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A COMPARATIVE ANALYSIS BETWEEN THE CUSTOMARY AND ISLAMIC LAWS OF INTESTATE SUCCESSION WITH REGARD TO DISCRIMINATION: A SOUTH AFRICAN CONSTITUTIONAL LAW CASE STUDY

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ABSTRACT

The law rule of male primogeniture (customary law of succession) was found to be unconstitutional in Bhe and Others v The Magistrate Khayelitsha and Others (Bhe) based on it unfairly discriminating against females. The Constitutional Court held that the rule of male primogeniture was inconsistent with the Constitution and invalid to the extent that it 'excludes or hinders women ... from inheriting property.' Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African government that gives effect to the Islamic law of succession. A Muslim daughter could argue that the Islamic law of intestate succession per se discriminates against females, as a Muslim son would always inherit double the share of a Muslim daughter. This article compares the position of females in terms of the customary

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and Islamic laws of intestate succession. An overview of the South African law of intestate succession is provided by way of introduction. This is followed by examining certain South African intestate succession law court cases where discriminatory provisions were challenged. The 2:1 rule as found within the Islamic law of intestate succession per se is then investigated. The article then examines the constitutionality of the 2:1 rule as found within the Islamic law of intestate succession per se based on the same constitutional principles applied in the Bhe judgment where the constitutionality of the rule of male primogeniture was investigated. The article concludes with an analysis of the findings and a recommendation.

Keywords*: Islamic law of succession, South African law of succession, South African constitution, equality, discrimination*

INTRODUCTION

South Africa has a mixed legal system. The sources of South African law include customary law, case law, and legislation. The South African law of intestate succession incorporates all these sources.[2] The South African

[2] Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 1-3. It should be noted that the law of testate succession applies to the estate of a deceased person that is governed by his or her will, whereby the law of intestate succession applies to the estate of a deceased person that is not governed by his or her will. This article focuses on the laws of intestate succession and not the laws of testate succession. It should also be noted that a Muslim person within the South African context can make use of the right to freedom of testation in order to ensure that his estate devolves in terms of the Islamic law of intestate succession upon his demise. The clause could basically state 'I hereby bequeath my estate in terms of the Islamic law of succession'. A will including such a clause could be referred to as an Islamic will. It should be noted that it is also possible that the constitutionality of an Islamic will could be challenged as well. This latter issue is, however, beyond the scope of this article. However, for a further discussion on the issue see Abduroaf M 'A Constitutional Analysis of an Islamic Will within the South African Context' (2019) 52(2) *De Jure Law Journal* 257 266. This article focuses on comparing the rule of male primogeniture (customary law of intestate succession) to the 2:1 rule (Islamic law of intestate succession). It further focuses on the question as to whether the

Constitution states that it is the supreme law of the Republic. It further states that any law or conduct that is inconsistent with it is invalid.[3] This would include provisions found within the laws of intestate succession. The rule of male primogeniture (customary law of intestate succession) was declared unconstitutional in *Bhe and Others v The Magistrate Khayelitsha and Others* (*Bhe*) on the basis that it unfairly discriminates against females.[4] The Constitutional Court held that the rule of male primogeniture was inconsistent with the Constitution and invalid to the extent that it 'excludes or hinders women…from inheriting property.'[5]

Muslims have been living in South Africa for over 300 years.[6] These persons are required, in terms of their religion, to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. A Muslim daughter could argue that the Islamic law of intestate succession *per se* discriminates against her, as a Muslim son always inherits double the share of a Muslim daughter.[7] This article looks at the position of females in terms of customary and Islamic laws of intestate succession. An overview of the South African law of

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2:1 rule would follow the same fate of the rule of male primogeniture, if the constitutional principles that were applied in the *Bhe and Others v The Magistrate Khayelitsha and Others* judgment to the rule of male primogeniture are applied to the 2:1 rule.

3 See s 2 of the Constitution of the Republic of South Africa, 1996.

4 The rule of male primogeniture was defined in *Bhe*. The Constitutional Court noted that '[t]he general rule is that only a male who is related to the deceased qualifies as an intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.' See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 77.

5 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 136.

6 The first recorded Muslim arrived in South Africa in 1654. See Mahida, Ebrahim Mahomed, *History of Muslims in South Africa: A Chronology* (1993), 1.

