

# A constitutional analysis of the disqualification of the child born out of wedlock from the inheritance principle found in the Islamic law of compulsory succession

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## SUMMARY

There is a common belief that several fundamental human rights and Islamic law (finding its basis in the Holy *Qur'ān* and the Prophetic teachings) are intrinsically at odds with one another. The disqualification of the child born out of wedlock from the intestate inheritance principle contained within the Islamic law of succession is one of the reasons for this assumption. The latter principle is the subject of this article's investigation. The article addresses whether there is truth in the assertion that the Islamic law of succession and fundamental human rights are at odds. This is done through a constitutional analysis to uncover how this principle could potentially pass constitutional muster albeit its *prima facie* discriminatory effects. 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. This research delves into the basis and rationale of this principle as found within Islamic law. Thereafter, recommendations are given by way of a practical scenario, to demonstrate that there are ways provided for in Islamic law to lawfully circumvent the principle's application. The article concludes with an overall analysis and provides recommendations to Muslims wanting to create a more "equitable distribution", thereby further alleviating misconceptions regarding specific legal principles and the religion of Islam.

## 1 Introduction

There is a common belief that several fundamental human rights and Islamic law (finding its basis in the Holy *Qur'ān* and the Prophetic teachings) are intrinsically at odds with one another.<sup>1</sup> I intend to disprove this belief on several levels. A fictional case will be utilised to illustrate this hypothesis. This case assumes that a Muslim male, person A, dies on 6 August 2023, leaving behind a net estate to the cash value of R900 000. The will further states his final wish of wanting his estate to be distributed

1 See Uddin "Women's Rights in Islamic Law" 2017 *Atlantic Council Report* 27. Also see Abduroaaf and Moosa "Islamic Law Mode of Estate Distribution in South Africa" 2016 *The International Survey of Family Law* 458; and Rautenbach, Goolam and Moosa *Introduction to Legal Pluralism in South Africa* (2010) 211 for further reading on examples of where this belief is stated.

according to the Islamic law of succession. Person A is survived by his wife, X, son Aashiq, and son Hashiem, born out of wedlock. Hashiem was born five months after the conclusion of the marriage between person A and wife X. The noteworthiness of the birth date of Hashiem in relation to his parents' marriage will be expanded on within section 3 of this article. For a holistic comparison, I will investigate two different scenarios to the situation of person A. It will be assumed that in scenario A, person A bequeathed R300 000 to his son Hashiem, whereas in scenario B, no bequest was made in favour of Hashiem.

In accordance with a formula prescribed by Islamic succession laws, a Muslim testator has the freedom of testation to distribute only a third of their gross estate.<sup>2</sup> The remaining two-thirds are to be distributed in accordance with the laws of the Islamic law of intestate succession.<sup>3</sup> The Islamic law of intestate succession, in general, disqualifies a child born out of wedlock from this intestate inheritance<sup>4</sup> equation.<sup>5</sup> It is crucial to recognise that there are clear differences between a child conceived outside of wedlock and a child born out of wedlock for the purposes of the inheritance laws in Islam. The Islamic law of intestate succession looks at the moment of conception and not the moment of birth.<sup>6</sup> As such, this principle generally prohibits a child from inheriting from the intestate inheritance equation of the father if the said child was conceived out of wedlock.<sup>7</sup> This general prohibition only affects the child's right to inheritance from the father's estate to the exclusion of the mother. Every child, therefore, irrespective of conception or birth status, maintains a right to inherit from their birth mother's estate.<sup>8</sup>

No cases have (to date) been heard by the Constitutional Court of South Africa concerning the constitutionality of the Islamic law of succession.<sup>9</sup> Many authors have written in general terms about the Islamic law of succession and how it is applied in various legal systems

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2 Abduroaf *The Impact of South African on the Islamic Law of Succession* (LLD thesis 2018 UWC) 25.

3 See Ali *The Holy Qur'an – English Translation of the Meanings and Commentary* Islamic Book Trust (1934) 4:11, 4:12 and 4:176.

4 The words 'intestate estate', 'intestate inheritance' and 'compulsory estate' will be used interchangeably throughout this paper due to its close relation to each other as it concerns to the subject matter.

5 See Sunnah.com "Shares of Inheritance - Section 2" <https://sunnah.com/mishkat:3054> (last accessed 2023-02-03): "If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may anyone inherit from him".

6 Abduroaf "An Analysis of the Right of a Muslim Child Born Out of Wedlock to Inherit From His or Her Deceased Parent in Terms of the Law of Succession: A South African Case Study" 2021 *Obiter* 131.

7 Mzee "Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of a Deceased Father: A Tanzanian Case Study" 2016 *Journal of Law, Policy and Globalization* 57.

