

To Bequeath or not to Bequeath? A South African Law Analysis of the "Problematic Areas" Found in the Islamic Law of Intestate Succession

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Abstract

The fairness of the Islamic Law of compulsory succession remains a heavily contested issue all over the world. Frequently debated topics, referred to in this article as the "problematic areas", include the 2:1 division of inheritance in favour of the male, the disqualification of a child born out of wedlock and the exclusion of an adopted child from the Islamic intestate inheritance equation. This equation is found in the primary texts of the religion of Islam i.e., the Holy *Qur'ān* and Prophetic teachings. These texts contain a formula dictating how the assets in a deceased person's estate should devolve, with individual freedom of testation limited to only a third of the net estate. The position followed in South African law is vastly different to the aforementioned. This article focusses on these so-called problematic areas found in the Islamic law of intestate succession. Part One of this article demonstrates these differences through the use of a hypothetical scenario involving person X. This hypothetical scenario includes an investigation of all three "problematic areas" mentioned. The article further progresses to uncover the rationale for each of these principles. The concluding section of this article provides recommendations on the lawful remedies available to Muslim testators wanting to create a more equitable distribution.

Keywords

The Islamic law of compulsory succession; fairness; problematic areas; equitable distribution; lawful remedies.

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1 Introduction

There is a common belief that many human rights and the Islamic law of succession (finding its basis in the Holy *Qur'ān* and the Prophetic teachings)¹ are intrinsically at odds with each other.² This article aims to clarify the reasons behind the formation of this notion, with a particular focus on Islamic succession laws. The research in this article further demonstrates that this is a fallacy that is false on numerous levels. In illustrating this hypothesis, a fictional scenario will be utilised. This scenario assumes that Person X, a South African Muslim male, dies on 15 November 2023. He leaves behind a written will in which he bequeaths 7/64 of his net estate³ 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 states that the remainder of his estate shall be distributed in terms of the Islamic law of compulsory/intestate succession.⁴ He is survived by his wife (A), two daughters (B being born out of wedlock and C born in wedlock) son Y (born in wedlock) and an adopted son (Z).

This article is a condensed version of the author's LLM mini-thesis,⁵ in which all these topics are covered on a more comprehensive basis. The author identified the topic of this study as a *lacuna* in academic writing, as the many authors who have written journal articles on the topic of the Islamic law of compulsory succession and the South African Law of Succession respectively, have done so in general terms.⁶ What can be derived from these readings is a general understanding of the Islamic Law system of distribution, along with its applicability in the context of the South African Constitution. The closest piece of literature on this topic is found in the writings of Abduroaf. Although many of the topics of this article are covered in separate articles by Abduroaf, no journal article contains all three areas of study covered in this article.

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¹ Mzee 2016 *Journal of Law, Policy and Globalization* 55.

² Abduroaf and Moosa "Islamic Law Mode of Estate Distribution" 458. Also see Sungay 2023 *LDD* 452 for examples of where this belief is stated.

³ Estate remaining after all liabilities have been paid. Person X at the date of his death had no liabilities on his name.

⁴ The phrases "compulsory succession" and "intestate succession" are interlinked at many points in this article. See Part 2 of this article for an elaboration of why the interlinking of these phrases is appropriate.

⁵ Sungay *Constitutional Legitimacy*.

⁶ Examples of these texts include Gabru 2005 *Obiter*; Abduroaf 2019 *De Jure*; Sungay 2022 *Manchester Journal of Transnational Islamic Law and Practice*; Abduroaf 2020 *Obiter* and Moosa *Comparative Study*.

The discussion that follows refers to the male and female genders and uses the accompanying pronouns "he" and "she" (or "their" for collective reference). This use is provided for on the basis that the Islamic law of succession specifies rules for each of these genders.⁷ This article will begin with a brief overview of how the Islamic law of succession as a whole operates in comparison to the South African law of succession. The section thereafter will delve into the common areas of controversy in the Islamic law of succession, namely the 2:1 rule of inheritance in favour of the male, the disqualification of a child born out of wedlock and the exclusion of an adopted child from the Islamic compulsory inheritance equation. The section that follows proceeds to describe the rationale for each of these principles. The article thereafter concludes by providing for lawful remedies available to Muslim testators wanting to create a more equitable distribution. These remedies assist in proving the core hypothesis of this article, relating to the Islamic law of succession not being a discriminatory system.

2 An overview of the Islamic law of succession incorporating both testate and intestate succession

The method for allocating a deceased person's assets is prescribed by the Islamic law of succession.⁸ These laws, finding their basis in the Holy *Qur'ān* and Prophetic teachings, are stated to establish the foundation for an impartial distribution of assets.⁹ The following sections will illustrate in brief how an Islamic estate is distributed in order of priority. A further demonstration will be provided in showing how person X's estate is to be distributed in line with this order.