7 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

intestate succession is looked at by way of introduction. This is followed by looking at certain South African intestate succession law court cases where discriminatory provisions were challenged. The 2:1 rule, as found within the Islamic law of intestate succession *per se*, is then investigated. The article then looks at the constitutionality of the 2:1 rule as found within the Islamic law of intestate succession *per se*, based on the same constitutional principles applied in the *Bhe* judgment where the constitutionality of the rule of male primogeniture was investigated. The article concludes with an overall analysis of the findings and makes a recommendation.

EXAMPLES OF SOUTH AFRICAN COURT CASES CHALLENGING DISCRIMINATORY PROVISIONS

There are several cases that have gone to the South African courts, challenging the constitutionality of discriminatory provisions found within the law of intestate succession.[8] Some of the cases were directed towards 'common law' intestate succession provisions whereas others were directed towards 'customary law' intestate succession provisions.

An example of a case where the issue of discrimination was brought up within the common law of intestate succession would be the case of *Daniels v Campbell* that was handed down by the Constitutional Court in 2004. A spouse married according to Islamic law only was (prior to this judgment) not entitled to inherit as a spouse for purposes of the Intestate Succession Act 81 of 1987. The surviving spouse in *Daniels v Campbell* challenged the constitutionality of this position on the basis that it discriminated against persons married in terms of religious law (Islamic law), as it only recognised persons married in terms of civil law. The Constitutional Court consequently declared that '… (i) the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes the surviving partner in a monogamous Muslim marriage… [my emphasis]'[9] The same issue was brought before the Constitutional Court in 2009 where the recognition of surviving spouses in the context of an Islamic polygynous marriage was looked at in *Hassam v Jacobs*. It is highlighted that the *Daniels v Campbell* case only dealt with a surviving spouse in a

[8] It should be noted that this article is limited to cases and matters concerning intestate succession. Cases and matters concerning testate succession is beyond the scope of this article.

[9] *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) para 40(1).

monogamous Muslim marriage but not with surviving spouses in a polygynous Muslim marriage.[10] In *Hassam v Jacobs*, the Constitutional Court declared that '… section 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygynous Muslim marriage in the protection it affords to "a spouse".' The *Bhe* judgment is an example of a case where the issue of discrimination was looked at within the context of the customary law of intestate succession. What makes this case significant is the fact that the Constitutional Court did not only investigate the constitutionality of customary law intestate succession provisions in terms of statute (s 23 of the Black Administration Act 38 of 1927), but further looked into the constitutionality of customary law intestate succession provisions found within the context of customary law.[11] The same could be done in terms of Islamic law. Islamic law intestate of succession provisions could be challenged on similar grounds.

DISTRIBUTION OF SHARES WITHIN THE ISLAMIC LAW OF INTESTATE SUCCESSION *PER SE*

A daughter inherits half the share of a son in terms of Al Qurān (4) 11.[12] The reason why females (at times) inherit less favourably than males in terms of the Islamic law of intestate succession *per se* is not clearly stated

[10] *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) para 36 where it states that '[i]t was made clear on the papers and in argument that the effect of the declaration sought was to cover the situation of the applicant who was a party to a Muslim marriage that was monogamous. This Court is not called upon to deal with the complex range of questions concerning polygamous Muslim marriages.'

[11] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 3 where it states that '[c]entral to the customary law of succession is the principle of male primogeniture. There are two main issues in the cases before this Court. The first is the question of the constitutional validity of section 23 of the Act. The second concerns the constitutional validity of the principle of primogeniture in the context of the customary law of succession (my emphasis).

[12] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

in the primary sources of Islamic law.[13] Some scholars have identified three rules that generally govern the distribution of shares within the Islamic law of intestate succession *per se*.[14] The rules state that '[d]escendant intestate beneficiaries generally inherit more favourably than ascendant and collateral intestate beneficiaries. Intestate beneficiaries with stronger intestate succession ties would generally inherit more favourably than intestate beneficiaries with weaker intestate succession ties. Intestate succession beneficiaries who have more financial Islamic law obligations generally inherit more favourably than intestate beneficiaries with less financial Islamic law obligations, in the event where they are of the same generation and have the same intestate succession tie.'[15] It should be noted that the three rules apply to the distribution of the intestate estate regardless of whether the intestate beneficiaries are male or female.

