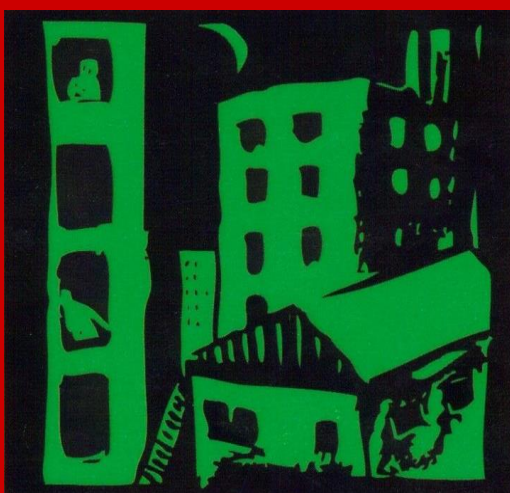
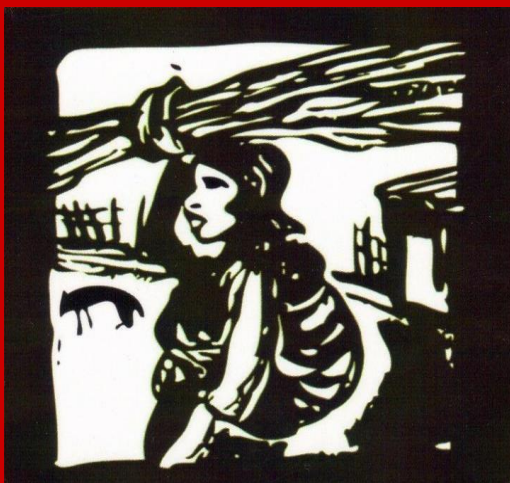


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Do women face discrimination under the Islamic law of succession? An examination of the male-preferential 2:1 rule of inheritance

MOHAMED HOOSAIN SUNGAY

*Assistant Lecturer, Department of Public
Law and Jurisprudence, University of the
Western Cape, Bellville, Cape Town*

<https://orcid.org/0009-0006-2576-6581>

ABSTRACT

There is a common belief that women's rights and Islamic Shari'ah law (finding its basis in the Holy Qur'an and the Prophetic teachings) are intrinsically at odds with one another. The 2:1 ratio of inheritance in favour of the male, which is enshrined in the Holy Qur'an, is the subject of this article's investigation into whether the Islamic law of succession discriminates against women. The paper explores the justification for this controversial rule, and further indicates that it is merely a general rule, not an absolute one. To address the main query of this article, a range of primary and secondary sources that cover various facets of this rule and its implementation are relied upon. The article demonstrates that, contrary to popular belief and much beyond what "modern civilisation" has provided, Shari'ah law grants women far more rights than might initially be thought to exist.

Keywords: women's rights; Shari'ah law; discrimination; Islamic law of succession; 2:1 rule in favour of the male

1 INTRODUCTION

In accordance with the Islamic law of intestate succession, a daughter is always entitled to receive half of a son's share.¹ The fundamental texts of Islamic law do not explicitly specify why women often inherit less favourably than men in intestate succession.² This is one of the reasons for the existence of the common belief that women's rights and Islamic Shari'ah law (finding its basis in the Holy Qur'an and the Prophetic teachings)³ are intrinsically at odds with one another.⁴ The intention in this article is to show how this belief has come about and to prove that it is a misconception which is inaccurate on many levels.

In illustrating this hypothesis, a fictional scenario will be utilised. The scenario that is used throughout this article assumes that a Muslim male, person X, dies on 12 July 2023, leaving behind a net estate⁵ to the value of R1,200,000. Person X leaves behind a will stating that he bequeaths one-third of his net estate to his daughter Aasiyah and his wife A in equal shares. In conclusion, the will states his final wish of wanting his estate to be distributed according to the Islamic law of succession. Person X is survived by his wife, A, his daughter, Aasiyah, and his son, Aasim.

No cases (to date) have been heard by the Constitutional Court of South Africa concerning the constitutionality of the Islamic law of succession. Many authors who have written about the Islamic law of succession and its application in various legal systems within the world 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 as well of its applicability in the context of the 1996 South African Constitution (the Constitution). The literature closest in relationship to the arguments in this paper is the work of Abduroaf, where he discusses the rationale for the distribution of shares in

¹ See Al-Qur'an chapter 4 verse 11: "... Allah commands you as regard your children's (inheritance); to the male, a portion equal to that of two females ..."

² Abduroaf M "An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession" (2020) 53(1) *De Jure* 115 at 115.

³ Mzee MM "Islamic law of inheritance: The case of illegitimate child and possibility of having an assets of a deceased father: A Tanzanian case study" (2016) 45 *Journal of Law, Policy and Globalization* 55 at 55.

⁴ Uddin A T "Women's rights in Islamic law" (2017) *Atlantic Council Report* 1 at 27. See further Abduroaf M & Moosa N "Islamic law mode of estate distribution in South Africa" (2016) *The International Survey of Family Law* 456 at 458; and C Rautenbach, NMI Goolam & N Moosa *Introduction to legal pluralism in South Africa* 3ed Durban: LexisNexis Butterworths (2010) at 211 for examples of where this belief is stated.

