05\\_chm-directive\[cr2015-104\].pdf](https://www.justice.gov.za/master/m_docs/2015-05_chm-directive[cr2015-104].pdf) (accessed 01 July 2022).

<sup>143</sup> Any surviving child of the deceased who can be an intestate heir as well as any deceased child of the deceased who leaves a descendant or descendants who can be an intestate heir or intestate heirs. In the practical scenario given in this mini-thesis, all the children of person X (daughters B and C along with sons Y and adopted son Z) would constitute a *stirpes* resulting in person X having 4 *stirpes*.

<sup>144</sup> De Waal, Schoeman and Wiechers *Law of Succession* 2 ed (1996) at p14.

<sup>145</sup> Abduroaf M (2021) at p128.

changed through the amendment of S1(2) in the Intestate Succession Act.<sup>146</sup> As a result, daughter B (born out of wedlock) is seen as no different to her siblings (C, Y, and Z) for inheritance purposes. The fact that she was born outside the confines of a marriage has no bearing on her status for purposes of inheritance. Simply said, a person who was born to unmarried parents under the South African form of distribution is still eligible to receive intestate inheritance from both of his or her parents (specifically father).<sup>147</sup> This is one of the main distinctions between the Islamic law of compulsory succession and South African law of intestate succession.<sup>148</sup>

Adopted son Z, finds himself in a situation similar to that of the daughter B (born out of wedlock) in that he is given the same consideration for South African intestate inheritance purposes. A reading-together of s 1(4)(e) of the Intestate Succession Act<sup>149</sup> with s 242(3) of the Children's Act 38 of 2005<sup>150</sup> instructs that an adopted child is for all purposes regarded as the child of the adoptive parent and vice versa. This too represents yet another distinction between the Islamic law of compulsory succession and South African law of intestate succession.<sup>151</sup>

Therefore, in applying these principles to the case of person X, the first point of call would be to determine the value of the bequest made by person X in favour of his two children i.e., daughter B (born out of wedlock) and adopted son Z. Each of these two children was given 7/64 of person X's net estate, thus equating to R109 375 each (or R218 750 in total).

The intestate estate now equates to R781 250. The next step would now be to determine the value of the child's portion. Person X has 5 stirpes i.e., his four children B, C, Y, Z, and wife A. This implies that the child's share can be determined to be worth R156 250 in total (R781 250 divided by the 5 stirpes). Because this child's portion is less than the sum specified by the Minister of Justice and Correctional

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<sup>146</sup> See s 1(2) of the Intestate Succession Act 81 of 1987 (hereafter Intestate Succession Act) where it states: 'Illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation'.

<sup>147</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* 3ed (2017) at p46.

<sup>148</sup> See 2.2.3.3 of this mini-thesis for an explanation on how the Islamic law of compulsory succession differs from this position.

<sup>149</sup> s 1(4)(e): 'An adopted child shall be deemed –

(i) To be a descendant of his adoptive parent or parents'.

<sup>150</sup> s 242(3): 'An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child'.

<sup>151</sup> See 2.2.3.4 of this mini-thesis for an explanation on how the Islamic law of compulsory succession differs from this position.

Services as per S1(c)(i) of the Intestate Succession Act (R250 000), wife A will receive the stipulated amount of R250 000 due to it exceeding the child's share. Additionally, the remainder of the estate amounting to R531 250 (R1 000 000(net estate after liabilities) – R218 750(testate bequest) – R250 000(Wife A's portion)) will be distributed evenly among the surviving descendants of person X. This results in each of the four children inheriting R132 812,50 (R531 250 ÷ 4).

### 2.3.3.1. SUMMARY OF HOW PERSON X'S ESTATE IS DISTRIBUTED AS PER THE SOUTH AFRICAN LAW OF INTESTATE SUCCESSION

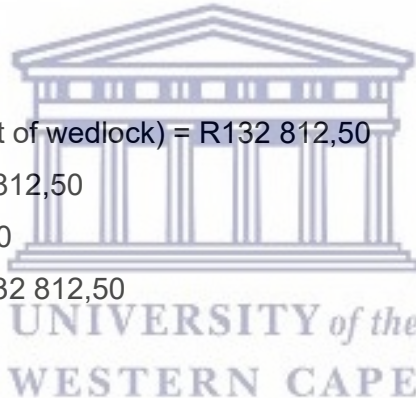
In essence, the estate of person X will be distributed as follows:

The testate estate:

1. Daughter B (born out of wedlock) = R109 375 (7/64)
2. Adopted son Z = R109 375 (7/64)

The intestate estate<sup>152</sup>:

3. Wife A – R250 000
4. Daughter B (born out of wedlock) = R132 812,50
5. Daughter C = R132 812,50
6. Son Y = R132 812,50
7. Adopted son Z = R132 812,50



### 2.4. COMPARATIVE TABLE ILLUSTRATING THE DISTRIBUTION OF PERSON X'S ESTATE IN BOTH NORMATIVE SYSTEMS.

Share distribution as per the Islamic Law of Succession <sup>153</sup>			
	Testate Estate Share/Value	Intestate Estate Share/Value	Total share/ Value
Wife A	X	R97 656.30	R97 656.30

<sup>152</sup> The calculation of the intestate estate as per the Intestate Succession Act is based off monetary calculations and not fractional share allotments as is done in the Islamic law of intestate succession.

<sup>153</sup> See 2.2.3 of this mini-thesis for an explanation on how these shares were calculated. For the sake of completeness, all values were rounded off to the nearest cent.

Daughter B (Born out of Wedlock)	7/64 = R109 375	X	7/64 = R109 375
Daughter C	X	R227 864.58	R227 864.58
Son Y	X	R455 728.17	R455 728.17
Adopted son Z	7/64 = R109 375	X	7/64 = R109 375
			R1 000 000

<b>Share distribution as per the South African Law of Succession<sup>154</sup></b>			
	Testate Estate Share/Value	Intestate Estate Value	Total Value
Wife A	X	R250 000	R250 000
Daughter B (Born out of Wedlock)	7/64 = R109 375	R132 812,50	R242 187,50
Daughter C	X	R132 812,50	R132 812,50
Son Y	X	R132 812,50	R132 812,50
Adopted son Z	7/64 = R109 375	R132 812,50	R242 187,50
			R1 000 000

## 2.5. CASE LAW DEALING WITH ISLAMIC LAW OF SUCCESSION MATTERS

### 2.5.1. DANIELS V CAMPBELL AND OTHERS

In this case, the court extended the meaning of the term 'spouse' in the Intestate Succession Act as well as the meaning of the word 'survivor' in the Maintenance of Surviving Spouses Act 27 of 1990 (hereafter the Maintenance Act) to the parties involved in a monogamous Muslim marriage.<sup>155</sup> The applicant, Mrs. Daniels, the wife of her deceased husband, got married in 1977 in accordance with Muslim law; a civil law marriage official did not later officiate the union.<sup>156</sup> Upon the death of her husband, the relatives of the deceased claimed that due to a non-existence of a civil marriage, Mrs Daniels could not constitute and fall part of a 'surviving spouse' as referred to in

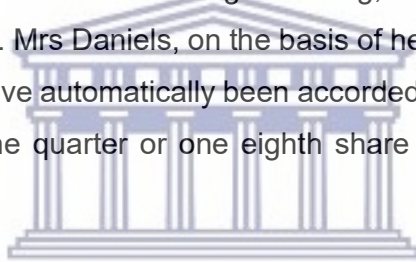
<sup>154</sup> See 2.3.3 of this mini-thesis for an explanation on how these shares were calculated.

<sup>155</sup> *Daniels V Campbell and Others* (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (hereafter *Daniels v Campbell*) at para 85.

<sup>156</sup> *Daniels v Campbell* at para 3.



the Intestate Succession Act, thereby precluding her from an intestate inheritance share from her husband's estate.<sup>157</sup> Upon the taking of this matter to the High Court of South Africa, the court found that this interpretation as applied by the relatives to exclude the wife from her husband's estate was indeed a violation of her rights to practice her religious and cultural beliefs.<sup>158</sup> The court thus ruled that the "spouse" in both the Intestate Succession Act and Maintenance Act shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous union.<sup>159</sup> Interestingly enough, on appeal, Justice Sachs remarked that a reading in was not necessary because the word 'spouse' should have been sufficient to include Mrs Daniels in that category as it is all inclusive irrespective of how the marriage was entered into.<sup>160</sup> Justice Ncobo in concurring with this judgement, stated that legislation must at all times be read in a manner that gives effect to the values of our constitutional democracy in terms of section 39(2) of the Constitution which requires that all legislation should be interpreted in a manner that promotes 'the spirit, purport and objects of the Bill of Rights'.<sup>161</sup> After evaluating this ruling, it can be said that it complies with Islamic law's principles. Mrs Daniels, on the basis of her valid Islamic marriage to her late husband, should have automatically been accorded the title of his spouse and thus inherited either the one quarter or one eighth share as stipulated by the *Holy Quraan*.<sup>162</sup>



### **2.5.2. HASSAM V JACOBS NO AND OTHERS**

In this case, the court further extended the Daniels cases ruling to include a situation whereby a polygynous wife in a Muslim marriage can claim an intestate share from her deceased husband's estate.<sup>163</sup> The Constitutional Court confirmed the order of the High Court and in doing so, utilised the *Bhe and Others v Khayelitsha Magistrate and Others*<sup>164</sup> case (hereafter referred to as the *Bhe* case) in coming to this conclusion and

<sup>157</sup> *Daniels v Campbell* at para 8.

<sup>158</sup> *Daniels v Campbell* at para 11.

<sup>159</sup> *Daniels v Campbell* at para 12.

<sup>160</sup> *Daniels v Campbell* at para 63.

<sup>161</sup> *Daniels v Campbell* at para 81.

<sup>162</sup> See Al-Quraan chapter 4 verse 12 where it states: 'And to them belongs a fourth of what you leave behind, if you die childless; and if you have any child then to them belongs one-eighth of what you have left behind'.

<sup>163</sup> *Hassam V Jacobs No and Others* (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (hereafter *Hassam v Jacobs*) at paras 48 and 53.

<sup>164</sup> *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] (hereafter *Bhe*).

hence modified this provision.<sup>165</sup> The applicant, Mrs Fatima Gabie Hassam, was one of the wives' to a polygynous marriage whose husband subsequently died intestate.<sup>166</sup> Upon her unsuccessfully lodging a claim to her late husband's estate, the executor mentioned that due to her marriage not being recognised, she was not entitled to a share of her husband's estate.<sup>167</sup> She contended that the Intestate Succession Act and Maintenance Act was unconstitutional as they excluded wives in polygynous marriages by excluding them from the concepts of 'spouse' and 'survivor', thus reserving these titles for monogamous spouses.<sup>168</sup> The High Court thus declared section 1(4)(f) of the Intestate Succession Act to be inconsistent Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir.<sup>169</sup> The High Court further declared that the word "survivor" in the Maintenance Act should be read to include surviving partners of polygynous Muslim marriages.<sup>170</sup> The aforementioned rulings was approved unanimously in the Constitutional Court on the basis that this exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.<sup>171</sup> To remedy the defect, the words "or spouses" are to be read-in after each use of the word "spouse" in the Act.<sup>172</sup> Once again, after evaluating this ruling, it can be said that it also complies with Islamic law's inheritance principles. Mrs Hassam, on the basis of her valid Islamic marriage to her late husband should have automatically been accorded the title of his spouse and thus inherited either the shared one quarter or one eighth share as stipulated by the *Holy Quraan* due to the presence of another spouse<sup>173</sup>

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<sup>165</sup> *Hassam v Jacobs* at paras 47 and 57.

<sup>166</sup> *Hassam v Jacobs* at para 3.

<sup>167</sup> *Hassam v Jacobs* at para 52.

<sup>168</sup> *Hassam v Jacobs* at para 38.

<sup>169</sup> *Hassam v Jacobs* at para 57.

<sup>170</sup> *Hassam v Jacobs* at para 48.

<sup>171</sup> *Hassam v Jacobs* at para 27.

<sup>172</sup> *Hassam v Jacobs* at para 48.

<sup>173</sup> See 2.3.2.1 of this mini-thesis for a further elaboration into this concept.

### **2.5.3. MOOSA NO AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS**

The facts of this case concerned a deceased Muslim male (X) who died testate on 9 June 2014.<sup>174</sup> He was married to two wives at the time of his death, of which both marriages were concluded in accordance with Islamic rights.<sup>175</sup> The will of the deceased stated that his estate is to be devolved in terms of Islamic Law and that an Islamic distribution certificate should be obtained from the MJC which will stipulate how his estate will be distributed in conformity with the Islamic law of successions principles.<sup>176</sup> A total of nine children were born of the two marriages with four male and five female.<sup>177</sup> The Islamic distribution certificate clearly outlined the apportioned shares, and it was very evident that there was an unequal distribution between the male and female genders – this aspect will be further elaborated on in chapter 3 of this mini-thesis. All 9 children of X repudiated/renounced the inheritance due to them as chosen by Mr X.<sup>178</sup> Section 2C (1) of the Wills Act states that if repudiation is done by anyone, the benefit shall vest in the surviving spouse.<sup>179</sup> The benefits due to the children were deemed testate benefits in terms of South African Law but Intestate benefits in terms of Islamic Law.<sup>180</sup> The executor of person X's estate elected to not follow Islamic law with regards to these renunciations. This is problematic due to the rules of renunciation being intrinsically at odds in the respective systems of law. In terms of Islamic law, a renounced testate share will devolve back into the gross estate of the deceased person and not as per the distribution set out in the Wills Act. Renouncing of intestate shares in Islamic law is a foreign principle.<sup>181</sup> What the children did was essentially cede their right of inheritance to the surviving spouses. This request, although not completely in conformity with the Sharee'ah law, was accepted and carried out by the Master's office.<sup>182</sup> The issue of determining who was

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<sup>174</sup> *Moosa NO and Others v Minister of Justice and Correctional Services and Others* (CCT251/17) [2018] ZACC 19; 2018 (5) SA 13 (CC) (hereafter *Moosa V Minister of Justice*) at para 6.

<sup>175</sup> *Moosa V Minister of Justice* at para 4.

<sup>176</sup> *Moosa V Minister of Justice* at para 6.

<sup>177</sup> *Moosa V Minister of Justice* at para 4

<sup>178</sup> *Moosa V Minister of Justice* at para 7.

<sup>179</sup> See s 2C (1) of the Wills Act 7 of 1953 wherein it states: 'If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse'.

<sup>180</sup> See 2.2.2.2 and 2.3.3 of this mini-thesis for further explanation on these concepts.

<sup>181</sup> Abduroaf M (2020) at p408.