8 Abduroaf 2021 *Obiter* 131.

9 Abduroaf *The Impact of South African Law on the Islamic Law of Succession* (LLD thesis 2018 UWC) 2.

worldwide.<sup>10</sup> A general understanding of the Islamic Law system of distribution and its relevance within the framework of the 1996 South African Constitution (hereafter the Constitution) can be gained from these readings. In the context of this article, the work of Abduroaf becomes relevant.<sup>11</sup> The author discusses the possibility of the child born out of wedlock inheriting from their deceased parent's estate should they die intestate or testate. Abduroaf's research, however, is limited as it does not investigate the rationale for the disqualification against the constitutionality of this principle. This article consequently expands on Abduroaf's writings, touching on similar aspects, by providing a broader overview of the operation of the Islamic law of succession in addition to investigating the belief that some fundamental rights and Islamic law are intrinsically at odds with one another. The article also investigates possible remedies available to Muslims who wish to lawfully allow their children born out of wedlock to inherit on a similar footing to descendants born in wedlock. The research further highlights the need for Muslims to educate themselves about these rules, not only to prevent the general public from making claims regarding Islamic law but to further create a more "equitable distribution" among the deceased heirs should this situation arise.

The section below will utilise the male and female genders and accompanying pronouns "he" and "she" (or "their" for collective reference). This approach is used due to the fact that the Islamic law of inheritance contains specific rules for each of these genders.<sup>12</sup> I will start by providing the reader with a brief summary of how the Islamic law of succession functions as a whole. The following section will delve into the focus area of the article, being the disqualification of a child born out of wedlock in relation to the Islamic law of intestate succession. In this section, the rationale behind the rule and its application will be investigated. The lack of absoluteness in the application of this principle will also be uncovered. In order to fully demonstrate the aforementioned, the scenarios regarding the case of person A will be alluded to throughout this piece. The concluding sections will investigate the constitutionality of this principle by looking at it through the lens of the Constitution.

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10 Examples of these texts include Gabru "The Applicability of the Islamic Law of Succession in South Africa" 2005 *Obiter* 340-356; Abduroaf "A Constitutional Analysis of an Islamic Will Within the South African Context" 2019 *De Jure* 257-266; Sungay "Constitutional Legitimacy of the Islamic Law of Wills in South Africa" 2022 *Manchester Journal of Transnational Islamic Law & Practice* 52-66; Abduroaf "Application of the Islamic Law of Succession in South Africa" 2020 *Obiter* 396-409 ; and Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women* (LLM thesis 1991 UWC) 1-201.

11 Abduroaf 2021 *Obiter* 126-135.

12 See Ali *The Holy Qur'an - English Translation of the Meanings and Commentary* Islamic Book Trust (1934) 4:11, 4:12, and 4:176.

## 2 Operation of the Islamic law of succession as a whole

In accordance with Islamic succession law, a deceased person's assets should be distributed according to a formula, with individual freedom of testation only permitted for a third of the net estate.<sup>13</sup> These regulations, which have their roots in the Holy *Qur'ān* and Prophetic teachings, lay the groundwork for an unbiased distribution of assets.<sup>14</sup>

An Islamic estate is broadly divided into three deductible claims: liabilities<sup>15</sup> being the first, followed by testate bequests, and finally, intestate estate subtractions, respectively.<sup>16</sup> The Testate Estate (*Wasiya*),<sup>17</sup> to which the author has freedom of testation is limited to a third of his/her net estate<sup>18</sup> (subject to certain restrictions).<sup>19</sup> As seen in the given scenarios, only scenario A includes a bequest made by the testator, person A. The relevance of this bequest will be unpacked further in section 4 below.

The Intestate Estate refers to the remaining two-thirds of an estate or more depending on whether a bequest was made. The reason for this being deemed the 'intestate estate' is due to the Islamic law of succession regulating the distribution of this remaining portion of the net estate.<sup>20</sup> As a result of this, this part of the estate will be referred to throughout this article as the compulsory/intestate estate. South African law, on the other hand, only finds the application of intestate beneficiaries in the absence of a will. These beneficiaries are determined by the Intestate Succession Act 81 of 1987 (hereafter, the Intestate Succession Act).<sup>21</sup> The intestate/ compulsory 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*.<sup>22</sup> These heirs can further be broken down into subcategories.

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13 Abduroaf 25.

14 Sungay 2022 *Manchester Journal of Transnational Islamic Law & Practice* 55.

15 These include debts, funeral expenses, and administration costs among other items. See Abduroaf *Deceased Estates: Islamic Law Mode of Distribution* (2018) 38-39 for further reading.

16 Essop *The Intersection Between the Islamic Law of Inheritance and the South African Law of Succession* (LLD thesis 2022 UCT) 169.

