The Intersection between the Islamic Law of Inheritance and the South African Law of Succession

by

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ESSFAT003

This thesis is submitted for the degree of

DOCTOR OF PHILOSOPHY

In the Department of Private Law

University of Cape Town

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12 April 2022

PLAGIARISM DECLARATION

I, Fatima Essop, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorize the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

While Muslims constitute 2% of South Africa's population, they formed an integral part of the South Africa's socio-political and historical landscape for over 350 years. Despite their historical marginalisation, in post-apartheid South Africa there are still no legislative provisions recognising Muslim personal law – even though the Constitution of the Republic of South Africa, 1996 (the Constitution) makes provision for such legislation to be enacted. Consequently, Muslims have been practicing their Islamic family laws of marriage, divorce, and inheritance within the private sphere, facilitated, and regulated by community-based Muslim judicial bodies, and their affiliated clergy (Sheikhs and Imāms).

The thesis seeks to identify how Muslims in Western Cape include and implement Islamic inheritance laws in their wills and estates. A socio-legal methodology was adopted to study Islamic inheritance laws as they occur in practice. Empirical research was conducted in the Cape Town metropole area of the Western Cape as it has the largest, oldest, and most established Muslim community in South Africa. I conducted qualitative interviews with various role players, including an official at the main Muslim judicial body in the Western Cape, attorneys involved in the drafting of Muslims' wills and the winding up of Muslims' estates, and an Assistant Master of the High Court (responsible for the probate of all estates). The data extrapolated from my research identified various legal challenges encountered by people implementing the Islamic inheritance laws within the context of the existing common law and statutory laws of succession framework. These include the contravention of certain black-letter common law rules of succession, for example, the prohibition against incorporation by reference and delegation of testamentary powers. In this regard, the thesis recommends that our courts should develop the common law to give expression to a Muslim testator's freedom of testation to devolve his or her estate in accordance with the constitutional guarantees of freedom of religion (s15) and right to property (s25).

The thesis identifies potential conflicts that may arise between the provisions of Islamic inheritance law and the values enshrined in the Constitution, such as the rights to equality (s9) and dignity (s10). It hypothesises how the courts should balance various constitutional and common law rights in accordance with prevailing values of public policy. The thesis cautions the courts to be circumspect when striking down provisions in private wills so as not to infringe the rights to privacy (s14), dignity and property of a testator.

Aside from the empirical research, the thesis relies on a broad spectrum of local and foreign literature in its discussion of both Islamic law and South African law. It provides an overview of the foundations of Islamic law generally, as well as Islamic laws of marriage, divorce, and inheritance. This overview contextualises the empirical research so that concrete suggestions for reform can be made. The thesis concludes with recommendations for the future implementation of Islamic inheritance laws by relevant role players.

ACKNOWLEDGEMENTS

Firstly, all thanks is due to my Creator for making this thesis possible.

Thank you to my supervisor, Professor Mohamed Paleker, for his invaluable feedback, guidance and support with this task.

Thank you to the Law Faculty of the University of Cape Town for awarding me the 'Law Faculty Masters and Doctoral Scholarship' in 2017 and 2018.

I would like to thank all my teachers of Islamic law, but especially Dr Munier Abduroaf, who taught me the foundations of Islamic inheritance law. Thanks is also due to my beloved Usul-al-Fiqh teacher and friend, Shaykh Seraj Hendricks, whom we sadly lost to covid during the pandemic.

Thank you to the Muslim Judicial Council who facilitated my empirical research at their offices and to all the attorneys who participated in the empirical research as well as the state officials at the Master of the High Court offices in Cape Town.

Thank you to the research assistants, Chevaan Davids and Saleem Firfirey who assisted me with empirical research at the South African Archives and at the Muslim Judicial Council. Thank you to Vanessa-Lynn Neophytou and Michael Crystal for casting their eyes over the thesis and for their constructive input.

Thank you also to my colleague and friend, Dr Fatima Osman, for her constant support and encouragement on my PhD journey.

Finally, thank you to my family – especially my parents, my beloved husband and my three wonderful sons. This project would not have been possible without your constant love, support and sacrifices.

This thesis is dedicated to my late parents, Dawood and Latiefa Essop.

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LIST OF ABBREVIATIONS

Abbreviations of Legislation

AEA	Administration of Estates Act 66 of 1965
CA	Children's Act 38 of 2005
DRA	Deeds Registry Act 47 of 1937
EDA	Estate Duty Act 45 of 1955
ISA	Intestate Succession Act 81 of 1987
MA	Marriage Act 25 of 1961
MSSA	Maintenance of Surviving Spouse Act
PFA	Pension Funds Act 24 of 1956
RCMA	Recognition of Customary Marriages Act 120 of 1998
RCLSA	Reform of Customary Law of Succession Act 11 of 2009
TPA	Trust Property Control Act 57 of 1988
WA	Wills Act 7 of 1953

'the Constitution' means the 'Constitution of the Republic of South Africa, 1996'.

Other Abbreviations

ACL	African Customary Law
AD	Appellate Division
IIL	Islamic Inheritance Law
MJB	Muslim Judicial Body
MJC	Muslim Judicial Council
MPL	Muslim Personal Law
NPO	Not-Profit Organisation
PBUH	Peace Be Upon Him
Q	Qur'ān
SCA	Supreme Court of Appeal
WLC	Women's Legal Centre

References from the Qur'ān are cited with 'Q' and the first number reflects the number of the chapter (*sūrah*), whilst the number following the separating colon indicates the number of the verse (*āyah*).

Journal Abbreviations

Arab LQ	Arab Law Quarterly
HRQ	Human Rights Quarterly
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SAJHR	South African Journal of Human Rights
Stell. LR	Stellenbosch Law Review
Tul. Eur. & Civ. LF	Tulane European and Civil Law Forum
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman Dutch law)
US-China L. Rev	United States - China Law Review

LIST OF COMMONLY USED TERMS

An Islamic Will	A will where the testator has stipulated that his or her estate should be distributed according to the tenets of Islamic law.
A Muslim Marriage	A Muslim marriage in the context of South African law is a marriage concluded between two parties through a *nikāh* according to the tenets of Islamic law.

LIST OF ARABIC TERMS

āhād	an isolated report
āyah pl.*āyāt*	verse/sign
ahl al-farā'id	those entitled to prescribed portions/Qur'anic sharer heirs
al walad li'-fīrāsh	the child belongs to the marriage bed
al-nāsikh wa-l-mansukh	abrogating and abrogated verses
amm	general
'asabah bi-ghayri-hi	co-dependent agnate
'asabah ma'a al-ghayr	dependent agnate
'asabiyya	descent through the male links from a common ancestor
'āsib, pl. *'asaba*	male agnate
asbāb al-nuzūl	circumstances or occasions of the revelation
asl	original
āyah pl. āyāt	a verse of the Qur'an
'awl	proportional reduction of the Qur'anic shares
bā'in	irrevocable
bayt al-māl–	public treasury
da'īf	weak
da'wah	act of inviting or calling people to Islam

dalīl	indicator
darar	harm
darūriyyāt	essentials
dayn	debt
dhawū'l arhām	the possessor of a uterine relationship/distant kindred
diyya	blood money
fard al-'ayn	individual obligation
fard al-kifāyah	communal obligation
fard	obligation
faskh	judicial decree dissolving a marriage
fatwa pl. *fatāwa*	A legal opinion or ruling issued by an Islamic scholar on a particular matter.
fiqh	Islamic jurisprudence
hadīth, pl. *ahādith*	a report of a saying or action of the Prophet Muhammed (SAW) or such reports collectively
hājiyyāt	complimentary benefits
hajj	the compulsory pilgrimage to Mecca
harām	forbid
hasan	good
hukm pl *ahkām*	judgment; ruling; law
fatwa pl *fatāwa*	legal opinion

i'rāb	grammar
iddah	waiting period
ijāb	offer
ijmā	consensus
ijtihād	independent reasoning utilised by a jurist to extrapolate rulings from the primary sources
ikhtilāf al-fuqahā	disagreements of the jurists/disputes of the jurists
illah	cause
'ilm al-farā'id	'science of the shares', the Islamic law of inheritance
imām	leader or authority in community
iqrār	paternity
istihsān	to consider something good, juristic preference
istishāb	presumption of continuity, continuance of companionship
jā'iz	*permissible*
jāhiliyyah	pre-Islamic times, the 'age of ignorance'
kafālah	sponsorship to feed/fosterage
kalāla	one who dies leaving neither parent nor child, or, all the heirs with the exception of parents and children.
khāss	specific
khul'	no fault divorce with compensation
kitāb	a written document; the Qur'an

li'ān	mutual oath taking
lugha	language
madrassa pl. *madāris*	Muslim school
mafqūd	missing person
mahr	dower
makrūh	reprehensible
mandūb	praiseworthy/recommended
manfa'ah	usufruct/benefit
maqāsid	goals/objectives/purposes
maqāsīd al-sharī'ah	objectives of the divine law
mard al-maut	deathbed sickness
mashhūr	famous/well known
masjid pl. masājid	Muslim place of worship.
maslahah mursalah	consideration of public interest
matn	the text of a report
mawrūth	net estate
mubāra'a	mutual discharge
mufassir pl *mufāssirūn*	interpreter of Qur'ān
mujtahid pl. mujtahidūn	an authoritative interpreter of Islamic religious law
mukhamāt	straightforward/apparent

mutashābihat	ambiguous
mutawātir	a report passed on by numerous companions, which was generally known from early times, and to which no objections were raised.
muwārith	testator
nasab	blood ties
naskh	abrogation
nikāh	marriage ceremony
qabūl	acceptance
qādī	legal specialist; judge
qarāba	relationship
qiyās	analogy
radd	return of the surplus to Qur'anic heirs
rajī'	revocable
sadaqa	gift; charity
sadd al-dharī'a	blocking the means
sahīh	sound
salāh	prayer
sanad pl. isnād	the chain of authorities upon which a report is based
saum	fast
Sharī'ah	the revealed law of Islam

shūra	mutual consultation
sulh	negotiated settlement
sunnah	sayings and actions of Muhammad (PBUH) including the tacit approval of behaviour he knew about.
sūra	a chapter of the Qur'ān
ta'sīb	agnation
tafsīr	exegesis
tahsīniyyāt	embellishments or luxuries
takhāruj	agreement where an heir exits an estate on an agreed amount of property
takhsīs	specification
talāq	breaking, divorce pronouncement
talāq bid'a	innovative divorce/triple divorce pronouncement
talfīq	placing together parts of a cloth by sewing, fusing the opinion of different legal schools
tanzīl	doctrine of representation
taqlīd	acting upon the word of another (jurist)/imitation
tarīkah	an estate
ulamā	religious leadership
umma	the Muslim community
'ūmrā	gift

‘Umariyyatān	two similar problems related to the Islamic law of inheritance, the solutions of which are attributed to the second caliph, ‘Umar
‘urf	custom
usūl al-fiqh	the sources of law; principles of jurisprudence
walā	slavery
walī	guardian
waqf	a charitable endowment
wārith, pl. *waratha*	heir(s)
wasiyya, pl. *wasaya*	a bequest; legacy
zakāh	compulsory alms tax
zaytūn	olive
zinā	adultery

A NOTE ON TRANSLITERATION

In this thesis, I have not followed any of the various guides on transliteration but have added certain selected transliterated words, which are listed in the 'List of Arabic terms' above. In various Muslim countries and communities, several different spellings and words are frequently used to describe the same thing, as Arabic words are often translated into local languages. This is no different in Cape Town, where the Arabic used is strongly influenced by the Afrikaans language. This is also reflected in some of the words used in this thesis, without implying that it is the 'correct' or most widely recognised spelling.

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

The Constitution of South Africa[1] guarantees everyone's right to freedom of religion[2] and furthermore makes provision for the State to enact legislation to recognise systems of personal and family law adhered to by persons professing a particular religion.[3] The State is therefore empowered to enact legislation regulating Muslim personal laws ('MPL')[4] of marriage, divorce, and inheritance. However, to date, no legislation has been enacted by the State to recognise and regulate systems of marriage, divorce, and inheritance within the Muslim community. Despite this lacuna, members of the minority Muslim community have for centuries been practising and continue to implement MPL within their private lives.[5] Matters pertaining to Muslim marriages, divorce and inheritance are regulated by Islamic non-state entities in the form of various Muslim judicial bodies (hereafter referred to as 'MJBs') that are based in different provinces within South Africa.[6] The Muslim community adheres to the normative authority of these MJBs because Muslims feel socially and morally obliged to do so. Currently, there is an unrecognised system of MPL that runs parallel to the existing State family law system.[7]

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[1] The Constitution of the Republic of South Africa, 1996 ('Constitution').
[2] Constitution, s15(1): 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'
[3] Constitution, s15(3)(a): 'This section does not prevent legislation recognizing-
(i) marriages concluded under any tradition, or a system of religious, personal, or family law; or
(ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.'
[4] In the context of this thesis, MPL refers to the Islamic laws of marriage, divorce, maintenance, and inheritance.
[5] Moosa and Dangor 'Introduction to Muslim Personal Law in South Africa: Past to Present' in Moosa and Dangor (eds) *Muslim Personal Law in South Africa - Evolution and Future Status* (2019) (hereinafter '*MPL in South Africa*') 1 at 3; Cachalia 'Citizenship, Muslim Family Law and a Future South African Constitution: A preliminary enquiry' in *MPL in South Africa* 68 at 76.
[6] Muslim judicial bodies are sometimes referred to as *ulamā* bodies. They are councils of Muslim theologians located in provinces throughout South Africa. There is not one single theological body that represents or that speaks on behalf of all Muslims in South Africa. The *Muslim Directory, South Africa* currently lists 11 official Muslim theological boards in South Africa. See http://www.muslim.co.za/organisations/theological_boards (accessed 8 November 2021). See also Moosa and Dangor (n5) at 3 and 13.
[7] Moosa and Dangor (n5) 3.

With respect to inheritance, Muslims ensure that their estates devolve according to Islamic inheritance law (hereafter 'IIL') by stipulating that this must be the case in their wills and are assisted in this regard by attorneys, legal professionals,[8] and MJBs.[9] On the death of a Muslim testator, the MJBs are also responsible for drawing up distribution certificates, which stipulate the Islamic law heirs of a testator and their respective shares.[10] MJBs, therefore, wield considerable authority in determining how wealth is transmitted within Muslim families through the institution of inheritance. Their interpretation and application of IIL are deferred to and relied upon (i) by members of the Muslim community; (ii) by members of the legal profession involved in estate planning for Muslim testators; and (iii) by State officials, such as the Master of the High Court[11], who are responsible for the winding up of deceased estates.

This thesis investigates how Muslims include IIL in their wills and the role of MJBs in implementing IIL within the South African legal system. It relies on qualitative research conducted in the Cape Town Muslim community to investigate the practical implications and challenges of implementing IIL within the existing South African common-law system of succession. It explores the potential conflicts that may arise between legal rulings in IIL and rights enshrined in the Constitution. To this end, this chapter firstly sets out the research questions and objectives of the thesis, followed by the literature review and the research methodology adopted in the thesis. When discussing the research methodology, I elaborate on the empirical research, including a discussion on the sample community, the positionality of

[8] Such as those working for financial institutions and banks. See §§6.9(b) and 6.10(b).
[9] See §§6.4 and 6.4(a).
[10] See §6.8(c).
[11] The Master of the High Court is an administrative body and one of its functions is to supervise the administration of deceased estates in terms of the Administration of Estates Act 66 of 1965 ('AEA').

the researcher within the sample community and the limitations of the empirical research. The chapter then concludes with a brief analysis of the structure of each subsequent chapter.

1.2 RESEARCH QUESTIONS AND OBJECTIVES

This thesis seeks to address three primary research questions, namely:

(a) How is IIL implemented in the South African legal system?

(b) What are the challenges encountered when implementing IIL within the existing common law of succession framework?

(c) What are the potential conflicts that may arise between the implementation of IIL and the values enshrined in the Constitution?

(d) How can the primary sources of Islamic law be interpreted to better serve a substantive equality imperative for women in South Africa.

To address these questions, the research pursues the following objectives:

(i) It examines the foundational sources of Islamic law and the various methodologies, maxims and doctrines utilised to arrive at legal rulings.

(ii) It examines the Islamic laws of marriage and divorce and how this branch of law interacts with IIL. It furthermore examines how the Islamic laws of marriage and divorce have been dealt with in the South African legal system.

(iii) It examines the Islamic laws of inheritance and how different legal opinions result in different legal rulings pertaining to who qualifies as a legatee or heir, as well as their share allocation.

(iv) It engages with and interprets the primary sources of Islamic law in a manner that results in legal rulings that are more consistent with a substantive equality imperative.

(v) Through empirical research, the thesis investigates how IIL is practically applied within the Cape Muslim community by the relevant role players.

(vi) Based on the empirical research, it explores and analyses the legal challenges that arise when implementing IIL in conjunction with the common-law system of succession.

(vii) Finally, the research delves into questions of both public policy and constitutionality that may arise in respect of the implementation of certain IIL rulings in the South African legal system.

1.3 LITERATURE REVIEW

MPL has been practised by Muslims in South Africa for many years, even though it receives no official recognition by the State in the form of legislation. Much has been written about the consequences of non-recognition and lack of regulation of Muslim marriages and divorces. Scholars like Amien,[12] Domingo,[13] Moosa,[14] Rautenbach,[15] and others have provided detailed accounts of the prejudicial effects of non-recognition. There is furthermore a body of case law and commentary on the state of the current legal position and, in particular, the consequences

[12] Amien 'Overcoming the conflict between the Right to Freedom of Religion and Women's Rights to Equality: a South African case study of Muslim marriages' (2006) 8 *HRQ* 729; Amien 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context' (2010) 24 *International Journal of Law, Policy and the Family* 361; Amien 'Reflections on the recognition of African customary marriages in South Africa: Seeking insights for the recognition of Muslim marriages' 2013 *Acta Juridica* 357; Amien & Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' 2014 Md. J. Int'l L. 505; Amien 'Judicial intervention in facilitating legal recognition (and regulation) of Muslim family law in Muslim-Minority Countries' (2020) 1(1) *Journal of Islamic law* 65.

[13] Domingo 'Muslim Personal Law in South Africa: until two legal systems do us part or meet?' (2011) 32 *Obiter* 377; Domingo 'The case of recognition of Muslim Personal Law in South Africa, Colonialism, Apartheid and Constitutional Democracy' Possamai, Richardson & Turner (eds) *The Sociology of Shari'a: Case Studies from Around the World* (2014) 175.

[14] Moosa 'Muslim Personal Law – To be or not to be?' (1995) 6 *Stell. LR* 417; Moosa 'The interim and final Constitutions and Muslim personal law: implications for South African Muslim Women' 1998 (9) *Stell. LR* 196; Moosa *Unveiling the Mind: The Legal Position of Women in Islam: a South African Context* (2011); Moosa and Dangor (n5) at 1.

[15] Rautenbach 'The recognition of Muslim marriages in South Africa: past, present and future' (2000) 17 *Recht van de Islam* 36; Rautenbach 'Some comments on the current (and future) status of Muslim personal law in South Africa' (2004) 7 *PELJ* 1; Rautenbach 'Islamic marriages in South Africa : *Quo vadimus*?' (2004) 69 *Koers: Bulletin for Christian Scholarship* 121.

of Muslim marriages not being recognised and regulated by the State.[16] A limited amount of empirical research has been conducted in the area of Islamic marriages and divorces.[17] However, there has been considerably less scholarly endeavour in the area of IIL as practised in the South African context and the challenges that arise as a result of these practices. One of the earlier works on the subject was a book by Omar, which discusses the application of the Islamic law of succession in South Africa.[18] However, this book was published in 1989, before the advent of South Africa's constitutional democracy and, therefore, does not take into account any of the legal developments in the area of MPL since then.

Later works in this area of law include the unpublished theses of Toffar[19] and Abduroaf[20], who discuss the application of IIL in the South African legal context. Toffar's thesis provides a comprehensive analysis of IIL but only dedicates one chapter to the administration of Islamic laws of succession, adoption, guardianship and endowment in South Africa.[21] His thesis is dated 1998 and does not take into account the subsequent case law that emerged to deal with the prejudicial effects of the non-recognition of Muslim marriages. Abduroaf's thesis, which is more recent, deals with the impact of South African law on the Islamic law of succession. Although comprehensive, it considers issues like the delegation of testamentary powers by Muslim testators to MJBs and the incorporation by reference of IIL in Islamic wills to a limited

[16] For a synopsis of cases see: Abrahams-Fayker 'South African engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages' 2019 in *MPL in South Africa* 252; Amien 'A discussion of *Moosa v Harnaker* illustrating the need for legal recognition of Muslim marriages in South Africa' (2019) 6 *Journal of Comparative Law in Africa* 115; Amien 'Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages' 2013 *Acta Juridica* 357; Gabru 'Dilemma of Muslim women regarding divorce in South Africa' (2004) 7(2) *PELJ* 43.

[17] See: Hoel 'Engaging religious leaders: South African Muslim women's experiences matters pertaining to divorce initiatives' (2012) 38 *Social Dynamics* 2; Essop 'Problems of and Possibilities for Islamic Divorce in South Africa' in Stiles and Yakin (eds) *Islamic Divorce in the Twenty-First Century – A Global Perspective* (2022) 65.

[18] Omar *The Islamic Law of Succession and its application in South Africa* (1988).

[19] Toffar *Administration of Islamic Law of Succession, Adoption, Guardianship, Legacies and Endowment in South Africa* (Unpublished PhD Thesis, University of Durban-Westville (1998)).

[20] Abduroaf *The Impact of South African Law on the Islamic Law of Succession* (unpublished PhD Thesis, University of the Western Cape (2018)).

[21] Toffar (n19) 350.

extent. Furthermore, Abduroaf's research findings are based on anecdotal evidence as opposed to empirical research. Published empirical research in the area of IIL is limited.[22] The empirical research undertaken in this thesis is broader and thus novel, contributing to new knowledge in this area of law. Abduroaf, Amien[23], and Rautenbach[24] recently highlighted some of the challenges that arise with implementing IIL in the South African legal system.[25] Beyond these works, there are limited contributions to the intersection between IIL and the South African common law of succession.

The thesis also contributes new knowledge to this area of law by highlighting the legal challenges that arise with implementing the system of IIL alongside the South African common law of succession, including potential constitutional challenges that may arise. By relying on case law and writings of academic writers,[26] I hypothesise how the courts might balance the constitutional rights to property, dignity, religion and equality when interpreting provisions of IIL that may be perceived as discriminatory.[27] Cases dealing with religious and cultural freedom in the sphere of inheritance are recent and constantly developing.[28] Our courts have

[22] In this regard, see Moosa '*A comparative study of the South African and Islamic law of succession and matrimonial property with especial attention to the implications for the Muslim woman*.' (Unpublished LLM Thesis, University of the Western Cape (1991)). This empirical research was conducted before the enactment of the Constitution.

[23] Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 *Acta Juridica* 192.

[24] Rautenbach and Goolam 'The legal status of a Muslim wife under the law of succession: is she still a whore in terms of South African law?' (2004) 15(2) *Stell. LR* 369.

[25] Moosa and Abduroaf 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v. Jacobs* and the Muslim Marriages Bill' 2014 *Acta Juridica* 160; Abduroaf 'The consequence of an Islamic divorce' (2019) 19 *Without Prejudice* 31; Abduroaf 'The impact of the South African Law of Succession and Administration of Estates on South African Muslims' (2019) 27(2) *Journal Syariah* 321; 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* 126; Abduroaf 'A constitutional analysis of an Islamic will within the South African context' (2019) 52(1) *De Jure Law Journal* 257.

[26] Modiri 'Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*' 2013 *PELJ* 583; Du Toit 'Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?' (2012) 27 *Tul. Eur. & Civ. LF* 97.

[27] See §9.5.

[28] For a synopsis on these cases see Matsemela 'Modern Freedom of Testation in South Africa: Its Application by the Courts' (2015) 2 *Journal of Law Society and Development* 93.

also been confronted with challenges to the African customary law ('ACL') of succession.[29] Islamic inheritance rulings that are potentially discriminatory have yet to be challenged in our courts. This thesis therefore seeks to contribute new arguments to this sphere of the law.

1.4 RESEARCH METHODOLOGY

Both desktop research and empirical research were used in this thesis. I elaborate on both below.

(a) Desktop research

The desktop research entailed reading and analysing published material (including books, journal articles, dissertations, statutes, and case law) in order to answer the stated research questions. Published material on the South African law of succession and Islamic law were considered. For the Islamic inheritance component, I relied directly on the Arabic texts of the primary sources of law but also relied on various translations to consolidate my understanding of the relevant texts. The desktop research assisted me in formulating my approach to my empirical research.

(b) Empirical research

A socio-legal methodology was adopted in the empirical research. Socio-legal research seeks to present an understanding of 'how legal rules, doctrines, legal decisions, institutional, cultural and legal practices work together to create the reality of law in action.'[30] Put differently, socio-legal research seeks to study law in its context. Harris notes: '…empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety

[29] *Bhe v the Magistrate, Khayeliysha* 2005 (1) SA 590 (CC) (hereinafter *"Bhe"*). For a discussion on *Bhe* see §9.5(c).
[30] Banaker 'Studying Cases Empirically: Sociological Method for Studying Discrimination Cases in Sweden' in Banakar and Traverse (eds) *Theory and Method in Socio-Legal Research* (2005) 139.

of ways, and can therefore only be properly understood if studied in that context.'[31] The thesis seeks to investigate how IIL is practised within the South African context and, more specifically, within the Cape Town area. To this end, the thesis utilises multiple methods of study and data sources in order to attain a more authentic understanding of the topic under investigation. According to Harrington and Merry, a mixed-method approach to research can 'enrich the insights' of a project.[32]

The empirical research entailed document analysis of numerous Islamic wills stored in the Muslim Judicial Council ('MJC') archives. In addition to the document analysis, I also conducted qualitative interviews with various role players involved in Islamic wills and estates. My document analysis, as well as qualitative interviews, provided me with a comprehensive understanding of how Muslims in Cape Town, through the drafting of their wills, can ensure that their estates are distributed according to IIL. It also highlighted the contrast between the law in theory and the law in action.[33] It, furthermore, provided me with interesting insights into the role of the MJC in assisting the Muslim public with wills and the impacts its legal rulings have on the eventual distribution of Muslim estates. My findings at the MJC were reinforced by my further qualitative interviews with attorneys who deal with Islamic wills and estates, as well as with the official at the Master of the High Court office ('the Master's office').[34]

[31] Harris 'Curriculum Development in Legal Studies' (1986) 20 (2) *Law Teacher* 110 at 112.
[32] Harrington and Merry 'Empirical Legal Training in the US Academy' in Cane and Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (2010) 1051.
[33] See discussion in chapter seven on how Islamic wills routinely contravene black letter common law rules of succession. According to Bell '[t]he most obvious goal of empirical research in law is to contrast the "law in books" with the "law in action"' Bell 'Empirical Research in Law' (2016) 25 (2) *Griffith Law Review* 262 at 264.
[34] The Master of the High Court is an administrative body and one of its functions is to supervise the administration of deceased estates in terms of the AEA.

(i) Authorisation and consent to conduct research

Before undertaking the empirical research, ethical approval and consent were obtained from the Faculty of Law Ethics Committee of the University of Cape Town ('UCT') on 13 February 2018. A copy of the UCT ethical clearance letter is attached at the end of the thesis; see Appendix 1. On 12 February 2019, the ethical clearance expired, and I had to apply for an extension as I had not yet finalised my research. I obtained an extension on 19 April 2019 in a clearance letter, attached hereto as Appendix 2. Ethical clearance ensured the confidentiality and anonymity of all participants. The informed oral and written consent of all participants involved in the study were obtained. The necessary consent was obtained from the Chief Master of the High Court to interview one of the Deputy Masters. A senior official at the MJC granted me permission to conduct a document analysis of the wills on record and to interview the relevant official involved in the drafting of wills and the administration of estates. I elaborate on these aspects in chapter five below. I began with my empirical research in February 2018, and it took 15 months to complete.

(ii) The sample community

The empirical research was restricted to the Cape Muslim community. As a resident of Cape Town, conducting my research in this community was logistically and practically more convenient. However, I also chose the Cape Muslim community because it is the oldest and largest Muslim community in South Africa.[35] This community has formed part of the South African socio-political and historical landscape for over 350 years. The first Muslims were brought to South Africa from five main regions of the world: the Indonesian archipelago, Bengal on the South Indian Coast, Ceylon (Sri Lanka), Madagascar, and the East African

[35] Moosa *Unveiling the Mind: The Legal Position of Women in Islam: a South African Context* (2011) 149.

Coast.[36] In the 17th century, the first slaves were brought by the Dutch East India Company from the aforementioned colonies to provide labour to the Dutch at the Cape. Many of these slaves brought to the Cape were Muslims.[37] In the first 150 years, the Dutch authorities restricted the religious rights of the Cape Muslims and prevented them from establishing a masjid or madrassa in the Cape.[38]

In addition to slave labour, hundreds of convicts from the Dutch colonies in the East Indies were brought to the Cape to serve out their sentences in the Dutch authorities' employ.[39] Among them were learned Islamic scholars like Abdullah Qadi Abd al-Salaam, commonly known as Tuan Guru, a former Prince of Tidore in the Ternate islands. He was one of the first prisoners to be held on Robben Island and subsequently became the *imām*[40] of the first *masjid*[41] established at the Cape in 1797, as well as the first teacher at an official madrassa.[42] Through Tuan Guru and others' efforts, Islam spread rapidly at the Cape in the first two centuries and was fully established at the Cape in the 20th century through the setting up of numerous *masājid*, *madāris*, and non-governmental social welfare organisations, which include *ulamā* bodies like the MJC.[43] As of 2013, Muslims comprised 2% of the total South African population, with most Muslims being concentrated in the Western Cape, followed by

[36] Davids *The Afrikaans of the Cape Muslims* (2011) 37.
[37] Bradlow 'The Origins of the Early Cape Muslims' in Bradlow and Cairns (eds) *The Early Cape Muslims* (1978) 86-91, 103-5 and 118-124; Robert *The Establishment and Spread of Islam at the Cape from the Beginning of Company Rule to 1838* (Unpublished B.A. (Honours) Thesis University of Cape Town (1974)) 4-29.
[38] Lewis 'The Religion of the Cape Muslims' in Hellman and Abrahams (eds) *The Handbook of Race Relations in South Africa* (1949) 587.
[39] Robert (n37) 4-29.
[40] The term *imām* in South Africa is a title given to a religious leader in the Muslim community who is usually based at a *masjid*. An *imām* is required to lead the prayers and fulfil other religious and spiritual responsibilities within a community, like officiating over marriages and funerals.
[41] The first masjid in the Cape was the Auwal Masjid, Bo-Kaap, Cape Town. Bo-Kaap was a designated 'Malay' area during the apartheid regime and is one of the oldest Muslim communities in South Africa. Mandivenga 'The Cape Muslims and the Indian Muslims of South Africa: A Comparative Analysis' (2000) 20 (2) *Journal of Muslim Minority Affairs* 347 at 347-8.
[42] Davids 'Alternative Education: Tuan Guru and the Formation of the Cape Muslim community' in Da Costa and Davids (eds) *Pages from Cape Muslim History* 1994 48-49.
[43] Dangor 'The establishment and consolidation of Islam in South Africa: From the Dutch colonization of the Cape to the present' (May 2003) 48 *Historia* 1: 209.

KwaZulu-Natal and Gauteng.[44] Although there is a growing Shi'ite[45] Muslim community in South Africa,[46] most Muslims in South Africa are Sunnī Muslims.[47] Furthermore, majority of Muslims in South Africa adhere to the Hanafī or Shāfi'ī schools of law,[48] which are two of the main Sunnī schools of law.[49] I therefore only consider Sunnī jurisprudence in this thesis.

Vahed highlights that Muslims in South Africa are deeply divided by race, doctrine, language, class, and ethnicity.[50] Geographically Indians are concentrated in Gauteng and KwaZulu-Natal, while most Coloureds live in the Western Cape, and Africans are scattered across townships.[51] He furthermore points out that, '[c]lass differences are stark because of differences in education, unemployment, and income…Work status is influenced by level of education and language.'[52] In the Western Cape, these class differences impact on whether Muslims have the means to secure the assistance of attorneys to draft their wills or whether they rely on MJBs or *imāms* to assist them. Muslim husbands are still the primary breadwinners in the family, but the number of Muslim women in gainful employment has increased, with many lower- and middle-class families relying on both spouses for the household income.[53]

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[44] Schoeman 'South African religious demography: The 2013 General Household Survey' (2017) 73(2) *HTS Theological Studies* 1 at 3. https://doi.org/10.4102/hts.v73i2.3837 last accessed on 2 March 2021.
[45] The Sunnīs and Shi'ites are the two main doctrinal sects in Islam. Although they share fundamental beliefs, they differ in areas of theology, ritual practice, beliefs on leadership and law. The ideological split between the Sunnīs and Shi'ite was solidified at around 661-750AD in Islamic history and continues to divide the Muslim world up until today. In South Africa the Shi'ites constitute about 3% of the Muslim population, according to Haider, the national spokesperson for the South African Shi'ite community. See https://www.iol.co.za/sunday-tribune/news/shia-hate-led-to-mosqueattack-14950713 last accessed on 18 March 2022.
[46] Vahed 'Contestation and transformation: Muharram practices among Sunnī Muslims in South Africa' in Sohoni and Tschacher (eds) *Non-Shia Practices of Muharram in South Asia and the Diaspora* (2022) 71 at 72.
[47] Moosa (n35) 28 n.48; Mandivenga (n41) 348.
[48] Moosa (n35) 151; Mandivenga (n41) 348.
[49] For a discussion on the four Sunnī legal schools see §2(c).
[50] Vahed 'Islam in the Public Sphere in Post-Apartheid South Africa: Prospects and Challenges' (2007) 27 *Journal for Islamic Studies*116 at 119.
[51] Ibid. This categorization of Muslims into various race groups has relevance in so far as they impact on every-day life and particularly in so far as they relate to class differences and access to various legal resources. I have not used inverted comas when using these racial terms.
[52] Ibid.
[53] Dangor 'Historical Perspective, Current Literature and an Opinion Survey among Muslim Women in Contemporary South Africa: A Case Study' (2001) 21(1) *Journal of Minority Affairs* 109 at 112 and 121; Cachalia (n5) 74.

Within the Western Cape, like in other provinces, there are various MJBs[54] to which *imāms* belong as members. These MJBs are responsible for administering the community's religious and spiritual affairs, including the MPL of community members.[55] They oversee matters like Muslim marriages, divorce and inheritance matters. These bodies are also responsible for issuing *fatāwa* on matters affecting the community, including matters pertaining to inheritance. The MJBs have no powers to enforce their *fatāwa*. Instead, they rely on their religious and moral authority when issuing legal rulings. These bodies are highly respected within the community, and their decisions have great persuasive value. They are akin to the semi-autonomous social bodies, which Moore contends, '[c]an generate rules and customs and symbols internally, but that [are] also vulnerable to rules and decision and other forces emanating from the larger world.'[56] It is apparent that in a pluralistic legal system like South Africa, the law is not limited to official State legal institutions. One of the main MJBs in Cape Town, namely the MJC, was a main participant in the empirical research for this thesis.

(iii) Positionality

My position as a Muslim female, Capetonian, facilitated my easy access to the sample community, especially to the MJC. The research was therefore conducted from an insider's perspective, resulting in participants willingly sharing relevant information with me. I experienced no apparent disadvantages in my position as a Muslim female whilst undertaking my empirical research. I have been involved in MPL for many years in various capacities. As a practitioner, I initiated the MPL project at the Women's Legal Centre ('WLC')[57] in 1999 and

[54] Some *ulamā* bodies are more established than others, for instance, the MJC, which I discuss in §6.7(a) enjoys greater recognition and acceptance by the overall Muslim community in the Western Cape.
[55] Cachalia (n5) 75.
[56] Moore 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' 1973 7 (4) *Law and Society Review* 746.
[57] The WLC is a public interest legal NPO that advances women's rights through litigation, advocacy and education. See http://www.wlce.co.za (last accessed 9 November 2021).

participated in its joint submission to the South African Law Commission's Issue Paper 15: Islamic marriages and related matters.[58] Over the years, I have advised many Muslim couples on their rights and responsibilities upon divorce. I have also assisted Muslim testators in drafting wills that are consistent with IIL. As an accredited family law mediator with FAMAC[59], I mediated numerous marital and divorce disputes between Muslim couples. In researching this thesis, I was, therefore, able to draw on my practical experience in MPL and could rely on anecdotal examples encountered over the years.

As a researcher in MPL, I wrote a regular column in a local community newspaper on concluding Muslim marriages in the South African legal context.[60] In 2019, I conducted ethnographical research on Islamic divorce procedures at the MJC, which research culminated in a pending publication on Islamic divorce in South Africa.[61] In addition to my South African law qualifications, in 2016, I obtained a bachelor's degree in Islamic law and Arabic. In 2017, I furthered my studies in Modern Standard Arabic at the Arabic Language Institute in Fez, Morocco ('ALIF').[62] In the same year, I obtained a professional qualification in Islamic finance and banking.[63] With my background in Islamic law and Arabic, I was able to navigate the primary sources of Islamic law as well as the various commentaries on the sources. It also allowed me greater insights into the legal rulings made by the MJC in the sphere of IIL.

[58] The joint submission can be found on the South African Law Commission's website at the following link http://www.justice.gov.za/salrc/ipapers/ip15_prj59_2000_rspo.pdf (last accessed 9 November 2021).
[59] Family Mediator's Association of the Cape (FAMAC) is a NPO in Cape Town that focuses on divorce mediation. See https://www.famac.co.za (last accessed 9 November 2021).
[60] The column on Muslim marriages was published in a community newspaper titled *Muslim Views*. See the following link: http://muslimviews.co.za/your-options-in-a-muslim-marriage/ (last accessed 9 November 2021).
[61] Essop (n17).
[62] For further details, see http://www.alif-fes.com (last accessed on 11 November 2021).
[63] The Certified Islamic Finance Executive™ (CIFE™) is a professional qualification accredited to conform with the Shariah standards of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). See https://ethica.institute (last accessed on 11 November 2021).

(iv) Limitations of empirical research

An evident limitation of my empirical research is that the findings cannot be generalised to the larger South African Muslim population. The Muslim community in South Africa does not constitute a homogenous community and has been described as 'heterogenous and plural' in both ideological and political expression.[64] MJBs also adopt different legal approaches to their interpretation and application of MPL and '[t]he Cape Muslim community is often seen as having a more liberal and egalitarian view of gender relationships than other communities in South Africa…'.[65] I, therefore, do not seek to extrapolate my findings to other Muslim communities within South Africa. Instead, the empirical research provides a qualitative understanding of how Muslims in Cape Town ensure that their estates are distributed according to IIL. It furthermore highlights the legal challenges that arise when implementing IIL in the context of the South African common-law system of succession. To understand the practices in other parts of South Africa will require further research in the future.

At the onset of my empirical research, I intended to do extensive historical research on whether and how Muslims at the Cape include IIL in their wills. In this regard, I undertook a document analysis of public files in the genealogical division of the National Archives and Records Service of South Africa ('the Archives') in Cape Town.[66] As these documents are in the public domain, I did not require ethical clearance for this research. I secured the help of two law students from the University of Cape Town to assist me in my research at the Archives. I gave them a comprehensive brief on how to identify and uplift files with common Muslim surnames

[64] Moosa (n35) 146.
[65] Bangstad 'When Muslims marry non-Muslims: Marriage as Incorporation in a Cape Muslim Community' (2004) 15 (3) *Islam and Christian -Muslim Relations* 349 at 352.
[66] See http://www.national.archives.gov.za/aboutnasa.html last accessed on 7 March 2022.

and which provisions to look out for in the wills. They were under my supervision when conducting research at the Archives.

Unfortunately, it became apparent to me soon after commencing my research that I needed to limit my historical analysis of Muslim estates as I encountered various insurmountable logistical problems: (i) the files at the Archives are not uploaded electronically, and one had to request them manually; (ii) only three files could be requested at a time; (iii) the lifts at the Archives were not functioning. Consequently, it would take very long for files to be brought from the storage area to the reading room by the messengers; (iv) often, the files retrieved did not contain a will as the deceased died intestate or the will and other relevant documents such as codicils and distribution accounts were misplaced; (v) special permission had to be obtained to photograph documents such as wills within the files. The photographs had to be taken in a separate cubicle in the reading room. These cubicles were not always available, and (vi) although the estate's register[67] listed the files in alphabetical order according to the name and surname of the deceased, it did not specifically identify estates of Muslims, which made it more difficult to decide which files to retrieve.[68] As a result of these challenges, I decided to abandon a detailed historical analysis of all the wills retrieved at the Archives and not rely on this data as evidence. That said, I did not wish to jettison all the valuable data I managed to retrieve. I, therefore, refer to the three wills I retrieved in chapter seven below as evidence of historical estate planning practices of Muslims in the Cape.

A further limitation of the empirical research is that I only conducted a qualitative interview with the Assistant Master in the Master's office. I did not analyse any Islamic wills at the

[67] There is a register containing a list of all the estate files stored in the Archives (the estate's register). Of the files listed, each has a file number, a reference number, the date of death of deceased as well as the surname, marital status, occupation and race of the deceased.
[68] Due to their slave heritage, many Muslims in Cape Town do not have Arabic sounding surnames.

Master's office. The filing system at the Master's office does not differentiate between testate[69] and intestate estates.[70] This made it difficult to identify those files containing wills. In addition, there is no differentiating in the filing system at the Master's office between Muslim and non-Muslim estates, which made it difficult to identify and research Islamic wills. Furthermore, the archives in the Master's office are in a poor state. After an estate is wound up, the file goes into storage at an off-site venue. It is impossible to access these files. The office also does not have dedicated research facilities. This makes it incredibly difficult to conduct on-site research. Nevertheless, it was useful obtaining the perspective of the Assistant Master, who is a self-proclaimed practising Muslim. He has a basic understanding of IIL and was able to provide valuable insights into how Muslims plan their deceased estates according to IIL.

Despite the limitations, I took care to ensure the reliability of the data so that meaningful conclusions could be drawn for the purposes of this thesis and to assist future researchers who may want to advance the research.

1.5 STRUCTURE OF THESIS AND CHAPTER OUTLINE

Chapter one: Introduction: The contents of this chapter were explicated earlier.

Chapter two: South African and Islamic law Framework. Chapter two provides a concise theoretical framework of the South African legal system and how IIL fits into the system. It provides an overview of the Islamic legal system, including a discussion on the objectives underlying the law, the primary sources of law, the jurisprudential methodologies utilised to derive legal rulings and lastly, a discussion on Islamic jurisprudence.

[69] Estates that are distributed according to a testamentary instrument, like the will of a testator.
[70] Estates without wills and that are distributed in terms of intestate laws.

Chapter three: Overview of the Islamic Laws of Marriage and Divorce. Chapter three provides an overview of the Islamic laws of marriage and divorce as these areas of law directly impact on IIL. I also discuss how the South African courts have dealt with matters pertaining to Muslim divorces and how they impact on a widow's right to inherit on the death of her husband.

Chapter four: The Development of the Islamic Law of Inheritance. This chapter sets out how the Islamic laws of inheritance developed from pre-Islamic Arabia to the finalisation of the Islamic inheritance and bequest laws. It also presents arguments on why the bequest verses were not abrogated and why Islamic law heirs are entitled to benefit from a bequest without the consent of the other heirs being required.

Chapter five: The Islamic Law of Inheritance. This chapter provides an overview of the various categories of Islamic law heirs as well as some of the key doctrines and rules in IIL. It highlights some of the differences of opinion that occur amongst the Islamic jurists when interpreting the primary sources of IIL. The chapter ends with a discussion on rules of exclusion in inheriting, as well as steps in the distribution of a Muslim estate.

Chapter six: Empirical research on Islamic wills and estate planning practices in the Cape Town Muslim community. The chapter focuses on my empirical research in the Cape Muslim community with respect to their estate planning practices and how they include IIL in their wills. The first part of this chapter deals with a document analysis of Islamic wills stored in the archives of the MJC. The second part of the chapter sets out my findings from my interviews with an official at the MJC, an official at the Master's office in Cape Town, and attorneys who specialise in the drafting of Islamic wills and the administration of Muslim estates. I analyse

some of my findings in chapter six, whilst those requiring a more detailed analysis are discussed in chapters seven and eight.'

Chapter seven: Delegation of Testamentary Powers and Incorporation of Islamic Inheritance Laws into Wills. In this chapter, I discuss the legality of Muslim testators delegating their testamentary powers to bodies like the MJC to determine their heirs, as well as the practice of incorporating IIL by reference into their wills. The delegation of testamentary power and incorporation by reference, as currently implemented in Islamic wills, are potentially in contravention of black-letter South African common-law rules of succession. To counter this potential illegality, I discuss how the common law could be developed to accommodate Islamic wills.

Chapter eight: Inheritance Rights of Surviving Widows and Succession Agreements. Based on my findings in the empirical research, in this chapter, I discuss the experience of widows on the death of their husbands. In this regard, I will consider the inheritance and maintenance rights of surviving widows. I focus on women because the practical application of IIL affects widows more negatively than widowers. As part of my discussion, I also discuss the legality of various succession and redistribution agreements encountered in my empirical research, which are often concluded to ameliorate the negative consequences of IIL on women in the South African context.

Chapter nine: Policy and Constitutional Considerations Arising from Islamic Wills. In this penultimate chapter, I discuss various practices in IIL that may be considered contrary to public policy and/or the values as enshrined in the Constitution. I discuss various cases that have come

before our courts that might serve to explain how our courts might deal with future legal challenges to established rulings and practices in IIL.

Chapter ten: Conclusion. In this final chapter, I make recommendations and concluding remarks.

CHAPTER TWO

OVERVIEW OF SOUTH AFRICAN LEGAL SYSTEM AND THEORETICAL FRAMEWORK OF ISLAMIC LEGAL SYSTEM

2.1 INTRODUCTION

To comprehend Islamic inheritance law ('IIL'), it is essential to understand how the Islamic legal system operates. The system evolved over the centuries, from the advent of Islam in the 7th century to the modern application of Islamic law in the 21st century. It is a complex system that is rooted in multiple sources and derived through complex methodologies. Muslim legal jurists have used extensive sources, proofs and methodologies over the centuries to come to diverse legal rulings on different subject matters through the process of *ijtihād*.[1] One of the outstanding features of the system is the plurality of legal opinions that exist in different areas of substantive law, with IIL being no exception. *Ikhtilāf al-fuqahā* is an established classical doctrine that offers multiple interpretations of the primary sources of law.[2] Just as the religion of Islam is not monolithic in nature, neither is its legal system. It is this plurality of opinions, which allows for legal change and flexibility in the application of the law, that debunks the myth that Islamic law is an immutable sacrosanct system of law that is not subject to change or adaptation. By relying on this inherent flexibility within the legal system, I will advance the argument that rulings in IIL, though perceived or depicted as static, are also capable of multiple interpretations.

[1] Lexically *ijtihād* means effort or exertion but legally *ijtihād* refers to '[a]n interpretive tool that applies legal reasoning based on the sacred texts to derive new legal rules that meet emerging legal problems.' See Harasani 'The Role of Ijtihad in Progressing Islamic Law in Modern Times' (2013) 10 *US-China L. Rev.* 361.
[2] Masud '*Ikhtilaf al-Fuqaha*: Diversity in *Fiqh* as a Social Construct' in Anwar (ed) *Wanted – Equality and Justice in the Muslim Family* (2009) (hereinafter '*Wanted*') 65. For an overview on the ethics of disagreement amongst Islamic jurists see: Al Alwani *The Ethics of Disagreement in Islam* (2007).

There is a minority of Muslims in South Africa who are opposed to the State legislating MPL, specifically the Islamic laws of marriage and divorce.[3] They argue that Islamic law is God-given law, which renders it immutable and not suited to our statute books.[4] These same arguments are advanced when Muslim women generally attempt to change discriminatory Islamic laws and practices.[5] By highlighting the flexibility of the Islamic legal system, this chapter seeks to illustrate how facile these arguments are. This chapter will demonstrate how the corpus of Islamic substantive law is largely based on the interpretations and opinions of jurists through the ages. The chapter, therefore, provides an overview of the Islamic legal system to better understand its application by the Muslim community in South Africa, in the sphere of MPL.

In the first part of the chapter, I provide a brief analysis of the South African legal system, which serves both as a comparator to the Islamic legal system but also assists in understanding the status of MPL within the South African legal system. In the second part of the chapter, I provide an overview of the Islamic legal system, by firstly clarifying terminology that is commonly used when discussing Islamic law and highlighting the underlying objectives of the law. Secondly, I discuss the two primary sources of Islamic law, namely the Qur'ān and the Sunnah. Thirdly, I set out the secondary sources and legal methodologies employed in the science of *usūl al-fiqh* (principles of Islamic jurisprudence) to derive legal rulings; and lastly, I discuss the science of *fiqh* (Islamic jurisprudence).

[3] Certain *ulamā* bodies in South Africa object to the legislating of Muslim marriages and divorces. In this regard see: Dadoo and Cassim 'The Debate Regarding Muslim Personal Law in South Africa: Achieving a Balancing of Interests' in *MPL in South Africa* 61; Moosa 'Muslim Family law in South Africa: Paradoxes and Ironies' in *MPL in South Africa* 112-114.
[4] Tayob 'The struggle over Muslim Personal Law in a rights-based Constitution-A South African Case Study' in *MPL in South Africa* at 143. An example of their views can be seen in comments by one such Ulamā body, in the attached link https://jamiatsa.org/uucsa-Constitutional Court/ (last accessed on 16 November 2021).
[5] Anwar 'Introduction: Why Equality and Justice Now' in *Wanted* at 1; Vahed 'Islam in South Africa: Prospects and Challenges' (2007) 27 *Journal of Islamic Studies* 116 at 124-125.

PART ONE

2.2 OVERVIEW OF SOUTH AFRICAN LEGAL SYSTEM

The South African legal system has been compared to a great baobab tree, where the roots indicate the foundations from which the legal system originates, the trunk symbolises the sources of the law, including those structures that support the legal system, and the branches reflect the different branches of the legal system, including substantive laws versus adjectival laws and public laws versus private laws.[6] Private law includes the laws relating to persons, family and succession, which are the areas of this thesis. The roots of the South African legal system can be found in Roman-Dutch law, English common law, and African Customary Law ('ACL'), resulting in a hybrid legal system.[7] Hence, the sources of South African law are statutory law, common law, and customary law.

Statutory law entails national, provincial, and local legislation and regulations, with the Constitution considered to be the highest law in the country. The common law is of non-statutory origin and is based on Roman-Dutch law principles, English legal principles and South African judicial precedents, the last being the most important from a practical perspective.[8] The doctrine of judicial precedent, which was inherited from English law, ensures that a ruling of a higher South African court sets a precedent for a lower court.[9] Since 1994, judicial decisions have ensured that the common law is consistent with the values enshrined in

[6] Barrat *et al Introduction to the South African Law-Fresh perspectives* (2019) 2.
[7] Ibid 18.
[8] Bradfield *et al Wille's Principles of South African Law* (2007) (hereinafter *Wille's Principles*) 65.
[9] The rationale for adhering to precedents was stated by Westhuizen J in *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 CC para [62]: 'Therefore precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot "rule" unless it is reasonably predictable.'

the Constitution.[10] This has resulted in a more value-orientated form of legal reasoning as opposed to the historical formalistic source-based approach.[11]

Lastly, ACLs are those indigenous or local laws that are practised by different communities in South Africa and which exist alongside the official South African law.[12] In line with the constitutional imperative contained in section 15(3) of the Constitution,[13] legislation was enacted to recognise African customary marriages[14] and to recognise ACL of succession.[15] So under the new democratic constitutional dispensation, ACL has been granted equal status to other sources of law, with a distinction being drawn between official customary law and living customary law. The latter reflects the actual customary practices of people as opposed to those customary practices regulated by statute or precedent.[16]

The South African legal system adopts what has been referred to as a deep legal pluralism approach to its multiple systems of existing laws.[17] In other words, there are multiple legal orders that co-exist within the South African society, and not all of them depend on the State for authority.[18] The fact that each legal system does not necessarily enjoy State recognition

[10] The Constitution, s39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights' See §7.4 for the discussion on developing the common law.
[11] *Wille's Principles* at 65 cites examples of cases where courts adopt a more value orientated approach to the interpretation of the common law of contract. A similar shift can be seen in Islamic law where contemporary scholars have argued for a more value orientated approach to the interpretation of primary sources of Islamic law. See discussion in §2.3 below.
[12] Barrat *et al* (n6) 21 and 154.
[13] See n3 in chapter 1.
[14] Recognition of Customary Marriages Act 120 of 1998 (hereinafter 'the RCMA').
[15] Reform of Customary Law of Succession Act 11 of 2009 (hereinafter 'the RCLSA').
[16] Barrat *et al* (n6) 154; Woodman 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws illustrated from the Field of Land Law' 2011 *Acta Juridica* 35.
[17] For a detailed discussion on legal pluralism see Woodman n16; Rautenbach 'The phenomenon of legal pluralism' in Rautenbach and Bekker (eds) *Introduction to Legal Pluralism in South Africa* (2014) and Himonga 'State and individual perspectives of a mixed legal system in Southern African countries with special reference to personal law' (2010) 25 *Tul. Eur. & Civ. LF* 23.
[18] Woodman (n16) 39; Himonga (n17) 36. Rautenbach notes 'In South Africa, the common and customary laws embodies official legal pluralism, whilst those two "official" legal systems, together with all other "unofficial"

does not detract from the factual existence of legal pluralism. So while official ACL is recognised by the State, living customary law continues to be practised within communities, irrespective of whether these practices are officially recognised by the State or not.[19] Similarly, the fact that the State has not officially recognised Islamic laws of marriage, divorce or inheritance does not detract from them being practised by the Muslim community within the private sphere.[20] In the spheres of marriage, divorce and inheritance, Muslim judicial bodies (MJBs) and *imāms* implement systems of Islamic law, which run parallel to the existing State law, without receiving official State recognition.[21] It is not uncommon for South African Muslims to conduct their personal lives in terms of both Islamic law and secular State law.[22]

In the latter part of the 19th century, the courts became less receptive to the institution of Muslim marriages, as they did not conform to the Roman-Dutch and English systems' notion of an acceptable Christian marriage. The main objections to Muslim marriages were the practice of polygyny and the rules pertaining to the unilateral repudiation of a Muslim marriage by the husband. In a line of cases, the courts confirmed that a marriage was a union of one man with one woman to the exclusion of others and that a union that allowed for polygyny, even if it was monogamous at the time a dispute arose, would not be regarded as valid under South

legal systems (eg Hindu law, Jewish Law and Muslim law) embody "deep" legal pluralism': Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 42(60) *The Journal of Legal Pluralism and Unofficial Law* 143 at 145 (n6).

[19] Diala 'The concept of living customary law: a critique.' (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 143.

[20] For a historical exposition of MPL in South Africa see Allie 'A legal and historical excursus of Muslim personal law in the Colonial Cape, South Africa, from the eighteenth to the twentieth century' *MPL in South Africa* 26.

[21] Cachalia 'Citizenship, Muslim Family Law and a Future South African Constitution: A preliminary enquiry' in *MPL in South Africa* 68 at 75; Hoel 'Engaging religious leaders: South African Muslim women's experiences matters pertaining to divorce initiatives' (2012) 38 *Social Dynamics* 2 184.

[22] Dadoo and Cassim 'The Debate Regarding Muslim Personal Law in South Africa: Achieving a Balancing of Interests' in *MPL in South Africa* at 55.

African law.[23] Therefore, marriages that were concluded according to Muslim rites only were not recognised as valid marriages.[24]

This was the position up until the dawn of the constitutional democracy in 1994, whereafter the courts, in various landmark judgments, recognised Muslim marriages in limited circumstances.[25] Despite the courts' piecemeal attempts to recognise Muslim marriages, the legislature has been remiss in its duty to promulgate legislation for the recognition of Muslim marriages or any other aspect of MPL.[26] The Constitution, in section 15, clearly envisions parallel systems of family law based on different religions or traditions. The promulgation of legislation governing ACL of marriage, divorce and succession illustrates that parallel systems of family law are achievable. However, to date, no legislation has been promulgated to recognise any form of MPL and, more specifically, Muslim marriages and their consequences.

In the recent SCA case of *President of the RSA v Women's Legal Centre Trust*,[27] the court found that the non-recognition of Muslim marriages is a violation of the constitutional rights of women and children in particular, including their rights to equality, dignity and access to court.[28] The court furthermore held that recognition and regulation of Muslim marriages would

[23] See *Bronn v Fritz Bronn's Executors* (1860) 3 SC 313; *Ebrahim v Mahomed Essop* 1905 TS 59 at 61; *Seedat's Exec v The Master (Natal)* 1917 AD; *Ismail v Ismail* 1983 (1) SA 1006 (AD).
[24] Only marriages concluded in terms of the Marriage Act 25 of 1961were regarded as valid marriages at the time.
[25] *Daniels v Campbell* 2004 (5) SA 331 (CC) spouses in a Muslim marriage were recognised as spouses for the purpose of inheriting intestate from each other and for maintenance claims against the estate of the deceased spouse. In *Hassam v Jacobs* 2009 (5) SA 572 (CC) the court recognised that all wives in a polygamous Muslim marriage were entitled to inherit from their husband intestate.
[26] In 2010 the Muslim Marriages Bill was published in 2010 and proposed to give formal statutory recognition to Muslim marriages. (GN 37 GG33946 of 21 January 2011) available at http://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf) However, this Bill never came into force as law. It furthermore only made provision for the Islamic laws of marriage, divorce, maintenance and custody but did not include any provisions on Islamic inheritance.
[27] 2021 (2) SA 381 (hereinafter 'the *WLC* case').
[28] Ibid [50]. The Constitutional Court recently confirmed the findings of the SCA and also held that the common law definition of marriage as it currently stands is unconstitutional and invalid in so far as it fails to recognise Muslim marriages as valid. *Women's Legal Centre Trust v President of the RSA* [2022] ZACC 23 para [68].

bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages, including the most vulnerable, women and children.[29] The court declared, amongst others, provisions of both the Marriage Act[30] and the Divorce Act[31] unconstitutional as:

> '[t]hey fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.'[32]

The court obliged the President and Parliament to pass new legislation within 24 months in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.[33] The judgment provides interim relief in various forms for parties who are married in terms of Muslim rites only.[34] Whether the State fulfils its constitutional responsibilities remains to be seen.

Whilst significant progress has been made with respect to advocating for the recognition of Muslim marriages and their consequences, very little effort has been made to ensure the recognition of IIL in the South African legal context.[35] In South Africa, an estate can devolve

[29] Ibid.
[30] 25 of 1961.
[31] 70 of 1979.
[32] *WLC* case *supra* [51].
[33] Ibid. The Constitutional Court confirmed the SCA's order in this regard in *Women's Legal Centre Trust v President of the RSA* [2022] ZACC 23. It is not entirely clear what the nature of the new legislation will be. The South African Law Reform Commission (SALRC) is investigating the idea of a single statute regulating different forms of protected relationships. See the SALRC, Project 144, Discussion Paper 152 (January 2021) at https://www.justice.gov.za/salrc/dpapers/dp152-prj144-SingleMarriageStatute-Jan2021.pdf (last accessed 29 July 2022).
[34] *WLC* case *supra* [51]. The order sets out the interim relief, pending the promulgation of legislation. It is beyond the scope of this thesis to delve into the implications of the interim relief granted by the court.
[35] Amien, who argues for the recognition of Muslim marriages in South Africa, argues against the recognition of the IIL as such recognition would negatively impact on the inheritance rights of women, adopted children and children born out of wedlock. She argues that these relatives currently enjoy greater inheritance rights under the South African laws of intestate succession than under Islamic law. See Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 *Acta Juridica* 192.

according to the will of a testator in terms of the Wills Act,[36] or if the testator has neglected to draft a valid will, his or her estate will devolve intestate, according to the provisions of the Intestate Succession Act[37] or the Reform of Customary Law of Succession and Regulation of Related Matters Act.[38] The RCLSA regulates estates of individuals who lived according to customary laws and who died intestate.[39] Muslims who do not draft wills cannot regulate their estates, according to IIL. Without a will, the person's estate will automatically devolve according to the ISA. To ensure that their estates are distributed according to IIL, Muslims must draft wills to this effect. My empirical research will illustrate that Muslims in Cape Town incorporate IIL into their wills to ensure that their estates are distributed according to IIL.[40] To understand the IIL and how it is applied in South Africa, it is necessary to first have an overview of the Islamic legal system, which I discuss below.

PART TWO

2.3 THEORETICAL FRAMEWORK OF ISLAMIC LEGAL SYSTEM

It is not possible within the scope of this thesis to give a detailed breakdown of the origins and development of Islamic law over the centuries. Other scholars have done so thoroughly and comprehensively.[41] I provide an overview of the theoretical framework of the Islamic legal system in order to better understand where IIL fits into the system and how flexibility may be achieved in its application. In relation to South African law, it is important to note that the two

[36] Act 7 of 1953 (hereinafter 'WA')
[37] Act 81 of 1987 (hereinafter 'ISA').
[38] Act 11 of 2009 (hereinafter 'RCLSA').
[39] The intestate distribution in the RCLSA is very similar to that in the ISA. See Rautenbach 'Mixing South African Common Law and Customary Law of Intestate Succession: '*Potjiekos*' in the Making' in Örücü (ed) *JCL Studies in Comparative Law: Mixed Legal Systems at New Frontiers* (2010) 222 at 236.
[40] In this regard see findings in §§6.4(b); 6.8(a); 6.9(b) and 6.10(b).
[41] In this regard, see Coulson *A History of Islamic law* (1964); Schacht, *An introduction to Islamic law* (1964); Hallaq *The Origins and early evolution of Islamic law and jurisprudence* (2005); Kamali *Principles of Islamic Jurisprudence* (1997); Black *et al Modern perspectives on Islamic law* (2013); Mahmassani *Falsafat al-Tashrī Fi Al-Islām* (*The Philosophy of Islamic Jurisprudence*) (trans. Frahat J. Ziadeh) (1961).

systems, though they may share some similarities, are fundamentally different. In Islam, ethics, morality and law are so intimately connected that they cannot be considered in isolation from each other. Law is said to regulate external conduct, whilst ethics and morality influence the minds and souls of individuals.[42]

If the South African legal system has been compared to the baobab tree, the Islamic law system could be compared to an olive tree.[43] The roots depict the foundations or primary sources of Islamic law; the trunk symbolises the legal proofs and methodologies employed to derive substantive legal rulings from the primary sources, which is referred to as *usūl al-fiqh*, and the branches depict the different substantive legal rulings, or positive laws of the Islamic legal system referred to as *fiqh*. The laws of marriage, divorce and inheritance constitute sub-branches of *fiqh*. In the ensuing section, I discuss these various components of the Islamic legal system. Before doing so, I wish to briefly elaborate upon the term Sharī'ah,[44] which is often referred to when describing Islamic law, with the two terms, Sharī'ah and Islamic law, frequently being used interchangeably.

Islamic scholar and philosopher Ramadan explained that Sharī'ah does not have a single definition,[45]instead, he suggested a bifurcated definition, namely:

[42] Kamali 'Law, Commerce and Ethics: A Comparison Between Sharī'ah and Common Law' in Marcinkowski (ed.) *The Islamic World and the West* (2009) 244.
[43] The olive tree is significant in Islam and the word *zaytūn* (olive) is mentioned six times in the Qur'ān. In chapter 95 of the Qur'ān God takes an oath by the olive, which is indicative of its importance.
[44] Lexically the term Sharī'ah means a 'pathway to a watering hole', whilst legally it is assigned numerous interpretations by scholars.
[45] The terms Sharī'ah and Islamic law are both controversial with varied understandings of each term propagated by scholars. Some have interpreted the Shariah as the revealed law, namely the laws contained in the Qur'ān and the Sunnah whilst others equate Sharī'ah and Islamic law. For some views in this regard see Ali *Modern Challenges in Islamic Law* (2016) 20-40; Esposito *et al Shariah-What everyone needs to know* (2018) at 12; Farooq *Toward our Reformation - From Legalism to value-oriented Islamic law and Jurisprudence* (2013) 19-45; Ahdar and Aroney 'The Topography of Shari'a in the Western Political Landscape' in Ahdar and Aroney (ed) *Shari'a in the West* (2010) 3-6, Auda *Maqāsid al-Shariʿah as Philosophy of Islamic Law – A Systems Approach* (2008) 56-60.

> '*Ash-shari'a*, on the basis of the root word, means "the way" ("the path leading to the source") and outlines a global conception of creation, existence, death and the way of life it entails, stemming from a normative reading and understanding of the scriptural sources. It determines "how to be a Muslim."
> *Ash-shari'a*, for jurists, is the corpus of general principles of Islamic law extracted from its two fundamental sources (the Qur'ān and the Sunnah).[46]

According to the first and broader definition of the term, Sharī'ah entails more than Islamic law.[47] It includes a reference to beliefs, rituals, morals, values, ethics and laws that govern a Muslim's entire life and is primarily derived from Qur'anic revelation and the Sunnah (prophetic traditions), both of which are explained in greater detail below. This understanding of the Sharī'ah goes beyond legal norms and standards, with Islamic law being only one component of this understanding of the Sharī'ah. The second and narrower definition proffered by Ramadan, which is what this thesis focuses on, emphasises 'the corpus of general principles of Islamic law extracted from its two fundamental sources (the Qur'ān and the Sunnah).'[48]

Although I focus on the Islamic law component of the Sharī'ah, it important to note that the underlying normative values, beliefs and ethics found in the broader understanding of Sharī'ah are what underpins Islamic law. These include values of justice, equality, freedom, human dignity, universal values of goodness, values of mercy and compassion to all creation, upholding the rule of law and rejection or avoidance of all harm.[49] These values find their foundations in the primary sources of Islamic law, and they should ideally permeate Islamic rulings. Some scholars have argued that these values constitute the *maqāsīd al-sharī'ah* (objectives of the sharī'ah) and that they represent the link between Islamic law and contemporary notions of human rights.[50] An oft-quoted passage of 14th century Islamic scholar

[46] Ramadan *Radical Reform: Islamic Ethics and Liberation* (2009) 359-360.
[47] This understanding is shared by other scholars including Black *et al* (n41) 2; Nyazee *Islamic Jurisprudence* (*Usūl al-Fiqh*) (2000) 24; Esposito *et al* (n45) 12; Farooq (n45) 41.
[48] Ramadaan (n46) 359-360.
[49] For a further elaboration on these underlying values see Farooq (n45) 66-93.
[50] Auda *Maqāsid al Sharī'ah-A beginner's guide* (2008) 3.

and philosopher Ibn al-Qayyim, encapsulates the influence of these values on Islamic law[51] by stating that:

> 'Sharīʿah is based on wisdom and achieving people's welfare in this life and the afterlife. Sharīʿah is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Sharīʿah, even if it is claimed to be so according to some interpretation.'[52]

Islamic laws should therefore embody the values of *inter alia* justice, mercy, wisdom and common good. *Maqāsid al-sharī'ah* has also been presented as the philosophy of Islamic law.[53] The term *maqāsid* refers to objectives, purposes, intents or goals. *Maqāsid* of Islamic law therefore refers to the objectives, purposes, intents and goals behind Islamic law rulings.[54] Historically, scholars classified the entire range of *maqāsid* into three categories, namely, the *darūriyyāt* (essentials), *hājiyyāt* (complimentary benefits) and *tahsīniyyāt* (embellishments).[55] There are five essentials, namely: religion, life, family/lineage, intellect, and property, which are regarded as essential to the normal order of society and contribute to the physical, social and spiritual well-being of the individual. Complimentary benefits are less essential for human life whilst interests at the level of embellishments serve beautifying objectives. Each of the different levels is interrelated, with each level seeking to serve and protect the level below it.[56] Islamic law, through its different legal rulings, seeks to protect, preserve and promote these objectives. Affirmative or punitive measures are adopted to protect and promote the essentials, for instance. Therefore alcohol is prohibited as it impairs the intellect, murder is prohibited as it negates life, marriage and inheritance laws protect the family, laws on theft protect property,

[51] Ibn al-Qayyim uses the word 'Sharī'ah' in this quote, which refers to the narrower definition of Islamic law as elaborated upon by Ramadaan in the previous paragraph.
[52] Ibn al-Qayyim *I'lām al-Muwaqqi-īn* (ed) Saad (1973) 3 (3) also cited in Auda (n45) 20.
[53] For a discussion on the philosophy of *maqāsid al-sharī'ah* see: Auda (n45) 1-15; 26-55; Kamali *Maqasid al Sharī'ah made simple* (2008); El-Mesawi *Ibn Ashur - Treatise on Maqāsid al-Shariʿah* (2006) 11-18; 67-82.
[54] Auda (n45) 2.
[55] Auda (n45) 3; Kamali (n53) 4-5.
[56] Auda (n45) 3.

and so forth. There is general agreement that the preservation of these essentials is the primary objective behind any revealed law.[57]

Modern Islamic scholars have included new classifications of *maqāsid* like justice, freedom, preserving human dignity and equality.[58] *Maqāsid al-sharī'ah* can be located in the sacred texts and is utilised by modern-day legal scholars to develop and transform Islamic law. Concerted efforts are being made to move from a legalistic literalist interpretation and engagement with sacred texts to a more value-orientated purposive approach when deriving legal rulings from the primary sources.[59] It must be noted, however, that the move to a more value-orientated purposive approach is not shared by all scholars who engage with the primary sources. As explained in chapter one, when describing the sample community, the South African Muslim community is not a homogenous Muslim community. Their approach to interpreting and engaging with the primary sources range from an ultra-conservative literalist approach to a more value-orientated purposive approach. In this thesis, I advocate for the latter approach to be adopted, especially in the area of IIL and have relied on the views of jurists who engage with and interpret the primary sources in a manner consistent with values of justice, fairness, equality and respect for human dignity. In the next section, I elaborate upon the two primary sources, namely the Qur'ān and the Sunnah.

(a) The primary sources of Islamic law

According to Shāfi'ī, who was the founder of the Shāfi'ī legal school of thought[60] and a leading Islamic jurist, there are four major sources or roots of Islamic law, namely, the Qur'ān, the

[57] Ibid.
[58] Auda (n45) 6-7; Kamali (n53) 16-17.
[59] Farooq (n45) 63-66, 90-93.
[60] See discussion on legal schools in §2.3(c).

Sunnah, *ijmā* (consensus) and *qiyās* (analogy).[61] Many works on Islamic law, therefore, cite these four sources as the foundations of Islamic law.[62] However, Kamali, a leading contemporary scholar on *usūl al-fiqh,* correctly refers to consensus and analogy as methodologies of deriving rulings from the primary sources as opposed to substantive sources.[63] I have therefore, only cited the Qur'ān and the Sunnah as the two primary sources of Islamic law, whereas consensus and analogy are discussed under the heading of *usūl al-fiqh.*

(i) The Qur'ān

Islam, as a religion, was revealed into a tribal society in Mecca in the Arabian Peninsula in 610 A.D.[64] This Arab society, often referred to as a *jāhiliyyah* (ignorant) society, had its own existing tribal laws and customs, which were not entirely abandoned with the introduction of the new Islamic legal system.[65] Islam was revealed to the Muhammad (PBUH) through what is considered the divine unspoken word of God in the form of the Qur'ān.[66] Upon receiving the Qur'anic revelation, Muhammad (PBUH) would convey it to his companions, who would memorise it and convey it to others.[67] The Qur'ān was revealed over a period of 23 years during Muhammad's (PBUH) lifetime[68] with the first 13 years being revealed in Mecca[69] and the last 10 years in Madina.[70] Most of the laws relating to inheritance were revealed in the Madinan

[61] Al-Shāfi'i *al-Risāla Fī Usūl al-Fiqh* (*Treaties on the Foundations of Islamic Jurisprudence*) (trans. Majid Khadduri) (1961).
[62] Coulson (n41) 55, Al-Shāfi'i'(n61) 28; Black et al (n41) 10-11; Griffel 'Introduction' in Amanat and Griffel (eds) *Shari'a – Islamic Law in the Contemporary Context* (2007) 3. Khan *The Islamic law of Inheritance* (2007) 4.
[63] Kamali (n41) 228.
[64] Mahmassani (n41*)* 15-16.
[65] Coulson notes that Qur'ānic legislation modified rather than replaced the existing Arab customary laws. This is illustrated in the laws of inheritance which are discussed in § 4.2. Coulson (n41) 15.
[66] Khan (n62) 5.
[67] Barlas *Believing Women in Islam – Unreading Patriarchal Interpretations of the Qur'ān* (2011) 33.
[68] Ibid 32.
[69] Ibid; Khan (n62) 5. This was referred to as the Meccan period.
[70] Ibid. This was referred to as the Madinan period. Muhammad (PBUH) migrated from Mecca to Madina, thirteen years after the first Qur'anic revelation. The migration from Mecca to Madina is referred to as the Hijra and the Islamic calendar dates back to the start of the Hijra, AH1 being 622AD. It was in Madina that Muhammad (PBUH) set up a political state and where the power of the nascent Muslim community grew exponentially. The Qur'anic verses revealed in Madina were more detailed and concerned legislation: Khan (n62) 5.

period when the Muslim community became more established. After the death of Muhammad (PBUH), one official version of the Qur'ān was compiled in written form under the rule of the third Islamic caliph, Uthman.[71]

The Qur'ān is considered a divinely inspired text which established the fundamental beliefs of Islam including monotheism and a belief in human beings' accountability to God in this life and the hereafter. It emphasises values like justice, mercy and compassion whilst at the same time it encourages excellence in human conduct and character. Many of its lessons are taught through parables of previous peoples and prophets. Legislation *per se* was a secondary feature in the Qur'ān, as the new Muslim community firstly had to grapple with adjusting to a new way of life with its unique beliefs and values. Coulson highlights that '[i]n the evolution of a society the technical process of legislation is a secondary stage.'[72]

The Qur'ān consists of approximately 114 chapters (*sūrah*), each deriving its name from a happening or from the wording in the chapter. It contains approximately 6 342 verses (*āyāt*)[73] but only a limited number of these verses deal with substantive legal rulings.[74] Many of the legal rulings relate to acts of worship like prayer, fasting or pilgrimage. Others pertain to human transactions and interactions, like family law, contractual law, or criminal law. The latter category only constitutes about two per cent of all Qur'anic verses[75] and many of them were revealed in direct response to factual situations that arose in the nascent Muslim society.[76] The legal verses are, furthermore, not all contained in one particular chapter, nor are any particular

[71] Barlas (n67) 33.
[72] Coulson (n41) 11.
[73] Khan (62) 5.
[74] According to Coulson, only 600 of the verses deal with legal topics and of these the majority deal with religious or ritual duties and obligations. Approximately only 80 verses deal strictly with legal topics: Coulson (n41) 12.
[75] Black *et al* (n41) 11.
[76] See §4.2 for the context that resulted in the revelation of the inheritance verses.

legal subjects codified into one chapter. Laws pertaining to a particular subject are easily spread over multiple chapters intertwined with other religious injunctions.