<sup>182</sup> *Moosa V Minister of Justice* at para 8.

the surviving spouses to inherit these ceded shares was now in question in the Western Cape High Court. It was argued that due to the non-existence of a civil marriage between deceased person X and wife Z, she was not to be considered a surviving spouse in terms of section 2C (1) of the Wills Act.<sup>183</sup> The court found that this differentiation discriminates against Z on the grounds of religion and marital status.<sup>184</sup> The Court thus declared section 2C (1) of the Wills Act inconsistent with the Constitution as it does not include a husband or wife in a marriage that was solemnised in terms of Islamic law.<sup>185</sup> This judgement was subsequently confirmed by the Constitutional court.<sup>186</sup>

As already pointed out within the previous paragraph, this judgement is not in conformity with the Islamic law of successions principles on the matter of renunciation of shares. The consequences of renunciation in terms of South African law are not the same as those in terms of Islamic law.<sup>187</sup> The Islamic law of succession generally requires that ownership must pass over to the rightful beneficiaries and only thereafter can the holder do with it as they so wish.<sup>188</sup> This is merely one illustration of how our courts have made rulings in Islamic related matters contrary to its principles.<sup>189</sup>

#### **2.5.4. FARO V BINGHAM**

This case concerned a Muslim Male (Y) who died intestate. The issue in this case was surrounding the aspect of a divorce between Y and his wife of whom he married two years before his death in terms of Islamic law.<sup>190</sup> A year after the marriage between the couple, Mr Y had issued his wife (Z) with a revocable divorce (*Taláq*).<sup>191</sup> At the

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<sup>183</sup> *Moosa V Minister of Justice* at para 10.

<sup>184</sup> *Moosa V Minister of Justice* at para 10.

<sup>185</sup> *Moosa V Minister of Justice* at para 4.

<sup>186</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p272.

<sup>187</sup> Abduroaf M 'An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the Moosa NO and Others v Harnaker and Others Judgment' (2019) 7 *Electronic Journal of Islamic and Middle Eastern Law* at p20.

<sup>188</sup> See Abduroaf M 'An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the Moosa NO and Others v Harnaker and Others Judgment' (2019) 7 *Electronic Journal of Islamic and Middle Eastern Law* for further reading on this operation of renunciation in the Islamic Law of succession.

<sup>189</sup> See Tayob Al 'The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study' (2005) 22 *Recht van de Islam* and Abduroaf M 'The consequence of an Islamic divorce' (2019) 19(9) *Without Prejudice* for further reading on this issue.

<sup>190</sup> *Faro v Bingham* (4466/2013) [2013] (hereafter *Faro v Bingham*) at para 2.

<sup>191</sup> *Faro v Bingham* at para 3.

time of his death, the applicant in the matter, Z was appointed the executrix of Y's estate. The subject of whether Y and Z were married at the time of Y's death, however, was a point of contention. Z claimed that they were married because the divorce was overturned during the waiting period (*iddah*), which is when Y and Z had a sexual encounter.<sup>192</sup> On investigation of whether this sexual encounter resulted in the divorce being revoked, the MJC was approached for guidance. It was stated that due to the rules of Islamic law, this sexual encounter did not revoke the divorce as express words of revocation is required to complete this task.<sup>193</sup> The MJC thus concluded that the couple were not married at the time of Y's death to the absence of this express revocation. Despite the Master of the High Court agreeing with the view of the MJC<sup>194</sup>, on appeal, the court overturned the initial ruling stating that sexual relations do indeed revoke a divorce.<sup>195</sup> Z was therefore declared to be the spouse of Y for purposes of the Intestate Succession Act and the Maintenance Act contrary to Sharee'ah law principles as presented by the MJC.

The aforementioned judgement is yet another illustration of the religious entanglement doctrine prevalent in our South African courts.<sup>196</sup> The MJC when called in for expert testimony in regard to the predicament of interpretation clearly outlined Sharee'ah laws position on the matter – stating that the marriage was annulled and is no longer in existence. Hearing the MJC's professional council, the South African High Court decided to reject it. Does our courts have authority, or should our courts have the authority to delve into religious rulings considering the respect purported in favour of religious rights in the mighty Constitution?<sup>197</sup> This is another illustration of how our courts have made rulings in Islamic related matters contrary to its principles.<sup>198</sup>

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<sup>192</sup> *Faro v Bingham* at para 29.

<sup>193</sup> *Faro v Bingham* at para 11.

<sup>194</sup> *Faro v Bingham* at para 10.

<sup>195</sup> *Faro v Bingham* at para 30-32.

<sup>196</sup> Essop F *The Intersection between the Islamic Law of Inheritance and the South African Law of Succession* (unpublished LLD thesis, University of Cape Town, 2022) at p104.

<sup>197</sup> See s 15 of the Constitution.

<sup>198</sup> See Tayob Al 'The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study' (2005) 22 *Recht van de Islam* and Abduroaf M 'The consequence of an Islamic divorce' (2019) 19(9) *Without Prejudice* for further reading on this issue.

### **2.5.5. LB AND ANOTHER V FNB TRUST SERVICES (PTY) LTD N.O. AND OTHERS**

This case represents the latest judicial decision on an Islamic law of succession matter. The central issue of this judgement was on a similar footing to that of the *Faro v Bingham* case expanded on above, in that the High Court of South Africa was tasked with determining whether the plaintiff was married according to Islamic law to the deceased at the time of his passing.<sup>199</sup> The deceased and plaintiff were partners in a polygynous marriage, with the plaintiff being the third wife of the deceased.<sup>200</sup> Upon the passing of the husband, the plaintiff laid a claim for maintenance, only to be told that it would not be entertained due to the deceased having allegedly issued the plaintiff with a *Talaaq*<sup>201</sup> prior to his death.<sup>202</sup> The plaintiff thereafter approached the MJC for a ruling on the matter to determine whether the plaintiff and deceased were married or not – to which the MJC found that on the basis of lack of evidence provided (no witnesses to the *Talaaq* being given), the marriage between the deceased and plaintiff still subsisted.<sup>203</sup> The High Court ruled in favour of the plaintiff in her action to claim maintenance from the deceased in agreement with the MJC's advice that the couple were married.<sup>204</sup> The problem that arises herein is that the right to claim spousal maintenance is not an Islamic law of succession right, as the spouse is entitled to a fixed share as per the *Holy Quraan's* distribution of shares.<sup>205</sup> This is yet another illustration of how our courts have made rulings in Islamic related matters contrary to its principles.<sup>206</sup>

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<sup>199</sup> *LB and Another v FNB Trust Services (Pty) Ltd N.O. and Others* (22013/2015) [2022] ZAWCHC 190 (27 September 2022) (hereafter *LB and Another*) at para 1.

<sup>200</sup> *LB and Another* at para 7.

<sup>201</sup> See Moolla M *The Imperative to Implement Muslim Personal Law in South Africa* (unpublished LLM Thesis, University of the Western Cape, 2018) at p17 where the concept of *Talaaq* is defined as: 'freeing or undoing the knot. *Talaaq* signifies the dissolution of marriage by the pronouncement of certain words.'

<sup>202</sup> *LB and Another* at para 8.

<sup>203</sup> *LB and Another* at para 9.

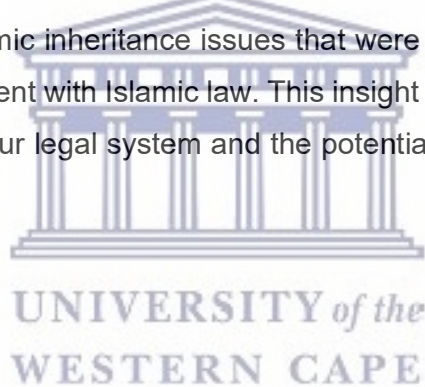
<sup>204</sup> *LB and Another* at para 87. Also see Abduroaf M and Moosa N 'An analysis of the right of a Muslim widow to claim maintenance in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990' (2023) (2) *TSAR* for further reading on an Islamic laws interpretation of this right to claim maintenance.

<sup>205</sup> Denson R (2021) at p357. Also see Al-Quraan chapter 4 verse 12 where it states: 'And to them belongs a fourth of what you leave behind, if you die childless; and if you have any child then to them belongs one-eighth of what you have left behind'.

<sup>206</sup> See Tayob Al 'The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study' (2005) 22 *Recht van de Islam* and Abduroaf M 'The consequence of an Islamic divorce' (2019) 19(9) *Without Prejudice* for further reading on this issue.

## 2.6. CONCLUSION

This chapter demonstrated the great significance and relevance of the law of succession in both South African citizens' and Muslims' lives, with Muslims' lives being much more affected by it as a result of the religious obligation associated to it. Following this finding, this chapter went on to show how the distribution plans under the South African law mode of distribution and the Islamic law of compulsory successions distribution are very different from one another – thus re-enforcing the need for Muslim's to draft a will to ensure that their religious obligation is upheld. Coinciding with these observations, the chapter continued to illustrate that there exists at many points rooms for possible constitutional challenges due to plenty of constitutional provisions being impaired i.e., daughter B (born out of wedlock) being disqualified, daughter C inheriting half the share of her counterpart –son Y and adopted son Z being omitted from the intestate inheritance equation as per Islamic Law. This mini-thesis examines the constitutionality of these issues in chapter 3 to determine the validity of these claims. A brief case law review revealed that just 2 of the verdicts in the five Islamic inheritance issues that were brought before our South African courts were consistent with Islamic law. This insight led to the discovery of the religious entanglement in our legal system and the potential issues it could lead to in the future.



## CHAPTER 3:

# THE CONSTITUTIONALITY OF THE ISLAMIC LAW OF INTESTATE SUCCESSION WITH REGARD TO PERSON X'S ESTATE AS WELL AS A JUDICIAL PERSPECTIVE ON OTHER LONG STANDING UNCONSTITUTIONAL SUCCESSION PRINCIPLES

### 3.1. INTRODUCTION

This chapter will examine the Constitution, illuminating its development process and showcasing its impact on our society. This inspection is then followed by the utilization of the Constitutions powers to investigate potential constitutional musters that the Islamic law of compulsory succession would initially appear to violate in our constitutionally supreme day and age. The scenario of person X will be used to illustrate three hotly debated constitutional violations: the omittance of the adopted child from the compulsory succession equation, the disqualification of the child born out of wedlock from the compulsory succession formula, as well as the 2:1 general rule of inheritance in favour of the male. A brief history will show how several jurisdictions advanced to abolish these exclusionary practices in secular laws and the reasons thereof. Case law thereafter will be touched on to show how certain areas of the Islamic Law of compulsory succession have been held to be in contention within our courts. In light of these case law discussions, the central leading question of this mini-thesis will then be posed to ask how, albeit all the proven unconstitutional provisions contained within the Islamic law of compulsory succession, it remains in practice?

### 3.2. THE CONSTITUTIONS AUTHORITY

The 1996 Constitution is the supreme or apex law in South Africa.<sup>207</sup> The most decisive feature of South Africa's current post-apartheid system is that of constitutional

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<sup>207</sup> Moosa N and Abduroaf M 'The New Framework Planned for the Legal Recognition and Regulation of Muslim Marriages in a Secular South Africa: From Litigation to Law Reform' (2022) 22 *AHKAM* at p4 (hereafter Moosa N and Abduroaf M (2022)).



supremacy<sup>208</sup> as a foundational value, and second the supremacy of the Constitution as a binding and enforceable rule in no uncertain terms.<sup>209</sup> As a result, the constitutional principles influence common law and specify how legislation should be written and understood, as well as how the courts should develop the common law.<sup>210</sup> As the Constitution supersedes all earlier laws, newly passed legislation must at all times adhere to its standards and tenets in order to avoid being deemed unconstitutional.<sup>211</sup> This is further substantiated in its preamble where it states:

*'We, the people of South Africa . . . adopt this Constitution as the supreme law of the Republic . . .'*

On this basis, everyone who assumes public power acknowledges that he/she or organisation should exercise that power in a manner that respects fundamental human rights, and abides by the structural prescripts of the Constitution.<sup>212</sup> Failure to abide by this standard will result in the individual or organ of state being held accountable in a court of law.<sup>213</sup> The founding values of the constitution as listed in section 1(c) are those of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism.<sup>214</sup> In this mini-thesis, the Bill of Rights (hereafter BOR), included in chapter 2 of the Constitution, will be crucial in determining if the three scenarios listed above in the scenario of person X are constitutionally legitimate.

The BOR was created in a fashion and with the intention of putting the Constitution's transformational vision into practice.<sup>215</sup> Moreover, it is asserted to principally support

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<sup>208</sup> See s 2 of the Constitution wherein it states: 'The Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.'

<sup>209</sup> De Vos P (ed), Freedman W (ed), Brand D et al *South African Constitutional Law in Context* (2014) at p15.

<sup>210</sup> Heerden MV 'The 1996 Constitution of The Republic of South Africa: Ultimately Supreme Without a Number' (2007) 26 *Politeia* at p34 (hereafter Heerden MV (2007)).

<sup>211</sup> See s 172(1)(a) of the Constitution wherein it states: 'When deciding a constitutional matter within its power, a court -a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;'

<sup>212</sup> Govender K 'Power and constraints in the Constitution of the Republic of South Africa 1996' (2013) 13 *AHRLJ* at p83 (hereafter Govender K (2013)).

<sup>213</sup> Govender K (2013) at p83.

<sup>214</sup> s 1(c) of the Constitution.

<sup>215</sup> De Vos P (ed), Freedman W (ed), Brand D et al *South African Constitutional Law in Context* (2014) at p319.

our nation's social and economic transition while preserving one of the most crucial ideals at its foundation, namely, human dignity.<sup>216</sup> Thus, our courts judge the legality of other laws and governmental activities that affect an individual's interests using the BOR and the Constitution's overall provisions as a yardstick.<sup>217</sup> The BOR in itself places both a negative and positive obligation on the state and in some instances, on private individuals to respect, protect, promote and fulfil all human rights contained within it.<sup>218</sup> The Constitutional Court at the apex – are the guardians of the rights contained within the Constitution in that they have the power to declare any act or legislation inconsistent with it invalid<sup>219</sup> provided it is not justifiable in terms of the limitation clause placed in section 36 of the Constitution (hereafter referred to as the limitation clause).<sup>220</sup> The applicability and relevance of the limitation clause will be further elaborated on within chapter 4 of this mini-thesis. In the case of *S v Makwanyane and Another*<sup>221</sup>, it was observed in the Constitutional Court by Justice Mahomed, that the Constitution is said to have set itself on the mission of assisting with the transformation of society in the public and private spheres in that it rejects that part which was racist, authoritarian, insular and repressive and facilitates moves towards a more democratic, universalistic, caring and aspirational egalitarian society.<sup>222</sup> The drafters of the Constitution purposefully placed in a number of mechanisms to ensure that public power is exercised, both substantively and procedurally, in a manner that accords with the vision outlined in section 1.<sup>223</sup>

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<sup>216</sup> Heerden MV (2007) at p38.