17 This portion of an Islamic estate is looked at by way of introduction. For an in-depth understanding of the particulars, see Abduroaf 25-33.

18 Net estate refers to the estate remaining after liabilities have been subtracted from the gross estate.

19 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. There exist exceptions to this limitation as well. For an in-depth reading on the restrictions placed on this portion of an Islamic estate, see Sungay *Constitutional Legitimacy of the Islamic Law of Compulsory Succession* (LLM thesis 2023 UWC) 15-16.

20 See Ali *The Holy Qur'ān - English Translation of the Meanings and Commentary* Islamic Book Trust (1934) 4:11, 4:12, and 4:176.

21 See the Intestate Succession Act 81 of 1987 ss 1(1)a-f.

22 Islamic Wills USA "Inheritance in Quran" (2024) <https://www.islamicwillsusa.com/law-of-inheritance-in-quran/> (last accessed 2022-02-23).

The main subcategories that find application for the purposes of this article are the sharer beneficiaries and residuary beneficiaries. A sharer beneficiary is defined as an intestate beneficiary who inherits a prescribed fractional share.<sup>23</sup> These beneficiaries by relation are expressly mentioned within 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.<sup>24</sup> In applying the scenario of person A, wife X would be the only sharer beneficiary, and Aashiq would be the only residuary beneficiary.<sup>25</sup>

### 3 The disqualification of the child being born out of wedlock from the compulsory succession equation

The Islamic Law of intestate succession, in general, disqualifies<sup>26</sup> a child born out of wedlock from the intestate inheritance equation.<sup>27</sup> A child born out of wedlock for inheritance purposes refers to children born from a non-marital Islamic union.<sup>28</sup> In Arabic terms, such a descendant is also referred to as a *walad al-zina*.<sup>29</sup> In relation to this discussion, the Muslim Judicial Council of South Africa (MJC)<sup>30</sup> encourages Muslims to adopt an amended approach to this disqualifying practice.<sup>31</sup> This approach is presented in a minority opinion found within Islamic jurisprudence, where it states that should a child be born 6 months after the conclusion of a valid Islamic marriage between the parents, the child maintains the right to inherit from their biological father's estate.<sup>32</sup> This decision establishes the precedent for conception status being considered the key factor when determining a child's entitlement to inherit in Islamic law.

23 Abduroaif *Deceased Estates: Islamic Law Mode of Distribution* (2018) 17.

24 Abduroaif (2018) 17.

25 Hashiem is not regarded as a residuary beneficiary due to his birth status. A further elaboration on this will be provided in section 3 of this article.

26 In this article, the term "disqualified" instead of "excluded" is used throughout because, while the two terms have the same meaning at their core, the latter word infers the prevention of the child from inheriting in totality.

27 See Sunnah.com "Shares of Inheritance - Section 2" <https://sunnah.com/mishkat:3054> (last accessed 2023-02-03): "If a man commits fornication with a free woman or a slave woman, the child is the product of fornication, he neither inherits nor may anyone inherit from him".

28 Sungay *Constitutional Legitimacy of the Islamic Law of Compulsory Succession* (LLM thesis 2023 UWC) 44.

29 As above.

30 A branch of the Muslim judiciary whose primary duty is to provide religious counsel to South Africa's Muslim community. See Muslim Judicial Council "Official Website" <https://mjc.org.za/> (last accessed 2025-03-07).

31 Muslim Judicial Council (SA) Fatwa Committee "MJC Position on Succession Law and Related Matters" (2017) 1-12 document on file with the author of this article.

32 As above.

Because Hashiem was born before the six-month mark following the conclusion of the marriage between person A and his wife X, he will not have met this criterion. As such, in this scenario, he will not be regarded as an inheriting intestate beneficiary of person A.

The Islamic law of succession provides another way to establish a connection to the biological father for inheritance purposes — acknowledgement by the biological father himself. This path infers that a sworn affidavit (preferably to be attached to the will) should be made by the biological father, stating that the child is indeed theirs.<sup>33</sup> There is, however, no mention of this acknowledgement made by person A in the scenario. To accommodate this disqualification, person A has left a testate bequest to provide Hashiem with one-third of his net estate. This exemplifies one remedy for this alleged problem that can be found in Islamic law's compulsory succession.<sup>34</sup>

## **4 The distribution of Person A's estate in Islamic Law and in South African Law**

### **4 1 The distribution of Person A's estate according to South African Law of intestate succession**

As provided for in the scenario set out in the introduction of this article, person A had a net estate of R900 000 in cash exclusively. The will further stipulate that he bequeathed R300 000 of his net estate to his son Hashim. For the sake of accuracy in the South African comparative context, we will assume that the remainder of the estate's distribution was not accounted for within the will. This omission results in the application of the Intestate Succession Act to the remainder of person A's estate. Two scenarios will be provided below. The first incorporates the bequest, with the second disregarding it. This approach is undertaken to exemplify the variations that exist in relation to earning capacity when a bequest is made in favour of a beneficiary.