As a further textual complication, certain laws were revealed in stages as the new Muslim community developed. For example, the laws pertaining to inheritance occurred in stages, with the initial verses recommending bequests to certain family members, whilst the latter verses introduced the compulsory legal shares in Islamic inheritance.[77] The revelation in stages resulted in juristic claims that later verses abrogated earlier verses.[78] The principle of abrogation will be addressed in more detail hereunder.

The Qur'ān was furthermore revealed in Arabic, which is a complex language with intricate grammar rules pertaining to gender and tenses, with nouns and verbs taking on singular, dual or plural forms. The complexity of these grammar rules finds expression in the different interpretations adopted when grappling with some of the inheritance verses pertaining to the allocation of shares to two or more compulsory sharer heirs, which can be observed in chapter four.[79]

The Qur'ān is not a legislative text *per se*. In a few instances, as in the case of the inheritance verses, the legal rulings are more specific and detailed. However, this is the exception more than the rule. Despite the limited laws contained in the Qur'ān, there exists a vast and comprehensive corpus of Islamic laws on various issues, from laws relating to hygiene and worship to laws pertaining to marriage, divorce, inheritance, contracts, and governance. These laws were derived from interpretations of the Qur'anic texts by jurists over the centuries,

[77] See §4.2(a)-(c).
[78] See §4.2(d).
[79] See the discussion on the shares of two or more daughters in §5.3(b)(i).

beginning with Muhammad (PBUH) and ending with modern contemporary scholars, who attempt to interpret the texts in order to adapt their application to our modern context. Jurists utilised the interpretative tool of *ijtihād* in order to decipher the intention of the legislator (God) and make His will apparent to humans.[80] Islamic scholar Hallaq highlights that without '[t]he entire system of legal hermeneutics developed by jurists, the revealed texts would remain empty of legal significance, for it was this hermeneutic that brought out their legal import.'[81]

Various Qur'anic sciences developed that was dedicated to Qur'anic hermeneutics. Some of the more important of these sciences include: *asbāb al nuzūl* (the contexts of the revelation); *ahkām* (legal ruling); *i'rāb* (grammar); *al-lughah* (language); *al-'amm* (general verses) versus *al-khass* (specific verses); *muhkamāt* (straightforward verses) versus *mutasāhbihat* (ambiguous verses); and *al-nāsikh wa-l-mansukh* (abrogating and abrogated verses).[82] These sciences were utilised in order to *inter alia* derive meaning from the Qur'anic text by, for instance, identifying the time and context in which a verse was revealed; examining a verse's linguistic terms and grammatical structure; deducing whether there were any legal implications to the verse; determining the scope of a verse's meaning depending on whether the wording of the verse was clear or ambiguous, and determining whether a verse was abrogated or not.[83] The application of some of these sciences becomes apparent when discussing the stages of development of Islamic inheritance[84] as well as various inheritance rulings.[85] It is not possible to discuss the various Qur'anic sciences in this thesis, but I briefly highlight the doctrine of

[80] Hallaq 'Muslim rage and Islamic law' (2002) 54(6) *Hastings Law Journal* 1705 at 1709.
[81] Ibid.
[82] Rippin 'Tafsir' Eliade (ed) *The Encyclopedia of Religion* (1987) 238.
[83] Hidayatullah *Feminist Edges of the Qur'ān* (2014) 26.
[84] See §§4.2(a)-(c).
[85] See discussions in §5.3.

abrogation, as it is relevant when discussing whether the Qur'anic bequest verses were abrogated by the inheritance verses.[86]

Historically, the four Sunnī legal schools[87] accepted the doctrine of abrogation whilst only having differences of opinion on its detail.[88] However, the question of whether certain Qur'anic verses were abrogated or not has been an issue of debate in modern times.[89] When referring to abrogation, I am referring to the cancellation of a legal ruling that occurred in one of the primary sources by a subsequent ruling based on textual evidence in one of the primary sources.[90] Auda, argues that there is no conclusive evidence to indicate '[t]hat anything in the Qur'ān refers to the abrogation in the sense of the annulment of the rulings outlined in the specific verses.'[91] He argues that the Qur'anic verse relied upon by proponents of abrogation, namely, '[a]ny revelation We annul or consign to oblivion'[92] refers to the annulment by the Qur'ān of previous Abrahamic codes, like the Jewish code of law.[93] He notes that if a claim is made that a particular Qur'anic verse and its concomitant legal ruling has been abrogated, then this claim has to be supported by conclusive evidence and a well-defined methodology to weigh the evidence in order '[t]o prove not only the annulment but also its finality.'[94] His reasoning is persuasive and would lend credence to the argument that the Qur'anic bequest verses were not abrogated by the subsequent inheritance verses.[95] Aside from the doctrine of abrogation, the various Qur'anic sciences contributed to the formulation of legal rulings.

[86] See discussion in §4.2(d) on whether the inheritance verses abrogated the bequest verses.
[87] See discussion on four Sunnī schools in §2.3(c).
[88] Nyazee (n47) 318.
[89] Nyazee (n47) 317; For a summary of the opposing views on the doctrine of abrogation, see Auda *A Critique of the Theory of Abrogation* (trans. Adil Salahi) (2019) 33-78.
[90] Auda (n89) 31.
[91] Ibid 38.
[92] Q2:106 and ibid 35.
[93] Ibid 35-38. Auda notes that Qur'anic commentator, Al-Rāzi, agreed with his predecessor, Abū Muslim, in holding that abrogation was limited to the abrogation of earlier messages and codes of law by previous Prophets.
[94] Ibid 39.
[95] See §4.2(d) for a discussion on this argument.

Collectively, the Qur'anic sciences resulted in extensive *tafsīr* (exegesis) works, which were commentaries on the Qur'ān and entailed interpreting and allocating meaning(s) to every word and verse in the Qur'ān.[96] Muhammad (PBUH) is regarded as the first *mufassir* (interpreter) of the Qur'ān, and after his death, his companions consolidated and augmented his interpretations and transmitted them to their successors. One of the most renowned transmitters from amongst the companions was Ibn'Abbās, who was given the epithet of '*Tarjuman al-Qur'ān'* (Interpreter of the Qur'ān) by Muhammad (PBUH).[97] His interpretations feature prominently in inheritance law and often occur as the dissenting opinion to the views of the majority.[98] Other prominent companions who distinguished themselves as *mufāssirūn* in the area of inheritance law were Ali (the son-in-law of Muhammad (PBUH) and the fourth caliph in Islam), Zayd ibn Thabiet (the adopted son of Muhammad (PBUH)), Umar (the father-in-law of Muhammad (PBUH) and second caliph in Islam), and Masud (one of the leading companions of Muhammad (PBUH)). They provided *tafsīr* on the inheritance verses, which resulted in legal rulings that were adopted by subsequent jurists and will be discussed in greater detail in chapter five below.

One of the more prominent *tafsīr* works is by the 12th century theologian and polymath Fakhr al-Din al-Rāzi, titled *Mafatih al-Ghayb* (Keys to the Unknown) or more commonly referred to as *Tafsīr al-Kabīr* (the Great Commentary).[99] It is a 32 volume *tafsīr* of the Qur'ān, and Usmani notes that, '[t]his book has no equal in interpretation of the meanings of the Quran'[100] and

[96] There are numerous well-known works of *tafsīr* in both Arabic and English. Some translations are direct translations from Arabic into English. Others provide English commentary as well. For a brief description of the more prominent *tafsīr* works see Usmani *An Approach to the Quranic Sciences* 2000 (transl.) Siddiqui at 214-220. In South Africa, the translation and commentary by Yusuf Ali is very popular: Ali *The Quran – Translation and Commentary* (1946). As far as possible, I have relied on Yusuf Ali's translation of the Qur'anic verses cited in this thesis.
[97] Hidayatullah (n83) 24.
[98] See §5.3(b)(ii) for the dissenting opinion of Ibn 'Abbās in the case of the mother who inherits with siblings.
[99] Al-Rāzi *Al-Tafsīr al-Kabīr* Abdulhamīd (ed) 32 vol. (1934-62).
[100] Usmani (n96) 516.

furthermore that, '[t]he legal injunctions relating to a verse have been described with detailed reasons.'[101] I rely on this *tafsīr* to argue that the bequest verses were not abrogated by the inheritance verses later in this thesis.[102]

Aside from the classical *tafsīr* works, in the late 19th and 20th centuries *tafsīr* literature was influenced by the Islamic modernist movements that sought to reconcile modernist values of democracy, rationality and science with the eternal sacred values located in Islamic texts.[103] In the 20th century, renowned Pakistani scholar Rahman asserted that the eternal values and principles enumerated in the Qur'ān could be applied to our modern-day context and could address the challenges of contemporary society.[104] These eternal values and principles had to be utilised to derive new rulings applicable to the modern-day context.[105] A significant contribution made by Rahman was his assertion that in cases where the Qur'ān conflicted with the *hadīth,*[106] then the Qur'ān would categorically take precedence over the *hadīth.*[107]Notably, he also argued that there could never only be one authoritative set of meanings derived from the Qur'ān since this was an obvious consequence of human interpretation of a text, which inevitably was flawed and fallible.[108]

Rahman's approach to *tafsīr* was influential in the Islamic feminist movement in the 20th century, which saw the rise in *tafsīr* by women.[109] This movement sought to challenge men's exclusive authority to interpret the Qur'ān and argued that classical interpretations were based

[101] Ibid.
[102] See §4.2(d).
[103] See Hidayatullah (n83) 27-36 for a summary of the modernist trends in *tafsīr* literature.
[104] Saeed 'Fazlur Rahman: A framework for Interpreting the Ethico-Legal Content of the Qur'an' in Taji-Faouki (ed) *Modern Muslim Intellectuals and the Qur'an* 2006 37-66 at 59.
[105] Ibid.
[106] See §2.3(a)(ii) for a discussion on *hadīth*.
[107] Saeed (104) 56.
[108] Ibid 58.
[109] Rahman 'The status of women in Islam: a modernist interpretation' in Papanek and Minault (eds) *Separate Worlds: Studies of Purdah in South Asia* (1982).

on ‘men’s experiences’ and ‘male centred questions’ and that there was a need to add women’s perspectives to these interpretations.[110] In the late 20th century, with the rise of Islamist revivalist movements throughout the Muslim world, there was a similar rise of women as interpreters of the Qur’ān, who, like the modernists, claimed their right to interpret the Qur’ān through *ijtihād*.[111] They used the timeless values contained within the Qur’ān to seek reformation of legal rules, especially in so far as they affected the rights and status of women in family law. Some of the more prominent *tafsīr* works by women in the 20th century include works by Wadud[112] and Barlas.[113] Both highlight that the patriarchal meanings ascribed to the Qur’ān are largely a function of who is reading and interpreting it and the context in which those interpretations occur. They further demonstrate that the Qur’anic values and teachings are egalitarian and antipatriarchal in nature, and these values should impact on the formation of legal rulings. My engagement with the inheritance verses is informed by their approach..

(ii) The Sunnah

The Sunnah is the second primary source of Islamic law and is based on the words and actions (explicit and implicit) of Muhammad (PBUH). It has been described as ‘[t]he lens through which the holy book is interpreted and understood.’[114] It is commonly understood that the Sunnah clarifies or elaborates upon whatever legal principles are contained in the Qur’ān. Whilst the Qur’ān sets out general principles of law, the Sunnah provides further detailed analyses of such general principles and may also provide examples or exceptions to the general rules, as will be observed when discussing the laws of inheritance and bequests in chapter four below. The Sunnah has been recorded and transmitted through *hadīth,* which are reports that

[110] Hidayatullah (n83) 35-36.
[111] Ibid.
[112] Wadud *Qur’ān and Woman: Rereading the Sacred Text from a Woman’s Perspectiv*e (1999).
[113] Barlas *Believing Women in Islam – Unreading Patriarchal Interpretations of the Qur’ān* (2002).
[114] Brown *Hadith Muhammad’s Legacy in the Medieval and Modern World* (2009) 3.

describe the words, actions or habits of Muhammad (PBUH). These reports were compiled over a century after his death and were completed over a period of more than three hundred years.[115]

The substantive content of a *hadīth* is referred to as the *matn* (narrative content), whilst the chain of narrators who transmitted the *hadīth* is referred to as the *sanad* (pl.*isnād*). *Ahādith* were graded according to the quality of the chain of narrators and were classified according to their levels of authenticity into three categories, namely:[116] (i) *sahīh* (sound), which were regarded as reliable owing to the meticulousness of their transmitters and the verifiable soundness of their content; (ii) *hasan* (good), which were less reliable owing to the poor memory of some of their narrators; and (iii) *da'īf* (weak), which were considered weak as the credibility of the narrators were in question or the authenticity of the content was dubious.[117] *Ahādith* were furthermore categorised based on the number of narrators within the chain of transmission, and were classified as: (i) *mutawātir*, those *ahādith* that were transmitted throughout the first three generations of Muslims by such a large number of narrators in one continuous chain, that fabrication is considered inconceivable. Very few *ahādith* belong to this category and there are hardly any that relate to legal issues;[118] (ii) *mashhūr* (famous), those *ahādith* that were transmitted in the first generation of Muslims by two, three or four transmitters, and then on their authority were transmitted by a large number of transmitters in subsequent generations; and (iii) *āhād* which are *ahādith* that were transmitted in the first three generations of Muslims through one to at most four narrators only.[119] The aforementioned

[115] Barlas (n113) 42.
[116] Determining the authenticity of a hadith involved a rigorous process of verifying the chain of transmission and by determining the correctness of the substantive content of the hadith by comparing it with other similar narrations. For comprehensive analysis on the science of *hadīth* see Brown (n114).
[117] Barlas (n113) 42.
[118] Ibid 43.
[119] Siddīqī *Hadīth Literature – Its Origins, Development, Special Features and Criticism* (2006) 194.

categorisations and classifications have various legal implications, as a *sahīh mashhūr hadīth* would serve as far greater proof for a legal ruling than a *hasan āhād hadīth*. This is especially relevant when discussing whether the Qur'anic verses on bequests were abrogated by an *āhād hadīth*.[120]

Specialised *hādith* sciences, like *ulūm al-hadīth* developed with the purpose of critiquing *ahādith* and determining their authenticity for the purpose of deriving legal rulings. *Ahādith* were furthermore recorded in six well-known canonical collections referred to as al-Sahīh a-Sittah (the Authentic Six), of which the two most renowned are the collections of al-Bukhāri, referred to as Sahīh al-Bukhari[121] and of Muslim, referred to as Sahīh Muslim.[122] It is important to note that even within these renowned collections there are *ahādith* that are not beyond dispute and that even *sahīh ahādith* are subject to various human interpretations, rendering them fallible.[123] Farooq therefore notes that as *ahādith* generally yield probabilistic knowledge, a restrained approach needs to be adopted when using *ahādith* as a source to derive legal rulings that impact on the lives and property of people.[124]

The foundations and roots of Islamic law therefore lie in these two main primary sources, the Qur'ān and the Sunnah. Both sources were subject to human interpretation, and in order to derive legal rulings from these two primary sources, reliance is placed on the legal science of *usūl al-fiqh*, which I discuss below.

[120] See discussion in §4.2. (d).
[121] For a discussion on al-Bukhāri's *Sahīh al-Bukhāri* see: Siddīqī (n119) 88-97 and Brown (n114) 31-34.
[122] For a discussion on Muslim's *Sahīh Muslim* see: Siddīqī (n119) 97-101 and Brown (n114) 31-34.
[123] Farooq (n45) 139.
[124] Ibid. Similar sentiments are expressed by Engineer 'Islam Women and Gender Justice' in Raines and Maguire (eds) *What Men Owe to Women – Men's Voices from World Religions* (2001) 109 at 120-121.

(b) *Usūl al-fiqh* (Principles of jurisprudence)

As a science, *usūl al-fiqh* is concerned '[w]ith the sources of Islamic law, their order of priority, and the methods by which legal rulings may be deduced from the source materials of the Sharī'ah. It is also concerned with regulating the exercise of *ijtihad*.'[125] *Ijtihād*[126] has also been described as '[t]he effort made by the mujtahid in seeking knowledge of the *ahkām* (rules of the Sharī'ah) through interpretation'.[127] The *ahkām* [128] of the Sharī'ah have been classified into five categories, namely *fard* (obligatory), *mandūb* (recommended), *jā'iz* (permissible), *makrūh* (reprehensible) and *harām* (forbidden).[129]

Obligatory acts are divided into individual obligations (*fard al-'ayn*) and communal obligations (*fard al-kifāyah*). An individual obligation would include the obligatory five daily prayers. Omitting such an act is considered sinful and, by implication, unlawful. Some scholars argue that ensuring that your estate devolves according to IIL is obligatory for every Muslim.[130] There are those who argue that exercising *ijtihād* to reach new legal rulings in our contemporary society is a communal obligation.[131] A *mandūb* act is an action that is rewarded when done but not punished when omitted, for instance, the act of setting aside 1/3 of your estate as a bequest towards charity. *Jā'iz* acts are neither encouraged nor discouraged and have no legal consequences. Most matters fall into this category.[132] *Makrūh* acts are those acts that are

[125] Kamali (n41) 1.
[126] See also description by Harasani(n1).
[127] Nyazee (n47) 263. In this quote *mujtahid* refers to an Islamic jurist. For a discussion on the qualifications of a mujtahid see Nyazee (n47) 270-2.
[128] In its literal sense the term *hukm*, which is the singular of *ahkām* means a command but in its technical sense it means a rule. It may be a rule of any kind. See Nyazee (n47) 46.
[129] See Kamali (n41) 413-430.
[130] Abduroaf *The Impact of South African Law on the Islamic Law of Succession* (unpublished PhD Thesis, University of the Western Cape (2018)) 1; Omar *The Islamic Law of Succession and its application in South Africa* (1989) 3.
[131] Ismail *Islamic Inheritance Planning 101* (2013) at 187 citing from Qaradāwi *Al-Ijtihād al-Mu'āsir bayn a-Indibāt wa-al-Infirāt* (1994).
[132] This is also based the legal maxim which stipulates: 'The origin of everything is permissibility.'

tolerated but disliked, and they result in a reward if omitted but no punishment if committed, such as the pronouncing of three *talāq* in one sitting by the husband.[133] Lastly, *harām* acts are considered sinful if committed and include acts like theft, fraud, adultery or murder. In Islamic law, priority is given to the categories of *fard* and *harām*, as they entail a sin by omission or commission, respectively and can be subject to legal consequences. The other three categories fall within the sphere of moral teachings and are not justiciable.

Jurists utilise the process of *ijtihād* to derive legal rulings from the primary texts. Hallaq notes that, '[i]t is exactly for the purpose of finding the rulings decreed by God that the methodology of *usul al-fiqh* was established.'[134] I discuss the various methodologies employed in *usūl al-fiqh* in the following section.

(i) Ijmā (Consensus)

Legally, *ijmā*[135] has been defined as the unanimous agreement of the *mujtahidūn* of the Muslim community of any period following the demise of Muhammad (PBUH) on any matter.[136] Where Islamic jurists of a particular period have reached consensus on a particular issue, that consensus becomes a source of substantive law. Ironically there is no consensus on the definition of 'consensus' as a source of law.[137] There are, furthermore, numerous conditions that have to be met for the validity of *ijmā*, but jurists themselves have not reached consensus on these conditions.[138] Consensus was difficult to attain in the early centuries of Islam and even more so in contemporary times with Muslims spread across the globe. As a result of this, Imām Hanbal, founder of the Hanbali school of thought, regarded *ijmā* to be the consensus of the

[133] See §3.4(a) for a discussion on the triple *talaq* in one sitting.
[134] Hallaq 'Was the gate of ijtihad closed?' (1984) 16(1) *International Journal of Middle East Studies* 3 at 4.
[135] Lexically the word *ijmā* means agreement.
[136] Kamali (n41) 230.
[137] Farooq (n45) 143 and 150.
[138] For the list of conditions and types of *ijmā* see Nyazee (n47)183-187.

companions only, whilst Imām Mālik, founder of the Māliki legal school, confined *ijmā* to the consensus of the people of Madinah only.[139]

In chapter five, it will become apparent that not even the companions of Muhammad (PBUH) reached consensus on a number of inheritance rulings.[140] There are only a handful of legal issues where complete consensus can genuinely be claimed, and they mostly relate to the laws of worship. There is, furthermore, no organised system of transmitting *ijmā*, (unlike with the Sunnah and Qur'ān), as the only means of transmission occurs within the books of the different legal schools.[141] Kamali therefore observes that the gap between the theory and practice of *ijmā* is a striking and pervasive feature of this doctrine.[142]

Farooq has argued that whilst recognising the important historical role *ijmā* has played in the development of Islamic law, Muslims should not claim divine sanctity for the doctrine and should be circumspect in claiming *ijmā* as a proof for particular legal rulings.[143] Significantly, he argues that the process of *ijmā* cannot be elitist and that people whose lives are going to be affected by any legal decision should be consulted in reaching a decision based on consensus.[144] He therefore advocates that the Islamic practice of *shūra* (consultation)[145] and the doctrine of *ijmā* should be reconciled and integrated in order to achieve representation-based decision-making processes, which will ensure functionality and dynamism in legal rulings.[146] In his opinion, a law only becomes Islamic when the following conditions are met: (i) the law is

[139] Kamali (n41)169.
[140] See §4.4(b) for differences amongst the companions on inheritance issues. For an explanation on who the companions were see §2.3(b)(iii) below.
[141] Nyazee (n47) 193.
[142] Kamali (n41) 228-229.
[143] Farooq (n45) 166. See similar reservations expressed by Engineer (n124) 115.
[144] Ibid 164-165.
[145] For a comprehensive outline on the principle of *shūra* (consultation) in Islam, especially in relation to legal rulings, see Al-Raysuni *Al-Shura: The Qur'ānic Principle of Consultation, A Tool for Reconstruction and Reform* (trans) Roberts (2011) 24-40.
[146] Farooq (n45) 164-165.

rooted in the primary sources of Islam; (ii) the law is based on the *maqāsid* and values in Islam; and (iii) the adoption and enactment of the law is through a process of *shūrā*.[147] These three conditions provide sound guidelines for developing legislation in South Africa for the recognition of MPL.

(ii) Qiyās (Analogy)

Qiyās[148] is the extension of one Islamic law ruling based on an original case (*asl*) to a new case because the new case has the same effective cause (*illāh*) as the original case.[149] The legal ruling for the original case must be derived from the Qur'ān, Sunnah or *ijmā*, and there must be commonality between the effective cause in the original case and the new case.[150] By way of example, the legal ruling which stipulates that 'the murderer will not inherit' is based on a *hadīth* to that effect. Consequently, a compulsory sharer heir who kills the testator is prohibited from inheriting from the testator's estate.[151] The *hadīth* does not make mention of the ruling for a legatee who murders a testator, and neither does the Qur'ān nor *ijmā*. Through the process of analogy, the legal ruling applicable to an heir is extended to a legatee who has murdered the testator. The legatee is prohibited from accepting any bequeathed property from the testator because the cause between the two cases is similar, namely '[h]astening the benefit prior to the appointed time through a criminal act or unjustified enrichment.'[152]

Although the four Sunnī legal schools[153] accept *qiyās* as a source of Islamic law, there is significant disagreement on what constitutes *qiyās*, its scope and its method of validation.[154]

[147] Ibid 165.
[148] Literally the word *qiyās* means measuring or estimating one thing in terms of another.
[149] Kamali (n41) 264.
[150] Ibid.
[151] See discussion in §5.4(b).
[152] Nyazee (n47) 217.
[153] See §2.3(c) for a discussion on four Sunnī legal schools.
[154] Farooq (n45) 174-175.

Each school places a different emphasis on *qiyās* as a proof for legal rulings. The common thread amongst all four schools is their attempt to identify the effective cause of the legal ruling. However, they do not always agree on what constitutes the cause, how it is derived or how it is validated.[155] *Qiyās* is therefore a speculative proof, subject to human interpretation and fallibility.[156]

(iii) Opinions of the Companions

A companion is someone who saw Muhammad (PBUH), believed in him and spent time with him in order to learn and understand some parts of the Sharī'ah from him.[157] After the death of Muhammad (PBUH), the companions were the first generation of jurists who, through the process of *ijtihād*, issued legal rulings and judicial decisions to settle cases where there was no clear evidence in the Qur'ān and Sunnah. This is illustrated in the various examples cited in chapter five when the companions issued legal rulings in the sphere of inheritance. By way of example, the companions agreed that in the absence of the mother to the deceased, the grandmother should receive 1/6 share of the inheritance even though the grandmother is not mentioned in the primary sources.[158] This agreement by the companions constitutes their authoritative *ijmā*.

However, companions were not obliged to agree with each other when exercising *ijtihād* and their rulings were therefore not binding on each other. There are differences of opinion on whether the legal opinions of the companions are binding on subsequent generations as nowhere in the two primary sources is one directed to accept the opinions of the companions.

[155] Ibid.
[156] Ibid.
[157] Nyazee (n47) 253.
[158] Kamali (n41)315. See also §5.3(b)(vi).

There were those who considered them to be absolutely binding and taking priority over *qiyās*, whilst others held them not to be binding on subsequent generations of jurists or anyone else.[159]

(iv) Istihsān (Juristic preference)

Legally *istihsān*[160] is a methodology whereby the jurist employs legal reasoning to avoid a literalist enforcement of existing law in favour of a more purposive, value-orientated approach.[161] Juristic preference has been described as 'setting aside an established analogy in favour of an alternative ruling that serves the ideals of justice and public interest in a better way.'[162] *Istihsān* is inspired by principles of fairness and justice and authorises a departure from a rule of positive law when its enforcement leads to an unfair result. Umar, the second caliph after the demise of Muhammad (PBUH), suspended the prescribed penalty for theft during a famine on the basis that applying the normal punitive rules under those existing conditions would be unjust and unfair.[163] The jurists are not, however in agreement on *istihsān* as a source or as a methodology to derive legal rulings, as there is no direct authority for it in the Qur'ān or the Sunnah.[164] Nevertheless, *istihsān* is a useful methodology to be employed when applying Islamic law in the modern context.

(v) Maslahah Mursalah (Consideration of public interest)

Maslahah literally means 'benefit' or 'interest', and when combined with *mursalah* it refers to considerations of public interest. It derives its validity as a methodology for developing legal rules from the principle that Islam seeks to secure the welfare of people by promoting their

[159] For the different views of jurists on this matter, see Kamali (n41) 315-322.
[160] Lexically the word *istihsān* means 'to consider something good'.
[161] Kamali (n41) 325.
[162] Ibid.
[163] Ibid.
[164] Ibid 328 for a breakdown of the different views on *istihsān.*

benefit or by protecting them from harm.[165] This is an open-ended objective of the Sharī'ah, as the means to benefit people are countless. There is no *numerus clausus* of public interest objectives, and they cannot be predicted as they change according to the times and context. So, a legal ruling might be beneficial in one instance but harmful in another instance. Contemporary jurists therefore consider prevailing public interests when devising new legal rulings.

The companions and their successors enacted laws and took measures in pursuing the public interest in the absence of textual authority to validate it.[166] The third caliph, Uthman, for example, validated the right of a wife to inherit from her husband, who had divorced her on his deathbed. Although there was no authority found in the primary sources for this ruling, Uthman considered it to be in the public interest to enforce such a ruling to protect wives from husbands who wanted to disinherit them on their deathbeds.[167] As long as the interests being protected are consistent with the objectives of Sharī'ah, they have to be upheld. *Maslahah mursalah* is another useful tool to derive innovative legal rulings in the modern context.

(vi) Istishāb (Presumption of continuity)

Istishāb[168] refers to the presumption of the continuation of an earlier rule, in other words the maintaining of the *status quo ante* with respect to a rule that was based on one of the primary sources.[169] It is considered by some schools of law as a source of law in its own right[170] but Nyazee points out that *istishāb* is not a source for establishing new rules; it is merely a set of

[165] Ibid 352.
[166] Ibid 355.
[167] See discussion on the husband giving a divorce on his deathbed in §5.2(a).
[168] Lexically the word *istishāb* means the continuance of companionship.
[169] Nyazee (n47) 236.
[170] The Shāfi'ī and Hanbali schools consider it a valid proof whereas the Hanafīs and Mālikis do not. For an elaboration of the reasons why some scholars did not consider it as a proof in its own right, see Kamali (n41) 384.

presumptions.[171] The following presumptions form the basis for *istishāb*: (i) the presumption that all things are permissible unless expressly prohibited in the primary sources; (ii) the presumption against liability, which places the burden of proof on anyone making a claim; and (iii) the presumption that certainty does not give way to doubt.[172]

By way of example, where a couple is married, the marital status of the spouses is presumed to continue unless the dissolution of the marriage can be proven by clear evidence. It must be noted, however, that the presumption of continuity is not an independent source of law and is not a method of deducing legal rulings. Therefore, if it is in conflict with another stronger proof or source, the latter takes priority.

(vii) Sadd al-dharī'a (Blocking the means)

The term *sadd al-dharī'a* refers to blocking the means to an unlawful end. The doctrine entails prohibiting otherwise lawful acts that may lead to unlawful outcomes.[173] The doctrine is based on the principle of preventing harm before it materialises. For instance, certain companions forbid the practice of a husband issuing an irrevocable divorce against his wife whilst on his deathbed, as it would result in her being excluded from inheriting from her husband.[174] They, therefore, blocked an otherwise lawful practice for fear that this form of divorce would become a means of abuse.[175]

[171] Nyazee (n47) 237.
[172] Ibid.
[173] Kamali (n41) 249.
[174] See discussion on the husband giving a divorce on his deathbed in §5.2(a).
[175] Kamali (n41) 405.

(viii) 'Urf (Custom)

'*Urf* refers to the recurring collective practices of a large number of people, which are reasonable and sound and which do not contradict the Sharī'ah.[176] '*Urf* in and of itself can become a source of law. Where a practice that has been in existence in a particular community over an extensive period of time, it can take on the status of a legal ruling, on condition that it does not contradict any rulings derived from the primary sources. A practice or custom cannot automatically be accepted as law. It has to be recognised as law by qualified Islamic jurists after being measured against Islamic legal principles.[177]

'*Urf* has furthermore been used as a valid criterion for interpreting Qur'anic provisions. In the Qur'anic chapter titled 'Divorce', verse 7 stipulates, '[l]et the man of means spend according to his means.'[178] The verse refers to the maintenance a husband has to pay his wife upon divorce, but the verse does not stipulate the amount that the husband must pay. Jurists have relied on prevailing customs within a community to determine the approximate amount of maintenance a husband must provide his wife.[179] In the area of inheritance, the Arab tribal laws and customs prevailing at the time served as sources of law when the Qur'anic verses on inheritance were revealed.[180] This was especially apparent in the agnatic system of succession that prevailed in IIL, a relic from pre-Islamic Arab tribal laws.[181]

[176] Kamali (n41) 370
[177] Nyazee (n47) 259.
[178] Q65:7.
[179] Kamali (n41) 371.
[180] The customary law prevailing in Arabia before Islam was a form of common law that comprised of legal and moral principles. This common law grew out of the customs of the forefathers, which was enforced through practice within the erstwhile Arabian community. See Al-Shafi'i (n61) 4.
[181] Coulson (n41) 17 confirms that the Qur'ānic legislation on succession supplemented and did not substitute the existing customary law of succession.

(ix) Empirical research

Although empirical research is not classified as a source or methodology to derive legal rulings in traditional *usūl al-fiqh* literature, Farooqi makes a persuasive argument for the need to embark on empirical research in order to establish the lived reality of people before devising legal rulings. He questions why there is a gap between '[t]he existing Islamic laws and the reality on the ground in terms of solving problems and upholding the Islamic principles of justice and balance'.[182] In his view, the reason for this gap is because Islamic law or *fiqh* '[l]acks a systematic empirical foundation'[183] and because Islamic law tends to be text-orientated as opposed to life-orientated.[184] He advocates for empirical research to be undertaken in order to fully understand and appreciate the problems occurring in society before formulating and enacting legal rulings.[185] By way of example, he notes that the classical IIL is fixed and rigid, with designated shares for different family members. However, no modern studies have been undertaken to investigate the impact of these laws on women, who constitute one of the most vulnerable segments of society.[186] He notes that, despite the idealised claims that women receive a lesser portion of inheritance because they are supported financially by various male members in their family, the reality is that upon divorce or bereavement, unless a woman possesses her own wealth, she cannot meaningfully rely on anyone for support.[187]

Empirical research would be a useful tool in the *usūl al-fiqh* toolbox and should be undertaken in order to establish the lived reality of people. It would help ensure that Islamic legal rulings are cognisant of how they impact real-life scenarios. Masud has also stressed that when

[182] Farooq (n45) 222.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid 233.
[187] Ibid. Similar arguments are made by Amien (n35) with respect to the lived reality of Muslim women in South Africa and why the Islamic law shares allocated to them is insufficient.

advocating for reform in Islamic law, Muslim women should move beyond anecdotes and should support their demands for reform with data and statistics of the nature and extent of the problem.[188] According to him, '[g]iven data about the problems, even the most patriarchal and fundamentalist people would have to agree with the analysis of the situation, and justice could then be used as a principle and guide for developing the appropriate solution'.[189]

I have provided an overview of *usūl al-fiqh*, a science dedicated to utilising different methodologies and proofs to extract legal rulings from the primary sources or to devise new legal rulings where the primary sources do not provide the legal answers to scenarios. As a science, it therefore allows modern-day Islamic jurists to issue legal rulings on contemporary challenges,[190] encapsulating the Islamic law principle that, '[i]t is not denied that rulings change according to change of time'.[191] This is an important principle when trying to develop MPL in South Africa, as certain stakeholders have insisted that '[i]t is not permissible to legislate in respect of Muslim marriages, that the dictates of the Holy Qur'an prevail in such matters'.[192] This is clearly an unfounded proposition. The composite body of substantive legal rulings derived from the science of *usūl al-fiqh* is referred to as *fiqh*, which is what is discussed in the following section.

[188] Masud (n2) 89.
[189] Ibid.
[190] Dogan *The Rulings of Marriage, Divorce, Custody and Adopting in Classical Islamic law* (2016) 11-17.
[191] Zahraa 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 *Arab LQ* 168 at 192.
[192] See attached newspaper article, where such views were expressed by certain South African Muslim theologians. https://www.iol.co.za/the-star/news/battle-for-recognition-of-muslim-marriages-heads-to-supreme-court-of-appeal-50682679 Last accessed on 5 April 2021.

(c) *Fiqh* (Islamic jurisprudence)

Fiqh[193] is divided into *fiqh al'ibādat* (laws of worship) and *fiqh al-mu'amalāt* (laws of human interactions) with the latter category including laws pertaining to marriage, divorce, maintenance and inheritance. It is important to note that there is not one uniform code of law in each area of *fiqh* that is applicable to all Muslims. *Fiqh* is the product of human interpretation and understanding of the primary sources by jurists and scholars, who developed different schools of legal thought (*madhāhib*). The four main Sunnī legal schools[194] are the Hanafīs, Mālikis, Shāfi'īs and Hanbalis, with each school deriving its name from its founder.[195] These four jurists developed and formulated the principles of *usūl al-fiqh* in the eighth century.[196] I refer to this period as the classical period of Islamic law as it was in this period when '[t]he science of jurisprudence flourished and attained its golden age...'[197] During this period, the four Sunnī schools became widespread, *ahādith* were collected, and numerous *tafsīr* works were produced.[198] The four legal schools differed according to their interpretations of the primary texts, which were influenced by the prevailing customs and socio-political context.[199] Each school developed its own sophisticated legal principles and methodologies when it engaged with the primary texts and derived legal rulings on different matters.

Some legal schools like the Shāfi'ī school, prioritised the Sunnah as a primary source over all other sources, whilst others like the Hanafīs elevated human reasoning and rationality above

[193] Lexically the word *fiqh* means 'understanding' but legally it is commonly translated as Islamic jurisprudence. The term, 'jurisprudence', in this context does not have the same meaning as Western legal theory and philosophy but refers instead to the body of substantive Islamic law ruling. In this regard see Black *et al* (n41) 2-3.
[194] The Shī'a have three main legal schools namely the Ithna 'Asharīyah, Ismā'īlīyah and the Zaydīyah. See Mahmassani (n41) 35-39 for an exposition of the Shī'a schools.
[195] For a brief exposition of each school and its founder see Mahmassani (m41)17-33.
[196] Ibid 17.
[197] Ibid.
[198] Ibid.
[199] Ibid 18.

the Sunnah, depending on the context.[200] Abū Hanīfa often resorted to the use of analogy and juristic discretion when developing legal rulings, whilst Mālik placed great importance on the doctrine of consensus of the people of Medina when determining valid rulings.[201] The founders of each school presented their legal opinions as non-binding opinions and did not expect their opinions to be followed blindly.[202] Islamic law has been referred to as 'jurists' law' as it is the product of hermeneutical labours by jurists and scholars over the centuries based on the revealed texts and methods of interpretation derived from the primary sources.[203] Whilst the South African common-law system is based on a system of binding judicial precedent, the Islamic law system places great emphasis on the writings of jurists and relies heavily on the four major schools of law.

Sunnī Muslims accept all four schools as equally valid interpretations of the primary sources.[204] However, Muslims generally adhere to the legal rulings of one of the four legal schools according to the doctrine of *taqlīd*.[205] Legally *taqlīd* has been defined as acting upon the word of another without proof.[206] *Taqlīd* is the process of a layperson following the opinion of a Muslim jurist or one of the Islamic schools in matters of *fiqh*.[207] It is based on the principle that the layperson places his or her full trust in the rulings of the jurists in a particular school of thought, knowing that they have utilised their skills and expertise to exercise *ijtihād* and to

[200] In the early stages of the development of Islamic law this resulted in two schools of legal thought, namely the traditionalist versus the rationalist. For a detailed discussion on these two different approaches, see Coulson (n41) 57.
[201] The community of Madina was privy to witness all Muhammad's (PBUH) deeds and decrees during his ten years of living in Madina. Imam Mālik, therefore, held that if a religious practice was approved of through consensus by the Muslim community of Madina, it must have been based on the Sunnah.
[202] Khan (n62) 3.
[203] Hallaq (n80) 1708.
[204] Moosa *Unveiling the Mind: The Legal Position of Women in Islam: A South African Perspective* 2ed (2011) 57.
[205] Lexically *taqlíd* is derived from the root word *qalādah*, which is an ornament tied around the neck.
[206] Nyazee (n47) 329.
[207] Hence, a Hanafī follows the opinions of the Hanafī school, whilst a Shāfi'ī will follow the Shāfi'ī school and so forth. As mentioned in chapter one, the majority, of South African Muslims, adhere to the Shāfi'ī or Hanafī schools. See §1.4(b)(ii).

derive valid legal rulings from the primary and secondary sources. According to Nyazee, '[t]he doctrine of precedent and *stare decisis* are nothing more than institutionalized forms of *taqlīd*. When the lower courts follow the opinions of higher courts, they are undertaking *taqlīd*'.[208]

A *mujtahid*, provided he or she fulfils all the necessary criteria, is obliged to exercise *ijtihād* and derive his or her own rulings from the primary and secondary sources. Lay Muslims, who do not have the requisite skills and qualifications, follow the rulings of a *mujtahid* or legal school on a matter. In modern times, the practice of *taqlīd* has been criticised as it is blamed for what is referred to as the 'closing of the gates of *ijtihād*', which in turn has resulted in the stagnation and ossification of Islamic law. Closing the gates of *ijtihād* refers to the belief that jurists at a certain point in the history of Islamic law stopped exercising *ijtihād* and simply followed the existing opinions of jurists who came before them.[209] However, Hallaq correctly argues that the doors of *ijtihād* were never closed and that, in fact, as a judicial activity, *ijtihād* should continue in contemporary times to solve new problems or to adapt old rulings to new contexts.[210] This is the only way to ensure that Islamic law will remain relevant and applicable through all times.

Connected to the doctrine of *taqlīd* is the doctrine of *talfīq*,[211] which entails the fusion of opinions from different schools of thought on a particular matter or within a particular area of law.[212] For instance, somebody who adheres to the Shāfi'ī school of thought might adopt a legal opinion from the Hanafī school should the need arise. This is illustrated in my empirical

[208] Nyazee (n47) 332.
[209] Moosa (n204) 68-69.
[210] Hallaq (n134) 4.
[211] Lexically the word *talfīq* has different meanings but one of its meanings is the patching together parts of a cloth by sewing.
[212] Krawietz 'Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfiq*' (2002) 42(1) *Die Welt des Islams* 3 at 3.

research, where the Muslim judicial body participant indicated that, as a rule, they adhere to the Shāfi'ī school, but where the need arose, they are amenable to relying on other schools of thought.[213] *Talfīq* is an attempt to overcome the rigidity of *taqlīd*, which requires an individual to adhere to one particular school of thought in all matters of *fiqh*. There are different views on the validity of *talfīq* amongst the Islamic jurists,[214] but in reality, *talfīq* is exercised not only by Muslim judicial bodies in South Africa, as mentioned above, but is also utilised in countries that implement MPL codes of law. Various examples occur in the context of inheritance laws.[215] Aside from its necessity in society in general,[216] there is no argument against its use in the primary or secondary sources, and the early Islamic jurists who founded the various schools of law did not have an issue with the practice of *talfīq*.[217] Moosa notes that, '[n]ot only is a Muslim free in principle to choose her own school of law, but she is also permitted to change from one school to another, when doing so would genuinely provide a better solution to a legal matter and is not done merely for opportunistic reasons.'[218]

In my empirical research it became apparent that the MJC relied on different legal schools when issuing *fatāwa* (legal rulings or opinions).[219] The various *fatāwa* were issued by the *mufti* of the MJC. A *mufti* derives his authority from his level of learning and through popular support.[220] There is no regulatory mechanism for *muftis* rather, communities themselves invest a *mufti* with status and legitimacy.[221] Keshavjee correctly notes that a *fatwa* issued by any

[213] See §6.8(b).
[214] For a comprehensive exposition on the different opinions on the validity of *talfīq*, see Krawietz (n212) 3-40.
[215] See §5.3 (b) on the approaches taken by different Islamic jurisdictions to *radd* (surplus). See also §9.2 (d) on how different Islamic jurisdictions deal with the grandchild's inability to inherit *per stirpes*.
[216] Muslims are not necessarily familiar with all the legal rulings of their chosen school of thought on various matters and hence it is not practical or viable to expect them to only follow their school of thought in all matters.
[217] Krawietz (n212) 28-29.
[218] Moosa (n204) 57.
[219] See §6.8(b) and §1.1-1.4 in Fatwa 1 (Appendix 8).
[220] Keshavjee *Islam, Sharia & Alternative Dispute Resolution-Mechanisms for Legal Redress in the Muslim Community* (2014) 74.
[221] Ibid.

particular *mufti* is not a universal statement, nor is it a divine construct, as it can be changed, withdrawn, or challenged by a counter-*fatwa*.[222] Consequently, the adoption by a lay Muslim of a particular *fatwa* is a voluntary act, which is important to bear in mind when considering the *fatāwa* issued by the MJC on inheritance matters.

2.4 CONCLUSION

From the discussion in this chapter it is apparent that the Islamic legal system is a complex and highly developed system, which is based on various sources and legal methodologies. It is highly dependent on jurists engaging with it and interpreting the primary sources in order to reach rulings that are in the best interests of the community. It is not an infallible system that cannot be developed to take into account the modern context. On the contrary, it is a system that historically embraced differences of opinion in legal matters, including in the area of Islamic inheritance. However, these different opinions do not necessarily find expression in the way MJBs interpret and apply IIL in contemporary South Africa. [223] This will be illustrated when discussing the rulings of the MJC in chapter six below. Before delving into the area of Islamic inheritance, it is necessary to elaborate upon the Islamic laws of marriage and divorce, as this area of law directly impacts the rights of spouses to inherit.

[222] Ibid.

[223] Zahraa notes that the disparity in applying the views of different jurists, '[i]s a healthy sign and a positive feature of Islamic law and perhaps a major reason for the success of Islam in attracting ordinary people, who by their very nature do not have uniform standard of abilities.' See Zahraa (n191) at 175.

CHAPTER THREE

ISLAMIC LAWS OF MARRIAGE AND DIVORCE

3.1 INTRODUCTION

In the previous chapter, I provided an overview of the Islamic legal framework and how substantive legal rulings are derived from different sources and methodologies. In this chapter, I provide a brief analysis of the Islamic laws of marriage and divorce. It is beyond the scope of this thesis to go into detail on the requirements and conditions of a valid marriage or how the legal schools differ on these requirements and conditions. There are numerous classical and contemporary works that comprehensively discuss the Islamic laws of marriage and divorce and the views of the different legal schools on these subjects.[1] I restrict my discussion to those elements of Muslim marriage and divorce that directly impact the rights of spouses to inherit from each other. Islamic inheritance laws (IIL) cannot be adequately understood unless one has a basic understanding of the laws of marriage and divorce, as these areas are inextricably linked. Spouses are considered compulsory heirs in the Islamic laws of inheritance, and it is, therefore, important to know the marital status of the testator at the time of his or her death. It is furthermore important to know how the Islamic laws of marriage and divorce are implemented in the South African legal context.

In this chapter, I therefore discuss the Islamic laws of marriage and divorce, especially as they are customarily applied in the South African context. To this end, I provide an overview of the

[1] Ibn Rushd *The Distinguished Jurist's Primer Vol II*: A Translation of *Bidayat Al-Mujtahid* (transl) Nyazee (1996) 1-121 1-149 (Provides a detailed breakdown of laws of marriage and divorce and the opinions of the four legal schools as well as other jurists); Naqib al-Misri *Reliance of the Traveller – A Classic Manual of Islamic Sacred Law* Keller (ed) trans (1999): 506-577 (Provide the Shāfi'i opinions on marriage and divorce); 'Abd al'Atī *The Family Structure in Islam* (1977) Tucker *Women, Family and Gender in Islamic Law* (2012)*;* Moosa *Unveiling the Mind: The Legal Position of Women in Islam - A South African Perspective* (2011): 32-47 Black *et al Modern Perspectives on Islamic Law*107-142, Dogan *The Rulings of Marriage, Divorce, Custody and Adopting in Classical Islamic law* (2016).

requirements and conditions of a valid Muslim marriage, followed by a breakdown of the different impediments to a Muslim marriage. I briefly discuss the practice of polygyny in Islamic marriages as it directly impacts on the share the wife or wives will receive on the death of the husband. I then provide an overview of some of the fundamental rights and responsibilities that flow from a Muslim marriage, especially in so far as they may impact the inheritance rights of spouses. This is followed by an analysis of the different forms of divorce in Islamic law and their consequences for inheritance. In my experience, as a practitioner, the validity of a Muslim marriage is hardly ever in dispute between parties. Instead, disputes occur around whether a marriage was validly terminated and the consequences of such termination.[2] I conclude this chapter with an analysis of how the South African courts have grappled with cases where Muslim marriages and inheritance rights were in dispute.

3.2 CONDITIONS AND REQUIREMENTS OF A VALID MUSLIM MARRIAGE CONTRACT

Marriage is considered the cornerstone of the family unit in Islam and is a highly recommended act for a Muslim. There are passages in the Qur'ān which espouse the virtues of marriage,[3] and *ahādith* to the effect that marriage fulfils half of one's religion and is therefore considered an act of piety.[4] The main purpose of marriage is to legitimise sexual relations between parties and to ensure the procreation of offspring within wedlock;[5] in other words, to protect lineage,

[2] See discussion on *Faro v Bingham* [2013] ZAWCHC 159 and *Hassam v Jacobs* 2009 (5) SA 572 (CC) in §3.5.
[3] Q30:21 'And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.' See also verses Q4:1, Q7:107, Q30:20, which speak to marriage as an act of piety.
[4] See *hadīth* cited in Abd al' Atī (n1) 52.
[5] Abd al'Atī (n1) 54-55; Dogan (n1) 19.

which is one of the essential objectives of the Sharī'ah as discussed in chapter two.[6] Marriage in Islam is said to contain both the elements of a religious sacrament and a secular contract.[7]

(a) Conditions of a valid Muslim contract

As far as the latter is concerned, a Muslim marriage is a civil contract between two parties, which gives rise to rights and obligations.[8] For a Muslim marriage contract to be valid, certain conditions must be fulfilled when concluding the marriage contract. Some of these conditions pertain to the parties, whilst others pertain to the contract itself. As regards the parties, they should both be adults with legal capacity; that is, they both must be sane and should have reached legal majority.[9] A valid Muslim marriage requires the consent of the two parties and/or the *wali* (guardian) of the female. I do not discuss the differences around consent in a Muslim marriage in great detail[10] because, in South Africa, the conclusion of Muslim marriages without the consent of spouses is not a common practice.[11] What is common, however, is for a guardian to conclude a marriage contract on behalf of an adult woman.[12] Only the Hanafī legal school recognises an adult woman's legal capacity to conclude her own marriage contract as long as it is to someone of equal or greater status to her.[13] According to other Sunnī schools, a woman's

[6] See discussion in §2.3.
[7] Dogan (n1) 59.1
[8] Black *et al* (n1)111-112.
[9] Coulson *Succession in the Muslim Family* (1971) 11. In South Africa, s17 of the Children's Act 38 of 2005 ("CA") stipulates that both male and females become majors upon reaching the age of 18. Section 26 of the Marriage Act 25 of 1961 ("MA") stipulates that, males below 18 and females below 16 require special consent to conclude marriage contracts. A minor may not be given in marriage unless the requisite consents have been obtained in terms of sections 24-27 of the MA and sections 12(2) of the Children's Act.
[10] For discussion on the differences of opinion in this regard, see Ibn Rushd (n1) 4-8; Abd al'Atī (n1)78.
[11] Dangor 'Historical Perspective, Current Literature and an Opinion Survey among Muslim Women in Contemporary South Africa: A Case Study' (2001) 21(1) *Journal of Muslim Minority Affairs* 109 at 116.
[12] Ibid.
[13] Ibn Rushd (n1) 9; Abd al'Atī (n1) 70-76; Coulson (n9) 11.

guardian must conclude the marriage contract on her behalf; otherwise, the contract is considered null and void.[14]

(b) Impediments to the marriage

Aside from the requirement of legal capacity, there should be no impediments to either party getting married. Impediments to a valid marriage can arise as a result of the attributes of a party or as a result of circumstances that prevent a party from concluding a valid marriage. I list some of them here in so far as they are relevant to the laws of inheritance. Same-sex partners cannot conclude a valid Muslim marriage.[15] Islamic law only recognises heterosexual marriages, and same-sex marriages are prohibited.[16] Other impediments to marriage are based on relationships of consanguinity. Hence, a marriage in the direct ascendant or descendant line of consanguinity is prohibited.[17] There are also prohibitions relating to affinity: a man cannot marry his mother-in-law, his stepmother or any of their descendants, nor can he marry his daughter-in-law or stepdaughter.[18] A man cannot be married to two sisters simultaneously if he wishes to enter into a polygynous union.[19] Furthermore, a Muslim woman is not allowed to marry a non-Muslim man, whilst the opposite is not the case – a Muslim man is able to marry a non-Muslim woman as long as she is a monotheist of one of the Abrahamic faiths.[20] Although marrying a

[14] Ibn Rushd (n1) 9-13.
[15] In South Africa, same-sex partners can conclude a valid marriage in terms of the Civil Unions Act 17 of 2006. Whether such a marriage between Muslim same-sex partners will be regarded as valid for the purposes of Islamic inheritance law is a topic for further research.
[16] The consensus of classical Islamic legal scholars and the majority of contemporary Islamic scholars consider these marriages as unlawful. However, there are a minority of scholars who argue in favour of same-sex Muslim marriages. For discussion on this minority position, see Jahangir and Abdullatif *Islamic Law and Muslim Same-Sex Unions* 2016; Jahangir and Abdullatif 'Same-sex unions in Islam' (2018) 24(3) *Theology & Sexuality* 157.
[17] See Q4:23 for the prohibited degrees of marriage, which apply to both men and women. See further Ibn Rushd (n1) 37 and Coulson (n9)14.
[18] Dogan (n1) 47-48.
[19] Ibid 49. There is also an impediment based on a relationship arising from 'wet nursing'. I do not discuss this impediment as it not a common practice in modern South African society.
[20] Abd al'Atī (n1) 35.

non-Muslim woman is not an impediment to marriage for a Muslim man, a non-Muslim wife is excluded from inheriting as a compulsory heir.[21] It also does not relieve the Muslim husband of his duty to financially support his non-Muslim wife during the marriage.[22]

A woman cannot be married when concluding a marriage contract as polyandry is not recognised as lawful in Islam. Polygyny is recognised as valid, and a man is allowed to have a maximum of four wives on condition that he upholds the Qur'anic injunction to treat all his wives justly.[23] Doing 'justice between them' has been interpreted in various ways, but generally, it means that the husband should be able to support each of his wives financially on a similar basis as well as divide his time equally between them.[24] As this is an onerous condition to meet, men are expressly cautioned in the said Qur'anic verse that marrying one woman is more suitable in order '[t]o prevent you from doing injustice'.[25] Based on this latter Qur'anic caution and the inevitable psychological harm caused to a wife when her husband enters into a second or third marriage, some scholars have argued that the practice of polygyny should be prohibited in its entirety and that monogamy is the preferred practice.[26] In South Africa, polygyny is still practised and based on my experience in practice; the husband seldom obtains the consent of his existing wife to remarry.[27] Polygyny is, therefore, part of the lived reality of Muslim women in South Africa, which directly impacts their inheritance rights upon the death of their husbands.[28]

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[21] See §5.4(c) and §9.4.
[22] Salie *Maintenance and Child Care According to Islamic law* (2001) 85.
[23] Q4:3 stipulates, '[m]arry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one…'
[24] Abd al'Atī (n1) 118-119.
[25] Q4:3. See Abd al'Atī (n1) 119.
[26] Hidayatullah *Feminist Edges of the Qur'ān* (2014) 100-101; Barlas *Believing Women in Islam-Unreading Patriarchal Interpretations of the Qur'ān* (2002) 190-192; Wadud *Qur'ān and Woman: Rereading the Sacred Text from a Woman's Perspective* (1999) 82-85; Al-Hibri 'A study of Islamic herstory: Or how did we ever get into this mess?' (1982) 5 *Women's Studies International Forum* 2; Black *et al* (n1) 121.
[27] See Hoel 'Engaging religious leaders: South African Muslim women's experiences matters pertaining to divorce initiatives' (2012) 38 *Social Dynamics* 2, 184.
[28] See discussion on the *Hassam* case in §3.5.

In addition to the above impediments to marriage, a recently widowed or divorced woman is also unable to conclude a new marriage contract.[29] In Islamic law, a widow or a divorcée has to fulfil her *iddah* (a waiting period) after her husband's death or after her divorce decree has been issued.[30] The *iddah* has been held to fulfil various purposes, namely: firstly, in the case of a revocable divorce (discussed below), it provides the spouses with an opportunity to reconcile; secondly, it allows time to determine whether the wife is pregnant in order to determine the paternity of the child; and thirdly, in the event of a husband's death it serves as a mourning period for the widow.[31] Jurists have varied opinions on what is permitted during the *iddah* and in Cape Town a widow or divorcée is expected to remain homebound during the waiting period and is only allowed to leave her home out of necessity. Necessity has been interpreted quite strictly by *imāms* at the Muslim Judicial Council ('MJC').[32] The waiting period is four months and ten days for a widow from the date of her husband's death and serves as a mark of mourning for her deceased husband.[33] If she is pregnant at the time of his death, the waiting period lasts until the child is born. During this waiting period, a widow is not permitted to conclude a new marriage contract. In the case of a divorce, the waiting period amounts to three menstrual cycles for the divorcée, during which time she is not permitted to conclude a new marriage contract. If the divorcée is pregnant at the time of her divorce, then her waiting period will last until the child's birth, after which period she is permitted to conclude a new marriage contract.

[29] Dogan (n1)28.
[30] Ibid 58. In the case of divorce the *iddah* starts after the first '*talāq*' is pronounced. The marriage will then be suspended but not terminated.
[31] Moosa (n1)115.
[32] According to my ethnographical research at the MJC the *imāms* advise recently divorced women to remain homebound throughout their *iddah*, with the exception of attending to their work commitments and going out for their essential living needs. See Essop 'Problems of and Possibilities for Islamic Divorce in South Africa' in Stiles and Yakin (eds) *Islamic Divorce in the Twenty-First Century – A Global Perspective* (2022) 65 at 78.
[33] Coulson (n9)14.

(c) Concluding the marriage contract

If both parties have legal capacity and there are no impediments to their marriage, the marriage contract entails an unequivocal *ijāb* (offer) by the woman or her guardian and an explicit *qabūl* (acceptance) by the man, with the parties agreeing on the payment of a *mahr* (dower) by the husband to the wife on the consummation of the marriage.[34] The contract usually occurs orally before at least two witnesses but can be substituted with a written contract between the two spouses or their representatives. In South Africa, the custom is for a woman's guardian to orally conclude the marriage contract on her behalf with the prospective husband before two male witnesses. The marriage contract is usually concluded in the presence of an *imām*, and the ceremony is referred to as the *nikāh* (marriage ceremony). The bride's guardian and the bridegroom will sign a marriage register provided by the *imām*, which the two witnesses will also sign.[35]

The payment of the *mahr* by the husband to the wife is enjoined by the Qur'ān,[36] the Sunnah and consensus.[37] It becomes the wife's sole property, which she is entitled to dispose of as she pleases.[38] The dower can consist of money, property, and moveable objects, or it can be a service that the bridegroom agrees to render to the bride.[39] It is largely dependent on the customary practices (*'urf*) in a particular region.[40] It can be paid upfront by the bridegroom at the conclusion of the marriage contract, or part of it can be paid upfront whilst the balance can

[34] Abd al'Atī (n1) 60.
[35] The data contained in the marriage registers of *imāms* are not stored in any central database by the State in South Africa. The is therefore no way of officially tracking who is married.
[36] Q4:4 stipulates, 'And give the women (on marriage) their dower as a free gift…'
[37] Tuck*er Women, Family and Gender in Islamic law* (2008) at 46.
[38] Abd al'Atī (n1) 64; Tucker (n37) 46.
[39] Abd al'Atī (n1) 64; Tucker (n37) 47.
[40] Historically, South African brides did not request a dower of great value as the dower was considered a symbolic gift within the Muslim community.

be deferred to a later stage.[41] A deferred dower can be deferred in whole or in part and is usually paid to the wife on divorce or her husband's death.[42] In the latter instance, the unpaid dower will constitute a debt against the husband's estate.[43]

3.3 CONSEQUENCES OF A MUSLIM MARRIAGE CONTRACT AND ITS IMPLICATIONS FOR ISLAMIC INHERITANCE

In a Muslim marriage, each of the spouses maintains his or her separate estate; there is no community of property and the accrual system does not apply.[44] Each party is generally responsible for his or her own assets and liabilities unless the parties expressly agree to alternative arrangements in their marriage contract or during their marriage.[45] There is consensus amongst scholars that the husband bears the financial responsibility to *nafaqah* (maintain) his wife and the family.[46] The wife's maintenance entails her right to housing, clothes, food, medical care, and general care.[47] There are numerous rules pertaining to maintaining a wife and family, relating to the husband's means, the wife's previous living standards and the prevailing customs.[48] I do not discuss these requirements in detail, but what is of particular relevance in the context of inheritance is that where the husband has not fulfilled his financial responsibilities towards his wife, resulting in her having to maintain herself from

[41] In some instances, the wife will request that the deferred dower be paid on the dissolution of the marriage by divorce.
[42] Abd al'Atī (n1) 165.
[43] See discussion in §5.5(a).
[44] Abd al'Atī (n1)165; Omar *The Islamic Law of Succession and its Application in South Africa* (1988) 11. In South African law, the accrual system automatically applies to all marriages and civil unions that are concluded out of community of property. See s 2 of the Matrimonial Property Act 88 of 1984 (MPA). On the dissolution of the marriage or civil union, the spouse's estate whose estate shows the lesser growth is entitled to an equitable share of the spouse's estate which shows the greater growth. For a further discussion on the accrual system, see Heaton and Roos *Family and Succession Law in South Africa* (2012) 193-196.
[45] Dogan (n1) 222.
[45] Ibid.
[46] Abd al'Atī (n1) 149; Salie (n22) 82; Dogan (n1) 219.
[47] Abd al'Atī (n1) 149—165.
[48] Ibid. See also Q65:5-6.

her own means, she is entitled to claim such arrear maintenance from her husband's estate.[49] She can claim whatever maintenance her husband owed her on the condition that she has not waived her right to maintenance and that she maintained herself during their marriage through her personal means. Such a claim for arrear maintenance is a personal debt against the husband's estate and can be lodged by the wife upon divorce or the death of the husband.

The South African courts have recognised such a claim arising from a Muslim contract upon divorce. Although Muslim marriages have not been formally recognised as valid in South African law, in *Rylands v Edros*[50] ('*Rylands*'), the court held that a Muslim marriage was a contract and proceeded to recognise certain commonly understood consequences of a Muslim marriage contract.[51] There was no written marriage contract in *Rylands*; instead, the court based its decision on the evidence of the expert Sharī'ah witnesses on what the accepted and inferred consequences are of a Muslim marriage.[52] The court held that in terms of the Muslim marriage contract a husband is obliged to maintain his wife, and if he failed to do so during the marriage, the wife is allowed, upon divorce, to claim for arrear maintenance to a maximum of three years.[53] The time limitation of three years was imposed as a result of prescription,[54] which stipulates that a debt is extinguished after the lapse of a period of three years.[55] The court furthermore held that where the divorce (in this particular case the *talāq,*[56] or divorce pronouncement) was unjustified, the wife was entitled to claim a *mu'tah* (consolatory gift) from the husband.[57] Payment of a consolatory gift by the husband to the wife is accepted by most

[49] Salie (n22) 82; Toffar *Administration of Islamic Law of Succession, Adoption, Guardianship, Legacies and Endowment in South Africa* (Unpublished PhD Thesis University of Durban-Westville, (1998)) 465-466.
[50] 1997 (1) BCLR 77 (C).
[51] Ibid at 94-95.
[52] Ibid at 82-83.
[53] Ibid at 94.
[54] Ibid at 96-97.
[55] S10(1) and S11(d) of the Prescription Act 1969, deals with extinctive prescription. It stipulates the relevant time periods for the termination of civil causes of actions, as a result of the passing of time.
[56] See §3.4 for a discussion on types of divorce.
[57] *Rylands v Edros supra* 97; 101.

legal schools, with some schools regarding it as obligatory whilst others regard it as a recommendation.[58]

Although this was a ground-breaking case for recognising and enforcing certain consequences of a Muslim marriage contract, the remedies provided by the court are seldom utilised by Muslim women in South Africa.[59] This can be attributed to several factors, including the fact that women are not educated about these court-approved remedies, and even if they are aware of them, it becomes a costly and lengthy court process to enforce them. Moreover, the Muslim judicial bodies ('MJBs') and *imāms* do not educate or encourage women to pursue these remedies for divorce as they do not form part of the custom in South Africa.[60] It is submitted that remedies, such as claiming arrear maintenance on divorce or claiming a consolatory gift, would only gain traction if they formed part of legislation dealing with Muslim marriages and divorces.

The unpaid dower and unpaid maintenance claims are two of the main claims a surviving wife can lodge against the estate of her deceased husband. Additional rights and obligations that flow from a Muslim marriage can be gleaned from more comprehensive works on this subject.[61] Mutual rights of inheritance would exist between spouses if their marriage was concluded according to the rules mentioned above. Once the marriage terminates irrevocably,

[58] Ibn Rushd (n1)118. For opposing views on post-divorce maintenance see Moosa and Karbanee 'An exploration of *mata'a* maintenance in anticipation of the recognition of Muslim marriages in South Africa:(re-) opening a veritable Pandora's box?' (2004) 8(2) *Law, Democracy & Development* 267.
[59] The judgment has also been criticised by Amien who notes that the court in recognising the wife's right to *mahr* and her duty to observe *iddah* on divorce, inadvertently gave recognition, '[t]o androcentric interpretations of Shari'a and MPL. In this way, the courts have tacitly consented to unequal relationship between Muslim spouses.'; Amien 'Overcoming the conflict between the Right to Freedom of Religion and Women's Rights to Equality: South African Case Study Muslim Marriages' (2006) 28 *HRQ* 729 at 738.
[60] Moosa and Karbanee (n58) 283-284.
[61] Ibn Rushd (n1) 63-67; Keller (n1)542-547; Abd al'Atī (n1) 146-182.

the mutual rights of inheritance cease between the parties. It is therefore important to understand the rules of divorce.

3.4 DIFFERENT FORMS OF ISLAMIC DIVORCE AND THE IMPLICATIONS FOR ISLAMIC INHERITANCE

In Islamic law, divorce is permissible but considered an undesirable or reprehensible action (*makrūh*).[62] Parties are not expected to remain in unhappy marriages and are therefore enjoined to part 'with kindness' in the event of a divorce.[63] Parties considering divorce are encouraged in the Qur'ān to pursue *sulh* (negotiated settlement) before finalising their divorce proceedings.[64] This invocation from the Qur'ān explains why *imāms* and MJBs in South Africa pressurise spouses to remain married or to reconcile when they wish to divorce.[65] The Islamic laws of divorce are complex, with different rules for men and women. I provide an overview of this area of law in order to establish a clear understanding of the types of divorce proceedings that terminate rights of inheritance between the parties. I restrict my discussion to the forms of divorce that occur in South Africa.

The main ways a Muslim marriage can be terminated are through a: (i) a *talāq* (the unilateral pronouncement of divorce by the husband); (ii) a *faskh* (a judicial decree dissolving the marriage upon application of one of the spouses); and (iii) by *khul'*[66] or *mubara'a* (mutual discharge). The first two methods, namely the pronouncement of divorce by the husband and judicial decree of separation, are the most common forms of terminating a Muslim marriage in

[62] Black *et al* (n1) 132; Dogan (n1) 146. See also discussion on five legal *hukm* in §2.3(b).
[63] Q2:229 encourages spouses to part in kindness upon divorce.
[64] Q4:35 stipulates, 'If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation…' For a discussion on *sulh*, see Keshavjee *Islam, Sharia & Alternative Dispute Resolution* (2013) at 66-80.
[65] In this regard, see findings by Hoel (n27).
[66] Lexically the term *khul*' means 'to take off one's dress' referencing the Qur'anic verse Q2:187, which metaphorically describes spouses as garments of each *other*.

South Africa and, more specifically, Cape Town.[67] Islamic divorce can be categorised as *raj'ī* (revocable) or *bā'in* (irrevocable).[68] A revocable divorce is not final, and a husband is able to retract his divorce declaration, allowing the parties to reconcile and resume their marriage. In contrast, an irrevocable or final divorce, once effected, does not allow for parties to reconcile unless they enter into a new marriage contract.[69] An irrevocable divorce terminates the marriage relationship between the parties rendering any intercourse between them as adultery (*zina*) and children born of such intercourse will be considered as children born out of wedlock.[70]

(a) Talāq

Talāq literally means 'breaking' and, in this case, breaking the bonds of marriage. It is the most common form of divorce, which occurs extra-judicially and is initiated by the husband through a unilateral verbal pronouncement of the word *talāq* (for example, 'I *talāq* you') or a synonym ('I divorce you') or a derivative thereof indicating divorce.[71] The husband or his representative should make the pronouncement that he is divorcing his wife in clear and unambiguous words, either orally or in writing.[72] A husband does not require a reason for wanting a divorce, although jurists classify a divorce without a reason as morally reprehensible (*makrūh*).[73] There are differences of opinion on whether the wife needs to be present or know of the divorce pronouncement as it is a unilateral action by the husband.[74] Divorce pronouncements through social media (such as WhatsApp or Facebook) have also been a recent trend, and questions

[67] Amien (n59) 733.
[68] Dogan (n1)152; Moosa (n1) 115.
[69] Dogan (n1) 152.
[70] Moosa and Karbanee (n60) at 268 (n7).
[71] Dogan (n1)152; Moosa (n1)115.
[72] Moosa (n1)114.
[73] Black *et al* (n1) 132.
[74] Ibid.

have been raised about the validity of pronouncing a divorce in this manner.[75] In most Muslim countries, legislation requires official notice and registration of the pronouncement of divorce with a Sharī'ah court or other registration body.[76] In South Africa, there is no official process for pronouncing an extra-judicial divorce by the husband, no witnesses are required to witness the pronouncement, the wife's consent is not required, and there is no obligation to register a divorce pronouncement with any MJB.[77] The ease with which a husband can divorce his wife has been criticised by contemporary Islamic scholars like Mir-Hosseini, who regard this form of divorce, as it is currently practised, as disempowering to women.[78]

In general, once the first divorce pronouncement is given, the parties must wait for the wife to complete three menstrual cycles as the waiting period after the divorce pronouncement before the divorce becomes final.[79] The spouses are still considered to be legally married during the wife's waiting period. If either spouse dies during this period, they will be entitled to inherit from the other.[80] During the waiting period, the parties are encouraged to reconcile, as the first divorce pronouncement is considered revocable.[81] There are differences amongst the legal schools as to what constitutes reconciliation. According to the Hanafī school,[82] reconciliation is implied once the parties resume intimate relations, which appears to be an obvious and common-sense deduction to make. However, according to the Shāfi'ī school, the husband must

[75] Herklotz '*Shayara Bano versus Union of India and Others*. The Indian Supreme Court's Ban on Triple Talaq and the debate around Muslim Personal Law and Gender Justice' (2017) 5 (3) *Law and Politics in Africa, Asia and Latin America* 300 at 302; According to my ethnographical research at the MJC, the practice of issuing a *talāq* via social media has increased Essop (n32) at 69.
[76] Black *et al* (n1) 133.
[77] Amien (n59) 732. In Cape Town, a divorce pronouncement can be confirmed by the MJC, and the parties will then be issued with a divorce certificate.
[78] Mir-Hosseini 'A Woman's Right to Terminate the Marriage Contract: The Case of Iran' in Quraishi and Vogel (eds) *The Islamic Marriage Contract* (2008) 215.
[79] Moosa (n1)116-117.
[80] Moosa (n1)117.
[81] Moosa (n1)115
[82] Ibn Rushd (n1) 102.

expressly, in the presence of witnesses, communicate to his wife his desire to reconcile. Resuming physical intimacy does not automatically imply reconciliation has occurred.[83]

Parties who are unaware of the differences between the legal schools would justifiably regard themselves as being reconciled after resuming intimate relations, even if no express words of reconciliation are stated by the husband. The issue of which actions constitute reconciliation becomes relevant to determine whether the marriage has been irrevocably terminated, as can be seen in the discussion of the cases below. If the parties reconcile, they continue to live together as husband and wife. However, if the husband decides to issue a second pronouncement of divorce after an attempted reconciliation, the wife must enter into *iddah* again.[84] If the parties do not reconcile during any of these waiting periods, the divorce becomes final and irrevocable.[85]

The Qur'ān expressly sets a limit on the number of times a husband can make a divorce pronouncement and reconcile and stipulates that: '[a] divorce is only permissible twice, after that, the parties should either hold together on equitable terms, or separate with kindness.'[86] Therefore, irrespective of the amount of time that has passed, once a third pronouncement is made, the divorce is considered irrevocable and final. The parties are no longer able to reconcile.[87] It must be noted that when the wife is pregnant the waiting period only becomes final after the birth of the child.[88] All legal schools agree that during the waiting period, the husband has to continue maintaining his wife until the divorce becomes irrevocable, or two

[83] Ibid 102-103.
[84] Moosa (n1)116.
[85] Dogan (n1)152
[86] Q2:229. See also Moosa (n1)114.
[87] Q2:230 stipulates: 'So if a husband divorces his wife (irrevocably), he cannot, after that, re-marry her until after she has married another husband and he has divorced her.' See also Dogan (n1) 20.
[88] Q65:1-4.

years after the baby has been born, where the wife was pregnant during the waiting period.[89] Once an irrevocable divorce occurs, the only way the spouses can reconcile is to conclude a new marriage contract with each other.