⁵ Estate remaining after all liabilities have been settled.

⁶ Examples of these texts include 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*; Aziz MZ *The Islamic law of bequest* (1986); 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).

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

terms of the Islamic law of intestate succession.⁷ Abduroaf's research, however, is limited in that it only displays the inconsistency of discrimination against females in addition to the rationale behind the 2:1 rule.

This article consequently expands on Abduroaf's writings and provides a broader overview of the topic. It also seeks to identify why some believe that women's rights and Islamic Sharī'ah law are intrinsically at odds with one another. In addition, the article delves into remedies available to Muslims who wish to lawfully allow their female descendants to inherit more than the half share, and furthermore points to ways for women to uplift themselves, particularly in the realm of inheritance laws.

The discussion that follows refers to the male and female genders and uses the accompanying pronouns "he" and "she" (or "their" for collective reference), given that Sharī'ah law of inheritance specifies rules for each of these genders.⁸ The article will begin with a brief overview of how the Islamic law of succession as a whole operates. The section thereafter will delve into a common area of controversy within the Islamic law of succession, namely the 2:1 rule of inheritance in favour of the male, as codified in the Holy Qur'ān. In this section, the rationale for the rule and its application is examined, along with the question of whether this rule is an absolute one. The concluding sections highlight the disparity between the laws as stated in the Qur'ān and the practice or application of them within specific cultures. This will form the basis for proving the core hypothesis of this paper.

2 AN OVERVIEW OF THE ISLAMIC LAW OF SUCCESSION INCORPORATING BOTH TESTATE AND INTESTATE SUCCESSION

The Islamic law of succession prescribes a formula dictating how a deceased person should dispose of his or her assets, with individual freedom of testation limited to only a third of the net estate.⁹ These laws, finding their basis in the Holy Qur'ān and Prophetic teachings, establish the foundation for an impartial distribution of assets.¹⁰ Prior to the distribution of the assets within the estate, in line with these rules or any of the wishes of the testator being carried out, the rules of the Islamic law of succession are that certain expenses need to be seen to, that is, debts, funeral expenses, and administration costs.¹¹ This is the first point of departure sought when distributing an individual's estate. Only once these expenses are seen to can one move on to the laws regulating the

⁷ See Abduroaf M "An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession" (2020) 53(1) *De Jure*.

⁸ See Ali AY *The Holy Qur'an: English translation of the meanings and commentary* Islamic Book Trust (1934) at 4:11, 4:12 & 4:176.

⁹ Moosa N "Muslim personal law: To be or not to be?" (1995) *Stellenbosch Law Review* 417 at 421.

¹⁰ Sungay MH "Constitutional legitimacy of the Islamic law of wills in South Africa" (2022) 17(1) *Manchester Journal of Transnational Islamic Law & Practice* 52 at 55.

¹¹ An in-depth explanation of these issues is beyond the scope of this article. See further Abduroaf K *Deceased estates: Islamic law mode of distribution* 2ed Cape Town: Highlands Waqaf Trust Publishers (2018).

testate estate (*Wasiya*) and then the intestate estate.¹² The following subsections expand on each of these expenses, explaining their application to the estate of a Muslim individual.

2.1 The testate estate (*Wasiya*)

The testate estate, also referred to as the *Wasiya*, to which the author has freedom of testation (subject to certain limitations) is restricted to a third of his or her net estate. Limitations on this portion of the estate, in addition to the limit of one-third placed on it, include not bequeathing this portion to a beneficiary already included in the intestate estate beneficiary.¹³ This stipulation creates a foundation of fairness wherein it limits what someone can inherit and eliminates the ability to discretionarily award more to the “favourite” heir.¹⁴ An exception to this limitation obtains only where the other beneficiaries consent to this wish of the testator.¹⁵ This express consent must be given by all intestate beneficiaries after the death of the testator.¹⁶

2.2 The intestate estate

The remaining two-thirds of an estate or more, depending on whether a bequest was made, are referred to as the intestate estate. The reason for this being deemed the intestate estate is that the Islamic law of succession regulates this remainder of the net estate to be distributed to the Qur’ānic heirs. South African law, on the other hand, finds the application of intestate beneficiaries only in the absence of a will. These beneficiaries are determined by the Intestate Succession Act 81 of 1987.¹⁷

The intestate beneficiaries in the Islamic law of succession are primarily set out within Chapter 4 (Surah *Nisa*) verses 11, 12 and 176 of the Holy Qur’ān.¹⁸ Intestate beneficiaries, for the reason that their shares are prescribed, can also be referred to as primary heirs.¹⁹ Primary heirs can be assigned into further subcategories. The main subcategories that are relevant for the purposes of this article are the sharer beneficiaries and residuary beneficiaries. A sharer beneficiary is defined as an intestate

¹² Abduroaf K *Deceased estates: Islamic law mode of distribution* 2ed Cape Town: Highlands Waqaf Trust Publishers (2018) at 33.