#### **4 1 1 Scenario A**

The section of the Intestate Succession Act applicable to person A's situation is section 1(1)(c).<sup>35</sup> The amount currently decided upon in this

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33 Abduroaf 2021 *Obiter* 131.

34 A further discussion on the remedies found within the Islamic law of succession available to testators will be unpacked within section 7 below.

35 See s 1(c) of the Intestate Succession Act 81 of 1987: "... 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;"

regard by the Minister in the Government Gazette, as stated in section 1(c)(i), equals R250 000.<sup>36</sup> A child's share is calculated by dividing the net estate value by a figure equal to the deceased person's number of stirpes<sup>37</sup> plus the deceased person's number of surviving spouses.<sup>38</sup> Although considered to be born out of wedlock in the Islamic law of succession,<sup>39</sup> South African law considers Hashiem on the same footing as Aashiq for inheritance purposes.<sup>40</sup>

The child's share can thus be calculated to be worth R200 000 (R600 000<sup>41</sup> divided by 3). Wife X will, therefore, be entitled to receive the amount determined by the Minister, equating to R250 000, due to the child's portion in this scenario being lower. With person A making a bequest in favour of Hashiem in this scenario, and wife X inheriting R250 000, this leaves the intestate estate valuation at R350 000. This amount is to be distributed equally amongst the remaining beneficiaries i.e., Hashiem and Aashiq. In summary, the estate of person X, as per this scenario, will be distributed as follows:

1. Wife A = R250 000
2. Hashiem = R475 000<sup>42</sup>
3. Aashiq = R175 000<sup>43</sup>

#### **4 1 2 Scenario B**

The calculation of the child's share in this scenario is different due to the disregard of a bequest made.<sup>44</sup> This results in the intestate estate of person A being larger than in the aforementioned scenario. The child's portion, therefore, amounts to R300 000, rendering wife X having a lawful claim of R300 000 of the estate of her late husband. This claim amount is present due to the aforementioned amount being higher than the child's portion gazetted. The remainder of the estate, amounting to R600 000, should thereafter be distributed in equal portions to the

36 The DOJ and CD "Circular 104 of 2015" (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) (last accessed 2022-07-01).

37 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 above, both sons of person A (Hashiem and Aashiq) would constitute his stirpes, thus resulting in person A having two stirpes.

38 De Waal, Schoeman and Wiechers *Law of Succession* (1996) 14.

39 See section 3 of this paper for a further discussion on this.

40 See s 1(2) of the Intestate Succession Act: "Illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation".

41 R900 000 – the bequest of R300 000 made to Hashiem.

42 The bequest of R300 000 plus the intestate succession share of R175 000.

43 The intestate estate value of R350 000 is divided by the remaining two beneficiaries, i.e., Hashiem and Aashiq.

44 See 4 1 below for an elaboration on the reasons for the disregard of a bequest made.

remaining beneficiaries. This results in scenario B having the following distribution:

1. Wife X = R300 000
2. Hashiem = R300 000
3. Aashiq = R300 000

## **4 2 The distribution of Person A's estate according to the Islamic Law of succession**

As provided for in the scenario, person A had a net estate of R900 000. The will furthermore stipulated that he bequeathed R300 000 of his net estate to his son Hashiem and that the remainder of his estate was to be distributed according to the Islamic law of succession. For the sake of an accurate comparison, two scenarios will once again be provided below. The first incorporates the bequest, with the second disregarding it. This approach is undertaken to exemplify the variations that exist in relation to earning capacity when a bequest is made in favour of a beneficiary.

### **4 2 1 Scenario A**

As expanded on in section 2 of this article, following the payment of all liabilities, the testate bequests are the next deduction from a deceased person's estate. The bequest made in favour of Hashiem amounted to R300 000.<sup>45</sup> This leaves behind R600 000 to be distributed according to the Islamic laws of intestate succession. Wife X, being deemed a sharer beneficiary, is entitled to inherit 1/8 of the net estate<sup>46</sup> of person A, with Aashiq inheriting the residue of the estate.<sup>47</sup> This results in scenario A herein having the following distribution:

- Wife X – R75 000  
Hashiem – R300 000  
Aashiq – R525 000

### **4 2 2 Scenario B**

Due to no bequest being made in this scenario, Hashiem will not be entitled to receive any inheritance from his late father's estate.<sup>48</sup> The remainder of the share distribution would therefore be as follows:

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45 This amount is within the one third limitation placed on Muslim testators.

46 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 ...".