In addition to the above practice of the divorce pronouncement, there is also the practice of *talāq bid'a* (innovative divorce), where the husband gives three divorce pronouncements in one sitting or in immediate succession.[90] *Talāq bid'a* prevents any opportunity for reconciliation. Sometimes *talāq bid'a* is pronounced impulsively or in anger. Although the *talāq bid'a* is considered legally valid by the majority of Sunnī scholars, it is considered morally reprehensible because it instantaneously and irrevocably terminates a marriage, giving the husband no opportunity to reconsider his decisions.[91] All rights of inheritance between the parties are terminated once a *talāq bid'a* is pronounced. Divorcing a wife irrevocably, in one sitting, places great hardship on a wife, who can be left emotionally isolated and financially stranded without any security of tenure in the marital home. Engineer notes that the triple divorce in one sitting is '[r]epugnant to one of the basic characteristics of modern law of divorce of fair play which is based on the principle of equity, justice and good character.'[92] The rationale behind a *talāq bid'a* being irrevocable is to deter a husband from pronouncing this form of divorce lightly. However, this form of divorce still occurs in South Africa.[93]

[89] Black et al (n1) 133.
[90] For example, a husband would announce to his wife in one sitting: 'I *talāq* you, I *talāq* you, I *talāq* you,' thereby terminating the marriage irrevocably.
[91] Black *et al* (n1) 133; Moosa (n1)119.
[92] Engineer *Islam, Women and Gender Justice* (2001) 54.
[93] My ethnographical research at the MJC confirmed that the triple *talāq* still occurs in Cape Town: Essop (n32) at 69. Moosa notes: 'It is not uncommon in practice for a husband to regret his decision, especially when made in a state of anger or jest, and for couples to continue to have sexual relations with each other during this period. However, this would be tantamount to adultery (*zina*) and any children conceived during this period will be regarded as illegitimate.' See Moosa (n1) 116.

The *talāq bid'a* has been the subject of much controversy and has been declared invalid in certain countries.[94] It has generated differences of opinion amongst Islamic jurists.[95] Ibn Taymiyyah, for example, ruled that the triple divorce pronouncement is equal to one.[96] The MJC allows spouses to reconcile even after the husband has pronounced a triple *talāq* in one sitting.[97] If parties are allowed to reconcile after the *talāq bid'a*, they would still be eligible to inherit from each other. This depends entirely on the ruling of a particular MJB with respect to the legal status of a *talāq bid'a*. Depending on the differences of opinion and the circumstances giving rise to the divorce, the *talāq bid'a* could potentially create a factual dispute about the irrevocability of the divorce if the husband dies shortly after pronouncing the divorce.

Another form that a divorce pronouncement can take is the *talāq tafwīd* (delegated divorce or divorce according to the wish of the wife), where the marriage contract expressly stipulates that the husband grants the wife the power to terminate the marriage.[98] Here the husband delegates his authority to pronounce a divorce to his wife; she is able to pronounce the divorce at her discretion.[99] The legal effect of the delegated divorce pronouncement is that it equalises the right of termination between the spouses. Unfortunately, despite being an acceptable form of divorce in Sunnī classical law, it is hardly ever insisted upon as a condition of the marriage contract by Muslim women in South Africa.[100]

[94] In 2017, the Indian Supreme Court declared the triple *talāq* (*talāq bid'a*) as unconstitutional in the *Shayara Bano* case. *Shayara Bano v Union of India* WP (C) 118/2016. For a discussion on the case and the triple *talāq* see Herklotz (n75) 300-311.
[95] Al-Azri 'One or Three-Exploring the Scholarly Conflict over the Question of Triple Talaq (Divorce) in Islamic Law with Particular Emphasis on Oman'(2011) 25 *Arab LQ* 277.
[96] Black *et al* (n1) 133.
[97] Essop (n32). The MJC has an intricate process, whereby they allow a husband to revoke his triple *talāq*, and to declare it as one *talāq*, when he regrets issuing the triple *talāq*.
[98] Moosa (n1)119.
[99] Black *et al* (n1) 145.
[100] Moosa (n1)119 and 121.

(b) Faskh

The *faskh* is the next common form of terminating a Muslim marriage in South Africa. A *faskh* occurs where, upon application, the wife obtains a judicial dissolution or annulment of the marriage through a judge or a Sharī'ah court. The schools of law have different approaches to *faskh* as a form of divorce, with the Hanafīs recognising limited grounds for it, whilst the Mālikis have the most liberal approach, allowing a judicial divorce on broad grounds including failure by the husband to provide maintenance to the wife, desertion and *darar* (harm) which can be physical, verbal or emotional.[101] A wife has to apply to a MJB for the decree of divorce. In South Africa, it takes the form of approaching one of the MJBs, who conduct their own Sharī'ah courts to hear these applications.[102] Once the Sharī'ah court grants the *faskh*, the divorce becomes final and irrevocable, thereby terminating all rights of inheritance between the parties. If the parties wish to reconcile, they must enter into a new marriage contract. This point is important, as will be seen in the context of the case of *Faro v Bingham,*[103] discussed below.

(c) Khul' and Mubara'a

Both *khul'* and *mubara'a* are forms of divorce where both parties mutually agree to dissolve their marriage.[104] Both of these divorce forms are regarded as no-fault divorces. In *khul'* the wife secures her release from the marriage by offering the husband some kind of financial compensation. Often the compensation entails the return of her dower to her husband.[105] If the wife's dower was deferred, she could waive her right to be paid the dower and waive her right

[101] Toffar (n49)175-177.
[102]See Hoel (n27) for a discussion on the challenges women face when applying to Muslim judicial bodies for a judicial decree of divorce. In Cape Town there are three MJBs who run Sharī'ah Courts, which hear *faskh* applications. In this regard see Essop (n32) 66.
[103] [2013] ZAWCHC 159.
[104] Moosa (n1) 120; Black *et al* (n1) 134.
[105] Ibid.

to be maintained during her *iddah* after the divorce. Once the husband accepts the compensation, he releases the wife by pronouncing the divorce decree, and the divorce becomes final and irrevocable. In *mubara'a* the parties mutually agree to terminate their marriage.[106] The husband initially makes the offer to mutually terminate the marriage, and if the wife accepts his offer, the divorce becomes effective immediately.[107]

Aside from the aforementioned types of divorce, there is also a divorce process referred to as *li'ān*, which I discuss in chapter four when dealing with succession on the grounds of blood relationships.[108] The most important consideration when deliberating the different types of divorces is to determine whether the divorce is revocable or irrevocable, as the latter terminates all rights of inheritance between the parties. The South African courts have not always appreciated this distinction when dealing with inheritance claims between Muslim spouses who were divorced, as I highlight in the section below.

3.5 THE SOUTH AFRICAN COURTS' INTERPRETATION OF ISLAMIC DIVORCE LAW AND ITS IMPACT ON A WIDOW'S INHERITANCE RIGHTS

Currently, in South Africa, parties can conclude a marriage in terms of the Marriage Act,[109] the Recognition of Customary Marriages Act,[110] or the Civil Union Act.[111] There is currently no legislation in South Africa that officially recognises the validity of Muslim marriages and their

[106] Moosa (n1) 120.
[107] Ibid.
[108] See §5.2(b).
[109] The MA governs civil marriages between heterosexual monogamous spouses. A Muslim couple can register their marriage in terms of the MA in addition to their Muslim marriage ceremony. Their marriage would then bear the consequences of both a civil marriage and a Muslim marriage. A marriage in terms of the MA is automatically in community of property unless the parties stipulate otherwise. See
[110] This RCMA governs African customary marriages. A Muslim African couple that lives according to both customary law and Islamic law could potentially marry in terms of the RCMA in addition to their *nikāh*.
[111] The CUA legalises marriages between *inter alia* same sex partners. Muslim same-sex partners could conclude a civil union in terms of this Act. It is unlikely to be recognized as a valid Muslim marriage within the Muslim community.

consequences.[112] If a Muslim couple concludes a marriage ceremony (a *nikāh*) according to Muslim rites only (hereafter referred to as "a Muslim marriage"), they are not automatically considered as lawful spouses for the purposes of all South African legislation.[113] They have to approach the courts to have themselves recognised as legal spouses in terms of different legislation. In the sphere of succession, the court recognised spouses in a Muslim marriage as legal spouses in terms of the ISA and the Maintenance of Surviving Spouses Act[114] in *Daniels v Campbell*[115] ('*Daniels CC'*). As a result of *Daniels,* spouses in a Muslim marriage can now inherit intestate from each other in terms of the ISA.[116] They can also institute claims for maintenance against the estate of their deceased spouse in terms of the MSSA.[117]Although the court in *Daniels* recognises Muslim marriages as valid for the purposes of instituting claims in terms of the ISA and MSSA, it does not recognise or give effect to provisions of Islamic inheritance law.

In *Hassam v Jacobs*[118] ('*Hassam*'), the court extended the reasoning in *Daniels* to spouses in polygynous marriages, thereby allowing polygynous spouses to inherit intestate in terms of the ISA.[119] In this matter, the deceased married the applicant, Fatima Hassam, in 1972 by Muslim rites only. The applicant was his first wife. In 1998, after 26 years of marriage, the applicant obtained a *faskh* from the MJC.[120] In court papers, the applicant alleged that her husband, the

[112] For a comprehensive analysis of the status of Muslim marriages in South Africa, see Amien (n59)*;* Amien 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context' (2010) 24(3) *The International Journal of Law, Policy and the Family* 361-396; Amien and Leatt 'Legislating religious freedom: An example of Muslim marriages in South Africa' (2014) 29 18.
[113] Amien 'Judicial Intervention in Facilitating Legal Recognition (and Regulation) of Muslim Family Law in Muslim-Minority Countries. The case of South Africa' (2020) Vol1.No.1 *Journal of Islamic Law* at 72.
[114] 27 of 1990 ("MSSA").
[115] 2004 (5) SA 331 (CC) ('*Daniels CC'*).
[116] ISA, s1(1)(a). See *Daniels (CC) supra* [23], [25], [40].
[117] MSSA, s1. See *Daniels (CC) supra* [21], [22], [40].
[118] [2008] 4 All SA 350 (C).
[119] ISA, s1 stipulates that a surviving spouse is entitled to a child's portion or whatever amount is stipulated in the Government Gazette (currently R250 000), whichever of the two amounts are greater.
[120] *Hassam supra* [2]. For a description of the MJC as a Muslim judicial body, see§6.7(a)

deceased, had rejected the MJC's ruling by tearing up the document that evidenced the judicial decree of divorce. As a result, she and the deceased continued living together as husband and wife until his death.[121] The deceased had concluded another Muslim marriage in 2000 with the third respondent, M, to whom he remained married until his death.[122] The deceased died intestate, which meant M was entitled to inherit from him as a spouse in terms of the ISA.

The applicant, however, claimed that she was also entitled to inherit as a spouse of the deceased in terms of the ISA, based on the fact that the deceased had torn up the *faskh* papers when she presented them to him in 1998 and that they continued living together.[123] Factually, a new marriage contract or *nikah* was never concluded between the applicant and the deceased after the *faskh* was granted. In terms of Islamic divorce laws, as explained above, the deceased was therefore not legally married to the applicant at the time of his death. Despite this, the court ruled that at the time of the deceased's death, he had two surviving spouses who were entitled to inherit from him as spouses in terms of the ISA.[124] The court misunderstood the nature and consequences of a *faskh* and did not request expert evidence on the revocability of the *faskh* as a form of Muslim divorce. The court simply accepted the applicant's factual version of the nature and consequences attached to a *faskh*. The decision of the Cape High Court was confirmed by the Constitutional Court.[125]

Moosa and Abduroaf have criticised the *Hassam* judgment for misapplying the Islamic law pertaining to a *faskh*.[126] A *faskh* dissolves a Muslim marriage irrevocably, thereby terminating

[121] Ibid at [2].
[122] Ibid.
[123] Ibid at [4].
[124] Ibid at [8] and [17-23].
[125] *Hassam v Jacobs NO and Others* [2009] (5) SA 572 (CC).
[126] Moosa and Abduroa 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v. Jacobs* and the Muslim Marriages Bill' (2014) *Acta Juridica* 160.

all rights of inheritance between the spouses. Consequently, the applicant should not have been entitled to inherit as a spouse as her *faskh* was granted in 1998 and she and the deceased never remarried. The parties cannot reconcile by living together. To reconcile, they had to conclude a new marriage contract. The case illustrates difficulties arising from Muslim divorces not being regulated by one body. It furthermore highlights the dangers of secular courts adjudicating on the Islamic laws of marriage and divorce in the absence of legislation or expert opinion to guide them. This can be remedied if legislation recognising Muslim marriages clearly stipulates the different forms of divorce, the concomitant procedures, and the consequences of each form of Islamic divorce.

In another Cape High Court case, *Faro v Bingham*[127] (*'Faro'*), the dissolution of a Muslim marriage was once again in dispute. This matter involved a claim by a surviving Muslim spouse against the estate of her deceased husband in terms of the ISA. The applicant married the deceased by Muslim rites on 28 March 2008.[128] On 24 August 2009, the deceased pronounced a single revocable divorce to the applicant in the presence of an *imām* affiliated with the MJC, who presented the deceased with a divorce certificate.[129] The deceased subsequently died of lung cancer on 4 March 2010, without a will.[130] The applicant alleged that she and the deceased were married at the time of his death. According to her, after the divorce pronouncement on 24 August 2009, but before her waiting period had expired, the parties reconciled by having intimate relations.[131] She, therefore, claimed that she was entitled to inherit intestate as a surviving spouse of the deceased in terms of the ISA.

[127] [2013] ZAWCHC 159.
[128] Ibid at [2].
[129] Ibid at [3].
[130] Ibid at [4].
[131] Ibid.

The applicant's claim was disputed by her adult stepchildren, who alleged that their deceased father had never reconciled with the applicant, and he was no longer married to the applicant at the time of his death. The applicant's stepdaughter obtained a divorce pronouncement certificate from the MJC offices.[132] She presented it to the Master of the High Court ('the Master') as proof that her deceased father had divorced the applicant.[133] The applicant, in turn, provided the Master with an affidavit, wherein she stated under oath that she had reconciled with the deceased.[134] This evidence was corroborated by her stepson and a social worker in separate affidavits.[135] When the applicant presented her version to the MJC, they wrote a letter revoking their previous divorce pronouncement certificate.[136] In a bizarre twist of events, the stepson retracted his previous affidavit and submitted a new one denying that his father had reconciled with the applicant.[137] This caused the MJC to retract its earlier position and confirm that there had been a valid divorce pronouncement in place.[138] The Master accepted the evidence presented by the stepchildren and the MJC and refused the applicant's claim to inherit as a surviving spouse.[139]

The court, having regard to all the evidence, including the evidence of an Islamic law expert, held that a divorce pronouncement could be revoked by express words or through sexual relations between the spouses.[140] Relying on the applicant's evidence, the court held that the applicant and the deceased had reconciled after the divorce pronouncement and that the applicant was the surviving spouse at the time of the deceased's death, and was thus entitled to

[132] Ibid at [5].
[133] Ibid at [6].
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid at [7].
[138] Ibid.
[139] Ibid at [10].
[140] Ibid at [30]-[32].

inherit from his estate.[141] Abduroaf has criticised the court's decision for disregarding the MJC's decision that the divorce pronouncement had not been revoked by the resumption of intimate relations between the parties.[142] However, the vacillating on the part of the MJC as regards the marital status of the applicant was problematic and illustrates the effect of the inconsistent approach by MJBs in making divorce pronouncements or issuing *talāq* certificates. The case highlights the uncertainty Muslim women face when determining their marital statuses, which led Rogers J to comment:

> 'The vulnerability of women in Islamic marriages arises primarily from the ease and relative informality with which an Islamic union may be dissolved at the instance of the husband. The mandatory holding of hearings by the Master when the dissolution of an Islamic marriage is in dispute would not address this source of vulnerability, which is a matter of substantive Islamic law.'[143]

The criticism of the judgment is also based on the premise that by ignoring the decision of the MJC, the court raised the issue of doctrine entanglement.[144] However, the case did not involve issues of doctrine. There was a factual dispute about whether the parties had reconciled after the first *talāq* was pronounced by the deceased. According to the evidence of the applicant and the social worker they had reconciled by engaging in sexual relations soon after the *talāq* was pronounced. There was sufficient expert evidence to the effect that in certain Islamic schools of thought, like the Hanafī school, reconciliation after a revocable divorce pronouncement can occur after the parties have engaged in sexual relations. It is an implicit form of reconciliation, and there is no need for express words of reconciliation to be uttered by the husband. As explained above, most lay Muslim spouses, irrespective of their particular school of thought, would assume that resuming physical relations is indicative of them reconciling.

[141] Ibid.
[142] Abduroaf 'The consequence of an Islamic divorce' (2019) 19(9) *Without Prejudice* 31.
[143] *Faro v Bingham supra* [38].
[144] Abduroaf (n142) 31.

The above case demonstrates that if legislation were to come into effect to recognise and regulate Muslim marriages, it should clearly stipulate criteria for valid reconciliation between spouses. Furthermore, it would be more feasible to have all divorce pronouncement processes administered and regulated by one MJB in order to avoid the vulnerability and uncertainty a Muslim woman currently suffers regarding the status of her marriage after an Islamic divorce.

3.6 CONCLUSION

In this chapter, I have illustrated that the laws pertaining to marriage, maintenance and divorce are inextricably related to the laws of inheritance. Whether spouses have been divorced revocably or irrevocably directly impacts the mutual inheritance rights between them in the context of both testate[145] and intestate succession in South Africa. As Muslim marriages and divorces are not regulated by the State, women are dependent on the decisions of either their husbands or MJBs, to determine whether their marital bonds have been severed irrevocably. MJBs are not always consistent in the manner they apply Islamic divorce laws, as was illustrated in the *Faro* case or in the way they deal with the *talāq bid'a.* This consequently impacts on a wife's right to inherit. MJBs are furthermore not regulated by any State body. In addition, the Master's office completely defers to the decisions of the MJBs in determining the marital status of Muslim spouses on the death of one of the spouses. MJBs, therefore, exercise considerable power in matters of divorce. This is the case in the sphere of inheritance as well as is evidenced by my empirical research in chapter six. Before discussing my empirical research on the application of IIL in South Africa, I first provide an overview of the Islamic inheritance law generally.

[145] For a discussion of how Muslim divorce impacts on the inheritance rights of spouses in terms of the WA see §7.2(f) under the heading 'The impact of s2B of the Wills Act on Muslim Divorce'.

CHAPTER FOUR

HISTORICAL DEVELOPMENT OF THE ISLAMIC LAW OF INHERITANCE

4.1 INTRODUCTION

In the previous chapter, I discussed the Islamic laws of marriage and divorce, with special emphasis on how they impact on the rights of spouses to inherit from each other and how they applied in South Africa. In the next two chapters, I focus solely on Islamic inheritance law (*mirāth*) as understood in classical *fiqh*. I rely on primary and secondary sources of law, as well as the methodologies discussed in chapter two, to explain how various legal rulings were reached in the context of inheritance. Islamic inheritance law ('IIL') is a complex and extensive area of law and is considered one of the most important branches of Islamic law.[1] It is beyond the scope of this thesis to discuss every aspect of IIL. Extensive literary works have already been dedicated to explaining its intricacies.[2] The aim of the next two chapters is to provide an overview of IIL.

In this chapter, I focus on the historical development of IIL from pre-Islamic Arabia to reforms brought about by the Qur'ān and the Sunnah. I highlight the dissenting opinions of those who argued that the bequest and widow Qur'anic verses were not abrogated by the inheritance verses. I argue that the bequests dealt with in these verses could be used to benefit Islamic female heirs who receive less than their male counterparts.

[1] In an authentic *hadīth*, Muhammad (PBUH) had stated that the laws of inheritance constitute one half of all knowledge and had encouraged his companions to learn the laws and teach them to others.

[2] See Ibn Rushd *The Distinguished Jurist's Primer Vol II*: A Translation of *Bidayat Al-Mujtahid* (transl) Nyazee (1996) 411-442; Powers *Studies in Qur'ān and Hadith: The Formation of the Islamic Laws of Inheritance* (1986); Khan *The Islamic Law of Inheritance – A comparative study of recent reforms in Muslim countries* (2007); Russel and Suhrawardy *Muslim Law-An Historical Introduction to the Law of Inheritance* (2008); Coulson *Succession in the Muslim Family* (1971); 'Abd al'Atī *The Family Structure in Islam* (1977); Ismail *Islamic Inheritance Planning 101* (2013); Al Fadl *A Comparative Study on Inheritance* (1995); Omar *The Islamic Law of Succession and its Application in South Africa* (1988); Abduroaf *Deceased Estates Islamic Law Mode of Distribution in Accordance with the Shaafi'ee School of Law* (2018).

4.2 THE DEVELOPMENT OF ISLAMIC LAWS OF INHERITANCE

The ultimate objective of IIL is to ensure that material provision is made for the closest surviving dependants and relatives of the deceased.[3] To ensure this objective is met, the Qur'ān and Sunnah stipulate the list of family members that are entitled to inherit as Islamic law heirs. Muslims feel morally and legally obliged to ensure that their estates are distributed according to the dictates of the primary sources. In summary, the division of an Islamic estate entails: firstly, settling all debts of the deceased; secondly, paying out any bequests (*wasiyya*) to a maximum value of 1/3 of the estate; and thirdly, distributing the remaining net estate between the stipulated Islamic law heirs of the deceased. The Muslim testator can only freely dispose of 1/3 of his or her estate, and this freedom is limited by rules on who is entitled to inherit from the 1/3.[4] The balance of the estate must be distributed to his or her fixed Islamic law heirs, who are relatives related to the deceased through blood and marriage.

Some scholars refer to the testator's right to make a bequest as testate succession, whilst the distribution of the balance to fixed Islamic law heirs is referred to as intestate succession.[5] The use of this terminology can cause confusion in the South African law context, where testate succession refers to the scenario where a testator distributes his or her estate according to a will,[6] whilst intestate succession refers to the scenario where a testator fails to draft a will and his or her estate devolves according to South African intestate laws.[7] This is not the equivalent

[3] Coulson (n2) 3.
[4] For a discussion on who may benefit from a bequest see §§4.2 (c)-(d).
[5] Abduroaf *The Impact of South African Law on the Islamic Law of Succession* (unpublished PhD Thesis, University of Western Cape (2018)) 30-33. Coulson notes that the term 'intestacy' could be used as a term of convenience to describe IIL, but that it does not refer to a system of succession where a deceased has failed in his or her duty to arrange for the devolution of his or her estate: Coulson (n2) 2.
[6] In terms of the WA.
[7] In terms of the ISA.

of IIL, and I, therefore, refrain from using this terminology.[8] The fixed Islamic law heirs and their portions are akin to the compulsory portions that occur in, for example, German law, where certain relatives of the deceased are entitled to inherit compulsory portions.[9] Similarly, in IIL, certain relatives are compulsory heirs to the deceased and cannot be excluded from inheriting unless there are valid grounds for exclusion.[10] It is useful to understand how the IIL system developed.

In pre-Islamic Arabia, the tribe was the most important unit in society, with tribe members tracing their lineage from a common ancestor, exclusively through male links.[11] These bonds of allegiance were referred to as '*asabiyya*.[12] The tribe was patriarchal and patrilineal.[13] To keep property within the tribe, rights of inheritance belonged to the male agnates of the deceased on the basis that those nearer in degree excluded those that were more remote from the deceased.[14] Given the patriarchal and patrilineal nature of inheritance, the order of priority was as follows: the male descendants of the deceased (male), followed by his father, his brothers and their male descendants, his paternal grandfather and lastly, his uncles and their descendants' male descendants.[15] If he was able to partake in military expeditions, an adopted son had the same rights of inheritance as a biological male descendant.[16] There were also

[8] Kimber, does not see the bequest verses and the inheritance verses as a reflection of two separate processes, namely testate and intestate succession. He considers both processes as a means to the dispose of an estate through a last will in accordance with God's will. The bequest verses remind the testator in general of God's requirements whilst the inheritance verses specify in greater detail those requirements.: Kimber 'The Qur'anic law of inheritance' (1998) 5 *Islamic Law and Society* 291.
[9] In German law, when a deceased has disinherited his or her parents, descendants, or surviving spouse, they can claim their compulsory share against the designated heirs of the deceased to receive the value of a certain part of the estate. In this regard, see Zimmermann, R 'Compulsory Portion in Germany' in Reid, De Waal and Zimmermann (eds) *Comparative Succession Law, Vol. III: Mandatory Family Protection* (2020) 268.
[10] See discussion on grounds for exclusion in §5.5.
[11] Coulson (n2) 29; Coulson *A History of Islamic Law* (1964) 11; Abd al'Atī (n2) 8. It should be noted that literature on pre-Islamic Arabia is scarce and should be approached with a certain degree of caution.
[12] Namely, descent through the male links from a common ancestor.
[13] Coulson (n11) 16.
[14] Ibid.
[15] Ibid.
[16] Khan (n2) 27.

mutual rights of inheritance between two free tribesmen if they had entered into a sworn oath of allegiance to become 'brothers' and assumed the obligations to support and protect each other.[17] Non-agnatic relatives were excluded from inheritance in order to preserve the tribal patrimony.

Females and minor children did not inherit anything.[18] If a father or husband wished to make provision for his wives or daughters, he had to confer property on them during his lifetime.[19] In certain instances, females were considered as part of the estate, with the stepson or brother of the deceased taking possession of the widow of the deceased along with his material possessions.[20] This practice was subsequently declared invalid in the following Qur'anic verse, 'O ye who believe! Ye are forbidden to inherit women against their will...'[21]

(a) The first stage

The advent of Islam brought about social and political changes that improved the status of women in the realm of inheritance substantially. The IIL did not completely abolish the customary pre-Islamic inheritance practices but did introduce some radical changes.[22] It replaced allegiance to the tribe with allegiance to the religion of Islam. Furthermore, the status of the immediate family consisting of the husband, wife, children and parents was elevated over the tribe.[23] However, male agnatic relatives still remained in a dominant position even after the new Qur'anic heirs were absorbed into the customary tribal rules.[24] Kimber notes that '[t]he Qur'anic rules serve[d] to qualify and mitigate the customary system of agnatic

[17] Khan (n2) 27. See also Russel and Suhrawardy (n2) 61-62 for a description of such sworn allegiances, and how Muhammad (PBUH) modelled these pacts of allegiance when he established the Islamic state.
[18] Khan (n2) 26 & 31; Russel and Suhrawardy (n2) 44.
[19] Russel and Suhrawardy (n2) 39.
[20] Khan (n2) 26.
[21] Q4:19.
[22] Khan (n2) 27
[23] Coulson (n11) 23; Coulson (n2) 135.
[24] Coulson (n2) 33.

succession and [did] so, broadly speaking, only to the extent of their express terms'.[25] The new Islamic inheritance system built on the existing tribal system of inheritance by superimposing new heirs in order to alleviate the difficulties that women and other vulnerable family members endured with respect to inheritance rights.

The first stage of development entailed the introduction of bequests for parents and close relatives. This was introduced through the revelation of the following Qur'anic verses:

> 'It is prescribed, when death approaches any of you, if he leaves any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing. (180) If anyone changes the bequest after hearing it, the guilt shall be on those who make the change …(181) But if anyone fears partiality or wrong doing on the part of the testator, and makes peace between (the parties concerned), there is no wrong in him…(182)'[26]

These verses were revealed at the beginning of Islam in the Meccan period.[27] Verse 180 enjoins those approaching death to leave a bequest to parents and close relatives. Verse 181 cautions against altering a testator's will. Verse 182 encourages parties to reconcile where there is a disagreement about the impartiality or correctness of the testator's will.[28] Verse 180 does not stipulate the value of each parent's share, nor does it provide a list of the close relatives that should be given bequests.[28a] It does not distinguish between male and female close relatives, which means both male and female close relatives of the deceased were entitled to bequests. These bequest injunctions were ground-breaking at the time because female relatives were previously excluded from inheriting.[29] I refer to these verses throughout the thesis as the

[25] Kimber (n8) 293; Coulson (n2) 30.
[26] Q2:180-182.
[27] See §2.3(n70) for a description of the Meccan versus Madinan period.
[28] Powers (n2)11.
[28a] Interestingly, contemporary scholar Muhammad notes that verse 180, in addition to the parents of the deceased, refers to caregivers of the deceased, ascendants of the deceased, the spouse of the deceased, descendants of the deceased, however low, siblings of the deceased, as well as agnate and cognate aunts and uncles of the deceased. See Muhammad *The Quran, Morality and Critical Reason: The Essential Muhammad Sharur* (2009) 232.
[29] Coulson (n11) 16.

'*bequest verses*'. Coulson notes that the bequest verses reflect the transition in '[I]slam from a society based on blood relationship to one based on a common religious faith.'[30]

The bequest verses are followed by verse 240 of chapter two, which stipulates: 'Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave (the residence), there is no blame on you for what they do with themselves, provided it is reasonable…'[31] I will refer to this verse as the '*widow verse'*. The widow verse strongly encourages the testator to make provision for one-year's maintenance for his widow, provided she remained in her deceased husband's house for that period.[32] This ensured that the widow had some measure of security of tenure and a means of livelihood for the first year after her husband's demise. After the widow verse, a verse was revealed that stipulated the basic requirements for a valid will, namely that it had to be drawn up and dictated in the presence of two witnesses.[33]

The bequest and widow verses did not dictate fixed shares, nor did they provide any particular order of priority amongst those entitled to bequests.[34] They simply stipulated the importance of making provisions for parents, close relatives and a widow. The testator could determine the type and quantity of the bequest. This permissive and discretionary system prevailed during the first 12 years of the Meccan period of Islam.[35]

[30] Ibid.
[31] Q2:240.
[32] This is how Q2:240 has been interpreted.
[33] Q5:109 provides: 'O ye who believe, when death approaches any of you, (take) witnesses among yourselves when making bequests, - two just men of your own (brotherhood)…'
[34] See 'stage two' below.
[35] These verses were revealed was between 610-622AD, about 2 to 12 years before the Hijri calendar starts. For an explanation on the Hijri calendar see §2.3(n70).

(b) The second stage

The second stage of development occurred with the revelation of the inheritance verses. They were revealed in response to an incident where a female companion, Umm Kuhha, complained to Muhammad (PBUH) that she and her daughters had been unjustly deprived of their inheritance from her deceased husband's (Sa'd) estate by the brother of her deceased husband.[36] In response to this scenario, the first verse revealed was verse 7 of the chapter titled 'The Women', which affirmed the right of women to inherit equally with men from their parents and close relatives. The verse reads as follows: 'From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, - a determinate share.'[37] This augmented the rights of females to inherit with their male counterparts from both parents and close relatives but did not yet specify exact share quantities. Verse 7 was followed by the revelation of verses 11 to 12 of the same chapter, which introduced the fractional compulsory shares of the immediate relatives of the deceased, including the wife and daughter of the deceased. As these two verses set out the foundations of IIL, I cite them in full. They stipulate as follows:

> '(11) God (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females: if more than two daughters, their share is two-thirds of the inheritance; if only one her share is a half. For parents, a sixth share of the 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 and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by God, and God is all-knowing, all-wise.
>
> (12) In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and 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

[36] The deceased was Sa'd b. al-Rabī, one of the companions of Muhammad (PBUH). The *hadīth* appears in Abū Dawūd *Sunān Abū Dawūd* (trans.) Qadhi (2008) 3(18) no.2891 at 431-433. For a slightly different version of this *hadīth*, see Powers (n2) at 12, as that version of the *hadīth* mentions the paternal cousin and not brother of the deceased, Sa'd taking his entire estate.
[37] Q4:7.

> legacies and debts; so that no loss is caused (to anyone). Thus it is ordained by God; and God is all-knowing, most forbearing.[38]

After the revelation of Q4:11-12, Muhammad (PBUH) instructed the brother of the deceased: 'Give the two daughters of Sa'd 2/3 of the estate, give their mother 1/8 and keep the remainder to yourself.'[39] This distribution was according to the prescribed shares in the above two verses; namely, the two daughters together received 2/3, the mother received 1/6, and the nearest male agnatic relative (in this case, the brother of the deceased) received the residue of the estate. Verses 11 and 12 set out the compulsory fractional shares of daughters, parents, spouses and siblings. They furthermore introduced the rule that when sons and daughters survive the deceased, the sons receive double the daughters' share. I discuss these share allocations in greater detail in chapter five.

In addition to verses 11 and 12 above, a further verse was revealed, namely verse Q4:176, which awarded shares of an estate to the consanguine or full siblings of a deceased if the deceased died without leaving ascendants or descendants (*kalāla*).[40] The verse stipulates as follows:

> 'They ask thee [Prophet] for a legal decision. Say: 'God directs (thus) about those who leave no descendants or ascendants [*kalāla*] 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 (between them). If they are brothers and sisters, (they share), the male having twice the share of the female. Thus God makes clear to you (His law), lest ye err. And God has knowledge of all things.'[41]

[38] Q4:11-12. The reference to brother and sister in verse 12 has been interpreted, through consensus, to mean the uterine siblings of the deceased. See, Ibn Rushd (n2) 417 and Ali *The Holy Qur'an Translation and Commentary* (1946) 182.
[39] Coulson (n2) 29; Powers (n2)12.
[40] The term '*kalāla*'is used in this verse. There is disagreement amongst the scholars on whether the term *kalāla* is referring to the testator or the heirs. See, Ibn Rushd (n2) 418. According to some it refers to the heirs and indicates relatives of the deceased other than a parent or child, whilst according to others it refers to the deceased and indicates a deceased who is survived by neither ascendants nor descendants. See also, Ali (n38) 182.
[41] Q4:176. The reference to brothers and sisters in this verse has been interpreted to mean the full and consanguine siblings of the deceased. See, Ali (n38) 235.

These three verses, namely Q4:11-12 and Q4:176, became known as the '*inheritance verses'* and are the foundations upon which the entire science of the shares is built.[42] Powers observes that, whilst the bequest verses allowed the testator himself to determine the type and quantity of the provisions made to parents, wives and close relatives, the inheritance verses has God determine the rightful heirs and how much they will receive.[43] The inheritance verses create a system of fixed shares for compulsory sharer heirs akin to a system of 'forced heirship' found in countries like Germany.[44] However, a Muslim testator also has the freedom to make bequests, as both verses Q4:11 and Q4:12 stipulate that the distribution of fixed shares to compulsory heirs only occurs 'after the payment of any bequest and debt'. At this stage, there were no limitations placed on the value of a bequest yet. The third stage of development in IIL entails the various restrictions placed on bequests made by a Muslim testator.

(c) The third stage

Restrictions were placed on the value of a bequest as well as the recipients of such bequest. With respect to restricting the value of a bequest, reliance is placed on a *hadīth* by one of the companions, Sa'd b. Waqqas, who, while on his death bed, enquired from Muhammad (PBUH) whether he could bequeath his entire estate to charity.[45] Muhammad (PBUH) discouraged Sa'd from doing this and advised that it was better not to leave his family destitute. He, therefore, advised Sa'd that 'a bequest may not exceed 1/3 of the estate'.[46] A testator could therefore make a discretionary bequest to a maximum of 1/3 of his or her estate, whilst the remaining 2/3 had to be distributed to his or her compulsory sharer heirs.

[42] Powers (n2)12.
[43] Ibid.
[44] See Zimmermann (n9) and comment in (n9).
[45] Al-Bukhari *Sahīh Al-Bukhāri* (trans.) Khan (2009) 4(5) no.5 at 633. See also: Powers (n2)13; Ibn Rushd (n2) 407.
[46] Ibid.

In addition to restricting the value of a bequest, new restrictions were introduced by a *hadīth* with respect to who was entitled to receive a bequest. The majority of Sunnī scholars[47] accepted the authenticity of the *hadīth* in which Muhammad (PBUH) stipulated that there is no bequest to an heir.[48] This *hadīth* has been interpreted to mean that a testator cannot make a bequest to persons who qualify as compulsory sharer heirs. According to another version of the *hadīth*, an Islamic law heir can receive a bequest provided the other heirs agree thereto.[49] The agreement of the other heirs can only be reached after the death of the testator and once their rights to their shares have vested in them.[50] So, for instance, if a testator is survived by his wife and two sons and leaves a bequest equalling 1/3 of his estate to his wife, then on the death of the testator, the sons would have to agree to their mother receiving the bequest valued at 1/3 in addition to her 1/8 fixed share. Prior consent is not considered valid or enforceable.[51]

The *ahādith* discussed in the third stage, and the inheritance verses discussed in the second stage, did not clarify the status of the initial bequest verses (Q2:180-182) and the widow verse (Q2:240) revealed in the first stage. The bequest and widow verses stipulated that a person contemplating death should make provision for parents, close relatives, and widows. However, the later inheritance verses also make provision for compulsory shares for parents, close relatives, and wives, which created a potential conflict between the inheritance verses and the bequest verses. Furthermore, there was the *hādith* stipulating that there may be no bequests to heirs. The Qur'ān itself does not explicitly stipulate that the bequest verses were abrogated by the later inheritance verses. On the contrary, the inheritance verses stipulate that the fixed

[47] Ibn Rushd (n2) 406.
[48] The *hadīth* appears in Abū Dawūd (n36) 3(17) no.2870 at 417. See also Powers (n2) 14; Ibn Rushd (n2) 406. This *hadīth* was not accepted as authentic by all classical Sunnī scholars, as discussed below.
[49] See Ibn Rushd (n2) 406 for another version of this *hadīth*.
[50] Abduroaf (n5) 30. See also Malik ibn Anas *Al-Muwatta* (*Al-Muwatta of Imam Makik ibn Anas-The First Formulation of Islamic law*) (2004) (trans) by Aisha A Bewley at 316 for *hadīth* on 'Bequests to heirs and rights of possession.'
[51] Abduroaf (n5) 30.

shares can only be distributed once all debts and bequests have been settled. To address this contradiction and reconcile the rulings in the inheritance verses with the earlier bequest verses, the majority of Sunnī scholars held that the bequest and widow verses were abrogated by the later inheritance verses.[52] A minority of classical Sunnī scholars argued that the bequest and widow verses were not abrogated, and I discuss their opinion in greater detail below.

(d) Dissenting opinions on the abrogation of the bequest and widow verses

The Qur'anic commentator, al-Rāzi, who wrote the 32 volume *Tafsīr al-Kabīr*[53] espoused the view that the bequest and widow verses were not abrogated. In his commentary, al-Rāzi relies on the opinion of Abū Muslim, an 11th-century grammarian who authored a 20 volume commentary on the Qur'ān.[54] Al Rāzi discusses the position of Abū Muslim, who also appears to have been of the view that the bequest verses were not abrogated by the inheritance verses. Powers has written extensively on this issue and provides a comprehensive analysis of the opinions of both scholars.[55]

Abū Muslim did not perceive a contradiction between the bequest verse (Q2:180) and the inheritance verses. He postulated various alternative interpretations.[56] For instance, he argued that the awards of inheritance and bequests to parents and relatives were not mutually exclusive because inheritance can be considered a gift from God, whilst a bequest is a gift from the testator. Consequently, a compulsory heir could receive both his or her fixed inheritance share in addition to a bequest, as per the two verses.[57] Abū Muslim also argued that even if one were

[52] For an exposition of the companions and scholars who thought that the bequest verses were abrogated, see Powers (n2)172-188.
[53] Al-Rāzi *Al-Tafsīr al-Kabīr* 'Abdulhamīd (ed) 32 vol. (1934-62). See discussion on this *tafsīr* in §2.3(a)(i).
[54] Powers (n2) 175.
[55] See Powers (n2)175-188; Pavlovitch & Powers 'A Bequest May Not Exceed 1/3: an *Isnād-cum-Matn* Analysis and Beyond' in Sadeghi *et al* (eds) *Islamic Cultures, Islamic Contexts* (2014) 133.
[56] Powers (n2) 175-176; Al- Rāzi (n53) 5:67.
[57] Ibid.

to regard these two sets of verses as contradictory, it would be possible to interpret the inheritance verse as specifying the bequest verse, Q2:180.[58] So even though the inheritance verses stipulate a fixed share for parents, if the testator's parents are non-Muslim, then they are not entitled to inherit in terms of the inheritance verses but could receive a bequest in terms of the bequest verse.

Al-Rāzi reinforced the position of Abū Muslim and challenged the dominant narrative that the bequest verses were abrogated by the *hadīth* 'no bequest to an heir'. Al-Rāzi presented various cogent arguments against the proponents of abrogation.[59] I focus on two of his most persuasive arguments. He correctly pointed out that the *hadīth*, 'no bequest to an heir,' is an isolated report and that such a report cannot abrogate a Qur'anic verse.[60] Powers illustrates the weaknesses in the *isnād* (transmission) of this *hadīth* and makes a compelling argument that the ruling 'no bequest to an heir' was actually a legal maxim that was put in the form of a *hadīth* during the course of the ninth century only.[61] As the *isnād* of this *hadīth* was incomplete, not a single version of it occurs in the Sahīh of Bukharī or the Sahīh of Muslim, despite it having been in circulation for at least half a century prior to the compilation of the two Sahīhs.[62] Powers correctly notes that as this *hadīth* qualified as an isolated report, it created probable knowledge only and therefore could not be utilised as evidence for the abrogation of a Qur'anic verse.[63]

Al-Rāzi also argued that even though the *imāms* of the four schools may have reached a consensus on the authenticity of this isolated report, which consequently resulted in its

[58] Ibid.
[59] Powers (n2) 174-178; Al-Rāzi (n53) 5:68.
[60] Ibid. Auda also notes that this *hadīth* is questionable and may therefore not abrogate the Qur'ān. See Auda *Critique of the Theory of Abrogation* (trans) Salahi (2019) 106.
[61] Powers (n2)168.
[62] Ibid. Auda notes,'This Hadīth does not meet al-Bhukārī's criteria of authenticity…': Auda (n60) 52.
[63] Ibid.

widespread circulation, this consensus was insufficient to abrogate verse Q2:180, as the Qur'ān cannot be abrogated by consensus.[64] He argued further that, since there was no consensus on whether the inheritance verses were abrogated by the bequest verses in the first place, the *imāms* could not claim consensus on the fact that this solitary *hadīth* abrogated the Qur'ān. Al-Rāzi concludes that none of the four sources (Qur'ān, *hadīth, ijmā and qiyās*) invoked by the proponents of abrogation constitute sufficient proof of abrogation.[65] Consequently, there was no logical reason why an heir could not receive a bequest in addition to his or her compulsory inheritance share.

Although the dissenting opinions of Abū Muslim and al-Rāzi's did not gain traction amongst the majority of Sunnī scholars, they remain valid legal opinions based on logical, rigorous and sound arguments.[66] Interestingly, Imām Shāfi'ī also mentioned alternative interpretations of the inheritance and bequest verses. After quoting both the bequest verses and the inheritance verses, he articulates the following interpretation:

> 'The two verses [Q.4:11-12] may be interpreted as confirming the bequest for parents and relatives [prescribed in Q.2:180], and the bequest for the wife [prescribed in Q.2:240], and inheritance together with bequests, *so that one may take by means of both inheritance and bequests.* [But] it may also be interpreted as inheritance abrogating bequests. *Since both interpretations are possible*, it is incumbent upon the learned to find an indication (*dalāla*) in the Book of God [as to which of the two is correct;] if no text is found in the Book of God, they should seek it in the Sunna of the Apostle.'[67] (my emphasis)

Apparently, Imām Shāfi'i conceived of a similar interpretation to that adopted by Abū Muslim and al-Rāzi. However, he diverges from the view of the latter two in that he first accepted the consensus of scholars on the existence and authenticity of the isolated *hadīth*, 'no bequest to

[64] Powers (n2) 176-177; Al-Rāzi (n53) 5:68.
[65] Ibid.
[66] With respect to jurists exercising *ijtihād* on matters, Zahraa notes, 'Should there be more than one view on the matter, the application of any of the well-known jurists' views will be Islamically valid so long as the jurist has provided sufficient evidence for his view.' Zahraa 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 *Arab LQ* 168 at 175.
[67] Al-Shāfi'ī *al-Risāla Fī Usūl al-Fiqh* (*Treaties on the Foundations of Islamic Jurisprudence*) (trans. Khadduri) (1961) 69 §398.

an heir', and second, he opined that this isolated *hadīth* could abrogate the inheritance verses of the Qur'ān.[68]

Similar arguments can be made with respect to the widow verse (Q2:240). Those who argue that verse Q2:240 was abrogated contend, first, that the verse Q2:234[69](the *iddah* verse) abrogated the widow verse in that it reduced the *iddah* of a widow from one year to four months and ten days.[70] Second, they argue that the inheritance verse, Q4:12, which awards a fixed share to the widow, abrogated the one-year maintenance ruling contained in the widow verse (Q2:240).[71] However, there is no explicit indication in the Qur'ān of an abrogation of Q2:240. Similarly, any reliance on the *hadīth* 'no bequest to an heir' is met with the same difficulties discussed above. As a result, Abū Muslim argued against the abrogation of the widow verse too.[72] He argued that prior to the advent of Islam, a widow was obliged to remain in her deceased husband's home for one year and that Islam, through the *iddah* verse (Q2:234), reduced the widow's *iddah* to four months and ten days. The widow verse offered her the option of remaining in her deceased husband's home beyond the four months and ten days for a maximum of one year. Her right to maintenance would therefore remain as long as she remained living in her deceased husband's home.[73]

Al-Rāzi supported these arguments of Abū Muslim against the abrogation of the widow verse but developed the argument even further on the basis of three principles. Firstly, he argued that abrogation should be avoided whenever possible; secondly, the order in which the two verses

[68] Ibid.
[69] Q2:234 stipulates: 'If any of you dies and leave widows, the widows should wait for four months and ten nights before remarrying…'.
[70] For an exposition of those who argue in favour of abrogation, see Powers (2)179-181.
[71] Ibid.
[72] Ibid 182.
[73] Ibid 184.

appear in the Qur'ān and are recited is not chronological, which suggests that the iddah verse did not abrogate the widow verse; and thirdly, Abū Muslim's argument, which requires specification[74] of the widow verse, is superior to arguments of those who argue for the abrogation of the verse.[75] The arguments presented by both Abū Muslim and al-Rāzi are legally sound and persuasive, albeit minority opinions. If they were accepted as valid interpretations, then they would lay the foundation for the following legal rulings, namely (i) a Qur'anic sharer heir is entitled to benefit from a bequest without the consent of the other heirs being required; (ii) any bequest received by a Qur'anic heir would be in addition to that heir's compulsory share; (iii) a testator may bequeath one year's maintenance to his widow provided she remained living in his home for one year after his death. These rulings particularly benefit female heirs, who receive less than their male counterparts, as this will entitle them to bequests in addition to their fixed compulsory share.

Aside from the scholarly differences relating to whether there was abrogation of the bequest and widow verses or not, there is consensus that the framework of the Islamic law of inheritance was settled by the inheritance verses and the *ahādith* on bequests. Further interpretational developments occurred through the legal rulings of the companions of Muhammad (PBUH) and through the consensus of later scholars, which I elaborate upon when discussing the various categories of heirs. In summary, the newly introduced Islamic law system of inheritance allowed a testator limited freedom of testation over 1/3 of his or her estate, whilst the remaining 2/3rd had to be distributed to compulsory Islamic law heirs according to fixed portions.[76]

[74] Abū Muslim's alternative interpretation of Q2:240 was, 'And those of you who die [leaving] a bequest to their wives' thereby attributing the words to the husband and not as a ruling from God. See Powers (n2) 183.
[75] Powers (n2) 183; Al Rāzi (n53) 6:170.
[76] Coulson notes that, '[i]deally, perhaps any legal system should recognize and give effect to the two distinct criteria of succession by rights and succession in case of need'. He notes that IIL catered for both as the rules of fixed shares, catered to the former, whilst the latter is facilitated by giving the deceased testamentary freedom over 1/3 of his estate. Coulson (n2)156.

4.3 CONCLUSION

In this chapter, I have illustrated that the development of IIL occurred in stages, with the right of female relatives to inherit from the deceased being entrenched under the new Islamic law system. Female relatives, like the mother, wife and daughter of the deceased, could not be excluded as they were allocated fixed shares in the Qur'ān. In addition, the IIL system encouraged a testator to make special provisions for his widow upon his death. The testator was also given the freedom to bequeath up to 1/3 of his or her estate to legatees. Although the majority of jurists hold the view that a bequest cannot be made to an heir, I will adopt the position that a bequest can be made to an heir without requiring the consent of the other heirs. In this regard, I rely on the opinions of Al-Rāzi and Abū-Muslim, who argued that the bequest verse (Q2:180) and the widow verse (Q2:240) were not abrogated by the inheritance verses. In the following chapter, I discuss the inheritance verses and compulsory heirs in greater detail.

CHAPTER FIVE

OVERVIEW OF THE ISLAMIC LAW OF INHERITANCE

5.1 INTRODUCTION

Whilst chapter four dealt with the historical development of Islamic inheritance law (IIL), this chapter provides a summary of the grounds of succession in Islamic law, followed by a discussion of the categories of Islamic law heirs. I deal with the categories of heirs most likely to inherit in the modern family context and discuss the differences of opinion that prevail among Islamic jurists in IIL in this regard. I also explain the grounds for exclusion from inheritance and end with a discussion on how an estate is distributed.

I restrict my discussion to those aspects of IIL that are relevant in the South African context regarding the customary local practices. I do not discuss issues like the rights of slaves inheritance, nor do I discuss in detail the *bayt al-māl* (public treasury), as these are irrelevant in the modern-day South African context. I also do not deal with the subject of *waqf* (charitable endowments),[1] which can be created in an Islamic will, because this is a vast topic on its own.[2] Lastly, I do not focus extensively on issues pertaining to the administration of deceased estates in terms of Islamic law because the administration of a Muslim testator's estate will take place in terms of the Administration of Estates Act ('AEA').[3]

The compulsory heirs are divided into two distinct categories of legal heirs; namely, the new category of Qur'anic heirs, referred to as *ahl al-farā'id* (those entitled to prescribed portions)

[1] A *waqf* is similar to a public endowment, which is created by a founder who places property in the possession of a fiduciary for philanthropic purposes. The property is typically inalienable in perpetuity.
[2] In this regard see Suleiman 'The Islamic Trust Waqf: a Stagnant or Reviving Legal Institution' (2016) 4 *Electronic Journal of Islamic and Middle Eastern Law* 27; Mohammad 'Waqf and trust: the nature, structures, and socio-economic impacts' (2019) 10 (4) *Journal of Islamic Accounting and Business Research* 512.
[3] 66 of 1965.

and the old tribal category of *'asaba* (agnates), that is, the male relatives entitled to the residue of the estate. In the absence of relatives from either of these two categories, the estate devolves upon a group of heirs commonly referred to as *dhāwū'al-arhām*[4] (distant kindred). Before elaborating on each category, I firstly deal with the grounds for succession in IIL.

5.2 GROUNDS FOR SUCCESSION

For an heir to inherit from the testator, he or she either must be related to the deceased through *nasab* (blood ties) or marriage.[5] A third category existed in classical *fiqh*, namely those related to the deceased through *walā* (slavery)[6], but as mentioned previously, I do not discuss this category. The Māliki school of law makes provision for a fourth category, namely the *bayt al-māl* (public treasury), which was historically inherited from an estate where there were no surviving relatives or where the Qur'anic heirs received their stipulated shares, and there were no agnatic heirs to inherit the residue. In such an instance, according to the Māliki school, the public treasury inherits the residue.[7] We do not have the equivalent of an Islamic public treasury in South Africa and I, therefore, do not delve into a discussion on this category.

This thesis focuses on those heirs related to the deceased by blood or marriage. In both instances, the relationship to the deceased must be based on valid legal grounds, namely, there has to be a valid marriage, or the blood relationship has to be considered legitimate in terms of Islamic law.

[4] See §5.3(c)for a discussion on distant kindred. See also Coulson *Succession in the Muslim Family* (1971) 30 and Ismail *Islamic Inheritance Planning 101* (2013) 49-54.
[5] Coulson (n4)10.
[6] The third ground of inheritance was based on the relationship between a freed slave and his former master. If the master freed the slave, the master would be entitled to inherit from his freed slave if the former slave died without any heirs by blood.
[7] Coulson (n4) 49.

(a) Succession on the grounds of marriage

The laws of marriage and inheritance are integrally related in Islamic law.[8] Spouses are mandatory heirs in IIL.[9] For either spouse to inherit, there must be a valid marriage in existence at the time of the death of the deceased.[10] The requirements for a valid marriage and divorce were set out in chapter three. Disputes inevitably arise around the question of whether the parties have been irrevocably divorced, thereby rendering them ineligible to inherit from each other.[11]

If a revocable divorce has been granted and the husband dies while a wife is in her *iddah*, then she will be entitled to inherit from her deceased husband's estate.[12] Mutual rights of inheritance continue to exist between the parties during the wife's *iddah*.[13] If the husband issues one *talāq* and the wife completes her *iddah* period, the divorce becomes final, and the spouses are no longer entitled to inherit from each other. Where the husband issues a *talāq bid'a*, the divorce is irrevocable from the moment of pronouncement, and the parties are not entitled to inherit from each other. If the wife obtains a *faskh* from a Sharī'ah court based at an MJB, then the *faskh* constitutes a final, irrevocable divorce once granted. The parties will not be entitled to inherit from each other during the wife's *iddah* and beyond.[14] Likewise, a divorce granted through the process of *khul*' is final, and the parties will not be entitled to inherit from each other if either of them dies during the *iddah* and beyond.[15]

[8] Toffar *Administration of Islamic Law of Succession, Adoption, Guardianship, Legacies and Endowment in South Africa* (Unpublished PhD Thesis, University of Durban-Westville, (1998)) 138.
[9] Ibn Rushd *The Distinguished Jurist's Primer Vol II*: A Translation of *Bidayat Al-Mujtahid* (transl) Nyazee (1996) 415.
[10] Coulson (n4) 11.
[11] See *Faro v Bingham* [2013] ZAWCHC 159 and *Hassam v Jacobs* 2009 (5) SA 572 (CC) discussed in §3.5.
[12] Coulson (n4) 17.
[13] Ibid.
[14] *Ibid* at 20. See discussion in §3.5 above with respect to how the courts misunderstood the consequences of a *faskh* in the *Hassam* case.
[15] Coulson (n4) 19.

There is one instance where a third or final *talāq* will not result in a wife losing her right to inherit from her husband's estate, and that is in the case where the husband pronounces a final *talāq* during his *mard al-maut* (deathbed sickness). Where a husband who is ill and potentially on his deathbed issues a *talāq bid'a* or a third and final *talāq*, there is disagreement amongst the scholars on whether the wife loses her right to inherit. According to the Hanafī, Hanbali and Māliki schools, there is a presumption that a husband who issues a final *talāq* during his final sickness or on his deathbed has the improper motive to disinherit his wife, thereby interfering with the compulsory share allocation in IIL.[16] According to their view, the wife should not lose her right to inherit from her husband if he passes away from a deathbed sickness.[17] They view the interference with IIL from two alternative angles: firstly, by issuing a final *talāq* on his deathbed, the husband is attempting to exclude his wife from inheriting her fixed portion of 1/4 or 1/8; alternatively, he is attempting to relieve her from being a compulsory heir, so that she could qualify to receive a bequest of up to 1/3 of the estate.[18] In either scenario, the testator is attempting to interfere with the natural progression of IIL. The Shāfi'ī school differs from their opinion. According to the Shāfi'ī school, if a husband issues a final *talāq* on his deathbed, the wife's right of inheritance is terminated.[19]

Knowing the intricate rules of Islamic divorce is a necessary precursor to understanding whether spouses will be entitled to inherit from each other in terms of IIL. The situation becomes slightly more complicated when these rules have to be applied in the South African legal context.[20]

[16] Ibid 277.
[17] Ibid.
[18] Ibid.
[19] Ibid 276.
[20] See discussion in §8.2(f).

The second and most important ground that lays the foundation for mutual rights of inheritance is that of blood relationships.

(b) Succession on the grounds of blood relationships (*nasab*)

After marriage, a relationship based on blood ties is the most important ground for inheriting from a deceased. The new IIL system terminated inheritance rights based on adoption, fosterage, or tribal allegiances. While an adopted child is not entitled to inherit from the deceased,[21] the deceased is entitled to make a bequest to an adopted child.[22]

The patrilineal line formed the foundation upon which an heir inherited from the deceased.[23] Furthermore, legitimacy at birth was indispensable to recognition within any line of ascendancy and descendancy. There is no legal relationship between a father and his extramarital child.[24] An extramarital child is a child conceived and/or born out of wedlock. IIL does not recognise the existence of legal rights and duties, including those of inheritance, between an extramarital child and his or her father or the blood relatives of the father.[25] In Sunnī jurisprudence, an extramarital child is not precluded from inheriting from its mother and from her family.[26]

An extramarital child cannot be legitimised by the subsequent marriage of the parents.[27] When a child is born to a married woman, it is presumed that the child is the legitimate child of her husband based on the Arabic maxim: *al walad li'-firāsh* translated as 'the child belongs to the

[21] Coulson (n4) 22.
[22] Mohammedi 'Sharia-Compliant Wills: Principles, Recognition and Enforcement' (2012) 57 (2) *New York Law School Law Review* 259 at 266.
[23] The patrilineal line refers to descent through the male line. In §9.3(b) I discuss the implications of excluding descendants through the female line from inheriting.
[24] Coulson (n4) 22; 172-173.
[25] Ibid.
[26] Ibid 23.
[27] Ibid.

marriage bed'.[28] Aside from the maxim, there are other legal presumptions pertaining to legitimacy. There is the presumption that a child born less than six months after the conclusion of the marriage is considered an extramarital child, as the minimal gestational period is considered six lunar months.[29] This is the position of the majority of schools and is adopted in South Africa, as borne out by my empirical research.[30] However, a minority of Sunnī scholars like Ibn Taymiyyah[31] espouse the view that if the husband acknowledges *iqrār* (paternity) of the child, then the child's genealogical relationship would be established for the purposes of inheritance, irrespective of when it is born.[32]

There is also a presumption that if a child is born six months or more after the spouses have concluded a valid marriage contract, then the child is considered to have been born within wedlock unless the husband denies paternity.[33] The implication of denying paternity would be that the wife is guilty of *zinā* (adultery), which is considered a crime in Islamic law with serious consequences.[34] To avoid a charge of adultery and the onerous evidentiary burden that attaches to such a charge, the parties engage in a procedure referred to as *li'ān* (mutual oath-taking), whereby the husband undertakes an oath four times denying paternity, and the wife has a choice of confessing to adultery or undertaking a similar oath four times, denying the husband's allegations.[35] As a result of this oath-taking process, the child is disowned by the husband, who has no further obligations towards the child in terms of maintenance or inheritance. The

[28] Ibid at 23.
[29] Ibid; Khan *The Islamic Law of Inheritance – A comparative study of recent reforms in Muslim countries* (2007) 51; Aminu 'Illegitimate child (*walad al-zina*) and his position in Islamic succession' (2015) 20 *Journal of Humanities and Social Science* 12 at 13.
[30] See discussion on Fatwa 1 in §6.8(d).
[31] Aminu (n29) 13.
[32] There are detailed rules pertaining to acknowledgment of paternity and the approaches adopted by the various schools. For a comprehensive discussion on these rules and criteria, see Sujimon '*Istilḥāq* and its role in Islamic law' (2003) 18 *Arab LQ* 117-143.
[33] Khan (n29) 51; Coulson (n4) 23.
[34] Coulson (n4) 23.
[35] Ibid 25.

husband must initiate this process during the wife's pregnancy or shortly after the child's birth. He cannot invoke *li'ān* if he has already expressly or impliedly accepted the child as his own.[36] *Li'ān* also terminates the marriage finally and irrevocably, thereby terminating all inheritance rights between the parties.

In the modern-day context, where paternity can easily be established through deoxyribonucleic acid ('DNA') testing, denying paternity through the process of *li'ān* would appear outdated.[37] However, there is no consensus in Islamic law on whether DNA testing suffices as proof of paternity or whether it serves as corroborative evidence with *li'ān*. In summary, there are three opinions on the matter: firstly, those who advocate that DNA testing suffices on its own as proof of paternity; secondly, those who argue that DNA testing could be used as corroborative evidence with *li'ān*; and thirdly, those who argue that DNA testing should be disregarded to verify paternity, which is the most conservative position of the three.[38] This is an area of Islamic law that requires further research and requires scholars to exercise *ijtihād* in order to reach new legal rulings that keep abreast with the developments in medical science.[39] The legality and constitutionality of the rulings pertaining to an extramarital child are discussed in greater detail later in this thesis.[40]

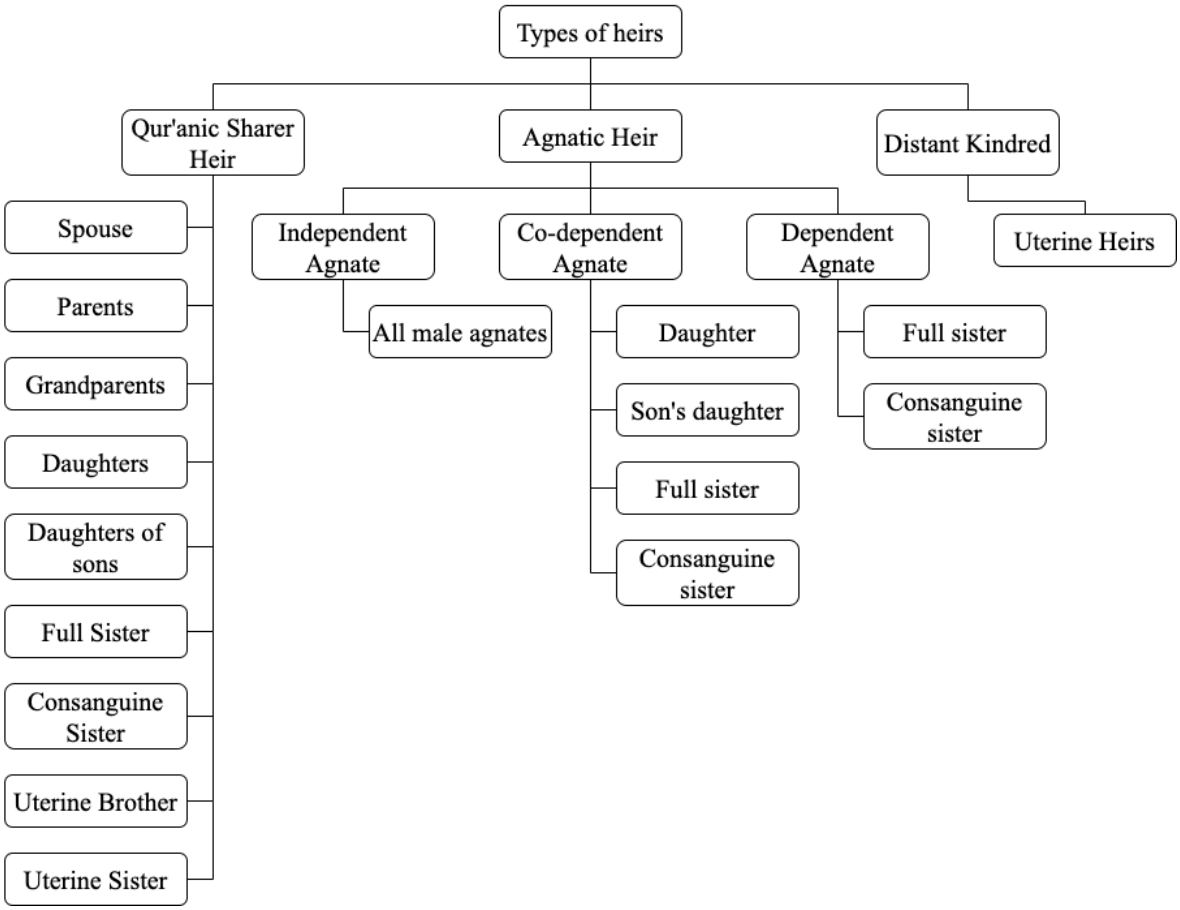
[36] Ibid 27.
[37] I did not come across any cases of *li'an* in my empirical research.
[38] Shabana 'Negation of paternity in Islamic law between li'ān and DNA fingerprinting'(2013) 20(3) *Islamic Law and Society* 157-201; Haneef 'The status of an illegitimate child in Islamic law: A critical analysis of DNA paternity test' (2016) 16 *Global Jurist* 159; see also Ibrahim 'Care of Abandoned Children in Sunni Islamic Law: Early Modern Egypt in Theory and Practice' in Yassari, Moller and Najm (eds) *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions* (2019) 1 at 5-7.
[39] Ismail discusses aspects of IIL in need of *ijtihād* in Ismail (n4) 187-203.
[40] See §9.2(a).

5.3 CATEGORIES OF ISLAMIC LAW HEIRS

There are three main categories of Islamic law heirs, namely the Qur'anic sharer heirs or *ahl al-farā'id* (possessors of compulsory shares), the *asaba* (agnates) and those referred to as *dhawū'l-arhām* (distant kindred). For convenience, I refer to them hereafter as the 'sharer heirs', the 'agnates' and the 'distant kindred', respectively. The sharer heirs are allocated fixed shares in the Qur'ān. Once the sharer heirs take their fixed portions, the residue of the estate devolves upon the agnates.[41] In most instances, the sharer heirs and the agnates will inherit as the deceased's primary Islamic law heirs. Where the deceased is not survived by relatives from either of these two groups, then the estate will devolve upon the distant kindred. The term 'distant kindred' includes uterine relatives,[42] like the descendants of a daughter of the deceased, or it could be more distant relatives. They are those family members who do not fall into the first two categories. They only inherit in the unlikely scenario where the other two main categories do not survive the deceased.[43] I, therefore, discuss the two main categories in far greater detail than I do the distant kindred. I illustrate the three categories of heirs in figure 1 below. I, firstly, discuss the agnates and some of the rules applicable to this category. This is followed by a discussion of the Qur'anic sharer heirs, and lastly, I discuss the distant kindred category.

[41] An agnate refers to a person related to the deceased without the intervention of a female link. See Khan (n29) 76 and the discussion below.
[42] A uterine relative or cognate is related to the deceased through one or more female links. See Khan (n29) 76 and the discussion below.
[43] Ibid 73.

Figure 1: Categories of Islamic law heirs[44]



(a) The agnates

The agnates are those heirs who will inherit the residue of the estate after it has been allocated to the Qur'anic sharer heirs. There are three categories of agnates, namely the independent agnates, the co-dependent agnates and the dependent agnates. The independent agnates are all male agnates who were the primary heirs under the Arab tribal laws and who retained their dominant position in Sunnī inheritance law. They are entitled to the residue of an estate after the Qur'anic sharer heirs have inherited. They are divided into the following categories: (i) the son and his male descendants; (ii) the father and his male ascendants; (iii) the father and his

[44] Figure 1 is based on a similar diagram in Ismail (n4) 31.

male descendants (the brothers of the deceased and their male ascendants); (iv) male descendants of the paternal grandfather (paternal uncles of the deceased and their descendants); and (v) male descendants of the great paternal grandfather and higher paternal grandfathers.[45] The independent agnates are the largest class of agnates.[46]

The co-dependant agnates (‘*asabah bi-ghayri-hi*) are four females who become agnates when they co-exist with their male counterparts of the same degree. They are: (i) the daughter, when her brother (the son of the deceased) is present, (ii) the granddaughter from the son when a grandson of the same or higher degree from the same son is present, (iii) a full sister, when her full brother is present and (iv) a consanguine sister when her consanguine brother is present.[47] They are known as co-dependent agnatic heirs because rights to the residue of the estate are bestowed upon them owing to the presence of another agnatic heir. So a son of the deceased will convert a daughter of the deceased into an agnatic heir.

The dependent agnates *(‘asabah ma’a al-ghayr*) is the third category of agnates, and constitutes two groups of people, namely female siblings sharing the same parents (full sisters) and female siblings sharing the same father (consanguine sisters) when they inherit together with a daughter or a granddaughter from a son or his descendants, or both; provided there is no male sibling.[48]I discuss examples of this category below.[49]

There are various rules which govern the category of agnatic heirs.

[45] Claims of descendants are superior to those of ascendants.
[46] Ismail (n4) 45.
[47] Ismail (n4) 47.
[48] Ismail (n4) 47.
[49] See §5.3(b)(ix) below.

(i) Al-Jabarī rule

The agnates are governed by three rules, which are collectively referred to as al-Jabarī's rules. These can be summarised as follows:

- The rule of class stipulates that members of a higher class will exclude members of a lower class, except for the brothers of the deceased, who are not excluded from inheriting by a surviving grandfather according to the majority of the Sunni schools.[50]
- The rule of degree stipulates that those nearer in degree to the deceased exclude the more remote.[51] Thus, among relatives of the same class, the nearer in degree to the deceased will exclude the more remote. Therefore a son's son will be excluded by the son of the deceased.
- Full-blood relatives are preferred over half-blood relatives among male collaterals in the same degree of relationship to the deceased.[52] Full-blood siblings share the same parents. Consanguine siblings share the same father but different mothers. Uterine siblings share the same mother but different fathers. Among the agnatic heirs of the same class and degree, full siblings take priority over consanguine siblings.

(ii) Rule of Ta'sīb

According to this principle of *ta'sīb*, a male agnate converts a female sharer heir, of the same class, degree, and strength of blood tie, into a residuary heir.[53] In this scenario, the male agnate will inherit double the female's share. This principle applies to lineal descendants and relatives on the paternal side.[54] By way of example, the Qur'ān stipulates fixed shares for

[50] Khan (n29) 68; Coulson (n4) 33. The case of the grandfather inheriting with the brothers of the deceased is complex and is discussed in greater detail §5.3(b)(vii) below.
[51] Khan (n29) 68; Coulson (n4) 33.
[52] Khan (n29) 69; Coulson (n4) 34.
[53] Khan (n29) 69.
[54] Ibid 43.

daughters,[55]however, if a deceased is survived by both a son and a daughter, then the son converts the daughter from a Qur'anic sharer heir into a residuary heir. The son will then inherit double the share of the daughter. In this instance, the daughter is said to inherit as a co-dependant agnate as opposed to the son, who is an independent agnate.

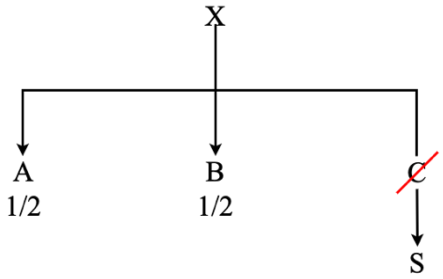
Coulson correctly notes that female Qur'anic heirs are always converted into co-dependant agnate by male relatives of the same class, degree and strength of blood tie.[56] The only Qur'anic female sharer heirs who are not affected by this principle are the wife, grandmother and uterine sister.[57] Each of these three exceptions will be explained in greater detail later in this chapter.

(iii) Representation vs Substitution

A further rule in IIL is that it does not recognise the principle of representation as far as agnates are concerned. Inheritance by representation occurs when a more distant relative automatically steps into the shoes of a nearer relative of the deceased and is treated like the nearer relative for the purposes of inheriting. In IIL, this form of representation is considered contrary to the underlying rule that those nearer in degree inherit to the exclusion of those more remote.[58] By way of example, if the deceased, X, is survived by three sons (A, B and C), then each son will inherit 1/3 However, if X is survived by two sons (A and B) and a grandson (S – a son of the predeceased son C), then A and B will inherit the entire estate in equal shares to the exclusion of S, as set out in figure 2. This is consistent with the rule that those agnatic heirs nearer in degree to the deceased (A and B in this instance) take precedence over those further in degree (S).

[55] See §5.3(b)(i).
[56] Coulson (n4) 42.
[57] Ibid. Uterine siblings, when they inherit from a deceased inherit equal shares.
[58] Coulson (n4)34.

Figure 2: Sons of a deceased exclude a grandson



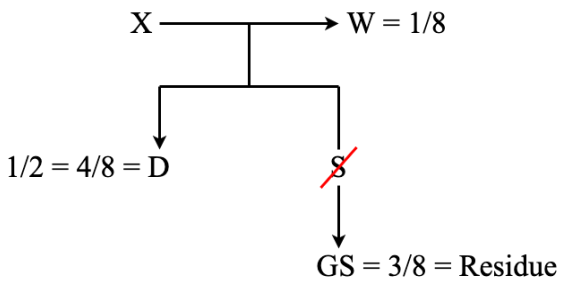
However, the principle of '*substitution'* does exist in certain instances. It might appear, at first glance, to resemble representation, but it is not the same. For instance, agnatic grandchildren and grandparents, at the second or more distant degree of removal from the deceased, are referred to as 'substitute' heirs for the children and parents ('the primary heirs') of the deceased, respectively, as they inherit, when entitled to do so, on broadly the same basis as the primary heirs.[59] They inherit in their own right as the relatives nearer in degree along the same line of relations with the deceased.[60] However, as they are further removed from the deceased than the primary heirs, whom they substitute, both their entitlement and the effect their presence has on other heirs are not the same as the primary heirs would have had in similar circumstances.

So, for instance, an agnatic grandson (however low) is automatically excluded from inheriting by the son of the deceased, whether it be his own father or one of his paternal uncles. However, if the son or sons of the deceased has or have predeceased the deceased, the grandson (the son of a predeceased son) becomes the residuary heir and will stand as a substitute for his father. In that instance, the grandson becomes the highest priority heir in relation to all other relatives of the deceased. Except for the daughters of the deceased and agnatic granddaughters (daughters of sons of the deceased) of the deceased, the grandson is in the same position as the son of the deceased would have been. By way of example, if X was survived by his wife (W),

[59] Ibid.
[60] Ibid 53.

his daughter (D) and his grandson (GS – the son of his predeceased son (S)), then they would inherit as follows: the wife would inherit her fixed portion of 1/8, and the daughter would inherit her fixed portion of 1/2. The grandson would step into the shoes of his father and would receive the residue of the estate.