The above rules are now looked at by way of examples. A daughter or daughters would belong to the generation of 'descendants' whereas a father would belong the generation of 'ascendants'. The daughter or daughters would therefore generally inherit more favourably than the father. This rule would apply, for example, where Ahmad dies leaving behind an intestate estate of R24000, and a father, a widow, and two daughters as his only intestate beneficiaries. His father would inherit 1/6 = 4/24 = R4000,[16] his widow would inherit 1/8 = 3/24 = R3000,[17] and each of his two daughters

[13] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' *De Jure Law Journal* 53, no. 1 (2020): 115-122.

[14] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 18. See also Dār al-Iftā'al-Miṣriyyah, 'Do Women Take Unequal Shares of Inheritance in Islam?', http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&, accessed on 28 November 2017.

[15] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 18. See Dār al-Iftā'al-Miṣriyyah, 'Do Women Take Unequal Shares of Inheritance in Islam?', http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&, accessed on 28 November 2017.

[16] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

[17] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '[i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you

would equally share 2/3 = 16/24 = R16000.[18] Each daughter would inherit 8/24 = R8000 which is double the share that his father inherits. His father would also inherit the remaining 1/24 = R1000 as a residuary beneficiary. A full sibling has a stronger intestate succession tie to the deceased than a half sibling. A full sister would therefore inherit more favourably than a consanguine brother. This rule would apply, for example, where Ahmad dies leaving behind an intestate estate of R26000, and a daughter, a full sister, and a consanguine brother as his only intestate beneficiaries. His daughter would inherit 1/2 = R13000[19] and his full sister would inherit the remainder = R13000.[20] The consanguine brother would not inherit as he has a weaker intestate succession tie to Ahmad. An intestate succession beneficiary who has more financial obligations in terms of Islamic law would generally (but not always) inherit more favourably than an intestate beneficiary with less financial obligations in terms of Islamic law, in the event where they are of the same generation and have the same intestate succession tie.[21] A son would inherit double the share of a daughter as he has more financial obligations in terms of Islamic law. This rule would apply, for example, where Amina dies leaving behind an intestate estate of

leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts.'

[18] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '…if (there are) only daughters, two or more, their share is two thirds of the inheritance…'

[19] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '…if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half…'

[20] Khan MM, *The Translation of the Meanings of Sahih Al Bukhari* 2004 (728) vol 8, 480 where it states that 'Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ud, he will tell you the same." Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said, "If I give the same verdict, I would stray and would not be of the rightly-guided. The verdict I will give in this case, will be the same as the Prophet did, i.e. one-half is for the daughter, and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the sister." Afterwards we cam[e] to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "So, do not ask me for verdicts, as long as this learned man is among you." '

[21] Dār al-Iftā'al-Miṣriyyah, 'Do Women Take Unequal Shares of Inheritance in Islam?', http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&, accessed on 28 November 2017.

R36000, and a son and a daughter as her only intestate beneficiaries. Her son would inherit 2/3 = R24000 and her daughter would inherit 1/3 R12000.[22]

There is no conclusive evidence found in the primary sources of Islamic law to back up the assumption that the reason why the son inherits more favourably than the daughter, is because of his financial obligations. There is also no direct link found in Islamic law between the Islamic law of intestate succession *per se* and the financial responsibilities of males. The argument is weakened by the fact that there are instances within the Islamic law of intestate succession *per se* where males and females inherit equally.[23] A father and mother would inherit equal shares where, for example, Ahmad dies leaving behind an intestate estate of R60000, a mother, a father, and a son as his only intestate beneficiaries.[24] His mother would inherit 1/6 = R10000,[25] his father would inherit 1/6 = R10000,[26] and his son would inherit the residue which is 4/6 = R40000.[27] A uterine brother and uterine sister would inherit equal shares where, for example, Amina dies leaving behind an intestate estate of R60000, a uterine brother, a uterine sister, and a full brother as her only intestate beneficiaries. Her uterine brother would inherit 1/6 = R10000,[28] her uterine sister would

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[22] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

[23] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 115-122.

[24] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

[25] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

[26] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

[27] Hilali MT and Khan MM, *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet 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."'

[28] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '…[i]f the man or

inherit 1/6 = R10000,[29] and her full brother would inherit the residue which is 4/6 = R40000.[30] A daughter would indirectly inherit more favourably than a son where, for example Amina dies leaving behind a mother, father, widower and a child as her only intestate beneficiaries. The first calculation is based on the child being male and the second calculation is based on the child being female. The mother would inherit 1/6 = 4/24,[31] the father would inherit 1/6 = 4/24,[32] the widower would inherit 1/4 = 6/24,[33] and the son would inherit the residue which is 10/24.[34] The calculation is now based on the child being female. The mother would inherit 1/6 = 4/24,[35] the father

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woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth…'

29 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '…[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth…'

30 Khan MM, *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet 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."'