47 See Khan *The Translation of the Meanings of Sahih Al Bukhari* (2004) 477: "[t]he Prophet (pbuh) said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'ān) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased'".

48 See section 3 of this article for the basis of this claim.



Wife X – R112 500

Hashiem – R0

Aashiq – R787 500

### 4 3 Tabulated summary of the above distributions<sup>49</sup>

	The South African law distribution	The Islamic law mode distribution
<b>Scenario A (with a bequest)</b>	1. Wife A = R250 000 2. Hashiem = R475 000 3. Aashiq = R175 000	Wife X – R75 000 Hashiem – R300 000 Aashiq – R525 000
<b>Scenario B (without a bequest)</b>	1. Wife X = R300 000 2. Hashiem = R300 000 3. Aashiq = R300 000	Wife X – R112 500 Hashiem – R0 Aashiq – R787 500

## 5 A South African jurisprudential view of this principle

### 5 1 A constitutional analysis

For centuries, children born out of wedlock have been subjected to many forms of discrimination. One such example is succession laws in various legal systems and cultures, which to date forbid them from inheriting directly from or via their father. This discrimination had negative effects and infringed on a number of constitutional rights. These rights include the constitutional rights to equality,<sup>50</sup> non-discrimination on the basis of birth, children's rights,<sup>51</sup> and dignity.<sup>52</sup> South African law today has advanced to the point where contemporary intestacy legislation is typically more supportive of non-marital offspring than intestacy statutes from the past. This is depicted in section 1(2) of the Intestate Succession Act, wherein a child born out of wedlock is given equal treatment as to a child born in wedlock.<sup>53</sup> Many countries around the world have aligned their laws to ensure non-discrimination on the basis of birth.<sup>54</sup> In the

49 See sections 4 1 and 4 2 for an elaboration on how these totals were calculated as per their respective systems.

50 S 9 of the Constitution.

51 S 28 of the Constitution.

52 S 10 of the Constitution.

53 See s 1(2) Intestate Succession Act: "[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act".

54 In Botswana, the customary-law position of excluding children born out of wedlock from inheriting was overturned as recently as 2014 in the case of *Baone Kealeboga and Anor v Tidimalo Mercy Kehumile Anor* Case no CACGB-045-13, wherein the court ruled on the basis that the principle was outdated and thereby not in accordance with modern social democratic realities.

section to follow, a brief overview of how each of these constitutional rights are violated by this disqualifying principle is discussed.

Sections 9(3)<sup>55</sup> and 9(4)<sup>56</sup> of the Constitution are contravened when the state, an individual or a juristic person unfairly discriminates against another person. It applies when a person is treated differently based on one of the grounds listed thereunder or on a ground that a court has found to be sufficiently similar to one or more of the listed grounds. When differentiation is based on any of the listed grounds, such differentiation is regarded to be discrimination. Moreover, section 9(5)<sup>57</sup> creates a presumption that such discrimination is unfair and places the onus on the party against whom the complaint of unfair discrimination has been made to prove that the discrimination was not unfair.<sup>58</sup>

On this basis, it can be asserted that due to birth status being a listed ground in section 9(3), disqualifying a child born out of wedlock from intestate inheritance due to their birth status is to be deemed automatically unfair.<sup>59</sup> To determine whether this discrimination could be deemed to be fair, a test in *Harksen v Lane*<sup>60</sup> was developed. This test contained certain considerations and factors, which included:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not; and
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal.<sup>61</sup>

Upon examining these considerations, it can be stated that throughout times, children born out of wedlock were always subject to some form of discrimination. In the American context, a very similar position to Islamic law was followed, whereby a child born out of wedlock was

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55 See s 9(3) of the 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."

56 See s 9(4) of the Constitution: "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

57 S 9(5) of the Constitution: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

58 De Vos and Freedman *South African Constitutional Law in Context* (2014) 450.

59 See s 9(5) of the Constitution: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

60 *Harksen v Lane* 1998 1 SA 300 (CC).

61 *Harksen v Lane* para 51.

automatically deemed exclusively his or her mother's legal child to the exclusion of the father.<sup>62</sup> Prior to 1988, South African law too excluded 'illegitimate' children from intestate inheritance from their biological father's estate, under the principle "*een wijf maakt geen bastaard*".<sup>63</sup> Furthermore, children born out of wedlock were categorised and labelled "illegitimate" or "bastard."<sup>64</sup> This Islamic law of succession rule can, therefore, be said to be significantly prejudicial to children born out of wedlock by depriving them of intestate succession based on their birth status. The fact that a child is prevented from inheriting due to their birth status is beyond their control, and certainly deserves no punishment.