Figure 3: Agnatic grandson substituting for his father, as a residuary heir

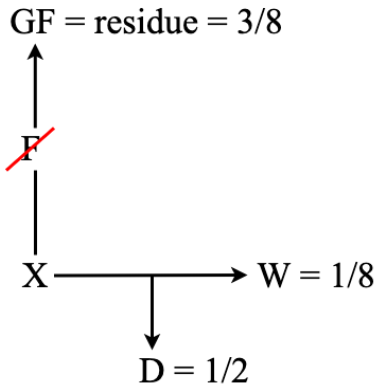


In the above example, although the grandson steps into the shoes of his father, he does not convert the daughter into a residuary heir as his father would have done. The daughter of the deceased does not inherit as a residuary heir with the son's son but will receive her fixed share.[61]

In another example, if the deceased, X, is survived by his paternal grandfather (GF), his wife (W) and one daughter (D), they would inherit as follows: W would inherit her fixed share of 1/8, as the deceased is survived by a descendant, D would inherit 1/2 as the only daughter,[62] and GF would inherit the residue of the estate as the sole agnatic heir. The grandfather steps into the shoes of the father of the deceased in this instance.

[61] Khan (n29) 88-89.
[62] For the inheritance share of a daughter see §5.3(b)(i).

Figure 4: Agnatic grandfather substituting for his son, as a residuary heir



Although IIL does not make provision for representation, a few countries that implement Muslim personal law codes have made provision for the grandchildren of the deceased to inherit through representation should their father predecease them,[63]or in certain jurisdictions, should their mother predecease them.[64]

(b) The Qur'anic sharer heirs

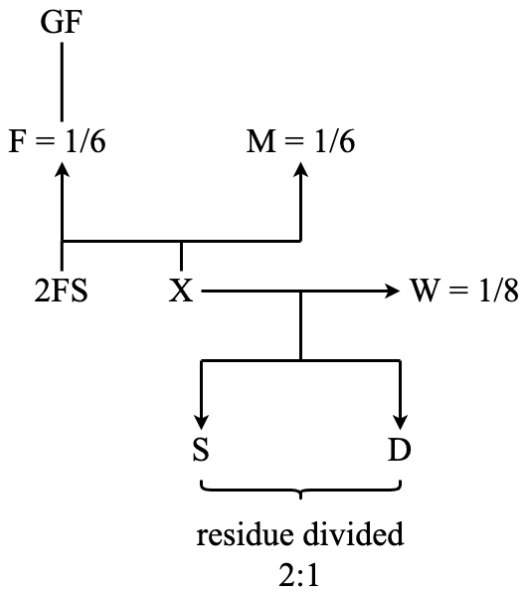
In Sunnī jurisprudence, there are 12 sharer heirs whose portions are mentioned and fixed in the Qur'ān, the *ahādīth*, or through consensus and analogy. They are the husband, wife or wives, father, mother, daughter, agnatic granddaughter (the son's daughter, however low), agnatic grandfather (the father of the deceased's father, however high), grandmother (maternal and paternal, however high),[65] full sister, consanguine sister, uterine sister, and uterine brother. The granddaughter, grandfather and grandmother are not expressly mentioned as sharer heirs in the inheritance verses. They have been included as sharer heirs through *qiyās*.[66] The father and grandfather are sharer heirs, but they can also be agnates who inherit the residue of an estate,

[63] In Syria and Morocco, the children of a predeceased son or agnatic grandson are entitled to inherit the inheritance share their father would have received or one-third of the net estate whichever is less. See discussion in §9.2(c).
[64] In Egypt and Tunisia, the children of a predeceased son or daughter of the testator will inherit the share their parent would have inherited to a maximum of 1/3 of the net estate. See discussion in §9.2(c) and Coulson (n4)145.
[65] There are differences of opinion on whether a grandmother beyond the third degree is entitled to rank as a Qur'anic heir, but I will not be discussing these differences as they hardly find practical application. For a detailed discussion on these differences refer to Coulson (n4) 60-1.
[66] Coulson (n4) 35.

as will be explained below.[67] The five sharer heirs who can never be excluded from inheriting by another heir are the husband, wife, mother, father and daughter.[68] The remaining seven sharer heirs, namely the agnatic granddaughter, agnatic grandfather, grandmother, full sister, consanguine sister, uterine sister, and uterine brother of the deceased will inherit depending on which sharer heirs or agnates survive the testator.

By way of example, if a deceased, X, is survived by his agnatic grandfather (AG), his father (F), his mother (M), his wife (W), a daughter (D), a son (S), and two full sisters (2FS), then they will inherit as follows: F, M and W will receive their fixed portions, being 1/6, 1/6 and 1/8 respectively, whilst D will be converted into a residuary heir by S, and they will inherit the residue, with S inheriting double the share of D as illustrated in figure 5 below.

Figure 5: Deceased survived by agnatic grandfather, father, mother, wife, two full sisters, one son and one daughter



[67] Ibid 37. See also §5.3(b)(iii) and (vii).
[68] They can only be totally excluded if they have one of the impediments discussed in §5.4.

In this instance, the father of the deceased excludes the agnatic grandfather's right to inherit (as the father is both a sharer heir and agnate and those nearer in degree to the deceased exclude those more remote). In addition, the son, who is also an agnate, will completely exclude the two full sisters and will convert the daughter into a co-dependent agnate. This example clearly illustrates that the inheritance of a Qur'anic sharer heir is not always fixed and straightforward. A sharer heir may sometimes inherit a residual share instead of the Qur'anic fixed portion, as was illustrated with the daughter in the above example. Alternatively, the Qur'anic portion is not always 'fixed' in the sense that it might change depending on which relatives survived the deceased, as will be illustrated in the example of the mother in paragraph (ii) below. It is difficult to provide a system of priority among the Qur'anic heirs, as there are so many exceptions to the rule. In addition, there are also the doctrines of *awl* and *radd* that might vary the portion to which an heir is entitled.

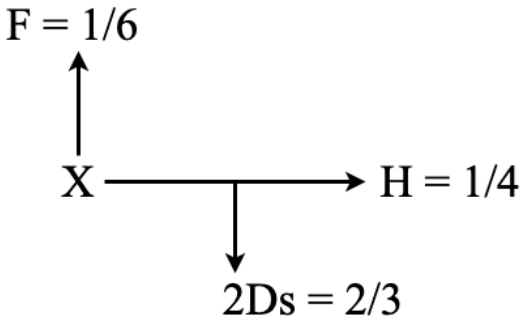
The doctrine of 'awl

The doctrine of *'awl*[69] applies when an estate is oversubscribed. This occurs when after assigning fixed portions to all the sharer heirs, the total of the shares exceeds one hundred per cent.[70]To address this problem, all the Qur'anic portions are reduced pro-rata in order to ensure that cumulatively they add up to one hundred per cent.[71] Hence, the fixed portion of each sharer heir will be reduced proportionally in the following manner: (i) the shares will be reduced to a common denominator, and (ii) the denominator is then increased to the sum of the numerators while allowing the numerators to remain the same.[72] For instance, where a deceased, X, is

[69] *Awl* literally means increase.
[70] Khan (n29) 92.
[71] Coulson (n4) 47.
[72] Ibid.

survived by her husband (H), her father (F), and her two daughters (2Ds), their respective shares would be 1/4, 1/6 and 2/3.

Figure 6: Application of the doctrine of *'awl*



With a common denominator of 12, their respective shares would amount to (H) 3/12, (F) 2/12 and (2Ds) 8/12, thereby exceeding one hundred per cent at 13/12. According to the doctrine of *awl,* one would increase the denominator to reflect the sum of the numerators, namely 13, whilst leaving the individual numerators intact. The shares would then be proportionately reduced and would reflect instead as (H) 3/13, (F) 2/13 and (2Ds) 8/13, respectively. According to Coulson, '[*a*]*wl* rests on the view that a Qur'anic portion does not represent an entitlement which is "fixed" in an absolute sense, but one which is "fixed" only in its ratio to other allotted portions.'[73]

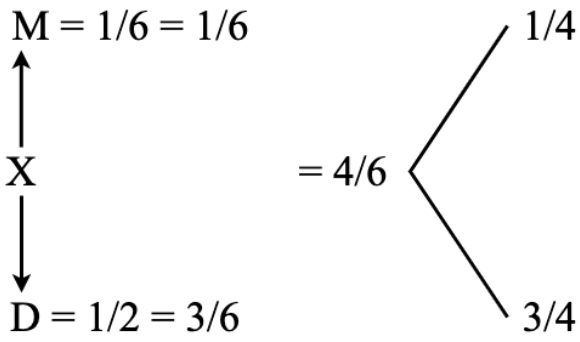
The doctrine of radd

Radd[74] is a reverse of *'awl* and occurs where there is a residue left after all the sharer heirs have received their stipulated shares, but there are no agnates to take the residue of the estate. In this

[73] Coulson (n1) 49.
[74] *Radd* literally means return.

scenario, except for the spouse's portion, each sharer heir's portion is proportionately increased to make the total equal to unity or one.[75] So if a deceased, X, is survived by his mother and daughter only, they would receive 1/6 and 1/2 respectively, which totals 4/6 if one uses a common denominator of 6. This would result in a residue of 2/6 and as there are no agnates to inherit the residue, it will devolve upon the mother and daughter proportionally.

Figure 7: Application of the doctrine of *radd*



As the total of the numerator is 4, the doctrine of *radd* dictates that the denominator will now be reduced to 4 whilst the numerator for each sharer heir remains intact. Thus, the mother receives 1/4, whilst the daughter receives 3/4, thereby ensuring unity or one in the total of allocated fractional portions. In the Hanafī, Hanbali and Shāfi'ī schools, the surviving spouse is not entitled to benefit from *radd* as he or she is not considered a blood relative.[76] In the absence of sharer heirs and agnates, the estate will therefore devolve upon distant kindred heirs. However, if the deceased is not survived by any of these categories of heirs, then the residue of the estate will devolve upon anyone with whom the deceased had acknowledged a relationship.[77] The Māliki school does not recognise the doctrine of *radd*, as it considers the

[75] Coulson (n4) 49.
[76] Coulson (n4) 50. The MJC allows a wife to inherit the *radd* in certain scenarios. See discussion in §6.11.
[77] Coulson (n4)139.

public treasury a residuary heir in the absence of agnates to the deceased.[78] The school is of the view that it is not permissible to give a sharer heir more than what is expressly stipulated in the Qur'ān.[79] The other three schools do not accept the public treasury as a legal heir to the deceased as they believe that blood relatives have greater rights to inherit than the State based on the Qur'anic verse that stipulates: 'Blood-relations among each other have closer personal ties in the decree of God, than (the brotherhood of) believers...'[80] They furthermore share the view that, except for the first few decades after the advent of Islam, the public treasury has not been properly administered.[81] They also correctly argue that the Qur'ān never cites the public treasury as a valid heir.[82]

The rule that a surviving spouse cannot benefit from *radd*, as adopted by all four schools, creates real challenges for a spouse, especially a widow, who can potentially be left destitute whilst some distant relative benefits from the residue of a deceased's estate.[83] In countries that implement IIL, different approaches are taken to *radd*, especially with respect to the surviving spouse. In India and Pakistan, a surviving spouse will be entitled to the *radd*, provided there are no other legal heirs.[84] In Egypt and Syria, the surviving spouse will benefit from *radd* in the absence of other surviving blood relatives,[85] and in Tunisia, the most radical reforms were implemented in this regard, with a surviving spouse being able to benefit from *radd* together with other Qur'anic sharer heirs.[86] These different approaches to *radd*, both by the Islamic legal

[78] Ibid 49; Khan (n29) 93.
[79] Ibid.
[80] Q33:6.
[81] Coulson (n4) 50.
[82] Khan (n29) 93.
[83] For the application of *radd* in the Algerian context, see Aissa 'The Provision of *Radd* in Inheritance Between Islamic Jurisprudence and the Algerian Family Law' (2018) 10(1) *De Jure: Journal Hukum dan Syar'iah* 12.
[84] Coulson (n4) 139.
[85] For a discussion on these provisions, see Anderson 'Recent reforms in the Islamic law of inheritance' (1965) 14 *The International and Comparative Law Quarterly* at 349; Anderson 'The Syrian law of personal status' (1955) 17(1) *Bulletin of the School of Oriental and African Studies, University of London* 34.
[86] Article 143A of the Tunisia Law of Personal Status No. 77 of 1959.

schools and different countries that implement IIL, indicate that the application of IIL is varied and context-dependent.

I will now provide a brief analysis of the general rules pertaining to each of the sharer heirs as they chronologically appear in the three inheritance verses. I furthermore highlight some of the differences of opinion that arose amongst the companions and, later, the different legal schools when it comes to the interpretation of certain aspects of the inheritance verses.

(i) The daughter

The daughter was not an heir under the customary Arab tribal laws, but the new Qur'anic legislation introduced her as a compulsory sharer heir who could not be excluded.[87] She inherits as a sharer heir when there is no son and a co-dependent agnate when there is one son or more.[88] According to verse Q4:11, if she is the only descendant of the deceased, she will inherit 1/2 of the estate. If there are three or more daughters, they cumulatively will inherit 2/3 of the estate. The scholars disagreed about the position of two daughters, with the majority holding that two daughters inherit 2/3, whilst Ibn'Abbās and those scholars who followed him held that two daughters would only inherit 1/2.[89] This difference of opinion is based on the interpretation of the wording 'if *more than two* daughters their share is two-thirds of the inheritance.'[90] The majority interprets verse Q2:11 grammatically as stipulating a 1/2 share for one daughter and 2/3 for two or more daughters, as no explicit mention is made of a fractional portion for two daughters. Ibn'Abbās, on the other hand, based on his interpretation of 'more than two', argued

[87] Q4:11.
[88] Khan (n29) 83.
[89] Ibn Rushd (n9) 413.
[90] Q2:11. My emphasis.

that only three and more daughters would inherit 2/3 whilst two daughters fell under the ruling of one daughter and would therefore inherit 1/2.[91]

If the deceased is survived by a son and a daughter, then, according to the principle of *ta'sīb*, the son converts the daughter into a residuary heir, and the daughter then receives half the portion of what the son receives. Aside from a son, the daughter's share cannot be varied by the presence of other relatives. Both the daughter and agnatic granddaughter do not exclude any ascendants nor any agnatic collateral relative, whether they be male or female.[92] They do, however, exclude uterine siblings.[93] As the first degree of descent, a daughter does not exclude an agnatic grandson or granddaughter.[94]

(ii) The mother

Parents, and especially the mother, hold an elevated status in Islam. There are numerous Qur'anic verses[95] and *ahādith*[96] that emphasise the importance of caring for one's parents. Although the father was always considered an heir under the Arab tribal system, the mother was introduced as a new class of ascendants under the IIL system. The Qur'anic verse, Q4:11, solidified the mother's right as a compulsory sharer heir, and other relatives can never exclude her. Neither the mother nor the grandmother excludes any siblings or any remote agnates. The mother does, however, exclude both maternal and paternal grandmothers but never an agnatic grandfather (no matter how high).

[91] Ibn Rushd (n9) 413.
[92] Coulson (n4) 37.
[93] Ibid.
[94] See Figure 2 as an example of a daughter not excluding a grandson.
[95] By way of example Q2:215 provides: 'They ask you (O Muhammad), what they should spend. Say, 'whatever you spend of good is (to be) for parents and relatives and orphans and the needy and the traveler.'"
[96] Muhammad (PBUH) was reported to have said: 'The best of deeds is the (observance of) prayer at its appointed time and being dutiful to the parents.' Nawawi *Riyad as-Salihin* (*Gardens of the Righteous*) (trans) Mahomedy (2008) 207.

The mother's share can vary depending on which relatives survive the deceased. If the deceased is survived by a child or an agnatic grandchild (however low), then the mother will receive 1/6.[97] Similarly, if the deceased is survived by siblings, the mother will inherit 1/6 as Q4:11 states: '[i]f 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.' All Sunnī schools interpreted 'brothers' to mean full, consanguine or uterine brothers and sisters, but they disagreed about the minimum number of brothers that reduced the share of the mother from 1/3 to 1/6.[98]

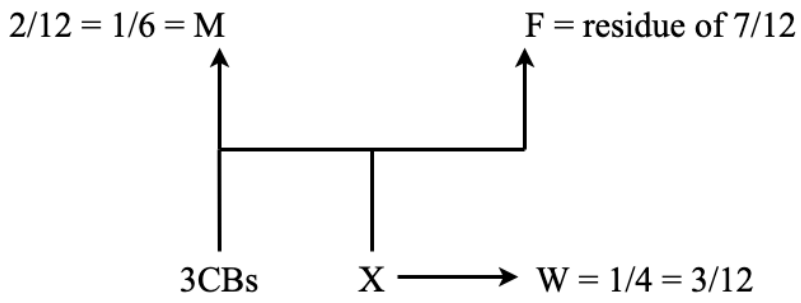
Of the leading companions, Ali and Ibn Mas'ūd were of the view that two or more brothers reduced the share of the mother to 1/6, and the Māliki school shared their view.[99] Ibn'Abbās, however, was of the view that three or more brothers would reduce the mother's share from 1/3 to 1/6 and that two brothers do not reduce the mother's share.[100] The disagreement is centred on the minimum number that a plural noun indicates.[101] Those who argued that the minimum a plural noun could indicate was three held that three or more brothers would reduce the mother's share, whilst those who argued that the minimum included in a plural number is two held that two brothers would suffice to reduce the mother's share. It would be in the mother's interest if Ibn'Abbās's interpretation was adopted, as her share would only be reduced if the deceased were survived by three brothers, not two.

These collateral brothers will restrict the mother's portion to 1/6 irrespective of whether or not they inherit themselves. So if deceased X is survived by his mother (M), his father (F), his wife (W) and three consanguine brothers (3CBs), they will inherit as follows: the mother will inherit

[97] As stipulated in Q4:11.
[98] Ibn Rushd (n9) 416.
[99] Ibid.
[100] Ibid.
[101] In Arabic, words are categorised as singular, dual, or plural, so where an ambiguity occurs in plural words it could potentially refer to two or three and more.

1/6 as her share is reduced by the consanguine brothers, the wife will inherit 1/4 as the deceased had no descendants and the father would inherit the residue as he is the nearest in degree to the deceased, thus excluding the consanguine brothers completely.

Figure 8: Collaterals reducing the share of the mother to 1/6



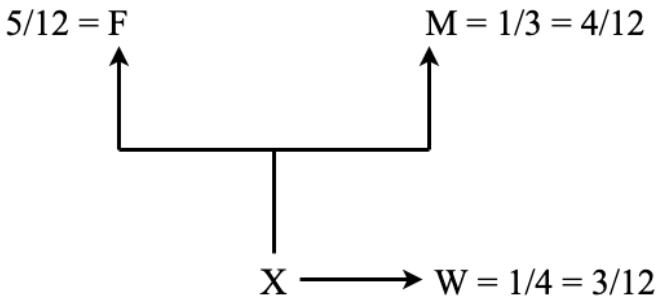
In figure 8 above, although the consanguine brothers have reduced the mother's share from 1/3 to 1/6, they are excluded from inheriting by the father.

If the deceased is survived by no descendants and no siblings, then according to Q4:11, the mother will be entitled to inherit 1/3 as the verse stipulates that 'if no children, and the parents are the only heirs, the mother has a third…'[102] Although the wording of the verse is clear and definitive, its interpretation has been the source of major controversy in the scenario where a deceased is survived by both parents and a spouse, especially where the deceased is a woman who is survived by her husband.[103] In a literal interpretation of the clear wording of the text, the husband would be entitled to 1/2 (as the deceased has no descendants), the mother 1/3 and the residue of 1/6 would accrue to the father. The division along these lines was approved by Ibn'Abbās, who argued that the mother was entitled to 1/3 of the net estate, as this was clearly

[102] Q4:11.
[103] See Ibn Rushd (n9) 416 for the differences of opinion on this point amongst the companions.

stated in the Qur'ān.[104] By the same token, he argued that if the deceased was survived only by his wife, his mother and his father, they would respectively inherit 1/4, 1/3 and 5/12 as in figure 9 below.[105]

Figure 9: Share of mother of deceased survived by father, mother, and wife



This is a sound and valid interpretation by Ibn'Abbās as it is based on the clear, unequivocal wording of the text and is clearly more favourable towards the mother. However, this interpretation of Ibn'Abbās has been rejected by the four Sunnī schools, who share the view that the mother should not inherit the stipulated Qur'anic portion, but should share in the residue with the father, taking half of what he does, after the surviving spouse has taken his portion.[106] Consequently, if the deceased is survived by her husband, mother and father their shares will be 1/2, 1/6 and 1/3 respectively, and where the deceased is survived by his wife, mother and father, then their shares will be 1/4, 1/4 and 1/2, respectively.

Interestingly, this interpretation deviates from the clear Qur'anic text and is not based on *hādith*. It is based on the consensus of the companions,[107] who in turn based their view on the

[104] Ibn Rushd (n9) 416; Coulson (n4) 45.
[105] Ibn Rushd (n9) 416-417; Coulson (n4) 45.
[106] Coulson (n4) 45.
[107] However, there was in fact no consensus of the companions as Ibn'Abbās did not share this interpretation of the said verse.

opinion of the leading companion, Umar, who was also the second caliph of Islam. He was the first companion to grapple with and resolve the case of the parents competing with the husband, and by analogy, this was extended to the scenario where the parents competed with the wife.[108] These two cases are therefore referred to as *'Umariyyatān* ('two decisions of Umar). The way these two cases were reconciled with the express Qur'anic texts was by interpreting the text to mean, 'the mother takes 1/3 of the residue' or as 'where the parents are the only heirs' (the surviving spouse is a fiction in the latter scenario). Coulson aptly notes that neither of these interpretations is as intrinsically sound as the one preferred by Ibn'Abbās.[109] I would concur with him in this regard and it is my opinion that Ibn' Abbā's interpretation of the verse should be preferred over that of Umar.

The main rationale behind the 'Umariyyatān forced interpretation of this verse was the inability of the companions to accept the possibility that the mother of the deceased could be entitled to a greater share than the father of the deceased.[110] This was especially difficult to accept in a context in which the mother had no guaranteed rights to inherit. It was argued that there was no precedent of a female receiving a greater share than her male counterpart where she was competing with a male of the same class and degree in relation to the deceased.[111] This reasoning is not entirely accurate, as we shall see with the shares of uterine siblings, discussed in (viii) below, who also inherit equally as per the Qur'anic injunctions. Also, in the presence of children of the deceased, the Qur'anic shares for both the father and mother of the deceased are equal, namely 1/6 each, in the absence of collaterals to the deceased. Nevertheless, the principle of *ta'sīb* was applied to the scenario where a deceased was survived by a spouse and both parents, thereby rendering the mother a residuary heir with the father in the ratio of 1:2.

[108] Coulson (n4) 45.
[109] Ibid.
[110] Ibid.
[111] Coulson, cites the views expressed by the Māliki authority, al-'Adawī : Coulson (n4) 45.

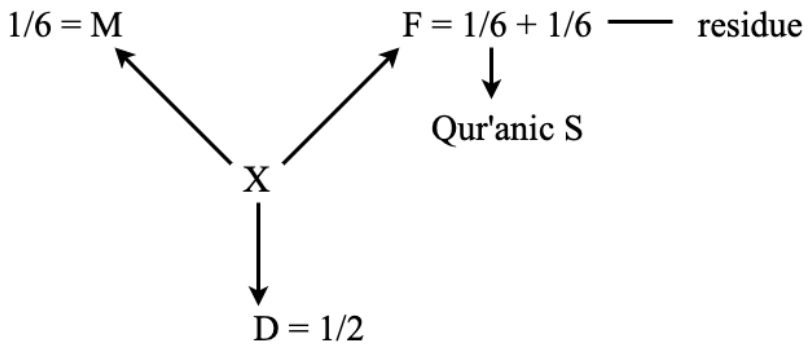
This solution was consistent with the principle that elevated the male agnates over the Qur'anic sharer heirs, a practice that survived from the Arab customary law.

(iii) The father

The father is another compulsory heir who can never be excluded.[112] The father of the deceased can inherit as a sharer heir, a residuary agnate or as both.[113] As a sharer heir, the father will inherit his fixed share of 1/6 if the deceased was survived by any lineal descendants, including an agnatic grandson (however low). In the absence of any child or agnatic grandson, the father will inherit as a residuary agnate as he is the male agnate with the highest degree of proximity to the deceased. He may be excluded as a residuary heir by a male agnatic descendant but cannot be excluded as a residuary heir by female descendants. By way of example, if deceased X, is survived by his mother, father, and son, then each parent will receive 1/6 respectively, with the son receiving the residue. However, if the deceased is survived by his mother (M), father (F), and daughter (D), their shares will be 1/6, 1/6 and 1/2, respectively and whatever residue remains, namely 1/6, will also accrue to the father as the residuary agnate as in per figure 10 below. In this example, the father inherits 1/3 in total, 1/6 as a Qur'anic sharer heir and 1/6 as a residuary agnate heir. The father also excludes brothers and sisters of the deceased as well as more remote heirs, based on the principle that those nearer in degree to the deceased exclude those more remote.[114]

[112] Khan (n29)79.
[113] Ibid.
[114] Ibid.

Figure 10: Father of deceased inheriting as sharer heir and agnatic residuary heir in the presence of a mother and daughter



(iv) The husband and wife

The husband and wife do not exclude other relatives, and they cannot be excluded by other relatives. The portion a surviving spouse will inherit depends on whether their deceased spouse is survived by descendants in the form of a child or an agnatic grandchild. According to Q4:12, a surviving husband would inherit 1/2 of his wife's estate if she had no descendants or 1/4 if she had a child or agnatic grandchild. A surviving wife is entitled to 1/4 of her husband's estate if he had no descendants or 1/8 if he had descendants.[115] Where there is more than one surviving wife, the wives of the polygamous union must share equally in the 1/4 or 1/8 share, respectively. A wife can never be converted into a residuary heir through *ta'sīb*. The wife's share has been regarded as inadequate, especially where there is more than one wife who must share in the paltry 1/8 share of the testator's estate.[116] It was also a recurring concern of many of the attorneys I interviewed in my empirical research.[117]

[115] Q4:12. See also Khan (n29) 78.
[116] Anderson (n85) 350.
[117] In §8.2 I discuss the various ways Muslim wives can augment their financial status on the death of their spouse.

The wife furthermore has a right to remain living in her deceased husband's house during her *iddah* of four months and ten days, which right takes precedence over the inheritance rights of the other heirs.[118] If one accepts the opinion that the widow verse was never abrogated, then a husband may also bequeath one year's worth of maintenance to his wife on the condition that she remains living in his home for a year after his death.[119]

(v) The granddaughter

Like the daughter, an agnatic granddaughter was not an heir under the customary Arab tribal laws. The granddaughter was designated as a sharer heir through analogy with the daughter. Only the daughters of the deceased's son, however low, namely the agnatic granddaughters, inherit as Qur'anic sharer heirs. The daughter's daughter is not regarded as a sharer heir but is classified as distant kindred. The various permutations under which the agnatic granddaughter can inherit are varied and complex. I do not traverse each of these permutations as it is beyond the scope of this thesis. They are deemed to be in a group of 'female children' to whom the Qur'ān allocated a collective share of 2/3 of the estate.[120] Their right to inherit this 2/3 share is dependent on their relative degree of removal from the deceased and which other relatives survive the deceased.[121]

If the deceased is survived by two or more daughters and an agnatic granddaughter, then the collective compulsory share of 2/3 is exhausted by the daughters, and nothing remains for the granddaughter. In this instance, the granddaughter suffers a *de facto*, not *de jure*, exclusion.[122] However, if the deceased was survived by one daughter and one granddaughter, then the

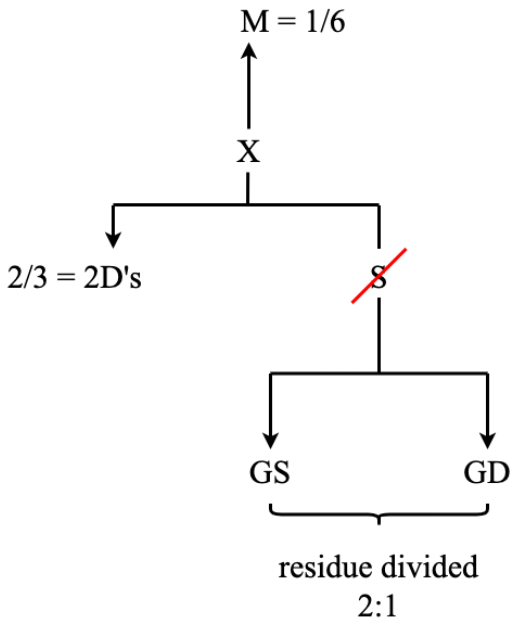
[118] Khan (n29) 79.
[119] See discussion in §4.2(d).
[120] Coulson (n4) 55.
[121] Ibid.
[122] Ibid.

daughter will take her 1/2 share, and the surplus of 1/6 will be inherited by the granddaughter.[123] In this scenario, the granddaughter is not taking a separate or individual share. Instead, she is taking 1/6 as part of the collective compulsory share of 2/3. The agnatic granddaughter and the daughters of the deceased are, therefore, co-owners of the 2/3 collective compulsory share and should the daughter decide to sell her 1/2 of the collective share; the granddaughter will have a pre-emptive right to purchase the 1/2 share.[124] In the absence of a daughter to the deceased, the entire 2/3 share will be inherited by the granddaughters.

Unlike other substitute heirs, namely the grandfather or grandson, who are excluded by their primary heirs, the agnatic granddaughter is *de jure* never excluded by other daughters of the deceased.[125] She will, however, be excluded by a son or nearer agnatic grandson according to the principle that those nearer in degree exclude those more remote; but apart from this, she will generally replace the daughter in the latter's absence.[126] Like the daughter, she also excludes the uterine siblings of the deceased from inheriting, and she will inherit either the Qur'anic stipulated share for a daughter or the residue if she is converted into a residuary heir by a grandson of equal degree. An example of the last-mentioned scenario would be if the deceased, X, were survived by his mother (M), two daughters (2Ds), a son of a predeceased son (an agnatic grandson (GS)), and a daughter of a predeceased son, (an agnatic granddaughter (GD)). In this scenario, the mother will inherit 1/6, the two daughters will inherit 2/3, and the residue will be divided between the grandson and the granddaughter in the ratio of 2:1, as the grandson converts the granddaughter, who is the same degree as him, into a residuary heir.

[123] The surplus is calculated as 2/3 less 1/2 equals 1/6 (⅔ - ½ =. ⅙).
[124] Coulson (n4) 55. In this context pre-emption arises when the owner of an undivided share in property sells the share. The co-owner of the property will then have the first option to purchase the share being sold.
[125] Coulson (n4) 55.
[126] Ibid.

Figure 11: Agnatic granddaughter of deceased converted into a residuary heir by an agnatic grandson in the presence of two daughters and mother



A granddaughter will always be converted into a residuary heir by a grandson who is in the same degree as herself.[127] She will also be converted into a residuary heir by a grandson of a lower level when there are two or more daughters that exclude her from sharing in the collective compulsory share of 2/3. This is an exception to the rule that *ta'sīb* only applies to male and female relatives who share the same degree of closeness to the deceased.[128]

(vi) The grandmother

The grandmother was also a new class of ascendants under the new IIL system, and she is entitled to 1/6 as a sharer heir in the absence of the mother. The grandmother can be a paternal or maternal grandmother. The grandmother (however high) serves as a substitute for the mother, and if there is more than one grandmother, they share equally in the 1/6.[129] As a

[127] Ibid 57.
[128] Ibid.
[129] Ibid 60.

substitute heir for the mother, the grandmother does not always share the same entitlements as the mother under all circumstances. Unlike the mother, the grandmother's share is never increased to 1/3 in the absence of descendants of the deceased or the absence of siblings of the deceased. She is also never converted into a residuary heir like the mother is by the father in the *'Umariyyatān* example cited above.[130] Whilst there is consensus amongst the Sunnī schools about the quantum of the grandmother's share, there are differences of opinion on the circumstances under which the grandmother may inherit. Some of these differences in opinion are of academic interest only, as they concern the inheritance rights of great grandmothers or grandmothers who are further removed from the deceased, and I therefore do not discuss these differences.[131]

Other differences concern the rules of exclusion between grandmothers and whether a distinction should be drawn between paternal and maternal grandmothers. The Hanafī and Hanbali schools regard grandmothers as a single group and hold that a nearer paternal or maternal grandmother of the deceased will exclude more remote grandmothers on both sides.[132] The Māliki and Shāfi'ī schools distinguish between maternal and paternal groups, and within each group, the nearer will exclude the more remote.[133]Another difference of opinion relates to whether the father of the deceased excludes the paternal grandmother from inheriting. According to the Hanbali school, the father does not exclude the paternal grandmother from inheriting, whilst the other three Sunnī schools are of the view that the father does exclude the paternal grandmother from inheriting.[134] This latter view is based on the fact that the father is closer in degree to the deceased along that particular line of connection.[135]

[130] Ibid.
[131] See Coulson (n4) at 61 for a further discussion on these differences.
[132] Ibid.
[133] Ibid 62.
[134] Ibid.
[135] Ibid.

(vii) The grandfather

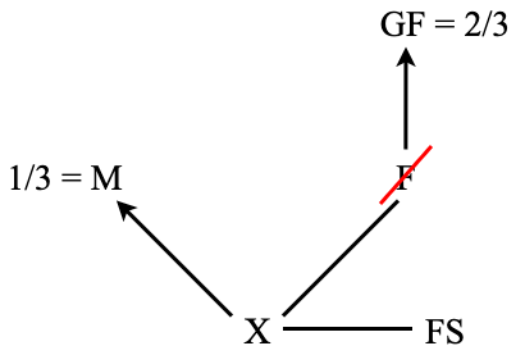
In the absence of the father, the agnatic grandfather[136] will replace the father and will inherit 1/6 as a Qur'anic sharer heir if the deceased is also survived by a son or agnatic grandson. The grandfather will inherit as a residuary heir in the absence of any lineal descendants to the deceased. Like the father, he will potentially inherit in a dual capacity in the presence of the daughter and the agnatic granddaughter, first as a sharer heir who inherits 1/6 and then as a residuary heir. There are two exceptions where the grandfather does not substitute the father in every respect. Firstly, where a spouse and a mother survive the deceased, then the grandfather does not convert the mother into a residuary heir through *ta'sīb*, as the father does. The spouse will take his or her fixed Qur'anic portion; the mother will take 1/3 as the deceased had no descendants, and the grandfather will take the residue. Secondly, according to most Sunnī scholars, unlike the father, the grandfather does not exclude the agnatic brothers and sisters of the deceased.[137]

The case of the agnatic grandfather,[138] however high, competing with the agnatic siblings for inheritance is another area of great dispute and differences of opinion exist amongst the scholars, as there is no explicit Qur'anic text or *ahādith* dealing with this scenario. It is beyond the scope of this thesis to delve into detail on each of these rulings or the rationale behind each ruling. Suffice it to say that each ruling is adequately substantiated and can therefore be adopted as a position when deciding on the inheritance of the agnatic grandfather in competition with collaterals.[139] The Hanafī school adopted the position taken by the companion Abū Bakr, who

[136] The grandfather from the maternal side is considered distant kindred.
[137] These include both full and consanguine siblings.
[138] This problem does not involve non-agnatic grandfathers like the maternal grandfather or a father's mother's father.
[139] See Coulson (n4) 79-90 and Ibn Rushd (n9) 420-423 for the detailed rationale behind these rulings.

held that the grandfather excluded all brothers and sisters of the deceased.[140] Hence, where the deceased, X, is survived by his mother, a full sister and an agnatic grandfather, the mother would receive 1/3 and the grandfather the residue of 2/3, thereby completely excluding the full sister.

Figure 12: Grandfather inheriting with mother and two full sisters of deceased



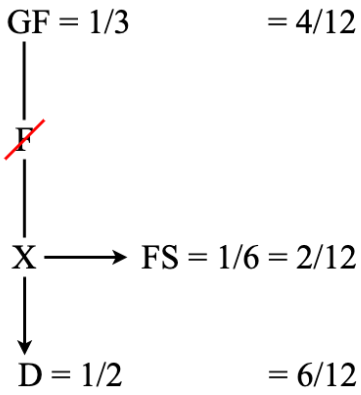
In the above example, the grandfather, who replaces the father, excludes collaterals, just as the father would. Furthermore, as the nearest agnatic male ascendant of the deceased, the grandfather will also inherit as a residuary heir.

The remaining three schools held that the grandfather would inherit alongside the collaterals but then differed on the acceptable mode of distribution between the two parties. The companions, Ali and Zaid, espoused two different doctrines on how the grandfather should inherit with the collaterals.[141] The Māliki, Shāfi'ī, and Hanbali schools subscribed to Zaid's doctrine, which stipulated that the grandfather, like the father, will take 1/6 as a Qur'anic heir, where it is to his benefit, but then will also be a residuary heir when inheriting with the

[140] Coulson (n4) 80.
[141] See Coulson (n4) 82-90 for a detailed discussion on each doctrine.

collaterals.[142] In addition, Zaid's doctrine advocated two further advantages that the grandfather would enjoy, namely: (i) when inheriting with the grandfather, sisters of the deceased will not inherit as Qur'anic heirs but will be converted into residuary heirs through the process of *ta'sīb* by the grandfather; and (ii) the grandfather will be entitled to a minimum portion of 1/3 of the collective entitlement of himself and the collaterals, whether from the whole estate or the residue, after deductions of the other Qur'anic shares.[143] By way of example, if deceased X, is survived by his daughter (D), full sister (FS) and grandfather (GF), then D will inherit her Qur'anic portion of 1/2, FS will inherit 1/6 as she will be converted into a residuary by GF and GF will inherit the residue of 1/3 as in figure 13.

Figure 13: Grandfather inheriting with daughter and full sister of deceased



The inheritance of the grandfather, in conjunction with collaterals, is very complex and has many permutations and exceptions that are not possible to discuss in the limited context of this thesis. However, it clearly illustrates, once again, that there are various rulings on how the estate can be distributed in the context where the grandfather and siblings survive the deceased.

[142] Ibid.
[143] Ibid.

(viii) The uterine siblings

Uterine siblings are dealt with in verse Q4:12, which *inter alia* states that '[i]f the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third…'. The scholars' consensus is that 'brother or sister' in this verse refers solely to uterine siblings, whilst the reference to brother and sister in verse Q4:176[144] refers solely to full siblings and consanguine siblings.[145] As a result of this scholarly consensus, uterine siblings inherit in terms of verse Q4:12 and will inherit a fixed portion of 1/6 if there is only one of them or if two or more of them, they share equally, irrespective of gender, in the collective portion of 1/3. The uterine brother does not convert the uterine sibling into a residuary heir, and this is one instance where male and female heirs who are of the same degree of closeness to the deceased share equally. Scholars like Chaudry have used this particular scenario as evidence that gender is not a rationale for the discrepancy in inheritance rights between certain categories of male and female heirs.[146]

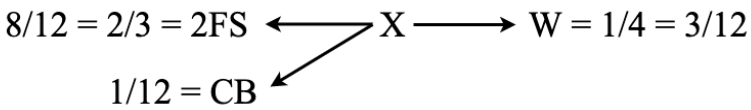
Uterine siblings are totally excluded from inheriting by any child (male or female), agnatic grandchild, father, or agnatic grandfather (however high) that survives the deceased. Of the primary and substitute heirs, only the mother and grandmother do not exclude uterine siblings from inheriting. The uterine siblings are not excluded by full or consanguine siblings.[147]

[144] See §4.2(b) for full citation and discussion of Q4:176.
[145] Coulson (n4) 65; Ibn Rushd (n9) 417.
[146] Chaudhry 'The myth of misogyny: A reanalysis of women's inheritance in Islamic law' (1998) 61 (2) *Albany Law Review* 511 at 537.
[147] Coulson (n4) 67.

(ix) The sisters (Full and consanguine)

When the deceased dies without either parents or a son (however low) but is survived by a full sister, then she inherits 1/2 of the estate, and if there are two or more full sisters, they will collectively inherit 2/3.[148] She inherits as a residuary heir with her full brother in the ratio of 1:2. In the distribution of the collective 2/3 to sisters, full sisters will take precedence over consanguine sisters. So, if the deceased is only survived by one full sister and one consanguine sister, the full sister will take 1/2, and the consanguine sister will take 1/6, which together constitute the collective compulsory share of 2/3. A full sister will also take precedence over a consanguine brother. Hence if the deceased, X, is survived by his wife (W), two full sisters (2FS) and a consanguine brother (CB), then W would receive 1/4, the 2FS would collectively receive 2/3, and CB would receive the residue of 1/12.

Figure 14: Deceased survived by wife, two full sisters and a consanguine brother



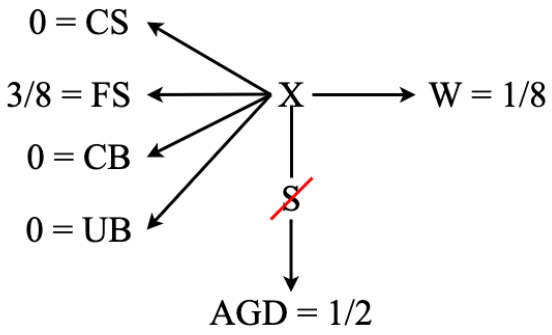
If a deceased is only survived by one consanguine sister, she will inherit 1/2 of the estate while two or more will inherit 2/3 collectively. A consanguine sister will not inherit if the deceased is survived by a child, or a child of a son, father, agnatic grandfather, full brother or two full sisters.[149] As explained above, if there is one full sister, the consanguine sister will inherit as a residuary and will inherit 1/6 (2/3-1/3=1/6). A consanguine sister will also inherit as a residuary heir with a consanguine brother and will receive half the share of her brother. Only full brothers

[148] Khan (n29) 84.
[149] Ibid.

can convert full sisters into residuary heirs, and only consanguine brothers can convert consanguine sisters into residuary heirs. Neither full sisters nor consanguine sisters exclude uterine siblings from inheriting.

The full and consanguine sisters inherit as dependent agnates if they inherit alongside the daughter or agnatic granddaughter of a deceased. So, where a deceased, X, is survived by his wife (W), agnatic granddaughter (AGD), full sister (FS), consanguine sister (CS), consanguine brother (CB), and uterine brother (UB), they will inherit as follows: W will receive 1/8 (as the deceased is survived by AGD); AGD will receive 1/2 (she is a substitute for one daughter); FS will receive the residue of 3/8 (in her capacity as a dependent agnate); CS and CB are excluded by FS (as FS is closer in blood ties to X), and UB is excluded by AGD.

Figure 15: Full sister inheriting as dependent agnate with agnatic granddaughter

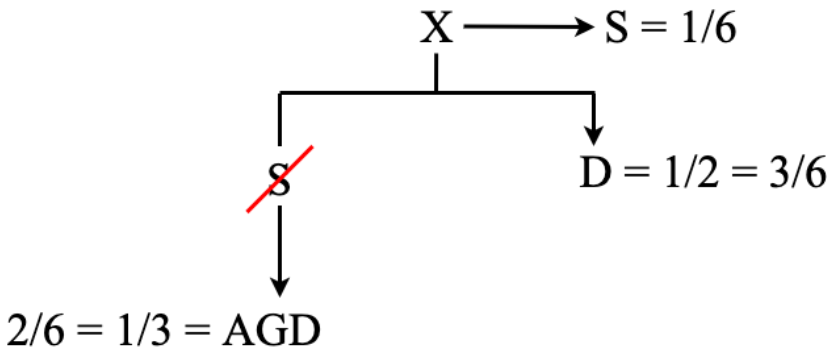


The full and consanguine siblings inherit in terms of verse Q4:176, which stipulates that if the deceased dies without leaving children or parents, then '…if there are brothers and sisters, (they share), the male having twice the share of the female.'[150] Although the verse expressly

[150] Q4:176.

mentions that siblings can only inherit if the deceased was childless, the consensus amongst the Sunnī schools was that agnatic siblings would only be totally excluded from inheriting by the son or agnatic grandson of the deceased but not by a daughter or agnatic granddaughter.[151] The justification for this reasoning in the face of the express wording in verse Q4:176 is the *hadīth* cited above with respect to the estate of Sa'd, where Muhammad (PBUH) allowed the deceased's brother to inherit as a residuary heir after the wife and two daughters had taken their Qur'anic portions.[152] It is also based on a case decided by one of the pre-eminent companions, Mas'ūd, who held that where a deceased, X, is survived by his daughter (D), his agnatic granddaughter (AGD), and his full sister (S), then D would take 1/2, AGD would take 1/3 (bringing their collective Qur'anic share to 2/3), and the residue would go to S, the sister of the deceased as per figure 16.[153]

Figure 16: Deceased survived by his sister, daughter, and agnatic granddaughter



In order to reconcile the above two rulings with the express wording of verse Q4:176, the scholars decided to interpret the word *walad* in the verse to mean 'a male child', and therefore a daughter or agnatic granddaughter will not exclude siblings. This restrictive interpretation

[151] Coulson (n4) 66.
[152] See *hadīth* cited in §4.2(b) above.
[153] Coulson (n4)54.

was only adopted in order to reconcile the *hādith* with the Qur'anic text in verse Q4:176, as the term *walad* in verses Q4:11-12 refers to both the male and female child. The full and consanguine siblings are excluded from inheriting by the presence of the son, agnatic grandson, or father of the deceased, but not by the daughter, granddaughter, mother, grandmother, or grandfather, according to the majority of scholars.[154] A full brother will totally exclude a consanguine brother or sister because of the strength of his blood ties to the deceased.

I have provided a summary of the inheritance rights of the twelve sharer heirs. It is beyond the scope of this thesis to discuss the detailed differences of opinion that occur with respect to the inheritance rights of each sharer heir. Suffice it to say that there are clearly valid and substantial differences of opinion on the inheritance shares that certain heirs are entitled to and that, in fact, the laws of inheritance are not as homogenous or fixed as many perceive. This is of special relevance in the South African context, where Muslim judicial bodies are tasked to interpret IIL and to draw up the distribution certificates of heirs of a Muslim testator who has included IIL in his or her will.[155]

(c) The distant kindred

The term 'distant kindred' is a misnomer as it does not necessarily refer to relatives who are distant or far removed from the deceased. They are male or female relatives from the female side who are not included in the Qur'anic sharer heir or agnate categories. So, for instance, the deceased's daughter's child (male or female) will be regarded as distant kindred, and so will the deceased's maternal grandfather, even though the grandchild and grandfather are close relatives of the deceased. The chances of this category of heir inheriting are slim, as they will

[154] Ibid.
[155] See §6.8(a)-(c).

only inherit if the deceased is not survived by any sharer heirs or agnates. I therefore only provide a cursory analysis of this category of heirs and the differences of opinion that exist within this area.

According to the Māliki school, the distant kindred is never entitled to inherit because, in the absence of sharer heirs and agnatic heirs, the estate should devolve upon the public treasury.[156] The other three Sunnī schools are of the view that in the absence of sharer heirs and agnates, distant kindred will inherit.[157] However, they differ in the methods of distribution to distant kindred. The Shāfi'ī and Hanbali schools adhere to *tanzīl* (the doctrine of representation), which advocates the principle that a relative from the distant kindred category will replace the ordinary legal heir through whom he or she is connected to the deceased and will therefore inherit whatever the ordinary legal heir would have inherited.[158] Grandchildren will therefore replace their own ascendants, whilst grandparents will represent their own descendants. Competition between several distant kindreds is regulated by complex rules, upon which I will not elaborate as these rules are not relevant to the research questions, aims and objectives of this thesis.[159]

The Hanafī school adheres to the doctrine of *qarāba* (relationship) regarding the distribution of the estate to distant kindred. This doctrine, in turn, is governed by the rule of exclusion and the rule of apportionment. The rule of exclusion prioritises distant kindred according to the same three rules of class, degree and strength of the relationship applied to agnatic heirs in the al-Jabarī rule discussed above.[160] The rule of apportionment distinguishes between

[156] Coulson (n4) 49.
[157] Ibid 50.
[158] Ibid 92.
[159] Ibid 92-98 for an elaboration of these rules.
[160] See §4.4(a).

apportionment *per capita* and apportionment *per stirpes* as was enumerated by two of the main students of Imām Abū Hanīfa, namely Abū Yūsuf and Al-Shaybānī, respectively. I will not be discussing the detail of these different rulings or the reasoning adopted by each jurist to reach his ruling.[161]

Having discussed the three main categories of Islamic law heirs, I now turn to the question of exclusions.

5.4 EXCLUSIONS (PARTIAL AND TOTAL)

Exclusions from inheritance can be partial or total. A partial exclusion refers to the scenario where an heir is excluded because of the existence of another heir, for example, a grandson of the deceased who is excluded because the deceased is survived by his sons.[162] Total exclusion occurs when someone who was entitled to inherit on the grounds of marriage or blood relationship is excluded as a result of a particular impediment. The heir who is barred from inheriting because of an impediment is considered non-existent at the time the testator dies, and so the net estate will be distributed as if that particular heir were not present.[163] So if the deceased was survived by his father, mother and two non-Muslim full brothers, then the mother's share would remain 1/3 as the non-Muslim siblings do not decrease her share to 1/6, and the father would inherit the residue of the estate. The testator, however, is not precluded from leaving a bequest to a relative who is subject to an impediment. So, in the above example, the testator would be entitled to leave a bequest to the maximum of 1/3 of his estate to his two non-Muslim siblings. I discuss three of the most common impediments in today's modern

[161] See Coulson (n4) 100-107 for a comprehensive breakdown of each ruling and its rationale.
[162] See Khan (n29) 47 for further examples of partial exclusions.
[163] Ibid.

context, namely: (a) children conceived or born out of wedlock; (b) the heir who kills the deceased; and (c) difference of religion between the heir and the deceased.[164]

(a) Children born or conceived out of wedlock

I have discussed the cases of children born or conceived out of wedlock above.[165] In Sunnī jurisprudence, an extramarital child cannot inherit from his or her father or the father's blood relatives.[166] However, such a child can inherit from his or her mother, from her children, and where relevant, from her other relatives as a member of the distant kindred category of heirs.[167] Where the deceased person was an illegitimate child, then according to the Māliki, Hanafī and Shāfi'ī schools, the deceased's mother, her mother and the deceased's mother's children, who are the uterine siblings of the deceased, will inherit their normal Qur'anic shares, whilst the other relatives will inherit as distant kindred.[168] If the deceased in this scenario is not survived by a son or son's son, the deceased will be considered to have no agnates to inherit as residuary heirs.[169] According to the minority Hanbali position, the male agnate relatives of the mother should be considered as the agnatic relatives of the deceased for the purposes of succession only. However, they would be totally excluded if the deceased was survived by a son or son's son (however low).[170]

[164] There are other impediments pertaining to differences of domicile, slavery and estoppel in succession but they find limited practical application in the South African legal context. For a discussion on these exclusions see Khan (n29) 53-54 and Coulson (n4) 37.
[165] See discussion in §5.2(b).
[166] Coulson (n4) 173.
[167] Ibid.
[168] Coulson (4) 174.
[169] Ibid.
[170] Ibid.

(b) Homicide

All legal schools agree that as a matter of public interest, the killer of the deceased shall not inherit from the deceased.[171] However, the schools disagree under which circumstances a homicide will disqualify an heir from inheriting. There are different rules pertaining to deliberate homicide and accidental homicide as well as direct and indirect homicides, which are too detailed to traverse in this thesis.[172] However, of significance is the fact that in Islamic law, homicide is considered a private delictual action more than a public criminal action.[173] There are exceptions, but generally, the family of the victim will decide whether to prosecute the perpetrator or not and whether a penalty should apply in the event of a successful prosecution.[174] In the event of deliberate homicide, the family may insist upon the death penalty by way of *qisās* (retaliation), or insist on the payment of *diyya* (blood money), or decide to exercise mercy and pardon the accused completely.[175]

Having said that, different schools adopt different rulings concerning an heir who is responsible for the death of the deceased. The Shāfi'ī school applies strict liability and maintains that the killer cannot inherit from his victim, irrespective of whether it is a deliberate homicide, culpable homicide, or a lawful execution.[176] The Hanbali school regards homicides that are intentional or negligent and direct or indirect as a ground for disqualification of an heir. However, it excludes lawful executions as a ground for disqualification.[177] The Hanafī school

[171] Coulson cites Al-Ramli who notes that, 'The public interest requires that the killer will be debarred from inheritance since, if he did inherit, killing would accelerate inheritance and lead to universal chaos'. Coulson (n4) 176. In South African law a beneficiary may be precluded from inheriting under a will because of conduct that makes him or her unworthy. See Corbett *et al Law of Succession in South Africa in South Africa* (2001) 81 and authorities cited in *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) at 752G-H.
[172] See Coulson (n4)176-183 for a more detailed discussion on this area of law.
[173] Coulson (n4)176.
[174] Ibid.
[175] Ibid.
[176] Ibid 180.
[177] Ibid.

bases its ruling on causation in homicide and therefore rules that only the direct, unlawful killing of the deceased by an heir disqualifies the heir from inheriting.[178] However, a direct killing could entail an intentional or negligent killing, as 'direct killing' refers to the scenario where the victim's death is caused solely by the killer's physical assault on the victim. In the Māliki school, the killer will be barred from inheriting if he or she causes the deliberate, intentional killing of the deceased.[179] Determining whether an heir will be disqualified from inheriting on these grounds is not a straightforward matter in IIL. It is uncertain whether any of these Islamic rulings would be applicable in South Africa, which has its own prohibitions against the killer of a deceased inheriting from the deceased's estate.[180]

(c) Differences in religion

There is consensus in classical Sunnī jurisprudence that non-Muslim relatives cannot inherit from Muslim relatives, and a Muslim cannot inherit from a non-Muslim relative.[181] Therefore a non-Muslim wife cannot inherit from her husband as a Qur'anic sharer heir, nor can a non-Muslim parent inherit from his or her Muslim child. However, a difference of religion is not a bar to receiving bequests, and a Muslim husband could therefore leave a bequest of up to 1/3 to his non-Muslim wife, which is far more than what she would ever receive as a sharer heir. According to the majority of Sunnī schools, the impediment arises if the differences of religion existed at the time the deceased passed on.[182] The Hanbali school is an exception to this rule, as it holds that if a relative were a non-Muslim at the time of death of the deceased but converted to Islam before the distribution of the estate, then that relative would be entitled to inherit as

[178] Ibid.
[179] Ibid 177, 181.
[180] In South African law a person, who unlawfully causes the death of a person, is barred from inheriting from that person's will or intestate estate. *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) at 752G-H. For a further a discussion on this rule and the relevant case law, see Corbett *et al* (n171) 82-85.
[181] Coulson (n4) 187.
[182] Ibid.

an ordinary Islamic law heir.[183] This particular impediment also differentiates between relatives who are born non-Muslim and relatives who are non-Muslim as a result of apostasy.

Apostasy is considered a serious sin in Islam, and consequently, the ruling with respect to the inheritance of a non-Muslim relative, who became so through apostasy, is far harsher.[184] All Sunnī schools are in agreement that an apostate is barred from inheriting from anyone, whether Muslim or non-Muslim.[185] The Sunnī schools, except for the Hanafī school, hold the view that a Muslim relative cannot inherit from the apostate (male or female) and that the property of the apostate belongs to the public treasury.[186] According to the Hanafī school, the property acquired by a deceased male before the act of apostasy shall devolve upon his Islamic law heirs, whilst property acquired after the act of apostasy shall revert to the public treasury.[187] According to the Hanafī school, a Muslim woman is not subject to the same laws of apostasy on inheritance, and all her property, whether acquired before or after her act of apostasy, will devolve upon her Muslim relatives on her death.[188]

Apostasy furthermore has the effect of immediately terminating a Muslim marriage *ipso facto* with the divorce considered as final and irrevocable.[189] According to the Māliki, Shāfi'ī and Hanbali schools, neither spouse will inherit from the other in this scenario. According to the Hanafī school, an apostate spouse can never inherit from a Muslim spouse; however, an apostate husband is treated as the husband on his deathbed.[190] Consequently, the wife's right

[183] Ibid.
[184] Apostacy is understood as a conversion from Islam to another religion.
[185] Ibid 188.
[186] Ibid.
[187] Ibid.
[188] Ibid 189.
[189] Ibid.
[190] Ibid.

to inherit from her apostate husband will continue to exist during her *iddah* period, as is the case with divorce by a husband on his deathbed.[191]

I have provided a brief summary of the grounds for exclusion from Islamic inheritance. These rules would not be applied in South Africa in the context of intestate succession as the ISA would govern the estate of the deceased. However, where a testator has stipulated in his or her will that IIL should apply to his or her estate, these exclusions are likely to be enforced by Muslim judicial bodies when determining the lawful Islamic law heirs of the deceased. Consequently, they would not include a child born out of wedlock as an heir of a testator nor would they include a non-Muslim relative as an heir of the testator.[192] Deceased estates, including Muslim estates, are wound up and distributed in terms of the AEA.[193] I nevertheless allude to some of the principles that govern the administration of an estate in terms of IIL.

5.5 DISTRIBUTION OF AN ISLAMIC ESTATE

For IIL to take effect, certain factors must be present. The testator (*muwarrith*) must be declared dead in fact or in law. In IIL, there are legal presumptions pertaining to a missing person *(mafqūd*). The presumption of continuity (*istishāb*) applies, and in the absence of factual evidence to the contrary, the *status quo* is presumed to continue.[194] As a result, the basic doctrine of all schools is that a judicial decree of the death of a missing person can only be

[191] See discussion on divorce given on death bed in §5.2(a).
[192] For a discussion on the constitutionality of such exclusions see §9.2(a) and §9.4.
[193] Act 66 of 1965.
[194] See §2.3(b)(vi) for a discussion on *istishāb*.

issued when what is recognised as his or her lifespan has passed.[195] In the absence of such a judicial decree, there is a presumption that the missing person is alive.[196]

The testator must have left property in his or her estate, which can include moveable and immoveable property, to his or her heirs (*wārith*). There is no distinction drawn between moveable or immoveable assets or between real or personal rights to property.[197] All assets in the net estate (*mawrūth*) are available for distribution after the funeral expenses, liabilities, and bequests have been paid out. From the moment the testator dies, his or her heirs acquire vested interests in their shares in the estate.[198] The heirs of a testator can only be determined at the time of the death of the testator.[199]

After the funeral expenses have been paid[200] and before any property can be distributed to the testator's legal heirs, any outstanding liabilities incurred by the testator in his or her lifetime must first be settled. Once the liabilities have been settled, any bequests made by the testator must be paid out, and the residue of the estate is then distributed to the deceased's legal heirs. The inheritance verses are unequivocal about the requirement that only once all liabilities have been settled and bequests paid can the residue be distributed to the legal heirs.[201]

[195] Coulson (n4) 196. According to Hanafī law a life-span constitutes 90 years, while the Māliki school caps it at 70 years. The Shāfi'ī and Hanbali schools leave the determination of the period to the discretion of the judge.
[196] In South Africa, the High Court will presume a missing person to be dead after considering factors like the length of time the person is missing, the age, health and position in society of the missing person. See Jamneck *et al The Law of Succession in South Africa* (2012) 16-17 and cases cited therein. A South African court decree might not be sufficient for the purposes of IIL, if one considers the position of the different schools in (n.195) above.
[197] Khan (n29) 38.
[198] Ibid 40.
[199] Ibid 42.
[200] Funeral expenses include any reasonable costs incurred in the preparation and concluding of the burial of the deceased. In South Africa the custom is for the family of the deceased to bear the costs of the funeral expenses.
[201] See, verses Q4:11-12 and Q4:176.

(a) Liabilities

The liabilities against a Muslim's estate are generally considered of two kinds, namely debts due to God and debts due to people, the latter including secured and unsecured debts.[202] Debts due to God include any amounts owed by the deceased in expiation of sins,[203] any unpaid *zakāh* (compulsory alms tax),[204] that was due at the time of the death of the testator, and the costs of a *hajj* (pilgrimage)[205] if the deceased had not performed it at the time of his or her death. Once again, the scholars differ on whether debts to God are payable from the estate. Whilst most of the schools hold that these debts are compulsory against an estate, the Hanafī school holds that they are not.[206] According to Shāfi'ī jurists, debts to God must be settled before debts to people, whilst the Mālikis stipulate that debts to people should be settled before debts to God.[207]The Hanbalis regard debts to God and people to be on equal footing.[208]

Any unpaid or deferred dower owing to a wife is considered a debt against the estate of a deceased husband.[209] Although it is not commonly listed as a valid claim against the estate, a wife could also put in a claim for arrear maintenance against the estate of the deceased husband.[210] This would arise in the event that the husband was unable to maintain his wife and his family during the subsistence of the marriage, and the wife agreed to maintain herself and their family, with the understanding that the husband would reimburse her for fulfilling his maintenance responsibilities. Most scholars are of the view that arrear maintenance, for

[202] Ismail (n4) 35.
[203] Islamic law makes provision for the payment of monetary compensation where an individual is guilty of engaging in some form of prohibited act. Where for instance a person is guilty of breaking the compulsory fast without good reason, then the person has to feed a certain amount of people as an expiation for their sins.
[204] Muslims must pay a compulsory annual alms tax on their savings.
[205] Performing the *hajj* is a compulsory act of worship for sane adults who are by the means to do so.
[206] Ismail (n4) 35.
[207] Ibid.
[208] Ibid.
[209] Khan (n29) 32.
[210] Salie *Maintenance & Child Care According to Islamic Law* (2001) 147. I did not encounter such a claim for arrears maintenance by a widow against her deceased husband's estate in my empirical research.

whatever period, is regarded as a strong debt and must be repaid unless the wife waives her right to it.[211] Once all the debts have been settled, bequests must be paid out first before the residue of the estate can be distributed to the sharer heirs and the residuary agnatic heirs.

(b) Bequests

The testator has freedom of testation to bequeath 1/3 of his or her estate, subject to the limitations discussed above.[212] Any property, moveable and immoveable, real or personal property, may be given as a bequest by the testator as long as it does not exceed 1/3 the value of his or her estate. According to Coulson, bequests that exceed the 1/3 value of a testator's net estate are considered *ultra vires* to the extent of the excess portion.[213] Only if the legal heirs ratify the bequest, which exceeds 1/3 the value of the net estate, does the *ultra vires* bequest become valid and fully effective.[214] Such ratification can only occur after the death of the testator.[215] According to the four Sunnī schools, the legal heirs will have to ratify a bequest granted to an heir along similar lines as above.[216] As mentioned previously, I subscribe to the view that a bequest can be granted to Islamic law heirs without the necessity of obtaining the consent of the other legal heirs.[217]

5.6 CONCLUSION

It is evident from my discussion in this chapter that the laws of Islamic inheritance are not straightforward and homogenous as there are numerous differences of opinion amongst the jurists on various aspects. Some interpretations render more egalitarian results for certain heirs

[211] Ibid 147.
[212] See §§4.2(c) to (d).
[213] In this regard see Coulson (n4) 235-236.
[214] Ibid 247.
[215] Khan (n29) 231.
[216] Interestingly, this is one of the major difference between Sunnī and Shi'a laws on inheritance, as the Shi'as, allow bequests to heirs and non-heirs. See Coulson (n4) 240.
[217] See §4.2(d). In Egypt, Article 37 of the Egyptian Wills Act equates an heir with a non-heir as valid beneficiaries of a bequest, without requiring the consent of the other heirs. See Khan (n29) 232.

than others do. Ibn'Abbas's opinion is more favourable to the mother in both, the *Umariyyatān* scenario[218] and in the scenario where a deceased was survived by two brothers and their mother.[219] Laypersons are not necessarily aware of these differences of opinion, nor do they understand how a particular calculation is made or what principles and exceptions are applied. They rely on *imāms* and MJBs to determine who their Islamic law heirs will be on their death and what their allocated shares will be. This became apparent when conducting my empirical research, which I discuss in the following chapter.

[218] See discussion in §5.3(b)(ii).
[219] According to Ibn'Abbas only three or more brothers of a deceased would reduce the mother's share from 1/3 to 1/6. See discussion in §5.3(b)(ii).

CHAPTER SIX

EMPIRICAL RESEARCH ON ISLAMIC WILLS AND ESTATE PLANNING PRACTICES IN THE CAPE TOWN MUSLIM COMMUNITY

6.1 INTRODUCTION

Having provided a conceptual overview of Islamic inheritance laws (IIL) in the previous chapter, this chapter deals with how IIL is applied within South Africa. The dearth of empirical evidence on how Muslims administer their estates within South Africa necessitated empirical research.[1] Farooqi argues that there is a need to embark on empirical research in order to establish the lived reality of people and devise more efficient legal rulings.[2] The aims of the empirical research were to establish how Muslims practically implement IIL in South Africa and what are the challenges they encounter.

I employed a mixed-method approach when undertaking my empirical research, combining document analysis with qualitative interviews, which I will elaborate on shortly. I focused my empirical research on the contemporary estate planning practices of Muslims in Cape Town. To this end, I undertook a document analysis of wills stored at one of the leading Muslim judicial bodies ('MJBs') in Cape Town, the Muslim Judicial Council ('MJC'). I also conducted qualitative interviews with: (i) an official at the MJC; (ii) five attorneys in Cape Town dealing with Islamic wills and estates; and (iii) one of the Assistant Masters at the Master's office in Cape Town. The findings of both my document analysis and qualitative interviews will be discussed in greater detail below.

[1] See §1.3 for literature on empirical research in IIL.
[2] Farooq *Toward our Reformation - From Legalism to value-oriented Islamic law and Jurisprudence* (2013) 222.

The first part of this chapter deals with a document analysis of wills stored in the archives of the MJC. I, firstly, provide a breakdown of my findings in the wills followed by a brief analysis of some of the findings. Those findings that require greater analysis, like issues pertaining to the incorporation of IIL into wills and the delegation of testamentary powers to the MJC by testators, I analyse in more detail in chapter seven. Similarly, issues pertaining to the legality of some of the provisions identified in the MJC wills, like succession agreements, will be discussed in greater detail in chapter eight.

This chapter also sets out my findings derived from my interviews with an official at the MJC, an official at the Master's office in Cape Town and five attorneys who specialise in the drafting of Islamic wills and the administrating of Muslim estates. Once again I do not provide a full analysis of all my findings in this chapter as they are too extensive. Issues pertaining to the rights of a surviving spouse, the inclusion of a usufruct in a will, redistribution agreements and how pension pay-outs are dealt with by the MJC are analysed in greater detail in chapter eight.

PART ONE

6.2 DOCUMENT ANALYSIS OF WILLS RETRIEVED AT THE MUSLIM JUDICIAL COUNCIL

The MJC was established in February 1945 and is the oldest MJB in Cape Town.[3] It is the leading MJB in the Western Cape Province,[4] of which Cape Town is the largest city.[5] It is a non-profit organisation, and according to its website, '[i]ts main functions relate to religious

[3] https://mjc.org.za/about-mjc/significance/ last accessed on 30 April 2021.
[4] Moosa and Dangor 'Introduction to Muslim Personal Law in South Africa: Past to Present' in *Muslim Personal Law in South Africa - Evolution and Future Status* (2019) 6 (hereinafter '*MPL in South Africa*').
[5] See §1.4(b)(ii) for the discussion on the sample Muslim community.

guidance, education, Fatawa, Da'wah[6], Halaal certification[7] and Social Development (especially marriage counselling).'[8] It considers itself '[t]he most representative and influential Muslim religious organisation in the Western Cape, recognised locally, nationally and internationally for the religious, cultural and organisational roles it plays in South Africa.'[9] Its offices are currently based in Athlone, on the Cape Flats.[10] The MJC has a Fatwa Department, which issues *fatāwa*. The Fatwa Department consists of a full-time administrator, a *mufti*, and seven scholars of Islamic law. The Fatwa Department is responsible for: (i) answering Sharī'ah queries; (ii) drafting Islamic wills; and (iii) issuing distribution certificates.[11] The *mufti* is responsible for issuing *fatāwa* on behalf of the MJC in response to various legal matters that occur within the community.

6.3 METHOD

The MJC allowed me to access its archives in order to peruse the various Islamic wills it has on record. To assist me with retrieving wills from the MJC archives and capturing the data in respect of these wills, I employed a research assistant. He received comprehensive instructions on what to look for in the wills and worked under my supervision. He assisted in collating all the data retrieved into spreadsheets and made copies of various wills for my analysis. This process occurred over a period of seven months at the MJC offices.

[6] The word *da'wah* refers to the act of inviting or calling people to Islam.
[7] *Halāl* certification refers to the process of certifying products as *halāl* (permissible) in terms of Islamic law. In this context it refers to the certification of food products as *halāl.*
[8] https://mjc.org.za/about-mjc/significance/ last accessed on 30 April 2021.
[9] Ibid.
[10] The Cape Flats is an expansive, low-lying, flat area situated to the southeast of the central business district of Cape Town. It has been described as the 'dumping ground of apartheid' as thousands of 'non-white' households were forcibly removed to these areas during apartheid as a result of the discriminatory Group Areas Act 36 of 1966.
[11] See §5.3(b)(iii).

The MJC archives have records of Islamic wills that start in the year 2002 up until the present. The wills are stored manually in lever arch files at the MJC offices. There are approximately 1 382 wills for the period 2002 to 2018.[12] We uplifted 30 wills at random from each year, starting in 2002 and ending in 2018, which provided a sample of 480 wills. After perusing 480 wills, it became apparent that we had reached saturation point as the same patterns recurred in the wills. Information was recorded from each will and captured in a spreadsheet. The following information was recorded from each will: the name, surname, and sex of the testator; whether it was a joint will drafted by a married couple; whether the will was based on the *pro forma* MJC template; whether special provisions were made for immovable property; whether provisions were made for a bequest, whether provisions were made for a testamentary trust; and whether the wills were compliant with formalities as stipulated in the Wills Act ('WA').[13]

All of the above information was captured in the spreadsheets under various headings. I provide summaries of these findings below in addition to examples of clauses that occur in the wills. I reproduce copies of the first three wills in the texts to illustrate the different MJC templates uncovered in my research.[14] All the wills in the sample follow the format of one of these templates. Differences only occur in the immovable property provision, which I discuss below. For the remaining wills, I only attach copies of the relevant pages dealing with the immovable property provision. These relevant pages are attached as appendices at the end of the thesis. [15] I discuss my findings and analysis under separate headings and restrict my discussion to the salient features of the wills retrieved.

[12] My empirical research on the MJC wills was concluded in 2018.
[13] Act 7 of 1953.
[14] The three wills included in the text are MJC1, MJC2 and MJC3.
[15] See MJC4-MJC7 attached to the thesis as Appendix 4-7.

6.4 FINDINGS

In my findings I firstly, highlight the demographic of the testators, followed by a description of the MJC will template. I then describe the joint wills found in the sample. Lastly, I discuss specific provisions in the MJC wills, *inter alia*, the immovable property provision, the testamentary trust provision and the religious liability provision.

(a) Demographic of testators

The sex of the testator was established on his or her Muslim name. Of the sample retrieved, 229 wills were by females (48%), 137 were by males (28%), and 114 were joint wills by husbands and wives (24%). The joint wills were by couples who were married by civil law and in community of property; an example of such a will is discussed below as MJC2.[16] It was interesting to note the number of Muslim couples who were married by both Islamic rites and in terms of civil law.[17]

Most of the testators were Muslims from lower socio-economic backgrounds. This was established based on the addresses of the testators, which were mainly in geographical locations on the Cape Flats. This sector of the population does not necessarily have the means to secure an attorney to draft wills; using the services of the MJC is a more affordable option.

[16] A joint will consist of two or more separate wills combined into one document. Most joint wills are mutual wills, with the latter entailing some form of reciprocity between the testators. See Corbett *et al Law of Succession in South Africa* (2001) 436.