31 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

32 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

33 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '… [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts…'

34 Khan MM, *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet 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."'

35 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

would inherit 1/6 = 4/24,[36] the widower would inherit 1/4 = 6/24,[37] and the daughter would inherit 1/2 = 12/24.[38] The doctrine of increase would find application and the new denominator would be 26.[39] The mother would inherit 4/26, the father would inherit 4/26, the widower would inherit 6/26, and the daughter would inherit 1/2 = 12/26. 12/26 is greater than 10/24 that a son would inherit. It would therefore be favourable for the child to be female.[40]

It should be noted that males have more financial obligations than females in terms of Islamic law. Al Qurān (4) 4 states: '[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).'[41] The payment of a dower is a financial obligation upon a male and not a female in terms of Islamic law.[42] It is stated in Al Qurān (4) 34 that '[m]en are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means…'[43] The responsibility of support does not lie with females in terms

[36] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '… [f]or parents, a sixth share of inheritance to each if the deceased left children…'

[37] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '… [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts…'

[38] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '…if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half…'

[39] The doctrine of increase refers to a situation where the numerator of an equation is more than its denominator.

[40] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 115-122.

[41] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4.

[42] Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 120.

[43] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 34.

of Islamic law.[44] The financial obligation placed on males can be further explained by way of an example. Ahmed dies, leaving behind an intestate estate of R600000. He also leaves behind a son and daughter, who are both on the verge of marriage, as his only intestate beneficiaries. His son would inherit R400000 whereas his daughter would inherit R200000.[45] Ahmad's son is however required, in terms of Islamic law regarding marriage, to pay a dower to his future wife or wives.[46] There is no stipulation as to what the maximum amount that may be requested by his future wife should be. It could possibly be more than the R400000 that he inherits from his father. Arrangements could even be made for the dower to be paid off in instalments if he does not have the necessary funds to satisfy the requested dower. This type of obligation does not lie with Ahmad's daughter as far as her future marriage is concerned. She is entitled to request a dower of her choice from her future husband. Al Qurān (4) 20 states that '… and you have given one of them a Cantar (of gold i.e. a great amount) as Mahr [dower], take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin?'[47] Ahmad's son is further required in terms of Islamic law to maintain his wife (or wives) and his future children born from the marriage. The financial obligation does not lie with his wife (or wives).[48] Ahmad's daughter is not required to maintain herself, her husband, and/or her future children born from the marriage. She may even claim arrear maintenance from her husband in the event where he has not maintained her in the marriage if it subsequently ends in a divorce. This specific scenario has occurred at the Western Cape High Court in *Ryland v Edros* (*Ryland* case).[49] The divorced wife in the *Ryland* case successfully instituted a claim for arrear maintenance from her former

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44 Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 120.

45 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

46 'Abd al-Raḥmān al-Jazirī, *Kitāb al-Fiqh 'alā Madhāhib al-Arba'ah*, vol. 4 (Bayrūt: Dār al-Fikr, 2000), 85-86. See also Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4.

47 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 20.

48 'Abd al-Raḥmān al-Jazirī, *Kitāb al-Fiqh 'alā Madhāhib al-Arba'ah*, vol. 4, 497-498. Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 120.

49 *Ryland v Edros* 1997 (2) SA 690 (C) 718-719.

husband. The claim was based on Islamic law principles. It should be noted that a male intestate beneficiary who inherits double the share of his female counterpart could argue that the Islamic law of dower and maintenance favours females while the law of intestate succession at times (but not always) favours males and that the balance is then restored.[50]

A female intestate beneficiary who inherits half the share of her male counterpart in terms of the Islamic law of intestate succession *per se* could argue that males (at times) do not fulfil their religious obligations regarding maintaining their dependants as is required in terms of Islamic law. This is

[50] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise.'; (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In 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 of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'; and (4) 176 where it states '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything."' Abduroaf M, 'An Analysis of the Rationale behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession,' 119-120.