<sup>217</sup> Heerden MV (2007) at p38.

<sup>218</sup> s 7(2) of the Constitution.

<sup>219</sup> De Vos P (ed), Freedman W (ed), Brand D et al *South African Constitutional Law in Context* (2014) at p26.

<sup>220</sup> See s 36 of the Constitution where it states:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights'.

<sup>221</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (hereafter *S v Makwanyane*).

<sup>222</sup> *S v Makwanyane* at para 262.

<sup>223</sup> Govender K (2013) at p84.

### **3.3. POTENTIAL AVENUES OF TESTING THE CONSTITUTIONALITY OF THE VARIOUS PROBLEMATIC SCENARIOS**

The following section will go into further detail about how the aforementioned sections and BOR values and principles find applicability to the perceived unconstitutional provisions as found in the Islamic Law of compulsory succession and in practice by person X. It will display how each scenario individually contravenes several of the Constitution's core principles and rules. This section will then conclude by posing the question that on this basis, how they still remain in practice without any obstruction from our supreme law and courts intervening?

#### **3.3.1. THE 2:1 RATIO AFFECTING DAUGHTER B**

As already shown in chapter 2 of this mini-thesis, the Islamic law of compulsory succession states that a woman is to generally inherit half the share of their male counterpart.<sup>224</sup> The effect of this rule in practice in the scenario of person X results in daughter C inheriting half the share of her male counterpart – son Y.<sup>225</sup> Our secular law, which finds its basis in the Constitution strongly promotes equality and non-discrimination,<sup>226</sup> holds that all the children is to inherit equal shares to each other with non being favoured over the other.<sup>227</sup>

Section 9(3) and 9(4) of the Constitution<sup>228</sup> is contravened when the state, an individual or juristic person unfairly discriminates against another person. It applies when a person is treated differently based on one of the grounds listed thereunder or on a ground that a court has found to be sufficiently similar to one or more of the listed grounds. When differentiation is based on any of the listed grounds, such

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<sup>224</sup> See Al-Quraan chapter 4 verse 11 where it states: 'Allah commands you to regard your children's (inheritance); to the male, a portion equal to that of two females'.

<sup>225</sup> See 2.2.3.2 of this mini-thesis for a detailed breakdown on these shares' apportionment.

<sup>226</sup> See s 9(1) of the Constitution which states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.

<sup>227</sup> See 2.3.3 of this mini-thesis for a detailed breakdown of these share apportionments in South African law.

<sup>228</sup> See s 9(3) of the Constitution which states: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' Also see s9(4) of the Constitution which states: 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

differentiation is regarded to be discrimination. Moreover, section 9(5)<sup>229</sup> creates a presumption that such discrimination is unfair and places the onus on the party against whom the complaint of unfair discrimination has been made, to prove that the discrimination was not unfair.<sup>230</sup> On a superficial reading, one may conclude this Islamic law of succession provision advocating that a female daughter is to inherit half of her male counterpart, undeniably discriminates against daughter Y on the basis of her sex. This as seen is a listed ground under section 9(3) of the Constitution. To determine whether this found discrimination could be deemed to be unfair, certain considerations and factors need to be considered. These include:

*“(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not; and*

*(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal.”<sup>231</sup>*

Upon examining these considerations, it can be said that throughout times, women were always subject to patriarchal practices be it in marriage, workplace or in daily life.<sup>232</sup> Women’s experience of marriage in particular was and sometimes still is one of subordination in many faiths, customs and general practices.<sup>233</sup> This Islamic law of succession rule can therefore be said to be significantly prejudicial to woman partially depriving them of inheritance on the basis of their sex. The fact that a woman being partially disinherited from inheriting due to her being of the female gender is beyond her control and certainly deserves no punishment unto themselves.

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<sup>229</sup> s 9(5) of the Constitution states: ‘Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair’.

<sup>230</sup> De Vos and Freedman *South African Constitutional Law in Context* (2014) at p450.

<sup>231</sup> *Harksen v Lane and Others* 1998 (1) SA 300 (CC) at para 51 (hereafter *Harksen v Lane*).

<sup>232</sup> *Harksen v Lane* para 94.

<sup>233</sup> *Harksen v Lane* para 94.

Additionally, this principle has the potential of infringing yet another Constitutional right i.e. the right to dignity as codified in section 10 of the Constitution.<sup>234</sup> In the infamous case of *President of the Republic of South Africa and Another v Hugo*<sup>235</sup>, the court placed human dignity at the heart of its equality enquiry.<sup>236</sup> Human dignity is one of the three founding values of the Constitution as a whole.<sup>237</sup> It is stated that this value and Constitutional right can be deemed impaired whenever a legally relevant differentiation treats people as 'second-class citizens', 'demeans them', 'treats them as less capable for no good reason', otherwise offends 'fundamental human dignity' or where it violates an individual's self-esteem and personal integrity.<sup>238</sup> This rationale embodies the powers of Sections 1 and 2 of the Constitution respectfully. On this basis, it can be noted that these negative effects find applicability to the life of daughter C in that her inheriting half the share of her counterpart has a massive potential of violating her self-esteem and demeans her on the sole basis of her sex.

The Constitution furthermore provides that international law must be considered when interpreting the Bill of Rights.<sup>239</sup> Consequently, it can be determined by examining foreign laws, Charters, and Articles of international law that several of these instruments including S8(c) of the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA)<sup>240</sup>, Section 18(3) of African Charter on Human and Peoples' Rights (ACHPR)<sup>241</sup> and Article 16(1) of the Convention on the Elimination of All Forms

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<sup>234</sup> See s 10 of the Constitution wherein it states: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>235</sup> *President of the Republic of South Africa and Another v Hugo* (CCT 11/96) [1997] (hereafter *Hugo*).

<sup>236</sup> See para 31 of *Hugo* wherein it is stated: 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups (our emphasis).'

<sup>237</sup> See s 1(b) of the Constitution.

<sup>238</sup> *Hugo* at para 41.

<sup>239</sup> See s 233 of the Constitution where it states: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

<sup>240</sup> See s 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination (hereafter PEPUDA) where it states: 'Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including - the system of preventing women from inheriting family property'.

<sup>241</sup> See s 18(3) of the African Charter on Human and Peoples' Rights (hereafter ACHPR) where it states: 'The State shall ensure the elimination of every discrimination against women and ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'.

of Discrimination Against Women (CEDAW)<sup>242</sup> can also be construed to be breached by this Islamic law of succession principle.

Therefore, when examining the situation, it can be said that daughter C's constitutional rights to equality and dignity as well as several international laws protecting women's rights, as seen in the preceding paragraph, are hampered on the grounds that her share is diminished due to her gender and furthermore the existence of her male counterpart.

### **3.3.2. THE EXCLUSION OF THE ADOPTED CHILD FROM THE COMPULSORY SUCCESSION EQUATION**

As already discussed within 2.2.3.4 of this mini-thesis, the Islamic law omits an adopted child from the compulsory succession equation on the basis of an absence of one of the three required ties to the deceased.<sup>243</sup> The result hereof is that adopted son Z is excluded from the compulsory succession equation of person X and therefore not entitled to a fixed inheritance share of person X's estate as opposed to the daughter C and son Y.

Conversely when looking at South African Law, as discussed in 2.3.3 of this mini-thesis, South African legislation is clear on the fact that no differentiation can be made between an adopted child and a child born under the 'normal course of events' i.e., conceived by the parents of the child in the confines of a relationship or marriage for inheritance purposes. The adoptive family therefore substitutes the natural family for all purposes in law.<sup>244</sup> On this basis, in terms of the Intestate Succession Act, an adopted child automatically inherits from his/her adoptive parent and the adoptive parent automatically inherits from his/her adopted child on the basis that it was in the best interest of the child in line with section 28 of the Constitution.<sup>245</sup> Prior to the enactment of this section of the Constitution, the ideal of the best interest of the child was well-known and has been upheld by our courts from the late 19th century

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<sup>242</sup> See Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter CEDAW) where it states: 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women'.

<sup>243</sup> These ties include blood, marriage and emancipation. Refer to chapter 2.2.3.4 for further information on this.

<sup>244</sup> Louw AS 'A De Facto Adoption Doctrine for South Africa?' (2017) 38(3) *Obiter* at p458 (hereafter Louw AS (2017)).

<sup>245</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* (2017) at p46.

already.<sup>246</sup> It is a key concept in all child rights protection movements around the world.<sup>247</sup> It was first expressly incorporated in the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations (UN) Declaration on the Rights of the Child respectively.<sup>248</sup> This principle was subsequently formally recognized and incorporated into several legal systems around the world.<sup>249</sup> Our legal system however did not always recognize this viewpoint. Section 8(1) of the first South African Adoption Act of 1923 held that an adopted child did not acquire any right to inheritance.<sup>250</sup> This change conveying inheritance rights onto adopted children came into existence with the enactment of the Children's Act 38 of 2005 (hereafter the Children's Act). Due to the fact that current laws and policies of the time not effectively address and giving effect to fundamental rights, additional legislation was required to effect children's rights as contained within section 28 of Constitution (hereafter referred to as the best interest of the child principle).<sup>251</sup> Section 28(2) of the Constitution provides that 'A child's best interests are of paramount importance in every matter concerning the child'.<sup>252</sup> The incorporating of this principle in our supreme Constitution thus established a standard that was more in line with the global norm in the realm of children's rights.<sup>253</sup> The effect of this inclusion in our Constitution as mentioned had a substantial effect on our legislative framework. One of the many examples hereof can be displayed when looking at section 242(3) of the Children's Act<sup>254</sup> wherein adopted

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<sup>246</sup> Mills L 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) 131(4) *SALJ* at p847.

<sup>247</sup> Degol A and Dinku S 'Notes On the Principle "Best Interest Of The Child' (2011) 5(2) *Mizan Law Review* at p319 (hereafter Degol A and Dinku S (2011)).

<sup>248</sup> Degol A and Dinku S (2011) at p319.

<sup>249</sup> See the 1989 UN Convention of the Rights of the Child (UNCRC). Also see the 1990 African Charter on the Rights and Welfare of the Child (ACRWC), the Civil Code of the Empire of Ethiopia and the Constitution of the Republic of South Africa, 1996.

<sup>250</sup> See s 8(1) of the Adoption Act of 1923 where it states: 'devolving on the heirs ab intestato of any child of lawful wedlock of the adopting parent or become entitled to any succession (whether by will or ab intestato) jure representation is his adopting parent unless a contrary intention clearly appeared from the instrument'.

<sup>251</sup> Bekker JC 'Commentary on The Impact of The Children's Act on Selected Aspects of The Custody and Care Of African Children In South Africa' (2008) 29(3) *Obiter* at p395. Also see chapter 1 of the Children's Act 38 of 2005 where it states: 'To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; ... to make new provision for the adoption of children ...'.

<sup>252</sup> s 28(2) of the Constitution.

<sup>253</sup> Couzens M 'The best interests of the child and the Constitutional Court: A critical appraisal' (2021) available at [https://constitutionalcourtreview.co.za/wp-content/uploads/2021/02/CCR\\_9\\_2019\\_0014.pdf](https://constitutionalcourtreview.co.za/wp-content/uploads/2021/02/CCR_9_2019_0014.pdf) (accessed 30 October 2022).

<sup>254</sup> s 242(3): An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.

children are categorised as on the same footing as biological children – due to this being considered in the child’s best interest. This promulgation further cemented the complete severance of all ties between the adopted child and his or her natural family due to logistical reasons brought about in South Africa by the enactment of section 20(2) of the Child Care Act of 1983.<sup>255</sup>

Section 9(3) of the Constitution,<sup>256</sup> as explained in 3.2.1 above is contravened when the state unfairly discriminates against a person. This applies to a scenario wherein a person is treated differently based on one of the grounds listed thereunder, or on a ground that a court has found to be sufficiently similar to one or more of the listed grounds. Moreover, section 9(5)<sup>257</sup> creates a presumption that such discrimination is unfair and places the onus on the party against whom the complaint of unfair discrimination has been made, to prove that the discrimination was not unfair.<sup>258</sup> Although birth status is not a listed ground under section 9(3) as found in the 2009 case *Flynn v Farr*<sup>259</sup>, this differentiation needs to be investigated to uncover whether it has the potential of unreasonably impairing the human dignity right of the recipient.<sup>260</sup> This inquiry is further extended by the words “one or more grounds including” as stated in section 9(3) of the Constitution, which shows that even though differentiation may not be on a listed ground, it does not mean that its legal or limited to the categories placed in section 9(3). Additionally, section 9(2) requires that this right includes the affording of full and equal enjoyment of all rights and freedoms by all citizens of our country.<sup>261</sup>

On the basis of the aforementioned considerations, the omission of son Z from the compulsory succession equation in Islamic law can therefore be said to be in contravention of section 9, section 10, section 28 (all of which found within the BOR) and the Children’s Act. The result of excluding son Z has a major potential of impairing

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<sup>255</sup> Louw AS (2017) at p467.

<sup>256</sup> See s 9(3) Constitution where it states: ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

<sup>257</sup> See s 9(5) of the Constitution where it states: ‘Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair’.

<sup>258</sup> De Vos and Freedman *South African Constitutional Law in Context* (2014) at p450.

<sup>259</sup> *Flynn v Farr* 2009 (1) SA 584 (C) at paras 22-24 (hereafter *Flynn v Farr*).

<sup>260</sup> *Flynn v Farr* at para 24.

<sup>261</sup> See s 9(2) of the Constitution.



his right to human dignity as contained within section 10.<sup>262</sup> This therefore causes that section 9(3) is also contravened due to the explanation provided in the preceding paragraph. Furthermore, this exclusion is not in line with the internationally acclaimed and constitutionalised best interest of the child principle, in that it hampers his right to inheritance from his adopted parents, specifically his father person X in this scenario. It additionally is directly in contravention of the aforementioned section of the Children's Act affording inheritance rights to adopted children.

### **3.3.3. THE DISQUALIFICATION OF THE CHILD BEING BORN OUT OF WEDLOCK FROM THE COMPULSORY SUCCESSION EQUATION**

As demonstrated within 2.2.3.3 of this mini-thesis, Islamic Law further excludes a child born out of wedlock (a child born to a nonmarital Islamic union or also referred to as a *walad al-zina*) from the compulsory inheritance equation.<sup>263</sup> Despite not always viewing this feature in this way, South African law has advanced to the point where contemporary intestacy legislation are typically more supportive of nonmarital offspring than intestacy statutes from the past. This is depicted in 1(2) of the Intestate Succession Act<sup>264</sup> wherein a child born out of wedlock is given equal treatment to a child born in wedlock. The rationale for this promulgation is explained in the following paragraph.