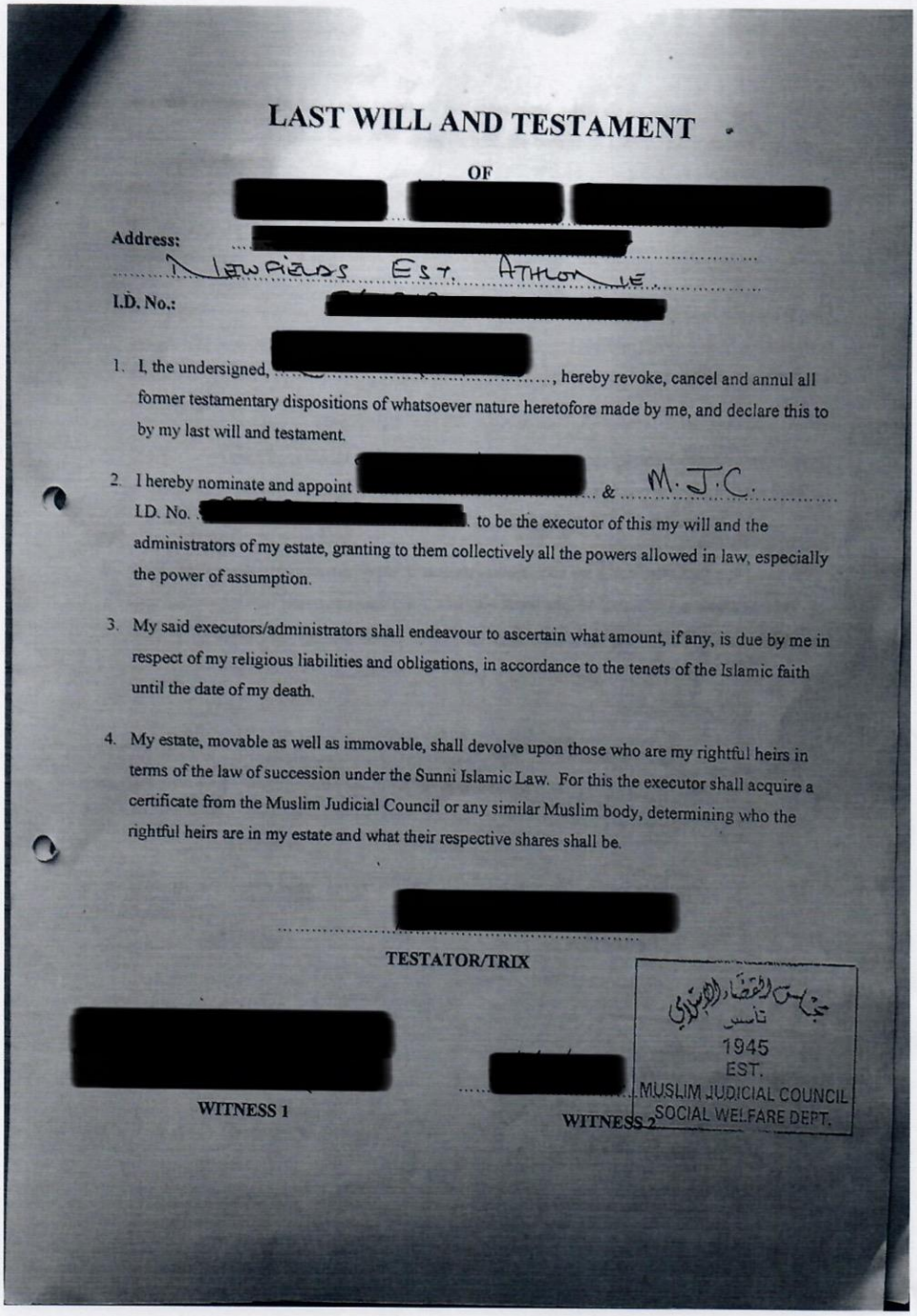
[17] These couples would have married by *nikāh* followed by a civil marriage in terms of the Marriage Act 25 of 1961 ("MA"). In terms of the Matrimonial Property Act 88 of 1984 ("MPA") the default matrimonial property regime is in community of property. On concluding the civil marriage, the assets and liabilities of each spouse are automatically transferred into the joint estate of the spouses with each spouse owning a 50% share in the joint estate. See Heaton and Roos *Family and Succession Law in South Africa* (2012) 185-189.

(b) The standard MJC will template

The wills in the sample were based on the standard MJC will template. This is not surprising, as clients who approach the MJC for the drafting of their wills are automatically supplied with the MJC template, which was confirmed in my interview with P1.[18] P1 confirmed that clients pay R150[19] for the MJC template. I include an example of the MJC template from a 2005 will, which I have marked as MJC1. I have removed the names of all parties mentioned in MJC1. The MJC template makes provision for the name, address, and identity number of the testator to be inserted into blank spaces in the introductory clause of the will. The missing information is usually inserted in handwritten form. The handwritten additions were not initialled or signed by the testator. Interestingly, the *mufti* of the MJC signs as a witness to many of the wills

[18] P1 is the official at the MJC, who managed the wills and estates department at the MJC at the time and was the person who I interviewed. See §6.8 for the findings of my interview with P1.
[19] In 2018, R150 amounted to approximately $11.

MJC1



LAST WILL AND TESTAMENT

OF

[redacted]

Address: [redacted]
Newfields Est. Athlone

I.D. No.: [redacted]

1. I, the undersigned, [redacted], hereby revoke, cancel and annul all former testamentary dispositions of whatsoever nature heretofore made by me, and declare this to by my last will and testament.

2. I hereby nominate and appoint [redacted] & M.J.C.
I.D. No. [redacted] to be the executor of this my will and the administrators of my estate, granting to them collectively all the powers allowed in law, especially the power of assumption.

3. My said executors/administrators shall endeavour to ascertain what amount, if any, is due by me in respect of my religious liabilities and obligations, in accordance to the tenets of the Islamic faith until the date of my death.

4. My estate, movable as well as immovable, shall devolve upon those who are my rightful heirs in terms of the law of succession under the Sunni Islamic Law. For this the executor shall acquire a certificate from the Muslim Judicial Council or any similar Muslim body, determining who the rightful heirs are in my estate and what their respective shares shall be.

[redacted]
TESTATOR/TRIX

[redacted]
WITNESS 1

[redacted]
WITNESS 2

مجلس القضاء الإسلامي
تأسس
1945
EST.
MUSLIM JUDICIAL COUNCIL
SOCIAL WELFARE DEPT.

5. Any one or some of my heirs may take over any asset in my estate on condition that due compensation paid to other heirs in accordance with the certificate mentioned under clause (4).

6. Any inheritance received under this testament shall not form part of any community of property in any marriage, neither become part of the accrual system in any marriage nor be subject to the marital power of any spouse.

7. Any dispute regarding the stipulations of this testament or the interpretation thereof among the heirs shall not be made the subject for litigation in a court of law, but shall be placed before the President of the Muslim Judicial Council for judgement and such judgement shall be considered as final and binding upon all.

8. The Executor shall keep the inheritance of minor children and those unable through some ailment or disability to handle their own financial affairs in separate trusts and may take from there from time to time towards the maintenance, education and medical needs of such minor.

9. The Executor may also invest such funds in such ventures that are Islamically legitimate, but as soon as such a minor becomes a major in the Islamic sense and the Executor considers him/her capable of handling his/her own affairs, such funds shall be handed over to him/her to manage.

[redacted]

TESTATOR/TRIX

[redacted]

WITNESS 1

[redacted]

WITNESS 2

مجلس القضاء الإسلامي
تأسس
1945
EST.
MUSLIM JUDICIAL COUNCIL
SOCIAL WELFARE DEPT.

10. With regard to the property situated at [redacted]
which is ... IN [redacted]
THAT THE PROPERTY BE DISTRIBUTED AMONGST MY LAWFUL HEIRS IN THE BEST MANNER THEY SEE FIT THAT DAY, SHOULD THEY WISH TO SELL OR OTHER THERE MUST BE UNANIMOUS AGREEMENT TO THE PROCESS, SHOULD THE PROPERTY GO TO ONE OF MY CHILDREN, HE/SHE PAYS THE MARKET PRICE AND CHILDREN ON THE YARD BE TREATED AS PEOPLE RENTING UNTILL THEY FIND ACCOMMODATION IN ANY OTHER WAY. MY WISH FOR MY CHILDREN IS THAT THEY STRIVE TO UNDERSTAND AND LOVE ONE ANOTHER.

Thus done and signed at M.J.C. ATHLONE, on this the 12 MAY 20[redacted] in the presence of the following witnesses:

Witness 1: [redacted] [redacted]
Full name Signature

Witness 2: [redacted] [redacted]
Full name Signature

[redacted]
Testator/ trix

مجلس القضاء الإسلامي
تأسس
1945
EST.
MUSLIM JUDICIAL COUNC
SOCIAL WELFARE DEPT.

The testator in MJC1 is a female, born in 1936 and living Athlone on the Cape Flats. Clause 1 is a standard revocation provision revoking all previous testamentary writings.[20] Clause 2 makes provision for the nomination and appointment of the executor and administrator of the estate and the granting of such executor and administrator all necessary legal powers, including the power of assumption[21] hereinafter 'the executor provision'. In MJC1, the testator appoints someone who appears to be a male family member, as well as the MJC, as the executors. It is not clear from the will who at the MJC has to act as the executor. Clause 3 instructs the executors to ascertain what is due by the testator in respect of her 'religious liabilities and obligations, in accordance to the tenets of the Islamic faith until the date of my death', hereafter 'religious liability provision'.

Clause 4 stipulates that the estate of the testator shall devolve upon 'those who are my rightful heirs in terms of the law of succession under the Sunnī Islamic law'. It directs that the executor should obtain a certificate from the MJC or any other similar Muslim body, which had to determine the heirs of the testator and their respective shares. This is the most pertinent clause in a Muslim will as it incorporates the Islamic laws of inheritance into the testator's will. I refer to it as the 'incorporation provision', and 98% of the wills in the sample included the incorporation provision. The remaining 2% of wills had the testators leaving their entire estate to their surviving spouses.

Clause 5 stipulates that any of the heirs 'may take over any asset in my estate on condition that due compensation paid to other heirs in accordance with the certificate mentioned under clause (4)', hereinafter 'redistribution provision'. Clause 6 of the will excludes the inheritance from

[20] A later will must expressly or by necessary implication revoke an earlier will. See Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* (2010) 4-13.
[21] Executors are often given the power to assume another person or persons as co-executors. See Meyerowitz (n20) 5-9.

any community of property of any of the married heirs.[22] Clause 7 makes provision for any dispute or interpretation disagreements that might arise with respect to the will and stipulates that any dispute or disagreement 'shall not be made the subject for litigation in a court of law, but shall be placed before the President of the Muslim Judicial Council for judgment and such judgment shall be considered as final and binding upon all'. I refer to this clause as the 'dispute provision'.

Clause 8 of the will makes provision for a testamentary trust for minor children and those unable to conduct their financial affairs as a result of any ailment or disability. It directs the executor to take money from the trust for the 'maintenance, education and medical needs of such minor'. I will refer to this clause as the 'testamentary trust provision'. Clause 9 grants the executor the discretion to invest any of the funds in the testamentary trust in 'such ventures that are Islamically legitimate' but stipulates that as soon as such minor 'becomes a major in the Islamic sense' and the executor considers him or her to be capable of managing his or her own affairs then such funds should be handed over to him or her. I will refer to this as the 'trust investment provision'.

Clause 10 makes a separate provision for any immovable property of the deceased. It begins in typewritten form, with the phrase '[w]ith regard to the property situated at' then leaves a blank space for the street address of the property to be written in. The handwritten additions are not signed or initialled by the testator. In MJC1 clause 10 continues with following handwritten instructions:

> 'That the property be distributed amongst my lawful heirs in the best manner they see fit that day, should they wish to sell or other there must be unanimous agreement to the process, should the property go to one of my children, he/she pays the market price and children on the yard be treated as people renting until they find accommodation in any other way…'.

[22] This is a standard provision in a will, which allows a testator to exclude any inheritance from the joint estate of the beneficiary married in community of property.

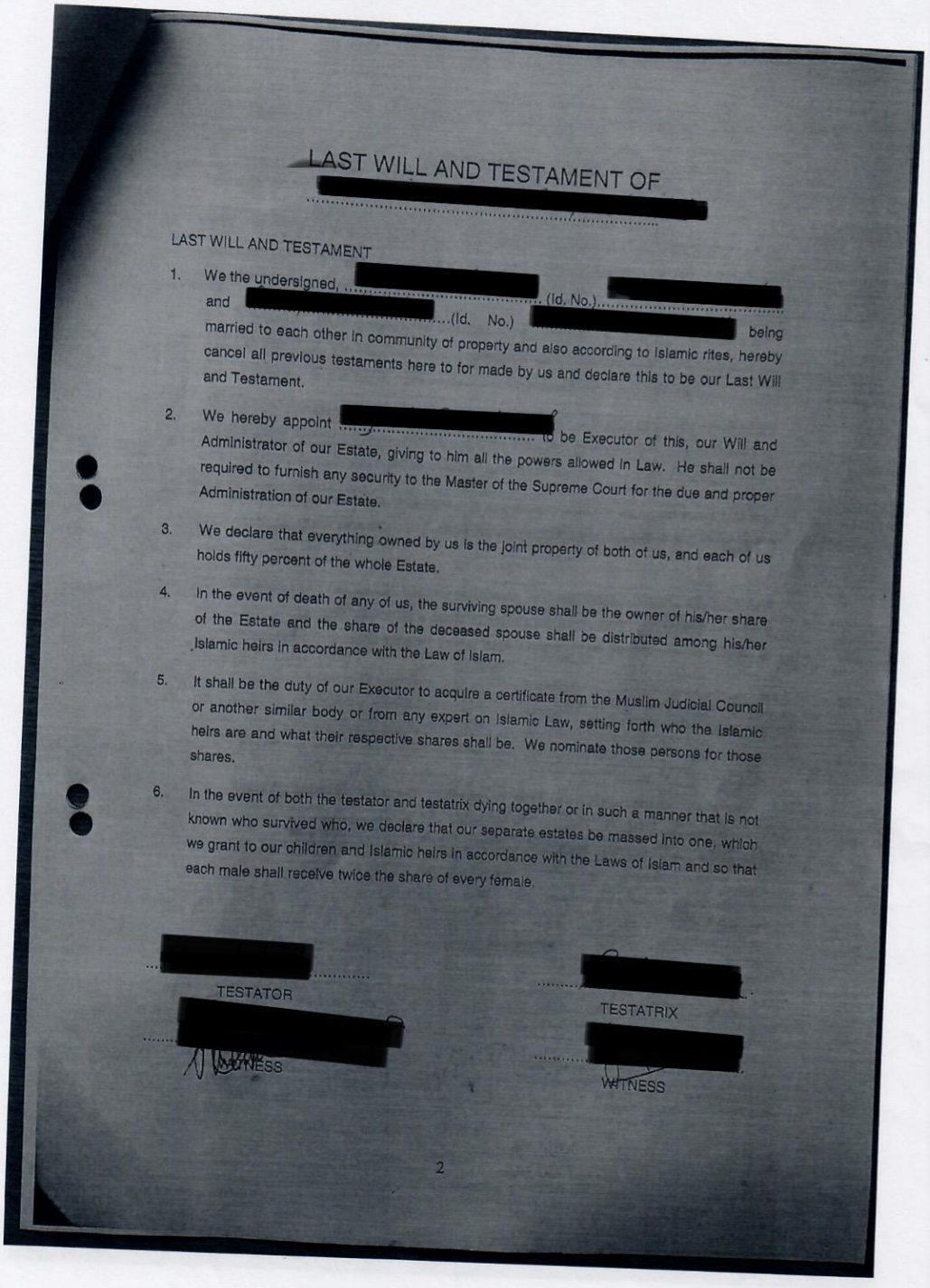
I refer to this as the 'immovable property provision.' Clause 10 stipulates that '[t]he property be distributed amongst my lawful heirs in the best manner they see fit that day.' It is not clear what 'that day' is, and it is unclear how this provision was reconciled with the incorporation provision contained in clause 4. The will was signed at the MJC offices in Athlone on 12 May 2005 in the presence of two witnesses. The immovable property provision repeatedly occurs in handwritten form in the MJC wills in the years between 2002 and 2013. However, as time progresses, the handwritten format of this provision is phased out and is replaced by a typed version of the provision.

(c) The MJC joint will template

As indicated earlier, 114 wills in the sample were joint wills executed by spouses. A joint will is a document containing the will of two or more people.[23] It may operate as the will of the first-dying of the testators only, or it may operate as the will of the surviving testator on his or her death.[24] If it operating as the latter, then the survivor is free to revoke it at any time before his or her death.[25] All the joint wills in the MJC sample were wills of spouses who were married in community of property. I have attached a copy of a will marked MJC2, dated 4th February 2008. MJC2 is similar to MJC1 in many respects, and I therefore only highlight those provisions that differ from MJC1.

[23] Meyerowitz (n20) 5-6.
[24] Ibid.
[25] Ibid.

MJC 2



LAST WILL AND TESTAMENT OF [redacted]

LAST WILL AND TESTAMENT

1. We the undersigned, [redacted] (Id. No.) [redacted] and [redacted] (Id. No.) [redacted] being married to each other in community of property and also according to Islamic rites, hereby cancel all previous testaments here to for made by us and declare this to be our Last Will and Testament.

2. We hereby appoint [redacted] to be Executor of this, our Will and Administrator of our Estate, giving to him all the powers allowed in Law. He shall not be required to furnish any security to the Master of the Supreme Court for the due and proper Administration of our Estate.

3. We declare that everything owned by us is the joint property of both of us, and each of us holds fifty percent of the whole Estate.

4. In the event of death of any of us, the surviving spouse shall be the owner of his/her share of the Estate and the share of the deceased spouse shall be distributed among his/her Islamic heirs in accordance with the Law of Islam.

5. It shall be the duty of our Executor to acquire a certificate from the Muslim Judicial Council or another similar body or from any expert on Islamic Law, setting forth who the Islamic heirs are and what their respective shares shall be. We nominate those persons for those shares.

6. In the event of both the testator and testatrix dying together or in such a manner that is not known who survived who, we declare that our separate estates be massed into one, which we grant to our children and Islamic heirs in accordance with the Laws of Islam and so that each male shall receive twice the share of every female.

[redacted]
TESTATOR

[redacted]
WITNESS

[redacted]
TESTATRIX

[redacted]
WITNESS

2

7. In the event of Clause 6 we appoint [redacted] to be the legal guardian of all our minor children and Executor of this testament.

8. Any one or some of our Islamic heirs may take over any asset in our Estate provided due compensation is granted to the rest of the Islamic heirs in accordance with the certificate mentioned under Clause 5.

9. Any inheritance received under this Will shall not be subject to any community of property in any marriage that heir may contract or have contracted, neither shall it be subject to the marital power of a spouse, nor form part of the accrual system in any marriage.

10. Should any dispute arise as a result of the stipulations of this testament or the interpretation thereof, such dispute shall be placed before the President of the Muslim Judicial Council for a decision and this verdict shall be final and binding on all.

11. The Executor shall keep the inheritance of the minor children in separate trusts and may take from there from time to time towards the maintenance and education and other needs of such a minor.

12. The Executor may also invest such funds in such ventures that are Islamic ally legitimate but as soon as a minor becomes a major in the Islamic sense and the Executor considers him/her capable of handling his own funds, such funds shall be handed over to him/her to manage.

13. With regard to the property situated at No 17 [redacted] Court, Bridgetown, Athlone we declare that in the event of the death of any one of us the property may be transfered to the names of the surviving spouse and children born out of our marriage and be retained as a jointly-owned property for as long as they wish and if by mutual agreement it is decided to sell it any of our children shall have a first option to buy it at a mutually agreed price, whereafter the proceeds shall be distributed among the heirs in accordance with the certificate of the MJC mentioned under clause 5 of this last will and Testament.

[redacted]
TESTATOR

[redacted]
TESTATRIX

[redacted]
WITNESS

[redacted]
WITNESS

3

Thus done and signed at the [redacted] on this the 4th day of February 2008 in the presents of the subscribing witnesses who were present and signed in each others presence.

[redacted]
TESTATOR (Full Name & Surname) SIGNATURE

[redacted]
TESTATRIX (Full Name & Surname) SIGNATURE

[redacted]
WITNESS (Full Name & Surname) SIGNATURE

[redacted]
WITNESS (Full Name & Surname) SIGNATURE

I, the undersigned, [redacted] hereby declare that I have satisfied myself as to the identity of Mr./Mrs. [redacted] by his/her identity document number [redacted] and hereby verify his/her mark/finger print of the left thumb.

Signed: [redacted] Stamp Dated: 4/12/2008

4

Clause 1 in MJC 2 is similar to clause 1 in MJC1 but indicates that the testators are married to each other in community of property and also according to Islamic rites. Clause 3 confirms that all property owned by the testator and testatrix is jointly owned by them, with each spouse owning 50% of the whole estate. Clause 4 stipulates that in the event of one of them dying, the deceased's 50% of the estate has to be distributed to his or her 'Islamic law heirs in accordance with the Law of Islam.' This clause is similar to the incorporation provision contained in clause 4 of MJC1 but only applies to the deceased's half of the estate.

Clause 5 directs the executor to obtain a certificate from the MJC or a similar body or from an expert in Islamic law setting out the Islamic law heirs. The phrase 'from an expert in Islamic law' is an addition to this template. Clause 6 deals with the scenario where both testators die simultaneously.[26] In this event, they instruct that their estate should be massed into one and devolve upon their children and Islamic heirs in accordance with Islamic law so that 'each male shall receive twice the share of every female.' This is the first time express reference is made to massing in the estate. Estate massing occurs in joint wills or mutual wills, where two parties (usually spouses) mass the whole or part of their estates into one consolidated economic unit for the purposes of testamentary disposal.[27] The dispositions by each spouse, where the spouses are married in community of property, apply to his or her half share in the joint estate only, and where they are married out of community of property, they apply to his or her separate estate only.[28] There is a presumption against massing,[29] and in order to avoid doubt, the word 'mass'

[26] Spouses, in a joint will, commonly provide for the eventuality of their dying simultaneously, in anticipation of an accident or catastrophe. There is no presumption in South African law based on age or sex with respect to survivorship of several persons killed in the same catastrophe. It depends on the facts and evidence of each case. In the absence of clear evidence that one of the *commorientes* has survived the other, the court will be inclined to assume that all died simultaneously. See Corbett *et at* (n16) 5 and cases cited in (n7) and Meyerowitz (n20) 5-8.
[27] Jamneck *et al The Law of Succession in South Africa* (2012) 147.
[28] Corbett *et al* (n16) 436.
[29] *Kleyn v Estate Kleyn* 1915 AD 527; *Union Government v Leask's Executors* 1918 AD 447 at 458; *Estate Smuts v Estate Rust* 1923 CPD 449; Corbett *et al* (n16) 438.

should be used by the drafter of the will.[30] In MJC2, the testators direct that their estates should only be massed in the event of both of them dying simultaneously.

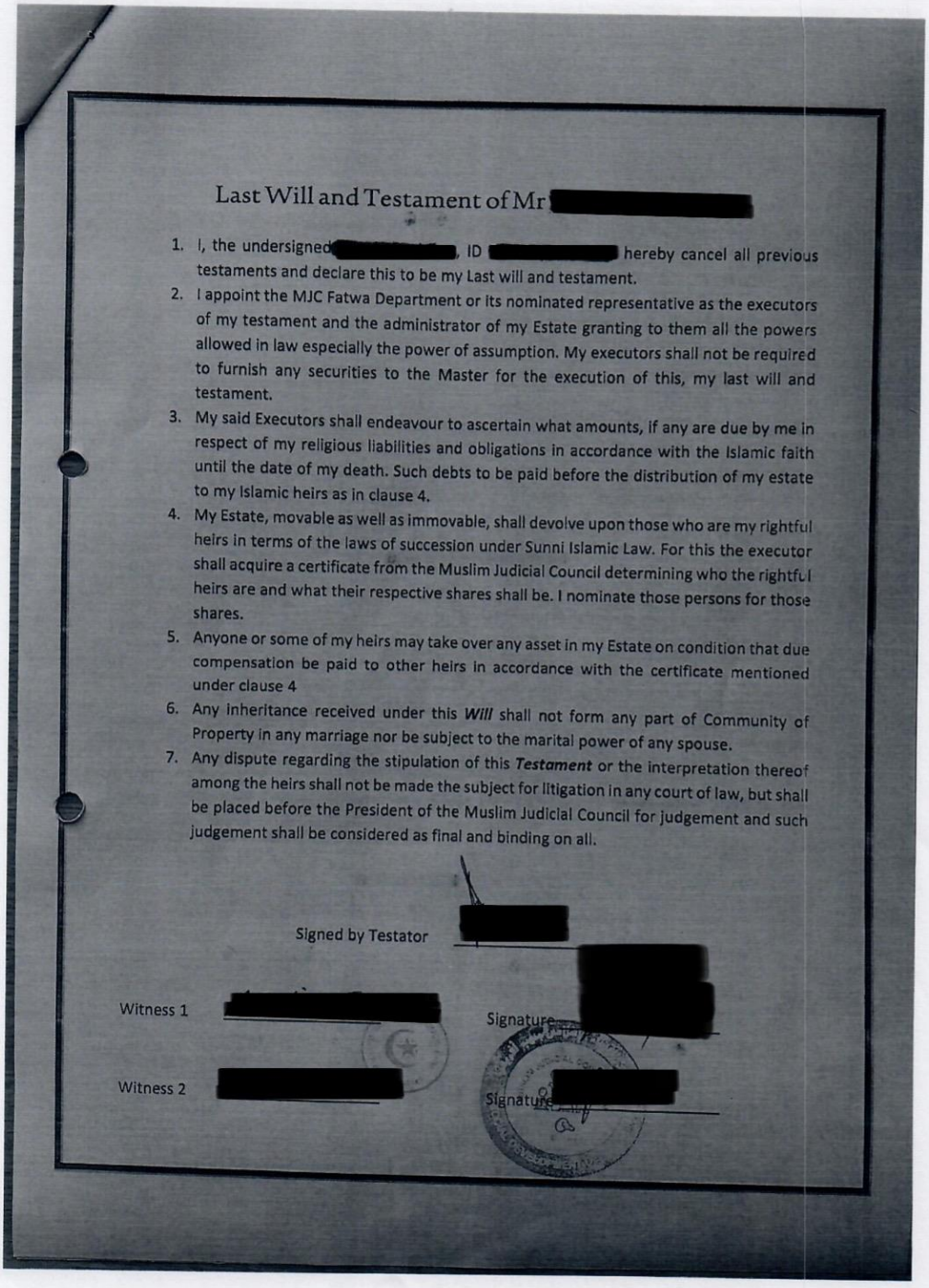
A further addition to the template in MJC2 is the inclusion of clause 7, which appoints a legal guardian to any minor children should both parents die simultaneously.[31] Clause 8 is the redistribution provision, which excludes any inheritance from any community of property of any of the heirs but also excludes the inheritance from forming part of the accrual system in any marriage of an heir.[32] Clause 10 is the dispute provision, clause 11 is the testamentary trust provision, and clause 12 contains the trust investment provision. Clause 13 is also a handwritten immovable property provision and stipulates that in the event of either of the two testators dying, the immovable property, '[m]ay be transfer[r]ed to the names of the surviving spouse and children born of our marriage and be retained as a jointly-owned property for as long as they wish and if by mutual agreement it is decided to sell it [then] any of our children shall have first option to buy it at a mutually agreed price.' It stipulates further that once the immovable property is sold, the proceeds of the sale must be distributed among the heirs in terms of Islamic law.

(d) MJC Template with typewritten version of immovable property provision

From 2014 onwards, the immovable property provision continues to be included in the majority of wills but in typed format, which is consistent with the rest of the will, as can be seen in the example of the will, MJC3 below, dated 28 September 2015.

[30] Corbett *et al* (n16) 436-438.
[31] For a discussion on the simultaneous death of testators see (n26).
[32] Under the accrual system, each spouse retains and controls his or her own estate during the subsistence of the marriage, but on dissolution of the marriage the spouses share equally in the growth their estates have shown during the subsistence of the marriage. See Heaton *et al* (n17) 193. Any inheritance received by a spouse will be excluded from the accrual in terms of clause 9 of MJC2.

MJC3



Last Will and Testament of Mr [redacted]

1. I, the undersigned [redacted], ID [redacted] hereby cancel all previous testaments and declare this to be my Last will and testament.
2. I appoint the MJC Fatwa Department or its nominated representative as the executors of my testament and the administrator of my Estate granting to them all the powers allowed in law especially the power of assumption. My executors shall not be required to furnish any securities to the Master for the execution of this, my last will and testament.
3. My said Executors shall endeavour to ascertain what amounts, if any are due by me in respect of my religious liabilities and obligations in accordance with the Islamic faith until the date of my death. Such debts to be paid before the distribution of my estate to my Islamic heirs as in clause 4.
4. My Estate, movable as well as immovable, shall devolve upon those who are my rightful heirs in terms of the laws of succession under Sunni Islamic Law. For this the executor shall acquire a certificate from the Muslim Judicial Council determining who the rightful heirs are and what their respective shares shall be. I nominate those persons for those shares.
5. Anyone or some of my heirs may take over any asset in my Estate on condition that due compensation be paid to other heirs in accordance with the certificate mentioned under clause 4
6. Any inheritance received under this ***Will*** shall not form any part of Community of Property in any marriage nor be subject to the marital power of any spouse.
7. Any dispute regarding the stipulation of this ***Testament*** or the interpretation thereof among the heirs shall not be made the subject for litigation in any court of law, but shall be placed before the President of the Muslim Judicial Council for judgement and such judgement shall be considered as final and binding on all.

Signed by Testator [redacted]

Witness 1 [redacted] Signature [redacted]

Witness 2 [redacted] Signature [redacted]

8. With regards the property situated at [redacted] Street, Highlands Estate I declare that I am the sole owner of said property and in the event of my death, this property may be transferred to my surviving heirs as a jointly owned property. Should the heirs agree to sell the property, the heirs shall have first option to purchase the property at an agreed price. If none is inclined to purchase the property, it shall be sold on the open market at a market related price and the proceeds shall be distributed among all the heirs in accordance with the certificate mentioned in clause 4 of this last will and testament.
9. The executor shall keep the inheritance of minor children and those unable through some ailment or disability to handle their own financial affairs in separate trusts and may take from there from time to time towards the maintenance, education and medical needs etc of such a person. As soon as a minor becomes a major in the Islamic sense and the Executor considers him/her capable of handling his/her own funds, such funds shall be handed over to him/her to manage.
10. I hereby bequeath to [redacted], DOB, 1991/02/04 a share equal to that of a son or a third of my estate, whichever be the lesser amount.
11. Lastly, I hereby advise all my heirs to fear Allah and to remain steadfast to the teachings of Islam and to continue to work righteousness that their lives may be improved for the better and I wish to advise them not to forget the hereafter.
12. It is also my earnest wish that they shall continue to live in peace and harmony with each other for the days of their lives.
13. It is my sincere wish that the house be retained as a family home and there always be a home for my wife. This is but a wish and cannot be forced on my heirs.

Thus done and signed at Athlone on this the 28th day of September 2015 in the presence of the subscribing witnesses

Signed by Testator [redacted]

Witness 1 [redacted] Signature [redacted]

Witness 2 [redacted] Signature [redacted]

In MJC3, the immovable property provision is contained in clause 8 and is drafted more clearly than the immovable property provision found in MJC1. Clause 8 makes provision for the heirs to have the first option to purchase the property, and if they fail to exercise the option, the property has to be sold on the open market with the proceeds to be distributed amongst the heirs according to the IIL incorporation provision.

In many of the wills, the immovable property provision would stipulate that the immovable property could only be sold if all the heirs, who became the joint owners of the immovable property, agreed to such a sale. This can be seen in both MJC1 and MJC2 above. In clause 13 of MJC3, the testator expresses the following wish with respect to his immovable property: '[i]t is my sincere wish that the house be retained as a family home and there always be a home for my wife. This is but a wish and cannot be forced on my heirs.'

Another variation of the immovable property provision is where a husband and wife have drafted a joint will. In this case, the immovable property provision would stipulate: 'I declare that property [address] is jointly owned by my wife and I, each owning 50%. In the event of my death, my wife shall retain her 50% share of said property with the remaining 50% forming part of my estate to be divided in accordance with the certificate mentioned in clause 4.' The certificate referred to would be the MJC distribution certificate. Of the 480 wills, 356 included the immovable property provision.

(e) Testamentary trust and trust investment provisions

Of the 480 wills, 90% make provision for a testamentary trust for minors or those heirs who are incapable of managing their financial affairs owing to some disability. The executors are instructed to invest the trust funds into 'such ventures that are Islamically legitimate.' Further

clarity is not provided on what these 'ventures' entail. It could be referring to Muslim-owned businesses or Sharī'ah investment funds.[33] The executor would have to decide. The minors would be income beneficiaries in terms of the trust. The investment provision furthermore stipulates that the inheritance, which has been kept in trust on behalf of the minor, must be given to the minor 'as soon as such a minor becomes a major in the Islamic sense….' The legality of this provision is discussed in my analysis below.

(f) Religious liability provision

All the MJC will templates include a provision for any religious liabilities that the testator may have incurred, namely the 'religious liability provision.' In MJC1, the executor is instructed to ascertain the religious liabilities of the testator, but no mention is made of settling such liabilities. By 2015, the religious liability provision is amended and includes an instruction to the executor to pay such liabilities before the distribution of the estate to the Islamic law heirs, as can be seen in clause 3 of MJC3 above. In MJC3, the MJC Fatwa Department, or its nominated representative, is appointed as an executor by the testator. The responsibility would therefore fall on the MJC or its duly appointed representative to establish the religious liability of the testator on his or her death. However, the reality is that the MJC does not undertake this responsibility, as was established in my interview with P1.[34]

(g) Bequest (*wasiyya*) provision

Only 15% of the wills perused make provision for a bequest. The terms 'bequest' and '*wasiyya'* are not necessarily used in the wills but are implied from the wording used in the applicable

[33] These are investment funds that comply with Islamic finance and investment legal requirements. Bhana notes: 'Shariah-compliant products and solutions emphasise partnerships and shared risks over conventional borrowing and interest-led investments. Industries and activities are carefully vetted to exclude sectors perceived to be harmful, such as gambling or tobacco industries.' Bhana 'Shariah-compliant structuring and its relevance to impact investing' (2021) 5 *Money Marketing* 10.
[34] See §6.8(f).

provisions. In clause 10 of MJC3, the testator bequeaths to XX 'a share equal to that of a son or a third of my estate, whichever be the lesser amount.' It is not clear from the face of the will what the relationship is between XX and the testator. XX is a male who shares the same surname as the testator and was born in 1991. It could be that XX is a son of the testator who was conceived or born out of wedlock, and hence he receives the same amount as a son of the testator. However, this is speculation on my part, which is based on the feedback I received from my interview with P1, who indicated that sometimes parents left a bequest for their children who were conceived or born out of wedlock. This was also confirmed in my interview with one of the attorneys.[35]

In MJC3, the bequest provision occurs after the incorporation provision and after the immovable property provision. The testator instructed that the bequest to XX be paid out first before distributing the immovable property, and the residue of the estate had to be distributed to the Islamic law heirs. However, in order to determine the value of the bequest, the executors first have to calculate the share a son would be entitled to from the net estate. The bequest would then be the equivalent of a son's share or 1/3 of the net estate, whichever is the lesser amount.

In MJC4, the testator and testatrix in their joint will stipulated in clause 13, which is handwritten, that 'YY shall be entitled to the share of a son in the estate of his father. We also declare that *one third of the estate* of the testatrix shall devolve upon XX by way of *wasiyyat(sic)*.'[36] This is an example where the term *wasiyya* is expressly mentioned. It is not

[35] See P6 Transcript 28 January 2019 at 7 (hereafter 'P6 transcript') at 8. P6 was one of the attorneys interviewed.
[36] My emphasis. A copy of the relevant provision in MJC 4 is attached at the end of the thesis as Appendix 4.

clear from the face of the will what the relationship is between YY and the testator nor the relationship between XX and the testatrix.

(h) Usufruct provisions

In some of the wills, a usufruct[37] provision occurs either expressly or impliedly. Of the 480 wills reviewed, a usufruct provision occurred in 1/3 of the wills. Common usufruct provisions read as follows: 'I leave my house to my children on condition that my wife be allowed to live in it until her death.' In MJC5, the testator in clause 8 instructs: 'My wife shall have a usufruct of the property at [address].' [38] The usufruct provision usually occurred in the last clause under the immovable property provision.

(i) House as a gift provision

The 'house as a gift provision' also occurred under the immovable property provision. An example can be found in MJC5.[39] I only include the last page of MJC5, which includes a handwritten immovable property provision, dated 23 January 2002. The testator is a male. Clause 8 of MJC5 stipulates various conditions for the distribution of different immovable properties in the estate and reads as follows: '[w]ith regard to the property situated at [A], which is registered in my name I declare it has been *given as a gift* to X to be transferred to his name on my death. The property [B] has *been given to my son*, Y to be transferred to his name after my death if not done before.'[40] Although MJC5 makes provision for the incorporation of the Islamic laws of inheritance, the testator, in a separate handwritten clause, made very

[37] 'A usufruct occurs when ownership is bequeathed to one person, but the right to use, enjoy and take the fruits of the property is bequeathed to another. The latter is called the usufructuary and the owner is called the dominus, remainderman or nude owner' Jamneck *et al* (n27) 167. For a further discussion on the usufruct see §§6.8(f) and 8.2(b).
[38] A copy of the relevant provision in MJC5 is attached at the end of the thesis as Appendix 5.
[39] Ibid.
[40] My emphasis.

specific provisions for his immovable properties. The testator made provision for his wife to have a usufruct over the property situated at [A], which he had gifted to his son X. It is unclear from the face of the will what is meant by the words 'given as a gift' and whether the testator intended gifting the houses to X and Y on his death. However, this would be contrary to the IIL share allocation. It may be that the bequests of properties to X and Y are over and above their IIL shares. It is furthermore unclear how the testator proposes to confer a usufruct on his wife if he has gifted property [A] to his son, X.

In MJC6, the testator is a female who stipulates in clause 10, 'I have given and granted this property as a free gift to my daughters [XX] and [YY] on condition that I will be allowed to continue to reside in the premises…'.[41] In MJC7, the testator is a female who stipulates in clause 10, 'With regard to the property situated at [address], which is registered in my name, I declare that on [date] I have given this property as a free gift to the following persons [XX] and [YY] as joint owners thereof. The property may be transferred to them after my demise. I reserve for myself the right to occupy some portion of the premises until my death…'.[42]

The various 'house as a gift' provision seems to be attempts by testators to donate properties to their children in their lifetime. It appears to be an attempt by the testator to circumvent the rigid Islamic law share distribution system. No transfer occurs to the children in the lifetime of the testators. These provisions appear to be based on a misunderstanding of the law of property, and I discuss their legal implications in greater detail in chapter eight below.

[41] A copy of the relevant provision in MJC6 is attached at the end of the thesis as Appendix 6. MJC6 is dated 28 June 2004.
[42] A copy of the relevant provision in MJC7 is attached at the end of the thesis as Appendix 7. MJC7 is dated 21 January 2008.

(j) The redistribution provision

The redistribution provision stipulates that any of the heirs may take over any asset in the testator's estate, provided the said heirs pay due compensation to the other heirs in accordance with the Islamic law distribution certificate. Hence, if one of the Islamic law heirs wishes to purchase the immovable property in the estate, then he or she could do so on condition that the proceeds of the sale of the immovable property are distributed to the remaining Islamic law heirs according to fractional values set out in the Islamic law distribution certificate. I discuss the distribution agreements in greater detail in my analysis below and in chapter eight.

6.5 ANALYSIS OF FINDINGS IN MJC WILLS

In this section, I provide an analysis of some of the findings that arose when perusing the MJC wills. I discuss issues related to compliance with formalities for wills in the MJC wills, the multiple roles of the MJC, the dispute provisions, the issues relating to joint wills, and the trust provision. I only provide a brief analysis of the immovable property provisions, like the house as gift provision and the usufruct provision because I provide a more detailed analysis of these issues in chapter eight below.

Researching the wills spanning a 15-year period at the MJC proved to be a very useful exercise, as it gave me a good indication of how one of the leading MJBs in the Western Cape includes the Islamic laws of inheritance in wills. The MJC created a *pro forma* will template with standard testamentary provisions in addition to a clause that incorporates IIL into the will. It does not stipulate the Islamic law heirs of a testator by name but has included a clause that instructs the executor to obtain a certificate from the MJC or similar body, which will set out the Islamic law heirs upon the death of the testator. The testator delegates his or her power to the MJC or a similar body to determine his or her Islamic law heirs. The standard Islamic will

raises a fundamental legal question regarding two black-letter common-law rules: does it violate the rule that prohibits incorporation by reference, and does it violate the rule that prohibits the delegation of a testator's testamentary power? Both these issues are discussed in greater detail in chapter seven below.

In the initial years of the sample, the formalities of a will in terms of the WA were not always complied with. In many instances, the testator inserted an additional handwritten provision at the end of the typed will, and this handwritten addition was not initialled or signed by the testator. These handwritten amendments occur up until 2013 and invariably deal with the immovable property provision. They were pre-execution amendments as the testator would insert the handwritten provision in the blank spaces provided in the MJC template before signing the will. The pre-execution amendments do not require any formalities to be lawful; however, handwritten insertions should have been signed by the testator and the witnesses as there is a rebuttable presumption, in terms of the WA, that amendments were made after the will was executed.[43]

These oversights with the handwritten provisions were clearly problematic and created the potential for fraud, which the WA seeks to guard against. It furthermore illustrates the dangers of having a 'one size fits all' template that is overseen by non-legal professionals at the stage of execution.[44] In *Louw v Engelbrecht*,[45] the court held that '[i]t is desirable that someone holding himself out to the public as an expert in connection with wills should be well trained,

[43] WA, s2(2).
[44] The execution of a will has been described as '[t]he process through which the testator and other parties comply with all the formalities of required to bring a valid will into existence.': Jamneck *et al* (n27) 61.
[45] 1979 (4) SA 841 (O).

and should act with both diligence and care.'[46] This is not necessarily the case at the MJC, where *imāms*, who are not properly qualified legal professionals, assist the Muslim public in drafting their wills. From 2014 onwards, there is overwhelming compliance with respect to the formalities of a will, and the handwritten provisions no longer occur, except for the insertion of the details of testators and executors.

The MJC fulfils multiple roles when it provides the public with *pro forma* wills, namely: (i) its officials assist the testator with the drafting of the will, including the insertion of any handwritten provisions; (ii) its officials act as witnesses to the testator's signature in many instances; (iii) it is appointed as executor of the testator's estate and is responsible for determining matters like the religious liabilities of the testator or which charitable organisations will benefit from the testator's bequest; (iv) it is responsible for determining the Islamic law heirs of the testator; and (v) its officials draw up the distribution certificate, which is submitted to the Master's office. In terms of the WA, any person who attests and signs a will as a witness or who writes out the will or any part thereof in his own handwriting shall be disqualified from receiving any benefit.[47] The nomination of a person as an executor is regarded as a benefit to be received from a will.[48] The fact that the MJC officials assist the testator in drawing up the will and act as witnesses should therefore disqualify them from receiving the benefit of being appointed as executors. They are not competent to act as executors if they are involved in the execution of the will. Nor can they benefit from any charitable bequest that a testator may make to them.

[46] Ibid at 842. Corbett notes: 'Persons who represent to the public that they are competent to advise in matters relating to wills should be properly qualified and should act with the necessary care.': Corbett *et al* (n16) 66 (n.123).
[47] WA, s4A(1).
[48] WA, s4A(3)

The multiple roles played by the MJC in the execution of these wills create a conflict of interest, especially if one considers that the MJC template also ousts the courts' jurisdiction in the dispute provision.[49] The dispute provisions occur in wills right up to 2018. In terms of the common law, the superior courts have inherent jurisdiction to hear disputes of this nature.[50] Our courts have held that a clause in a will that purports to exclude the jurisdiction of the courts to interpret it, or entrusts the interpretation to the executor, is void because it is against public policy.[51] Similarly, a clause that stipulates that a dispute arising under a will should be settled by an arbitrator 'whose decision shall be final' is invalid.[52] The Constitution has fortified the inherent jurisdiction of the courts and stipulates that the superior courts *inter alia* have the inherent power to develop the common law, taking into account the interests of justice.[53] The dispute provision in the MJC will template, if challenged, would therefore be considered invalid and unconstitutional.

Interestingly, the majority of the testators in the sample of wills were female, and 24% of the wills were joint wills. These joint wills were utilised by the MJC when the testator and testatrix were married in terms of civil law in community of property, in addition to being married by Islamic rites. The civil marriage provides greater protection to both parties, as not all the consequences of a Muslim marriage are recognised as valid in South African law. As mentioned in chapter three, Muslim marriages are regarded as being automatically out of community of property and excludes the accrual system, with each spouse retaining ownership of his or her separate property. The MJC has issued a *fatwa* confirming that marriages in

[49] See clause 7 in MJC1, clause 10 in MJC2 and clause 7 in MJC3.
[50] Herbstein *et al The Civil Practice of the Supreme Court of South Africa* (*Now the High Courts and the Supreme Court of Appeal*) (1997) 38 (para 543).
[51] *Barclays Bank v Anderson* 1959 (2) SA 478 (T); see also Corbett *et al* (n16) 643.
[52] *Yenapergasam v Naidoo* 1932 NPD 96; *Barclays Bank v Anderson supra* 482 G-H.
[53] Constitution, s173.

community of property cannot be reconciled with Islamic law.[54] Despite this *fatwa*, Muslim couples continue to conclude civil marriages in community of property.[55] When a couple has concluded a civil marriage in community of property, the parties to the marriage usually stipulate in their wills on the death of the first dying, only his or her half of the estate should devolve according to Islamic law. The other half is retained by the surviving spouse in accordance with the matrimonial property regime governing their civil marriage and does not form part of the deceased's estate.

The fate of immovable property is obviously a concern to the majority of Muslim testators. Despite having the Islamic law incorporation provision, 74% of testators made specific provision for their immovable property. The most common provision is for the testator to stipulate that the immovable property owned by the testator has to devolve upon the Islamic law heirs of the testator, and for such heirs to have joint ownership of the property. This would mean that each heir alive at the time of the testator's death will co-own a fractional share in the property according to the Islamic law portions mentioned in chapter five above. In most of the immovable property provisions, the testator would stipulate that the property should only be sold if all the heirs agree to such a sale. Requiring this level of consensus can create challenges as the sale of the property can be held up by one heir, whilst the remaining heirs might prefer the cash proceeds from a sale. In my experience as a practitioner, I encountered many estates that were not finalised after prolonged periods because the Islamic law heirs could not agree to

[54] Fatwa1 para 2.5.1 provides: 'It is difficult, if not impossible, to reconcile community of property as a consequence of marriage with ownership and transfer of property under the Sharī'ah.'

[55] P1 notes that, '[t]he older couples, especially if they wanted to acquire a council house, would get married in community of property. So you'll find lots of older couples married in community of property.': P1 Transcript dated 17 April 2018 (hereinafter referred to as 'P1 Transcript') at 27-28.

sell the immovable properties in the estates. This was also borne out in my interviews with the various attorneys.[56]

Another permutation of the immovable property provision was the inclusion of a usufruct provision, usually made in favour of the surviving spouse so that he or she can remain in the immovable property until death or remarriage. Presumably, these testators were concerned about a surviving spouse only inheriting 1/8 of the estate. A usufruct would ensure security of tenure for the surviving spouse. If the surviving spouse adiated and accepted the usufruct, it would result in the immovable property being encumbered with a limited real right. This in turn, would prevent the other Islamic law heirs from selling the property and distributing the proceeds according to their Islamic law shares. The estate would only be distributed according to Islamic law on the death of the surviving spouse. I discuss and analyse the usufruct provision in greater detail in chapter eight.[57]

Another significant provision is the 'house as a gift' provision. In this provision, the testator stipulates that he has gifted the house in his lifetime to one of his heirs, but that transfer should only occur upon the death of the testator. This provision was inserted in wills despite the incorporation provision. As a bequest, it would, therefore, take precedence over the incorporation provision, and an Islamic law heir would inherit both as a legatee and as an heir. I discuss and analyse this provision in greater detail in chapter eight.[58]

[56] See P4 Transcript 25 March 2018 at 2 (hereafter 'P4 transcript') at 14-16, where P4 note: 'You don't want communal ownership because it creates problems.' And 'So I report the estate timeously but we cannot transfer, because they [the heirs] cannot come to an agreement…Nobody wants to pay conveyancing fees.'
[57] See discussion in §8.2(b).
[58] See discussion in §8.4.

The religious liability provision instructs the executor to determine the religious liabilities of the testator before distributing the estate. These religious liabilities, what I refer to as debts to God, are discussed in chapter five above.[59] Based on my subsequent interviews with various participants, it would appear that this provision hardly has any practical implications once the estate is wound up, as the executors rarely follow up on this particular instruction by the testator. I discuss this provision in greater detail below when analysing my findings from my qualitative interviews.

The bequest or *wasiyya* provision occurred in very few wills. In some cases, they are expressly referred to as *wasiyya,* whilst in other cases the testator would simply bequeath a sum of money or a particular asset to a person (legatee). The instances where bequests have been made include; (i) for the building or maintenance of a Mosque; (ii) to an adopted child; (iii) towards the payment of an outstanding pilgrimage (*hajj*); or (iv) to a legatee, who is allocated the same share as that which one of the children of the testator would receive. A bequest was seldom, if ever, left to an Islamic law heir.

Two very common provisions which occur in the MJC standard will template were the testamentary trust and trust investment provisions, which were specifically created for minor dependants of the testator or for those heirs who were incapable of managing their own financial affairs owing to some disability.[60] When dealing with a testamentary trust, the last will and testament is considered the trust deed.[61] A testator in his or her will may create a testamentary trust, whereby he or she bequeaths property to a person (a trustee), requiring such person to assume control of the property on the death of the testator and to administer it for the

[59]See §5.5(a) above.
[60] See clauses 8-9 of MJC1, clauses 11-12 of MJC2 and clause 9 of MJC3.
[61] See s1, Trust Property Control Act 57 of 1988 (TPCA) for the definition of a "trust instrument".

benefit of another person or persons, who were appointed in the testator's will.[62] The wording of the will must clearly indicate the intention of the testator to create a trust, who the beneficiaries are, and which assets should be bequeathed to the trust.[63] It should also set out the terms of the trust and should nominate a trustee to manage the trust assets.[64] The trustee has no beneficial ownership in the property. Instead, he or she is vested with *dominium* in the property and is under a fiduciary duty to control, administer and care for it.[65]

Clause 9 of MJC3 stipulates:

> 'The executor shall keep the inheritance of minor children and those unable through some ailment or disability to handle their own financial affairs in separate trust and may take from there from time to time towards the maintenance, education and medical needs etc of such a person. *As soon as a minor becomes a major in the Islamic sense* and the Executors considers him/her capable of handling his/her own funds, such funds shall be handed over to him/her to manage.[66]

It is not clear whether this provision would include major beneficiaries who are unrehabilitated insolvents or have addiction problems. It could be argued that these two categories of beneficiaries suffer an 'ailment'. Based on the wording of the testamentary provision in MJC3, the executor of the will was also appointed as the trustee of the testamentary trust. The MJC Fatwa Department was appointed as the executor of the estate in MJC3, which means it would also acts as the trustee of the testamentary trust if the need arose.[67] This provision grants the MJC far-reaching powers in the private estate of a testator and it is not certain if the testator fully understands the implication of the provision.[68]

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[62] Corbett *et al* (n16) 388.
[63] Ibid at 395-396.
[64] The same persons may be appointed as executors and trustees, but it is better to expressly appoint the trustees. See Meyerowitz (n20) 5-20.
[65] Corbett *et al* (n16) 388.
[66] My emphasis.
[67] The MJC was also appointed as a co-executor in MJC1 and consequently as a co-trustee of the testamentary trust created in clauses 8-9 in MJC1.
[68] A trustee must furnish security unless he or she falls within a class of persons which are exempted from doing so in terms of the TPA or in terms of the will. Clause 2 of MJC 3 exempts the MJC from furnishing security in its role as executor/trustee.

The trustee is furthermore directed to place the inheritance of minor heirs into a testamentary trust and to administer it until they attain majority, in the Islamic sense. In Islamic law, a minor becomes an adult on physical puberty or at the latest when he or she reaches the age of 15 years.[69] This contradicts the age of majority in terms of the Children's Act, which stipulates that a child reaches the age of majority at 18 years,[70] and the Constitution, which stipulates that a child means a person under 18 years.[71] It is furthermore inconsistent with the AEA as children under the age of 18 cannot inherit assets directly[72] because they do not have the capacity to sufficiently manage their financial affairs as minors. In the absence of a testamentary trust, any cash bequeathed directly to a minor child will be held by the Guardian Fund, which is administered by the Master of the High Court in favour of the minor, until the he or she reaches the age of majority.[73] In light of the above, the provision in the MJC *pro forma* will that stipulates that the executor can hand over the inheritance funds to a minor when he or she reaches the age of majority in Islamic law would be considered unlawful and invalid.

I have identified the main issues of concern in the MJC *pro forma* wills. In part two of this chapter, I discuss my empirical research, which contains the findings and analysis of the qualitative interviews undertaken to further determine the contemporary estate planning practices of Muslims in the Western Cape.

[69] Coulson *Succession in the Muslim Family* (1971) 11.
[70] Children's Act, s17.
[71] Constitution, s28(3).
[72] AEA, s43.
[73] AEA, s90.

PART TWO

6.6 QUALITATIVE INTERVIEWS TO ESTABLISH CURRENT ESTATE PLANNING PRACTICES IN CAPE TOWN

Although researching the records of wills stored at the MJC proved to be a useful exercise as it highlighted various patterns in Muslim estate planning and allowed me to identify problematic issues within these wills, it was not reflective of all the current estate planning practices of Muslims in Cape Town. Those who approached the MJC for assistance with their wills inevitably adopted the MJC template, which incorporated IIL. To determine the broader practices of Muslims in Cape Town, I conducted qualitative interviews with other participants who are involved in estate planning or the administration of estates.

My primary research questions remained: do Muslims practice and implement the Islamic laws of inheritance in South Africa and what are the challenges they encounter? In order to elicit detailed responses to these questions, I compiled a list of questions, which served as a guideline for the interviews. I have attached the list of questions at the end of the thesis, marked as 'Interview Questions'.[74] I did not always follow the order of these questions during the interviews but was guided by the participants and would take my cue from them when determining the direction of the interviews. I conducted all the interviews myself over a period of six months in 2018, and all the interviews were conducted at the offices of the various participants. I only conducted one interview per day. The length of the interviews varied from one-and-a-half hours to three hours. The interviews were semi-structured but qualitative in nature as they took the form of detailed interactive conversations with the participants to establish their experiences of being involved with Muslim estates. Before conducting my

[74] See Appendix 3.

interviews, I provided each participant with an information sheet and a consent form, providing them with a background of my research. The consent form makes provision for the participant to remain anonymous, and although a few of the participants opted not to remain anonymous, I have used pseudonyms for all the participants in order to protect their identities. There were three categories of participants that I interviewed: participants from two MJBs; five participants from attorneys' law firms who either specialised in estate planning or practised extensively in this area of law; and a participant from the Master's office in Cape Town. The MJBs and the Master's office are institutions in the public domain, so I refer to the institutions by their names.

All of the participants, except one, gave me permission to record our interviews. I had the recorded interviews transcribed. During the interview with the participant who did not wish to be recorded, I took detailed notes. Once the interviews were transcribed, I labelled them as participant 1 (P1), participant 2 (P2), and so forth. I have retained hard copies of the transcribed interviews, and the electronic copies are saved in the cloud as password-protected documents. Once I transcribed the interviews, I organised the information according to key themes which I identified during my interviews. I collated the contents of each interview according to each theme. Not every participant commented on each theme. As each category of participant interfaced with Muslim estates in different ways, I have written up my findings as well as my analysis separately for each category. Before proceeding with my findings and analysis, I will first provide a more detailed description of each participant category.

6.7 CATEGORIES OF PARTICIPANTS

I interviewed three categories of participants.

(a) Muslim Judicial Council

Initially, I interviewed participants from two of the leading MJBs in Cape Town, namely the MJC and the Islamic Council of South Africa ('ICSA') in order to establish their involvement with the estate planning practices of Muslims in Cape Town. However, after my initial interviews with participants of both MJBs, I concluded that ICSA plays a very limited role in the administration of Islamic wills and estates.[75] I, therefore, decided to restrict my discussion to my findings from the qualitative interview conducted at the MJC. I conducted an extensive interview with the administrator of the Fatwa Department, whom I refer to as P1. P1 studied Arabic and Islamic studies for more than six years at a renowned Shāfi'ī Islamic institution in Cape Town and he was therefore familiar with the Islamic inheritance law. He is also imām at a masjid in Cape Town. He has no training in South African wills and estates law. He was responsible for assisting clients with drafting Islamic law wills and providing distribution certificates to clients and attorneys who requested them. P1 was, therefore, able to shed light on queries I had with respect to the wills we retrieved from the MJC archives. P1 also provided me with copies of various *fatāwa*[76] issued by the MJC that are relevant to IIL. These *fatāwa* were very useful in understanding the MJC's position on certain inheritance matters. They are discussed in my findings below.

(b) Assistant Master of the High Court

The Master of the High Court is an administrative body that is responsible for the administration of all deceased estates.[77] There are 15 Master's Offices in the country situated at the seat of each High Court.[78] I obtained permission from the Master of the High Court in

[75] ICSA's main focus is the halāl certification of various consumer food products.
[76] For a discussion on the legal nature of a *fatwa* see §2.3(c).
[77] Meyerowitz (n20) 1-6.
[78] AEA, s3(1).

Cape Town to interview one of the Assistant Masters in the Cape Town office, to establish trends and challenges in the administration of Muslim estates. I refer to the Assistant Master as P2. P2 is a qualified legal practitioner in South African law, and as a self-proclaimed practising Muslim, he had a basic understanding of IIL.

(c) Attorneys

I interviewed five attorneys in the broader Cape Town area. Four of the attorneys specialised in wills and the administration of estates, whilst the fifth had a general practice that included a large department dealing with wills and estates. Each attorney I interviewed had extensive experience in the drafting of wills and the administration of estates. I was referred to the five attorneys either through word of mouth by one of the attorneys I interviewed or by the Assitant Master, as he was familiar with the attorneys working in the field. Two of the attorneys I interviewed were based in the Southern Suburbs in Cape Town; one was based on the Cape Flats, and two were based in the broader Cape Town CBD area. Each attorney was the senior partner in his or her respective law firm. These law firms represented clients from all socio-economic backgrounds.

The first attorney I interviewed, P3, was based in the broader Cape Town CBD. His practice specialised in wills and estates, and he had done extensive work in the area of Islamic wills and estates. He also worked as an Assistant Master at the Master's office in Cape Town for a number of years before opening his law firm. At the time of the interview, he had been in legal practice for 16 years and also served as a member of the Wills, Estates and Trusts Committee of the Cape Law Society. He referred me to the next two attorneys whom I interviewed. The second attorney, P4, was the director of an established law firm based on the Cape Flats, which provided a range of legal services, including the drafting of wills and the administering of

estates. At the time of the interview, P4 had been in practice for over 25 years. The third attorney, P5, was a senior attorney in a practice based in the Southern Suburbs, which focused on wills and the administration of estates. At the time of the interview, P5 had been practising in the area of wills and estates for over 20 years. The fourth attorney, P6, was an attorney based in the Southern Suburbs who had over 18 years of experience as an attorney practising in wills and estates. She worked in the Master's office for 12 years before opening her own law firm. The fifth attorney, P7, was based in the broader Cape Town area. She was a sole practitioner who specialised in the drafting of wills and the administration of deceased estates. At the time of the interview, she had been in practice for over 20 years and also lectured in this area of law for over 10 years. She has furthermore published a book on the drafting of wills.

Of the five attorneys I interviewed, only P7 was a non-Muslim. I reached saturation point after interviewing five attorneys as similar trends emerged in their responses to my list of questions. I will provide my findings under each category of participants and will then conclude with an overall analysis of my findings.

6.8 INTERVIEW AT THE MJC

For ease of reference, I have categorised my findings under different themes or headings below. I interviewed P1 at the MJC offices. P1 expressed his view on the status of the MJC in South Africa and how it is perceived by the State. He notes:

> 'We consider ourselves as the most, ja the oldest, most experienced and also the most generally accepted [Islamic organization] even by state departments. Government comes to us when it has issues with the Muslim community…We regularly host them in our boardrooms, ministers, the President has been here, and we regularly host City governmental officials.'[79]

[79] P1 Transcript at 7.

(a) Services provided by the MJC in the area of wills and estates

P1 works as an administrator in the MJC Fatwa Department. He described his duties as follows:

> 'The one part is drawing up the will itself, making sure it is Shariah compliant to the best of our ability and the other part is after the death of the testator, the executor or the attorneys representing them [the estate] will contact us and we assist them with issuing them the distribution certificate.'[80]

P1 indicated that the MJC used a standard will template which had been developed by the previous *mufti* of the MJC, who is now deceased. The template evolved over time to the present version and included a provision that stipulated that the Islamic laws of inheritance should apply on the death of the testator (the incorporation provision). P1 noted:

> 'I'm just sitting with the end product, so it is very simple. For me it's a matter of adding names, ID numbers and if there are of course particular needs of clients, then I will try to adapt certain clauses here and there to assist them as long as in my mind it is Shariah compliant.'[81]

P1 confirmed that the MJC charged R150[82] for a will but that it does not simply provide its template upon payment. He said: 'No we don't give templates. You actually have to draft the will with us.'[83] The R150 is, therefore, for the consultation with P1 and the will finalised by him. According to P1, in the past, they did provide the template upon payment, but they no longer did so as they ran into problems at one stage. He explained that an earlier version of the template did not make provision for excluding inheritance from an heir's marital regime. This resulted in someone who was an heir to a will drafted by the MJC querying why this particular provision was omitted. The MJC *pro forma* will was subsequently updated to include the 'exclusion from marital regime' provision.

In order to avoid similar issues, P1 sits with the testator personally and goes through the will, clause by clause. He assists the testator in filling in the personal details and making

[80] Ibid 1.
[81] Ibid 5.
[82] This was the cost at the time of the interview in 2018 when R150 was the equivalent of $11.
[83] P1 Transcript at 5.

amendments or additions according to the testator's requests. The testator will then attest to the will in the presence of witnesses, and such witnesses would often be officials at the MJC offices. The testator is given the original will, whilst a copy is kept in the MJC archives. According to P1, 'so usually we fill out about two or three lever arch files for the year, so it fills up quite quickly.'[84] He indicated that the demand for wills increases shortly before Muslims embark on their compulsory pilgrimage (*hajj*). He said, '*hajj* time, we'll see after Ramadān, and there's a lot of wills. Not just Monday and Tuesday, but Monday to Friday you have to see people.'[85] In addition to assisting community members with the drafting of wills, the MJC also issues distribution certificates, which I discuss below.

(b) Islamic legal school adopted by the MJC in its legal rulings

I enquired from P1 which Islamic legal school the MJC adopts when issuing legal rulings on inheritance matters or any other matters. P1 explained that as a general rule, they adopted the Shāfi'ī legal school but where a situation required, they would resort to the opinions of the other schools. He explained that aside from him, there was a *mufti* in the department who issued *fatāwa* on various legal matters. He provided me with a written *fatwa* by the *mufti* that sets out which school of law the MJC adopts. I have marked this *fatwa* as 'Fatwa 1' and have attached it as Appendix 8 to this thesis. Fatwa 1 is dated 19 July 2017 and is addressed to an *imām* who is a member of the MJC. Fatwa 1 is headed 'Re: MJC position on Succession Law and related matters'. According to P1, the *fatwa* was issued in direct response to written queries made by the aforementioned *imām*. Fatwa 1 stipulates as follows:

> '1. Principles
> 1.1 In principle, the MJC Fatwa Committee proceeds in all matters from the given position of the Shāfi'ī madhhab.
> 1.2 *Where warranted* by circumstances or the specific nature of the case in question, *there would be departure from the position of the Shāfi'ī madhhab to any of the four madhāhib*.

[84] Ibid 2.
[85] Ibid 2. Ramadān is the month of compulsory fasting for Muslims. It occurs two months before the month of the compulsory *hajj*.

> 1.3 When the Shāfi'ī madhhab does not provide a solution, the MJC avails itself of solutions from any of the four madhāhib; At times, and *in lieu* of specific circumstances, the MJC would even advise the adoption of positions from beyond the four madhāhib.'[86]

Fatwa 1 sets out various other legal rulings pertaining to inheritance. I discuss some of these rulings in greater detail below.

(c) The distribution certificates

P1 indicated that in addition to assisting members of the Muslim public with drafting their wills, the MJC is also responsible for issuing distribution certificates at a cost of R300.[87] He explained that the executor of an estate, usually the attorney, will contact him requesting a distribution certificate. He will request a list of documents from the executor in order to draft the distribution certificate. He provided me with the MJC letter that he sends to attorneys to request documentation, which I have attached as Appendix 9 to this thesis. The documents requested include a certified copy of the deceased's death certificate, copies of the deceased's marriage certificate (all marriage certificates in the event that the deceased was male and had more than one wife), a copy of the deceased's will, a completed next-of-kin affidavit (otherwise known as a J192 form at the Master's office), copies of the deceased's children's identity documents, and any other documents relevant to the estate of the deceased and relevant to determining the heirs of the deceased. Based on these documents, P1 will draw up the distribution certificate according to the IIL shares.[88]

[86] Fatwa 1 at §1. My emphasis.
[87] This was the cost at the time of the interview in 2018. R300 was the equivalent of $22 at the time.
[88] A sample of the MJC distribution certificate is attached at the end of the thesis as Appendix 10.

He mentioned that he uses an Islamic inheritance software program called IRTH, which automatically calculates the inheritance portions due to each heir according to IIL.[89] He inserts the various categories of surviving family members of the deceased into the IRTH program, and the program will automatically generate who the heirs of the deceased are as well as calculate the inheritance shares of each heir. He compiles the distribution certificate, which sets out all the Islamic law heirs as well as their respective shares in terms of the Islamic law. P1 indicated that whenever he is confronted with an unusual scenario or a query from a member of the public, he will write to the *mufti* requesting a *fatwa* on the matter.

The distribution certificate gives a breakdown of all the heirs of the testator as well as the fractional share each heir is entitled to. According to P1, the MJC is the main, if not the only, MJB in the Western Cape that provides distribution certificates that are accepted by the Master's office. He commented:

> 'If they don't see our certificate, then it's like a question mark that goes on. Why is it not coming from the MJC? So, if you want to skip that whole process, everyone just comes to us now. They don't still bother to go anywhere else, because as soon as they don't see our yellow page [the MJC distribution certificate] coming to them at the Master's office, then the Master will ask them questions.'[90]

Attorneys from all over Cape Town and the Boland area approach the MJC for distribution certificates on a daily basis. On the days I was present at the Fatwa Department, I witnessed attorneys collecting their relevant estate files (which include the completed distribution certificates) from the department.

[89] http://islamicsoftware.org/irth/v2/en/irth.html (last accessed on 6 January 2022). IRTH is a free Islamic Software program that allows users to determine the Islamic law heirs of a testator on his or her death. It allows the user to choose one of either the four Sunnī legal schools or three Shi'a legal schools or Egyptian law as their preferred method of calculating the inheritance shares of the deceased.
[90] P1 Transcript at 38.

(d) Children conceived out of wedlock

Fatwa 1, referred to above, also sets out the position of the MJC with respect to children conceived out of wedlock. It stipulates that 'when a child is conceived out of wedlock but born more than six months after [the] marriage has been contracted between the biological parents, the child is regarded as legitimate'[91]. The implication of this *fatwa* is that such a child may inherit as a Qur'anic sharer heir. In calculating the minimum period of six months, the lunar calendar is utilised from the date the spouses begin living together as a married couple.[92] This is the position adopted by the Shāfi'ī school. Fatwa 1, however, stipulates further that:

> 'In view of certain situations, we believe that *discretionary consideration* ought to be given to the view that where a child has been conceived out of wedlock by an unmarried woman, the child becomes legitimate (with all the consequences that flow from legitimacy) if the father claims paternity (*istilhāq*), even if the child was born before the passage of 6 months from the marriage.'[93]

The implication of this *fatwa* is that if the father claims paternity, discretionary considerations can be exercised in declaring the child legitimate,[94] irrespective of when the child was born. The *fatwa* does not stipulate who has to exercise this discretionary consideration. Presumably, it is the MJC official who completes the distribution certificate that exercises this discretion.

Although Fatwa 1 sets out the MJC position on the rights of children who were conceived out of wedlock to inherit, I nevertheless enquired from P1 how he dealt with those cases. P1 explained, '[s]o that's why we need the Muslim marriage certificate for actually, is to see okay [when] you were born. You were married at this date and the first kid was born at this time.'[95] He relies on the marriage certificate of the testator and the identity document of the child to

[91] See §2.1 of Fatwa1.
[92] Fatwa 1, §2.1.3 stipulates that the lunar calendar will be used. The Islamic calendar is based on the phases of the moon with the new month starting upon the birth or sighting of the new moon.
[93] See §2.1 of Fatwa 1. My emphasis.
[94] The term 'legitimate' as opposed to 'a child born within wedlock' is used here, based on the terminology used in Fatwa 1
[95] P1 Transcript at 10.

determine the six-month legitimacy rule. I enquired what happens if the information from the document indicates that the child was born within six months of the parents marrying. He responded as follows:

> 'If it's within [six months] it does present a bit of a problem for us, but we do not quickly draw up the certificate… I draw up a standard document; basically the legitimate or rightful Islamic heirs sign the document. We want them [the child conceived out of wedlock] to be included normally, so they [the legitimate heirs] are in essence, just forfeiting a bit of their rights technically speaking.'[96]

When asking for further clarity, P1 continued:

> 'Ja, and what I will state on the certificate, like maybe number (1) Islamic distribution and number (2) as per agreement by heirs…So I have to say, but look this wasn't because of the inheritance laws, this was on a request by the heirs as they have the right to forfeit whatever - it is their right'.[97]

Apparently, to protect a child who may have been conceived out of wedlock, P1 lets the legitimate Islamic law heirs sign a separate agreement, whereby they agree to forfeit part of their inheritance in favour of their sibling who may be excluded in terms of IIL. P1 indicated that there are times when siblings might contest the legitimacy of one of their siblings, especially in the scenario where the testator had a few children from different mothers.[98] In this scenario, entering into a separate agreement is not feasible, and P1 would then exclude from the distribution certificate the child who was born within the six months of the parents marrying.

When a child is considered to be born out of wedlock, he or she is not included in the distribution certificate of his or her deceased father as there is consensus amongst the scholars that such a child does not inherit in terms of IIL. Such a child will, however, inherit from his or her mother.[99] The exclusion from the inheritance of children conceived or born out of

[96] Ibid 12.
[97] Ibid.
[98] Ibid.
[99] See §5.2(b) and §5.4(a).

wedlock raises constitutional concerns and will be discussed in greater detail in chapter nine below.

(e) *Wasiyya*/Bequest

According to P1, the people who approach the MJC to prepare their wills very seldom leave 1/3 of their estates as bequests. This was confirmed by the sample of wills discussed in part one above, as only 15% made provision for a *wasiyya*.[100] According to P1, '[b]equests usually come in if the person is very wealthy, then he'll think okay, there's enough for my heirs, let me bequest to as mosque [sic] or to an Islamic institution that he was perhaps affiliated to.'[101] In his experience, testators with no descendants were also more inclined to leave bequests to a *masjid* or charitable institutions.[102] In this scenario, he will indicate on the distribution certificate that the bequest must first be paid out before any inheritance. I enquired from P1 if there are ever cases where a testator leaves a bequest to an heir, for example, to equalise the shares between sons and daughters. P1 responded as follows, '[s]ometimes they do, but that is an invalid *wasiyya*. You cannot give a *wasiyya* to an heir.'[103] As far as P1 was concerned, leaving a bequest to an Islamic law heir is invalid, and he never encourages testators to do so.

(f) Religious liabilities or 'debts to God'

I enquired from P1 how he dealt with religious liabilities, like unpaid *zakāh* or an unperformed *hajj*, in the distribution certificate. He indicated that he assumes that the testator would have informed his or her executor or his or her heirs about any religious liabilities. The MJC does not make enquiries into these debts and does not make provision for these religious liabilities in the distribution certificate. P1 noted, '[n]o, we just put it [the religious liability provision]

[100] See §6.4(g).
[101] P1 Transcript at 14.
[102] Ibid.
[103] Ibid 21.

there and the executor must know what to do. We assume he knows.'[104] P1 indicated that, at most, the executor might put in a claim against the estate for an amount that is sufficient to pay for the performance of a pilgrimage on behalf of the deceased testator. The MJC does not really get involved in determining whether the deceased had these religious debts. It prefers to leave the matter to the executor to determine.

(g) Usufruct

I enquired from P1 what his experience was with respect to the inclusion of a usufruct in a will.[105] He responded:

> '…the usufruct itself is problematic from an Islamic point of view, because adding [a] usufruct means that the property can't be sold and it would mean that the other heirs can't immediately get their rights.'[106]

He, therefore, does not encourage including a usufruct in Islamic wills. He did, however, indicate that it is very common for male testators to want to include the usufruct as a form of security for their surviving spouses.[107] He provided me with another *fatwa* issued by the *mufti* of the MJC, which specifically deals with the question of the usufruct. I have marked this fatwa as 'Fatwa 2' and attached it as Appendix 9 to this thesis.

Fatwa 2 is undated, appears to be addressed to an attorney, and is signed by then *mufti* of the MJC. It is a lengthy *fatwa.* In essence, it refers to the Māliki notion of *'ūmrā* (gift), which entails transferring the use and enjoyment of a property but not the asset itself. The use and enjoyment, referred to as *manfa'ah* in Arabic can be transferred for the duration of the lifetime

[104] Ibid 19.
[105] A usufruct is a personal limited real right that entitles a person to have the use and enjoyment of another's property and to take its fruits without impairing the substance of the said property. The holder of this right is termed a usufructuary and the property affected is referred to as usufructuary property. A usufruct is usually employed by a testator who wishes to provide an income after his or her death to one person (for example his or her spouse), but wants the property itself to devolve upon another person (for example his or her daughter). See Erasmus *et al* 'Wills and Succession' (2011) 31 *LAWSA* para 379.
[106] P1 Transcript at 24.
[107] Ibid.

of the recipient. Upon the death of the recipient, it returns to the donor, or if the donor has predeceased the recipient, the property is returned to the heirs of the donor at the time of the donor's death.[108] The recipient of the *'ūmrā* is entitled to the use of the property as well as the benefits that derive from the gifted property. The only limitation is that the recipient may not alienate or destroy the gifted property. Up to this point, the notion of *'ūmrā* is very similar to the South African notion of a usufruct as contained in a will. However, the *fatwa* then continues and stipulates that:

> 'However, in arranging the inclusion of an *'umrā* into a will, what must be taken into acute consideration is that the transfer of the *manfa'āh* should occur within the testatrix lifetime and should not be deferred to the time of the testatrix's death. There should ideally be a document separate from the will, executed in the testatrix's lifetime, in which the *'umrā* is recorded, to which retrospective reference would be made in the will.'[109]

According to Fatwa 2, an *'ūmrā* should be executed by the donor in his lifetime. The *fatwa* concludes with the following caution:

> 'If the *'umrā* is not validly executed during the testatrix's lifetime, its inclusion into the will becomes a matter of *wasiyyah.* As a *wassiyah* to a *wārith* (statutory heir) it would then become complicated by issues such as quantification to ascertain whether it exceeds 1/3, and where it does, ratification by the remaining heirs.'