what happened in the *Ryland* case.[51] A possible solution to this situation would be to enforce the Islamic law provisions regarding maintenance. This is exactly what the purpose behind the 2010 MMB is where it states in s 11(2) that '... a husband is obliged to maintain his wife during the subsistence of a Muslim marriage according to his means and her reasonable needs; (b) that a father is obliged to maintain his - (i) female children until they are married; and (ii) male children until they reach the age of majority or otherwise for the period that they are in need of support; (c) in the case of the dissolution of a Muslim marriage by divorce - (i) that a husband is obliged to maintain his wife for the mandatory waiting period of 'Iddah; (ii) where the wife has custody of any children as provided for in section 10, that the husband is, after the expiry of 'Iddah, obliged to remunerate his wife, including for the provision of a separate residence for his wife if she is unable to provide a residence, for the period of custody only; (iii) that the wife is entitled to be remunerated (ujrah al-hadimah) separately in relation to a breastfeeding period not exceeding two years, calculated from the date of birth of an infant, provided she has in fact breast-fed the child; and (iv) that a husband's duty to support a child born of the marriage includes the provision of food, clothing, separate accommodation, medical care and education...'[52] These provisions show that there are a number of financial obligations placed on males in terms of Islamic law that are not placed on females. Section 11(5) of the 2010 MMB also provides for arrear maintenance claims where it states that '[a]ny unpaid arrear maintenance, either mutually agreed to or in terms of a court order, which is due and payable to a wife, may not be extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act No. 68 of 1969), or any other law.'[53]

It can be seen from the above discussion that the basis for the son inheriting double the share of the daughter within the Islamic law of

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51 *Ryland v Edros* 1997 (2) SA 690 (C).

52 See s 11(2) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011, *www.gov.za/sites/www.gov.za/files/33946_gen37.pdf*, accessed on 26 October 2017. It should be noted that there have been some advancements with regard to the recognition of Muslim Personal Law in South Africa. However, no legislation has (to date) come into effect in this regard.

53 See s 11(5) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011, *www.gov.za/sites/www.gov.za/files/33946_gen37.pdf*, accessed on 26 October 2017.

intestate succession *per se* cannot be confirmed with absolute certainty. It will be accepted for purposes of the following investigation that the daughter inherits half the share of the son because she has fewer financial obligations in terms of Islamic law. The daughter could argue that this is discrimination based on sex because of gender. These grounds will be accepted as the reasons for the discrimination for purposes of the investigation. Sex is a biological term whereas gender is a social term.[54] The argument that could be made by a South African lawyer is that the daughter (female sex) inherits less, as Islamic law places fewer financial obligations on her (gender role), whereas the son (male sex) inherits more, as Islamic law places more financial obligations on him (gender role).

COMPARING CUSTOMARY AND ISLAMIC LAWS OF SUCCESSION WITH REGARD TO FEMALES

The original position regarding females and gender discrimination within the customary law of succession was stated in the facts of the *Bhe* judgment. The judgment concerned three different cases. The applications were heard together because they collectively dealt with intestate succession within the context of customary law.[55] The first application was *Bhe and Others v The Magistrate Khayelitsha and Others* (*Bhe* case). The *Bhe* case concerned two daughters who were prevented from inheriting from the intestate estate of their deceased father due to the application of the customary law rule of male primogeniture. The estate was inherited by the father of the deceased to the exclusion of his two daughters and their mother (widow). [56] The second application was *Charlotte Shibi v Mantabeni Freddy Sithole and Others* (*Shibi* case). The *Shibi* case concerned a sister who was prevented from inheriting from the estate of her deceased brother due to the application of the rule of male primogeniture. The third application was brought by the South African Human Rights Commission (SAHRC) and the Women's Legal Centre Trust (WLCT). These institutions brought their application primarily based on public interest.[57] The main issue before the Court was the constitutional validity

[54] Currie Ian & Johan De Waal, *The Bill of Rights Handbook* (Claremont: Juta and Company Ltd., 2013), 229-230.

[55] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) 4.

[56] It will be accepted for purposes of this article that the mother of the two daughters was also the widow of the deceased.

[57] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 6-7.

of the rule of male primogeniture in the context of customary law of succession.[58] It had been argued by the applicants in the case that the customary law rule of male primogeniture unfairly discriminates against females on the basis of gender and birth.[59] The following discussion focuses on the gender discrimination as referred to in terms of the *Bhe* judgment.