2.1 Liability claims against the estate

Ensuring that all obligations are paid is the first step in dispersing the estate of a Muslim person.¹⁰ These liability expenses include the settling of the deceased's debts, his/her funeral expenses, and the administration costs of winding up the estate.¹¹ Only once these expenses are settled from the gross estate¹² may one proceed to distribute the bequests made by the testator in terms of the will.

⁷ See Ali *Holy Qur'an* 4:11, 4:12 and 4:176.

⁸ Sungay 2023 *LDD* 452.

⁹ Sungay 2022 *Manchester Journal of Transnational Islamic Law and Practice* 55.

¹⁰ An in-depth explanation of these expenses is beyond the scope of the central focus of this article. See Abduroaf *Deceased Estates* 38-39.

¹¹ Abduroaf *Deceased Estates* 38-39.

¹² Estate available prior to any deductions.

2.2 *The testate estate (Wasiya)*

The testate estate¹³ in the Islamic law of succession is restricted to a third of the testator's net estate. Additional limitations on this portion of the estate include not bequeathing a bequest in favour of an already inheriting beneficiary.¹⁴ An exception to this rule exists whereby the consent of the remaining beneficiaries overrides this principle.¹⁵ This clause establishes a foundation of equity by restricting the amount that an individual can receive, and does away with the option of providing the "favourite" successor an advantage over others.¹⁶

2.3 *The intestate estate*

The remainder of the estate, after all liabilities and testate bequests have been paid, is referred to as the intestate estate. The Holy *Qur'ān* contains a formula dictating who the beneficiaries of this portion of an estate are. For this reason, the author alludes to this distribution of an Islamic estate as the compulsory estate.

These intestate beneficiaries are primarily set out in Chapter 4 (Surah *Nisa*) verses 11, 12 and 176 of the Holy *Qur'ān*.¹⁷ Sharer beneficiaries¹⁸ and residuary beneficiaries¹⁹ are the primary subcategories of intestate beneficiaries that are pertinent to the scenario of person X. Wife A would, therefore, be the only sharer beneficiary, with Daughter C and Son Y being the only residuary beneficiaries.²⁰

2.4 *The distribution of person X's estate according to the Islamic law of compulsory succession*

Person X, as provided for in the introduction of this article, bequeathed 7/64 of his net estate to his daughter B (born out of wedlock) and 7/64 to his adopted son Z. We shall assume for the sake of an accurate comparison

¹³ Commonly referred to as the *Wasiyah* in Arabic terms.

¹⁴ See Sunnah.com 2022 <https://sunnah.com/nasai:3643>, where the Holy Prophet Muhammad (pbuh) is quoted to have said: "[I]ndeed, Allah has given every owner of right his due right. Therefore, no bequest can be bequeathed to an inheriting Intestate Beneficiary."

¹⁵ See Abduroaf *Deceased Estates* 39.

¹⁶ Sungay 2022 *Manchester Journal of Transnational Islamic Law and Practice* 55.

¹⁷ Sungay 2023 *LDD* 453.

¹⁸ These beneficiaries are defined as an intestate beneficiary who inherits a prescribed fractional share. These beneficiaries by relation are expressly mentioned in Chapter 4 (Surah *Nisa*) verses 11, 12 and 176 of the Holy *Qur'ān*. See Abduroaf *Deceased Estates* 17 for further reading on this subcategory.

¹⁹ These beneficiaries are defined as intestate beneficiaries who inherit the residue of the intestate inheritance after the sharer beneficiaries have inherited their respective shares. See Abduroaf *Deceased Estates* 17 for further reading on this subcategory.

²⁰ The reason for which daughter B and son Z's not being included in this category will be expanded on in Part 2.4 of this article.

between the two normative systems investigated in this article, that after all liabilities have been settled, the net estate equates to R1 000 000.

It is provided that daughter B was born 4 months and 25 days after the conclusion of the marriage between person X and her mother A.²¹ Only two of person X's children – daughter C and son Y – were conceived and delivered in the boundaries of a valid Islamic marriage between Person X and wife A. Thus, only they will be named among person X's intestate beneficiaries in accordance with Islamic law, to the exclusion of daughter B (born outside of marriage) and adopted son Z. The sections that follow show the distribution of Person X's intestate estate.

2.4.1 Widow A's share

A widow is entitled to inherit either a quarter or an eighth of the intestate estate. The specific share due is dependent on the presence of children.²² A widow is entitled to one-fourth of the intestate estate if the deceased's children are not present. Conversely, should the children of the deceased be present, the widow's share will be reduced from one-quarter to one-eighth of the intestate estate. In the event that the marriage is polygynous, this share is then to be split equally in half between the spouses.²³ Wife A will, therefore, be entitled to claim one-eighth of her late husband's estate.