Additionally, this principle has the potential of infringing yet another constitutional right, namely the right to dignity as codified in section 10 of the Constitution.<sup>65</sup> In the case of *President of the Republic of South Africa v Hugo*,<sup>66</sup> the court placed human dignity at the heart of its equality enquiry.<sup>67</sup> Human dignity is one of the three founding values of the Constitution as a whole.<sup>68</sup> It is stated that this value and constitutional right can be deemed impaired whenever a legally relevant differentiation treats people as "second-class citizens, demeans them, treats them as less capable for no good reason, or otherwise offends fundamental human dignity or where it violates an individual's self-esteem and personal integrity".<sup>69</sup> This rationale embodies the powers of sections 1 and 2 of the Constitution.<sup>70</sup> On this basis, it can be noted that these negative effects find applicability to the life of Hashiem in that being

62 Davidson "Mother's Baby, Father's Maybe! - Intestate Succession: When Should a Child Born Out of Wedlock Have a Right To Inherit From Or Through His Or Her Biological Father?" 2011 *Columbia Journal of Gender and Law* 534.

63 Sungay *Constitutional Legitimacy of the Islamic Law of Compulsory Succession* (LLM thesis 2023 UWC) 46.

64 Davidson 2011 *Columbia Journal of Gender and Law* 538.

65 See S10 of the Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected."

66 *President of the Republic of South Africa v Hugo* (CCT 11/96) [1997] 1-107.

67 See para 31 of *President of the Republic of South Africa v Hugo*: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups (our emphasis)".

68 See s 1(b) of the Constitution.

69 *President of the Republic of South Africa v Hugo* para 41.

70 See s 1 of the Constitution: "The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

Also see s 2 of the Constitution: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

excluded from his father's intestate inheritance equation has a massive potential of violating his self-esteem and by implication, his dignity. It further has the potential to demean him with the sole basis being his birth status.

Finally, this principle can also be said to breach the best interests of the child principle as depicted in section 28 of the Constitution. The principle of the best interests of the child as purported by our Constitution and backed by several international standards, dictates that a child's best interests are of paramount importance in every matter concerning the child.<sup>71</sup> It is undoubtedly not in their best interests for society to have condemned the child in the area of inheritance for the actions of his or her parents.<sup>72</sup> The effect of this disqualification furthermore has the ability to infringe on the child's right to dignity as expanded on within the preceding paragraph. Human dignity plays a central part in all discrimination enquiries, being one of the three founding values of the Constitution, as pointed out above. Anyone's right to human dignity may be considered violated if they are treated in a way that diminishes their sense of self-worth, their sense of moral character or treats them like second-class citizens without cause.<sup>73</sup> On this basis, it can be noted that these negative effects find applicability to the life of Hashiem in that he does not have a right to inherit from his biological father's estate for the sole reason of his birth status. This, yet again, has the potential to affect his self-esteem and dignity.

## 5.2 The constitutional validity of the principle

As shown within the preceding sections, there are several constitutional grounds that can be interpreted to be contravened by this principle found within the Islamic law of compulsory succession. This naturally leads one to ask about the constitutional validity of this principle. The answer to this problem lies in utilising the common law in addition to other constitutional rights to disprove unfair discrimination and accompanying rights infringed by this principle. It is further observed that instead of using a narrow approach to assessing whether an amendment or limitation of a common law right is required, the Constitution as a whole should be considered to find out how the principle could pass constitutional muster.

In order to ensure that Person A's estate is allocated in accordance with the Islamic law of succession, he exercised his common law right to freedom of testation through the writing of a will.<sup>74</sup> This principle is defined as the "[t]he right of an individual to dispose of his or her property on death as he or she pleases".<sup>75</sup> However, importantly, can this common law right trump various constitutional rights infringed by

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71 S 28(2) of the Constitution.

72 Davidson 2011 *Columbia Journal of Gender and Law* 538.

73 *President of the Republic of South Africa v Hugo* para 41.

74 Abduroaf 2019 *De Jure Law Journal* 258.

75 Corbett, Hofmeyr and Kahn (2001) 39.

the principle? This observation is supported even more so when considering section 8(3)(a) of the Constitution, wherein it states that a court must develop the common law should it not give effect to a right found in the Bill of Rights.