The majority decision in *Bhe* was written by Deputy Chief Justice Pius Nkonzo Langa. The Constitutional Court stated that the four problematic issues with regard to the application of the rule of male primogeniture are that (1) it prevents widows from inheriting from their deceased husbands, (2) it prevents daughters from inheriting from their parents, (3) it prevents extra-marital children from inheriting from their fathers, and (4) it prevents younger sons from inheriting from their parents.[60] The following discussion focuses on the first two issues dealing with gender discrimination within the customary law of succession. The customary law rule of male primogeniture states that only a male can inherit as an intestate beneficiary. The male would step into the shoes of the deceased and take control of the property. He would then be responsible to support the family of the deceased. This would include the immediate as well as the extended family.[61] The Islamic law position is quite different as both males and females would collectively inherit from the intestate estate. There are instances where males and females inherit equal shares of the intestate estate. There are also instances where females inherit more favourably than males from the intestate estate. It has been argued that the reasoning behind why males (at times) inherit more favourably than females is because they have more financial obligations.[62] This is where the customary law of intestate succession and the Islamic law of intestate succession *per se* are similar. The Constitutional Court held that excluding women from inheriting on the ground of gender is a clear violation of s 9(3) of the

[58] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 3.

[59] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) 53-54.

[60] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 88.

[61] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 160.

[62] See 'DISTRIBUTION OF SHARES WITHIN THE ISLAMIC LAW OF INTESTATE SUCCESSION *PER SE*' above, where this is discussed.

Constitution.[63] It also held that excluding female children from inheriting from their parents is in violation of s 9(3) of the Constitution.[64] Women and female children are not prevented from inheriting in terms of Islamic law. There are instances where males and females inherit equal shares. There are also instances where females inherit more favourably than males. A daughter could argue that the instance where she inherits less favourably than a son based on sex because of gender is a clear violation of s 9(3) of the Constitution as both sex and gender are listed grounds in s 9(3) of the Constitution. It could also be argued that the instance where a son 'indirectly' inherits less favourably than a daughter, based on sex, is a clear violation of s 9(3) of the Constitution. The son could argue that the discrimination applies to both males and females. A daughter could argue that the discrimination applies more to females than males as far as discrimination based on sex is concerned. The above situations are all regarded as unfair discrimination in terms of s 9(5) of the Constitution.[65] The Constitutional Court held that excluding women from inheriting on the grounds of gender is in violation of the right of women to human dignity as guaranteed in terms of s 10 of the Constitution.[66] It implied that women are not fit to own and administer property.[67] Females do inherit in terms of Islamic law of intestate succession *per se*. They (at times) inherit more favourably than males. The instances where females inherit less than males based on sex because of gender could be in violation of human dignity in terms of s 10 of the Constitution.[68] The same would apply in the instances where females indirectly inherit more favourably than males based on sex.

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63 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 91. See also s 9(3) of the Constitution of South Africa, 1996 where it states that '[t]he 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.'

64 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 93.

65 See s 9(5) of the Constitution of South Africa, 1996 where it states that '[d]iscrimination on one or more of the grounds listed in subsection [9](3) is unfair unless it is established that the discrimination is fair.'

66 See s 10 of the Constitution of South Africa, 1996.

67 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 92.

68 See s 10 of the Constitution of South Africa, 1996 where it states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'

A South African lawyer could argue that the violation applies to both males and females.

The Constitutional Court investigated whether the rule of male primogeniture is justified under s 36 of the Constitution or not.[69] The Court noted that the duty of the male intestate beneficiary to support the dependants of the deceased is no longer satisfactory. This is due to the change in the family structure. The Court noted that the family is no longer structured purely along traditional lines. Nuclear families have largely replaced extended families. The male intestate beneficiary does not necessarily live with the entire extended family.[70] The male intestate beneficiary would often acquire the estate of the deceased without assuming any responsibilities.[71] A daughter could argue that the Muslims living in South Africa live in nuclear families and not extended families. She could argue that males and females should therefore always inherit equal shares. A son could argue that the distribution of the intestate estate in terms of the Islamic law of intestate succession *per se* is quite different to the distribution in terms of the rule of male primogeniture. The intestate estate is not inherited by one male intestate beneficiary as in the case of the

[69] See s 36 of the Constitution of South Africa, 1996 where it states that '(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.'

[70] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) paras 80-82.