2.4.2 The 2:1 share applying to daughter C and son Y

The Holy *Qur'ān* 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.²⁴ Adopted children and children born out of wedlock are not accounted for in this section; only full sons and full daughters are.²⁵

2.4.3 The disqualification of daughter B (conceived out of wedlock) from the intestate succession equation

It is crucial to understand from the onset that, with regard to the effects of the Islamic law of succession, an out-of-wedlock conception and an out-of-wedlock birth differ significantly from each other. The Islamic law of succession looks at the moment of conception and not the moment of

²¹ The relevance of the birth date after the conclusion of the marriage for inheritance purposes will be discussed in 2.4.3 of this article.

²² Ali *Holy Qur'an* 4:12.

²³ Kafumbe 2010 *Human Rights Review* 208.

²⁴ See Ali *Holy Qur'an* 4:11, 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...".

²⁵ See 2.4.3 and 2.4.4 of this article for a further discussion on the basis for these exclusions.

birth.²⁶ As such, the inheritance formula in Islamic law generally prohibits a child from inheriting from the compulsory inheritance equation of the father if the said child was born out of wedlock.²⁷ To the exclusion of the mothers, this general limitation alone impacts on the child's entitlement to inherit from the father's wealth.²⁸ Therefore, all children have the right to inherit from their biological mother's estate, regardless of how they were conceived or born, in or out of wedlock.²⁹ Muslims in South Africa are encouraged by the Muslim Judicial Council of South Africa (MJC) to modify their approach to this practice by following a minority opinion in Islamic law.³⁰ An exception to this principle exists where children born six months after the conclusion of a valid Islamic marriage between the parents are allowed to maintain their right to inherit from their biological father's estate as opposed to the default position.³¹ In this instance, daughter B will not be regarded as an intestate beneficiary of her father X. This is because she was born prior to the six months that elapsed following the conclusion of person X and his wife A's marriage. An acknowledgement provided by the biological father through a sworn statement declaring that the child is theirs would be another way to establish a connection to the father for intestate inheritance purposes.³² Unfortunately, person X did not do this. On this basis, daughter B will not be eligible to inherit from the intestate estate. Person X has, however, left a testate bequest of 7/64 of his net estate in order to allow for this exclusion. This exemplifies one remedy for this alleged problem that can be found in Islamic law's compulsory succession. Additional solutions to this perceived predicament are offered in Part 5 of this article.

2.4.4 *The omission of son Z from the compulsory succession equation*

The Islamic law of succession provides three methods for an individual to establish an intestate inheritance relationship to the deceased. These relate to ties to the testator by marriage, emancipation³³ or blood relation.³⁴

Son Z is considered to be in the first group under South African law, meaning that he is related to the deceased through blood ties.³⁵ According to Islamic law, however, a blood relation to the deceased is met in three ways. These three paths relate to being a descendant of the deceased

²⁶ Abduroaf 2021 *Obiter* 131.

²⁷ Mzee 2016 *Journal of Law, Policy and Globalization* 57.

²⁸ Sungay *Constitutional Legitimacy* 18.

²⁹ Abduroaf 2021 *Obiter* 131.

³⁰ Fatwa Committee "MJC Position"; document on file with the author of this article.

³¹ Fatwa Committee "MJC Position"; document on file with the author of this article.

³² Abduroaf 2021 *Obiter* 131.

³³ This in essence represents the act of freeing a slave from one's custody and ownership.

³⁴ Abduroaf *Deceased Estates* 42

³⁵ This will be further expanded on in part 3.4 of this article.

(direct children born of an Islamic marriage),³⁶ an ascendant of the deceased (parents of the deceased, provided the deceased was born from a legal marriage), or a collateral relative (siblings who share the same blood parents).³⁷ Due to a lack of a legitimate legal blood relationship to the deceased, adopted son Z does not fall into one of these categories. As a result, he is not eligible to inherit as an intestate beneficiary. 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.

3 An overview of the South African law of succession incorporating both testate and intestate succession

With a few exceptions, the distribution of an estate among South African citizens is comparable to that of an Islamic estate. The following subsections will deliberate on the claims present (in order of priority).³⁸

3.1 Liability claims against the estate

The two main categories of liability claims are administrative expenses³⁹ and debt claims.⁴⁰ Following these claims being paid from the gross estate, the remainder (if any) must then be distributed to the testate and intestate beneficiaries. These beneficiaries will be explained in the paragraphs to follow.

3.2 Testate succession claims

South African law grants an individual an almost unfettered freedom of testation.⁴¹ This infers that the deceased may bequeath his/her estate however he/she wishes, including the inclusion of several unreasonable conditions. Although this idea is highly valued by our law, it is not unqualified and is nevertheless subject to some common law restrictions.⁴² One of the purposes of placing these restrictions on a deceased person's will is to

³⁶ Essop *The Intersection between the Islamic Law of Inheritance* 83-88 for further reading on this concept.