For centuries, children born out of wedlock have been subjected to many forms of discrimination. One such example is succession, which forbids a child born out of wedlock from inheriting directly from or via its father. This discrimination had adverse implications and subsequently violated a constellation on such children's rights as will be shown in this subsection. In general, society justified this cruel treatment of children born out of wedlock by arguing that it preserved traditional family values by forbidding men and women from having children separately.<sup>265</sup> Many scholars have argued for decades that children born out of wedlock should have the same rights, respect and

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<sup>262</sup> See 3.2.1 of this mini-thesis for a further explanation on what this right entails.

<sup>263</sup> See Sunnah.com 'Shares of Inheritance - Section 2' available at <https://sunnah.com/mishkat:3054> (accessed 02 February 2023) where it states: 'If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may anyone inherit from him'.

<sup>264</sup> See s 1(2) of the Intestate Succession Act where it states: '[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act'.

<sup>265</sup> Jonas O and Gunda P 'Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor' (2015) 48(1) *The Comparative and International Law Journal of Southern Africa* at p90 (hereafter Jonas O and Gunda P (2015)).

consideration as those who were born to a marital union.<sup>266</sup> Several legal systems have since realised this and amended laws to benefit this realisation. In Botswana, the customary law position of excluding children born out of wedlock from inheriting was overturned as recent as 2014 in the case of *Baone Kealeboga and Anor v Tidimalo Mercy Kehumile Anor and Another*<sup>267</sup>, on the basis that the principle was outdated and thereby not in accordance with modern social democratic realities.<sup>268</sup> In the American context, a very similar position to Islamic law was followed as deliberated on within 2.2.3.3 of this mini-thesis, whereby a child born out of wedlock was automatically deemed exclusively his or her mother's legal child to the exclusion of the father.<sup>269</sup> The Constitutional court in Indonesia also progressed on their outlook of this principle ruling that that it is not fair and proper that children born out of wedlock have a legal relationship with only their mothers, yet men are free from financial or custodial responsibilities for their biological children after a sexual relationship has led to pregnancy.<sup>270</sup> In our South African jurisprudential context, illegitimate children could not inherit from their father, as they were deemed to be related to the mother, but not to the father under the principle "*een wijf aakt geen bastaard*".<sup>271</sup> Further, the children born out of wedlock were categorised and labelled "illegitimate" or "bastard."<sup>272</sup> The Intestate Succession Act has since done away with all limitations of the illegitimate child to inherit.<sup>273</sup>

In assessing this situation on the basis of the aforementioned jurisprudential outlook, it could be correctly argued that, among many other local and international legislative reforms, the exclusion of a child born out of wedlock from intestate inheritance short-circuits their rights to equality<sup>274</sup>, non-discrimination, children's rights<sup>275</sup>, and dignity<sup>276</sup>.

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<sup>266</sup> Jonas O and Gunda P (2015) at p89.

<sup>267</sup> Case no CACGB-045-13.

<sup>268</sup> Jonas O and Gunda P (2015) at p90.

<sup>269</sup> Davidson CM 'Mother's Baby, Father's Maybe! - Intestate Succession: When Should a Child Born Out of Wedlock Have A Right To Inherit From Or Through His Or Her Biological Father?' (2011) 22(2) *Columbia Journal of Gender and Law* at p534 (hereafter Davidson CM (2011)).

<sup>270</sup> Nurlaelawati E and Van Huis SC 'The status of children born out of wedlock and adopted children in Indonesia: interactions between Islamic, adat, and human rights norms' (2019) 34(3) *Journal of Law and Religion* at p357. (Hereafter Nurlaelawati E and Van Huis SC (2019))

<sup>271</sup> News 24 'Estate planning is key' available at <https://www.news24.com/news24/community-newspaper/express-news/estate-planning-is-key-20200818> (accessed 01 November 2022).

<sup>272</sup> Davidson CM (2011) at p538.

<sup>273</sup> See s 1(2) of the Intestate Succession Act where it states: '[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act.'

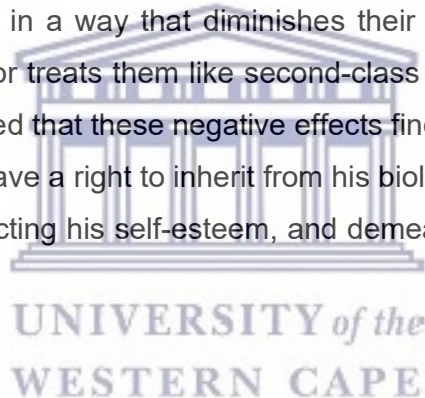
<sup>274</sup> See 3.2.1 of this mini-thesis for a further explanation on what this right entails.

<sup>275</sup> See 3.2.2 of this mini-thesis for a further explanation on what this right entails.

<sup>276</sup> See 3.2.1 of this mini-thesis for a further explanation on what this right entails.

On the basis of equality, birth status is a listed ground in s9(3), as was previously discussed in 3.2.2 above. This differentiation of disqualifying a child born out of wedlock from intestate inheritance due to their birth status is therefore deemed automatically unfair<sup>277</sup> with the onus on the individual practicing it to prove it is fair.<sup>278</sup>

This exclusionary principle can additionally be said to breach the best interest of the child principle as depicted in section 28 of the Constitution and deliberated on in 3.2.2 above. The principle of the best interests of the child as purported by our Constitution, backed by several international standards dictates that a child's best interests are of paramount importance in every matter concerning the child.<sup>279</sup> Society having condemned the child in the realm of inheritance for the sins of his or her parents is surely not in their best interest.<sup>280</sup> The effect of this exclusion furthermore has the ability to infringe on the child's right to dignity as contained within the BOR.<sup>281</sup> Human dignity plays a central part in all discrimination enquiries<sup>282</sup> being one of the three founding values of the Constitution.<sup>283</sup> Anyone's right to human dignity may indeed be violated if they are treated in a way that diminishes their sense of self-worth, their sense of moral character, or treats them like second-class citizens without cause.<sup>284</sup> On this basis, it can be noted that these negative effects find applicability to the life of son Z in that he does not have a right to inherit from his biological fathers estate, thus having the potential of affecting his self-esteem, and demeans him on the sole basis of his birth status.



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<sup>277</sup> See s 9(5) of the Constitution where it states: 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.

<sup>278</sup> De Vos and Freedman *South African Constitutional Law in Context* (2014) at p450.

<sup>279</sup> s 28(2) of the Constitution.

<sup>280</sup> Davidson CM (2011) at p538.

<sup>281</sup> See s 10 of the Constitution where it states: 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

<sup>282</sup> See para 31 of *Hugo* where it is stated: 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups (our emphasis)'.

<sup>283</sup> See s 1(b) of the Constitution.

<sup>284</sup> *Hugo* case at para 41.

### 3.4. AN ANALYSIS OF HOW THE OUR COURTS OVERRULED/AMENDED DISCRIMINATORY SUCCESSION PRINCIPLES

#### 3.4.1. MALE PRIMOGENITURE

The customary principle of male primogeniture was brought into the spotlight in the case of *Bhe and Others v Khayelitsha Magistrate and Others*. The main challenge made in this case was by two minor daughters wherein they contended that the customary law principle of male primogeniture unfairly discriminated against them as it prevented them from inheriting from the estate of their late father.<sup>285</sup> A similar occurrence happened in the *Shibbi v Sitole and Others*<sup>286</sup> case wherein a female was prevented from inheriting from the estate of her brother on the basis of her gender.<sup>287</sup> In providing some context to this rule in brief, it was a customary law principle that had been in application for centuries before, which stated that only legitimate male heirs could inherit from a deceased to the exclusion of females.<sup>288</sup> The South African Human Rights Commission and the Women's Legal Trust brought forward a class action on behalf of all women affected and to be affected by this customary principle.<sup>289</sup> The Constitutional court held that this principle was thus unconstitutional in that it contravened section 9(3) of the Constitution along with section 10 of the Constitution in that it implied that woman and illegitimate children weren't fit and or competent to own property.<sup>290</sup> The effect of this rule was that it placed woman in a lower bracket thereby undermining them on the basis of their sex and gender.<sup>291</sup> The Constitutional Court further remarked that this rule discriminated against extramarital children as well.<sup>292</sup> Many authors remark that this discrimination is still ongoing through the foundation of various religions and cultures i.e. Christianity considering a child born out of wedlock as a lesser status,<sup>293</sup> Customary Law in Botswana still denying children

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<sup>285</sup> *Bhe* at para 140.

<sup>286</sup> *Shibbi v Sitole and Others* (CCT 50/03, CCT 69/03, CCT 49/03) [2004].

<sup>287</sup> *Bhe* at para 140.

<sup>288</sup> *Bhe* at para 77.

<sup>289</sup> *Bhe* at para 7

<sup>290</sup> *Bhe* at para 92

<sup>291</sup> *Bhe* at para 50

<sup>292</sup> Jamneck, Ratenbach, Palekar et al *The Law of Succession in South Africa* 3ed (2017) at p47.

<sup>293</sup> Meeusen J 'Judicial Disapproval of Discrimination against Illegitimate Children: A comparative study of developments in Europe and the United States' (1995) 43 *Oxford University Press* at p120.

born out of wedlock the right to inherit from their biological fathers estates<sup>294</sup> in addition to many other religions and cultures.

### 3.4.2. EXTENDING OF THE TERM SPOUSE

In the *Gory v Kolver NO and Others*<sup>295</sup> the Constitutional Court ruled that the Intestate Succession Act was to include 'same sex life partners' next to the words spouse.<sup>296</sup> During this time, there was an issue that arose from same sex partners who were living together prior to the enactment of the Civil Union Act 17 of 2006, and upon the death of one of the partners, the surviving partner was unable to inherit from their partners intestate estate on their death.<sup>297</sup> The Constitutional Court in presiding over this matter found that this was unconstitutional in that it infringed on section 9(equality) and 10(dignity) of the Constitution.<sup>298</sup> The parties involved in this case, Mr Henry Harrison Brooks (the deceased) and Mark Gory (the applicant) were, at the time of Henry's death, allegedly partners in a permanent, same-sex life partnership.<sup>299</sup> The High Court upon investigating this allegation of them being in a life partnership found that the deceased and the applicant had indeed been involved in a permanent same-sex life partnership and had assumed reciprocal duties of support.<sup>300</sup> It furthermore found that the exclusion of same sex life partners from the provisions of section 1(1) of the Intestate Succession Act to be unconstitutional and ordered the reading of certain words into the section.<sup>301</sup> The Constitutional Court on reviewing this declaration of unconstitutionality upheld the High Court's finding regarding the unconstitutionality of section 1(1) and the reading in after the word "spouse", wherever it appears in that section, of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".<sup>302</sup>

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<sup>294</sup> Jonas O and Gunda P (2015) at p89.

<sup>295</sup> *Gory v Kolver NO and Others* (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) (hereafter *Gory v Kolver NO and Others*).

<sup>296</sup> *Gory v Kolver NO and Others* at para 66.

<sup>297</sup> *Gory v Kolver NO and Others* at para 1.

<sup>298</sup> *Gory v Kolver NO and Others* at para 19.

<sup>299</sup> *Gory v Kolver NO and Others* at para 2.

<sup>300</sup> *Gory v Kolver NO and Others* at para 2.

<sup>301</sup> *Gory v Kolver NO and Others* at para 43.

<sup>302</sup> *Gory v Kolver NO and Others* at para 43.

In the *Govender v Ragavayah NO and Others*<sup>303</sup> case, the court utilized the *Daniels v Campbell, Hassam v Jacobs, Gory v Kolver* cases as basis and ruled that not recognising a polygynous spouse in a Hindu marriage amounts to unjustifiable unfair discrimination.<sup>304</sup> The applicant brought an order to court to declare that the word spouse in the Intestate Succession Act includes a surviving partner to a monogamous Hindu marriage.<sup>305</sup> The couple had entered into a Hindu rites marriage in 2004, with all the customs and traditions but it was not registered in the Marriage Act 25 of 1961 (hereafter the Marriage Act).<sup>306</sup> Upon the husband dying without a will, the applicant being the wife of the deceased asked the court to be put in the category of spouse and surviving spouse so that she can have a claim to the intestate estate. The applicant relied on the case of *Daniels v Campbell* in that she finds herself in the same issues as this case was decided on.<sup>307</sup> The applicant also argued that under the Constitution, the legal recognition of a marriage is not a prerequisite in order to be declared a spouse under the Intestate Succession Act.<sup>308</sup> The court followed the age old approach in *Harksen v Lane* and argued that by not extending the word spouse to include those in monogamous Muslim marriages would be discrimination on religious and cultural grounds.<sup>309</sup> The case took a natural course, as cases have in these situations and the court found there was no reason not to grant the applicant the relief that she was seeking in her notice of motion, accordingly the Act was extended to include those in a monogamous Hindu marriage.<sup>310</sup>

In the case of *Daniels v Campbell and Others*, the court extended the meaning of the term 'spouse' in the Intestate Succession Act as well as the meaning of the word 'survivor' in the Maintenance of Surviving Spouses Act to the parties involved in a monogamous Muslim Marriage.<sup>311</sup> The facts of this case was already deliberated on within 2.4.1 of this mini thesis, and won't be repeated in this chapter due to a word count restriction. In essence, the presiding officers in this case ruled that there was a

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<sup>303</sup> *Govender v Ragavayah NO and Others* (6715/08) [2008] ZAKZHC 86; 2009 (3) SA 178 (D); [2009] 1 All SA 371 (D) (hereafter *Govender v Ragavayah NO and Others*).

<sup>304</sup> *Govender v Ragavayah NO and Others* at para 44.

<sup>305</sup> *Govender v Ragavayah NO and Others* at para 44.

<sup>306</sup> *Govender v Ragavayah NO and Others* at para 12.

<sup>307</sup> *Govender v Ragavayah NO and Others* at para 17.

<sup>308</sup> *Govender v Ragavayah NO and Others* at para 28.

<sup>309</sup> *Govender v Ragavayah NO and Others* at para 32.

<sup>310</sup> *Govender v Ragavayah NO and Others* at para 44.