The *fatwa* cautions that including an *'ūmrā* in favour of a Qur'ānic heir (referred to as a statutory heir) will only be valid if the value of the *'ūmrā* does not exceed 1/3 of the net estate. If it exceeds 1/3, the remaining heirs have to ratify such a gift on the death of the testator. This cautionary note at the end of the *fatwa* could explain why P1 does not encourage testators to include a usufruct in their wills. I discuss the legal implications of this *fatwa* in greater detail in chapter eight.[110]

[108] Ibid.
[109] Fatwa 2 at §§2-3.
[110] See §8.2(b).

(h) House as a gift provision

I enquired from P1 about the rationale behind the inclusion of the 'house as a gift' provision discussed above. P1 explained that the 'house as a gift' provision is an attempt by the testator to transfer immovable property to an heir during his or her lifetime without having to pay any donations tax or transfer duty.[111] However, no official transfer of the property will take place during the lifetime of the testator. The legal validity and implications of these provisions are discussed in greater detail in chapter eight.

P1 indicated that sometimes a testator will express concern about his wife not being supported by his children after his death. He noted:

> 'I will allow sometimes a will to apparently superficially not be that Sharī'ah compliant. Let's say an extreme situation, this guy knows the wife is going to get it hard afterwards, because the way the sons are carrying on, whatever, there's no benefit in his kids getting anything.'[112]

He then indicated that in this scenario, albeit in very limited cases:

> 'I will actually in the will state that the house goes to the wife. Finished. Because what happens if you tell them transfer it [in their lifetime] because sometimes the people are poor. They cannot afford those transfer costs. They can't afford many things.'[113]

In other instances, he will ensure that the will of the testator includes the standard incorporation provision, but then he will draw up a separate document wherein he will stipulate that the testator has donated the house in his lifetime to his wife or one of his other heirs. In this regard, he had the following to say:

> 'I have a separate document drafted for him…I don't put that in the will because I don't want the lawyers to see that…I have a separate document drafted up and I say, "look here Boeta[114] say here that you are giving the house to your wife." I draw up the wording, he signs it, his wife signs as the recipient. I even sometimes have the kids. Some of them, just sign here. Sign here, you see [the house is] your mommy's – so eventually the person does pass away, that house goes straight into the mother's name.'[115]

[111] P1 Transcript at 45.
[112] P1 Transcript at 45.
[113] Ibid.
[114] The word 'Boeta' is a colloquial Afrikaans reference to the term 'Sir'.
[115] P1 Transcript at 46.

P1 will then store the separate document on file under the testator's name as part of the MJC records in case there is a future query on the matter. According to P1, it will serve as proof that the testator donated the house to his wife in his lifetime, irrespective of what the will says. He indicated that '[s]ometimes I have to do [this] because of the necessity.'[116] The validity of these 'family' agreements is discussed in chapter eight.[117]

(i) How are pension pay-outs dealt with?

I enquired from P1 what the MJC position is on pension pay-outs and whether it regards these pay-outs as forming part of the estate. According to P1, the MJC has ruled that the pension pay-outs should form part of the Muslim testator's estate and should be distributed in terms of IIL. In the sample of MJC wills, there were some wills that stipulated that the pension pay-out should form part of the testator's estate. In MJC8, the testator stipulated in clause 10: 'The payout [*sic*] of my retirement Pension Fund shall form part of my Estate for distribution among my Islamic heirs.'[118]

P1 referred me to paragraph 2.4 of Fatwa 1, which essentially distinguishes between that portion of the pension pay-out that came from the employee's contribution and that portion that was contributed by the employer. According to Fatwa 1, only the employee's contribution and the growth thereon forms part of the estate of the deceased, and only that portion should be distributed according to the IIL. The issue of pension pay-outs is analysed in greater detail in chapter eight.[119]

[116] Ibid.
[117] See §8.4.
[118] A copy of MJC8 is attached at the end of the thesis as Appendix 12.
[119] See §8.3.

6.9 INTERVIEW WITH ASSISTANT MASTER OF THE HIGH COURT

I categorised my findings under different headings. I interviewed P2 at the Master's offices in Cape Town. He is an Assistant Master in the Master's office, where he had been working for 10 years at the time of the interview. He works through 50 to 60 estate files a day, ensuring that all the necessary documents are in order and answering any queries that members of the public or attorneys might have on files that are allocated to him. He had some interesting insights to share on the way Muslims manage their estates.

(a) Muslims dying intestate

According to P2, there are many Muslims, especially from the lower socio-economic bracket, who are still dying intestate.[120] He noted:

> 'Majority of them have a low level of education. I'm talking about the lowest strata of people, especially those that come from sub-economic areas like Hanover Park, Mitchell's Plain etc…they very seldom have wills and if they do have wills it will be drawn up by a bank.'[121]

He attributed this to a lack of knowledge of both the South African and Islamic laws of succession.[122] P2 noted, '[t]he layman, Muslim layman, they have a very poor understanding of Islamic law.'[123] Those who do have wills usually have their wills drawn up by one of the mainstream banks instead of an attorney. These wills do not always include the IIL.

He also observed that many Muslims from lower socio-economic groups have their marriages registered as civil marriages in terms of the MA. He noted the following: '[m]ost of them are married in community of property. Very few people in the Muslim community are married ante-nuptially, even though Islamic law provides for antenuptial contracts.'[124] In many

[120] P2 transcript dated 9 April 2018 (hereafter P2 transcript)at 1-2.
[121] Ibid at 3.
[122] Ibid.
[123] Ibid.
[124] Ibid at 2. Spouses who do not want community of property to operate in their marriage may exclude it in an antenuptial contract. An antenuptial contract may contain any provisions which are not impossible to perform, or which are not contrary to the law, good morals or the nature of marriage. See Heaton *et al* (n17) 192.

instances, the spouses will get married civilly in order to secure finances for the purchase of a home or to qualify for the City of Cape Town housing subsidies.[125] The default matrimonial property regime will then be in community of property. In his experience, those Muslims from the lower socio-economic strata who are married in community of property will not draw up wills according to Islamic law. They will either leave their entire estate to their surviving spouse, including the house, or they will simply die intestate.[126]

(b) Wills that incorporate Islamic law

P2 does encounter Islamic wills that include the incorporation provision. In those cases, he will request a distribution certificate from the MJC. He does encounter MJC wills as well. He noted that many Muslims use the will template of one of the leading Islamic Banks in South Africa. He felt that this particular template could be improved as it adopted 'a one size fits all' approach and did not take into account the peculiarities of each testator.

(c) Distribution certificates

P2 indicated that the Master's office generally only accepts a distribution certificate issued by the MJC. This is the same distribution certificate discussed by P1 in §6.8 (c) above. P2 was not aware of any other MJBs that issue distribution certificates. I enquired from him whether other MJBs issues distribution certificates, and he replied:

> 'None that I know of that are qualified to do that. We normally ask the MJC to do the certificate. I don't know if they charge for that certificate, but the people will have to do that themselves. Go to the MJC. Or the attorney will have to do that and request the MJC to provide us with the distribution according to the will itself. The distribution will then be according to what the certificate states.'[127]

[125] Ibid.
[126] Ibid 3.
[127] Ibid 4.

He continued: 'we accept that [the distribution certificate] as being correct, of course checking against the next of kin affidavit that is handed in.'[128]

(d) *Wasiyya*/Bequests

The Islamic wills that P2 has come across do not really make provision for a *wasiyya*. If a will does, it is usually a bequest to a charitable institution and is not necessarily as much as 1/3 of the estate. He did, however, recall that the wills drawn up by one of South Africa's leading Islamic Banks make provision for 1/3 of the deceased estate to be given as a *wasiyya*.

To P2's understanding, there is no obligation to leave a *wasiyya*, especially if the family of the deceased is struggling financially. He notes: '[a] lot of people don't have to give, Fatima. I mean if I am in debt, I cannot give charity.'[129] He felt it is more important to settle the deceased's debts and to leave the residue of the estate to the heirs of the deceased who are in need. I asked him if he ever encountered a testator leaving a *wasiyya* to an heir and he responded: '[t]hey never give it to their heirs. It must be given to a charitable organisation.'[130] P2's understanding of Islamic law was that a bequest could never be left to an Islamic law heir.

(e) Children born out of wedlock

I asked P2 if he was aware of how children conceived out of wedlock are dealt with in the MJC distribution certificate. He was unaware of the distinction drawn between a child born within six months of the parents marrying and a child born more than six months after the parents married.[131] As far as he was aware, the MJC does not include children who have been proven to have been born out of wedlock in its distribution certificate. However, he indicated that in

[128] Ibid.
[129] Ibid at 9.
[130] Ibid.
[131] Ibid 21-22. See also §5.2(b) for a discussion of gestational periods for extra-marital children.

some instances where such a child has not been included in the distribution certificate, the mother of that child might put a claim against the estate of the deceased for maintenance of the child. He noted:

> 'If it is a minor child, then if the mother is witty and wise enough, she will lodge a maintenance claim against the estate… Let's face it, with the current situation as it is going there is a lot of people that have illegitimate children, and it is a difficult scenario to resolve where people are at loggerheads with one another and the illegitimate child can whittle away the complete estate.'[132]

(f) Usufructs and maintenance claims by surviving spouses

P2 noted that in his experience, many Muslim testators who include IIL in their wills would create usufructs in favour of their surviving spouses. He indicated that many Muslim widows are left destitute in the absence of a usufruct as in terms of the Islamic laws of succession, the widow is only entitled to 1/8 if her deceased husband had children. P2 noted:

> 'The Shariah basically says that the wife is entitled to 1/8th but what do you do in today's age when the children do not look after their parents? I always tell the surviving spouse if you feel insecure about it lodge a maintenance claim against the estate, especially if your children never came forward and I've seen it happening often.'[133]

He, therefore, encourages surviving spouses to submit claims in terms of the Maintenance of Surviving Spouses Act ('MSSA').[134]

(g) Fractional shares in immovable property

P2 indicated that often the family home is the main property in an estate. He noted: '[y]ou have these estates where there is a big house involved and there is a lot of money involved and the people cannot pay each other out. They cannot even afford to pay the rates and taxes…that creates family problems.'[135] P2 continued, '[s]o what I suggest to people normally is sell the

[132] P2 Transcript at 6.
[133] Ibid 7.
[134] 27 of 1990.
[135] P2 Transcript at 17.

property. Let each one get their share and you go your way. You will have better relationships with one another.'[136]

6.10 INTERVIEWS WITH ATTORNEYS

The attorneys I interviewed all had extensive experience in administering estates. They all had at least a basic understanding of IIL and have either drafted wills that included IIL or have administered estates of Muslim testators. I categorised the findings according to common themes that arose in my interviews with the attorneys.

(a) Are Muslims drafting wills?

The attorneys had mixed experiences when it came to the question of how commonplace it is for Muslims to draft their own wills. P3 noted: '[w]hen I started out in 2003 there weren't many wills by Muslims. Many estates had wills drawn up by Absa and other banks, *pro forma* wills not including Islamic inheritance provisions.'[137] Mainstream banks offered this service to clients when they took out mortgage bonds. In about 2006, P3 started experiencing an increase in Muslim clients requesting wills. P4 noted: '[o]ne still has a problem with a fair amount of intestate estates, despite all the publicity that happens.'[138] P5 confirmed that many Muslims still die intestate but noted: '[w]hen we have free wills week in September then we [are] quite busy'.[139] Over their years of practice, the attorneys experienced an increase in Muslims dying with wills. P7 could not really comment on whether there has been an increase in the number of Muslims drafting wills.

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[136] Ibid.
[137] P3 Transcript 13 March 2018 at 11 (hereafter 'P3 Transcript').
[138] P4 Transcript 25 March 2018 at 2 (hereafter 'P4 Transcript').
[139] P5 Transcript dated 10 April 2018 at 3 (hereafter 'P5 Transcript'). In September each year, the Law Society of South Africa, runs a 'National Wills Week' wherein attorneys offer a free will drafting service to the public.

Four of the attorneys confirmed that many Muslims decide to draft their wills shortly before departing for their compulsory pilgrimage. P6 mentioned that she was aware that some Muslims would obtain a will from their travel agents, which they referred to as a 'travelling will' and commented: '[t]hese are very risky and badly drafted as they do not cover the needs of the individual testator.'[140] P4 and P5 also expressed similar concerns about these wills. They both indicated that these wills were usually hastily completed shortly before the testator was about to leave for pilgrimage to Mecca and without necessarily following the proper formalities. P4 expressed her frustration with this phenomenon within the Muslim community: '[s]ome of them must have a will for the suitcase. There is no such thing as a suitcase will. There is no such thing as a travelling will. A will is a will.'[141]

(b) Do Muslims include the Islamic laws of succession in their wills?

P3 indicated that not all his Muslim clients want their estates to be distributed according to IIL. He noted: '[t]hey would leave their estate to their children in equal shares or to their spouse and not always in terms of Sharī'ah.'[142] In the past, when he mentioned this practice to the previous *mufti* of the MJC, he was advised as follows:

> 'Moulana X, informed me that I have to tell them they have a duty to draft an Islamic will and if they do not want to, then he advised me not to draft their will…I found it very difficult to adhere to this ruling.'[143]

However, when they want their estates to be distributed according to IIL, he will include the Islamic law of inheritance through an incorporation provision similar to the one used in the MJC template, with an instruction to obtain a distribution certificate from the MJC. In his experience, the larger the estate and the wealthier the testator, the less likely the testator will

[140] P6 Transcript 28 January 2019 at 7 (hereafter 'P6 Transcript').
[141] P4 Transcript at 17.
[142] P3 Transcript at 1.
[143] Ibid.

be to insist on IIL governing his or her estate, as he or she will not wish to be restricted by the rigid fractions of IIL.

P4 indicated that many of her Muslim clients wish to have their estates distributed according to IIL, but some are concerned about their spouse's security of tenure in the family home. In many instances, the Muslim testator will leave the family home to his wife on the understanding that it will be distributed to his Islamic law heirs on the death of his wife. There are times when P4 will incorporate IIL through the incorporation provision but will, nevertheless, subject the immovable property to a usufruct in favour of the surviving spouse. In other instances, she will include a straightforward incorporation by reference provision with a request for a distribution certificate from a recognised MJB.

P5 indicated that many of her Muslim clients wish to include IIL in their wills, but at the same time, they will want to make special provisions for their wives and daughters, whom they know will otherwise receive less than their male counterparts. P5 noted: 'I've had quite a few [wills] where if one of the parties pass on, the survivor becomes the sole heir and only in the event of the survivor dying must the estate be administered according to Shar ī'ah '.[144] She furthermore indicated that in her experience, some Muslims prefer dying intestate because then they are guaranteed that their sons and daughters, as well as their children who were born out of wedlock, will inherit equally. P6 also confirmed that when Muslims request their wills to be according to IIL, she will incorporate IIL by reference by inserting the incorporation provision. She will also include the provision requesting a distribution certificate from an MJB.

[144] P5 Transcript at 7.

P7 indicated that the first time she experienced drafting an Islamic will was in the mid-90s. She was approached by one of her Muslim clients, who asked her to draft an Islamic will. At that stage, she was not familiar with IIL. Her client referred her to the Qur'anic provisions on inheritance, which she read and proceeded to do further research. In her research, she came across an article by Bulbulia titled 'How to draft a will for a Muslim client'.[145] She found the Bulbulia article particularly helpful in drafting her first Islamic will.

Bulbulia clearly sets out a basic overview of the Sunnī Islamic laws of inheritance and advises attorneys on how to incorporate the Islamic laws of inheritance into a Muslim client's will through the inclusion of an incorporation provision similar to the one used by the MJC.[146] The only significant difference is that Bulbulia stipulates that to give effect to this incorporation provision, the executor has to file with the Master a certificate in an affidavit form, executed by one or more competent and qualified officials of a relevant provincial MJB.[147] P7 confirmed that subsequently, whenever she has to draft an Islamic will, she will incorporate IIL by reference into the will. She did not perceive this incorporation by reference to be in contradiction with the common-law rule that regards incorporation by reference as unlawful. She noted: '[a]n Islamic law heir can only be determined on the death of the testator. Also, the Islamic laws of succession are clear cut and can be applied mechanically based on the fractions allocated to set Islamic law heirs.'[148] She also mentioned that she was aware that some Muslims approach South Africa's leading Islamic Bank to draft their Islamic wills, which were based on a standard Islamic will precedent.

[145] Bulbulia, 'How to draft a will for a Muslim client' (1982) *De Rebus* September 411.
[146] Ibid.
[147] Ibid 412.
[148] P7 Transcript 22 November 2018 at 2 (hereafter P7 Transcript).

All the attorneys indicated that, in most cases, they obtain their distribution certificates from the MJC. One attorney mentioned that the MJC distribution certificate is readily accepted by the Master's office without any hassles, whilst introducing a distribution certificate from another MJB or an *imām* will delay the winding up of the estate as the Master's office will not readily accept these certificates. P5 noted, 'We just grateful for the MJC certificate man! We stuck without that certificate.'[149]

(c) To bequeath or not to bequeath?

All the attorneys were aware that Muslim testators could leave 1/3 of their estates as a bequest to a non-heir or to charity. They were not aware of the fact that a Muslim testator can grant a bequest to an heir with the consent of all the other heirs. However, P5 noted: 'Yes the bequest of a third, many dads have asked me to bequeath it to their daughters'[150] She noted further: 'I have many clients who want to give more to their daughters, but cannot because the estate is going according to Shariah…but the daughters do so much for them so they give that third to them.'[151] Some of them mentioned that they had clients who left a part of 1/3 or the full 1/3 as a bequest to their child born out of wedlock or to their adopted child.[152] P4 actively encouraged her Muslim clients to leave 1/3 of their estates as a *wasiyyah* to be distributed to charity.[153]

(d) Religious liabilities

P6 mentioned that, as far as she was aware, attorneys who act as executors never really follow through on these religious debts.[154] At most, when acting as an executor of a Muslim estate, she will enquire whether the deceased had an outstanding pilgrimage and then she will appoint

[149] P5 Transcript at 4.
[150] Ibid at 7.
[151] Ibid at 9.
[152] P4 Transcript at 17; P5 Transcript at 9-10.
[153] P4 Transcript at 20-21.
[154] P6 Transcript at 4.

a travel agent who specialises in *hajj* travels to perform the pilgrimage on behalf of the deceased, and will deduct this amount from the estate. She indicated that on a practical level, it is very difficult to keep track of all the other religious debts. She also noted: '[t]he MJC never enquires on the debts to Allah'[155] when issuing its distribution certificates. This was confirmed in my interview with P1, who indicated that the MJC never requires documentation detailing the deceased's religious debts when issuing the distribution certificate.[156] The most common and generally the only religious liability that P3, P4 and P5 consider when administering a Muslim estate is whether the deceased had an outstanding pilgrimage.

P7 drew my attention to the Islamic Bank will template, which contained provision for the payment of religious liabilities. The will template directs the executors to ascertain the testator's religious liabilities in accordance with the tenets of the Islamic faith as of the date of the testator's death. It then lists various religious liabilities including: unperformed *salāh* (prayers); unpaid *zakāh*; unkept *saum* (fast) uncompleted *hajj* and any outstanding expiation for unfulfilled vows and oaths. P7 indicated that in her experience as a practitioner, she has never encountered the scenario where the executor pays these religious debts from the estate of a deceased.[157] She believes these religious liabilities to be very onerous requirements and suspects that only the very orthodox adherents of the Islamic faith comply with these obligations.[158] They are, furthermore, very difficult to keep track of and difficult to prove after the death of the testator.

[155] Ibid at 5.
[156] P1 Transcript at 16-17.
[157] P7 Transcript at 5.
[158] Ibid.

(e) Children born out of wedlock

P3 indicated that in his experience, the MJC does not include children born out of wedlock in its distribution certificates. P3 had the following to say about one of his clients:

> 'In matter X, he [my client] was excluded …he could not inherit from his father because he was born out of wedlock but he could inherit from his mother because that was intestate…the mother's estate was intestate and the father's estate had a will with a Sharī'ah provision and the sharia certificate excluded him (my client) from inheriting…nobody challenged the certificate…nobody has ever challenged the [MJC] allocation'.[159]

P3 was aware that the MJC determines whether a child was conceived out of wedlock by looking at the dates on the marriage certificate of the parents and the birth certificate of the child in question. However, he was not aware of the ruling that if a child was born within six months of the parents marrying and the father acknowledges paternity, such child could inherit as an Islamic law heir.

P4 and P5 mentioned that parents usually make provision for their children who were conceived or born out of wedlock by either giving them something in their lifetime or leaving them a bequest from the 1/3 of their estate over which they have freedom of testation. P5 also mentioned that on many occasions, her clients would make provision for such children during their lifetimes. P5 noted:

> 'My clients want their children to inherit more or less the same, so I work out what the child out of wedlock would have received had he been a Sharī'ah heir and then I stipulate that amount as a *wasiyya*. I will generally give that child a *wasiyya*. It cannot be more than what the other rightful heirs would receive'.[160]

As their attorney, P6 tries to estimate what a child conceived or born in wedlock would inherit and then she will ensure that the child born out of wedlock receives the same amount from 1/3 of the estate. The attorneys were aware that, as a general rule, the MJC does not include a child born out of wedlock in its distribution certificates.

[159] P3 Transcript at 3.
[160] P5 Transcript at 3.

(f) Redistribution agreements

With the exception of P7, the remaining four attorneys all confirmed that Muslim heirs often enter into redistribution agreements, where the testator's will has incorporated IIL.[161] According to P3:

> 'Redistribution is the go to position…Islamic wills with mother getting 1/8, sons twice the girls, parents a 1/6 each, is difficult to administer and maintain a property like that…we can correct this through redistribution agreements when one heir takes ownership of the property and pays out the other heirs…The family home is the main asset and division through fractions [is] problematic…if the heirs cannot agree on a redistribution agreement then I transfer the property into all their names.'[162].

According to P4:

> 'So often where there is just a straightforward Sharī'ah will and the children feel they want to re-arrange the assets, it happens in the father's estate…The Master must consent and each heir must get something.'[163]

One heir will pay out the other heirs to avoid fragmented ownership of immovable property or a family business. Alternatively, the heirs will forfeit their right to their share in favour of the surviving parent, on the understanding that once the surviving parent dies, the estate will be distributed according to Islamic law. P7 had a different view on redistribution agreements: 'I cannot see how a redistribution agreement can work with an Islamic will. Each heir is entitled to a fixed fraction and should the children for instance forfeit their share in favour of their mother, does this not defeat the objective of having a Sharī'ah will?'[164]

P5 and P6 expressed concerns that the rigid Islamic law fractional share-based system creates problems from a practical perspective. Each heir will own a fractional share in the estate, including the immovable property. Some heirs will want to sell the immovable property to realise their shares, whilst others will wish to hold onto the property without necessarily having

[161] See P5 Transcript at 11 and 26; P6 Transcript at 7.
[162] P3 Transcript at 4.
[163] P4 Transcript at 6.
[164] P7 Transcript at 3.

the finances to maintain it. This inevitably results in an impasse, and many estates are not wound up precisely because of this kind of stalemate. P5 also indicated that it is difficult to register the smaller fractional shares against the immovable property with the Registrar of Deeds as the fractions have to be converted into percentages. She indicated that the bigger fractions are not a problem, like 1/8, 1/4, or 1/5 but smaller fractions (for instance, 2/35) are more problematic to convert into percentages for the purpose of registering ownership.

P4 also indicated that in some instances, male heirs of a testator would have a problem with their sisters getting half the value of their share, and they will request that the shares between the siblings be equalised irrespective of the MJC's distribution certificate. A further issue raised by P5 is that IIL does not make provision for inheritance via representation, so if one of the children of the testator has predeceased the testator, the descendants of that child will not be entitled to inherit in terms of Islamic law. This creates problems for the grandchildren of the deceased.[165]

(g) Inclusion of a usufruct in an Islamic will

The attorneys that I interviewed all had different views and experiences with respect to including a usufruct in an Islamic will. P7 indicated that she did not encounter clients who requested the inclusion of a usufruct as part of their Islamic wills. In her opinion, including a usufruct would defeat the objective of having an estate devolve according to IIL. She indicated that if the testator left his immovable property as a usufruct to his surviving wife, the usufruct would have to be valued in order to determine whether it constitutes 1/8 of the deceased's net estate. She pointed out that it was really difficult to determine the value of such a usufruct.

[165] P5 Transcript at 19-20. The issue of grandchildren not inheriting through representation is discussed in greater detail in §9.2(c).

The remaining four attorneys indicated that, based on their client's instructions, they would include a usufruct in an Islamic will to protect the security of tenure of a surviving spouse on the death of the testator. P3 noted: 'A lot of clients enquire after a usufruct…I include it to protect a spouse…clients don't really enquire whether its Sharī'ah compliant.'[166]P5 noted: 'Yes, with an older mom we always include a usufruct in the father's will, because then nobody can throw her [the mother] out'.[167] P4 mentioned that even though she often includes a usufruct in a testator's will she finds it to be of limited practical use. She indicated that often the elderly usufruct holder is unable to uphold and maintain the immovable property, or instances where the remaining heirs make life so difficult for the usufruct holder that the holder eventually gives up his or her right to use and enjoy the immovable property. In the latter instance, the surviving parent inevitably becomes dependent on one of his or her children to provide accommodation. P4 noted: 'The usufruct is meaningless! The only way I can guarantee [financial security] for this woman, is to ensure he [the husband] leaves the property to her. So unfortunately one does not follow the Sharī'ah that way.'[168] The attorneys were aware that including the usufruct might not be consistent with IIL, but they nevertheless include it on their client's instructions. They felt that IIL does not provide adequate protection for a surviving spouse, especially if the surviving spouse is a widow who is only entitled to 1/8 of the deceased's estate.

(h) Maintenance of surviving spouse claims

Three of the five attorneys mentioned that they had assisted Muslim widows lodge claims against their deceased husbands' estates in terms of the MSSA. Two attorneys indicated that the reason a Muslim widow lodges a claim in terms of the MSSA is that her 1/8 inheritance

[166] P3 Transcript at 3.
[167] P5 Transcript at 3.
[168] P4 Transcript at 4.

share is not enough to sustain her. P3 noted: 'They [widows] put in a claim in terms of the Maintenance of Surviving Spouse Act…where the testator did an Islamic will and she's not happy with her 1/8 share.'[169] The attorneys understood that in terms of IIL the estate of the deceased only needed to ensure the maintenance of the widow for the period of her *iddah.* After the *iddah* the widow is expected to survive on her 1/8 share, which inevitably is inadequate.

P3 mentioned one of his cases, where a deceased had two wives to whom he had been married by Muslim rites only, and after his demise, the first wife disputed the fact that she had been irrevocably divorced by the deceased. P3 represented the first wife, whom he assisted in lodging a claim against the deceased husband's estate in terms of the MSSA. The second wife disputed the first wife's claim and alleged that the deceased had irrevocably divorced the first wife. P3 noted: 'My client had evidence from her children, neighbours and her father-in-law to prove they were still married when he died.'[170]The parties had to also lead expert evidence on whether the first wife had been irrevocably divorced. If she had been irrevocably divorced, she was not entitled to inherit or institute a claim for maintenance. P3 noted that there is no uniformity amongst the *imāms* or MJBs in the way divorce is dealt with in the Muslim community. This impacts the inheritance rights of the wife, especially when there is a dispute as to whether a divorce was irrevocable or not.

It would appear that the main reason a Muslim widow would lodge a claim against her deceased husband's estate in terms of the MSSA would be that the 1/8 share she is entitled to (or the 1/16 share if she is a second wife)[171] is not sufficient to maintain her. P4 mentioned the unusual scenario of one of her clients, an *imām*, who was married to four wives at the same time. In

[169] P3 Transcript at 5
[170] Ibid at 7.
[171] See discussion of spouse's share in §5.3(b)(iv).

this scenario, each of his wives would only be entitled to 1/32 of his estate if he died, as he was survived by descendants.

(i) Testamentary trust

The experience of the attorneys varied in so far as testamentary trusts are concerned. P3 mentioned that he only includes a reference to a trust in a Islamic will when his clients specifically request it. However, he was told by the *mufti* of the MJC that trusts are only allowed in three circumstances, namely, to create a *waqf* (a charitable endowment) for minor children or for children who are mentally disabled and who need to be taken care of. In the latter case, the child's share will be placed in a trust to be administered for his or her benefit by his or her guardian or a trustee. P3, therefore, only encourages his Muslim clients to create a testamentary trust in the above instances. The remaining attorneys indicated that they would create testamentary trusts for minor children when drafting Islamic wills. Each minor child will be entitled to receive income in accordance with his or her IIL share. P7 mentioned that, in her opinion, it is permissible to create a testamentary trust in Islamic wills for adult Islamic law heirs who have substance abuse problems or who are incapable of managing their affairs.

(j) Pension fund pay-outs

The attorneys generally understood that pension fund pay-outs do not form part of the estate of a deceased and that the trustees of the pension fund will decide which of the dependants of the deceased are entitled to benefit from the pay-outs. P3 felt that this should be legally challenged as he felt it should form part of the estate of the deceased, or at the very least, the trustees of the pension fund should distribute it to the Islamic law heirs of the deceased. He had gone as far as to obtain a legal opinion on this matter but was advised that the chances of succeeding on such a legal challenge are slim. P5 indicated that she was happy that pension fund pay-outs

do not form part of the deceased's estate because this means a surviving wife who was dependent on the deceased in his lifetime will be entitled to more than her limited Islamic law fractional share.

6.11 ANALYSIS OF QUALITATIVE RESEARCH INTERVIEWS

My qualitative interviews rendered extensive findings on the inheritance and estate planning practices of Muslims at the Cape. It provided an overview of how Muslims include IIL in their wills and what some of the challenges are that they encounter when doing so. The different categories of participants experienced different aspects of IIL, but there were common threads or patterns that emerged from all three categories. In this section, I provide an analysis of some my findings derived from my qualitative interviews. A more detailed analysis of the remaining issues occur in chapters seven and eight.

The data derived from the document analysis of the wills at the MJC, combined with the qualitative interview of P1, proved useful in identifying and understanding: (i) how the leading MJB in the Western Cape, namely the MJC, facilitates the drafting of Islamic wills for the broader Muslim public; (ii) the legal rulings issued by the MJC on Islamic inheritance matters; and (iii) how the MJC is relied upon by the attorneys' profession and the Master's office to provide distribution certificates. The MJC has been providing a will drafting service for a few decades in the Western Cape at a nominal fee of R150 per will. It developed a *pro forma* Islamic will, which includes IIL in testators' wills through an incorporation provision. The officials at the MJC are not legally trained professionals, and so there is the risk that certain legal formalities are not complied with when assisting members of the public with drafting their wills.

Based on my interview with P1, it also became apparent that provisions might be inserted in the MJC template or agreements might be reached, which are potentially invalid according to South African succession law. Examples would be: (i) P1 draws up a separate family agreement for the testator to transfer immovable property to his spouse and such agreement does not form part of the formal will; or (ii) where P1 has the children heirs enter into an agreement that allows a child conceived out of wedlock to inherit from the parent's estate. These are some of the pitfalls that could arise as a result of having non-legal professionals provide a will-drafting service to the public. Having said that, the MJC continues to fulfil a critical service in the community, especially to Muslims from the lower socio-economic strata who cannot afford the services of attorneys.

P1 also shed light on some of the legal rulings issued by the MJC pertaining to IIL matters as can be gleaned from Fatwa 1[172] and Fatwa 2.[173] In Fatwa 1, the MJC notes that, as a general rule, it adopts the Shāfi'ī rulings on matters but that it will resort to the practice of *talfīq*[174] by relying on the other three legal schools when the situation necessitated it or that it may even rely on positions beyond the four Sunnī legal schools.[175] By way of example, the MJC issued a ruling in Fatwa 1, which stipulates that where a deceased is survived by a Muslim wife, a non-Muslim mother and non-Muslim sister, then mother and sister may only receive a combined share of 1/3 (4/12) by way of bequest.[176] They cannot inherit as heirs, owing to the exclusion against non-Muslims inheriting from a Muslim testator.[177] The wife would be entitled to 1/4 (3/12) share as the deceased had no dependants, which leaves a residue of 5/12. Fatwa 1 notes that although there is *ijmā* on the ruling that a wife is not entitled to *radd* where the estate

[172] See discussion in §6.8(b) and (d) and Appendix 8.
[173] See discussion in §6.8(g) and Appendix 11.
[174] See discussion on *talfīq* in §2.3(c).
[175] See findings in §6.8(b).
[176] Fatwa 1 §2.9.4.3.
[177] See discussion in §5.4(c).

is left without an heir, the MJC would take its cue from the Hanafī school and rule that the wife is entitled to the *radd* under these circumstances.[178] The *fatwa* does not clarify which Hanafī opinion it relies upon, which is interesting in light of the fact that it notes that there is consensus amongst the legal schools that a spouse cannot inherit the surplus. Another issue dealt with in Fatwa 1 is the, is the issue of pension pay-outs and whether they form part of the testator's estate on his or her death and whether they are subject to IIL. I discuss the validity of the MJC's legal ruling on this issue in greater detail in chapter eight below.[179]

Although these *fatāwa* are not necessarily binding on the Muslim public, they are being applied by the MJC officials who assist members of the public with the drafting of their wills. More significantly, they are applied when drawing up the distribution certificates that determine the Islamic law heirs of a testator. By all accounts, the MJC appears to be the MJB of choice for attorneys who require distribution certificates in Muslim estates. The MJC distribution certificate also appears to be met with the least resistance at the Master's office, which accepts it without much querying. The approach of the MJC to Islamic inheritance matters is, therefore, of particular importance. I will discuss the impact of its legal rulings in more detail in chapter seven when dealing with the question of incorporating Islamic law by reference into a will and the delegation of a Muslim testator's testamentary power.

The data obtained from the attorneys confirmed that more Muslims are drafting wills currently than was the case historically. It appears that members of the public do take advantage of the free 'National Wills Week' offered in September each year.

[178] Fatwa 1 §2.9.4.3.
[179] See discussion in §8.3.

It was interesting to note that many Muslim couples are married by civil law and in community of property. The reason could be that this matrimonial system of marriage provides spouses, especially the wife, with greater financial protection on death or divorce, than a marriage solemnised according to Muslim rites only.

In most cases, where a client wants to include IIL in his or her will, he or she will do so through an incorporation by reference provision. None of the attorneys found it problematic that in this scenario, the determination of a testator's heirs was left to a third party, namely the MJC or another Islamic law expert. As far as they were concerned, IIL is straightforward with little room for disagreement, and hence, there is no problem with a third party determining heirs. They assumed that the determination of heirs and their respective shares was a mechanical process. Most of the attorneys were not aware of the different legal opinions that prevail in IIL, as discussed in the previous chapter. So, for instance, they were not aware of the different rulings pertaining to the time frames when a child was conceived, nor were they aware of the fact that a bequest can be left to an Islamic law heir if the remaining heirs consent thereto. They had a general understanding of the Islamic inheritance shares but were not aware of the various nuances and subtleties that occur when, for instance, a testator is survived by his wife, mother and father, as discussed in the *'Umariyyatān* examples above.[180] They essentially defer to the MJC to determine who the heirs are and what their correct shares should be.

Some of the attorneys did find the Islamic fractional shares very rigid, especially when they result in joint ownership in immovable property by all the Islamic law heirs. This creates its own sets of challenges in the scenario where the heirs are unable to reach agreement on the sale of the property. An estate can remain in probate for years because heirs, as co-owners of

[180] See discussion in §5.3(b)(ii).

immovable property, cannot reach agreement on whether the family property should be sold or not. In the interim, heirs are trapped with their inheritance and are jointly and severally liable for the maintenance, insurance, rates and taxes on the immovable property. This was confirmed by both P5 and P6.

P3 mentioned that wealthier clients with big estates were less inclined to have their estates devolve according to IIL and would therefore not incorporate IIL into their wills. The Assistant Master, P2, also mentioned that some Muslims, especially those married in community of property, deliberately omit to draft wills as they would prefer that their estates devolve according to South African intestate laws. In this way, they are guaranteed that their spouses will inherit a more substantial amount than in IIL, and their daughters will inherit equally with their sons.

Three of the attorneys also found it problematic that a surviving wife is only entitled to 1/8 of her deceased husband's estate. They found that widows are inevitably left vulnerable as a result of this negligible share in their deceased husband's estate. To address this challenge, they include a usufruct in favour of the surviving spouse, especially in favour of the surviving wife. They were aware that it is debatable whether a usufruct included in an Islamic will is consistent with Islamic legal principles. P7 correctly pointed out that such a usufruct would have to be quantified to ensure it does not exceed 1/3 of the net estate. P1 of the MJC did not encourage the inclusion of a usufruct in the MJC wills as he felt it was not compliant with IIL I discuss the inclusion of a usufruct in a Islamic will in greater detail in chapter eight below.[181]

[181] See discussion in §8.2(b) where I highlight that Islamic law generally regards the value of the *usufructuary* right as equivalent to the value of the *corpus* of the property to which it is attached.

The common understanding amongst all the participants was that a bequest could not be given to an Islamic law heir. However, this knowledge did not prevent attorneys like P5 from including bequests for Islamic law heirs, especially for daughters in the wills of Muslim testators who requested it. The attorneys were not aware that a bequest of up to a 1/3 value of the net estate could be given to an Islamic law heir if the other heirs agreed to it on the death of the testator.

These are some of the issues that arose in my empirical research. I continue my analysis of my findings in chapters seven and eight.

6.12 CONCLUSION

My empirical research confirmed that IILs are being applied to the administration of Muslim estates in South Africa. Muslim testators are incorporating the entire system of IIL into their wills through a standard incorporation provision. They are relying on MJBs to interpret and give effect to IIL. They delegate their testamentary powers to MJBs, like the MJC, to determine who their heirs will be on their death and what their Islamic law shares shall be. The decisions of the MJC in this regard are unquestioningly accepted and respected by the Muslim public, the attorneys who work in this area of law, and the Master's office.

In run-of-the-mill cases, the MJC mechanically uses a software program to determine the heirs of a testator and to calculate their shares. However, in more complex scenarios, the MJC has issued various *fatāwa* indicating how they will deal with these scenarios. The *fatāwa* demonstrates that the MJC does exercise discretion when determining certain inheritance matters, and in chapter seven, I discuss what the implications are of incorporating IIL into a will and of delegating testamentary powers to third parties like the MJC.

CHAPTER SEVEN

THE IMPLICATIONS OF INCORPORATING BY REFERENCE ISLAMIC INHERITANCE LAWS INTO WILLS AND DELEGATING TESTAMENTARY POWERS TO MUSLIM JUDICIAL BODIES

7.1 INTRODUCTION

In the previous chapter, I illustrated, through my empirical research, the manner in which Islamic inheritance laws (IILs) are practised and implemented in South Africa by Muslims in the Cape. I identified various problematic issues. Some of these issues were discussed in chapter six, such as the concerns around non-compliance with the formalities of a will and the validity of provisions ousting the South African courts' jurisdiction in respect of disputes arising from Islamic wills. In this chapter, I delve into two of the main legal issues arising out of my empirical research, namely: (i) the delegation of testamentary powers to Muslim judicial bodies ('MJBs') like the Muslim Judicial Council ('MJC'); and (ii) the incorporation of IIL by reference into Islamic wills.

In most of the MJC Islamic wills that I surveyed the testators incorporated IIL into their wills. They furthermore delegated their testamentary powers to the MJC or similar bodies to determine their Islamic law heirs. This was not always the practice when drafting Islamic wills. In my research at the South African Archives ('the Archives'), I uncovered alternative methods of including IIL in a will. I will refer to three wills retrieved from the Archives in which the Muslim testators did not delegate their testamentary powers to third parties to determine their Islamic law heirs, nor did they incorporate IIL by reference into their wills.

I discuss the common-law rules against the delegation of testamentary powers and incorporation by reference. In this regard, I draw on case law, Roman-Dutch authority, and academic opinion. I highlight the problems that may arise with testators incorporating IIL by reference into their wills and delegating their testamentary powers to MJBs. In concluding this chapter, I argue that these black-letter principles of succession, even though testators have violated them, they might have to be developed to take into account the constitutional values that allow people to regulate their private affairs according to their personal laws.[1]

7.2 DELEGATION OF TESTAMENTARY POWERS

Under this section, I firstly discuss three Islamic wills that I retrieved from the Archives in which the testators do not delegate their testamentary powers to a third party to determine their Islamic law heirs. I then discuss the common-law rule against the delegation of testamentary powers, followed by a discussion of the exceptions to the rule and whether the current practice of Muslim testators delegating their testamentary powers to the MJC qualifies as an exception.

(a) Did Muslim testators always delegate their testamentary powers? Case studies of Islamic wills from the Archives

Although, as mentioned previously,[2] I abandoned my research in the Archives, I found some of the archival material useful to understand how Muslim testators drafted wills in the past. In this section, I discuss my findings regarding three archive wills where the Muslim testator did not delegate his[3] testamentary powers to an external body to determine his Islamic law heirs. Instead, the testators included IIL by specifically mentioning their Islamic law heirs in their wills and their respective shares. For the sake of convenience, I will label the wills as 'will

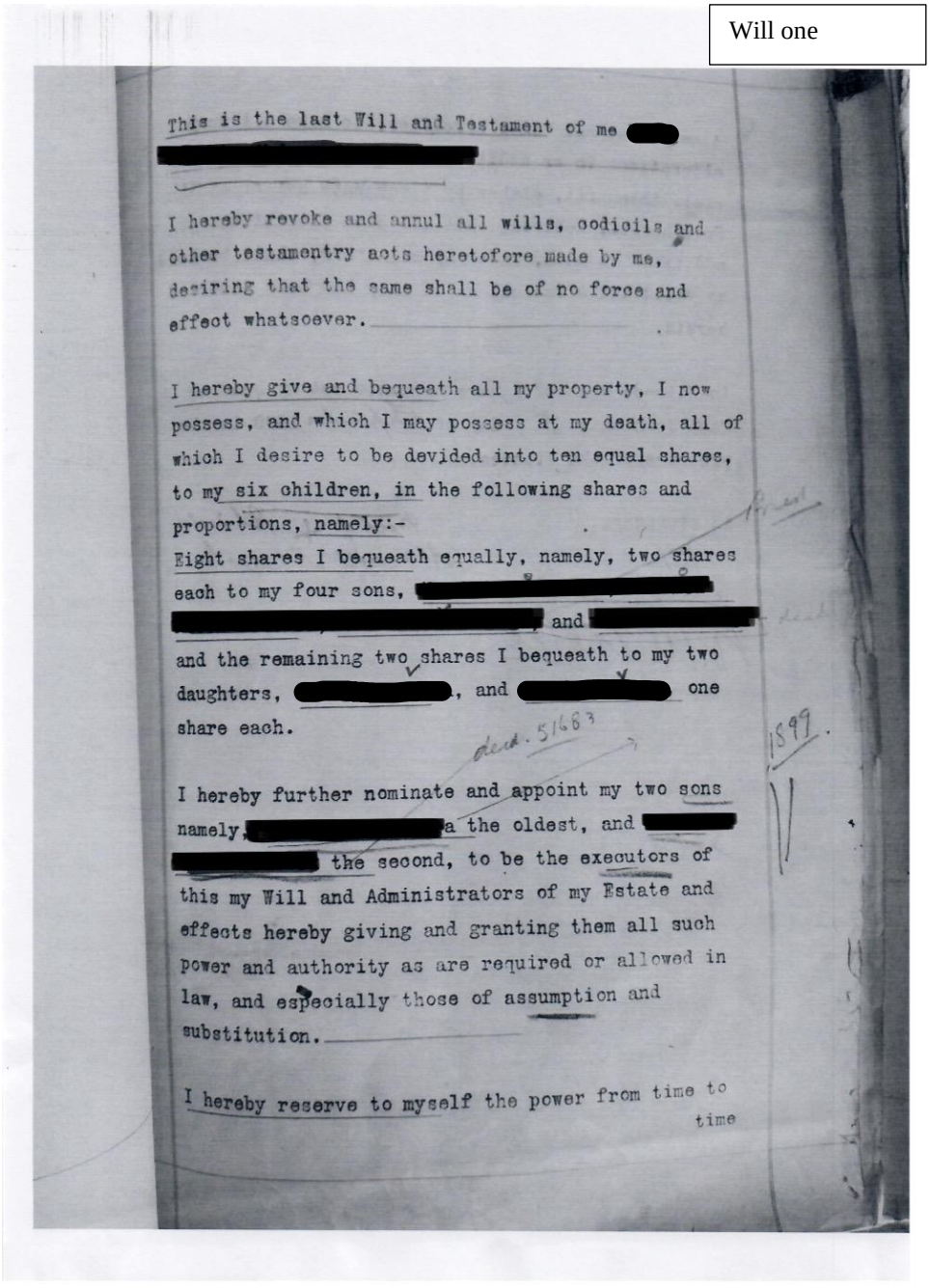
[1] See constitutional provisions in chapter one (n3).
[2] See §1.4 (b)(iv).
[3] All three testators were males.

one', 'will two' and 'will three'. I will discuss my findings in respect of each will, followed by my general comments.

(i) Will one

Will one is dated 5 September 1899. It is stored under file number 2313/06 in the Archives with a reference number of 1707.

Will one



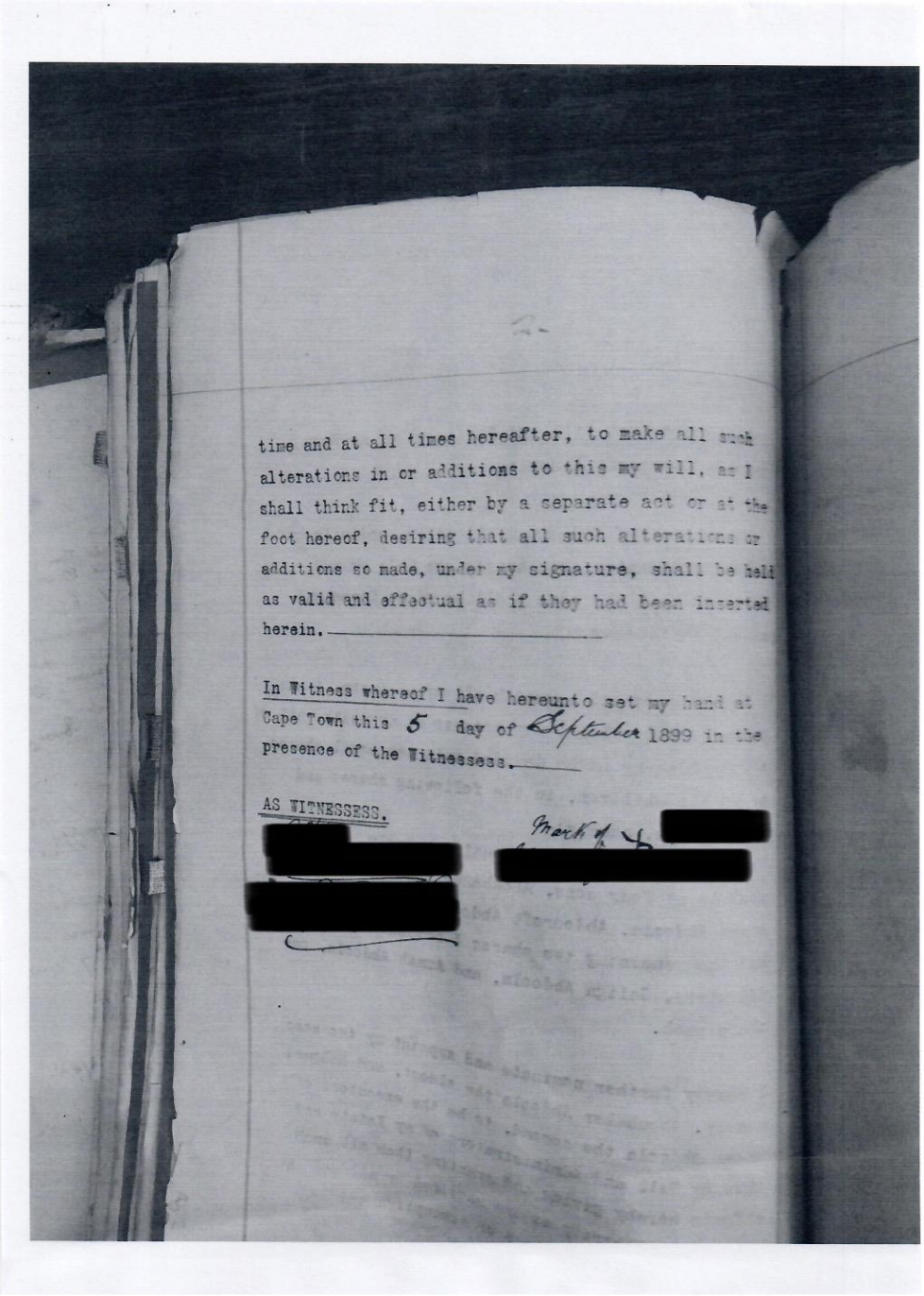
This is the last Will and Testament of me [redacted]

I hereby revoke and annul all wills, codicils and other testamentry acts heretofore made by me, desiring that the same shall be of no force and effect whatsoever.

I hereby give and bequeath all my property, I now possess, and which I may possess at my death, all of which I desire to be devided into ten equal shares, to my six children, in the following shares and proportions, namely:-
Eight shares I bequeath equally, namely, two shares each to my four sons, [redacted] and [redacted] and the remaining two shares I bequeath to my two daughters, [redacted], and [redacted] one share each.

I hereby further nominate and appoint my two sons namely, [redacted] the oldest, and [redacted] the second, to be the executors of this my Will and Administrators of my Estate and effects hereby giving and granting them all such power and authority as are required or allowed in law, and especially those of assumption and substitution.

I hereby reserve to myself the power from time to time



time and at all times hereafter, to make all such alterations in or additions to this my will, as I shall think fit, either by a separate act or at the foot hereof, desiring that all such alterations or additions so made, under my signature, shall be held as valid and effectual as if they had been inserted herein.

In Witness whereof I have hereunto set my hand at Cape Town this 5 day of September 1899 in the presence of the Witnessess.

AS WITNESSESS.

[redacted]

Mark of [redacted]

[redacted]

The deceased in will one was a Muslim male who died in 1922. He was married twice. Both wives predeceased him. According to archival records, his profession was listed as 'Emaam (Malay Priest)'. According to further information obtained from the file, the deceased's parents predeceased him. I have blocked out the names of all relevant parties in order to protect the right to privacy of the descendants of the testator.

In clause two the testator directs that on his death, his estate must be divided into ten equal shares to be distributed to his six children. He allocates eight of the shares to his four sons, whom he mentions by name, with each son to receive two shares each. The remaining two shares he allocates equally between his two daughters, who are also named. Although the testator does not mention IIL explicitly in his will, the way he has allocated his estate is illustrative of a will that is compliant with the fixed shares allocated in IIL. He grants all his sons equal shares, and the two daughters receive half the share of their brothers. As an *imām*, one must also assume that he was familiar with the IILs.

It is interesting to note that if he remarried after executing the will, this would have presented a problem because, in terms of Islamic law, the spouse would have been entitled to inherit. However, by not making provision for a spouse, the surviving spouse would have been disinherited with no prospect of a maintenance claim.[4] To get around the difficulties, the testator would have had to either amend his will by executing a codicil or draft a new will. In the absence of a clear indication that IIL had to apply to his estate, the testator's desire to abide by the laws of Islam would have been frustrated if the aforementioned scenario unfolded.

Furthermore, if any of the testator's children predeceased him, it is not clear if the share of the predeceased child would accrue[5] to his or her siblings or if it would vest in the children of the predeceased child (the grandchildren of the deceased). In Islamic law, the children of a predeceased son or daughter of a testator are excluded from any share in their grandparent's estate by a surviving uncle (i.e. one of that grandparent's own sons).[6] The testator made no

[4] Under the common law and before the coming into force of the MSSA, a surviving spouse did not enjoy a claim for maintenance against the estate of a predeceased spouse, as was confirmed by the AD in *Glazer v Glazer* 1963 (4) SA 694 (A) at 707D-E.

[5] '…the right of accrual (*aanwas*) is the right which co-heirs, co-legatees and other joint beneficiaries have of inheriting and succeeding to the portion of those who, for some reason or other, cannot, or will not, take themselves.' Corbett *et al Law of Succession in South Africa* (2001) 243; see also Jamneck *et al The Law of Succession in South Africa* (2012) 169.

[6] See §5.3(a)(iii) and §9.2 (c).

provision for substitution in his will. A substitution provision in a will nominates another beneficiary to take the place of an appointed heir or legatee in certain circumstances, such as where an heir or legatee predeceases the testator.[7] The testator did not indicate that his dominant intention was to have IIL apply to his will, so the South African common law prevailing at the time would have applied. As no provision was made in the will for substitution and as there was no legislation directing for substitution at the time[8], the common-law rule of accrual would have applied.

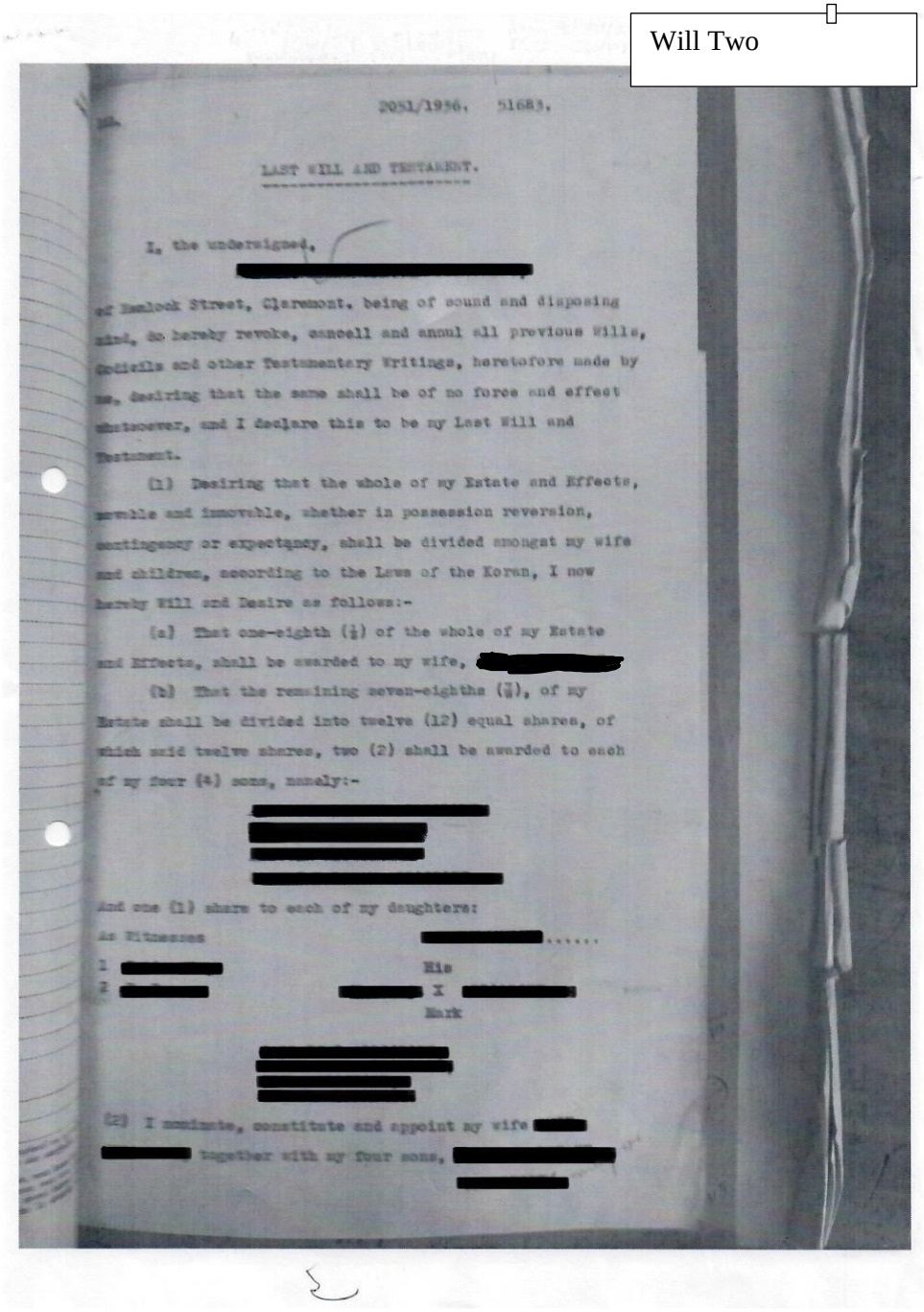
In *Labuschagne v Schoeman,*[9] the testator had bequeathed £200 to A and B, but as B had predeceased the testator the entire £200 accrued to A. Similarly, in *Engelbrecht v Botha,*[10] the testators had bequeathed their farm to four of their children by name, but as the one child predeceased the testators, the court held that her share accrued to the three remaining children of the testators, as it was a case of joinder *re et verbis* (joinder through the property and words)[11]and therefore the right of accrual applied.

The same reasoning would have applied to will one, which was executed in 1899, with the testator dying in 1922. If one of the children predeceased the testator, his or her share would have accrued to the surviving siblings, with the brothers taking double the share of the sisters. When accrual operates, those to whom the vacant share accrues take the same share of it as they do of their own.[12] Fortuitously the outcome in the common law would have coincided with the IIL position in this case.

[7] *Greef v Estate Greef* 1957 (2) SA 269 (A) at 274B-D.
[8] See §9.2 (c) for a discussion on the direct substitution provision in s2C of the WA.
[9] 1915 CPD 19.
[10] (1907) 24 SC 726.
[11] For a discussion on *joinder re et verbis* see §9.2 (c) below.
[12] *Eksteen v Eksteen's Executors* (1885) 4 SA 13 at 17.

(ii) Will two

Will two is dated 23 January 1936. It is stored under file number 4811/06/09/, with the reference number 51683.



Will Two

2051/1936. 51683.

LAST WILL AND TESTAMENT.

I, the undersigned, [redacted]

of Hemlock Street, Claremont, being of sound and disposing mind, do hereby revoke, cancell and annul all previous Wills, Codicils and other Testamentary Writings, heretofore made by me, desiring that the same shall be of no force and effect whatsoever, and I declare this to be my Last Will and Testament.

(1) Desiring that the whole of my Estate and Effects, movable and immovable, whether in possession reversion, contingency or expectancy, shall be divided amongst my wife and children, according to the Laws of the Koran, I now hereby Will and Desire as follows:-

(a) That one-eighth (1/8) of the whole of my Estate and Effects, shall be awarded to my wife, [redacted]

(b) That the remaining seven-eighths (7/8), of my Estate shall be divided into twelve (12) equal shares, of which said twelve shares, two (2) shall be awarded to each of my four (4) sons, namely:-

[redacted]

And one (1) share to each of my daughters:

As Witnesses [redacted].....

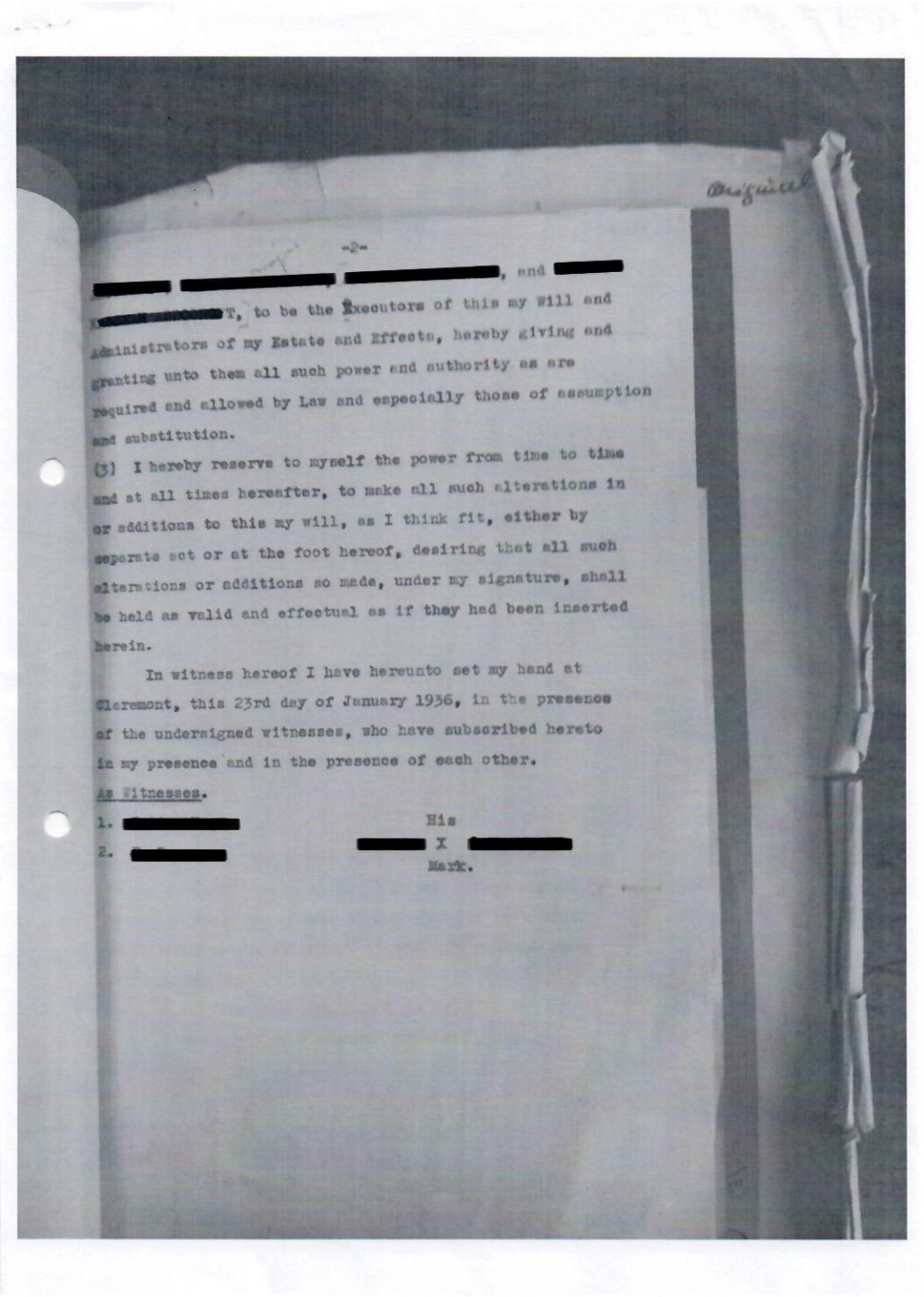
1 [redacted] His

2 [redacted] X [redacted]

Mark

[redacted]

(2) I nominate, constitute and appoint my wife [redacted] together with my four sons, [redacted]



-2-

[redacted], and [redacted]
[redacted]T, to be the Executors of this my Will and Administrators of my Estate and Effects, hereby giving and granting unto them all such power and authority as are required and allowed by Law and especially those of assumption and substitution.

(3) I hereby reserve to myself the power from time to time and at all times hereafter, to make all such alterations in or additions to this my will, as I think fit, either by separate act or at the foot hereof, desiring that all such alterations or additions so made, under my signature, shall be held as valid and effectual as if they had been inserted herein.

In witness hereof I have hereunto set my hand at Claremont, this 23rd day of January 1936, in the presence of the undersigned witnesses, who have subscribed hereto in my presence and in the presence of each other.

As Witnesses.

1. [redacted]
2. [redacted]

His
[redacted] X [redacted]
Mark.

The deceased in will two was a Muslim male who died in 1936. At the time of his death, he was married according to Mohammedan rites.[13] His occupation is listed as a 'Mohammedan Priest', and he is classified as Malay.[14]

[13] Being married according to Mohammedan rites is the same as being married by Muslim rites.
[14] The term Malay was used under apartheid to describe the non-Indian Muslim population in Cape Town.

In clause one the testator stipulates:

> 'Desiring that the whole of my Estate and effects, …, shall be divided amongst my wife and children, *according to the laws of the Koran*, I now hereby Will and Desire as follows:- (a) That one-eighth (1/8) of the whole of my Estate and Effects, shall be awarded to my wife, [name] (b) That the remaining seven-eighths (7/8), of my Estate shall be divided into twelve (12) equal shares, of which said twelve shares, two (2) shall be awarded to each of my four (4) sons, namely [names] And one (1) share to each of my daughters [names].'[15]

In will two, the testator expressly stipulates that his estate should be divided between his wife and children according to the IILs, which he describes as 'the laws of the Koran'. In addition, he provides clear guidelines on who his Islamic law heirs are and what their respective shares should be. He does not delegate his testamentary powers to a third party to determine his Islamic law heirs. As he had descendants, he allocated 1/8 of his estate to his surviving wife, and the residue is to be distributed to his children in the ratio of 2:1 to his sons and daughters, respectively. This is an archetypal Islamic will as its provisions are consistent with the succession rules of allocating fixed shares. He mentions his wife and children, who will inherit, by name. He does not make provision for what would happen to their shares should any of them predecease him. If the wife predeceased the testator, then presumably, her vacant share would have accrued to the remaining beneficiaries as per Islamic law. Similarly, if one of the children predeceased the testator, his or her share would also accrue to the remaining heirs, subject to the stipulation that the sons should mathematically receive double the share of the daughters. If such a predeceased child had children, those children would not inherit their parent's share if the Islamic law was strictly applied.

(iii) Will three

Will three is dated 25 April 1950. It is stored under file number 6/9/2455, with the reference number 229/58.

[15] My emphasis.

Will Three

T, 1913.

LAST WILL AND TESTAMENT

THIS IS THE LAST WILL AND TESTAMENT of me, [redacted], of Cape Town.

1.

I do hereby revoke, cancel, annul and make void all former Wills or other Testamentary Dispositions herefore made by me.

2.

I do hereby nominate constitute and appoint my Brothers [redacted] and [redacted] or the survivor of them to be the Executors of this my Will and Administrators of my Estate and Effects hereby giving and granting unto them all such powers as are allowed by law and more especially the Power of Assumption; I direct that my said Executors shall not be required to give security for the due and proper administration of my Estate.

3.

I do hereby give and bequeath to [redacted] (born [redacted]) to whom I am married according to The Mohammedan Rites only the sum of £20.0.0 (TWENTY POUNDS)

4.

I do hereby nominate constitute and appoint my Children of my former late wife [redacted] (born [redacted]) to be the Heirs of all my property , Estate and Effects of which I may die possessed, whether same be in possession, reversion, remainder or expectancy nothing whatsoever excepted subject to the condition relating to the distribution amongst my Heirs, namely that the distribution of my Estate shall be made as near as possible to the Mohammedan Law of Intestacy, that is, in dividing the portions due to my heirs, the distribution shall be so that my male heirs shall receive double that of my female heirs.

5/...

5.

I do hereby reserve to myself the power from time to time and at all times hereafter to make all such alterations in or additions to this my will as I may deem fit, either by a separate act or at the foot hereof, desiring that all such alterations or additions so made under my signature shall be held as valid and effectual as if inserted herein.

THUS DONE AND EXECUTED at CAPE TOWN, this 25th day of APRIL, 1950, in the presence of the subscribing witnesess, who in my presence afxthaxsmbsaxbingxwitnessesy and in the presence of each other, all being present at the same time, have subscribed their signatures herete as witnesses.

AS WITNESSES:

1. (Sgd.) [redacted] (Sgd.) [redacted]

2. (Sgd.) [redacted]

TESTAMENT AANGENEEM EN GEREGISTREER
WILL ACCEPTED AND REGISTERED.

Sgd. H. van edyw

MEESTER VAN DIE HOOGGEREGSHOF,
MASTER OF THE SUPREME COURT,
KAAPSTAD — CAPE TOWN.

23/11/ 8.

The deceased in will three was a Muslim male who died in 1958, and at the time of his death, he was married according to Mohammedan rites. His first wife predeceased him. His occupation is listed as a cabinet maker, and he is classified as Malay. In clause three, the testator bequeaths to his second wife, Y, to whom he is married 'according to The Mohammedan rites only the sum of £20.0.0 (TWENTY POUNDS)'. In clause four, he appoints his children from his late wife as heirs to all his property on condition that 'the distribution of my Estate shall be made as near as possible to the *Mohammedan Law of Intestacy*, that is, in dividing the portions due to my heirs, the distribution shall be so that my male heirs shall receive double that of my female heirs.'[16]

The testator expressly incorporates IIL in that he stipulates that his estate should be distributed as near as possible to the 'Mohammedan Law of Intestacy' and that his sons should receive double the share of his daughters. The 'Mohammedan Law of Intestacy', though a misnomer, is indicative of the fact that the testator wanted his estate to devolve according to IIL, with his Islamic heirs receiving their compulsory shares. However, unlike in the previous two case studies (will one and will two) he does not mention his children by name, although he does stipulate that only his children from his first marriage will inherit as his heirs. On an interpretation of the will, he excludes children born of his second marriage, if any. However, this would be inconsistent with IIL and with the intention of the testator to die according to IIL. As regards the bequest to his wife of £20, it is not clear whether this amount is intended to be a monetary sum equivalent to the 1/8 share that a spouse is entitled to receive in terms of Islamic law. This will appear to be the case if one takes into account the dominant intention of the testator, which is to have his estate devolve according to IIL.

[16] My emphasis.

If one of the children of his first marriage predeceased the testator, and if IIL was strictly applied as per the testator's intention, the descendants of the predeceased child would not inherit. If IIL was not strictly applied, the descendants of the predeceased child of the testator would have inherited their parent's share *per stirpes*[17] in terms of s24 the General Law Amendment Act 32 of 1952, which stipulated that:

> 'Whenever according to the terms of the will of a testator who dies after the date of commencement of this Act, a predeceased child of that testator would have become entitled to any benefit under that will if he had survived the testator, the lawful descendants of that child shall be entitled *per stirpes* to that benefit, unless the terms of the will indicate a contrary intention.'

The above section applied to wills of testators who died after the date of commencement of the Act, being 4 June 1952.[18] The testator in will three died in 1958. In 1992, the above-cited s24 was repealed by s2C of the Wills Act ('WA'), as amended by the Law of Succession Amendment Act.[19] I discuss s2C of the WA in greater detail in chapter nine below.[20]

(iv) Comments on the wills

The three wills serve to illustrate how testators in the past included IIL provisions in their wills. They either made express mention of IIL by using words like 'according to the laws of the Koran' or 'Mohammedan Law of Intestacy', or they implicitly included IIL provisions by ensuring that their sons received double the shares of their daughters. In will two, the surviving wife is allocated the Islamic law share of 1/8, but in will three, the surviving spouse is left a bequest, which might approximate to a 1/8 share. Even though this is a limited sample, the wills serve to show how Muslims included IIL in their wills during the early- to mid-20th century. Unlike the wills discussed in the empirical research, the testators in wills one, two and

[17] *Stirpes* (plural of a *stirps*) refers to a line of descendants of common ancestry like every surviving descendant of the deceased and the descendants of a predeceased descendant of the deceased. 'All the children of a predeceased heir together form a stirps and they inherit any part of the deceased's intestate estate jointly.': Jamneck *et al* (n5) 22-23.
[18] The wording of this section led to critical comment. Corbett (n5) at 214.
[19] Act 43 of 1992.
[20] See §9.2(c).

three do not delegate their testamentary powers to an external third party to determine their Islamic law heirs. In wills two and three, in addition to expressing their intention that IIL should govern the distribution of their estates, the testators also expressly mention who their Islamic law heirs are at the time of executing their wills.

These wills are compliant with IIL without contravening the common-law prohibition against incorporation by reference or the prohibition against a testator delegating his or her testamentary powers to a third party. However, this method of distributing one's estate according to IIL could potentially have created problems as the deceased's heirs and their respective shares could only be conclusively determined at the testator's date of death. By mentioning the heirs, the wills raise the problem of how to deal with predeceased heirs because Islamic law does not make provision for heirs to inherit *per stirpes*. As the testators intended Islamic law to apply to the distribution of their estates, presumably, the share of a predeceased heir would have accrued to the remaining Islamic law heirs according to their set share ratios because 'where the right of accrual operates, those to whom the vacant share portion accrues take the same share of it as they do of their own.'[21]

In will three, it is clear that the testator deviated from Islamic law by only referring to his children born of his first marriage. It is unclear whether the deviation was intentional or unintentional. It is plausible that, at the time of executing his will, the testator's second wife may not have borne him children yet, and hence he saw no need to make provision for further offspring in his will. However, if his second wife bore children, they would not be included as Islamic law heirs unless the testator amended his will or drafted a codicil to include them. In the absence of the requisite amendments, the testator's intention to have Islamic law apply to

[21] Corbett *et al* (n5) 243; *Eksteen v Eksteen's Executors supra* 17.

the distribution of his estate would have been frustrated. If the testator had simply incorporated IIL into his will, as is the case with the modern wills discussed in chapter five, the difficulties discussed above would not have arisen.