³⁷ Abduroaf *Deceased Estates* 44.

³⁸ These descriptions will be done in brief to ensure the focus area of this article is maintained and the word count is abided to. See Abduroaf *Impact of South African Law* 66-94 for an in-depth reading on the aforesaid.

³⁹ These include funeral costs, maintenance, and other administration costs. For further reading on an in-depth breakdown of these costs individually, see Sungay *Constitutional Legitimacy* 23.

⁴⁰ Debts can be further broken down into secured debts v unsecured debts. See Majaski 2022 <https://www.investopedia.com/ask/answers/110614/what-difference-between-secured-and-unsecured-debts.asp> for further reading on what these debts and their related consequences entail.

⁴¹ Jamneck *et al Law of Succession* 143.

⁴² De Waal, Schoeman and Wiechers *Law of Succession* 3, where it states that common law restrictions include provisions of a will that are unlawful, against good morals, too vague or impossible to perform.

ensure that it complies with the South African Constitution, which forbids unfair discrimination.⁴³

3.3 Intestate succession claims

Intestate succession claims represent the final claims that are to be settled from an estate. These claims are prescribed by legislation, specifically the *Intestate Succession Act*,⁴⁴ and link an individual's right to inheritance in relation to the deceased person. These relations include affinity, consanguinity, surrogacy, adoption, union and acceptance.⁴⁵ The following section will demonstrate how these claims are made in relation to the estate of person X.

3.4 The distribution of person X's estate according to the Intestate Succession Act 81 of 1987

As mentioned in part 2.3 of this article, we shall assume, for the sake of an accurate comparison between the two normative systems investigated in this article, that the net estate after all liabilities have been settled equates to R1 000 000. The *Intestate Succession Act*, as stated in 3.3 above, will apply to the distribution of person X's estate. Section 1(1)(a)-(f) specifies a number of factual situations that regulate how an intestate estate is divided in each situation. The section applicable to person X's situation is section 1(1)(c).⁴⁶ The amount currently decided upon in this regard by the Minister in the Government Gazette, as stated in section 1(c)(i), equals R250 000.⁴⁷ 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*⁴⁸ plus the deceased person's number of surviving spouses.⁴⁹

Before 1988 South African law disqualified a child born out of wedlock from the intestate inheritance equation of their father.⁵⁰ However, as a result of

⁴³ See s 9 of the *Constitution of the Republic of South Africa*, 1996.

⁴⁴ See ss 1(1)(a)–(f) of the *Intestate Succession Act* 81 of 1987.

⁴⁵ Abduroaf *Impact of South African Law* 79.

⁴⁶ 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;"

⁴⁷ DOJ&CD 2015 [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).

⁴⁸ 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 article, all the children of person X (daughters B and C along with sons Y and adopted son Z) would constitute stirpes resulting in person X having four stirpes.

⁴⁹ De Waal, Schoeman and Wiechers *Law of Succession* 14.

⁵⁰ Abduroaf 2021 *Obiter* 128.

the revision of section 1(2) of the *Intestate Succession Act*, this viewpoint has now changed.⁵¹ As a result, daughter B (born out of wedlock) is seen as no different to her siblings (C, Y, and Z) for inheritance purposes. This represents one of the main distinctions between the Islamic law of compulsory succession and the South African law of intestate succession.⁵²

When assessing the situation of adopted son Z, South African law further does not differentiate between biological children and adopted children. A reading-together of section 1(4)(e) of the *Intestate Succession Act*⁵³ with section 242(3) of the *Children's Act* 38 of 2005⁵⁴ 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 the South African law of intestate succession.⁵⁵

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. Person X bequeathed a share of 7/64 to both adopted son Z and daughter B. These shares calculate to R109 375 each (or R218 750 in total).

The intestate estate now equates to R781 250. In calculating the child's share, we utilise the number of *stirpes* present in the scenario i.e., his four children B, C, Y, Z, and wife A, thus equating to five. 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 share is less than the sum specified by the Minister of Justice and Correctional Services as per section 1(c)(i) of the *Intestate Succession Act* (R250 000), wife A will be entitled to receive the stipulated amount of R250 000. Additionally, the remainder of the estate amounting to R531 250 (R1 000 000 – the net estate after liabilities) – R218 750 (the testate bequest) and 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).

⁵¹ See s 1(2) of the *Intestate Succession Act* 81 of 1987, where it states: "Illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation."

⁵² See 2.4.4 of this article for an explanation on how the Islamic law of compulsory succession differs from this position.

⁵³ Section 1(4)(e) of the *Intestate Succession Act* 81 of 1987: "An adopted child shall be deemed – (i) To be a descendant of his adoptive parent or parents."

⁵⁴ Section 242(3) of the *Children's Act* 38 of 2005: "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."