[71] One of the three cases in *Bhe and Others v Magistrate Khayelitsha and Others*, concerned two daughters who were excluded from inheriting from their father. The male heir was the father of the deceased and resided in Berlin in the Eastern Cape. The deceased, his two daughters, and the mother of the two daughters resided in Cape Town in the Western Cape. They lived together as a family unit. The father was appointed as the representative and sole heir of the estate. The main asset in the estate was an immovable property where the family resided. The father made it quite clear that he intended selling the property in order to settle the funeral costs. The two daughters and mother would then have been rendered homeless. See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) paras 16-17.

rule of male primogeniture. The intestate estate is inherited by both males and females in terms of Islamic law of intestate succession *per se*. There are instances where the bulk of the intestate estate is inherited by females. There are also instances where the intestate estate is inherited by females to the exclusion of males who are present.[72] The son, for example, would inherit more favourably than the daughter but would have more financial responsibilities irrespective of whether he lives in a nuclear or an extended family. This would be in terms of Islamic law.[73] The Constitutional Court held that succession of the male intestate beneficiary to the assets of the deceased does not necessarily correspond in practice to an enforceable responsibility to provide support to and maintain the family.[74] A daughter could argue that this is also the situation in terms of the Islamic law position. There is merit in this argument. This is also one of the main reasons as to why there is a need for the 2010 MMB to be enacted. Enactment of the 2010 MMB would mean that the son would be obliged to maintain his wife (or wives) and children in terms of the law. The daughter on the other hand would be supported by her husband in terms of the 2010 MMB. A daughter could argue that she can choose not to marry and that she would then not have a husband to maintain her. An example of this would be where a deceased leaves behind a widower, a son and a daughter as her only intestate beneficiaries. The widower is also the father of the son and daughter. The widower would inherit 1/4,[75] the son would inherit 2/4,[76] and the daughter would inherit 1/4.[77] The father (widower in this example)

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[72] See 'DISTRIBUTION OF SHARES WITHIN THE ISLAMIC LAW OF INTESTATE SUCCESSION *PER SE*' above, where this is discussed.

[73] See 'DISTRIBUTION OF SHARES WITHIN THE ISLAMIC LAW OF INTESTATE SUCCESSION *PER SE*' above, where this is discussed.

[74] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 80.

[75] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts…'

[76] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

[77] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands

would be liable to maintain the daughter until she marries but would be liable to maintain the son only until he has reached the age of maturity. This is confirmed in s 11(2)(b) of the 2010 MMB where it states 'that a father is obliged to maintain his - (i) female children until they are married; and (ii) male children until they reach the age of majority or otherwise for the period that they are in need of support…'[78] The daughter in this example would be provided for by her father, even if she chooses not to marry. It should, however, be noted that the religion of Islam encourages Muslims to marry as it is part of the prophetic tradition.[79] The Constitutional Court held that the rule of male primogeniture as currently applied in the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. It held that it cannot survive constitutional scrutiny in its present form.[80] It cannot be said (with absolute certainty) that the Islamic law of intestate succession *per se* would have the same outcome as the customary law rule of male primogeniture as there are a number of differences between how the two systems operate.

There is also a difference between the Islamic law of intestate succession *per se* and the customary law rule of male primogeniture with regard to constitutional obligations. Section 39(2) of the Constitution specifically states that the Bill of Rights must be promoted when developing customary law.[81] It was further noted in *Bhe* that the nature of customary law is that it evolves as the people who live by its norms change their way of life. Customary law has historically been developed in order to meet the changing needs of the community.[82] Al Qurān (4) 13 and 14

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you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

[78] See s 11(2)(b) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011, *www.gov.za/sites/www.gov.za/files/33946_gen37.pdf*, accessed on 26 October 2017.

[79] Khan MM, *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 7, 2 where it states that '[t]he Prophet said, "… By Allah, I am more submissive to Allah and more afraid of Him than you, yet I fast and break my fast, I do sleep and I do marry women. So he who does not follow my tradition in religion, is not from me (not from my followers)."

[80] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 95-97.

[81] See s 39(2) of the Constitution of South Africa, 1996.