¹³ See Sunnah.com “Sunan An-Nasa’i 3643 – the Book of Wills” (2022) available at <https://sunnah.com/nasai:3643> (accessed 27 May 2022), 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.”

¹⁴ Sungay MH “Constitutional legitimacy of the Islamic law of wills in South Africa” (2022) 17(1) *Manchester Journal of Transnational Islamic Law & Practice* 52 at 55.

¹⁵ Abduroaf K *Deceased estates: Islamic law mode of distribution* 2ed Cape Town: Highlands Waqaf Trust Publishers (2018) at 39.

¹⁶ See Abduroaf (2018) at 29.

¹⁷ See the Intestate Succession Act 81 of 1987 section 1(1)(a)–(f).

¹⁸ Islamic Wills USA “Inheritance in Quran” (2022) available at <https://www.islamicwillsusa.com/law-of-inheritance-in-quran/> (accessed 23 February 2022).

¹⁹ Abduroaf (2018) at 39.

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

beneficiary who inherits a prescribed fractional share.²⁰ These beneficiaries by relation are expressly mentioned in Chapter 4 (Surah Nisa) verses 11, 12 and 176 of the Holy Qur'ān. Residuary beneficiaries are defined as intestate beneficiaries who inherit the residue of the intestate inheritance after the sharer beneficiaries have inherited their respective shares.²¹ In terms of the scenario of person X, wife A would be the only sharer beneficiary, with Aasiyah and Aasim being the residuary beneficiaries.

3 THE 2:1 RULE OF INHERITANCE IN FAVOUR OF THE MALE

Chapter 4 verse 11 of the Holy Qur'ān states: "Allah thus commands you concerning your children: the share of the male is like that of two females ..." This verse is the primary basis for the rule in Islamic succession law which provides that the male is to inherit double the share of his female counterpart. This rule is applicable to all male/female counterpart relationships from the deceased bloodline. Examples of these relationships include brother/sister, husband/wife, father/mother and uncle/aunt relations.²²

Many refer to this rule as a basis for claiming that the Islamic law of succession discriminates against women. If one were to look at it in a South African context at face value, it could be construed to be in conflict with several constitutional principles, including equality²³ and dignity.²⁴ Furthermore, the rule could also be found to be in contravention of several international laws²⁵ protecting women's rights. These observations would be made on the basis that her share is diminished on the sole basis of her gender.

This article proves, however, that this finding cannot be asserted in a blanket manner, due to several factors. These factors include the consideration that the testator opts to employ his/her right to freedom of testation when choosing to apply the Islamic law method of distribution to their estate.²⁶ Another consideration involves the rationale and purpose for this principle's existence. The final consideration relates to this rule not

²⁰ See Abduroaf (2018) at 17.

²¹ See Abduroaf (2018) at 17.

²² See Abduroaf (2018) at 97–101.

²³ See section 9(3) of the Constitution of the Republic of South Africa, 1996 (Constitution): "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."

²⁴ See section 10 of the Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected."

²⁵ See section 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA), 2000; section 18(3) of African Charter on Human and Peoples' Rights (ACHPR), 1981; article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

²⁶ See Sungay MH "Constitutional legitimacy of the Islamic law of wills in South Africa" (2022) 17(1) *Manchester Journal of Transnational Islamic Law & Practice* 52–65.

being set in stone, thus allowing a testator discretion as to how he/she wishes to distribute their estate. The following subsections delve into these factors in more depth.

3.1 Is the 2:1 rule an absolute rule wherein women inherit half the share of the male?

It is important to emphasise that the 2:1 ratio of inheritance in favour of a male is just a general guideline and not an absolute principle.²⁷ Many scenarios exist where a female indirectly inherits the same as, and at times more than, her male counterpart. One situation where a female inherits the same portion as her male equivalent is a scenario in which the deceased leaves behind both parents, a widower and a son. The distribution of this estate would result in the father and mother inheriting equal shares of one-sixth each²⁸ and the son inheriting the residue of the estate.²⁹ This hypothetical situation demonstrates how the mother receives the same proportion of the estate as her husband.³⁰ Other examples exist in which the aforementioned end result occurs, but these will not be discussed in this paper.³¹

There are also scenarios where females lawfully inherit more than their male counterparts. An example is a situation in which X dies leaving behind a mother, father, widower and a child. The first calculation is based on the child being male (scenario A) and the second is based on the child being female (scenario B). Scenario A would result in the mother and father each inheriting one-sixth of the net estate,³² the widower inheriting one-quarter of the net estate,³³ and finally the son inheriting the residue or remainder of the net estate,³⁴ amounting to a 10/24 share.³⁵ Scenario B, on the other hand, would result in the same share-distribution for the mother, father and widower in

²⁷ Sungay MH *Constitutional legitimacy of the Islamic law of compulsory succession* (unpublished LLM thesis, UWC, 2023) at 63.