<sup>311</sup> *Daniels v Campbell* at para 85.

violation of religious rights and cultural beliefs<sup>312</sup> and therefore ruled that the words be read in to include persons married not in civil marriages to be more inclusive of Islamic marriages for inheritance purposes.<sup>313</sup>

In the *Hassam v Jacobs NO and Others* case, the court further extended the Daniels cases ruling to include a situation whereby a polygynous wife in a Muslim marriage can claim an intestate share from her deceased husbands estate.<sup>314</sup> The facts of this case was also already deliberated on within 2.4.2 of this mini-thesis, and won't be repeated in this chapter due to a word count restriction. In essence The Constitutional Court confirmed the order of the High Court and included polygamous spouses in the definition of spouse.<sup>315</sup> The High Court thus declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir.<sup>316</sup> The High Court further declared that the word "survivor" in the Maintenance of Surviving Spouses Act should be read to include surviving partners of polygynous Muslim marriages.<sup>317</sup> These ruling were made on the basis that this exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.<sup>318</sup>

The abovementioned 4 cases were a brief illustration of how the Constitutional Court at the apex developed succession laws contained within the Intestate Succession Act and Maintenance of Surviving Spouses Act to be in extending of the term 'spouse' to be in line with the values of principles of the Constitution.

### **3.4.3. LIMITATION OF THE FREEDOM OF TESTATION PRINCIPLE**

The *King N.O. and Others v De Jager and Others*<sup>319</sup> case represents the latest Constitutional Court ruling affecting succession laws as we know it. The Constitutional court herein made noteworthy findings concerning the validity of an out-and-out disinheritance clause contained in a persons will (a certain Mr Johannes Cornelius De

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<sup>312</sup> *Daniels v Campbell* at para 11.

<sup>313</sup> *Daniels v Campbell* at para 66.

<sup>314</sup> See Al-Quraan chapter 4 verse 12.

<sup>315</sup> *Hassam v Jacobs* at para 48.

<sup>316</sup> *Hassam v Jacobs* at para 57.

<sup>317</sup> *Hassam v Jacobs* at para 48.

<sup>318</sup> *Hassam v Jacobs* at para 27.

<sup>319</sup> *King N.O. and Others v De Jager and Others* (CCT 315/18) [2021] (hereafter *De Jager*).

Jager) precluding female descendants inheriting certain property from his estate.<sup>320</sup> The testator penned in a provision (hereafter referred to as clause 7) which gave off certain farms to only male descendants up until the third generation of his lineage.<sup>321</sup> Many years after the demise of this testator and the successful and unchallenged application of this clause, a male descendant, Mr Kalvyn De Jager, father to no male descendants passed on bequeathing the land inherited from his great grandfather to his five daughters.<sup>322</sup> The courts were thus tasked with the decision of whether this clause 7 was still enforceable in our current democratic country in which the Constitution and its underlying principles prohibiting unfair discrimination reigned supreme.<sup>323</sup> The applicants in this case was subsequently disappointed on two occasions both in the High Court and on Appeal to the Supreme Court of Appeal wherein both courts concluded that their allegation was not unconstitutional as the provision was not public in character and only limited to their family.<sup>324</sup> Finally on appeal to the Constitutional Court, did they find the relief they sought. On the 19 February 2021, the Constitutional court ruled that this clause was invalid as it indeed discriminated unfairly against the 2<sup>nd</sup> till the 6<sup>th</sup> applicants, of whom all were female. The majority judgement written by Jafta J held that it was not necessary to develop the common law in this way, as unlawful provisions in wills have always been invalid and unenforceable.<sup>325</sup> In coming to this conclusion, Jafta J utilized several cases as the basis for this including the *Minister of Education and Another v Syfrets Ltd NO and Another*<sup>326</sup> and the *BoE Trust Ltd NO and Another* in coming to the conclusion that the *boni mores* of society are indeed capsulated in our Bill of Rights.<sup>327</sup> What is important to note herein is that the court stated that although this clause 7 was over ruled as unconstitutional, this does not mean that testators hands are tied and they are required to bequeath things to all their family members. The principle of freedom of testation still allows any testator, male or female, the ability to inherit and disinherit whoever they wish. The only differentiation that now exists is that should a provision contained in a will discriminate against someone purely on the basis of one of the listed grounds

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<sup>320</sup> *De Jager* at para 1.

<sup>321</sup> *De Jager* at para 12.

<sup>322</sup> *De Jager* at para 113.

<sup>323</sup> *De Jager* at para 123-128.

<sup>324</sup> *De Jager* at para 101 - 105.

<sup>325</sup> *De Jager* at para 164.

<sup>326</sup> *Minister of Education and Another v Syfrets Ltd NO and Another* (2544/04) [2006].

<sup>327</sup> *De Jager* at para 72.



mentioned in section 9 of the Constitution, only then will the court have power to intercede and deem that provision/s as unlawful and invalid.<sup>328</sup> This was indeed the effect of clause 7 as contained in the will of Mr Johannes Cornelius De Jager and thus the ruling was effected. Could this judgement influence the current state of affairs of the application of the Islamic Law of succession in the South African context? Chapter 4 of this mini-thesis will delve into this question.

#### **3.4.4. DEFINING THE WORD 'PARENT' IN A CONSTITUTIONAL MANNER**

In the 2020 *Wilsnach N.O. v M and Others*<sup>329</sup> case, the Gauteng High Court was tasked with interpreting the meaning of the word 'parent' as found within section 1(1)(d) of the Intestate Succession Act.<sup>330</sup> The matter concerned the large estate of M, a minor male child who was born with and succumbed to cerebral palsy caused by medical negligence during the birthing process.<sup>331</sup> The large estate of M was obtained through an out of court settlement with the MEC for Health amounting to R21 Million.<sup>332</sup> The mother and grandmother of M contended that due to them being the sole carers for the now deceased M, to the exclusion of the father who had last seen the child four and a half years ago, that they be declared the parents of the child for intestate succession purposes.<sup>333</sup> At the time of M's death a mere 5 years after his birth, the value of his estate stood as a staggering R15 Million.<sup>334</sup> In determining what the meaning of the word parent was, due to it not being defined within the Intestate Succession Act<sup>335</sup>, the court remarked concerning the facts of the scenario, that there are many paths to becoming a parent just as there are many forms of parenthood.<sup>336</sup> The court thus ruled that due to the absence of the father and lack of responsibilities undertaken during the short life of M, the biological father was not to be defined as a parent to child M and further ruled that the mother and grandmother could be considered to be the 'parents' of M for intestate succession purposes.<sup>337</sup> This ruling was made in terms of sections 28 of the Constitution (wherein the child's best interest

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<sup>328</sup> *De Jager* at para 244.

<sup>329</sup> *Wilsnach N.O. v M and Others* [2020] ZAGPPHC 756; [2021] 1 All SA 600 (GP) (Hereafter *Wilsnach*).

<sup>330</sup> *Wilsnach* at para 1.

<sup>331</sup> *Wilsnach* at para 10-11.

<sup>332</sup> *Wilsnach* at para 17.

<sup>333</sup> *Wilsnach* at para 12-14.

<sup>334</sup> *Wilsnach* at para 19.

<sup>335</sup> *Wilsnach* at para 48-49.

<sup>336</sup> *Wilsnach* at para 41.

<sup>337</sup> *Wilsnach* at para 68, 75-76.

principle is contained), in addition to section 18 (which provides for the acquisition and loss of parental rights) and 21 of the Childrens Act (containing the responsibilities and rights of unmarried fathers).<sup>338</sup> This entitled the mother and grandmother to inherit the R15 million estate of child M in equal portions as per the Intestate Succession Acts distribution stipulated in section 1(1)(d).<sup>339</sup> The interesting finding in this judgement is that the court overlooked biological link and instead looked into what responsibility was undertaken in terms of M in determining the central legal question of parenthood. Although this case was adjudicated on primarily on the basis of South African law, it could potentially have a tremendous impact on the application of an Islamic will in the South African context as well. A South African Muslim, as is further expanded on in chapter 4.2 of this mini-thesis, bequeaths his assets in terms of an Islamic will via the utilisation of the South African law of testate succession to apply the Islamic law of intestate succession. The author of this mini-thesis therefore contends that the finding in this case allowing the lawful disqualification of an absent father from the inheritance equation and deeming it as fair discrimination, could be interpreted in the same line as disqualifying a child born out of wedlock or an adopted child from the compulsory succession equation found in the Islamic Law of Succession.

### **3.4.5. RECOGNITION OF MUSLIM MARRIAGES**

Although the following case does not have a direct impact on succession laws in the South African context, it would be unjust to omit its mention in this section of the paper due to its relevancy herein. This ruling by the Constitutional Court, although not expressly affecting the dynamic of how succession laws impact Muslim's, displayed how far the Constitution's reach and power truly is by giving true effect to its principles. In the recent *Women's Legal Centre Trust v President of the Republic of South Africa and Others*<sup>340</sup>, the Constitutional Court confirmed the ruling of the Supreme Court of Appeals ruling of constitutional invalidity of the Marriage Act and the Divorce Act 70 of 1979 (hereafter the Divorce Act), as they fail to recognise marriages concluded in accordance with Sharee'ah law as being valid for purposes of the regulation of the consequences of such recognition.<sup>341</sup> The Constitutional court in a unanimous

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<sup>338</sup> *Wilsnach* at para 46-51

<sup>339</sup> *Wilsnach* at para 93

<sup>340</sup> *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 (28 June 2022) (hereafter *Woman's Legal Centre*).

<sup>341</sup> *Woman's Legal Centre* at para 1.

judgment handed down and penned by justice Tlaetsi stated that this non recognition of Muslim marriages were inconsistent with sections 9(equality), 10(dignity), 28(children's rights) and 34(the right of access to courts) of the Constitution in several ways. One of these ways include that this non recognition amounts to unfair discrimination as it deprives the Muslim woman and children to these marriages of the remedies and safeguards available to other woman who enter marriages in accordance with the Marriage Act.<sup>342</sup> The courts in South Africa were and arguably still are unable to compel Muslim males in particular to endow their woman folk their God given rights in marriage and divorce.<sup>343</sup> These enforcement mechanisms are however available to Muslim women in Muslim countries. On this basis, it is evident, as was found in the *Women's Legal Centre* case, that there is a gap in a law in this regard, which needs to be remedied in a manner that will result in both systems of law being given its rightful recognition.

These 7 cases are but a few examples exemplifying how our courts have overruled long standing practices and principles in the realm of succession laws and evolved the law in accordance with the tenants of the Constitution.

### **3.5. CONCLUSION**

This chapter navigated a brief understanding of our Constitution in our day and age wherein all actions, principles and legislation are required to abide by its high standards. These standards can be briefly summarised as those contained within the founding values, the BOR and legislation as empowered by this supreme Constitution. It was further shown that should any individual or organ of state fail to abide by this set standard, they will be answerable in a court of law. This chapter further demonstrated that the three facets as highlighted within the Islamic law of compulsory succession in the scenario of person X within this mini-thesis can be proven to be in violation of several Constitutional principles including the highly enshrined Constitutional rights to Equality, Dignity and Children's rights as contained within chapter 28 of the Constitution. Further to these Constitutional breaches, it was further presented that several Acts and International Conventions and Treaties can further be construed to be breached by these principles. These Acts, Treaties and Conventions

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<sup>342</sup> *Woman's Legal Centre* at para 53.

<sup>343</sup> These rights will be expanded on within 4.4.1 of this mini-thesis.

include but are not limited to the Children's Act, PEPUDA, CEDAW and ACHPR. A case law analysis was thereafter carried out to demonstrate how certain areas of Succession laws have been held to be in contention within our courts by looking at matters involving our courts striking down male primogeniture rules as found within customary law, the extending of the meaning of the word spouse for succession purposes, the latest landmark Constitutional court case involving the limitation of the principles of freedom of testation. This chapter also touched on the very recent Muslim marriages ruling in demonstrating the power of our courts in matters wherein long-standing principles and practices are overruled and evolved to be in line with the Constitution. Following on from these writings, the central leading question of this chapter thereafter asks, albeit all the unconstitutional provisions contained within the Islamic law of compulsory succession, as shown within this chapter, does this system still remain unimpeded?



## CHAPTER 4:

### WILL THE ISLAMIC WILL OF PERSON X PASS A CONSTITUTIONAL MUSTER?

#### 4.1. INTRODUCTION

After already finding that the Islamic law of compulsory succession indeed contains several unconstitutional rules, one tends to wonder how in our constitutional day and age wherein the Constitution reigns supreme, is it still allowed? This chapter discusses how the Islamic Law of compulsory succession has passed and whether it will continue to pass a constitutional muster. An interesting avenue will be briefly explored after the aforementioned finding wherein room for consideration of this finding exists due to the latest *De Jager* case finding. Following on from this, this chapter will expand on paths by which the Islamic Law of Succession, as a whole, provides remedies to its own perceived 'flaws'. The concluding sections of this chapter will further develop by providing a different perspective on the 'problematic aspects' in deciphering whether rectifications are still needed, thus once again linking this to the scenario of 'person X'.

#### 4.2. HOW THESE PRIMA FACIE UNCONSTITUTIONAL PRACTICES IN PERSON X'S ISLAMIC WILL REMAIN UNIMPEDED IN OUR CONSTITUTIONAL AGE

In the past, the South African courts have only had to deal with minor matters pertaining to the application of a certain legal system's application to succession laws. The 2018 Constitutional Court case of *Moosa NO v. Minister of Justice*, wherein the Court determined that the deceased's will was to be carried out in accordance with Islamic mode of distribution, including all spouses to inherit from the deceased, as opposed to the monogamous distribution of assets as per the Wills Act, provides an example of this "minor issue."<sup>344</sup> Other cases that have gone to our courts have been discussed in chapter 2 of this mini-thesis.<sup>345</sup> As shown within chapter 3 of this mini-thesis, there are several constitutional grounds that can be interpreted to be contravened by the Islamic law of compulsory succession, yet South African courts have not yet heard any cases involving the constitutionality of the Islamic law of

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<sup>344</sup> *Moosa v Minister of Justice* at para 39.

<sup>345</sup> See 2.5 of this mini thesis for further reading on these cases.

compulsory succession as a whole.<sup>346</sup> The main goal of this chapter is to explain why the discovery described above is the way that it is.

In order to ensure that a Muslim's estate is allocated in accordance with Islamic law, a Muslim testator or testatrix exercises their Common Law right to freedom of testation.<sup>347</sup> This principle is defined as the "[t]he right of an individual to dispose of his or her property on death as he or she pleases".<sup>348</sup> So albeit having opted to utilize this instrument, one cannot help to ponder how this Common Law right overpowers the various Constitutional rights infringed by the provisions contained within the Islamic law of compulsory succession, specifically the principles highlighted in chapter 3 of this mini-thesis. This observation is supported so even more so when considering section 8(3)(a) of the Constitution wherein it states that a court must develop the Common Law should it not give effect to a right found in the Bill of Rights.<sup>349</sup>

The answer to this inquiry lies in the utilization of this Common Law right in addition to other Constitutional rights to overpower the proven unfair discrimination and accompanying rights infringed by the Islamic law of compulsory successions principles. The limitation clause stipulates that a Constitutionally recognised right may only be limited should a set list of requirements be met.<sup>350</sup> Therefore, instead of using a narrow approach to assessing whether an amendment or limitation of a common law right is required, it is necessary to consider the Constitution as a whole in establishing if these requirements are met.