South Africa is a nation of numerous cultures and religions; in other words, a nation of vast diversity.<sup>76</sup> Muslims in South Africa constitute the largest minority religious group in a predominantly Christian South Africa.<sup>77</sup> According to statistics, there are just under two million Muslim citizens living in South Africa.<sup>78</sup> To affect these Muslim citizens' rights, the Constitution guarantees freedom of religion for all religious persons and religions in the country.<sup>79</sup> This fundamental freedom afforded to Muslims can further be decomposed into the right of person A to distribute their property in accordance with their wants, in conformity with the Islamic law of compulsory succession. The right to property enshrined within section 25 of the Constitution also plays a pivotal part herein. This property clause grants every citizen the right to own and dispose of their property according to their desires.<sup>80</sup> In the *BOE Trust* case, the Supreme Court of Appeal ruled that the property clause right further secures a person's right to testate freely. The Supreme Court of Appeal further held that this right is connected to the constitutionally recognised right of human dignity as found within section 10 of the Constitution.<sup>81</sup> The freedom of person A to choose how his estate will be distributed thus ensures that his right to human dignity is protected. Additionally, the right to freedom, as contained within many sections of the Constitution, can also be said to be enacted through this principle's application. The specific section in relation to this right is the one found within section 9(2) of the Constitution, whereby all citizens are granted the general right to fully realise their right to freedom.<sup>82</sup>

76 Coertzen "Constitution, Charter and Religions in South Africa Pieter" 2014 *AHRLJ* 127.

77 Moosa "How loud is too Loud? Competing Rights to Religious Freedom and Property and the Muslim Call to Prayer (Adhan or Azan) in South Africa" 2021 *Religions* 1.

78 Sungay and Booley "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 *Journal of Islamic History and Literature* 60.

79 See s 15(1) of the Constitution: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion".

80 See s 25(1) of the Constitution: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

81 *Ex parte: BOE Trust Ltd NO* (211/09) [2009] para 26. Also see section 4 below for an expansion of this constitutional value and principle.

82 See s 9(2) of the Constitution: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

The limitation clause contained within section 36 of the Constitution<sup>83</sup> stipulates that a constitutionally recognised right may only be limited should a set list of requirements be met. The consequences of altering the right of freedom of testation in the Islamic context would essentially result in the removal of person A's right to inherit and disinherit who they wish (or, in this case, to allow the Islamic law principles to dictate distribution), and grant this right to another.<sup>84</sup> Altering this position will, therefore, not suffice the standard placed by section 36 of the Constitution. When looking at person A's right to utilise the Islamic law of compulsory succession and specifically the principle in question; it essentially comes down to him employing his constitutionally mandated rights as explained above. Additionally, these constitutionally mandated rights, i.e., freedom and human dignity, are two of the three fundamental human rights upon which all BOR principles are based.<sup>85</sup> Furthermore, the court in the *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being*<sup>86</sup> stated that the court has a limitation placed on itself to not interfere with private lives in their rulings.<sup>87</sup>

On this basis, it can be ascertained that should our judiciary be allowed to alter the will of a person A who opted to follow the Islamic law of compulsory succession, it would essentially be deeming the several rights contained within the BOR (as expanded on above) as meaningless.<sup>88</sup> The striking down of person A's wishes would, in essence, be using one constitutional right to overpower another constitutional right. This has the potential to render the principle of freedom of testation and its empowering constitutional principles and sections insignificant.<sup>89</sup> This situation has the potential to spiral out of

83 See s 36 of the Constitution: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose. (2). Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

84 Sungay *Constitutional Legitimacy of the Islamic Law of Compulsory Succession* (LLM thesis 2023 UWC) 60.

85 See s 7 of the Constitution: "1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. 2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. 3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill".

86 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* 2016 2 SA 1 (CC).

87 *De Lange* para 79: "It is one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preference".

88 Abduroaf 2019 *De Jure Law Journal* 265.

89 Sungay 2022 *Manchester Journal of Transnational Islamic Law & Practice* 64.

control because it is quite easy to raise questions regarding the weight of various constitutional sections and where the courts should draw the line in their judgments.<sup>90</sup> Thus although Hashiem could very rightly argue that his rights to equality, dignity and other rights, as explained above, have been breached in this scenario by the Islamic law of compulsory succession, on a holistic reading, it can be said that the unfair treatment is simultaneously constitutionally justified.<sup>91</sup> I further argue that although our judiciary has a general discretion to choose which cases it hears, this discretion should be limited by the aforementioned argument along with the application of the Doctrine of Religious Entanglement.<sup>92</sup>

## 6 The rationale for this principle

Single-parent families are created in several ways. These include the death of one parent, divorce, and desertion.<sup>93</sup> Most single-parent families in the middle of the 20th century were created as a result of a spouse's death.<sup>94</sup> But as time went on, statistics revealed that an increasing number of single parents were never married, making this the main factor in the rise of single-parent families globally.<sup>95</sup> The number of single-parent households is still increasing.<sup>96</sup> In South Africa alone, more than 40% of mothers are single parents, and this number continues to grow.<sup>97</sup> These single-mother homes evidently experience severe financial problems. The single mother is often forced to solely provide for her child's fundamental requirements, including the costs of food, clothing, school fees, and several other expenses.<sup>98</sup> In a typical home, these costs are often split equally.<sup>99</sup> In an Islamic household, however, the husband has a number of functions or obligations that must be fulfilled in accordance with Islamic law. The Holy *Qur'ān* places the maintenance obligation solely on the husband<sup>100</sup> and father of the child

90 Sungay 2022 *Manchester Journal of Transnational Islamic Law & Practice* 64. *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) paras 23-24.