²⁸ See Al-Qur'ān chapter 4 verse 11: "If the deceased has any offspring, each of his parents shall have a sixth of the inheritance..."

²⁹ See Khan MM *The translation of the meanings of Sahih Al Bukhari* Houston: Dar-Us-Salam (2004) at 477: "The 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.'"

³⁰ The reason for this terminology being used is due to the shares being prescribed by the Holy Qur'ān.

³¹ See further Abduroaf M "An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession" (2020) *De Jure*.

³² See Al-Qur'ān chapter 4 verse 11: "If the deceased has any offspring, each of his parents shall have a sixth of the inheritance ..."

³³ See Al-Qur'ān chapter 4 verse 11: "And to you belongs half of whatever has been left behind by your wives if they die childless; but if they have any children then to you belongs a fourth of what they have left behind ..."

³⁴ The remainder of an intestate inheritance after the sharer beneficiaries have inherited their shares.

³⁵ See Khan MM *The translation of the meanings of Sahih Al Bukhari* Houston: Dar-Us-Salam (2004) at 477: "The 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.'"

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

scenario A above, but the share of the daughter would be increased to $12/26$ ³⁶ as a result of the application of the doctrine of increase.

The doctrine of increase refers to a situation where the beneficiaries inherit less than their assigned fractional shares due to a mathematical correction.³⁷ This refers to a scenario where the prescribed shares, when added together, amount to more than the single estate and thus require mathematical correction. Further examples exist where females indirectly inherit the same or more than a male according to the law of compulsory succession equation, but this will not be expanded on within this paper.³⁸

The general devolution of the estate of person X given in the introduction of this article would amount to Aasiyah inheriting less than her brother Aasim. Person X's estate would be distributed in the following manner, namely wife A inheriting a $1/8$ th share (amounting to R100,000) of the net estate,³⁹ with the remainder of the estate distributed to Aasiyah and Aasim in a manner such that Aasim gets double the share of his sister Aasiyah.⁴⁰ These shares, when calculated, amount to Aasiyah inheriting R233,333.33 and Aasim inheriting R466,666.66. It is thus evident in this scenario that the female inherits less from the intestate estate than her male counterpart. This, however, as stated at the beginning of this subsection, is not a rule cast in stone.

Should the Islamic law of intestate succession, as in the given situation, not allow for a woman to inherit the same or a better share of inheritance than her male counterpart, then there are lawful avenues within the Islamic law of succession whereby any testator can do this, should the testator so wish. Examples of these lawful avenues include the testate bequest avenue⁴¹, gifts during one's lifetime,⁴² and the creation of a testamentary trust (*Al-Waqf*).⁴³ As seen in the scenario of person X, he utilised one of these remedies, that is, the testate bequest avenue, by bequeathing one-third of his net

³⁶ See Al-Qur'ān chapter 4 verse 11: "... if there is only one daughter, then she shall have half the inheritance ..."

³⁷ See Abduroaf (2018) at 96–102 where it explains the doctrine of increase as a situation where the beneficiaries inherit less than their assigned fractional shares due to a mathematical correction.

³⁸ See further Abduroaf (2020).

³⁹ See Al-Qur'ān chapter 4 verse 12: "... [i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth ..."

⁴⁰ See Al-Qur'ān chapter 4 verse 11: "Allah commands you as regard your children's (inheritance); to the male, a portion equal to that of two females ..."

⁴¹ Up to one-third of the net estate may be left in these bequests, at the donor's discretion subject to minimal restrictions. See further Abduroaf K *Deceased estates: Islamic law mode of distribution* 2ed Cape Town: Highlands Waqaf Trust Publishers (2018) at 39.

⁴² Money or property belonging to the testator but given to a beneficiary during his or her lifetime to avoid its being distributed in terms of a will.

⁴³ An effective structure created under a will where there is no real owner and the beneficiaries named in the Trust Deed share the right to benefit and profit from the assets within. See Sánchez RL "Testamentary trusts in English law: An introductory approach" (2015) 7(1) *Cuadernos DERECHO Transnational* for further reading on the creation and operation of testamentary trusts.

estate to his daughter Aasiyah and wife A in equal shares. This bequest entitles both wife A and Aasiyah to inherit an additional R200,000 each from the net estate of person X. The net distribution from person X's estate thus amounts to: wife A inheriting R300,000; Aasiyah inheriting R433,333.33; and Aasim inheriting R466,666.66. This hypothetical situation serves as an example of one of the legal methods utilised to equalise Aasiyah's inheritance with that of her brother Aasim.