South Africa is a country of many cultures and many religions – indeed, a country of pluralities.<sup>351</sup> It is stated that the Muslim population in South Africa constitutes 3% of

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<sup>346</sup> Abduroaf M 'A Constitutional Analysis of an Islamic Will within the South African Context' (2019) *De Jure Law Journal* at p262 (hereafter Abduroaf M (2019)).

<sup>347</sup> Abduroaf M (2019) at p258.

<sup>348</sup> Corbett, Hofmeyr and Kahn *the Law of Succession in South Africa* 2 ed (2001) at p39.

<sup>349</sup> s 8(3)(a) of the Constitution.

<sup>350</sup> See s 36 of the Constitution where it states:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

(2). Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights'.

<sup>351</sup> Coertzen P 'Constitution, Charter and Religions in South Africa Pieter' (2014) 14 *AHRLJ* at p127.

the total population of 60 million people, thus representing just short of two million citizens.<sup>352</sup> To affect these Muslim citizens' rights, the Constitution guarantees freedom of religion for all religious persons and religions in the country.<sup>353</sup> This fundamental freedom so afforded to Muslim's can further be decomposed into the right of a Muslim person to distribute their property in accordance with their wants, in conformity with the Islamic law of compulsory succession. Section 25 of the Constitution (the Property clause) will be the next point of this comprehensive constitutional analysis. The right to property is enshrined within section 25 of the Constitution. This Property clause grants every citizen the right to own and dispose of their property according to their desires.<sup>354</sup> In the *BOE Trust* case, the Supreme Court of Appeal ruled that this property clause right further secures a person's right to testate freely, and that this right is additionally connected to a an additional constitutionally recognized right of human dignity<sup>355</sup> as found within section 10 of the Constitution.<sup>356</sup> Therefore, the right to human dignity is upheld because each person has the freedom to choose who they want to inherit from and disinherit. The final right appropriate to the granting of an author of a will the ability to inherit and disinherit who he wishes can be said to be the right to freedom as contained within many sections of the Constitution. The specific section that will be highlighted within these sections due to its applicability is the one found within section 9(2) of the Constitution whereby all citizens are granted the general right to fully realise their right to freedom.<sup>357</sup> The following section will now determine whether there is a legal basis for these personal rights (Section 25, Section 10, and the common law right to freedom of testation) superseding and empowering the rights of others infringed as explained within chapter 3 of this mini-thesis.

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<sup>352</sup> Sungay MH and Booley A 'Case in Point South Africa: A Brief Overview Of Whether Islam Is Deemed Less Tolerant Of Women's Rights Than Other Faiths And Cultures?' (2023) 1(2) at p60.

<sup>353</sup> See s 15 (1) of the Constitution where it states: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion'.

<sup>354</sup> See s 25(1) of the Constitution where it states: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

<sup>355</sup> See s 10 of the Constitution where it states: Everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>356</sup> *BoE Trust* case at para 26. Also see 3.1 and 3.2 of this mini-thesis for a further discussion on what the right to dignity further entails and its importance.

<sup>357</sup> See s 9(2) of the Constitution where it states: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

The consequences of altering the right of freedom of testation in the Islamic context would essentially result in the removing of a Muslim's right to inherit and disinherit who they wish and grant this right to another (the individuals whose rights are infringed by the Islamic law of compulsory successions principles). This cannot be said to constitute a reasonable and justifiable right as required by section 36 of the Constitution. When looking at a Muslim's right to elect who they wish to inherit and disinherit, it essentially comes down to the testator or testatrix<sup>358</sup> utilizing their constitutionally mandated rights as explained in the above. Additionally, these constitutionally mandated rights i.e., freedom and human dignity, are two of the three fundamental human right by which all BOR principles are based upon.<sup>359</sup> The court in the *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* case<sup>360</sup> stated that the court has a limitation placed on itself to not interfere with private lives in their rulings.<sup>361</sup> This ruling may however due to judicial developments be repealed in favour of an opposing approach. This aspect will be unpacked within section 4.2. of this chapter.

On this basis, it can be ascertained that should our judiciary be allowed to alter the will of a Muslim individual who opts to follow the Islamic law of compulsory succession (in this case person X), it would essentially be deeming the several rights contained within the BOR (mentioned above) as meaningless.<sup>362</sup> The striking down of person X's wishes would in essence be using one constitutional right to overpower another constitutional right, and thus render the principle of freedom of testation and its empowering Constitutional principles and sections insignificant.<sup>363</sup> This happening has the potential of going down a slippery slope as questions such as 'what weight would these constitutional sections have?' and 'where do the courts draw the line in their

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<sup>358</sup> See 1.1 of this mini-thesis for a justification as to why only the male and female gender is being referenced to.

<sup>359</sup> See s 7 of the Constitution where it states:

'1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'.

<sup>360</sup> *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 2 SA 1 (CC) (hereafter *De Lange*).

<sup>361</sup> See para 79 of the *De Lange* case where it states: 'It is one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preference'.

<sup>362</sup> Abduroaf M (2019) at p265.

<sup>363</sup> Sungay MH (2022) at p64.



endeavours?', among many others could very easily come about.<sup>364</sup> So though the beneficiaries could very rightly argue that their rights to equality, dignity and many other rights as explained within chapter 3 of this mini-thesis, have been breached in this scenario by the Islamic law of compulsory succession, one needs to realise that this 'unfair treatment' is justified. The reason for this is due to differentiation being a necessity for growth and development (within confines), particularly in a country such as South Africa.<sup>365</sup> It is a fact that it would be impossible to govern a modern, diverse country like South Africa efficiently, and to harmonise the interests of all its people for the common good without allowing for differentiation.<sup>366</sup> The author of this mini-thesis further contends that although our judiciary has a general discretion to decide over which cases they adjudicate, the aforementioned argument in addition to the Doctrine of Religious Entanglements<sup>367</sup> application hinders judicial discretion in this regard.

#### **4.2.1. POSSIBLE EFFECTS OF THE LATEST *DE JAGER* CASE RULING**

This case was discussed in depth within chapter 3 of this mini-thesis.<sup>368</sup> On this basis, no discussion regarding the facts will be explained in this section, rather only its applicability to the pivotal inquiry at hand. As stated within 3.3.3. of this mini-thesis, both the High Court and Supreme Court of Appeal ruled on this matter stating that the provision was not public in character and thus, the courts could not intervene.<sup>369</sup> The Constitutional Court however overturned these respective rulings in favour of the applicant, now resulting in the courts of South Africa having the ability to delve into personal matters, should the matter include outright express discrimination on one of the grounds mentioned within section 9 of the Constitution.<sup>370</sup> The particular principle in the Islamic law of compulsory succession that replicates clause 7 in the will of Mr De Jager relates to the residuary beneficiary application in favour of the male.<sup>371</sup> On this basis, there exists a possibility that our South African courts will in future interfere and make rulings with regards to the Islamic law of compulsory successions

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<sup>364</sup> Sungay MH (2022) at p64.

<sup>365</sup> *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paras 23-24 (hereafter *Prinsloo*).

<sup>366</sup> *Prinsloo* at paras 23 -24.

<sup>367</sup> See *De Lange* at para 30 where this doctrine is defined as: "The reluctance of the courts to become involved in doctrinal disputes of a religious character."

<sup>368</sup> See 3.3.3 of this mini-thesis for further reading into the particulars of this case.

<sup>369</sup> *De Jager* at para 101 - 105.

<sup>370</sup> *De Jager* at para 244.

<sup>371</sup> See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* (2004) at p477 where it states: '[t]he Prophet (pbuh) said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased'.

application on the basis of the direct discrimination occurring in many of its practices.<sup>372</sup>

#### **4.3. REMEDIES AVAILABLE IN SHAREE'AH LAW TO MUSLIMS WANTING TO CREATE AN EQUITABLE DISTRIBUTION**

This component of the mini-thesis heavily relies on the principle of freedom of testation. In person X's scenario, he executed a will wherein he expressly stated that he wishes to have his estate distributed in accordance with the laws of compulsory succession as regulated by Sharee'ah law. As explained in chapter 2 of this mini-thesis, the law of compulsory succession only allows freedom of choice in distributing of assets for a third of an estate with the remaining two thirds distribution being regulated by the law of compulsory succession. This third share will prove to be one of the solutions to the situation that is thought to exist in this part. This section will provide for remedies to allow for daughters to inherit a bigger share than her male counterpart as provided for within the Islamic law of compulsory succession and remedies available to the testator to pave a pathway to allow for an adopted children and children born out of wedlock to inherit a share of their father's estate.

The first solution provided in this section will address the general principles within the Islamic law of compulsory succession that affords the male double the share of the female. Prior to looking at the remedies for this perceived predicament, it should be noted that woman do not always inherit half the share of the male, and this is merely a general rule. The discrimination against females according to the Islamic law of compulsory succession is therefore not a consistent practice and there exists possibilities where this is not the case.<sup>373</sup> One example where a female inherits the same share as the male can be illustrated when looking at a situation whereby the deceased leaves behind both parents and a son. The distribution of this estate would result in the father and mother inheriting equal shares<sup>374</sup> and the residue of the estate going in favour of the son.<sup>375</sup> Another example where a female inherits more than a

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<sup>372</sup> See 3.2.1. – 3.2.3 of this mini-thesis for more information regarding these possible direct discrimination claims.

<sup>373</sup> Abduroaf M (2021) at p116.

<sup>374</sup> See Al-Quraan chapter 4 verse 11 where it states: '[f]or parents, a sixth share of inheritance to each if the deceased left children...'

<sup>375</sup> See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* (2004) at p477 where it states: '[t]he Prophet (pbuh) said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased'.

male as per the Islamic law of compulsory succession can be seen whereby X dies leaving behind a mother, father, widower and a child as the only intestate beneficiaries. The first calculation is based on the child being male and the second calculation is based on the child being female. In the first calculation, the mother and father would both inherit a  $\frac{1}{6}$ <sup>th</sup> share ( $\frac{4}{24}$ )<sup>376</sup>, the widower would inherit  $\frac{1}{4}$  share ( $\frac{6}{24}$ )<sup>377</sup> and the son would be entitled to inherit the residue of the estate ( $\frac{10}{24}$ ).<sup>378</sup> The second scenario involving a daughter in the place of a son would see the same shares being awarded to the aforementioned parents ( $\frac{1}{6}$ <sup>th</sup> each), the widower ( $\frac{1}{4}$ ) but the daughter inheriting half the estate ( $\frac{12}{24}$ ).<sup>379</sup> Due to the addition of the apportioned shares totalling more than the base of the equation i.e. 24, the doctrine of increase<sup>380</sup> would find application result in the new denominator being 26.<sup>381</sup> There exists further examples of when a female inherits more than a male according to the law of compulsory succession equation, but will not be expanded on within this mini-thesis any further due to word constraints.<sup>382</sup>

Should the Islamic law of compulsory succession in the given situation not allow for a woman to inherit the same or better share of inheritance than her male counterpart, there exists lawful avenues whereby any testator can do this. The testate bequest avenue can be proven to be extremely helpful in remedying this situation. There is a common misconception regarding this principle i.e., that it is an absolute principle and woman are always to inherit half of their male counterparts. As was shown in the previous paragraph, this is not the case, and this section of this chapter will demonstrate two ways to lawfully grant the daughter, should the testator so wish, the same inheritance of her male counterpart (hereafter referred to as scenario 1) and in

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<sup>376</sup> See Al-Quraan chapter 4 verse 11 where it states: '...[f]or parents, a sixth share of inheritance to each if the deceased left children...'

<sup>377</sup> See Al-Quraan chapter 4 verse 12 where it states: '...[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'

<sup>378</sup> See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* (2004) at p477 where it states: '[t]he Prophet (pbuh) said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased'.

<sup>379</sup> See Al-Quraan chapter 4 verse 12 where it states: '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

<sup>380</sup> Situation whereby the numerator of an equation equates to more than the denominator. See Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) at p101 -104 for further reading on this concept.

<sup>381</sup> Abduroaf M (2020) at p117.

<sup>382</sup> See Abduroaf M (2021) for further reading on this.

some situations more than double the share of her male counterpart (hereafter referred to as scenario 2). To illustrate this in a practical example, the scenario of person X will be altered to only include his wife A, daughter C and Son Y. The distribution of this estate according to the law of compulsory succession (without a testate bequest made in favour of daughter C) will result in wife A receiving a 1/8th share (equating to 3/24)<sup>383</sup>, daughter C inheriting 7/24 and son Y inheriting 14/24).<sup>384</sup> Scenario one would require that person X bequeath 1/4 (6/24) of his estate (this figure is smaller than the 1/3 restriction as per the Islamic of compulsory successions principles)<sup>385</sup> to his daughter C, the breakdown of his estate would result in Wife A still inheriting her 1/8th share (3/24)<sup>386</sup>, daughter C would thereafter inherit her compulsory succession share in addition to her bequeathed share of 6/24 which would amount to (11/24 ) and son Y would thereafter inherit (10/24).<sup>387</sup> As seen in this scenario, the dynamics of the devolution of the assets has now changed drastically in favour of daughter C with her inheriting a slightly higher share than her male counterpart. Scenario two would require that person X bequeath his entire 1/3 (24/72) of his estate (this figure is within the restriction as per the Islamic of compulsory successions principles)<sup>388</sup> to his daughter C, the breakdown of his estate would result in Wife A still inheriting her 1/8th share (9/72), daughter C would thereafter inherit her compulsory succession share in addition to her bequeathed share of 24/72 share which would amount to (37/72 ) and son Y would thereafter inherit (26/72).<sup>389</sup> In this scenario, the tables are tilted to a large extent in favour of daughter C with her inheriting almost double the share of her male counterpart. The only regulation/restriction placed on this additional award is that the consent of the other inheriting intestate beneficiaries would need to consent to this additional award after the death of the testator.<sup>390</sup> This

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<sup>383</sup> See Al-Quraan chapter 4 verse 12 where it states: '...[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'

<sup>384</sup> See Al-Quraan chapter 4 verse 11 where it states: '...[f]or parents, a sixth share of inheritance to each if the deceased left children...'