In light of the difficulties that Muslim testators face, in terms of expressly stating the beneficiaries (whether as individuals or a class of persons), the current practice of incorporating IIL by reference into a Muslim's testator's will makes more sense. This might explain why standardised modern wills have deviated from the approach that was adopted in the past and why testators now delegate their testamentary powers to MJBs, like the MJC, to determine their heirs on their deaths.[22] However, this does not detract from the fact that, according to the common law, a person cannot delegate testamentary power to a third party to determine who his or her beneficiaries should be.

(b) Common-law principles on the delegation of testamentary powers

According to South African law, testators can appoint whomever they wish as beneficiaries to their wills as long as they exercise this power of appointment themselves. This is referred to as testamentary power. According to the common law, a person cannot delegate testamentary power to a third party to determine who his or her beneficiaries should be under a will.[23] The general rule was stated by Van der Heever AJA in *Watkins-Pitchford v CIR* as follows:

> 'The general policy of our law is that a testator must himself make his will and cannot commit the discretion as to who shall be beneficiaries under his will to others. There are a few exceptions such as bequests to *piae causae*, which are deemed to be bequests to the administrators of such funds and the

[22] Amien is of the view that an Islamic will cannot stipulate precise heirs and precise shares because if an Islamic heir is not alive at the time of the deceased's death and a replacement beneficiary recognised under Islamic law has not been named in the will, the latter cannot then be said to devolve according to traditional Islamic law. Amien postulates that this may be why some members of the South African Muslim *ulamā* advise their followers to simply incorporate Islamic law of inheritance into their wills.: Amien 'The Viability for Women's Rights of Incorporating Islamic Inheritance Laws into the South African Legal System' 2014 *Acta Juridica* 192 at 202.

[23] *Watkins-Pitchford v CIR* 1955 (2) SA at 458 - 459; *Estate Orpen v Estate Atkinson* 1966 (2) SA at 643 - 644; 1966 (4) SA at 593 - 594 and 596 - 597; *Arkell v Carter* 1971 (3) SA at 245; *Braun v Blann & Botha* 1984 (2) SA 850 (A); Corbett 'Discretionary Trusts, Powers of Appointment and the Rule Regarding Delegation of Testamentary Power' in Khan (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 188.

> case where a fiduciary is charged with the duty of allocating the bequest at his discretion to one or more persons belonging to limited class, or allocating the bequest in unequal proportions.'[24]

The rule was reinforced in *Estate Orpen v Estate Atkinson*, when Trollip AJA stated the following:

> 'It is a fundamental rule of our law, as it is in English and Scots Law, that a person may not delegate his testamentary power. For example, in regard to the institution of an heir by will, *Voet*, 28.5.29 (*Gane*, vol. 4, p. 729) says: 'Finally institutions are not to be considered valid if they have been referred directly to the discretion of a third party, such as 'Let Maevius be heir to me if Titius has so willed', or 'Let the heirs to me be such as Titius may have willed'. The ancients resolved quite consistently that the very rights of last wills, and thus also of institutions, ought to be stable of themselves, and *not to depend on another's discretion*.' That is taken directly from Roman law, *Digest* 28.5.32 and 69, and 35.1.52.'[25]

Despite the aforementioned common-law rule against the delegation of testamentary powers, my empirical research confirmed that testators in modern day Islamic wills routinely delegate their testamentary powers to the MJC or a similar body, which will exercise its discretion to determine the testators' Islamic law heirs and their respective shares on their deaths.

(c) Exceptions to the prohibition against delegation of testamentary powers

The prohibition against the delegation of testamentary powers has been accepted into our common law subject to the two exceptions cited by Van der Heever AJA above, namely a bequest for charitable purposes (*ad pias causas*), and the delegation to a bearer of an interim right.[26] In the case of the first exception, namely a bequest for charitable purposes, the testator may authorise a beneficiary or an executor of his or her estate, or a trustee of a trust, to appoint a charitable organisation or an educational institution to benefit from the charitable bequest.[27] This occurred in some of the Islamic wills I examined at the MJC, where the testator bequeathed a certain percentage of his or her estate to a Masjid or Muslim charitable

[24] *Watkins-Pitchford v CIR supra* at 458-459.
[25] 1966 (4) SA 589 (A) at 596 – 597. My emphasis.
[26] *Watkins-Pitchford v CIR supra* 458-459.
[27] Jamneck *et al* (n5) 128.

organisation to be determined by the executor.[28] According to some of the attorneys I interviewed (P4 and P5), testators included such bequest provisions for charitable institutions in the wills of their clients on condition that the bequests did not exceed 1/3 of the estates.[29]

The second exception is where a testator delegates the right to appoint a beneficiary to the bearer of an interim right, like a fiduciary in a *fideicommissum*[30], the usufructuary in a usufruct or a trustee of a testamentary trust.[31] These interim right holders can be given the power to nominate the eventual beneficiaries or to determine what each beneficiary will receive. The rationale for allowing the bearer of an interim right this power of appointment is that this person has a beneficial interest in the property.[32] Although a trustee is not considered to enjoy a beneficial interest in the property, the Appellate Division in *Braun v Blann & Botha*[33] held that such power could be conferred on trustees, provided that the trustees' powers of appointment are limited to choosing beneficiaries from a designated group of people.[34] Whoever receives the power of appointment has to exercise it in accordance with the provisions of the will in which it was created.[35]

For the purposes of this research, the question arises whether the appointment of the MJC or similar MJB to determine the heirs of a testator falls within the above two exceptions. The MJC is not the bearer of an interim right, nor is it in the position of a fiduciary, usufructuary or a trustee. It has no beneficial interest in the property of Muslim testators. In *Ex parte Henderson*, it was held that a purported conferment of a power of appointment on a grantee, who had no

[28] See §6.4(g).
[29] See §6.10(c).
[30] *Du Plessis v Straus* 1988 (2) SA 105 (A).
[31] Jamneck *et al* (n5) 129.
[32] *Estate Orpen v Estate Atkinson* 1966 (2) SA at 639.
[33] 1984 (2) SA 850 (A).
[34] Ibid at 867.
[35] *Smith v Du Toit* 1981 (3) SA 1249; *Ferreira v Smit* 1981 (3) SA 1264 (A); Jamneck *et al* (n5) 130.

beneficial interest in the property to be distributed, would be invalid.[36] The administration of the estate does not vest with the MJC either. From the perspective of the common law, delegating the right to appoint one's heirs to a MJB would therefore not qualify as one of the two exceptions and would consequently be invalid.

However, it could be argued that the power of appointment given to the MJC is not a general power of appointment but a special power of appointment. A general power of appointment is where the grantee of the power has unlimited freedom of choice in selecting the persons upon whom the property concerned should devolve,[37] whilst a special power of appointment is where the choices of the grantee are limited to specific persons or a specified class of persons.[38] It could be argued that since the MJC's powers only extend to choosing the beneficiaries from certain persons or from a specified class of persons, namely the Islamic law heirs of the testator at the time of his or her death, it is a special power of appointment. This form of special power of appointment is regarded as an exception to the general rule that prohibits the delegation of testamentary powers.[39]

For a special power of appointment to be valid, the class of Islamic law beneficiaries should be easily discernible and agreed upon. In the straightforward Islamic inheritance scenario, where the testator has either specified the school of thought that should be applicable to his or her will, or where there is consensus amongst the four legal schools about the heirs of a deceased, this would not be a problem.[40] However, where there are differences of opinion on whether an

[36] 1971 (4) SA 549 (D) at 552H-553B.
[37] See *Westminister Bank Ltd v Zinn* 1938 AD 57 at 66-7.
[38] *Westminister Bank Ltd v Zinn supra* at 66; *Smith v Ferreira* 1979 (4) SA 590 (C), confirmed on appeal:1981 (3) SA 1264 (A).
[39] Corbett *et al* (n5) at 360. See further *Braun & Botha supra* 867C-F.
[40] Even in this scenario the assumption would be that the testator was a Sunnī Muslim and that there was consensus amongst the Sunnī scholars on whom his or her heirs will be.

heir can inherit and the testator has not specifically stipulated which opinion should be adopted, the delegation of the special power of appointment to a body like the MJC could be problematic.

By way of example, the ruling on whether a child conceived out of wedlock can inherit or not will depend upon the relevant opinion adopted by the officer compiling the distribution certificate at the MJC.[41] Similarly, the question of whether a wife will inherit from her husband after he has issued a final divorce decree against her on his death bed will also depend on which opinion is adopted by the MJC.[42] Or the question of whether the *talaq bid'a* constitutes one revocable *talaq* or a three in one final, irrevocable *talaq*.[43] Or whether a spouse will be entitled to the *radd* beyond the circumstances cited in Fatwa 1.[44] In these scenarios, the MJC is given wider powers of discretion to determine the heirs of the testator. In the case of *Braun v Blann and Botha*[45] a power of appointment was held to be invalid on the grounds that it conferred too wide a discretion on the grantee.[46]

Despite the problems identified above, delegating testamentary powers to bodies like the MJC appears to be a common practice in Islamic wills and has never been challenged despite being a potential contravention of a black-letter common-law rule. Hence, there is an existing practice that, while contravening the rules against the delegation of testamentary powers, facilitates the ability of Muslim testators to have their estates devolve according to Islamic law, in the most convenient and practical manner. Even though one cannot rely on past practices as justification for breaching a rule, I will argue that it might be necessary to relook at the common-law rule

[41] See discussion in §5.2(b) and findings in §6.8(d).
[42] See discussion in §5.2(a). See also discussion in §8.2 (f) for the impact of s2B of the WA on a Muslim divorce.
[43] See discussion in §3.4(a).
[44] See discussion in §6.11.
[45] 1984 (2) SA 850 (A).
[46] Ibid at 867 C-G. See also discussion in Corbett *et al* (n5) at 360-361.

in order to bring it in line with constitutional values that respect and uphold diversity in religious and cultural practices.

7.3 INCORPORATION BY REFERENCE

(a) The common law rule against incorporation by reference

According to the common law, a will has to exhibit testamentary character.[47] In *Ex Parte Davies Estate*[48] the court held that for a will to have testamentary character, the following had to be discernible: (i) the identity of the beneficiaries; (ii) the property bequeathed; and (iii) the extent of the property or interest bequeathed to each beneficiary. In most of the modern Islamic wills, the testator does not identify the beneficiaries by name nor the extent of the property that the testator wishes to bequeath to each beneficiary. Instead, the will refers to a class of heirs: 'my Islamic law heirs' or 'my heirs according to Islamic law', which heirs and their shares in the estate have to be determined by the MJC or similar MJB. It might be argued that the modern Islamic will does not display sufficient testamentary character. In addition, the IILs are incorporated into these wills through the incorporation provision, as discussed above.[49]

Under Roman and Roman-Dutch law, a testator could nominate an heir or a beneficiary or allocate shares in inheritance by referring in his or her will to another document that need not be attested to nor be in existence at the time.[50] English law similarly permitted incorporation by reference[51] and before the enactment of the WA, the Natal Ordinance of 1868[52] mirrored

[47] *Ex parte Davies Estate* 1957 (3) SA 471 (N).
[48] Ibid.
[49] See §§6.4(b); 6.8(a)-(b); 6.9(b); 6.10(b).
[50] Corbett *et al* (n5) at 66.
[51] Ibid 67.
[52] Law 2 of 1868 (N).

the English law in this regard.[53] However, statutes in the other three provinces (Cape, Orange Free State and Transvaal) stipulated that testamentary instruments had to be executed and authenticated in a prescribed manner.[54] Any document that had not been executed and authenticated with the requisite testamentary formalities could not, through reference and incorporation, acquire testamentary validity.[55] In *Moses v Abinader*[56] Schreiner J held that:

> '….it is not possible under Ordinance 14 of 1903 (T), or similar statutes, to incorporate the terms of a document, not executed in terms of the statute, in a duly executed instrument, so as to make the former an effective part of the latter. Whatever language was used in the duly executed instrument it could not be shown that the earlier document was executed on every sheet by the testator and the attesting witnesses all present at the same time when the latter instrument was executed.'[57]

The above principle has been held to similarly apply to wills governed by the WA and executed after 1 January 1954.[58] The effect of this principle is that a testator cannot incorporate by reference any non-testamentary document containing his or her dispositions or stipulating his or her beneficiaries.[59] In fact, our courts have held that even if the other document was executed by the testator himself, with the formalities required of a will, this would not suffice.[60] The rationale for the incorporation by reference rule is to avoid any potential fraud that may occur with a document that is not executed in terms of the WA. If it cannot be shown that the document was executed in accordance with the prescribed formalities, it cannot be considered valid.[61] A testator cannot incorporate by reference the contents of an external document in order to give his or her will testamentary character.

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[53] Prior to 1 January 1954 a document could by reference and incorporation be given testamentary validity in Natal: see *Mack v Watt* 1927 NPD 47; *Ex parte Sieberhagen* 1946 CPD 83 at 95.
[54] Ordinance 15 of 1845 (Cape); Wills Ordinance 14 of 1903 (Transvaal); Wills Ordinance 11 of 1904 (Orange Free State).
[55] *Van Reenen V Board of Executors* 1876 Buch 44; *Ex parte Webber's Executors* (1902) 19 SC 427; *Moses v Abinader* 1951 (4) SA 537 (A), *Estate Orpen v Estate Atkinson* 1966 (2) SA 639 (C).
[56] 1951 (4) SA 545 (A).
[57] Ibid at 553G.
[58] *Estate Orpen v Estate Atkinson supra* at 644 C-F; *Ex parte Davies Estate supra* at 474 A-C.
[59] *Moses v Abinader supra ; Ex parte Davies Estate supra*; *Estate Orpen v Estate Atkinson supra.*
[60] *Estate Orpen v Estate Atkinson supra* at 645 A.
[61] Ibid.

(b) Do Islamic wills contravene the common law rule against incorporation by reference?

Modern Islamic wills fall foul of the well-established black-letter common-law rule that prohibits incorporation by reference in two respects. Firstly, the testator incorporates IIL by reference into his or her will; and secondly, the testator incorporates the distribution certificate by reference, drawn up by the MJC. I deal with the distribution certificate first. The distribution certificate: (i) is an extrinsic document that does not form part of the will; (ii) does not fulfil any of the formalities required by the WA; (iii) comes into existence after the death of the testator; (iv) is prepared by a third party, in this case, an official at the MJC, who has no direct interest in the estate; and (v) lastly, and most importantly, in certain cases allows the third party to exercise a discretion based on legal interpretation when determining the heirs and their concomitant shares. Despite lacking the requisite formalities for wills, the distribution certificate has been repeatedly incorporated into Islamic wills over the years and has been used to determine the heirs of Muslim testators. This practice runs contrary to the common-law rule as our courts have held that a beneficiary must be named in the will itself and cannot be named in an attached informal note or letter written by the testator.[62]

The prohibition against incorporation by reference is subject to an exception. If the testator incorporates extrinsic material that is simply of interpretational value, then it is valid. In *Ex parte Sieberhagen*[63], a testator incorporated by reference the terms and conditions of a pre-existing bond into his will by instructing the testator in the following words: '[t]he terms and conditions of this bond to be similar to the terms and conditions of the two bonds for £2,500 and £2,000 at present held by the Standard Bank over the farms Lamara and Siebern Park.'[64] The court had to decide whether it was permissible to incorporate by reference an extrinsic

[62] *Ex parte Estate Davies supra* 474A-C; see also Corbett *et al* (n5) 67.
[63] 1946 CPD 83 at 95.
[64] *Ex parte Sieberhagen supra* 95.

bond document, which was not executed with the formalities required of a will. The court held that the terms and conditions of the pre-existing bond could be incorporated by reference because they did not amount to a testamentary disposition, and they served as a model for a similar bond that the son was directed to secure. The court therefore permitted this incorporation by reference as the terms and conditions in the pre-existing bond were mechanically included in the new bond stipulated in the will.[65]

In addition to incorporating the distribution certificate, incorporating the body of IIL into wills is commonly practised and accepted in modern Islamic wills. It could be argued that this form of incorporation is merely of interpretive value as well as it requires a mechanical application of well-established, undisputed principles, which can clearly be derived from the Qur'ān and Sunnah. It is akin to a testator stipulating in his or her will: 'my executor is hereby instructed to determine my heirs in terms of the Intestate Succession Act 81 of 1987, which heirs shall inherit my entire estate.' Although this is a strange example, it is cited to illustrate that this particular will would have testamentary character, as the heirs to this estate and their respective shares can easily be determined with reference to the provisions of the ISA. It simply requires a mechanical application of the ISA, rendering the legislation of interpretational value only.

(c) Which Islamic inheritance laws are being incorporated into an Islamic will?

The question that needs to be asked is: what is being incorporated when a testator incorporates IIL into a will? Is it the straightforward mechanical application of easily accessible and undisputed Qur'anic verses and *ahādith*? Or is it a particular interpretation of the primary

[65] 'Documents referred to in a will and in existence at the time the will was executed may be referred to as part of the surrounding circumstances.': Corbett *et al* (n5) at 475.

sources by the MJC that is being included? I would argue that in all cases, it is a particular interpretation of the primary sources that the MJC relies upon. Hence, every will that comes before the Master might potentially fall foul of the incorporation by reference rule. That being said, in straightforward cases, the MJC would rely upon interpretations that scholars have reached consensus on, and in those cases, the task of the MJC would appear to be a mechanical implementation of the Islamic inheritance shares. This would be those cases where P1 at the MJC utilises the IRTH program to mechanically determine the Islamic heirs of the testator to be included in the distribution certificate.[66] The program calculates the inheritance portions due to heirs according to Islamic law and can be used by testators or executors. The program displays various heir categories, and P1 simply has to enter the number of heirs in each category. The program then calculates the portions due to each of the heirs.[67] The program also makes provision for a testator to donate part of his or her estate as a bequest to a person who is not an eligible heir, with the proviso that such a donation should not exceed 1/3 of the testator's estate.[68] Lastly, the program allows specification of the testator's preferred juristic school.[69]

So, for example, if the testator, X, dies, having incorporated IIL into his will and he is survived by his mother, wife, a son, and a daughter, the appointment of heirs by the MJC would be straightforward. P1 would insert the various categories of family members into the IRTH program, and the mother would receive 1/6, the wife 1/8 and the residue would be divided amongst the son and daughter in the ratio of 2:1. There is consensus amongst the four schools and Islamic jurists on this distribution (as was discussed in chapter four above) and by

[66] For a discussion on the IRTH program see discussion in §6.8(c).
[67] Ibid.
[68] Ibid. The program does not subscribe to the opinion that a bequest can be made out to an existing Islamic law heir, even though this is a valid opinion as discussed above.
[69] Ibid.

implication, the interpretation of the relevant Qur'anic verses.[70] In this instance, the reference to 'my Islamic law heirs' is simply of interpretational value as it requires a mechanical, straightforward application of the Islamic laws. One could argue that there was no delegation of testamentary power to the MJC in this instance. The MJC is simply giving flesh to the intention of the testator as set out in the will.

However, the problem arises in the more complex inheritance matters, where there are differences of opinions by scholars. In these scenarios, the Islamic law heirs and their respective shares are dependent on extrinsic sources and may differ depending on the scholarly opinion that is adopted. P1 conceded that in complex cases, he would seek the opinion of the *mufti* of the MJC[71] as the MJC is not obliged to use the IRTH program. It also bears mentioning that in the MJC wills, the testator does not expressly stipulate a preference for a particular school of thought. Irrespective of which legal school or opinion the testator may have intended, the MJC, when determining the heirs, generally adopts the Shāfi'ī school of thought.[72] However, it has expressly indicated that it would rely on the other three schools where the situation necessitated this.[73] The MJC has also relied on opinions beyond the four schools where it felt the circumstances required it. In complex scenarios, the Islamic law that is incorporated depends on the interpretation of the primary sources adopted by the MJC.

By way of example, if the testatrix, Y, is survived by her father, mother, and husband, the appointment of heirs would not necessarily be that straightforward. According to the majority of scholars, the husband would receive 1/2 whilst the father would receive double the share of

[70] If a deceased is survived by descendants, then the share of the mother of the deceased is fixed at 1/6 and the wife at 1/8th.
[71] P1 Transcript at 41-42.
[72] See §6.8(b) and §6.11(e).
[73] Ibid.

the mother. However, there is a valid, albeit minority, opinion that holds that the husband would receive 1/2, the mother 1/3, and the father 1/6.[74] In the first interpretation, the father receives a greater share than the mother, whilst in the second interpretation, the mother receives the greater portion. It could be argued that the second interpretation would better serve a substantive equality imperative and should therefore be preferred.

In another example, if the deceased, X, was survived by his wife, mother, and two brothers, then according to one opinion, the wife would receive 1/4, the mother 1/6, and the residue would be distributed equally amongst the two brothers. However, according to the opinion of Ibn 'Abbas only three or more brothers would reduce the mother's share from 1/3 to 1/6, and two brothers do not reduce the mother's share.[75] Hence, according to his opinion the wife would receive 1/4, the mother 1/3, and the residue would be distributed to the two brothers. It would therefore be in the mother's best interest if Ibn'Abbas's interpretation was adopted. Another example is where the MJC rules that a triple *talāq* counts as one *talāq* thereby entitling a wife to inherit from her deceased husband's estate despite the husband issuing a triple *talāq*.[76]

In these examples, the reference to Islamic law is not only of interpretational value as there are varying opinions. When determining the Islamic law heirs and drawing up the distribution certificate, the official at the MJC exercises discretion in complex cases. He has to decide which scholarly opinion should be adopted. It is not unreasonable to assume that the opinion decided upon by the MJC official might not have been within the contemplation of the testator when he or she drafted the will. The testator has no way of knowing in advance what circumstances

[74] See §5.3(b)(ii) for a discussion on this minority opinion.
[75] Ibid.
[76] See discussion in 3.4(a).

could unfold at the time of his or her death or how the MJC will exercise its discretion in adopting a particular opinion.

(d) The exercising of discretion by the MJC when determining Islamic law heirs

Both the attorneys (who request the distribution certificate from the MJC) and the Master's office (that accepts the distribution certificate) unequivocally accept the judgment of the MJC in determining the Islamic law heirs of a Muslim testator. The fact that the MJC restricts itself to a particular interpretation and its interpretations are unquestioningly accepted by the public at large does not detract from the fact that valid alternative interpretations and opinions exist, and these might have been resorted to in various cases. When drawing up the distribution certificate, the MJC is exercising its discretion, and such a discretion inevitably results in inconsistencies. These inconsistencies are apparent in the MJC *fatāwa*, where although it claims to generally follow the Shāfi'i school in its legal rulings, there are deviations from the accepted Shāfi'ī position in various scenarios, like allowing the wife to inherit the surplus (*radd*)[77] or allowing a child, who was conceived within the first six months of the parents' marriage, to inherit.[78] Abduroaf confirms that the Islamic law experts, who draw up distribution certificates, are free to exercise their discretion and draw upon the legal rulings of other Islamic law jurisdictions when deciding on the lawful heirs or legatees of a Muslim testator.[79] Of concern is the fact that there is no regulatory body that monitors or oversees the MJC when it exercises its discretion. The only recourse available to someone unhappy with a particular interpretation adopted is to take the MJC decision on review to the courts. This route has cost implications, which makes this option inaccessible to many lay individuals. In any event,

[77] See discussion in §6.11.
[78] See discussion in §6.8(d).
[79] Abduroaf *The Impact of South African Law on the Islamic law of Succession* (Unpublished PhD thesis, University of the Western Cape 2018) 127. Abduroaf, cites an example of the compulsory bequest rule, which is part of legal reform of inheritance laws in Syria and Egypt and which I discuss in greater detail in §9.2(c).

disgruntled Muslim heirs may be reluctant to have their family inheritance disputes resolved in a forum that is not familiar with Islamic law. As both P1 and some of the attorneys confirmed, Muslim heirs very seldom, if ever, challenge the determination of the heirs and their shares, as set out in the MJC distribution certificate.[80]

Although the incorporation of IIL into a will might make practical sense, incorporation by reference in wills is strictly prohibited under the common law. It is interesting to note that neither the Master's office nor the legal profession has invoked the prohibition when interpreting and giving effect to Islamic wills.[81] The Master's function is an administrative one only.[82] The Master simply gives effect to the words used by the testator by accepting the MJC distribution certificate.[83] The difficulty, however, is that the Master's office has no way of really knowing whether it is a mechanical application of the Qur'anic verses or an application based on interpretation by the MJC. It has also become customary practice in the attorneys' profession to accept these wills and the distribution certificates as valid.[84] It might be that the rule is not understood or that, for the sake of expediency, the prohibition has been overlooked in order to foster cultural and religious diversity and inclusivity. To date, the validity of an Islamic will has not been challenged for incorporating IIL and the distribution certificate. In *Moosa v Harnaker,*[85] the High Court unquestioningly accepted the fact that the testator had incorporated the Islamic law and the distribution certificate into his will.[86] The High Court's

[80] P1 Transcript at 44; P3 Transcript at 3; P4 Transcript at 35; P5 Transcript at 16.
[81] Abduroaf (n79) 125.
[82] Jamneck et al (n5) at 212.
[83] In the *Faro v Bingham* case, discussed in §3.5, Rogers J chastised the Master of the High Court for relinquishing its function of assessment to an external non-statutory body like the MJC. The court held that the opinion of the MJC was simply one of many opinions that the Master should take into consideration and that MJC's opinion could not be the sole determinant of the Master's decision on a matter: *Faro v Bingham* [2013] ZAWCHC 159 para [34].
[84] In the context of ACL Bennet notes: 'A local custom may be deemed obligatory, and thus part of the legal code, once witnesses attested to the existence of a repeated practice that was reasonable, certain, uniform and well established.': Bennet *Customary Law in South Africa* (2004) 11.
[85] 2017 (6) SA 425 (WCC).
[86] Ibid para [7].

decision was confirmed by the Constitutional Court.[87] Similarly, academic writers have not questioned the validity of the incorporation provision or the fact that Muslim testators delegate their testamentary powers to third parties.[88] It would appear that the current practice of incorporation of reference, which results in the delegation of testamentary powers to bodies like the MJC, is here to stay, despite the problems with its application in IIL.

7.4 DEVELOPING THE COMMON LAW

One solution to this apparent contravention of the common-law rules is to relax the rules around the test for testamentary character or the rule against incorporation by reference. Advocating for the relaxation of these rules would be acceptable if the ultimate objectives are: (i) to retain the dignity of the Islamic will as it is currently drafted,[89] (ii) to protect rights to religion, conscience, and belief as guaranteed by the Constitution,[90] (iii) to guarantee property rights in s25 of the Constitution,[91] (iv) to protect the right to dignity of Muslim testators,[92] and (v) to promote freedom of testation[93] and to ensure the interests of justice are met.

[87] *Moosa v Harnaker* 2018 (5) SA 13 (CC).
[88] Amien 'A discussion of *Moosa No and others v Harnaker and others* illustrating the need for legal recognition of Muslim marriages in South Africa' (2019) 6(1) *Journal of Comparative Law in Africa* 115 at 119; Abduroaf 'An analysis of renunciation in terms of s2(C)(1) of the Wills Act 7 of 1953 in light of the *Moosa No and Others v Harnaker and Others* Judgment' (2019) 7 *Electronic Journal of Islamic and Middle Eastern Law* 15 at 17-18; Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 *Acta Juridica* 192 at 202.
[89] Constitution, s15(3)(a)(ii) makes provision for the recognition of personal and family law systems under any tradition or adhered to by persons professing a particular religion. See §1.1 (3) and also discussion in §9.5.
[90] Constitution, s15(1) stipulates: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'
[91] Constitution, s25(1) stipulates: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'
[92] Constitution, s10 stipulates: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'
[93] There are those who argue that s25(1) should be given a broad interpretation to not only guarantee the right to private ownership but also the right to freely dispose of one's property *inter vivos* or by will. See Corbett *et al* (n5) at 47; Schoeman-Malan 'Recent developments regarding South African common law and customary law of succession' (2007) 10 (1) *PER* 114.

There is currently no legislation in place that recognises Muslim marriages, divorces, or inheritance matters. The most practical way a Muslim testator can ensure that his or her property is distributed according to the dictates of his or her religious beliefs on death is through incorporating Islamic laws into his or her will. When discussing the wills from the South African Archives in section 7.2 above, I indicated the difficulties that can arise when a testator attempts to stipulate his Islamic heirs before his death. From a practical perspective, incorporating IIL into a testator's will appears to be the most viable option. It is furthermore the accepted practice adopted by testators who wish to include IIL in their wills, and is therefore reflective of the lived reality of the Muslim community. It would be in the interests of justice to develop the common law in order to accommodate this lived reality.

The Constitution empowers the courts to develop the common law, taking into account the interests of justice.[94] It furthermore directs the courts to develop the common law to the extent that legislation does not give effect to the rights that are entrenched in the Bill of Rights.[95] Section 8(3)(a) of the Constitution is reinforced by s39(2) of the Constitution, which obliges the courts to develop the common law, in order to ensure that it is consistent with the 'spirit, purport and objects of the Bill of Rights.'[96] In *Carmichele v Minister of Safety and Security*[97], the court held that judges should 'not hesitate to ensure that that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights'[98] and that the necessity to develop the common law also arises 'where the common law as it stands is deficient in promoting the

[94] Constitution, s173 stipulates: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.'
[95] Constitution, s8(3)(a) stipulates, 'When applying a provision of the Bill of Rights to a natural or juristic person…a court in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right.'
[96] Constitution, s39(2) stipulates: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
[97] 2001 (4) SA 938 (CC).
[98] Ibid at 995A.

s39(2) objectives.'[99] Lubbe notes that '[j]udicial intervention is required either when a rule of the common law is in conflict ("in stryd") with a constitutional provision, or when a court is obliged to adopt a new stance on a matter of public policy because the former position has been rendered untenable by the impact of the Bill of Rights.'[100]

Our courts have not been remiss in developing both the common law[101] and African customary law in the realm of succession.[102] It has similarly developed the common law in the context of Muslim marriages.[103] In *Khan v Khan*[104] the court extended the reach of the Maintenance Act[105] to polygynous Muslim wives, who can now enforce their Islamic maintenance rights against their defaulting husbands in terms of the Act. [106]

It could be argued that the black-letter rule against incorporation by reference is not optimally suited to realise the constitutional values of religious freedom and human dignity, and that rigidly adhering to the common-law rules at the expense of these constitutional values is inconsistent with the imperative to develop the common law. Lubbe is of the view that the test in respect of the injunction in s39(2) of the Constitution is a facilitative one.[107] Therefore, in

[99] Ibid. The court in *Carmichele* has been criticised for the approach it adopted to developing the common law. In this regard see Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611. Nevertheless the approach of *Carmichele* has been consistently applied by our courts.
[100] Lubbe 'Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law.' (2004) 121 *SALJ* 395.
[101] For example in *Fourie v Minister of Home Affairs,* 2005 (3) BCLR 241 (2005) (3) SA 429) (SCA), the common law concept of marriage was developed to embrace same-sex partners; in *Gory v Kolver NO* 2007 (4) SA 97 (CC) the court extended the definition of spouse in section 1 of the ISA to include a, '*partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support';* in *Paixão v RAF* 2012 (6) SA 377 (SCA), the court extended the common law duty of support to the 'adopted' family of the deceased.
[102] In *Bhe v Magistrate, Khayelitsha,* (2005) (1) SA 580 (CC) para [97 C- D], the customary law principle of male primogeniture was declared unconstitutional and invalid as it impeded the capacity of women and children born out of wedlock to inherit property.
[103] In this regard, see the discussion in §3.5 on *Daniels v Campbell* 2004 (5) SA 331 (CC) and *Hassam v Jacobs* 2009 (5) SA 572 (CC).
[104] 2005 (2) SA 272 (T).
[105] Act 99 of 1998.
[106] *Khan v Khan supra* 283 D.
[107] Lubbe (n100) at 403.

addition to identifying whether there is a conflict between the common law and the Bill of Rights, there is also a need to identify whether 'the existing instrumentarium of the common law is optimally suited for the realisation of the constitutional imperative.'[108] It could be argued that the existing common-law rule against incorporation by reference should be relaxed specifically in the context of Islamic wills so that Muslim testators are allowed the freedom to dispose of their property in a manner that is consistent with their religious beliefs. Insisting on upholding the common law rule also does not accurately reflect the lived reality of Muslims in South Africa. Although I have highlighted various problems that might arise as a result of incorporating Islamic law and delegating the right to decide on Islamic heirs to third parties, these difficulties can be overcome in various ways.

One of the main mechanisms to address the shortcomings of incorporating Islamic law by reference would be to educate both lay people and legal practitioners involved in the drafting of Islamic wills about the different opinions that exist with respect to how a Muslim estate can devolve. There is a prevailing assumption that IILs are set in stone and that there is no room for alternative interpretations and understandings of the primary texts. I have illustrated that there are differences of opinion in various aspects of IIL and that some interpretations are more gender sensitive than others. Currently, the MJC provides a template will to all Muslim testators, and after the death of the testator, it decides which interpretation to adopt when drawing up the distribution certificate. The MJC and similar bodies should educate the public about the alternative interpretations in order to afford testators the choice about which opinion would suit their circumstances best. Similarly, attorneys who draft Islamic wills should be educated about the various opinions in IIL so that they are able to provide their clients with more nuanced advice. This would provide testators with the ability to make informed choices

[108] Ibid.

about how their estates should be distributed in an Islamically compliant manner. In addition, the Master's office should be circumspect about accepting the MJC's distribution certificates without question. As the distribution certificate is not a testamentary document and was compiled by the MJC acting on the instruction of the testator, a greater level of scrutiny is required. The Master's office should similarly be made aware of the different legal opinions that exist within Islamic inheritance.

7.5 CONCLUSION

In this chapter, I have identified further salient issues that arose in my empirical research, notably that testators seem to be delegating their testamentary power to the MJC to determine their Islamic law heirs. From the wills I retrieved in the archives, I demonstrate that it was possible to include IIL in a will without a testator delegating any responsibility to a third party and without incorporating IIL by reference into the will. However, I illustrated that certain challenges arise with this method in terms of South African succession laws. As a result, it has become common practice for Muslim testators to incorporate IIL into their wills through incorporation by reference, which might inevitably result in testators delegating their testamentary powers to bodies like the MJC. Despite both these practices being contraventions of black-letter common-law rules in South Africa, they have more or less continued unchecked by the various role players, including the Master's office. Despite these legal impediments, I have submitted that in order to ensure the integrity of an Islamic will, the common law should possibly be developed to accommodate these practices. In the following chapter, I highlight further IIL practices uncovered in my empirical research, which present legal challenges in the context of South African law of succession.

CHAPTER EIGHT

THE INHERITANCE RIGHTS OF A SURVIVING WIFE AND OTHER TECHNICAL LEGAL ISSUES ARISING OUT OF THE EMPIRICAL FINDINGS

8.1 INTRODUCTION

In part one of this chapter, I discuss the rights of a surviving wife to inherit. Both the Assistant Master and the attorneys I interviewed expressed concern about the inadequacy of the share allotted to a surviving wife if an estate is distributed according to Islamic law.[1] As a result of socio-economic realities, wives in Muslim marriages are less likely to have accumulated substantial estates; hence they are especially disadvantaged by their nominal inheritance shares. Coupled with the impact of varying Islamic divorce laws on her marital status, a surviving wife's ability to inherit from her deceased husband's estate is significantly affected.[2] Furthermore, the non-recognition of Muslim marriages has had a disproportionately negative effect on Muslim women.[3] For these reasons, I focus my discussion on the rights of surviving wives only and not surviving husbands. I discuss alternative mechanisms to secure more rights for a surviving wife, within the Islamic law paradigm and within South African law. As wives in polygynous Muslim unions are more vulnerable I also explore the ways our courts have dealt with similar scenarios in African customary law ("ACL").

In part two of the chapter, I focus on other technical succession matters that arose in my empirical research. One of the thorny issues that came to the fore was the MJC's legal rulings on pension pay-outs. I discuss these rulings and whether they are reconcilable with certain sections of the Pension Funds Act[4] ('the PFA') and the attendant case law. The disposal of

[1] See §§5.3(c)(vi) and (d)(vii)-(viii).
[2] See §3.4 for a discussion on Islamic divorce laws.
[3] *President of the RSA v Women's Legal Centre Trust* [2020] ZASCA 177 at [50].
[4] Act 24 of 1956.

immovable property, within the Islamic will prepared by the MJC, is another matter that raised some complex issues in the empirical research. Certain testators tried to dispose of their immovable property during their lifetimes either through the inclusion of certain provisions in their wills or by separate agreements to their wills. I discuss these provisions and agreements in light of the common-law rules relating to *pacta successoria* (succession pacts). Lastly, I discuss the legal implications of what I have termed 'redistribution provisions' in the MJC wills.

PART ONE

8.2 SECURING GREATER RIGHTS FOR THE SURVIVING WIFE OR WIVES

I firstly, discuss the possibilities of expanding a wife's inheritance share on the death of her husband, based on alternative interpretations of the primary Islamic sources; secondly, I discuss how testators utilise a usufruct over their immovable property in order to secure stronger rights for their wives on their deaths and the ruling of the MJC in this regard; thirdly, I discuss alternative claims a wife can lodge against her deceased husband's estate, such as a claim for outstanding dower and a maintenance claim in terms of the MSSA; fourthly, I discuss competing claims of polygamous wives against their husband's estate, where one of the wives was married to the deceased by Islamic law and civil law; and lastly, I discuss the impact of s2B of the WA on wives who have been divorced according to Islamic law.

(a) Expanding the surviving wife's inheritance in Islamic law

A surviving wife is entitled to a fixed portion of the deceased estate, which is either 1/4 (if the testator had no descendants) or 1/8 (if the testator had descendants).[5] If the testator was in a

[5] See §5.3(b)(iv).

polygamous union at the time of his death, the wives have to share in the 1/4 or 1/8. As a result of societal norms and the historical unequal bargaining power between spouses, Muslim widows are generally more negatively affected by the fixed share they are entitled to. In many instances, the husband is the primary breadwinner during the marriage and often, he is the sole owner of any immovable property that has been acquired during the course of the marriage. If the parties have not concluded a civil marriage,[6] and the husband incorporated IIL into his will, then on his death, his wife will only be entitled to her fixed Islamic shares, which is inevitably inadequate.

None of the participants interviewed considered the possibility that the testator could include a provision in his Islamic will that would entitle a widow to reside in her deceased husband's home for one year after his death, as is provided for in the widow verse (Q2:240).[7]Bearing in mind the socio-economic realities that widows face it would be in the public interest (*maslahah mursalah*)[8] for the MJC to adopt a legal ruling that allows for the application of the widow verse. They could advise male testators to include a standard provision in their wills for the maintenance of their surviving spouses for one year after their death, on condition that they remain living in the deceased husbands' home. Attorneys will take their cue from the MJC and will similarly advise their male clients to do so.

There is furthermore adequate evidence to support the legal ruling that a Qur'anic sharer heir, including a wife, is entitled to benefit from a bequest without the consent of the other heirs

[6] If they married in terms of the MA the wife would be entitled to half the value of the joint estate on the death of her husband. See §8.2(d).
[7] See discussion in §§4.2(a) and (d).
[8] See discussion on public interest as a methodology for deriving new rulings in §2.3(b)(v).

being required.[9] Countries like Egypt[10] and Sudan[11] allow the testator to award a bequest to Islamic law heirs and non-heirs without the consent of the other heirs as long as it is within the bequeathable third.[12] Interestingly, in Egypt, when justifying the validity of a bequest to an heir in its legislative reforms, an explanatory memorandum was issued, stating that the reform was based on the bequest verse in the Qur'ān and that it was the view of '[a] number of expositors, including Abū Muslim al-Asfahāni and also a number of jurists from outside the four (Sunnī) school' and that this view was adopted in Article 37, '[b]ecause people stood in need of it.'[13] Anderson notes that, 'this reform clearly goes a certain way towards remedying the unenviable position of the widow, for it at least allows her husband to augment her paltry entitlement…by a bequest of up to one-third of his net estate.'[14] In consideration of the public interests the MJC could adopt similar ruling and encourage husbands to bequeath up to one third of their estates to their wives, in addition to their compulsory share of 1/8 or 1/4.

Legislative reforms in certain Muslim countries have also allowed a surviving spouse to benefit from the surplus (*radd*).[15] The MJC allows a surviving wife to benefit from the *radd* in the limited circumstances set out in Fatwa 1.[16] Once again on the basis of public interest considerations, the mufti of the MJC could exercise *ijtihād* and issue a fatwa, which allows a

[9] See discussion in §4.2(d).
[10] Article 37 of the Egyptian Law of Testamentary Dispositions , 1946.
[11] In Sudan the reform was effected by Judicial Circular No.53 of 1945, which prefaced the reform with the statement: 'Experience has shown that people are in need of a relaxation in the provisions of the law of bequests as currently applied and that the adoption of the following provisions will be to their manifest advantage…' Anderson 'Recent reforms in the Islamic law of Inheritance' (1965) 14 *International and Comparative Law Quarterly* 349 at 355.
[12] For a list of reforms in these countries see Anderson (n11) 354-356 and Coulson *Succession in the Muslim Family* (1971) 138-152.
[13] Explanatory Memorandum issued with the enactment of Article 37 of the Egyptian Law of Testamentary Dispositions, 1946 as cited in Anderson (n11) 355.
[14] Anderson (n11) 355.
[15] See discussion on the doctrine of *radd* in §5.3(b).
[16] See discussion on Fatwa 1 in §6.11.

surviving spouse to benefit from the *radd* with the other Qur'anic sharer heirs whenever there is a surplus in the testator's estate.

Based on my aforementioned arguments for reform, a surviving wife may be entitled to the following:

- One year's accommodation in the deceased's home after his death;
- One year's maintenance should she decide to remain in the deceased's home for a year;
- A bequest of up to 1/3 of the value of the estate, without the consent of the other heirs required;
- Her 1/4 or 1/8 Qur'anic share; and
- An entitlement to share in the *radd* with other Qur'anic sharer heirs.

(b) Does a usufruct secure greater rights for a surviving wife?

To address the concern of the wife's limited share, my empirical research found that husbands would employ a different mechanism to secure greater rights for their wives. For instance, the husband would instruct either P1, if seeking assistance from the MJC, or his attorney, to include a usufruct over the family home in favour of his wife in his will.[17] This would ensure that she has some form of security of tenure on his death. However, P1 was reluctant to include it as a result of the MJC's ruling on usufructs.[18]

Fatwa 2 stipulates that an '*umrā*, which is similar but not the same as a usufruct, should be executed by the testator in his lifetime and should not be deferred to the testator's death.[19]

[17] See §6.8(g) and §6.10(g).See also P1 Transcript at 24; P3 Transcript at 3; P4 Transcript at 3; P5 Transcript at 3.
[18] See §6.8(g).
[19] See §8 of Fatwa 2,which stipulates: '[i]n arranging the inclusion of an 'umrā into the will, what must be taken into acute consideration is that the transfer of the manfa'āh should occur withing the testatrix's lifetime, and should not be deferred to the time of the testatrix's death.'

Presumably, the *fatwa* is referring to registering a usufruct against the title deed of the immovable property in the lifetime of the testator when it cautions that the '*umrā* should be validly executed in the testator's lifetime.[20]According to the *fatwa*, '[t]here should ideally be *a document separate from the will*, executed in the testatrix's lifetime, in which the *'umrā* is recorded, to which retrospective reference would be made in the will.'[21] It is not clear what the legal nature of the separate document would be. It could be that what is intended is that, during his or her lifetime, the testator should register a usufruct against the immovable property in favour of the surviving spouse as a gift or donation to the spouse. This, of course, has cost implications as the testator would have to secure the services of attorneys to register the usufruct against the title deed of the property during his lifetime. Once the usufruct holder dies, in this case, the surviving wife, the usufruct will lapse[22] and further costs will have to be incurred to remove those conditions of the usufruct from the title deed.

In addition, a testator might not want to encumber the immovable property in his lifetime as this would limit his ability to deal freely with the property. The owner of a usufructuary property cannot prejudice the usufructuary's rights and requires the consent and co-operation of the usufructuary for the sale, mortgage, or any other dealings with the property.[23] Furthermore, in the event of the parties divorcing, the divorcée would continue to have a registered real right against the property until her death, thereby limiting the testator's ability to freely dispose of the property in his will. Given these difficulties, from a practical point of view, registering a usufruct in the lifetime of the testator as advised by the MJC *fatwa* is

[20] As a usufruct limits the property owner's ability to exercise his or her real rights (to the immovable property), it has to be registered against the title deed of the immovable property in the Registrar of Deeds office.
[21] See §9 of Fatwa 2. My emphasis.
[22] As a usufruct is a highly personal right, it cannot extend beyond the lifetime of the usufructuary, as is confirmed by s66 of the Deeds Registry Act 47 of 1937 ('DRA'). See also *Bhamjee v Mergold Beleggings* (*Edms*) *Bpk* 1983 4 SA 555 (T).
[23] DRA, s4(1)(b), 68, s70(6); see also *Ex parte Graphorn* 1948 (4) SA 276 (O) and Du Bois *et al Wille's Principles of South African Law* (2007) 608 (hereinafter '*Wille's Principles'*)

unlikely to occur. Based on the empirical research findings, testators are more likely to include a usufruct over immovable property in favour of their spouses in their wills rather than registering them in their lifetimes.

However, Fatwa 2 cautions that if the *'umrā* is not validly executed during the testator's lifetime, then its inclusion in a will would be considered a bequest and a bequest in excess of one-third of the testator's net estate is considered invalid according to Islamic law.[24] Awarding a bequest to any one of the Islamic law heirs creates complications, as the other heirs would have to consent to the bequest and the value of the *'umrā* would have to be quantified in order to ensure that it does not exceed 1/3 of the value of the estate.[25] Islamic law generally regards the value of the usufructuary right as equivalent to the value of the *corpus* of the property to which it is attached.[26] Where this value exceeds the bequeathable 1/3, the usufructuary right is limited to 1/3 of the value of the property.[27] Where the value of the usufruct exceeds 1/3, it will have to be ratified by the remaining heirs on the death of the testator. As a result of these complications, P1 discourages testators from including usufructs in their wills.[28]

If a testator creates a usufruct to his or her immovable property in the will, then as a limited real right against the immovable property, the usufruct would prevent the remaining Islamic law heirs from realising and enjoying their full rights to the said immovable property on the death of the testator. Notably, registering a usufruct against the property in the lifetime of the testator would have the same effect as would be the case if it was included in a will. Both have

[24] Fatwa 2 §9. See also discussion in §5.5(b).
[25] See §5.5(b).
[26] Coulson (n12) 239. The exception to this is the Hanbali school, which calculates both the value of the property divested of the usufructuary right and the value of the usufructuary right itself and then set the former off against the latter. For more on how a usufruct is utilised in Islamic inheritance law see Carrol 'Life Interests and Inter-Generational Transfer of Property-Avoiding the Law of Succession' (2001) 8(2) *Islamic Law and Society* 245 at 267.
[27] Ibid.
[28] See §6.8(g).

the effect of encumbering the property. The difference between including a usufruct in a will and registering it against the property in the lifetime of the testator is that in the latter instance, it will not be considered a bequest and will therefore not be bound by IIL relating to a bequest. Consequently, the value of the usufruct need not be limited to 1/3 of the estate, nor is the consent of the other heirs required.

On the other hand, leaving any property to a surviving spouse, including a usufructuary interest, in one's will has various tax benefits. According to s4(q) of the Estate Duty Act[29] ('EDA'), the value of all property bequeathed to a surviving spouse[30], either in respect of a will or by intestate succession, is deductible from the gross estate of the deceased.[31] This deduction includes any property included in a testator's estate that accrues to a surviving spouse, including a usufructuary interest. Deferring the enjoyment of the usufruct by a surviving wife to the death of the testator will have estate duty savings benefits, which would be lost if the usufruct is registered against the immovable property in the lifetime of the testator.

The usufruct or an '*umrā* is not the most straightforward way to secure the rights to immovable property for a surviving spouse. It would be easier for the testator to donate immovable property or a share of immovable property to his or her spouse during his or her lifetime. Donations[32] made between spouses[33] do not attract donations tax in terms of the Income Tax Act.[34] Parties

[29] Act 45 of 1955.
[30] The definition of spouse includes a partner in 'a union recognized as a marriage in accordance with the tenets of any religion' in terms of EDA, s1.
[31] EDA, s4(q) provides: 'The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say…(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased.'
[32] A donation is defined as: 'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right' in terms of s55(1) of the Income Tax Act 58 of 1962 ('ITA').
[33] Section 1 of the ITA includes in its definition of a spouse parties married by Muslim rites. The section defines spouse as: "'spouse', in relation to any person, means a person who is the partner of such person …
(b) in a union recognised as a marriage in accordance with the tenets of any religion".
[34] ITA, s56.

who are married to each other, irrespective of their matrimonial property regime, may freely donate money or assets to each other without triggering donations tax. A testator, who is married by Muslim rites only could, therefore, donate immovable property or shares in immovable property to his spouse during his lifetime, as opposed to going through the onerous and costly process of registering a usufruct against the property during his lifetime. *Inter vivos* donations between spouses are valid within Islamic law, as it is permissible to give away as much of one's wealth as one wants to during one's lifetime.[35] These *inter vivos* donations are also a means of avoiding the rigid constraints of the Islamic inheritance shares and the limited portion allotted to a spouse. It furthermore avoids the complications of including a usufruct in the testator's will.

(c) A surviving wife's claims for outstanding dower and arrears maintenance

A Muslim widow has additional claims that she may institute against her deceased's husband's estate in order to bolster her financial security on the death of her husband. An unpaid dower or deferred dower can be claimed from a deceased husband's estate. The outstanding dower is considered a liability against the testator's estate and therefore takes precedence over any bequests and inheritance shares.[36]

Either spouse could also lodge a claim in terms of the MSSA if he or she feels that his or her Islamic law share is insufficient to maintain them on the death of their spouse. Section 2 of the MSSA provides that where a marriage is dissolved by death, the surviving spouse shall have a claim for reasonable maintenance against the estate of the deceased spouse, in so far as he or she is not able to provide such maintenance from his or her own means or earnings. When

[35] Mohammedi 'Sharia-Compliant Wills, Principles, Recognition and Enforcement' (2012) 57 (2) *New York Law School Law Review* 259 at 278; Carrol (n26) 246-255.
[36] See §5.5(a).

determining the reasonable needs of a surviving spouse, the court will consider various factors,[37] including the following: (i) the amount in the deceased's estate that is available for distribution to heirs and legatees;[38] (ii) the existing and expected means, earning capacity, financial needs and obligations of the surviving spouse as well as the subsistence of the marriage,[39] and (iii) the standard of living of the surviving spouse during the subsistence of the marriage and his or her age at the time of death of the deceased spouse.[40] Such a claim will only prevail until the surviving spouse's death or remarriage. This claim enjoys the same order of preference as the maintenance claim of a dependent child against the deceased estate.[41] If the maintenance claim of the surviving spouse and the maintenance claim of the dependent child end up competing with each other, each claim has to be reduced proportionately.[42]

A claim of a surviving spouse can be paid out periodically or in a lump sum, depending on the agreement reached between the heirs.[43] Sonnekus expressed reservations about lump-sum payments and noted that historically maintenance claims were periodical as they are only supposed to cover the claimant for the period for which they are claimed.[44] In *Feldman v Oshry*[45], Van Zyl J expressed policy concerns about lump sum payments, as they could expose the estate to risks because the surviving spouse might die earlier than expected or he or she might remarry.[46] In these scenarios, the remaining heirs would be prejudiced. A monthly maintenance award was therefore made in favour of Mrs Feldman. Heaton criticises this

[37] See *Oshry v Feldman* 2010 (6) SA 10 (SCA) for the various factors that the court will consider.
[38] MSSA, s3(a).
[39] MSSA, s3(b).
[40] MSSA, s3(c).
[41] MSSA, s2(3)(b).
[42] MSSA, s2(3)(b).
[43] MSSA, s2(3)(d) empowers the executor of the deceased spouse's estate to enter into agreements with the surviving spouse, heirs and legatees who may have such an interest in such an agreement. See also *Oshry v Feldman supra* [139]-[149].
[44] Sonnekus 'Verlengde onderhoudsaanspraak vir langslewende gade geen onbedagte meevaller vir erfgename van aanspraakmaker nie: regspraak' 2010 (4) *TSAR* 808 at 819.
[45] [2009] JOL 23442 (KZD).
[46] *Feldman v Oshry supra* [34].

finding of the court because an award for periodic maintenance payments inevitably delays the finalisation of the deceased estate, especially in polygynous marriages, where multiple surviving spouses lodge claims against the deceased estate for maintenance.[47] On appeal, Navsa J awarded the surviving spouse a lump sum payment for maintenance.[48] Consequently, a surviving Muslim wife or wives can now claim a lump sum from the estate of their deceased husband if their 1/4 or 1/8 is insufficient to maintain them financially after the death of their husband.

A spouse in a Muslim marriage is included in the definition of 'surviving spouse' in the MSSA[49] and so are polygynous wives.[50] In my empirical research, there was conflicting evidence on whether Muslim widows submitted claims in terms of the MSSA. P1 claimed that in his experience, widows do not utilise the MSSA as they are satisfied with their fixed share of 1/4 or 1/8.[51] This was not the experience of the Assistant Master and the attorneys' who indicated that in their experience, Muslim widows do submit claims in terms of the MSSA.[52] In fact, the Assistant Master, P2, encourages widows to do so.[53] As the Assistant Master and attorneys were regularly involved in the winding up of estates, their feedback on maintenance claims by surviving spouses is more probable.

Notwithstanding these conflicting opinions, as a matter of law, the surviving widow is entitled to submit a claim for maintenance against the estate of her deceased husband in terms of the MSSA, especially if he was wholly or partially responsible for her maintenance during his

[47] Heaton 'Family law' 2009 *Annual Survey of South Africa* 440 at 485.
[48] *Oshry v Feldman supra* 139-149.
[49] *Daniels v Campbell* 2004 (5) SA 331 (CC).
[50] *Hassam v Jacobs* 2009 (5) SA 572 (CC).
[51] P1 Transcript at 44.
[52] See §§6.9(f) and 6.10(h).
[53] See §6.10 (h).

lifetime. Even if the sons of the widow contribute to her maintenance, she would nevertheless have a claim for maintenance against her deceased husband's estate in terms of the MSSA. In *Oshry v Feldman*[54] the court had to determine whether the sons' voluntary contributions to their mother's maintenance should be taken into account as part of her 'existing means'.[55] Navsa J held that 'the existing and expected means must be those of the surviving spouse'[56] and that 'during his lifetime the deceased could not, if he had the means to support the respondent, have insisted that she look to her children or any other source of maintenance'.[57]

P3 cited an example where he lodged a maintenance claim in terms of the MSSA on behalf of one of his clients, the first wife of a deceased, who died leaving a substantial estate.[58] However, there was a dispute about whether, at the time of his death, the deceased had been validly married to P3's client. The deceased had also concluded a second marriage in terms of Muslim rites and was married to the second wife at the time of his death. The second wife disputed the first wife's maintenance claim.[59] At the time of writing, the matter had not yet been adjudicated upon by the courts. The fact that Islamic divorce processes are not uniform across South Africa and that these processes are not regulated by one body creates numerous problems, especially in the realm of inheritance.[60]

(d) Competing claims of wives against their deceased husband's estate

The scenario cited by P3 above would be more complicated where testator (X), for instance, was married to his first wife (Y) by Muslim rites only and subsequently entered a civil marriage

[54] 2010 (6) SA 10 (SCA).
[55] MSSA, S3(b) requires the court to consider the existing and expected means of the surviving spouse when determining her maintenance.
[56] *Oshry v Feldman supra* [35].
[57] Ibid.
[58] See §6.10(h).
[59] Ibid.
[60] See §3.4 and §3.5.

with his second wife (Z) in terms of the Marriage Act ('MA').[61] In the absence of an antenuptial contract, the second marriage will automatically be in community of property,[62] as there is a rebuttable presumption that when a couple concludes a civil marriage, they are marrying in community of property.[63] Their separate estates are combined into a single joint estate for the duration of their marriage.[64] X and Z, in the above scenario, become co-owners in undivided and indivisible half-shares of the joint assets[65] they respectively own at the time of concluding their marriage and the assets that they acquire during the marriage.[66] Furthermore, transfer of ownership in their respective assets is automatic, and no delivery is required of movable property nor is registration required of immovable property.[67] When the second marriage between X and Z is dissolved upon death or divorce, the balance of the joint estate, after all liabilities have been settled, must be divided equally between the two spouses in the civil marriage. This could create real challenges for the first wife (Y), who was married to X by Muslim rites only.

If, for instance, X dies testate in 2019 and stipulated in his will that his estate should be distributed according to IIL and that the MJC should determine his Islamic law heirs, then this instruction would only apply to his half of the joint estate with Z. If X married Y in 2001 by Muslim rights only, their marriage would automatically be out of community of property as this is the default matrimonial property regime in Islamic law.[68] If he was the primary

[61] Act 25 of 1961.
[62] Barrat and Domingo *Law of Persons and Family* (2012) at 279; Hahlo *The South African Law of Husband and Wife* (1985) at 157.
[63] *Edelstein v Edelstein* 1952 (3) SA 1 (A) 10; *Brummund v Brummund's Estate* 1993 (2) SA 494 (NmHC) 498.
[64] *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA) 312G; Hahlo (n73) 157-158.
[65] There are a few exceptions of assets that are excluded from the joint estate, like bequests or donations made by a third party to one of the spouses and which have expressly been included from the joint estate. For a discussion on these exceptions see: Heaton and Roos *Family and Succession Law in South Africa* (2012) 184-185.
[66] *De Wet v Jurgen* 1970 (3) SA 38 (A) 46; *Mazibuko v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA) para [48].
[67] De Jong and Pintens 'Default matrimonial property regimes and the principles of European family law- a European- South Africa comparison (part 2)' (2015) 3 *TSAR* 552.
[68] Omar *The Islamic Law of Succession and its application in South Africa* (1998) 11.

breadwinner, he, in all likelihood, would have acquired all property in his name, including the family home, which he shares with Y and their children. Let us assume X subsequently enters a second marriage with Z in 2015, whom he marries according to Muslim rites and in terms of the MA in community of property. He dies in 2019 and is survived by both wives, Y and Z, as well as two sons and two daughters from his marriage to Y. He had no children with Z.

The MJC, in its distribution certificate, would allocate X's estate as follows: Y and Z would get a 1/16 share each and the sons and daughters would inherit the residue in a ratio of 2:1, respectively. This allocation would only apply to X's half share of the joint estate with Z. In 2015, when X married Z, all his property became part of their joint estate. Z, therefore, owned a 50% share in all X's assets, including his family home with Y. In addition, Z would inherit 1/16 of X's half of their joint estate. Y, after many years of marriage, would only inherit a 1/16 share of X's half of the joint estate, which is an unfair and unjust outcome for Y. Y would be entitled to submit a maintenance claim against X's estate in terms of the MSSA, but such a claim can only be brought against X's half of the joint estate. In addition, her maintenance claim would decrease the inheritance share of her four children. She would have no claim to Z's half of the joint estate. Z, as the main shareholder in the family home,[69] would be within her rights to insist on occupation of the property or, at worst, evict Y and her children. This is clearly an untenable situation which actually occurs in the Muslim community.

It must be noted that if the above scenario arose in ACL, the matter would be dealt with differently. ACL also permits polygamous unions, but these marriages are governed and regulated in terms of the Recognition of Customary Marriages Act[70] ('RCMA'), whereas

[69] On the death of X, Z will own ½ plus 1/16th share in the family home, which is more than any of the other Islamic law heirs.
[70] 120 of 1998.

polygamous Muslim marriages are not currently regulated by any legislation.[71] In terms of s7(6) of the RCMA, 'a husband in a customary marriage who wishes to enter into a further customary marriage with another woman, after the commencement of this Act, must make an application to the court to approve a written contract which will regulate the future matrimonial property system of the marriages.'[72] In *Ngwenyama v Mayelane*[73] the court held that the purpose of s7(6) of the RCMA is to protect the proprietary interests of both the existing and prospective spouses and not to determine the validity of the marriage.[74] In that case, the deceased had been married to his first wife according to ACL only and then married his second wife in terms of the RCMA without informing his first wife. The court upheld the validity of the second customary marriage in this case but concluded that it had to be out of community of property.[75] This decision was reversed by the Constitutional Court[76], which held the second customary law marriage to be invalid as the first wife had not been informed about the second marriage.[77] This decision has far-reaching effects, especially for the second wife and her constitutional rights to property.

Of even greater significance is the fact that the Constitutional Court, in a different matter, has ruled that all customary law marriages, including those concluded before the commencement of the RCMA, are automatically in community of property.[78] This creates various challenges for spouses in polygamous customary law marriages, and academic commentators have correctly noted that, '…under a joint property regime such as community of property, formal

[71] See discussion in § 2.2 and §3.5.
[72]RCMA, s7(6).
[73] 2012 (4) SA 527 (SCA).
[74] *Ngwenyama v Mayelane supra* [19]. In the case of *MM v MN* 2010 (4) SA 286 (GNP), the court held that the second customary marriage entered into by the deceased was invalid as he had not complied with the requirements of s7(6) of the RCMA.
[75] *Ngwenyama v Mayelane supra* [38].
[76] [2013] ZACC 14.
[77] *Mayelane v Ngwenyama* [2013] ZACC 14 para [37]. The terms of Xitsonga custom (which was the custom of the first wife) the consent of the first wife is required before a husband can conclude a second customary marriage.
[78] *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

equality cannot be attained where more than one marriage subsist at the same time or where…the pie must be split into shares, which are less than half.'[79] It is beyond the scope of this thesis to unpack the further implications of s7(6) of the RCMA or to engage in a detailed discussion on the aforementioned judgments.[80] Suffice it to say, despite the various challenges that arise from polygamous customary marriages; there are at the very least mechanisms in place to regulate the proprietary consequences of these marriages, whereas no such protection exists for Muslim polygynous marriages.

The Constitutional Court was confronted with Muslim polygynous marriages in *Hassam v Jacobs*[81] where it held that the purpose of the ISA '…would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion.'[82] However, the *Hassam* case differs from the hypothetical example I sketched above in two important respects, namely, both wives in *Hassam* were married to the deceased by Muslim rites only, and secondly, *Hassam* deals with the scenario where the deceased died intestate.[83] Our courts have not had the opportunity to deal with a case where the facts are similar to those sketched in the above hypothetical example. In the absence of legislation regulating polygynous Muslim marriages, it remains to be seen how the courts will deal with such cases.

[79] Sloth-Nielsen and Van Heerden 'The constitutional family developments in South African child and family law 2003-2013' (2014) 28(1) *International Journal of Law, Policy and the Family* 100 at 107.
[80] For a discussion of some of these difficulties see Sloth-Nielsen and Van Heerden (n79) at 105-108.
[81] 2009 (5) SA 572 (CC).
[82] *Hassam v Jacobs supra* [38].
[83] See discussion in §3.5.

Our courts have been very sympathetic to the first wife in a polygynous customary marriage. In *Mayelane v Ngwenyama*[84] the court emphasised the first wife's rights to equality and human dignity and had the following to say:

> 'Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present…While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution…where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent…the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life…'[85]

Given the courts' approach to polygamous customary law marriages cited above, it would not be improbable for our courts to declare second Islamic polygynous marriages to be invalid, even if the second marriage was a civil marriage, as discussed above[86] and even though Islamic law does not require the consent of the first wife before her husband concludes a second marriage.

(e) The impact of s2C(1) of the Wills Act on polygynous wives

Although not based on similar facts like those set out in the hypothetical case study, our courts have grappled in the context of s2C(1) of the WA with competing claims of wives in a polygynous Muslim marriage where one wife was married by Muslim rites only, whilst the other was married by Muslim rites and by civil law. Section 2C(1) of the WA stipulates:

> 'If a descendant of a testator excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.'

[84] [2013] ZACC 14.
[85] Ibid at [71]-[73].
[86] In the recent unreported judgement of *Ngcwabe-Sobekwa v Sitela* [2020] ZARCMHC 51, 20 October 2020 available online at http://www.saflii.org/za/cases/ZAECMHC/2020/51.pdf, the deceased concluded a customary marriage with the first respondent in 1988. He subsequently concluded two further civil marriages without the knowledge or the consent of the first respondent. The court declared the two civil marriages invalid.

If a descendant of a testator renounces his or her benefit, which he or she was entitled to inherit together with the surviving spouse in terms of the testator's will, then the renounced benefit will vest in the surviving spouse. Enacting this rule is relatively straightforward, where a deceased is survived by one spouse only. However, the situation becomes more complicated when a deceased is survived by more than one spouse and children from each of the two spouses, as was the case in *Moosa v Harnaker*.[87]

In *Moosa*, the deceased husband (X) had been in a polygynous Muslim union with two wives, namely Y and Z, at the time of his death.[88] X was initially married to Y by Muslim rites only. With Y's consent, he subsequently concluded a second marriage with Z according to Muslim rites only too.[89] Later, with Z's consent, he married Y in terms of civil law too, [90] in order to secure finances to purchase immovable property. The civil marriage was in community of property. After concluding the civil marriage, the house was bought and was registered in equal shares between X and Y. Nine children were born of the two marriages – four sons and five daughters. X had a standard Islamic will, which incorporated the Islamic laws of inheritance, and which directed the MJC or similar body to draw up a distribution certificate to determine his Islamic law heirs. On his death, the MJC duly compiled the distribution certificate, wherein it allocated a 1/16 share of X's estate to each wife, whilst the sons received double the share of the daughters.[91] As X was married to Y in community of property, the distribution certificate only pertained to X's half of the joint estate.

[87] 2017 (6) SA 425 (WCC). Hereafter referred to as '*Moosa*'.
[88] For a detailed discussion on the case see Amien 'A discussion of *Moosa NO and others v Harnaker and others* illustrating the need for legal recognition of Muslim marriages in South Africa' (2019) 6(1) *Journal of Comparative Law in Africa* 115 at 119.
[89] *Moosa v Harnaker supra* [3].
[90] In terms of the MA.
[91] *Moosa v Harnaker supra* [7].

All nine children renounced their benefits in terms of the Islamic will and stipulated that their shares had to be inherited in equal shares by Y and Z.[92] The executor, relying on s2C(1) of the WA, decided that the renounced benefits should vest equally between the two wives. This was reflected in the liquidation and distribution account, which was accepted by the Master of the High Court.[93] However, when the executor attempted to register the immovable property into the names of both wives in equal shares, the Registrar of Deeds refused to effect the registration on the basis that only Y was the legal surviving spouse of X and, therefore, only she was entitled to the benefits renounced by her children in terms of s2C(1) of the WA.[94] The Registrar of Deeds was of the view that Z was not the legal surviving spouse to X and that any benefits her children renounced in terms of X's will should devolve upon their descendants as per s2C(2) of the WA.[95] Section 2C(2) creates a general rule that a descendant of the testator who renounces, lacks capacity, or predeceases the testator, is represented by his or her descendants *per stirpes*. The matter came before the Western Cape High Court, where the applicants argued that s2C(1) of the WA discriminated against Z on the grounds of religion and marital status.[96]

The High Court held that s2C(1) was unconstitutional as, firstly, it discriminated against spouses that were married according to Muslim rites only,[97] and secondly, it did not include multiple wives married to a deceased in terms of Muslim rites.[98] Consequently, s2C(1) was declared invalid, subject to confirmation by the Constitutional Court. The Constitutional Court held that s2C(1) differentiated between: (i) those spouses married under the MA and those

[92] Ibid [8].
[93] Ibid [9]
[94] Ibid [12]-[13].
[95] WA, s2C(2) provides: 'If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, *unless the context of the will otherwise indicates*.' (my emphasis).
[96] *Moosa v Harnaker supra* [17].
[97] Ibid [39].
[98] Ibid [39].

married under Islamic law; (ii) those surviving spouses in a monogamous civil marriage and those in a polygynous Muslim marriage; and (iii) those surviving spouses in polygynous customary unions, whose marriages are recognised in terms of the RCMA, and surviving spouses of polygynous Muslim marriages.[99] This differentiation constituted discrimination in terms of s9(3) of the Constitution as it bore no rational connection to a legitimate purpose.

The Constitutional Court specifically highlighted the fact that s2C(1) was particularly discriminatory to Z, the second wife, as owing to her Muslim marriage to X, she was not recognised as a surviving spouse, whilst only Y was afforded this privilege owing to her civil marriage to X. The court therefore ruled that s2C(1) violated the second wife's right to equality. Consequently the Constitutional Court declared s2C(1) unconstitutional and invalid and directed that the following words be added to s2C(1): 'For the purpose of this subsection, a "surviving spouse" includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.'[100] The court furthermore ruled that the declaration of invalidity operates retrospectively with effect from 27 April 1994, with certain provisos relating to property that was transferred before the order was granted.[101] The applicants had also asked the Constitutional Court to rule that the inheritance repudiated by the descendants of a testator should be divided equally among the surviving spouses of the deceased.[102] The Constitutional Court declined to make such a ruling on the basis that it would infringe on the principle of freedom of testation.[103] The order of the Constitutional Court makes no mention of how the renounced benefits should be distributed between the two surviving

[99] *Moosa v Minister of Justice* 2018 (5) SA 13 (CC) [10].
[100] *Moosa v Minister of Justice supra* para [21] part two of the order.
[101] Ibid para [21] part three of the order.
[102] Ibid para [18].
[103] Ibid.

spouses. As nothing in the order indicates the proportions that each spouse should receive, it is presumed that the renounced shares will vest in them in equal shares.[104]

Although the judgment has been lauded for furthering the rights of spouses in Muslim marriages,[105] certain aspects of the judgment have been criticised. It has been pointed out that the court did not give sufficient attention to the fact that the testator intended to have the Islamic laws of inheritance apply to the devolution of his estate, as was stipulated in his will.[106] The court *a quo* made reference to the fact that '[t]he Executor opted not to follow the Islamic law with regard to renunciation'.[107] However, the matter was not taken any further. Surely, the executor should have returned to the MJC, which had issued the original distribution certificate, in order to enquire what the consequences were in Islamic law when descendants of a deceased renounced their benefits? This would have remained true to the testator's intention.

Abduroaf argues that s2C(1) of the WA should not have applied to the *Moosa* case based on the fact that the testator intended the Islamic laws of inheritance to apply to the devolution of his estate.[108] He argues that the MJC should have been approached to amend the distribution certificate after the descendants had renounced their benefits.[109] He opines that the Islamic law doctrine of *takhāruj* (agreement/settlement) would then have applied. *Takhāruj* entails an agreement between the heirs to renounce their benefits in favour of any of the other Islamic law heirs, either in return for another asset in the deceased's estate or in return for no benefit.[110]

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[104] Wood-Bodley 'Section 2C(1) of the Wills Act 7 of 1953 and the meaning of "Spouse" *Moosa NO v Minsiter of Justice* 2018 (5) SA 13 (CC)' 2020 *Obiter* 461 at 473.
[105] Amien (n88) at 115.
[106] Wood-Bodley (n104) 473.
[107] *Moosa v Harnaker supra* [8].
[108] Abduroaf 'An analysis of renunciation in terms of s2(C)(1) of the Wills Act 7 of 1953 in light of the *Moosa No and Others v Harnaker and Others* Judgment' (2019) 7 *Electronic Journal of Islamic and Middle Eastern Law* 15 at 19.
[109] Ibid.
[110] Ibid; Ahmad *et al* 'Flexibility of *Takharuj* Principle in Solving the Inheritance Issue' (2017) 8 (11) *International Journal of Civil Engineering and Technology* 867 at 869.

This was, in essence, what occurred in *Moosa*, as all the Islamic law descendant heirs renounced their benefits in favour of the two surviving widows. Therefore, the outcome of the heirs' *takhāruj* coincided with the application of s2C(1). However, this may not always be the case. The children of Y could have entered into a *takhāruj* and renounced their benefits in favour of their own mother only. It is not clear how such an agreement can be reconciled with s2(C)(1) or with the decision of the Constitutional Court in *Moosa*. Ultimately the application of s2C(1) could result in potential conflicts with the provisions of a standard Islamic will.

(f) The impact of s2B of the Wills Act on Muslim divorces

Another section of the WA which impacts Islamic wills is s2B. Section 2B stipulates:

> 'If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.'

According to s2B, in the event of divorce and the testator dying within three months of the dissolution of the marriage, the testator's will must be implemented as if the ex-spouse had predeceased the testator. By treating the ex-spouse as if he or she had predeceased the testator, the section deprives the former spouse of the benefit conferred by the will.[111] If the testator dies more than three months after the dissolution of the marriage, the ex-spouse will be entitled to benefit from any benefits conferred by the testator's will. In an Islamic will, the situation is more complicated. If a husband issues a unilateral first *talaq* and he passes away within his wife's *iddah* period, then s2B would not come into play, despite him dying within three months

[111] In *JW v Williams-Ashman NO and Others* [2020] ZAWCHC 27, the applicant husband applied to the Western Cape High Court for an order declaring section 2B of the WA inconsistent with the Constitution on the basis that it *inter alia* conflicted with section 25(1) of the Constitution. The applicant argued that section 2B denied the testator the right to freely dispose of her property as she pleased. The court dismissed the application and held amongst others that it can safely be accepted that the vast majority of divorcees do not wish to keep on benefiting their ex-spouses after their divorce.

of the dissolution of the marriage. His wife would still be able to inherit in terms of his will as the divorce was not yet final.