⁵⁵ See 2.4.4 of this article for an explanation of how the Islamic law of compulsory succession differs from this position.

4 Comparative table illustrating the distribution of person X's estate in both normative systems

The author of this article has tabulated the findings of the research to simplify the explanations in the above two subsections

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

Share distribution as per the South African Law of Succession			
	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

5 Remedies Available in the Islamic Law of Succession for Muslims Wanting to Create a More Equitable Distribution in Terms of the "Problematic Areas"

The commonly contested area of the 2:1 division of inheritance in favour of the male will be the first area of investigation in this section. It is important to note from the outset that women do not always inherit half the share of men.⁵⁶ There are several instances where this is not the case.⁵⁷ It cannot, therefore, be said with certainty that the Islamic law of succession invariably implies discrimination against women. An example wherein a female inherits the same share of an intestate inheritance as her male counterpart can be seen in a situation when the deceased leaves behind both parents and a son. The distribution of this estate would result in the father and mother inheriting equal shares⁵⁸ and the residue of the estate's going in favour of the son.⁵⁹ As is evident herein, the male and female, i.e. the mother and father, inherit the same ratio.

Another example where a female inherits more of an intestate inheritance than a male can be seen where X dies, leaving behind a mother, a father, a widow and a child as the only intestate beneficiaries. The first computation assumes that the child is male, whereas the second assumes that the child is female. In the first calculation, the mother and father would both inherit a $1/6^{\text{th}}$ share ($4/24$),⁶⁰ the widow would inherit $1/4$ share ($6/24$),⁶¹ and the son would be entitled to inherit the residue of the estate ($10/24$).⁶² The second scenario involving a daughter in the place of a son would see the same shares being awarded to the aforementioned parents ($1/6^{\text{th}}$ each), the widow would inherit one quarter ($1/4$), but the daughter would inherit half the estate ($12/24$).⁶³ Due to the addition of the apportioned shares totalling more than the base of the equation, i.e. 24, the doctrine of increase⁶⁴ would

⁵⁶ Sungay 2023 *LDD* 455.

⁵⁷ Abduroaf 2020 *De Jure* 116.

⁵⁸ See Ali *Holy Qur'an* 4:11, where it states: "[f]or parents, a sixth share of inheritance to each if the deceased left children".

⁵⁹ See Khan *Translation of the Meanings of Sahih Al Bukhari* 477, 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.'"

⁶⁰ See Ali *Holy Qur'an* 4:11, where it states: "[f]or parents, a sixth share of inheritance to each if the deceased left children".

⁶¹ See Ali *Holy Qur'an* 4:12, 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".

⁶² See Khan *Translation of the Meanings of Sahih Al Bukhari* 477, 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.'"

⁶³ See Ali *Holy Qur'an* 4:12 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".

⁶⁴ A situation whereby the numerator of an equation equates to more than the denominator. See Abduroaf *Deceased Estates* 101-104 for further reading on this concept.

find application and result in the new denominator being 26.⁶⁵ This exemplifies the daughter's inheriting more than the son, thus further bolstering the initial statement that the perceived discrimination is not constant. Due to restrictions in the length of this article, further instances of females inheriting on an equal footing as males or inheriting more than their male counterparts will not be included in this article.⁶⁶

Should a woman not be entitled to inherit the same or a greater portion of an inheritance than her male counterpart as per the Islamic distribution formula, there exist other ways to lawfully circumvent this. The testate bequest route will prove to be quite beneficial in resolving this issue. To illustrate this with a practical example, the scenario of person X will be altered to include only his wife A, his daughter C and his son Y. The distribution of this estate without a testate bequest being made in favour of daughter C would result in her inheriting less than her male counterpart.⁶⁷ Should person X wish to afford his daughter C and son Y a different distribution to the benefit of daughter C, a bequest may be made in favour of her. As an illustration, we will assume that person X bequeaths $\frac{1}{4}$ ($\frac{6}{24}$) of his net estate to his daughter C. The distribution of his estate would thus result in wife A still inheriting her $\frac{1}{8}$ th share ($\frac{3}{24}$)⁶⁸, daughter C inheriting $\frac{11}{24}$ and son Y inheriting the residue amounting to $\frac{10}{24}$.⁶⁹ As seen in this scenario, the dynamics of the devolution of the assets have now changed drastically in favour of daughter C. She now inherits a slightly higher share than her male counterpart as opposed to the default position. The sole constraint or regulation on this additional award is that, following the testator's death, the other inheriting intestate beneficiaries would need to accede to this additional award.⁷⁰ This restriction is due to daughter C's being an already inheriting intestate beneficiary.

A solution similar to the above can be implemented in regard to the omission of adopted children and the disqualification of children conceived outside of wedlock from intestate inheritance. As expanded on in Part 2.4.3 of this article, the 6 months rule presents one of the allowances in the Islamic law of compulsory succession to lawfully inherit as an intestate beneficiary.⁷¹

⁶⁵ Abduroaf 2020 *De Jure* 117.