<sup>385</sup> See 2.2.2.2 of this mini thesis for further reading on this restriction.

<sup>386</sup> See Al-Quraan chapter 4 verse 12 where it states: "...And to them belongs a fourth of what you leave behind, if you die childless; and if you have any child then to them belongs one-eighth of what you have left behind..."

<sup>387</sup> See Al-Quraan chapter 4 verse 11 where it states: Allah commands you as regard to your Children (Descendant Intestate Beneficiaries); to the male, a share equal to that of two females...

<sup>388</sup> See 2.2.2.2 of this mini thesis for further reading on this restriction.

<sup>389</sup> See Al-Quraan chapter 4 verse 11 where it states: 'Allah commands you as regard to your Children (Descendant Intestate Beneficiaries); to the male, a share equal to that of two females...'

<sup>390</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p39.

restriction is due to daughter C being an already inheriting beneficiary as per the laws of compulsory succession. This would essentially mean that in this scenario, Person X's wife A and son Y would need to grant express consent to their deceased father's wishes to award daughter C an additional share from the testate estate avenue.

With regards to the omittance of adopted children from the compulsory succession equation and disqualification of children conceived out of wedlock from the Islamic compulsory succession equation, a similar phenomenon occurs herein. This refers to their exclusion not being absolute, but rather a general exclusion. As expanded on within chapter 2 of this mini thesis, there is an allowance in Islamic law that makes way for a child conceived out of wedlock to lawfully inherit from the compulsory succession equation i.e., the 6 months rule.<sup>391</sup> However should these requirements not be met in order to allow for a child conceived out of wedlock to inherit, other remedies do exist. The remedy that will be recommended in this section follows the same approach as the aforementioned remedy relating to the daughter inheriting half the share as expanded on in the above paragraph. These remedies relate to the utilization of the testate bequest avenue (*wasiyyah*) and the avenues of gifts and endowments during one's lifetime in favour of the said excluded party. Person X in this scenario has utilized this avenue by awarding a share of 7/64 of his estate to his daughter B (born out of wedlock) and 7/64 of his net estate to his adopted son (Z).

As illustrated above, the law of succession can be worked in many ways to allow the female counterpart to inherit the same if not more than her male counterpart through strength in relation along with testate succession laws. Therefore, although the general position is that the daughter inherits half the share of her male counterpart according to Islamic intestate succession laws, should the deceased wish to grant more to the daughter, for whichever reasons he sees fitting including wanting to follow the equal inheritance debate as is currently a contested issue in the world today, he has a right and remedies to do so.<sup>392</sup> The position of the daughter can be further elevated in this regard by X should he wish to convey upon Y inter vivos gifts during the deceased's lifetime (in the form of money, property etc) or set up an endowment (al Waqf)<sup>393</sup> in which the beneficiary may draw revenue or proceeds from long after the testator has

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<sup>391</sup> See 2.2.3.3 of this mini-thesis for further reading on this.

<sup>392</sup> Sungay MH (2022) at p64.

<sup>393</sup> Investment & Finance 'Al-Waqf al-Ahli' (2013) available at <https://investment-and-finance.net/islamic-finance/a/al-waqf-al-ahli.html> (accessed on 08 March 2022).

passed on. As can be seen, due to these bequests made, these children, which would have generally been excluded from inheriting due to their blood relation and birth status, are now lawful beneficiaries and included on a similar footing to the remaining children of person X. It is thus recommended that South African Muslim's should make use of the options available to put children conceived out of wedlock and adopted children on a similar footing to those conceived in wedlock.<sup>394</sup>

#### **4.4. THE RATIONALS IN SHAREE'AH LAW FOR EACH OF THE THREE EXCLUSIONARY RULES**

##### **4.4.1. THE RATIONALE FOR THE 2:1 GENERAL RULE IN FAVOUR OF THE MALE**

In Chapter 4 verse 34, an acclaimed justification for the general rule that the male inherits twice as much as his female counterpart is stated.<sup>395</sup> It is clearly stated herein that the financial obligation within the family dynamic falls primarily on the male figure with little or no financial burden placed on the female folk. This, although not expressly stated in laws dealing with inheritance, is regarded by many scholars and academics as one of the main rationales for which the Islamic law of wills provides that the male is to by default, inherit double the share of the female (as a general rule), due to his responsibility towards her and her limited responsibility in daily life.<sup>396</sup> Every girl is endowed a male guardian (*Wali*)<sup>397</sup> from the moment of her birth.<sup>398</sup> Prior to her marriage, her father or brother fills this role.<sup>399</sup> After her marriage, her husband takes this role of guardianship over to care for her maintenance (*nafaqa*).<sup>400</sup> Food, shelter,

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<sup>394</sup> Abduroaf M (2021) at p135.

<sup>395</sup> See Al-Quraan Chapter 4 verse 34 where it states: 'Men are the protectors and caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them from their means...'

<sup>396</sup> Abduroaf M 'An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession' (2020) *De Jure Law Journal* at p119.

<sup>397</sup> An individual who has been entrusted with the obligation God has levied on him to see to the needs of and represent another. This individual is regarded as her physical and financial protector from birth to and including death. See Moolla M *The Imperative to Implement Muslim Personal Law in South Africa* (unpublished LLM Thesis, University of the Western Cape, 2018) at p15-17 for further reading on this concept.

<sup>398</sup> Farooq M 'Walayah (Guardianship): The Authority Over A Woman's Choice in Marriage and How This Reflects A Desire To Control and Kafa'a (Equality): A Barrier To A Woman's Marriage Choice?' (2019) 3(2) *Granite Journal* at p21 (hereafter Farooq M (2019)).

<sup>399</sup> Farooq M (2019) at p21.

<sup>400</sup> See Al-Quraan chapter 2 verse 233 where it states: '.... And upon the father is their (i.e. the mothers') provision and their clothing according to what is acceptable. No person is charged with more than his capacity'.

and clothing for the wife and kids during the marriage are all included in this upkeep. In an Islamic household, the husband has a number of functions or obligations that must be fulfilled in accordance with Sharee'ah law. The term "*qawwamun*," literally translates to "the protectors and the maintainers of women," is given in the *Holy Quraan* in recognition of the maintenance obligation *Allah* Almighty has placed on males.<sup>401</sup> On this basis, men have a greater and more difficult responsibility in supporting their families.<sup>402</sup> The female is thus always assured by law of adequate care to the extent that the wealthy wife has a right to be maintained by her husband, the needy sister by the brother, the mother by the son and the daughter by the father.<sup>403</sup> This missing half share from the females inheritance is provided for by the aforementioned financial responsibility laying on the male figure responsible for the female folk and the remaining family. These maintenance responsibilities are further extended to the waiting period (*iddat*)<sup>404</sup> following the termination of the marriage.<sup>405</sup> This obligation continues even after death, as a woman's funeral costs are to be covered by her *Wali*, whereas the reverse is not true.<sup>406</sup> Further to this, every Muslim woman maintains the right to ask to her desires for a dower upon the conclusion of a valid Islamic marriage.<sup>407</sup> It is important to note that Dower (*mahr*) and bridal price, as found within customary law, are vastly different concepts in that the former concept wherein the female is entitled to the benefit as opposed to the male is the one practiced in Islam.<sup>408</sup> This dower is chosen by the woman and belongs to her solely. The purpose

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<sup>401</sup> See Al-Quraan chapter 4 verse 34 wherein it states: 'Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially'. Also see Barlas A 'The Qur'an and Hermeneutics: Reading the Qur'an's Opposition to Patriarchy' (2001) 3(2) *Journal of Qur'anic Studies* and Abbas MZ and Shamreeza R 'Diversity of interpretations regarding Qawwam in Islamic thought with special reference to Surah An-Nisa' (2013) 11 *Pakistan Journal of Islamic Research* for further reading on the concept of 'qawwamun' and its interpretations by legal and Islamic scholars.

<sup>402</sup> Bani LM and Pate HA 'The Role of Spouses under Islamic Family Law' (2015) 37 *International Affairs and Global Strategy* at p104 (hereafter Bani LM and Pate HA (2015)).

<sup>403</sup> Ati HAA *The Family Structure in Islam* (1995) at p269.

<sup>404</sup> The term "waiting period" or "iddat" refers to the period of waiting for the woman before remarrying after her divorce or death of her husband. However, the waiting period or iddat differs from case to case. In the case of a divorced woman who menstruates, the waiting period is three menstrual cycles. The waiting period for a woman who has passed the age of menstruation is three lunar months, and in the case of a woman whose husband is deceased the period is four months and ten days respectively. See Mohammad I J and Lehmann C 'Women 's Rights in Islam Regarding Marriage and Divorce' (2011) 4 *Journal of Law and Practice* for further reading on this aspect.

<sup>405</sup> Booley A 'Divorce and the law of Khul: A type of no-fault divorce found within an Islamic legal framework' (2014) 18 *Law, Democracy and Development* at p45 (hereafter Booley A (2014)).

<sup>406</sup> Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* 2 ed (2018) at p38.

<sup>407</sup> Bani LM and Pate HA (2015) at p104.

<sup>408</sup> Booley A (2014) at p44.

of the dower is firstly given as a sign of respect to the wife.<sup>409</sup> Additionally, the dower serves as a security to shield a wife from unfavourable circumstances i.e., the death of her husband.<sup>410</sup> Because of this, the wife's financial situation after marriage is quite favourable to her.<sup>411</sup> The husband has no right over the dower given, nor can he reclaim it under any circumstance.<sup>412</sup> She is not required to share this dower and is free to do what she wishes with the gift.<sup>413</sup> This represents one of the main differences between the *Mahr* and the customary practice of bridal price (dowry).

In essence therefore, although the end result contains that the general share a woman is to receive in inheritance is arithmetically different, this does not mean that they are necessarily unequal in the final analysis.<sup>414</sup> This is mainly due to the males varied financial duties to all female relatives, whereas the converse not being true. This may suggest that the male can therefore more likely be said to be “liable” than a “beneficiary”?<sup>415</sup>

#### **4.4.2. THE RATIONALE FOR THE EXCLUSION OF A CHILD CONCEIVED OUT OF WEDLOCK FROM THE COMPULSORY SUCCESSION EQUATION**

Single parent families are created in several ways including the death of one parent, divorce, and desertion.<sup>416</sup> In the mid-twentieth centuries, most single-parent families came about because of the death of a spouse.<sup>417</sup> However as times progressed, statistics show that more and more single parents were never married now making this the primary contributor to single parent families in the world.<sup>418</sup> The number of single parent households are evidently increasing at an alarming rate.<sup>419</sup> In South Africa alone, more than 40% of mothers are single parents and this number continues

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<sup>409</sup> Ferdousi N 'The Practice of Dower and Dowry in Muslim Marriage' (2019) 27 *Jurnal Syariah* 553 (hereafter Ferdousi N (2019)).

<sup>410</sup> Ferdousi N (2019) 547.

<sup>411</sup> Jansen YO (2017) 185.

<sup>412</sup> See Al-Quraan chapter 2 verse 229 wherein it states: 'And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep (within) the limits of Allah'.

<sup>413</sup> Mohammad I J and Lehmann C 'Women 's Rights in Islam Regarding Marriage and Divorce' (2011) 4 *Journal of Law and Practice* at p5 (hereafter Mohamed I J and Lehmann C (2011)).

<sup>414</sup> Ati HAA *The Family Structure in Islam* (1995) at p268.

<sup>415</sup> Ati HAA *The Family Structure in Islam* (1995) at p269.

<sup>416</sup> Prabhakar B and Kotwal N 'Problems Faced by Single Mothers' (2009) 21(3) *J Soc Sci* at p197 (hereafter Prabhakar B and Kotwal N (2009)).

<sup>417</sup> Prabhakar B and Kotwal N (2009) at p197.

<sup>418</sup> Prabhakar B and Kotwal N (2009) at p197.

<sup>419</sup> Irwin G, Sara SM 'Single Mothers and Their Children: A New American Dillema' 1987 *The Wilson Quarterly* at p43.



to grow.<sup>420</sup> Within these single mother households, a major financial crises comes to play. These are due to the now single mother being forced to meet the basic needs of her child including the expenses of food, clothing, school fees and many other expenses as well.<sup>421</sup> Typically in a general household, these expenses are either shared by the parents equally.<sup>422</sup> In an Islamic household however, the husband has a number of functions or obligations that must be fulfilled in accordance with Sharee'ah law. The *Holy Quraan* places the maintenance obligation solely on the husband<sup>423</sup> and father to protect and see the to the needs of their wives and offspring.<sup>424</sup> Additionally, the *Holy Quraan* is very clear about the Islamic prohibition of premarital sex.<sup>425</sup> Premarital sex can either take the form of fornication<sup>426</sup> or adultery<sup>427</sup>. These ideas are collectively included under the term "Zina" in Islam.<sup>428</sup> In essence, any sexual fulfilment outside of marriage is regarded as a violation of God's rule.<sup>429</sup> Islam thus places an incumbency on all Muslim's to marry prior to fulfilling their sexual desires as this marriage contract provides, as shown above, that the financial welfare of both the wife and children born in the marriage is sought for as opposed to the single mother households prevalent today as a result of desertion and lack of legal protection afforded to them. Another disadvantage of engaging in sexual activities outside the confines of a marriage can include the transmission of sexually transmitted diseases. It is also a proven fact that persons who freely participate in sexual relations with

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<sup>420</sup> Dube S 'COVID-19 pandemic: Single mothers bear the biggest brunt' available at <https://health-e.org.za/2021/11/16/covid-19-pandemic-single-mothers-bear-the-biggest-brunt/> (accessed 29 November 2022).

<sup>421</sup> Prabhakar B and Kotwal N (2009) at p199.

<sup>422</sup> Anania K 'Managing Money as a Newly Married Couple' available at <https://www.investopedia.com/articles/personal-finance/030716/managing-money-couple.asp> (accessed 27 November 2022).

<sup>423</sup> See Al-Quraan chapter 4 verse 34 wherein it states: 'Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially'.

<sup>424</sup> Bani LM and Pate HA 'The Role of Spouses under Islamic Family Law' (2015) 37 *International Affairs and Global Strategy* 104 (hereafter Bani LM and Pate HA (2015)).

<sup>425</sup> See Al-Quraan Chapter 17 verse 32 where it states: 'Do not go near adultery, surely it is an indecency, and an evil way [of fulfilling sexual urge]'.

<sup>426</sup> See Green R 'Griswold's Legacy: Fornication and Adultery as Crimes' (1989) 16 *Ohio Northern University Law Review* at p545 where fornication is defined as: 'Consenting intercourse between unmarried adults' (hereafter Green R (1989)).