3.2 What is the rationale for the 2:1 rule of inheritance?

Chapter 4 verse 34 of the Holy Qur'ān reads: "Men are the protectors and caretakers of women, as men have been provisioned by Allah (God) over women and tasked with supporting them from their means ...". It is thus clearly stated that the financial obligation within the family falls primarily on the male figure, with no financial burden placed on the female folk.⁴⁴ This, although not expressly stated in laws dealing with inheritance, is regarded by many scholars and academics as one of the main reasons for which the Islamic law of succession provides that the male is, by default, to inherit double the share of the female (as a general rule), due to his financial responsibility towards her.⁴⁵ It is guaranteed that a woman's property, whether inherited or self-acquired through personal earnings before or after marriage, is solely hers, and that her male guardians have no right to any of it.⁴⁶ Prior to a woman getting married, her father fulfils this role of guardian,⁴⁷ seeing to her needs.⁴⁸ Subsequently, after her marriage, her husband takes over this role of guardianship to maintain (*nafaqa*) her.⁴⁹

In general, maintenance (*nafaqa*) refers to what is spent to support one's wife with food, clothing, accommodation and other expenditures.⁵⁰ The maintenance responsibilities

⁴⁴ Sungay MH & 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) *Journal of Islamic History and Literature* 59 at 64.

⁴⁵ Abduroaf M *The impact of South African law on the Islamic law of succession* (unpublished LLD thesis, University of the Western Cape, 2018) at 153.

⁴⁶ Samar F *Study of the status of women in Islamic law and society with special reference to Pakistan* (unpublished PhD thesis, University of Durham, 1986) at 10.

⁴⁷ 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. The Arabic term for this individual is *Wali*. See further Moolla M *The imperative to implement Muslim personal law in South Africa* (unpublished LLM thesis, University of the Western Cape, 2022) at 15-17.

⁴⁸ Sungay & Booley (2023) at 64.

⁴⁹ See Al-Qur'ān chapter 2 verse 233: "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."

⁵⁰ Mohd A & Ibrahim BH "Muslim wife's rights to maintenance: Husband's duty to maintain a working wife in Islamic law and the law in Malaysia" (2012) 18(1) *IJUM Law Journal* 103 at 104

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

stemming from marriage extend to the waiting period (*iddat*)⁵¹ following the termination of the marriage and continue even after death, as a woman's funeral costs are to be covered by her guardian, whereas the reverse is not true.⁵² 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 sister in need by the brother, the mother by the son, and the daughter by the father.⁵³ Further to this, at the conclusion of any Islamic marriage, a woman is entitled to freely request any amount of dowry from the prospective husband.⁵⁴ Should the amount requested not be available at the time, the woman can request that it be paid off over a certain period.⁵⁵ It is also important to note that this dowry received belongs solely to the wife, and that she may do with it as she wishes.⁵⁶ It can thus be said that the missing half-share of the woman's inheritance is thereby provided, because the husband is responsible for the female folk and the remaining family.⁵⁷

This rationale can be further understood by looking again at the hypothetical scenario in the introduction of this article. At face value, the previous section demonstrated that Aasim would inherit double the share of his sister Aasiyah from the intestate estate, by virtue of his being male. The preceding paragraph showed, however, that the man's wealth is not restricted to his own needs, but rather to his family's, and specifically the female relatives around him. The converse is not true of females. To think of this in terms of the scenario, Aasim, although inheriting double the share of inheritance from person X's estate, has a religious duty endowed upon him to see to the needs of his wife, children, sister and mother. Aasiyah, on the other hand, does not have this responsibility, and is free to use her wealth as she pleases.

The author uses this scenario in the example of a father, person X, sending his daughter (Aasiyah) and son (Aasim) to the shop. The father gives his son R100, and states that he must buy bread, milk, and whatever his sister and mother need; only thereafter may he buy what he wants. The father then turns to his daughter Aasiyah, giving her R50, and stating that she can purchase whatever she wishes too, with no conditions attached thereto. This example, it is submitted, perfectly exemplifies that the double share of

⁵¹ Iddah refers to a period of waiting for the woman who is divorced or legally separated from her husband or whose husband died. See further Mohd & Ibrahim (2012).

⁵² See Abduroaf (2018) at 38.

⁵³ Ati HAA *The family structure in Islam* (1995) at 269.

⁵⁴ Sungay & Booley (2023) at 64.

⁵⁵ Abduroaf (2020) at 120.

⁵⁶ Sungay & Booley (2023) at 64.

⁵⁷ Sungay (2023) at 67.

men's inheritance is not based on gender privileging,⁵⁸ but rather on the greater financial responsibility placed on the male folk in the family system of Islam.⁵⁹

4 WHAT ARE THE ORIGINS OF THESE MISCONCEPTIONS?

The misconceptions about the 2:1 rule are influenced by many factors, including social, political and cultural ones. The following sections will focus on three issues which are responsible worldwide for this predicament, namely patriarchy, customs, and ineffectual laws. The first concern to be discussed herein is patriarchy.⁶⁰

Patriarchy refers to a system of government where men rule societies through their position as heads of households.⁶¹ This system has no borders and, as a phenomenon, is found in all societies and cultures. In many societies, the ascendance, intensification, or persistence of patriarchal norms and structures are one of the root causes of women being deprived of integral inheritance rights.⁶² The author will use Pakistan as an example to show how this issue has significantly impacted women's inheritance rights in an Islamic nation, where the principles of the Holy Qur'an are incorporated into national law. This example shows how an Islamic nation can still reflect a society in which women's inheritance rights are still severely impacted despite the legal protections available to them.