⁶⁶ See Abduroaf 2021 *Obiter* for further examples exemplifying these instances.

⁶⁷ Daughter C inheriting $\frac{7}{24}$ and son Y inheriting $\frac{14}{24}$. See Ali *Holy Qur'an* 4:11, 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".

⁶⁸ See Ali *Holy Qur'an* 4:12, 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".

⁶⁹ See Ali *Holy Qur'an* 4:11, 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".

⁷⁰ Abduroaf *Deceased Estates* 39.

⁷¹ See 2.4.3 of this article for further reading on this.

Should the descendant not fall in this category, which would enable him to inherit as an intestate beneficiary, other remedies do exist. The remedy that will be recommended in this section follows the same approach as the aforementioned remedy utilising the testate bequest and endowment of gifts to accommodate such exclusion. Person X foresaw the possibility of daughter B and adopted son Z not being considered intestate beneficiaries, so he rightfully utilised the testate bequest avenue by awarding them the testate estate share. This demonstrates that the exclusion of these individuals can be lawfully circumvented. The Islamic laws of inheritance can thus be worked to allow excluded children, whether through adoption or conceived out of wedlock, a right of inheritance. It is therefore advised that Muslims in South Africa and worldwide utilise the available resources to place adopted children and children conceived out of wedlock on the same footing as those conceived in marriage.⁷²

6 The rationale for these areas of the law

6.1 *The rationale for the 2:1 general rule in favour of the male*

Chapter 4 verse 34 of the Holy *Qur'ān* contains an acclaimed justification for the general rule affording the male double the intestate inheritance of his female counterpart.⁷³ This verse makes it quite evident that the male figure in the family dynamic bears most of the financial responsibility, with the female figure bearing little to no financial load. Despite not being specifically mentioned in inheritance laws, this is widely considered by scholars and academics to be one of the main justifications for the double inheritance in favour of the male.⁷⁴ Every girl is endowed with a male guardian (*Walī*)⁷⁵ from the moment of her birth.⁷⁶ Prior to her marriage, her father or brother fills this role.⁷⁷ Once she gets married, her husband assumes the role, placing the responsibility of her maintenance (*nafaqa*) on him solely.⁷⁸ In an Islamic household the husband has a number of functions or obligations that

⁷² Abduroaf 2021 *Obiter* 135.

⁷³ See Ali *Holy Qur'an* 4:34, 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".

⁷⁴ Abduroaf 2020 *De Jure* 119.

⁷⁵ 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 death, and including death. See Moolla *Imperative to Implement Muslim Personal Law* 15-17 for further reading on this concept.

⁷⁶ Farooq 2019 *Granite Journal* 21.

⁷⁷ Farooq 2019 *Granite Journal* 21.

⁷⁸ See Ali *Holy Qur'an* 2:233, where it states: "And upon the father is their (i.e. the mother's) provision and their clothing according to what is acceptable. No person is charged with more than his capacity."

must be fulfilled in accordance with *Shar'ah* law.⁷⁹ Because of this, men have a heavier and more challenging burden to provide for their families.⁸⁰ Thus, women are always guaranteed by law to receive proper care, to the point that affluent wives have a right to receive maintenance from their husbands, needy sisters from their brothers, mothers from their sons, and daughters from their fathers.⁸¹ Every Muslim woman further maintains the right to ask to her desires for a dower upon the conclusion of a valid Islamic marriage.⁸² This dower is chosen by the woman, and belongs to her solely.⁸³ This dower serves as a token of respect to the wife and not as a method of quantifying her value.⁸⁴ Furthermore, it acts as security to protect a wife from unfavourable events, such as her husband's passing.⁸⁵ It is thus clear that the wife has a very favourable financial condition following her marriage.⁸⁶ The husband has no right to the dower given, nor can he reclaim it under any circumstance.⁸⁷ The maintenance (*Nafaqa*) responsibilities stemming from a marital relationship are further extended to the waiting period (*iddat*)⁸⁸ following the termination of the marriage,⁸⁹ and continues even after death as well. Thus, a woman's funeral costs are to be covered by her *Wali*, whereas the reverse is not true.⁹⁰

Essentially, then, even while the final conclusion indicates that a woman's overall inheritance share is arithmetically different, this does not imply that they are ultimately unequal.⁹¹ As proven above, this is mainly due to the male's varied financial duties to all female relatives, whereas the converse

⁷⁹ Made up of four primary sources: the Holy Qur'an, the Prophetic Traditions (the *Sunnah*), the consensus of juristic opinions (*Ijma*) and reasoning by analogy (*Qiyas*). See Mzee 2016 *Journal of Law, Policy and Globalization* 55 for further reading on this concept.