[82] *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 81.

however states that '[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad [PBUH]) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success. And whosoever disobeys Allah and His Messenger (Muhammad [PBUH]), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.'[83] Muslims are thus duty-bound in terms of their religion to adhere to the Islamic law of intestate succession *per se* in terms of these verses. The Islamic law of intestate succession *per se* is also constitutionally protected in terms of the right to freedom of religion. Section 15(1) of the Constitution grants all persons the right to freedom of religion.[84] It is not certain from the above investigation if the Islamic law of intestate succession *per se* would satisfy the requirements of s 36 of the Constitution.[85] It would in the final analysis be left up to the South African courts to decide.[86]

The minority judgment in *Bhe* was written by Justice Sandile Ngcobo. He noted that customary law is not a fixed body of rules. The nature of customary law is that it evolves as the people who live by its norms change their way of life. Customary law has historically been developed to meet the changing needs of the community. He further stated that the customary law rule of male primogeniture needs to be developed 'to bring it in line

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[83] Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 13-14.

[84] See s 15(1) of the Constitution of South Africa where it states that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.'

[85] See s 36 of the Constitution of South Africa where it states that '(1) [t]he 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.'

[86] This would apply in a situation where the Islamic law of intestate succession *per se* has been incorporated into South African law by way of legislation, as was the case in the *Bhe* case regarding the rule of male primogeniture. The courts would then have to decide on the constitutionality of the 2:1 rule within this context.

with our Bill of Rights.'[87] Development in the area of the Islamic law of intestate succession *per se* is not possible as can be seen in terms of Al Qurān (4) 13-14 as discussed above.[88] There is nothing in Islamic law that prevents an inheriting intestate beneficiary from ceding his or her rights in the intestate estate in favour of other inheriting intestate beneficiaries in order to augment the shares inherited by them. A son could therefore cede R50000 in favour of the daughter in the event where the deceased leaves behind an intestate estate of R300000, and the son and the daughter as the only intestate beneficiaries. The son and daughter would each receive R150000 of the intestate estate. There is also a mechanism (1/3 bequest) found within the Islamic law of succession that could be used to augment the share received by a daughter and other intestate beneficiaries. An example of this would be where X dies leaving behind a net estate of R400000. He also leaves behind a son (Y) and a daughter (Z) as his only intestate beneficiaries. X can bequeath R100000 in favour of Z on condition that both Y and Z consent to the bequest, after X dies. X can then bequeath the remainder of his estate in terms of the Islamic law of intestate succession *per se*. Z would inherit R100000 as a testate beneficiary if consent is given after X's death. She would also inherit 1/3 of the remaining R300000 (1/3 x R300000 = R100000) in terms of the Islamic law of intestate succession *per se*.[89] Y would inherit 2/3 of the remaining R300000 (2/3 x R300000 = R200000).[90] The daughter and son would therefore receive equal shares from the net estate. The daughter would inherit R100000 as a testate beneficiary and another R100000 as an intestate beneficiary. The son on the other hand would inherit R200000 as an intestate beneficiary. The son and daughter would de facto inherit equal shares. It is possible that the son does not consent to the bequest. This would then be problematic as a son is not obliged to consent. There is a

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87 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 222.

88 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 13-14.

89 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

90 Hilali MT and Khan MM, *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…'

minority opinion stating that a bequest may be made in favour of the daughter without the condition that the remaining intestate beneficiaries consent. This opinion is also followed in Egypt.[91] This opinion would be a viable option in the event where a real need exists. The son and daughter would then inherit equal shares. It is submitted that a South African Muslim should consult an Islamic scholar prior to adopting this opinion.

CONCLUSION

This article compared the customary and Islamic laws of succession regarding discrimination, with a constitutional focus. The customary law rule of male primogeniture was compared to the Islamic law of intestate succession *per se* regarding discrimination based on sex and/or gender. What was apparent from the investigation was that the customary law rule of male primogeniture operates differently to the application of the Islamic law of intestate succession *per se*. It is not clear from the investigation as to whether the Islamic law of intestate succession *per se* satisfies the constitutional notion of equality or not. The question of whether or not the Islamic law of intestate succession *per se* would pass constitutional muster in the final analysis is left up to the South African courts to decide, if challenged on discriminatory grounds. It has also been shown in this article that there is an available mechanism (1/3 bequest) found within the Islamic law of succession that could be used to augment the shares inherited by certain intestate beneficiaries from the estate of a deceased person. The mechanism could, however, be used where the need exists.

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[91] Muṣṭafā al-Sibā’ī, *Sharḥ al-Qānūn al-Aḥwāl al-Shakhṣiyyah* 7ed, vol. 2 (Bayrūt: Dār al-Warrāq, 2000), 70-71.

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