Pakistan is one of the nation's with the highest Muslim populations worldwide.⁶³ The Pakistani government introduced a repugnancy clause into the 1956 Constitution, the nation's first Constitution, in order to implement Islamic laws and accommodate the country's sizable Muslim population within its legal framework. This clause states that no existing law in Pakistan shall be incompatible with Islam, and forbids the enactment of any future legislation contrary to Islamic provisions.⁶⁴ This clause is still in force to date.⁶⁵ Despite this, women in Pakistan are reportedly still not granted the minimum Islamic inheritance rights and are frequently left out of the inheritance process

⁵⁸ In the most basic sense, the difference between "gender" and "sex" is that sex is biologically determined whereas gender is culturally determined. See further Torgrimson BN and Minson CT "Sex and gender: What is the difference?" (2005) 99(3) *Journal of Applied Physiology*.

⁵⁹ Shah NA *Women, the Koran and international human rights law the experience of Pakistan* Martinus Nijhoff Publishers (2006) at 55.

⁶⁰ Bahlheda R "The democratic gulag: Patriarchy, leadership & education" (2015) 488 *Peter Lang AG* 15 at 15.

⁶¹ Walby S "Theorising Patriarchy" (1989) 23(2) *Sociology* 213 at 214.

⁶² Bishin BG & Cherif FM "Women, property rights, and Islam" (2017) 49(4) *Comparative Politics* 501 at 505.

⁶³ Beata P "Influence of Islamic law, social customs and practices on the women's inheritance rights in Pakistan" (2022) 18(2) *Manchester Journal of Transnational Islamic Law and Practice* 101 at 101.

⁶⁴ Kennedy CH "Repugnancy to Islam: Who decides? Islam and legal reform in Pakistan" (1992) 41(4) *The International and Comparative Law Quarterly* 769 at 770.

⁶⁵ See section 227(1) of the Constitution of the Islamic Republic of Pakistan, 1973: "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

altogether. Statistics show that up to 97 per cent of women are excluded from the inheritance of agricultural land and real estate – the assets with the highest material value.⁶⁶

In the recent case of *Ghulam Qasim v Mst. Razia Begum*,⁶⁷ the Supreme Court in Pakistan was tasked with yet another inheritance matter, where a woman had been disinherited and the benefits had gone to male individuals. The Supreme Court noted that this act was unacceptable; that in the Islamic Republic of Pakistan women are notoriously deprived of their inheritance by male heirs who resort to different dubious tactics; and that there is a lack of effective measures to protect the rights of inheritance of women.⁶⁸ The case was brought before the court when three sons of a certain Ghulam Ahmed Shah dispossessed their sister of part of her inheritance on the basis that they had taken care of her well-being expenses.⁶⁹ The court ruled against the brothers and declared that her God-given right, as stated in the Holy Qur'ān, should be honoured.⁷⁰ Thus, despite the fact that Pakistan's Constitution explicitly incorporates Islamic law, these practices persist, with this case being just one of several documented instances in which a woman has successfully asserted her rights. How many women, then, have gone unaffected?

The second issue is the practice of customs. Several cultural customs exist in Pakistan that, once more, directly conflict with the tenets of Islamic Law and seek to bar women from inheriting wealth. Examples include marriages with the Holy Qur'ān,⁷¹ exchange marriages,⁷² and *Haq Bukhshwana*,⁷³ among others. Due to the prevalence of these regional customs, many individuals regrettably attribute such un-Islamic acts to religion rather than custom. The custom of disinheriting women remains a problem that affects the entire world, not just Pakistan.⁷⁴ In Nigeria, for instance, these issues have also had

⁶⁶ Beata (2022) at 113.

⁶⁷ *Ghulam Qasim v Razia Sultan* PLD 2021 Supreme Court 812.

⁶⁸ *Ghulam Qasim v Razia Sultan* PLD 2021 Supreme Court 812 at para 6.

⁶⁹ Beata (2022) at 107.

⁷⁰ *Ghulam Qasim v Razia Sultan* PLD 2021 Supreme Court 812 at para 6.

⁷¹ Women who are “married” to the Holy Qur'ān spend their lives in celibacy and isolation, praying and studying the sacred texts. This discriminatory tradition is still practised in some parts of Pakistan, especially in Sindh, but due to the sensitivity of the subject it is hard to obtain reliable data about the popularity of this practice. See further Beata P “Influence of Islamic law, social customs and practices on the women's inheritance rights in Pakistan” (2022) 18(2) *Manchester Journal of Transnational Islamic Law and Practice*.

⁷² The brother and sister most commonly get married to a related pair of siblings – the primary purpose of this sort of marriage is to maintain property within the family. See further Zaman M “Socio-cultural security, emotions and exchange marriages in an agrarian community” (2008) 28(3) *Sage Publications*.

⁷³ A situation in which the bride-to-be officially announces the waiver of her inheritance right in front of the entire family. See further Shakeel B *Perception of males about giving inheritance to women: A qualitative study* (unpublished thesis, University of Panjab, 2019).