⁸⁰ Bani and Pate 2015 *International Affairs and Global Strategy* 104.

⁸¹ Ati *Family Structure in Islam* 269.

⁸² Bani and Pate 2015 *International Affairs and Global Strategy* 104.

⁸³ Ferdousi 2019 *Jurnal Syariah* 553.

⁸⁴ Ferdousi 2019 *Jurnal Syariah* 553.

⁸⁵ Ferdousi 2019 *Jurnal Syariah* 547.

⁸⁶ Jansen *Extended Family Relationships* 185.

⁸⁷ See Ali *Holy Qur'an* 2:229, 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."

⁸⁸ The term "waiting period" or *iddat* refers to the period of waiting for the woman before remarrying after her divorce or the 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 and Lehmann 2011 *Journal of Law and Practice* for further reading on this aspect.

⁸⁹ Booley 2014 *LDD* 45.

⁹⁰ Abduroaf *Deceased Estates* 38.

⁹¹ Ati *Family Structure in Islam* 268.

is not true. This may suggest that the male can, therefore, more likely be said to be "liable" than a "beneficiary".⁹²

6.2 The rationale for the exclusion of a child conceived out of wedlock from the compulsory succession equation

There are various reasons why single-parent families arise, such as parental death, divorce or desertion.⁹³ Most single-parent families formed in the middle of the 20th century as a result of a spouse passing away.⁹⁴ The data reveal that as time progressed, an increasing number of single parents were never married. This is currently the main cause of single-parent households worldwide.⁹⁵ The number of households headed by a single parent, particularly single mothers, is rising at a worrying rate.⁹⁶ In South Africa alone, more than 40% of mothers are single parents, and this number continues to grow.⁹⁷ These single-mother homes are experiencing severe financial crises. These result from the single mother's obligation to provide for her child's fundamental necessities, which include paying for food, clothing, school supplies, and several other expenses.⁹⁸ Usually, the parents split these costs evenly in a typical household.⁹⁹ In an Islamic household, however, as expounded in 6.1 above, the male head of the household bears the sole financial responsibility. The Holy *Qur'ān* places the maintenance obligation solely on the husband¹⁰⁰ and father to protect and see to the needs of his wives and offspring.¹⁰¹

The Islamic ban against having sex before marriage is made abundantly clear in the Holy *Qur'an*.¹⁰² Premarital sex can either take the form of fornication¹⁰³ or adultery.¹⁰⁴ These ideas are collectively included under the

⁹² Ati *Family Structure in Islam* 269.

⁹³ Prabhakar and Kotwal 2009 *Journal of Social Sciences* 197.

⁹⁴ Prabhakar and Kotwal 2009 *Journal of Social Sciences* 197.

⁹⁵ Prabhakar and Kotwal 2009 *Journal of Social Sciences* 197.

⁹⁶ Garfinkel and McLanahan 1987 *Wilson Quarterly* 43.

⁹⁷ Dube 2021 <https://health-e.org.za/2021/11/16/covid-19-pandemic-single-mothers-bear-the-biggest-brunt/>.

⁹⁸ Prabhakar and Kotwal 2009 *Journal of Social Sciences* 199.

⁹⁹ Anania 2022 <https://www.investopedia.com/articles/personal-finance/030716/managing-money-couple.asp>.

¹⁰⁰ See Ali *Holy Qur'an* 4:34, wherein it states: "Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially."

¹⁰¹ Bani and Pate 2015 *International Affairs and Global Strategy* 104.

¹⁰² See Ali *Holy Qur'an* 17:32, where it states: "Do not go near adultery, surely it is an indecency, and an evil way [of fulfilling the sexual urge]."

¹⁰³ See Green 1989 *Ohio NU L Rev* 545, where fornication is defined as "consenting intercourse between unmarried adults".

¹⁰⁴ See Green 1989 *Ohio NU L Rev* 545, where adultery is defined as "where an adult is married to another whilst having intercourse with a person who is not your spouse".

term *Zina* in Islam.¹⁰⁵ Essentially, it is believed that engaging in any sexual activity before marriage is against God's commandment.¹⁰⁶ Islam, therefore, requires all Muslims to get married before satisfying their sexual urges because, as previously mentioned, the marriage contract ensures that the financial well-being of the wife and any children born into the union is prioritised. This is opposed to the single-mother households that are common in today's society due to the desertion of fathers, and a lack of legal protection afforded to mothers in the absence of a marriage.