<sup>427</sup> See Green R (1989) at p545 where adultery is defined as: 'where an adult is married to another whilst having intercourse with a person who is not your spouse'.

<sup>428</sup> Rizvi SM 'Chapter Three: The Islamic Sexual Morality (2) Its Structure' available at <https://www.al-islam.org/marriage-and-morals-islam-sayyid-muhammad-rizvi/chapter-three-islamic-sexual-morality-2-its> (accessed 30 November 2022).

<sup>429</sup> See Al-Quraan chapter 23 verse 5-6 where it states: 'The believers are... those who protect their sexual organs except from their spouses... Therefore, whosoever seeks more beyond that [in sexual gratification], then they are the transgressors'.

multiple partners are more prone to contracting sexually transmitted diseases.<sup>430</sup> Finally from a mental perspective, it has also been proven that single mothers are more prone to depression as they tend to suffer from a feeling of rootlessness and lack of identity.<sup>431</sup> Furthermore, one could also conclude that the child being excluded from inheriting punishes the child for the sins of his/her parents rather than the actual sinners themselves.

#### **4.4.3. THE RATIONALE FOR THE EXCLUSION OF AN ADOPTED CHILD FROM THE COMPULSORY SUCCESSION EQUATION**

Adopted children in Muslim households have certain rights and obligations that they are entitled to from their adopted families just as in the general South African household.<sup>432</sup> These rights comprise of using family names, having access to family amenities, continuing to provide care and assistance, among many other things.<sup>433</sup> Adoption is seen as a noble deed in Islam since it is equivalent to providing assistance to children, particularly orphans. However, even though an individual is adopted, Islamic law still holds certain restrictions that differentiate an adopted child from a full child of an individual. An example of one of these limitations can be said to be the exclusionary *mahram*<sup>434</sup> principle hindering an adopted child from being a *Mahram* to their adoptive parents.<sup>435</sup> Therefore in this breath, even though it is incumbent that adopted children should be treated on equal footing to full born children, they are differentiated in this way and thus cannot inherit from the compulsory succession equation of their adopted parents.<sup>436</sup>

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<sup>430</sup> Lawrence BF, Darrock JE and Singh S 'Sexual Partnership Patterns as a Behavioral Risk Factor for Sexually Transmitted Diseases' (1999) 31(5) *Guttmacher Institute* at p228.

<sup>431</sup> Prabhakar B and Kotwal N (2009) at p198.

<sup>432</sup> Anwar K and Kasdi A 'Inheritance Distribution of Adopted Children in The Perspective of Customary Law and Islamic Law Compilation: Case Study of the Application of Inheritance Law in Kudus' (2019) 29(2) *AHKAM* At p148 (hereafter Anwar K and Kasdi A (2019)).

<sup>433</sup> Anwar K and Kasdi A (2019) at p148.

<sup>434</sup> An individual that you are unable to marry. This individual can be your lawfully recognised security. Examples include a brother being a Mahram to a sister and a son being a mahram to a mother. See Hadad R 'Understanding Muslim Woman Travel Behaviour: A Theoretical Perspective' (2019) 15(6) *Economica* for further reading on what a Mahram entails.

<sup>435</sup> Anwar K and Kasdi A (2019) at p147.

<sup>436</sup> There is very little information and research done by academics on the uncovering on this rationale as found within the Islamic law of compulsory succession. The author of this mini-thesis noted this as a limitation in our current day and age and sees this topic as a potential future topic of interest wherein more research can be conducted to uncover.

#### 4.5. A DIFFERENT PERSPECTIVE ON THESE UNEQUAL INHERITANCE ASPECT IN FAVOUR OF THE MALE

In view of contemporary social trends, President Beji Caid Essebi proposed in 2017 that Tunisia pass legislation establishing an equal inheritance law.<sup>437</sup> Many Muslim's around the world and Tunisian residents strongly opposed this proposed change to the Islamic law of wills on the grounds that the *Quraan's* verses (specifically those relating to inheritance) were unambiguous and definitive.<sup>438</sup> The *Holy Quraan* is unambiguous in its judgement that the male figure bears all of the financial burden of providing care, as was demonstrated in this 4.4 of this mini-thesis. However, if one were to consider the current changes in society around the world, particularly in South Africa, the role of women is fundamentally different from what it always was. Examples supporting the aforementioned statement can be seen when looking at South Africa's progressive laws empowering more women serving in high-ranking positions within government than ever before,<sup>439</sup> access to education by young girls and women has improved substantially over time<sup>440</sup> and more women being the breadwinners in families among many other advances to women's positions in society<sup>441</sup> among others. On the basis of this, a different strategy in favour of equal inheritance may successfully be made. The assertion by Fazul Rahmaan that verses of the *Holy Quraan* cannot be said to be eternally binding but rather be viewed with the times one finds themselves in, can thus very well be considered a plausible argument.<sup>442</sup> Furthermore, it may be said that when the *Holy Quraan* was revealed 1400 years ago, it emphasized fundamental equality for men and women as well as giving women inheritance rights when they previously lacked them.<sup>443</sup> The Islamic law of compulsory succession does include means for men and women to inherit on an equal footing, and even at times in

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<sup>437</sup> Sari H and Azzam T 'Gender Equality in the Inheritance Debate in Tunisia and the Formation of Non-Authoritarian Reasoning' (2019) *Journal of Islamic Ethics* at p210 (hereafter Sari H and Azzam T (2019)).

<sup>438</sup> Sari H and Azzam T (2019) at p210.

<sup>439</sup> Stats SA 'Realizing women's rights for an equal future on Women's Day' available at <http://www.statssa.gov.za/?p=14559#:~:text=There%20is%20no%20doubt%20that,of%20Pass%20Laws%20to%20women>. (accessed 09 March 2022).

<sup>440</sup> Stats SA 'Realizing women's rights for an equal future on Women's Day' available at <http://www.statssa.gov.za/?p=14559#:~:text=There%20is%20no%20doubt%20that,of%20Pass%20Laws%20to%20women>. (accessed 09 March 2022).

<sup>441</sup> Stats SA 'Realizing women's rights for an equal future on Women's Day' available at <http://www.statssa.gov.za/?p=14559#:~:text=There%20is%20no%20doubt%20that,of%20Pass%20Laws%20to%20women>. (accessed 09 March 2022).

<sup>442</sup> Sari H and Azzam T (2019) at p216.

<sup>443</sup> Sungay MH (2022) at p54.

the woman's favour, as was demonstrated in section 4.2 of this mini-thesis. However, the actual execution of Tunisia's inheritance rules reveals that these methods allowing for females to inherit equal shares and at times more than their male counterpart is only utilized approximately 20% of the time.<sup>444</sup> As a result, it is possible to argue and demonstrate that it is acceptable and likely to adjust the Islamic rule of wills in order to provide for equal inheritance in modern times and as we move with the times. This would however include the relinquishing of the male's financial responsibility to care for the woman simultaneously.

#### **4.6. CONCLUSION**

This chapter has shown that a Muslim testator utilizes their common law right to freedom of testation as backed by sections 25 and section 10 of the Constitution to allow the Islamic law of compulsory succession and its proven theoretically unconstitutional practices valid and enforceable on the basis of satisfying the limitation clause as contained within section 36 of the Constitution. This finding has shown that if the Court were to rule the Islamic law of compulsory as unconstitutional, it wouldn't be compliant to the limitation clause and the aforementioned Constitutional sections. This chapter further explored an additional possibility that this finding that has been in application since the creation of the Constitution in 1996, relating to the latest *De Jager* case ruling wherein the court has now laid precedent to allow the courts to interfere in private estate matters. Thereafter, the chapter provided that the discretionary benefit avenue, gifts and testamentary benefit avenues are all lawful ways by which Muslim testators can lawfully amend the general principles of the Islamic law of successions principles to avoid all these perceived problematic issues (of which the rationales were explained in this chapter) faced by this system. The concluding sections of this chapter provided a different perspective on these problematic aspects relating to modernizations in the world advancing the position of woman in the formal sector thereby asking the question whether there is still a need for men to provide for woman or whether an equal inheritance debate could be a plausible one.

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<sup>444</sup> Sari H and Azzam T (2019) at p216.

## CHAPTER 5:

### CONCLUSION AND RECOMMENDATIONS

This mini-thesis set out with a central enquiry regarding the Constitutionality of the Islamic law of Succession in our Constitutionally supreme day and age. The focus of this enquiry was on three heavily debated areas in the Islamic law of succession pertaining to the omittance of the adopted child from the intestate inheritance equation, the disqualification of the child being born out of wedlock from the intestate inheritance equation, and the Islamic Law ruling asserting that the male is to inherit double the share of their female counterpart. In undertaking this research journey, the author utilized a hypothetical situation involving an individual's estate (person X) wherein all three of these problematic areas featured. This chapter's concluding part will summarize the findings of each chapter, highlight the lessons learned, and offer prospective recommendations for Muslim's in light of potential future constitutional concerns that might arise.

This mini-thesis began by emphasizing the importance and applicability of the law of succession to the lives of Muslims' and South African people. The results of this investigation showed that, due to the religious obligation linked with succession laws as mandated by several verses of the *Holy Quraan* and certain teachings of the Holy Prophet (pbuh), succession laws played an even more crucial part in Muslims' lives. Following on from this, a short analysis revealed that only two of the judgments in the five cases involving Islamic inheritance that were filed before our South African courts were in line with the Islamic law of successions principles.<sup>445</sup> This insight led to the discovery of the religious entanglement in our legal system and the potential issues that could arise in the future. This potential gap for exploration was further explored in chapter 4 of this mini-thesis by considering the 2021 *De Jager* landmark case ruling wherein the court allowed for the highly held freedom of testation principle to be overruled through the Constitutions powers. This discovery will be further elaborated on in the concluding sections of this chapter. After this discussion, it was demonstrated how drastically different the distribution strategies under the South African law mode

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<sup>445</sup> See 2.5 of this mini-thesis wherein these cases are described in detail thereby illustrating how only the *Daniels v Campbell and Hassam v Jacobs* cases rulings are in conformity with the principles of Islamic Law.

of distribution and the Islamic law of compulsory successions distribution are from one another. Coinciding with this observation, it was evident that these differences at many points left room for possible constitutional challenges due to plenty of constitutional provisions being impaired i.e., the three focus areas of this mini-thesis as highlighted in the scenario of person X.

Chapter 3 of this mini-thesis demonstrated a brief understanding of our Constitution in our day and age wherein all actions, principles and legislation are required to abide by its high standards. These standards can be briefly summarised as those contained within the founding values, the BOR and legislation as empowered by this supreme Constitution. Any person or government agency that disobeys these rules as set out shall be held legally responsible in a court of law. This finding went on to display that the three facets as highlighted within the Islamic law of compulsory succession in the scenario of person X within this mini-thesis can be proven to be in violation of several Constitutional principles including the highly enshrined Constitutional rights to Equality, Dignity and Children's rights as contained within section 28 of the Constitution. Further to these constitutional breaches, it can be further contended that several legislated Acts and International Conventions and Treaties can be construed to be breached by these principles found in the Islamic law of succession. These Acts, Treaties and Conventions include but are not limited to the Children's Act, PEPUDA, CEDAW and ACHPR. A case law analysis showed how certain areas of succession laws have been held to be in contention within our courts by looking at matters involving our courts striking down male primogeniture rules as found within customary law, the extending of the meaning of the word spouse for succession purposes and the latest landmark Constitutional court case involving the limitation of the principles of freedom of testation in the De Jager case. Chapter 3 of this mini-thesis also touches on the very recent 2022 Muslim marriages ruling in demonstrating the power of our courts in matters wherein long-standing principles and practices are overruled and evolved to be in line with the Constitution, thereby further illustrating the power of our Constitution. The central leading question of this chapter thereafter asks how, albeit all the unconstitutional provisions contained within the Islamic law of compulsory succession as shown within the introduction to this chapter, does this system still remains unimpeded?

This mini-thesis then progressed to answer the central question of this study, showing that a Muslim testator utilizes their common law right to freedom of testation as backed by sections 25 and section 10 of the Constitution to allow the Islamic law of compulsory succession and its proven unconstitutional practices valid and enforceable on the basis of satisfying the limitation clause as contained within section 36 of the Constitution. This finding has shown that if the Court were to rule the Islamic law of compulsory succession is unconstitutional, it wouldn't be compliant to the limitation clause and the aforementioned Constitutional sections. Room for discussion was left open to thought wherein the *De Jager* ruling came into now laying precedent, contrary to long standing traditions and practices, to allow the courts to interfere in private estate matters. The author thereafter addressed the general public concerns relating to the three focus areas of this mini-thesis can be 'cured' through the utilization of the discretionary benefit avenue, gifts and testamentary benefit avenues as lawful ways by which Muslim testators can lawfully amend the general principles of the Islamic law of successions principles to avoid all these perceived problematic issues (of which the rationales were explained in this chapter) faced by this system. The concluding sections of this chapter provided a different perspective on these problematic aspects relating to modernizations in the world advancing the position of woman in the formal sector, thereby asking the question whether there is still a need for men to provide for woman or whether an equal inheritance debate could be a plausible one.

Nelson Mandela is quoted to have said: "[e]ducation is the most powerful weapon which you can use to change the world."<sup>446</sup> This profound statement, in the view of the author advises that people should familiarize themselves with the rules of succession as it plays a pivotal part in the lives of all human beings. The reality in life is that every living being will inevitably come to an end with human beings being no exception to this rule. The emphasis placed in Islamic law on drafting a will, as shown within this mini-thesis, is thus applicable to all irrespective of religion, faith or culture. The author has thus come to the realisation, in agreement with Abduroaf M, that South African Muslims' should make use of the options available to put children conceived out of wedlock on a similar footing to those conceived in wedlock.<sup>447</sup> The author further extends this realisation to all three Constitutionally problematic areas as discussed

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<sup>446</sup> Mandela NR *Long Walk to Freedom* (1995) at p20.

<sup>447</sup> Abduroaf M (2021) at p135.

within this mini-thesis to the extent that Muslims' should apply the remedies available in Islamic law to create an equitable distributions in situations wherein potential issues could arise, such as the Constitutionally impeded ones shown. Verily, God knows what we know not.<sup>448</sup>

Word count: 32 995 words



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<sup>448</sup> Al-Quraan chapter 16 verse 74.



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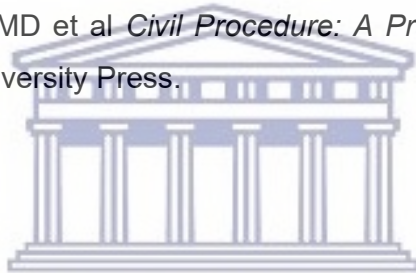
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