⁷⁴ Ogugua VC & Onyenyironwu FS “Exploring the effects of cultural norms and practices on female inheritance in Imo State, Nigeria” (2021) available at

adverse effects on women's inheritance rights. Given that Nigeria is primarily made up of Christians, it is possible to recognise that disinheritance is not exclusively attributable to Islam but is rather a phenomenon that occurs across the board – which in turn reinforces the main point here, namely that, globally, patriarchy and customs are the root cause of women's inheritance rights not being realised.⁷⁵

The final cause of this phenomenon relates to ineffective laws for protecting women's rights. Unlike in a country like Pakistan, where Muslim women can approach a court and lay claim to a right under Islamic law, many countries do not allow such women these rights – with South Africa, unfortunately, being one of them. In reality, many women are left without recourse in a court of law due to non-recognition of their rights in Islamic law, to the extent that their marriages are not even recognised.

In the *Women's Legal Centre Trust* case,⁷⁶ a matter was brought on behalf of two parties, both of whom were aggrieved females whose Muslim marriages had been dissolved, calling out the South African government for its failure to pass legislation recognising Muslim marriages. Owing to the non-recognition of Muslim marriages, parties to these marriages (particularly females) are left with little to no recourse when compared to those who have entered into civil marriages.⁷⁷ To make matters worse, despite being citizens of South Africa, Muslim women generally lack legitimate access to the country's courts as a result of this non-recognition.⁷⁸ It has been asserted furthermore that such non-recognition amounts to nothing less than compromising citizens' right to dignity⁷⁹ and equality,⁸⁰ among other constitutional rights.⁸¹ Therefore, due to the lack of mechanisms to enforce their religiously granted rights, Muslim women face dire social and economic problems when going through divorce.⁸² These have a knock-on effect, resulting in Muslim women being unable to claim maintenance from their divorced husbands for their well-being, despite the Holy Qur'an providing for these rights to women in divorce matters and doing so to the extent that the father of the children has the sole responsibility to see to the maintenance of his offspring.

https://www.nigerianjournalonline.com/index.php/IJOLACLE/article/view/1707/1669_2 (accessed 4 January 2023).

⁷⁵ See Ogugua & Onyenyironwu (2021).

⁷⁶ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022].

⁷⁷ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] at para 38.

⁷⁸ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] at para 62.

⁷⁹ See section 10 of the Constitution.

⁸⁰ See section 9 of the Constitution.

⁸¹ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] at para 17.

⁸² 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) *Journal of Islamic History and Literature* 59 at 68.

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

It is thus evident that the Sharī'ah law system of rules is not to blame for the perilous position women find themselves in today. In present-day post-apartheid South Africa, there are still no legislative provisions recognising Muslim personal law – even though the Constitution makes provision for such legislation to be enacted.⁸³ Consequently, Muslims have been practising their Islamic family laws of marriage, divorce, and inheritance in the private sphere, where this is facilitated and regulated by community-based Muslim judicial bodies and their affiliated clergy (*Sheikhs* and *Imāms*).⁸⁴

These clergy have limited to no enforcement mechanisms in comparison to what the national judicial system wields.⁸⁵ For example, if a court makes a maintenance order against an ex-husband from a marriage, the latter will be aware that if he does not comply with the order, he will be arrested and prosecuted in court. In contrast, Muslim judicial bodies and their affiliated clergies can merely recommend that certain rectification measures should be followed. In the event that someone does not comply with the advice or orders given, there are no mechanism to enforce women's rights under Islamic law.⁸⁶ This phenomenon is sadly the reality in contemporary South Africa. A man will not think twice about abandoning his wife without providing for her Islamically required right to upkeep, because there is no accountability. At the same time, that individual would be scared to drive faster than the posted speed limit out of concern that he might get fined. There is also evidence showing that women in Muslim marriages are often unable to persuade their partners to conclude civil marriages so as to allow them recourse to a court of law.⁸⁷

5 REMARKS AND RECOMMENDATIONS

A great deal of the literature on the position of Muslim women underlines the revolutionary nature of the reforms introduced by the Holy Prophet Muhammad (pbuh) through his Prophetic teachings. It is well known that Qur'ānic injunctions uplifted women's status and contributed to the abandonment of some extreme and anti-women customs cultivated in ancient Arabia.⁸⁸ Islam thus granted women a number of rights that they did not have in pre-Islamic societies. Women from the *al-Jahiliyyah*⁸⁹ period

⁸³ See section 7(2) of the Constitution: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

⁸⁴ 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 2.

⁸⁵ Essop (2022) at 2.

⁸⁶ Sungay MH & 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) *Journal of Islamic History and Literature* 59 at 69.

⁸⁷ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] at para 47.

⁸⁸ Esposito JL *Women in Muslim family law* 2ed Syracuse: Syracuse University Press (2001) at 15.