Another disadvantage of engaging in sexual activities outside the confines of a marriage can include the transmission of sexually transmitted diseases. It is a known truth that those who engage in several sexual partners at will are at a higher risk of acquiring sexually transmitted diseases.¹⁰⁷ It has also been demonstrated that single mothers are more likely to experience depression from a mental health standpoint. This is due to their experiencing feelings of identity loss and rootlessness.¹⁰⁸ Lastly, it is also possible to draw the conclusion that the child's exclusion from inheritance serves as retribution for the parents' transgressions rather than the sinners themselves.¹⁰⁹

6.3 The rationale for the exclusion of an adopted child from the compulsory succession equation

Adopted children living in Muslim households are entitled to receive certain privileges and duties from their adoptive families, just as in any other South African household.¹¹⁰ Among many other things, these rights include the use of family names, access to family facilities, and the ability to continue offering care and support.¹¹¹ Adoption is seen as a noble deed in Islam since it is equivalent to providing assistance to children, particularly orphans.¹¹² Nevertheless, Islamic law maintains some distinctions between an adopted child and an individual's biological offspring. An example of one of these limitations can be said to be the exclusionary *Mahram*¹¹³ principle, which

¹⁰⁵ Rizvi 2022 <https://www.al-islam.org/marriage-and-morals-islam-sayyid-muhammad-rizvi/chapter-three-islamic-sexual-morality-2-its>.

¹⁰⁶ See Ali *Holy Qur'an* 23:5-6, 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."

¹⁰⁷ Finer, Darroch and Singh 1999 *Family Planning Perspectives* 228.

¹⁰⁸ Prabhakar and Kotwal 2009 *Journal of Social Sciences* 198.

¹⁰⁹ Sungay *Constitutional Legitimacy* 70.

¹¹⁰ Anwar and Kasdi 2019 *Al-Ahkam* 148.

¹¹¹ Anwar and Kasdi 2019 *Al-Ahkam* 148.

¹¹² The Holy Prophet Muhammad (pbuh) also adopted an individual by the name of Zayd bin Haritha, a freeman from the South of Syria, who was kidnapped by Arab tribes and sold off in the slave market in Mecca around AD 600. See Yassari 2015 *Am J Comp L* for further reading on this part of history.

¹¹³ 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

prevents an adopted child from being a *Mahram* to the adoptive parents.¹¹⁴ Adopted children are distinct in this sense and cannot inherit from their adoptive parents' intestate estate, even if it is mandatory that they be treated on an equal basis with biological children.¹¹⁵

7 Conclusion and recommendations

Since the revelation of the Holy *Qur'an* and its accompanying injunctions, many individuals' rights have been uplifted. In the end, these advancements helped lead to the complete abandonment of numerous customs that were practised in ancient Arabia and other parts of the world.¹¹⁶ Much of the literature on the subject of Islamic succession law fails to recognise the revolutionary character of the changes brought about by the teachings of the holy Prophet Muhammad (pbuh). As was proven in the preceding section, all the principles contained in the Islamic law of succession have a rationale behind their existence. Further to this, these rules are not cast in stone, as there are various means by which testators can lawfully circumvent their application should they wish to.

The author of this article thus advises all Muslims to familiarise themselves with the principles of Islamic inheritance law. This entails being aware of the general workings of the Islamic law of succession as well as the rationales behind its exclusions. In order to achieve a more equitable distribution, it is advantageous – as demonstrated by the scenario of person X – to further educate oneself on the legal exceptions to these exclusionary rules. This will consequently prevent misconceptions growing about the religion of Islam, and further draw individuals to the reality and beauty of the religion in itself.

This article has demonstrated that, despite the existence of exclusionary rules such as the reduction of the female's share, the disqualification of a child born outside of marriage from inheriting as a beneficiary of an intestate estate or the exclusion of an adopted child from an intestate inheritance, they are not absolute. This article has further proceeded to show how a Muslim testator can conduct estate planning to ensure all his offspring are not disqualified from inheriting from his estate. These solutions include

son being a *Mahram* to a mother. See Hadad 2019 *Economica* for further reading on what a *Mahram* entails.

¹¹⁴ Anwar and Kasdi 2019 *Al-Ahkam* 147.

¹¹⁵ There is very little information and research done by academics on the uncovering of this rationale as found in the Islamic law of compulsory succession. The author of this article notes 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.

¹¹⁶ These examples included the granting of Muslim women the right to inheritance in addition to the granting of other individuals' rights through blood and marriage ties as opposed to the little to no regulation that existed in many cultures and religions. See Esposito *Women in Muslim Family Law* 15 for further reading on this.

granting testate bequests in favour of the excluded beneficiaries and investigating whether the disqualification or exclusion fully applies to the scenario. These avenues, as shown, not only allow the descendant the right to inherit but have the potential to enable them to inherit on a better footing than children born in normal circumstances. Verily, God knows what we know not.¹¹⁷

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¹¹⁷ Ali *Holy Qur'an* 16:74.

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List of Abbreviations

Am J Comp L
DOJ&CD

American Journal of Comparative Law
Department of Justice and Constitutional
Development

LDD

Law, Democracy and Development

MJC

Muslim Judicial Council of South Africa

Ohio NU L Rev

Ohio Northern University Law Review