92 See *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* para 30, where this doctrine is defined as: "The reluctance of the courts to become involved in doctrinal disputes of a religious character."

93 Prabhakar and Kotwal "Problems Faced by Single Mothers" 2009 *J Soc Sci* 197.

94 Prabhakar and Kotwal 2009 *J Soc Sci* 197.

95 As above.

96 Irwin and Sara "Single Mothers and Their Children: A New American Dilemma" 1987 *The Wilson Quarterly* 43.

97 Dube "COVID-19 pandemic: Single mothers bear the biggest brunt" (2021) <https://health-e.org.za/2021/11/16/covid-19-pandemic-single-mothers-bear-the-biggest-brunt/> (last accessed 2022-11-29).

98 Prabhakar and Kotwal 2009 *J Soc Sci* 199.

99 Anania "Managing Money as a Newly Married Couple" (2024) <https://www.investopedia.com/articles/personal-finance/030716/managing-money-couple.asp> (last accessed 2022-11-27).

100 See Al-Qur'ān chapter 4 verse 34: "Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially".

to protect and see to the needs of their spouse/s and children.<sup>101</sup> Additionally, the Holy *Qur'ān* is very clear about the Islamic prohibition of premarital sex.<sup>102</sup> Premarital sex can either take the form of fornication<sup>103</sup> or adultery.<sup>104</sup> These ideas are collectively included under the term “*Zina*” in Islam.<sup>105</sup> In essence, any sexual fulfilment, although encouraged within the confines of a marriage in Islam,<sup>106</sup> when done outside of marriage is regarded as a violation of God’s rule.<sup>107</sup> The obligation to marry before sexual gratification is thus imposed by the religion of Islam on all Muslims. This is due to the marriage contract providing that the financial welfare of both the wife and children born in the marriage is sought.

## 7 Recommendations and conclusion

A large part of the publications devoted to the issue of the Islamic law of succession don’t do justice to the progressive nature of the reforms introduced by the religion of Islam. Since the revelation of the *Holy Qur'ān* and its accompanying injunctions, many individuals’ rights have been better realised. These have ultimately contributed to the abandonment of many radical customs cultivated in ancient Arabia and around the globe.<sup>108</sup>

I recommend that all Muslims should educate themselves on the workings of the laws of inheritance in Islamic law. This includes the knowledge of how the Islamic law of succession as a whole operates, along with its exclusions/disqualifications and the rationales for these exclusions/disqualifications. It is indeed beneficial, as was proven in the scenario of person A, for the general Muslim public to further educate themselves about the lawful exceptions that exist in order to create a more “equitable distribution”. This will consequently prevent issues of

101 Bani and Pate “The Role of Spouses under Islamic Family Law” 2015 *International Affairs and Global Strategy* 104.

102 See Al-Qur’ān Chapter 17 verse 32: “Do not go near adultery, surely it is an indecency, and an evil way [of fulfilling sexual urge]”.

103 See Green “Griswold’s Legacy: Fornication and Adultery as Crimes” 1989 *Ohio Northern University Law Review* 545 where fornication is defined as: “Consenting intercourse between unmarried adults”.

104 See Green 1989 *Ohio Northern University* 545 where adultery is defined as: “where an adult is married to another whilst having intercourse with a person who is not your spouse”.

105 Sungay *Constitutional Legitimacy of the Islamic Law of Compulsory Succession* (LLM thesis 2023 UWC) 69.

106 Azam “Sex, Marriage, and Eroticism in Contemporary Islamic Advice Literature” 2013 *Duke University Press* 72.

107 See Al-Qur’ān chapter 23 verses 5-6: “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”.

108 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* (2001) 15 for further reading on this.



misconceptions growing about the religion of Islam, and further draw individuals' attention to its *actual* operation.

As this article has attempted to demonstrate, albeit the disqualifying principle excludes a child born of wedlock from inheriting, the matter is not absolute. Section 3 demonstrated that this principle is merely a general rule and there exists many considerations to lawfully circumvent its application. These include applying the six-month rule and acknowledgement of paternity by way of a sworn affidavit. The article further attempted to show that should these considerations not be prevalent, other avenues and solutions are available to grant the descendant this inheritance right from the father's estate. One of the solutions, as highlighted in the case of person A, is through the granting of testamentary bequests to Hashiem. This, as shown, not only allows the descendants the right to inherit but also has the potential of enabling them to inherit on a better footing than children born in 'normal' circumstances.