⁸⁹ Al-Jahiliyyah in Islam is the period preceding the revelation of the Quran to the Prophet Muhammad. In Arabic, the word means "ignorance" or "barbarism". See further Zeidan A "jāhiliyyah" (2018) available at <https://www.britannica.com/topic/jahiliyah> (accessed 1 May 2022).

experienced every form of oppression, injustice and discrimination. They could not inherit, own property, decide on their own marriage, and after their husband's death, were often inherited by his immediate family as a part of the property.⁹⁰

According to Mernissi, the Holy Qur'ān endowed new laws on inheritance that deprived men of their privileges from those very dark ages.⁹¹ This resulted not only in women no longer being "inherited" like camels and palm trees,⁹² but in their having the right to inherit some property and wealth, unlike before, thus entering into competition with men for the sharing of fortunes.⁹³ Islam thus not only granted women the right to inherit, but also made it a religious obligation.⁹⁴ This section therefore shows once again that Muslim women enjoyed property rights centuries before women in the West, even in countries today regarded as paragons of gender equality.⁹⁵

This paper highlights that there are solutions available to address these issues rife in our society. Within both the South African context as well as in the various legal systems around the world where this phenomenon is prevalent, recognition of Muslim marriages to empower women's access to court systems would be one of the principal remedies. Section 34 of the South African Constitution of 1996 grants all citizens equal access to court structures to allow for their disputes to be heard.⁹⁶ The consequences of this recognition should not be restricted only to accessing courts. It should be extended to allow Muslim women to institute claims related to maintenance, custody and access, which are the proprietary consequences of marriage and divorce. The law governing these matters should be dealt with under the religious system of Islam. Adopting a separate Sharī'ah court to deal with Islamic law matters, and ensuring that it uses qualified persons who truly understand the laws of Islam, would certainly assist even further in this cause.⁹⁷

Another solution for alleviating these predicaments goes to the very basis of things: education and, in particular, the education of women. Women should be educated as to their marital, divorce and inheritance rights so that they can be the driving force of their own empowerment, rather than letting the male patriarchal systems continue. Nelson Mandela famously said, "Education is the most powerful weapon which you can use to

⁹⁰ Naseef FU *Women in Islam: A discourse in rights and obligations* International Islamic Committee for Women & Child (1999) at 41-42.

⁹¹ Mernissi F *The veil and the male elite* New York: Basic Books (1992) at 120.

⁹² See Al-Qur'ān chapter 4 verse 19: "O ye who believe! It is not lawful for you to forcibly inherit the women (of your deceased kinsmen)."

⁹³ Mernissi F *The veil and the male elite* New York: Basic Books (1992) at 120.

⁹⁴ See Al-Qur'ān 4:11, 4:12 & 4:176.

⁹⁵ Bishin BG & Cherif FM "Women, property rights, and Islam" (2017) 49(4) *Comparative Politics* 501 at 501.

⁹⁶ See section 34 of the Constitution: "Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum."

⁹⁷ See further Sungay & Booley (2023).

DO ISLAMIC WOMEN FACE DISCRIMINATION UNDER THE ISLAMIC LAW OF SUCCESSION?

change the world.”⁹⁸ The truism of this statement remains profound. Research demonstrates that investment in women, and more specifically women’s education, has numerous positive effects on not only women but their children and families.⁹⁹ The author thus recommends that men as well as women should educate themselves in the laws of inheritance and the Islamic rationale for the distribution of shares in an estate in order to prevent these issues from hindering social growth and development within the world.

6 CONCLUSION

This article investigated the discriminatory potential of the Islamic law of succession. The findings have shown how many beliefs to the effect that women’s rights and Islamic Shari’ah law are intrinsically at odds with one another are inaccurate. In dispelling such misconceptions, the author began by providing that one of the rationales for this rule’s existence, is due to the sole financial obligation placed on men in the family system of Islam. This paper went on to show that this 2:1 rule is in fact not an absolute rule, as there are many lawful avenues through which testators can grant female descendants a share equal to or higher than their male counterparts should they so wish. One of these ways was demonstrated in the fictional scenario involving person X making a bequest to his surviving wife A and daughter Aasiyah. This bequest resulted in both Aasiyah and Aasim inheriting on an almost equal footing.

Through this example, the paper sought to prove that testators should educate themselves and utilise these lawful avenues available to them when drafting their Islamic wills. The concluding sections went on to show that the common perception that the Islamic law of succession is discriminatory towards females originates from other factors, and not the Islamic law system. These factors include patriarchy, specific customs, and the non-recognition of Muslim marriages in many societies and legal systems across the world. Both Muslim males and females should educate themselves about inheritance laws in Islam, not only to prevent the spread of misconceptions about Islam, but to ensure that they live up to their religious obligations. Verily, God knows what we know not.¹⁰⁰

⁹⁸ Mandela NR *Long walk to freedom* New York: Back Bay Books (1995) at 20.

⁹⁹ Jackson LW “Educate the women and you change the world: Investing in the education of women is the best investment in a country’s growth and development” (2009) *Forum on Public Policy* 1 at 1.

¹⁰⁰ Al-Qur’an 16:74.

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