Only once a divorce has been finalised[112] and there is no room for the parties to reconcile will the wife no longer be able to inherit in terms of Islamic law. There is one instance where a final or third *talaq* will not result in a wife losing her right to inherit from her husband's estate. When a husband announces a third and final *talaq* on his deathbed and passes away from the deathbed illness, there are differences of opinion on whether the wife will inherit from her deceased husband's estate in terms of Islamic law.[113] It is not clear how such a scenario would be dealt with in terms of s2B of the WA. A court would have to be cognisant of the different jurisprudential rulings to determine whether s2B can be mechanically applied. A mechanical application of s2B could have the effect of depriving the wife of her property rights and would thus potentially be open to constitutional challenge.

Clearly there are a number of challenges facing the surviving Muslim spouse because of the dissonance between Islamic law and South African law. As borne out by theoretical as well as empirical research, a fundamental issue relates to the differing approaches in divorce theory and inconsistent practices. It seems many of the difficulties in this area can only be addressed by uniform legislation. The effect of legislative intervention will be to settle or ameliorate many of the contentious succession issues faced by surviving spouses.

[112] See discussion in §3.4 for when an Islamic divorce is final.
[113] See discussion in §5.2(a).

PART TWO

8.3 PENSION PAY-OUTS

A thorny issue that came to the fore in my empirical research was the MJC's approach to pension pay-outs, which is encapsulated in MJC Fatwa 1.[114] Before analysing the contents of the *fatwa*, I wish to highlight the relevant sections of the PFA. Section 37C of the PFA provides that where a member of a pension fund dies, the payment from the pension fund does not form part of the estate of the deceased. These benefits are referred to as 'death benefits', and the section places a duty on the trustees of the fund to identify the dependants and nominees of the deceased member and to effect a fair and equitable distribution of the benefits amongst the identified dependants and nominees, after taking into account all relevant factors. Section 37C thus limits the testamentary freedom of a member as he or she is not able to dispose of pension benefits as he or she wishes by will or by a beneficiary nomination form. While a member can nominate beneficiaries in a nomination form, the nomination is not binding on the trustees. The nomination form can serve as evidence of who might be the deceased's dependants. The courts have held that s37C overrides any law which is contrary to its provisions, including ACL.[115] In *Sithole v ICS Provident Fund*[116], the trustees paid the full death benefit to the grandmother of the deceased on the basis that she was the sole nominee appointed by the deceased, and in terms of customary law, she was considered the head of the household. The Pension Funds Adjudicator overturned the decision of the trustees as the deceased had been survived by a spouse and three children. The Adjudicator held that s37C takes precedence over any law, including customary law.

[114] See Appendix 8.
[115] *Sithole v ICS Provident Fund* [2000] 4 BPLR 430 (PFA).
[116] Ibid.

The rationale behind s37C is a socio-economic one. By its enactment, the State ensures that dependants of the deceased are maintained and that the fiscus is not burdened with this responsibility. It safeguards the dependants if the testator's estate is insolvent. It also mitigates the effects of a testator who fails to make adequate provision for dependants in a will. In *Mashazi v African Products Retirement Benefit Provident Fund*,[117] the Hussain J noted:

> 'Section 37C was intended to serve a social function. It was enacted to protect dependency even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependents are left without support. Section 37C(1) specifically excludes the benefits from the assets of the estate of a member'.[118]

In my empirical research, it came to light that there were differing legal opinions (*fatāwa*) on how pension benefits should be dealt with. Firstly, MJC Fatwa 1 distinguishes between those contents of the fund which were deducted from the employee's salary and that portion contributed by the employer.[119] According to Fatwa 1, only the purified portion of the pay-out that represents the deductions from the employee's salary and the growth thereon are subject to inheritance.[120] As far as the MJC is concerned, '…the legal structure used to house the fund…amounts to a legal fiction…but does not alter the underlying reality of ownership.'[121] The *fatwa* classifies the pension fund as a legal fiction. Based on this reasoning, the MJC considers ownership of the pay-outs that derive from the employee's contributions plus the growth thereon to vest in the estate of the deceased member. Accordingly, such pay-outs should be subjected to IIL.

The portion of the pension pay-out that was contributed by the employer is not considered as forming part of the employee's estate, based on the reasoning that ownership never vested in the employee. In so far as this portion is concerned, Fatwa 1 stipulates that '…the *beneficiaries*

[117] 2003 (1) SA 629 (W).
[118] *Mashazi v African Products Retirement Benefit Provident Fund supra* at 632.
[119] Fatwa 1, §2.4.1.
[120] Fatwa1 §2.4.5.
[121] Fatwa1 §2.4.6.

by law may come to a settlement agreement among themselves in which they are not necessarily guided by the stricture of the Islamic law of succession.'[122] It is not clear who is being referred to as the 'beneficiaries by law'. It could be referring to the Islamic law heirs, or it could be referring to those beneficiaries or dependants who the trustees of the pension fund determine should be paid the death benefits. Either way, this portion of the pension pay-out is not subject to Islamic inheritance distribution according to Fatwa 1.

Secondly, Fatwa 1 also stipulates that unless the pension fund investments had been Sharī'ah compliant,[123] the pension pay-outs in the form of death benefits would first have to be purified of any unlawful returns. The implication is that whatever returns have been derived from investments that are not Sharī'ah compliant should be removed from the pension pay-out before the death benefits can be considered for the purposes of inheritance. Fatwa 1 notes that '[w]here actual facts and figures are accessible they should be used; otherwise discretionary percentages should be resorted to.'[124] It does not elaborate on what the discretionary percentages are or how they should be calculated. It would be quite difficult to determine which investments were not Sharī'ah compliant. The executor would have to conduct a forensic audit of how the pension funds were invested for the duration that the deceased was a member of the pension fund. Once the executor determines which returns were derived from non-compliant investments, no guidance is provided on what should be done with these 'tainted' returns. According to Abduroaf, the proceeds in an estate that have been acquired through unlawful means should be disposed of, either by returning them to the rightful owner or his or her beneficiaries or donated

[122] Fatwa1 §2.4.8. (my emphasis).
[123] Sharī'ah compliant in this instances would refer to investments in products or business, which do not engage in business activities that are prohibited by Islamic law. These would include *inter alia*, conventional financial services, tobacco companies, gambling, pornography etc.
[124] Fatwa 1, §2.4.4.

to charity.[125] The practicalities and enforceability of such measures are not, however, explored or elaborated upon. It is doubtful whether this exercise takes place in practice.

In a matter in which my advice was sought, a beneficiary had received substantial death benefits from her deceased husband's pension fund. Because the deceased had no children, she was deemed to be the sole dependant in terms of the PFA. Once the siblings of the deceased heard of the pay-out, they were insistent that she distribute the death benefits amongst the Islamic law heirs of the deceased as she was only entitled to 1/4 of the deceased's estate in terms of IIL. Clearly, she was not obliged to enter into any agreement to distribute her deceased husband's death benefits in terms of the PFA. However, the attitudes of the siblings were not surprising, given the ambiguous *fatwa* issued by the MJC.

The MJC *fatwa* does not refer to the provisions of s37C(1) of the PFA at all and appears to be an attempt to circumvent the objectives of this provision of the PFA. The MJC's actions are potentially *in fraudem legis* (in fraud of the law). An act can be *in fraudem legis* where: (i) one tries to disguise one's transaction in order to avoid the law; (ii) one tries to structure one's transactions to defeat the purpose of the law but not the letter of the law[126]; or (iii) one does indirectly what one is not permitted to do directly.[127] In *Dadoo v Krugersdorp Municipal Council*,[128] the Innes CJ cites the following passage from the *Corpus Iuris Civilis* when dealing with the *in fraudem legis* doctrine: '[a] man who does what a statute forbids, transgresses the statute; a man who contravenes the intention of the statute, without disobeying the actual

[125] Abduroaf *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD thesis, University of the Western Cape (2018)) 19.
[126] *Dadoo v Krugersdorp Municipal Council* 1920 AD 530.
[127] *Collins v Minister of Interior* 1957 (1) SA 552 (A); see also Hutchinson and Hutchinson 'Simulated transactions and the *fraus legis* doctrine' 2014 131 *SALJ* 70.
[128] 1920 AD 530.

words, commits a fraud on it.'[129] The MJC, by insisting that pension benefits form part of the member's estate and by issuing a legal opinion (*fatwa*) to this effect, would be guilty of contravening the objectives of the PFA. Although its *fatwa* is not binding on the public, it holds persuasive power on those members of the public who seek its advice on these matters. The MJC's actions could, therefore potentially be perceived as being *in fraudem legis*, which could expose it to penalties in terms of the PFA[130] if a fund member or any interested party had to lodge a complaint against it for its legal ruling on this matter.

In contrast to the MJC, Omar correctly (in my view) holds that pension benefits do not form part of the estate of the deceased.[131] He points out that as the pension fund is regarded as a juristic person, the contributions made by the member to the pension fund are accordingly owned by the pension fund as a separate legal entity.[132] Importantly, he points out that s13 of the PFA[133] stipulates that the rules of the fund are binding both on the pension fund as well as the members. The implication of s13 is that the Muslim employee and member have explicitly agreed to how the pension fund contributions will be dealt with under s37C of the PFA.[134] This position is consistent with the Islamic commercial law obligations that require persons to uphold agreements.[135] Omar concludes that pension pay-outs paid by the trustees of the pension fund to the dependants of the deceased should, from an Islamic law perspective, be considered

[129] Digest 1.3.29 cited in *Dadoo v Krugersdorp Municipal Council supra* 544.
[130] PFA, 37(1)(c) stipulates 'Any person who…(c)in any application in terms of this Act deliberately makes a misleading, false or deceptive statement or conceals any material fact, is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.
[131] Omar *Contemporary Applications in Islamic law* (2012) 68.
[132] This is contrary to the aforementioned position taken in the MJC fatwa, which regards the Fund as a legal fiction, thereby insisting that ownership of the contributions rest with the employee.
[133] PFA, s13 stipulates, 'Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund *and the members*, shareholders and officers thereof, and on *any person* who claims under the rules or *whose claim is derived from a person so claiming*.' My emphasis.
[134] Omar (n131) at 67.
[135] This ruling is derived from the following Qur'anic verse, Q5:1 'Oh you who believe! Uphold your pacts (agreements)'. See also Kharofa *Transactions in Islamic law* (1997) at 1-9.

gratuitous payments, similar to a gift or donation. According to him, it makes no difference whether membership to a pension fund is voluntary or compulsory.[136] This opinion is legally sound from an Islamic law perspective and is reconcilable with South African pension laws. What is evidently needed is more public education about how members can structure their pension fund investments to ensure that they are Sharī'ah compliant. There are avenues available to members to ensure that their pension fund contributions are Sharī'ah compliant[137] , and bodies like the MJC should be raising awareness along these lines.

8.4 SUCCESSION AGREEMENTS

In this section, I deal with the provisions in the MJC wills that dispose of immovable property separately to the Islamic inheritance distribution system. I say 'separately' because these wills all contain the provision which purports to incorporate IIL into the testator's will. However, certain testators also appear to exclude immovable property from the Islamic inheritance distribution and allocate it to specific heirs. These provisions occurred in only a few of the older MJC wills, and so I do not discuss them in great detail.[138] I also discuss agreements made by testators over and above their wills, which agreements were facilitated by P1 of the MJC. Once again, these agreements were the exception rather than the rule according to P1,[139] and therefore my discussion in this regard is limited. With both scenarios, I discuss whether they could qualify as a *pactum successorium* (succession by contract).[140]

[136] Omar (n134) at 68.
[137] A growing number of pension funds in South Africa allow members to exercise choice in how they wish their pension fund assets to be invested. Increasingly Sharī'ah compliant options are available to members as part of the member level choice framework.
[138] See §6.4(i).
[139] P1 Transcript at 44-46.
[140] A *pactum successorium* has been defined as a contract in which the parties attempt to regulate the devolution of their entire estate or part of the assets of one or both parties. Jamneck *et al The Law of Succession in South Africa* (2012) at 231.

Examples of the 'house as a gift' provision can be found in MJC 5, 6 and 7.[141] These provisions appear to be attempts by testators to donate immovable property to certain beneficiaries in the lifetime of the testator. In MJC 5, the testator gifts immovable property to his sons; in MJC 6, the testator gifts immovable property to her daughters, and it is not certain whom the testator gifts her immovable property to in MJC7. Presumably, the two females mentioned in MJC7 were also the daughters of the testator. The immovable properties being gifted were not intended to form part of the testators' estates, and consequently, the testators did not intend for these properties to be part of the Islamic law distribution system. However, the testators do not carry out the donations in their lifetime as this would attract donations tax and, more importantly, it would deprive them of ownership in the property, which does not appear to be their intention. Hence no transfer of the immovable property occurs during the lifetime of the testators. The vesting of ownership would only occur on the death of the testators. Whoever has been "gifted" the immovable property in these wills only acquires a personal right to obtain transfer of the immovable property on the testator's death. This personal right would be subject to a suspensive condition because if the testator goes insolvent, the donation will fall away. For the convenience of discussion, I will refer to the above scenario as 'scenario one'. It is unclear what the legal status of this provision is. I considered whether it might constitute a *pactum successorium*.

In the second scenario, P1 mentioned that in certain instances, a testator consulting him would request an Islamic will but would also request that a separate agreement be drafted whereby he could donate the family home to his wife.[142] In this scenario, the testator would have P1 assist him with a standard MJC Islamic will, but he would then also conclude a separate 'donation'

[141] Discussed in §6.4(i).
[142] See P1 Transcript at 45 and discussion in §6.8(h).

agreement wherein he would stipulate that he donates the family home to his wife in his lifetime. P1 would ensure that the husband and wife sign the donation agreement in addition to executing the standard MJC Islamic will. Sometimes he would have the children sign the donation agreement too.[143] The donation agreement would be kept on record at the MJC offices to serve as proof that the testator had donated the family home to his wife in his lifetime and that it did not form part of his estate. As with scenario one, no transfer of the family home occurred in the lifetime of the testator. Ownership of the house is only intended to vest in the surviving wife on the death of the testator. I will refer to this as 'scenario two' and will discuss whether it can be classified as a *pactum successorium*. In Islamic law, both example one and example two would constitute *inter vivos* gifts. As Powers notes, 'there was no doctrinal objection to a man transferring assets to his wife or a father transferring assets to his children by means of an *inter vivos* gift.'[144] In fact, it was not uncommon for testators to utilise *inter vivos* gifts to circumvent the perceived constraints of Islamic inheritance laws.[145] However, delivery and transfer of ownership of the property is necessary for the completion of the gift in Islamic law.[146] This results in the donor of the gift losing control over the property. In both scenario one and scenario two, ownership of the houses was not transferred to the stipulated beneficiaries and wife, respectively, during the lifetimes of the testators. It is, therefore, debatable whether this can be classified as a proper *inter vivos* gift according to Islamic law.

In South African law, an estate can either devolve according to a will or according to the rules of intestate succession. However, there are instances where testators try to regulate the

[143] Ibid at 46.
[144] Powers 'The Art of the Judicial Opinion: on *Tawlīj* in the Fifteenth-Century Tunis' (1998) 5(3) *Islamic Law and Society* The Islamic Inheritance System 359 at 377.
[145] Powers notes that this was commonly found amongst Muslim testators in eighth-century Medina, twelfth-century al-Andalus and fifteenth-century North Africa. Powers (n144) 379.
[146] Powers 'The Islamic Inheritance System: A Socio-Historical Approach' in Mallat and Connors (eds) (1990) *Islamic Family Law* at 25.

devolution of their estates by utilising contracts.[147] These contracts are regarded as *pactum successoria* (succession pacts). The testator uses the *pactum successorium* to commit himself or herself during his or her lifetime to give someone a share of his or her estate (or part of his or her estate) after he or she has died.[148] Such agreements are invalid in our law because they *inter alia* restrict the testator's freedom of testation, and they make nonsense of having formalities for wills.[149] *Pactum successoria* are divided into two categories, namely: contracts where the agreement relates to rights of succession of one or both contracting parties; and contracts where the agreement relates to an envisaged succession to a third party by one of the contracting parties.[150] Scenarios one and two of the MJC would fall under the first category. An example of the first category would be where Y promises to make a bequest in favour of Z in his or her will.[151] This agreement would restrict Y's freedom of testation. Another example of the first category would be where Y enters into an agreement with Z in terms of which Y purports to dispose of property *mortis causa* (upon death) in Z's favour.[152] This agreement not only restricts Y's freedom of testation but also purports to do by contract what can only be done by will, thereby evading the formalities required for the execution of testamentary instruments.[153]

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[147] Jamneck *et al* (n140) at 231.

[148] Two forms of *pactum successorium* are permissible in our law namely, the *donatio mortis causa* (a deathbed donation) and the succession provisions contained in antenuptial contracts. Both of these exceptions are not applicable to scenarios one and two.

[149] The court in *Borman en De Vos v Potgietersrusse Tabakkorporasie* 1976 (3) SA 488 (A) placed a high premium on the principle of freedom of testation and have used it as the test to determine whether an agreement is a *pacta successorium* or not. In the case of *McAlphine v McAlphine* 1997 (1) SA 736 (A) the court confirmed that if an agreement restricts the freedom of testation of the testator, then it is an invalid *pactum successorium.* Other reasons have been proffered for the invalidity of the *pactum successorium* but our courts have considered this the primary reason. For a discussion on other objections to the *pactum successorium* in modern South African law, see Jamneck *et al* (n140) at 233.

[150] Corbett *et al The Law of Succession in South Africa* (2001) 37.

[151] *Salzer v Salzer* 1919 EDL 221; *Nieuwenhuis v Schoeman's Estate* 1927 EDL 266; *James v James' Estate* 1941 EDL 67.

[152] *Van Wyk v Van Wyk's Executor* (1887-1888) 5 SC 1; *Ahrend v Winter* 1950 (2) SA 682 (T).

[153] Corbett *et al* (n150) 37.

Where an agreement makes provision for the immediate vesting of rights (*dies cedit*), but postpones the enjoyment of those rights (*dies venit*) until the death of one of the contracting parties, then the disposition will be regarded as having taken place *inter vivos* and not *mortis causa*, and will therefore be considered valid.[154] According to Corbett, '[t]he question whether or not the donee acquires a vested right (as opposed to a contingent right) is thus basic to the question whether or not the agreement constitutes a prohibited *pactum successorium.*'[155] Hence, if the promise of disposing of an asset in favour of another causes the right to the asset to vest in the promisee only upon or after the death of the promisor then the agreement would be indicative of a *pactum successorium*. However, where the vesting of the right takes place prior to the death of the promisor, then the agreement is unlikely to constitute a *pactum successorium.*[156] If the agreement confers a vested right, it will constitute an *inter vivos* disposition, which in no way restricts the promisor's freedom of testation. There is a presumption in favour of *inter vivos* dispositions.[157] The question of whether a promise confers a vested right to property or not depends on the construction of the agreement.[158] When interpreting a will, our courts will adopt a construction that will render the agreement valid, especially where they are in doubt about the nature of the agreement.[159] Our courts have furthermore held that as long as a *pactum successorium* is revocable, it is considered valid as it does not restrict a testator's freedom of testation.[160] However, if the agreement provided that vesting of the rights to the property would occur on or after the death of the donor, then it would

[154] Ibid at 38.
[155] Ibid at 37.
[156] Ibid.
[157] *Van Wyk v Van Wyk's Executor supra* at 3-4; *Varkervisser v Estate Varkervisser* 1959 (4) SA 196 (SR) at 199D-E; *Costain and Partners v Godden* 1960 (4) SA 456 (SR) at 460A-C.
[158] Corbett *et al* (n130) 38.
[159] *Varkervisser v Estate Varkervisser supra* at 199G-H; *Costain and Partners v Godden supra* at 460B-C; *Jubelius v Griesel* 1988 (2) SA 610 (C) at 626E-G.
[160] *Varkervisser v Estate Varkervisser supra* at 198H; *Costain and Partners v Godden supra* at 459G-460C; *Jubelius v Griesel supra* at 622I-623C.

amount to a circumventing of the formalities required for the execution of a testamentary instrument and would, on this basis be regarded as invalid.[161]

Having discussed the relevant law on *pactum successoria*, it remains to be determined whether the provisions in the wills in scenario one and the agreement in scenario two constitute invalid *pactum successoria.* The 'gifting of the house' provisions in scenario one occurred in a few of the MJC wills and was executed in accordance with the formalities of those wills. It appeared to be given as benevolent gifts to the children of the testators in the lifetime of the testators. However, it is immovable property, and no transfer or registration of the immovable properties occurred into the names of the children. In all three cases (MJC5,6 and 7), transfer was contingent on the death of the testator. Hence, the right to ownership of the house would only vest in the beneficiaries on the death of the testator. Furthermore, the promise of gifting the house to the various beneficiaries remains revocable by the donor/testator any time prior to his or her death. As the donation remains revocable, it does not restrict the freedom of testation of the testator. Based on the fact that the agreement is revocable and no right vested in the beneficiaries before the death of the testator, this particular promise in the will would not constitute a *pactum successorium*. On the death of the testator, the house would form part of the testator's estate, despite the testator's instruction that the immovable property was given as a gift to the variously named beneficiaries. It is not clear whether on the death of the testator the said immovable property would be subject to the Islamic laws of inheritance or whether it would constitute a bequest to the named beneficiaries. If it is given as a bequest, then it would be consistent with the testator's intention to gift the immovable to the named beneficiaries, but it would be contrary to Islamic law ruling that stipulates that there may be no bequests to

[161] *McAlphine v McAlphine* 1997 (1) SA736 (A) at 747E-F.

heirs.[162] Furthermore, if the value of the immovable property exceeds 1/3 of the net value of the testator's estate, it would also be in breach of the Islamic laws on bequests.[163]

In scenario two, the testator concludes the donation agreement with his wife, whereby he gives her a vested interest in the property upon his death. The donation agreement does not comply with the formalities of a will. No transfer of the immovable property occurs to the wife in the lifetime of the testator. Both the right to the property (*dies cedit*) and the enjoyment of the right to the property (*dies venit*) are postponed to the death of the testator. The testator effectively concludes two wills, namely, will one wherein he stipulates that the Islamic law should apply to the devolution of his estate, and will two, wherein he donates the family home to his wife on his death. However, as the donation agreement only vests the right on the death of the testator and as it does not comply with the formalities of a testamentary instrument, it would be regarded as a *pactum successorium.* Consequently, it would be invalid and unenforceable by the wife on the death of the testator. She would not be able to demand transfer of the family home on the death of her husband. P1 at the MJC may have been under the impression that he was assisting the testator to create an enforceable commercial agreement, but this is not the case.

It could be argued that the agreement is not a *pactum successorium* as it *prima facie* does not restrict the testator's freedom of testation, and he could still revoke the promise in his lifetime. Furthermore, if the testator had to go insolvent before his death, the family home would constitute part of his insolvent estate as it was never transferred into the name of his surviving wife during his lifetime. However, even if it did not constitute a *pactum successorium* it would

[162] See §4.2(c). For a contrary view see discussion in §4.2(d).
[163] See §4.2(c) and §5.5(b).

still not be enforceable. In terms of the Alienation of Land Act,[164] rights in immovable property must be in writing and must be signed by the parties to be enforceable.[165] Furthermore, any alienation of immovable property, including a donation of immovable property to a spouse, requires registration at the Registrar of Deeds.[166] As this did not occur in scenario two, the family home would form part of the testator's estate and would be distributed according to the MJC Islamic will. The wife would not be entitled to ownership of the family home but would only be entitled to her 1/8 share of her deceased husband's net estate.

Both scenario one and two illustrate the dangers of having the MJC or its officials advise members of the public on legal matters of this nature, when they do not have the requisite qualifications and expertise to do so. Advising parties incorrectly can result in real prejudice to the parties, as can be seen in both scenarios. Not only does a poorly drafted will or agreement frustrate the intention of the testator, but it also potentially prejudices potential heirs and legatees of the relevant estate.

8.5 REDISTRIBUTION AGREEMENTS

Redistribution agreements were another issue which came to the fore in the empirical research. A redistribution agreement occurs where the heirs depart from the stipulation of the will or the rules of intestate succession, by dissolving co-ownership of assets in the estate and each heir then taking sole ownership of those assets allocated to him or her in terms of the redistribution agreement.[167] In *Klerk v Registrar of Deeds*[168] the court explained redistribution agreements as

[164] 68 of 1981.
[165] Ibid, s2(1).
[166] Deeds Registry Act ("DRA"), s14(1)(a).
[167] Wiechers *et al Wills and Administration of Estates* (2021) 5.
[168] 1950 (1) SA 626 (T).

follows: 'There is contemplated some sort of reshuffle of assets in the estate, which would in any case have passed to the heirs, in a way which departs in some respect from the actual disposition of the will or the normal course of devolution *ab intestatio*.'[169] A redistribution agreement can be in respect of the whole or any portion of the assets of an estate.[170] It can also be entered into between heirs and legatees.[171] However, both heirs and legatees must have vested rights and not merely a *spes* (hope).[172]

As the heirs and legatees are deviating from the precepts of the will when redistributing the assets in the estate, it requires a formal written agreement.[173] The executors have to ensure that an agreement exist before the assets are distributed.[174] The objective of the agreement must be to redistribute the assets in the testator's estate, with each heir who is party to the agreement to contribute something or receive something.[175] If this does not occur, then it is not really a redistribution agreement but rather a deed of donation, a disguised sale, or something similar disguised as a redistribution agreement.[176] It must be clear that the main objective of the agreement is the redistribution of assets and nothing else. Furthermore, if the beneficiaries are all majors and their redistribution agreement simply reshuffles assets which would in any case have fallen to them, then the Master of the High Court would not have a problem with consenting to the agreement. The Master's responsibility is to examine the agreement as part of the executor's account and then to endorse the agreement as 'accepted'. He or she is not

[169] Ibid at 631.
[170] DRA, 14(1)(b)(*iii*).
[171] Ibid.
[172] *Leach v Champion Estates* 1956 (3) SA 574(C).
[173] There is no prescribed form for a redistribution agreement, but the wording of regulation 5(1)(e) of the AEA, clearly implies that the agreement should be in writing. Section 2(1) of the Alienation of Land Act 68 of 1981 also stipulates that if immovable property is involved in the redistribution, then the agreement needs to be in writing.
[174] Wiechers (n167) 5-6.
[175] Ibid.
[176] Ibid.

concerned with whether a redistribution agreement is lawful.[177] However, when there are minors involved in a redistribution agreement, the Master will pay closer attention to the specific portion they are to receive.[178] If the Master detects that a minor's portion is less than those of the other heirs, he or she will refuse to approve the redistribution agreement.[179]

Interestingly, in the MJC wills, despite the Islamic law incorporation provision, a 'redistribution provision' was also included.[180] The redistribution provision stipulates: '[a]ny of my heirs may take over any asset in my estate on condition that due compensation is paid to other heirs in accordance with the certificate mentioned under clause (4).' According to P1 of the MJC, the purpose of this provision was for one of the Islamic law heirs to take ownership of an asset (in most cases the family home) and to pay out the remaining Islamic law heirs their compulsory shares.[181] This was done in order to avoid fragmented ownership of immovable property. The implication of this provision is that the estate of the deceased is not strictly being distributed according to Islamic law as the testator intended.

Of the attorneys interviewed, P7 was adamant that redistribution agreements, if applied correctly, defeat the testator's intention to have his or her estate distributed according to Islamic law and amounted to a modification of the testator's will.[182] In *De Wet v De Wet*[183] the court held that 'acts and agreements by and between them (beneficiaries) which vary or modify the terms of a will are invalid and unenforceable unless sanctioned by the court, which sanction is

[177] Ibid 7.
[178] Ibid.
[179] The High Court must approve a redistribution agreement if a minor's interest in immovable property forms the subject of the agreement and amounts to more than R100 000 (AEA, s80.). Also, if any part of a minor's immovable assets is to be mortgaged, charged and transferred by any means, the consent of the High Court is required.
[180] See §6.4(j).
[181] P1 Transcript at 15.
[182] See §6.10(f).
[183] 1951 (4) SA 212 (C).

given only in certain expected cases.'[184] Similarly in *Bydawell v Chapman*[185] the Appellate Division disapproved of the practice of entering into family agreements aimed directly or indirectly at altering or modifying the effect of provisions in wills. In *Jewish Colonial Trust Ltd v Estate Nathan*[186], the Appellate Division held that it could not vary a will and change the devolution of an estate.[187] The court held that the beneficiaries must be content to take what they are given in accordance with the terms in which it was given in the testator's will.[188]

However, s14(1)(b)(iii) of the DRA has altered the common law, as inevitably, all redistribution agreements alter the provisions of a will. The remaining four attorneys interviewed indicated that Muslim heirs often entered into redistribution agreements, despite the will stipulating that the Islamic laws of inheritance should apply.[189] The effect of the agreement would be to have one heir taking over a particular asset and paying the other heirs their share in terms of Islamic law. Attorneys P5 and P6 expressed concerns that the rigid Islamic law fractional share-based system creates problems from a practical perspective as each heir would own a fractional share in the estate, including the immovable property. P5 also indicated that difficulties arose when trying to register the smaller fractional shares against the immovable property with the Registrar of Deeds, as the fractions had to be converted into percentages. This could be problematic when converting smaller fractional shares, such as 1/35, into percentages for the purpose of registering ownership in immovable property.

[184] Ibid.
[185]1953 (3) SA 514 (A); see also *Ex parte Marais* 1966 (3)SA 378 (O); *Ex parte Watling* 1982 (1) SA 936 (C) 942.
[186] 1940 AD 163 at 182-183.
[187] Ibid.
[188] Ibid.
[189] See §6.10(f).

In Islamic law, the doctrine of *takhāruj* makes provision for Islamic law heirs to enter into agreements similar to redistribution agreements. *Takhāruj* is doctrine whereby the heirs reach an agreement to renounce their rights to their share in the estate and it can take different forms. An heir can renounce his or her share in a particular asset in exchange for another asset in the deceased's estate.[190] *Takhāruj* between two Islamic law heirs can occur where, for instance, X, renounces his share in a particular immovable asset in favour of Y, in return for certain monetary consideration.[191] Alternatively, an heir could renounce his or her share for no consideration, thereby gifting it to the other Islamic law heirs.[192] These are all acceptable forms of redistributing the assets in an Islamic estate. The practice of *takhāruj* is not commonly understood within the Cape Town Muslim community, and the MJC does not openly advocate it when advising Muslims on their wills and estates. It is nevertheless an acceptable practice within Islamic law, which is reconcilable with the practice of heirs redistributing their assets in terms of South African law.

8.6 CONCLUSION

In this chapter, I discussed the various challenges faced by Muslim widows in the context of inheritance and how the Islamic law can be interpreted and applied to provide greater relief to widows. In addition, I highlighted the need for legislation that recognises and regulates Muslim marriages and divorces, as the Islamic rules in both these areas directly impact a Muslim widow's right to inherit. In part two of the chapter, I addressed the remaining technical issues that arose in my empirical research and how they interact with the South African law of inheritance and administration of estates generally. In the next chapter I discuss potential

[190] Ahmad *et al* (n110) at 869.
[191] Ibid.
[192] Ibid.

constitutional challenges that could be brought against standard IIL provisions contained in Islamic wills.

CHAPTER NINE

CONSTITUTIONAL AND POLICY CONSIDERATIONS WITH THE IMPLEMENTATION OF ISLAMIC INHERITANCE LAWS IN SOUTH AFRICA

9.1 INTRODUCTION

In the previous chapter, I highlighted some of the technical issues that I identified in my empirical research. In this chapter, I discuss certain Islamic inheritance law ('IIL') rulings that could potentially be considered contrary to public policy or the values of the Constitution. These rulings automatically form part of Islamic wills, as they are incorporated by reference into these wills. The provisions I discuss either pertain to the exclusion of certain relatives of the deceased on the basis of certain immutable characteristics or pertain to differentiation between heirs on the basis of gender or religion. I discuss various scenarios below and how they interrelate with South African law. In the first section, I discuss issues pertaining to the rights of children. In the second section, I discuss those provisions in Islamic wills that could be construed as discriminating against heirs on the basis of gender. The third section deals with provisions in Islamic wills that exclude all non-Muslim relatives from inheriting as Islamic law heirs. In the fourth section, I discuss the public policy and constitutional considerations that the courts might take into account when considering the aforementioned discriminatory provisions in Islamic wills. Lastly, I elaborate on the approach of our courts to disputes pertaining to religious and cultural rights.

9.2 RIGHTS OF CHILDREN

The rights of biological children, who were conceived and born within wedlock, have been firmly secured in IIL, with fixed shares allocated to them. Children who were conceived or

born out of wedlock are disqualified from inheriting as Islamic law heirs. Adopted children also do not qualify as Islamic law heirs. Both these categories of children may only benefit from bequests by the testator. A Muslim testator may bequeath up to 1/3 of his or her estate to a child conceived or born out of wedlock or to an adopted child. However, if the testator does not create such a bequest and he or she incorporates IIL into his or her will, then both adopted children and children conceived or born out of wedlock will not be included in the distribution certificate issued by the MJC. In addition to these two scenarios, there is also the question of the grandchildren of a testator not being able to inherit *per stirpes* if their parents predecease their grandparents. I discuss this Islamic ruling in conjunction with the South African law doctrine of accrual. I furthermore discuss how this ruling can be reconciled with s2D(1) of the WA.

(a) Children conceived or born out of wedlock

In chapter two, I noted that one of the main objectives or *maqāsid* of the Sharī'ah is the protection of lineage and the family.[1] Islamic law, therefore, outlaws fornication and adultery because they result in the disintegration of the institution of marriage, which is the foundation of the family unit.[2] It is therefore not surprising that the issue of the legitimacy of a child is an important matter in Islamic law and why importance is given to the specific period of gestation when determining legitimacy.[3] Once it is determined that a child was not conceived in wedlock or was born out of wedlock then such a child will only inherit from the mother's side of the family and not that of the father.[4] Ishaque notes that these principles '…[d]o not take into account the financial standing of the biological mother, who may be destitute and has very little

[1] See §2.3.
[2] In Islamic law a child has a right to be born to a married couple and hence legitimacy.
[3] See §5.2(b) for discussion on whether a child is conceived within wedlock based on gestational periods.
[4] See §5.2(b).

if any assets to pass on',[5] nor do they address the hardship such a child faces as a result of the circumstances of his or her birth.[6]

Under the South African common law, an extramarital child (that is, a child born out of wedlock) could inherit intestate from his or her mother and her relations only and not from the father.[7] However, the common-law position was changed by s1(2) of the Intestate Succession Act[8] ('ISA'), which stipulates that being born out of wedlock does 'not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.'[9] As a result, if a Muslim dies intestate, in terms of s1(2) of the ISA, all his and her children will inherit equally, irrespective of whether they were conceived or born out of wedlock. In the context of African customary law ('ACL') the Constitutional Court in *Bhe v Magistrate, Khayelitsha,*[10] ('*Bhe*') held denying extra marital children the ability and opportunity to inherit from their deceased fathers, was in violation of s9(3) of the Constitution.[11]

As far as testate succession was concerned, there was a presumption under the common law that if a male testator referred to a 'child', 'issue', or 'descendant' in his will, he was referring

[5] Ishaque 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and the Inheritance Related Concerns in Context of a Child's Right to an Identity.' (2008) 22 (3) *International Journal of Law, Policy and the Family* 393 at 408.
[6] In Islamic countries, children who are born out of wedlock are still stigmatized and discriminated against. For a discussion on this see: Syed, 'The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-Marital Children under Shari'a' (1998) 6(4) *International Journal of Children's Rights* 359; Raja Gopal 'Does illegitimacy status of children matter? A review on Malaysian perspectives' (2014) 5(4) *International Journal of Applied Psychology*, 109.
[7] Jamneck *et al Law of Succession in South Africa* (2012) 25.
[8] Act 81 of 1987.
[9] ISA, s1(2) provides: 'Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children's Act, 2005 (Act 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.'
[10] 2005 (1) SA 580 (CC). See §9.5(c) for a more detailed discussion on *Bhe.*
[11] Ibid at [89].

to a legitimate child only.[12] This presumption applied to female testators too, but with less force.[13] This presumption no longer applies and no distinction is drawn between children born in or out of wedlock. The Law of Succession Amendment Act of 1992[14] amended the WA by the insertion of a new s2D(1), which provides that:

> 'In the interpretation of a will, *unless the context otherwise indicates* -
> (a) …
> (b) the fact that any person was born out of wedlock shall be ignored in determining his relationship to the testator or another person for the purposes of a will.'[15]

This presumption can be rebutted if 'the context otherwise indicates.'[16] This leads to the question of whether incorporating IIL into a will indicates that the testator intended otherwise. Our courts have held that '[t]he golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule [of] law from doing so.'[17] The emphasis is therefore placed on the language used in the will. If the language used by the testator is clear and unambiguous, then there is no room for further construction, presumption, or conjecture.[18]

In Islamic wills, the dominant intention of the testator is to have IIL apply to his or her estate on his or her death. It is trite law that children born out of wedlock do not inherit from their father or his family in terms of IIL. Consequently by incorporating IIL into a will, a Muslim male testator explicitly intends excluding such a child as an Islamic heir. The MJC furthermore

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[12] Corbett *et al The Law of Succession in South Africa* (2001) 534. Historically children were classified as legitimate or illegitimate. This classification was abandoned in the Children's Act 38 of 2005 ("CA"). The terms 'child born of married persons' and 'child born of unmarried persons' was deemed more appropriate.
[13] Ibid.
[14] Act 43 of 1992.
[15] My emphasis.
[16] Corbett *et al* (n12) 535.
[17] Per Innes ACJ in *Robertson v Robertson's Executors* 1914 AD 503 at 507; *Ex parte Sadie* 1940 AD 26 at 30; *Cuming v Cuming* 1945 AD 201 at 206; *Van Zyl v Van Zyl* 1951 (3) SA 288 (A) at 291G-H; *Will v The Master* 1991 (1) SA 206 (C) at 209F-G.
[18] *Cuming v Cuming supra* 206.

does not include children born out of wedlock as Islamic law heirs in its distribution certificates. When there is uncertainty as to whether a child was conceived in or out of wedlock, it is more difficult to determine what the testator's intention was, as there are different opinions in this regard. The testator is unlikely to have indicated which opinion should be adopted. According to Abduroaf, it would be advisable for the executor to approach a Muslim judicial body that accepts the minority opinion,[19] which includes a child who was potentially conceived out of wedlock in the distribution certificate.[20] This approach highlights the problem with judicial bodies exercising their discretion when deciding whether to include an heir in the distribution certificate or not. I would argue that the MJC should include such a child as an Islamic law heir as long as the testator was married to the mother of the child at the time the child was born and never denied paternity of the child.[21] Ultimately, it will be the MJC or a similar body in South Africa that will determine whether to include this child in its distribution certificate. A Muslim child who is aggrieved by his or her disinheritance as a result of the MJC Islamic law ruling has various remedies available.

The child is entitled to lodge a claim for maintenance against the estate of the deceased Muslim testator. The obligation to support his or her minor children, irrespective of whether they were born in or out of wedlock, does not end with the death of the testator.[22] It is a common-law obligation that depends on the needs of the child and will end when the child reaches majority or when he or she is financially independent. The maintenance claim of a dependent child takes

[19] For the minority opinion pertaining to children who were born within the first six months of the marriage being concluded see §5.2(b).
[20] 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* 126-135 at 134.
[21] This would be consistent with the common law presumption against the disinherision of children. See *Harter v Epstein* 1953 (1) SA 287 (A) at 296. In this matter the respondent daughter tried to rely on this presumption but the AD did not uphold presumption as the daughter did inherit from parent's estate.
[22] *Carelse v Estate De Vries (*1906) 23 SC 532; *Ex parte Burnstein* 1941 CPD 87; *Glazer v Glazer* 1963 (4) SA 694 (A).

precedence over legatees and other heirs.[23] It will therefore take precedence over the claims of all the other Islamic law heirs and is only preceded by the claims of creditors.[24] In addition to lodging a maintenance claim against the estate of the deceased, the child conceived or born out of wedlock could also challenge the Islamic law ruling for excluding children conceived or born out of wedlock from inheriting. This, of course, raises various constitutional arguments around reconciling the right to equality with the right to religious freedom. I discuss these arguments under a separate heading below.

(b) Adopted children

During the pre-Islamic era, adoption as it is currently practised in many western societies was recognised.[25] If one adopted a son, the people would call him by the name of the adoptive father from whom he could inherit.[26] This practice was subsequently prohibited by the Qur'ān.[27] Islam does not regard the legal status of an adopted child to be on par with that of a biological child, especially in regard to inheritance and limited laws of adoption exist in most Muslim countries.[28] This does not mean that Islam does not make provision for orphaned children or destitute children. On the contrary, the care of orphans and needy children is regarded as an important religious duty, and a system of *kafālah* exists, which literally means 'sponsorship to feed'.[29] It is a system of fosterage or guardianship over a ward, whereby a guardian provides

[23] *Davis' Tutor v Estate Davis* 1925 WLD 168; *Goldman v Executor Estate Goldman* 1937 WLD 64; *Ex parte Estate Pitt-Kennedy* 1946 NPD 776.
[24] *Ritchken's Executors v Ritchken* 1924 WLD 17, *In re Estate Visser* 1948 (3) SA 1129 (C).
[25] Ishaque (n5) 400; Assim and Sloth-Nielsen 'Islamic *Kafalah* as an Alternative Care Option for Children Deprived of a Family Environment'(2014) 14(2) *African Human Rights Law Journal* 322 at 326.
[26] Ibid.
[27] Q33:4-5 provides: '…nor has He made your adopted sons your (real) sons; that is simply a saying of your mouths…Call them by the names of their fathers; that is more just in the sight of Allah. But if you do not know their fathers, they are your brothers-in-faith and your wards.'
[28] Sharma 'What's in a name? Law, religion and Islamic names', (1998) 26 *Denver Journal of International Law and Policy* 151 at 176; Ibrahim 'Care of Abandoned Children in Sunni Islamic Law: Early Modern Egypt in Theory and Practice' in Yassari, Moller and Najm (eds) *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions* (2019) 1-5; Assim and Sloth-Nielsen (n25) at 325.
[29] Ishaque (n5) 401. See also: Assim and Sloth-Nielsen (n25); Ibrahim (n28) 17-18.

guardianship, shelter and care to a child within a family without ever changing the child's identity or absorbing the child's assets into the estate of the family providing the care.[30] *Kafālah* is recognised, as an alternative care option for children deprived of families, in various international human rights instruments.[31] However, *kafālah* does not give the child a right of inheritance in the estate of his or her guardian and vice versa. The child retains the right to inherit from his or her biological parents and their ascendants and descendants, from whom his or her lineage stems.[31a]

(i) The status of the adopted child in South African law

The status of an adopted child in Islamic law differs from the status of an adopted child in South African law, as in terms of South African law, all rights and obligations between a child and its biological parents terminate on adoption.[32] An adopted child is regarded as the child of the adoptive parent, and the adoptive parent is for all purposes regarded as the parent of the adopted child, including in the case of inheritance.[33] In terms of the ISA, an adopted child is deemed to be a descendant of his or her adoptive parents for the purposes of inheriting.[34] Similarly, an adoptive parent is deemed an ancestor of his or her adopted child.[35] The effect of s1(4)(e) read with s1(5) of the ISA is that a child may not be a descendant of his or her adoptive

[30] Ishaque (n5) 414. In Islamic law the guardian plays the role of a trustee when managing the property of his or her orphan ward. There are strict injunctions in the Qur'an that direct how the property of orphans should be dealt with. Q4:2 provides: 'To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own…'

[31] *Kafālah* is recognized in *inter alia* Art 20(3) of the UN Convention on the Rights of the Child. For a discussion on the recognition of *kafālah* in various international human rights instruments see: Assim and Sloth-Nielsen (n25) at 324-326.

[31a] Ishaque (n5) 407.

[32] Unless the biological parent is also the child's adoptive parent, or the biological parent was married to the adoptive parent at the time of the adoption as is set out in s2D(1) of the WA.

[33] CA, s242(3).

[34] ISA, s1(4)(e)(i)&(ii) provides: 'an adopted child shall be deemed—
(i) to be a descendant of his adoptive parent or parents;
(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child'

[35] ISA, s(1)(5) provides; 'If an adopted child in terms of subsection (4) (e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.'

parents as well as his or her natural parents and that, in turn, both the adoptive and natural parents cannot both be regarded as ancestors of the child.[36]

Similarly in testate succession, when interpreting a will, an adopted child is considered a descendant of the adoptive parent, in terms of the WA. Section 2D(1) of the WA stipulates:

> 'In the interpretation of a will, unless the context otherwise indicates –
>
> (a) an adopted child shall be regarded as being born from his adoptive parent or parents and, in determining his relationship to the testator or another person for the purposes of a will, as the child of his adoptive parent or parents and not as the child of his natural parent or parents or any previous adoptive parent or parents, except in the case of a natural parent who is also the adoptive parent of the child concerned or who was married to the adoptive parent of the child concerned at the time of the adoption…'.

The implication of s2D(1)(a) is that when a will is interpreted, any reference to a child in the will automatically includes an adopted child, unless the testator has expressly or impliedly disinherited the child.[37] The adopted child is also deemed to be related to relations of the adoptive parents, which is indicated by the wording 'or another person for the purposes of a will,' in s2D(1)(a) above.

(ii) Lessons from *Harvey v Crawford*

In the recent case of *Harvey v Crawford* [38] ('*Harvey*'), the Supreme Court of Appeal had to determine whether the adopted grandchildren of a trust donor qualified as beneficiaries in terms of a private family trust that was executed in 1953. In 1953 the Children's Act 31 of 1937 (the '1937 Act') governed adoption, and regarded an adopted child as the child of the adoptive parent.[39] However, the 1937 Act required a testamentary instrument, which was executed prior to an adoption order, to clearly display an intention by the adoptive parent that his or her

[36] Confirmed in *Flynn v Farr NO & Other* 2009 (1) SA 584 (C).
[37] Jamneck *et al* (n7) 215.
[38] 2019 (2) SA 153 (SCA).
[39] According to s71 of the 1937 Act, an adopted child was, 'for all purposes whatsoever…deemed in law to be the legitimate child of an adoptive parent.'

property was to devolve upon the adopted child.[40] The court, when interpreting the trust deed, adopted a restrictive interpretation of the term 'legal descendants' and ruled that it did not include the adopted grandchildren of the trust donor. Ponnan JA, who wrote the judgment for the majority, relied on *Cohen v Roetz in Re: Estate Late AJA Heyns*[41], where the court held that a child or grandchild 'does not go beyond a testator's own child (bloedkind) or an own child of such child'[42] and furthermore that the word 'descendant' in its usual meaning only referred to 'blood relations in the descending line and excludes adopted children.'[43] Ponnan JA concluded that the donor should have used express terms if he wanted to include the adopted children in the trust deed and that his failure to do so indicated that it was not his intention.[44]

The majority judgment in *Harvey* was criticised for *inter alia* failing to engage sufficiently with what is meant by 'legal descendants' and for adopting a restrictive approach to the interpretation of the trust deed.[45] The minority judgment by Molemela JA has been lauded for being more consistent with promoting the constitutional value of equality, including the equality of adopted children.[46] Molemela JA relied on various judgments, including *Boswell v Van Tonder*[47], where the court held that adopted children were included under the term 'children' but that the legal fiction of an adopted child being a biological child for all purposes would be rebutted if the relevant instrument, read as a whole, revealed an intention to exclude the adopted children.[48] Based on the ordinary rules of interpretation, Molemela JA sought to

[40] Section 71(2)(a) of the 1937 Act provided that an adopted child could not by virtue of the adoption, 'become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child.'
[41] 1992 (1) SA 629 (AD).
[42] Ibid 639E.
[43] Ibid 640A.
[44] *Harvey v Crawford supra* [51].
[45] Ferreira and Pretorius 'Interpretation of a Trust Deed – *Harvey v Crawford* 2019 (2) SA 153 (SCA)' (2020) 41 (2) *Obiter* 2.
[46] Ibid.
[47] 1975 (3) SA 29 (A).
[48] *Harvey v Crawford supra* [29]

identify whether the testamentary intention in the trust deed rebutted the aforementioned legal fiction.[49] The judge highlighted the fact that every will has to be interpreted according to its own language and context.[50] After looking at the wording of the trust deed and considering the broader context in which the donor drafted the trust deed, Molemela JA concluded that the donor did not intend to exclude adopted children from benefiting from the trust deed and that the words 'children', 'descendants', 'issue' and 'legal descendants' in the trust deed should be interpreted to include adopted children or grandchildren.[51]

The matter went on further appeal to the Constitutional Court in *Wilkinson v Crawford*[52] ('*Wilkinson'*), where the court had to decide whether '[t]he impugned words in the Trust Deed exclude adopted children. If so, whether that exclusion constitutes unfair discrimination against adopted children on the basis of birth as well as on an analogous ground of adoptive status and is thus contrary to public policy and unenforceable.'[53] The majority judgment was handed down by Mhlantla J, who held that:

> 'The words 'children', 'descendants', 'issue' and 'legal descendants' used in the Trust Deed exclude adopted children. The exclusion constitutes unfair discrimination against adopted children and therefore it is contrary to public policy. Accordingly, this court cannot enforce that exclusion. … the exclusion must therefore be treated as *pro non scripto* and the bequest should be given effect as if the exclusion of adopted children does not exist.'[54]

Mhlantla J concluded that excluding adopted children from the meaning of 'children' or 'descendants' in the trust deed amounted to discrimination on the basis of birth in terms of s9(3) of the Constitution.[55] Since birth is a listed ground, the discrimination is presumptively unfair. Although the judgment deals specifically with a trust deed and not a will, it is the prevailing precedent and, in all likelihood, would apply if an adopted child had to challenge

[49] Ibid.
[50] Ibid at [24].
[51] Ibid at [40].
[52] 2021 (4) SA 323 (CC).
[53] Ibid at [23].
[54] Ibid at[100].
[55] Ibid at [78].

his or her exclusion as an Islamic law heir in an Islamic will. The testator, by incorporating IIL into his or her will, does not intend for an adopted child to benefit as an Islamic law heir. In the absence of express terms to include the adopted child, the child would not inherit under a standard Islamic will. Based on the majority judgment in *Wilkinson* an adopted child would potentially be successful in challenging his or her exclusion from an Islamic will.

However, the minority judgment of Majiedt J in *Wilkinson* bears mentioning. Majiedt J disagreed with the majority in various respects and stated that adoption cannot reasonably be included under 'birth' as a listed ground of unfair discrimination.[56] Majiedt J highlighted that freedom of testation is not merely a common-law principle but is based on the rights to dignity, privacy, and property enshrined in the Constitution.[57] He noted that:

> 'It includes the right to dispose of property during one's lifetime as well as at death. With regard to dignity, it is an acknowledgment that the relationships that mattered to the testatrix in life, and which informed her testamentary choices, are worth of respect. It implicates her right to privacy in a particularly fundamental way. A testatrix's decisions on whom to include and exclude in bequests, are manifestations of personal love and affection, loyalties and kinship. Those decisions are taken in a most intimate, personal sphere – they occur within what this court has called the person's "inner sanctum", and within "the core most protected realms of privacy."'[58]

Majiedt J noted that to override an individual's testamentary choices is to criticise both his or her proprietary choices and personal preferences. The judge highlighted that freedom of testation is a cornerstone not only of South African succession law but can also be found in other common-law jurisdictions, such as Australia and England, as well as in civil law jurisdictions, such as Germany and the Netherlands. He cited Du Toit in this regard, who noted that:

> '[F]reedom of testation is regarded as the founding principle of the law of testation in all four systems. This freedom is supported by the recognition of private ownership and private succession in all four legal systems.'[59]

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[56] Ibid at [104].
[57] Ibid at [118].
[58] Ibid.
[59] Du Toit 'The limits imposed upon freedom of testation by the *boni mores*: Lessons from common law and civil law (continental) legal systems' (2000) 11 *Stell LR* 358 at 365-6 at 383.

Majiedt J recognised the need for courts to intervene in cases where discriminatory provisions occur in public trusts but held that courts should exercise restraint when dealing with provisions in the private sphere.[60] According to him, there is no basis to warrant the same level of intrusion in respect of bequests in private testamentary instruments, and importantly, no one has a right to inherit.[61] Bequests are moral rather than legal dispositions, subject to the testatrix's wishes and '[a]ccording to her own personal preferences, foibles and eccentricities.'[62] Based on Majiedt J's reasoning, an adopted child may not be successful in challenging his or her exclusion from an Islamic will.

(c) The grandchild's inability to inherit *per stirpes*

An issue raised by attorney P5 was that IIL does not make provision for a grandchild to inherit the share of his or her predeceased parent.[63] If a child of a testator predeceases the testator, the descendants of that child will not be entitled to inherit in terms of IIL if there is another son that has survived the testator. By way of example, if a deceased is survived by one son and two grandchildren from a predeceased son, then the grandchildren will be excluded as the son will inherit the entire estate. This rule is based on the principle that those nearer in degree to the testator will exclude those who are further in degree[64] and the fact that a potential beneficiary only acquires rights in the estate upon the death of the deceased. Consequently, a descendant of a predeceased beneficiary cannot take the place of such a predeceased beneficiary as the latter had no vested rights that can be transmitted to such descendant.[65] This rule potentially causes hardship to grandchildren who may have benefited financially from their parents' Islamic law share. Therefore, in countries that implement IIL, various legislative reforms have

[60] *Wilkinson supra* at [126]-[131].
[61] Ibid.
[62] Ibid.
[63] P5 Transcript at 19-20.
[64] See §5.3(a)(ii).
[65] Omar *The Islamic Law of Succession and its application in South Africa* (1988) 31.

been introduced to overcome the exclusion of grandchildren and the potential financial challenges they may experience as a result of being excluded as heirs.[66]

By way of example, in Egypt, legal reforms were introduced that allow the children of a predeceased son or daughter to inherit their parent's share within the maximum limit of 1/3 of the net estate.[67] In Tunisia, the same rule applies.[68] In Morocco[69] and Syria[70] children of a predeceased son or grandson are entitled to inherit their father's share, alternatively 1/3 of the net estate, whichever is the lesser of the two amounts. In Pakistan, the most radical reform has taken place in this regard, with the enactment of the Muslim Family Laws Ordinance of 1961, which allows orphaned grandchildren to inherit the share of their predeceased parent, *per stirpes*.[71] The above reforms have not been without challenges or criticisms, but it is beyond the scope of this research to discuss these in greater detail.[72] These reforms highlight that the classical Islamic legal ruling, which bars orphaned grandchildren from inheriting their predeceased parent's share, resulted in an untenable situation and that reforms in the public interest[73] had to be introduced to address the challenges arising from this blanket bar.

In the standard Islamic will found in the MJC sample, the testator does not make provision for substitution. Substitution is a provision in a will where the testator nominates another

[66] For a discussion on the legislative reforms pertaining to the rights of grandchildren to inherit, see Rahman 'Problems of Orphaned Grandchildren in Succession: A Study of Suggestions' (1986) 25(2) *Islamic Studies* 211-226; Carrol 'The Pakistan Federal Shariat Court, Section 4 of the Muslim Family Laws Ordinance and the Orphaned Grandchild' (2001) 9 *Islamic Law and Society* 70; Coulson *Succession in the Modern Family* (1971) 143-157.
[67] Egyptian Law of Testamentary Disposition, 1946.
[68] Tunisian Law of Personal Status and Supplement thereto 1959.
[69] Moroccan Code of Personal Status, 1958.
[70] Syrian Law of Personal Status, 1953.
[71] Section 4 of the Muslim Family Law Ordinance of 1961 stipulates that, 'In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.'
[72] For a discussion on the challenges and criticisms pertaining to these reforms see Rahman (n66) and Carrol (n66).
[73] See discussion on how considerations of public interest be utilised to develop new legal rulings in §2.3(b)(v).

beneficiary to take the place of an appointed heir or legatee in the event of a certain event, such as the death of the heir or legatee.[74] However, the WA makes provision for statutory substitution or representation in s2C(2), which stipulates as follows:

> 'If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, *unless the context of the will otherwise indicates*.'[75]

Section 2C(2) has to be read with s2C(1) of the WA, which was discussed in greater detail in the previous chapter.[76] Section 2C(2) applies to descendants of the testator, who would have been entitled to benefit under the testator's will but who cannot or who do not wish to inherit. When they cannot inherit because they have predeceased the testator or they have been disqualified, then their descendants can represent them or be substituted for them. Where a descendant of a testator repudiates a benefit in a will and there is no surviving spouse to the testator, representation *per stirpes* will also apply to the children of the descendant. Section 2C(2) applies to all the descendants of the testator but is not applicable to ascendants or collaterals of the testator. Importantly for Islamic wills, is that the section includes a proviso, which stipulates that the section will apply, 'unless the context of the will otherwise indicates'.

It is this proviso that would potentially exclude the application of s2C(2) to an Islamic will. In a standard Islamic will, the dominant intention of the testator would be that IIL should apply to the devolution of his or her estate. Based on the agreed interpretation of the four Sunnī schools, an orphaned grandchild is not entitled to inherit his or her parents' share via representation. This would be the interpretation that the MJC would adopt in its distribution certificate. The MJC has not adopted similar positions to any of the legislative reforms adopted

[74] Corbett *et al* (n12) 199.
[75] My emphasis.
[76] See discussion in §8.2(e) for the impact of s2C(1) of the WA on polygynous wives.

in the Muslim countries cited above. It is questionable whether laypersons are aware of or understand the implications of the MJC ruling in this regard. However, the fact that a testator has stipulated that the IIL should prevail would result in his or her grandchildren not inheriting the share of their predeceased parent. In the absence of a grandchild inheriting *per stirpes*, the share of the predeceased parent will accrue to the remaining Islamic law heirs.

In South African, law, the right of accrual refers to the right of co-heirs or co-legatees and other beneficiaries to inherit or succeed to the portion of those who cannot or will not take the benefit themselves.[77] Where a beneficiary is unable to take a benefit under a will because he or she predeceased a testator or is disqualified from inheriting, the right of accrual comes into operation. Where the right of accrual operates, those heirs to whom the vacant portion accrues will take the same shares of it as they do of their own. Alternatively, if accrual does not apply, the vacated share will devolve upon the remaining heirs by intestate succession.[78] Whether accrual operates in any given case depends on the intention of the testator, as can be gleaned from the terms of the will.[79]

In determining a testator's probable intention, certain canons of construction are utilised based on the different modes of joinder of heirs adopted in a will.[80] In an Islamic will, the applicable mode of joinder utilised is *joinder re et verbis*, where the heirs are joined through the property and the words in a will. In this mode, the same property is left to different beneficiaries in the same sentence or clause of the will, with none of them expressly being allocated specific shares

[77] Corbett *et al* (n12) 243.
[78] *Eksteen v Eksteen's Executors* (1885) 4 SC 13 at 17 where De Villers CJ noted: 'If the *jus accrescendi* applies, the remaining testamentary heirs would take the inheritance; but if it does not apply, the heirs *ab intestato* would share in the lapsed portion.' In other words, the intestate heirs would share in the lapsed portion.
[79] *Winstanley v Barrow* 1937 AD 75 at 90; *Ex parte Linder* 1945 WLD 20 at 23; *Lello v Dales* 1971 (2) SA 330 (A).
[80] *Lello v Dales* 1971 (2) SA 330 (A); *Gelft v Gelbart* 1984 (4) SA 515 (C) at 519E-H.

of the property. The testator in an Islamic will stipulates: 'I leave my estate to my Islamic law heirs' or 'my entire estate should be distributed according to the Islamic laws of inheritance.' None of the Islamic law heirs is granted a specific share in any property in the estate. Furthermore, in terms of the IIL, the share of a predeceased heir accrues to the surviving Islamic law heirs according to their respective shares. Thus, for example, if testator (X) on his death was survived by his wife (Y), two sons (A and B), and a grandson (GS) of a predeceased son (C), the distribution would be as follows: Y would receive 1/8 while the residue of the estate would accrue to A and B, as the nearest surviving agnatic heirs of the testator. The grandson, GS, would not be entitled to inherit C's share through representation. The wife, Y, would also not benefit from accrual as her share is fixed at 1/8.

In the aforementioned scenario, the grandson (GS) would be left in the proverbial cold. He could potentially submit a claim for maintenance against his grandparent's estate. Historically, the claim of a grandchild for maintenance against his or her grandparent's estate was at an impasse because there were two conflicting judgments on the matter. In *Lloyd v Menzies*[81], the court held that grandchildren did have a claim against a grandparent's estate. However, in *Barnard v Miller*[82], the court held that it was not prepared to extend the maintenance claim of grandchildren to a grandparent's estate and that the court in *Lloyd* had erroneously relied on common-law authorities when reaching its decision.[83] Both these cases were decided many years ago and did not take into account the socio-economic challenges in contemporary South Africa. As a result of the labour migration system, grandparents have always played an active role in parenting and supporting their grandchildren.[84] Certain academics have convincingly

[81] 1956 (2) SA 97 (N).
[82] 1963 (4) SA 426 (C) at 427-428.
[83] Ibid 428.
[84] Buurman 'Intergenerational family care: a legacy of the past and implications for the future' (1996) 22 *Journal of Southern African Studies* 585.

argued that the common law should be developed in order to allow grandchildren to lodge a claim for maintenance against a deceased grandparent's estate.[85] They argue that the non-recognition of a grandchild's right to claim maintenance from the grandparent's estate amounts to a potential infringement of the grandchild's rights in terms of s28 of the Constitution[86] and the grandchild's right to dignity in terms of s10 of the Constitution.[87]

It is not surprising, therefore, that in a recent Supreme Court of Appeal case, *Van Zyl v Getz,*[88] the court was asked to develop the rule as set out in *Barnard v Miller,*[89] so that the common law would recognise a duty of support on the part of a deceased grandparent's estate towards a grandchild. Unfortunately, the facts of the case did not lend themselves to developing the common-law rule enunciated in *Barnard* and Zondo J concluded that Parliament was the forum best suited to undertake such development if it is considered appropriate.[90]

9.3 GENDER DISCRIMINATION IN ISLAMIC INHERTANCE LAWS

Another thorny issue that may arise in Islamic wills is the differentiation between the shares that male and female heirs inherit in certain scenarios.

[85] Mackintosh and Paleker 'A grandchild's claim to maintenance from a deceased grandparent's estate.' in De Waal and Paleker (eds) *The South African Law of Succession and Trusts – The past meeting the present and thoughts for the* future (2014) 41 at 59-68.
[86] Constitution, s28 provides: '(1)Every child has the right
(a) …
(b) to family care or parent care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter basic health care services and social services…'.
[87] Constitution, s10 provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'
[88] [2020] ZASCA 84.
[89] 1963 (4) SA 426 (C).
[90] *Van Zyl v Getz supra* at [59].

(a) The 2:1 ratio in favour of male heirs

As a general rule, male heirs will receive double the share of female heirs, where they are of the same class, degree and strength of blood tie to the deceased.[91]Therefore, even though a daughter is a Qur'anic sharer heir when she inherits with a brother, she is converted into a residuary heir and will receive half his share.[92] Similarly, if a full sister survives the deceased on her own, she is entitled to one half of the estate, but if she and a full brother survive the deceased together, she is converted into a residuary heir and will receive half his share.[93] There are occasions where male and female heirs in the same category inherit equally. This would occur if a deceased were survived by both his or her parents as well as male descendants. In this scenario, both the mother and the father will each inherit a 1/6 share.[94] Similarly, with uterine siblings, if two or more uterine siblings survive the deceased, they all share equally in 1/3 of the estate, irrespective of their gender.[95] The general rule that females get half the share of males is thus not a blanket rule. The principle that a male heir will receive double the share of a female only applies where agnatic brothers and sisters inherit together or where male and female descendants of the same rank (and related to the deceased in the same way) inherit together.[96]

Chaudhry argues that the cause (*illah*) behind males heirs receiving twice the share of their female counterparts has nothing to do with gender.[97] She argues that if gender was the underlying cause, then the 2:1 ratio should apply to all cases where males and females of the

[91] See §5.3(a)(i).
[92] Ibid and Omar (n65) 32.
[93] See §5.3(b)(ii)-(iii) and Omar (n65) 50.
[94] See §5.3(b)(ii).
[95] See §5.3(b)(viii).
[96] Sayed 'The accommodation of minority customs in Sweden: The Islamic law of inheritance as an example' (2010) 12 (4) *European Journal of Law Reform* 319 at 332; Chaudhry 'The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law' (1997) 61(2) *Albany Law Review* 511 at 537.
[97] Chaudhry (n96) 537.

same class are inheriting together, which is clearly not always the case.[98] She concludes that '[g]ender as such, is therefore considered to be an invalid *illah*, and the claim that the sex-based inferiority of the female is the underlying rationale for the difference in the distribution cannot stand.'[99] She furthermore argues that the objectives of Islamic law would be violated if the 2:1 ratio was simply based on gender.[100] One of the main objectives of the law, as discussed in chapter two, is the protection and preservation of property.[101] A natural consequence of this objective is that the law cannot arbitrarily and unjustly deprive any human of his or her right to own property. As both men and women enjoy equal rights to own and dispose of property in Islam, Chaudhry argues that '[i]t would be unjust to deprive a woman of a certain share in estate property, or to limit her share, simply because she is a woman.'[102] Such reasoning would elevate a literal interpretation of the Qur'anic verses over a more purposive approach.

Chaudhry argues that the reason for the differentiation in shares between male and female heirs is that in Islamic societies, male and female members have complementary rights and responsibilities.[103] Males are fully responsible for the financial well-being of their families, whilst women have no such economic responsibility.[104] A woman is entitled to claim a dower on marriage, which becomes her sole property, which right is not afforded to a husband.[105] On death or divorce, she is entitled to claim any outstanding dower owed to her.[106] She is furthermore entitled to be maintained by her husband throughout her marriage, irrespective of whether she earns her own income, whereas she has no reciprocal duty of support towards her

[98] Ibid at 538.
[99] Ibid at 539.
[100] Ibid.
[101] See discussion on *maqasid al-sharī'ah* in §2.3.
[102] Chaudhry (n96) 539.
[103] Ibid 541.
[104] Ibid. This is common understanding of the two is to one ratio amongst most scholars and academic writers on the subject. See also Ahangar 'Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal' (2014) 28 *Arab LQ* 111 at 134.
[105] See discussion in §3.2.
[106] See §5.5(a).

husband.[107] If her husband has defaulted on maintaining her during their marriage, she is entitled to claim arrear maintenance.[108] She is furthermore entitled to maintenance during her *iddah* on death or divorce.[109] The husband is also solely responsible for maintaining the children borne of the marriage. If the father of children has passed on, then the agnatic grandfather of the children or agnatic brothers of the deceased is responsible for the maintenance of the minor children. Unmarried women who are unable to financially support themselves are entitled to financial support from their fathers or agnatic brothers.[110]

As a result of the aforementioned rulings and to alleviate the greater financial burden placed on male members of society, it is argued the Qur'an therefore allocates them a larger share in inheritance than their female counterparts.[111] Chaudhry concludes that the distribution of inheritance shares in a 2:1 ratio in certain instances is therefore not based on gender discrimination but instead is a 'natural corollary of the difference in economic responsibilities and roles of the two sexes in a Muslim society.'[112] In the scenarios where male and female agnates inherit together, the 2:1 ratio would apply as the males have greater responsibilities towards the corresponding female agnates with whom they inherit and toward their family in general. A similar rationale could be applied to the ruling behind a husband receiving a greater share on the death of his wife as he bears the greater financial burden in a marriage.

Some argue that as laudable as the rationale may be for the differentiation in shares between males and females, such rationale is outdated in present-day Muslim societies because of

[107] See §3.3.
[108] Ibid.
[109] See §3.4.
[110] Chaudhry (n96) 541-542
[111] Faruqi *Women, Muslim Society, and Islam* (1988) 4 at 39.
[112] Chaudhry (n96) 543.

changing socio-economic circumstances.[113] Chaudhry concedes that in many instances, the nuclear family has replaced the extended family, and the concomitant reliance females could place on the male agnates in the extended family has dissipated.[114] Unmarried and divorced women now live on their own and work outside the home in order to secure their financial independence.[115] Many Muslim women fulfil the role of single mothers and are unable to rely on their ex-husbands or male agnates in their extended family for financial support.[116] Consequently, Amien argues that the IIL needs to be reformed in order to become more socially responsive to the lived realities of Muslims in South Africa.[117] Amien notes that it is not uncommon to find women being left financially destitute when their husbands die.[118] This was confirmed anecdotally by my own experience as a practitioner. Research has furthermore shown that one of the main reasons a Muslim woman seeks a *faskh* or a dissolution of her marriage is due to her husband failing to maintain her and her children.[119]

Chaudhry contends that before changing the law to meet the needs of women and society, solutions to the perceived problems should first be found within the existing system.[120] She argues that various measures should be employed to address the socio-economic challenges faced by Muslim women. This includes facilitating ways for Muslim women to enforce

[113] Billoo 'Change and Authority in Islamic Law: The Islamic law of Inheritance in Modern Muslim States' (2007) 84 *University of Detroit Mercy Law Review* 637 at 653; Amien 'The viability for women's right of incorporating Islamic inheritance laws into the South African legal system' 2014 in De Waal and Paleker (n85) 192 at 200; Moosa, and Shaheena 'An exploration of *mata'a* maintenance in anticipation of the recognition of Muslim marriages in South Africa:(re-) opening a veritable Pandora's box?' *Law, Democracy & Development* (2004) 8(2) 267 at 284-5.
[114] Chaudhry (n96) 544.
[115] Moosa and Shaheena (n113) 284-5.
[116] Amien (n113) 200.
[117] Ibid at 218.
[118] Ibid at 200. See also 2016 report by Musawah on *Mapping Muslim Family Law Globally – South Africa* at https://www.musawah.org/mapping-muslim-family-laws/?location=za accessed on 28 July 2021 5-8.
[119] Essop 'Problems of and Possibilities for Islamic Divorce in South Africa' in Stiles and Yakin (eds) *Islamic Divorce in the Twenty-First Century – A Global Perspective* (2022) 65 at 69 and 75.
[120] Chaudhry (n96) 546.

compliance with maintenance obligations by recalcitrant male family members and encouraging male testators to effect *inter vivos* gifts to their wives and daughters.[121]

It is doubtful that the 2:1 ratio will be jettisoned within Muslim communities. The verses in the Qu'rān dealing with these allocations are considered clear, fixed and unchangeable. Amien notes that Muslims in South Africa would not support reform that deviates from the fixed Qur'anic shares as this would be considered un-Islamic.[122] Interestingly, Muslims in Kenya opposed reforms that attempted to equalise inheritance shares between males and females. In Kenya, the 1981 Law Succession Amendment Act ('1981 Amendment Act') was promulgated with the aim of merging and consolidating the four systems of inheritance laws existing at the time into one statute applicable to all Kenyans.[123] The 1981 Amendment Act introduced various reforms, including the equalising of inheritance rights between female and male children.[124] Between 1981 and 1990, the Muslim community objected and protested so much against these reforms that in 1990, the government succumbed to the pressure and amended the 1981 Amendment Act to exclude its application to Muslims.[125] In South Africa, reforms that are undertaken that are not within the rubric of Islamic law will not gain the authenticity required for them to be effective.[126] Interestingly, in a study conducted by Dangor on Muslim women in contemporary South Africa, the majority of the Muslim female respondents did not

[121] See discussion in §8.2(b),
[122] Amien (n113) 200.
[123] Before the 1981 Amendment Act was passed, there were four separate systems of inheritance for Africans, Europeans, Muslims and Hindus in Kenya. See Harari 'Women's Inheritance Rights and Bargaining Power: Evidence from Kenya' (2019) 68(1) *Economic Development & Cultural Change* 189 at 191.
[124] Ibid 192.
[125] The 1981 Amendment Act was amended by the Act No.2 of 1990. This resulted in the Khadi courts regaining jurisdiction to determine matters relating to Islamic inheritance. See Harari (n123) 192.
[126] In the context of African customary law of succession, Himonga highlights the growing gap between formal ACLs and the living customary laws that regulate day-to-day lives of people. She notes: 'Unless the formal law can effect the good outcome intended, it is practically of little value.'see Himonga 'Reflections on *Bhe v the Magistrate, Khayeliysha:* In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32(1) *South African Public Law* 1 at 3.

regard IIL as discriminatory towards women.[127] Despite appearing discriminatory on the face of it, the 2:1 ratio between men and women in IIL will not easily be jettisoned by the South African Muslim community.

(b) The exclusion of cognatic relatives in the presence of sharer heirs and agnatic heirs

Another category of heirs that is excluded as a result of gender is cognatic relatives of the deceased. A cognatic relative of the deceased is neither a Qur'anic sharer heir nor an agnate, and I have referred to them as 'distant kindred' in chapter four.[128] They are only entitled to inherit in the absence of Qur'anic sharer heirs and agnates. The only exception is when they inherit in conjunction with a surviving husband or wife, as the latter two are not entitled to inherit the *radd*.[129]

By way of example, if the testator (T) incorporates IIL in his will and is survived by his wife (W), his mother (M), his son (S), and the grandson (GS) of his predeceased daughter, the Islamic law distribution would be 1/8 to (W), 1/6 to (M) and (S) will inherit the residue. The son (GS) of the testator's predeceased daughter would not inherit as he is considered distant kindred and will only inherit if the testator is not survived by sharer heirs or agnates. In a second example, if the testator (T) is survived by his mother (M), a daughter (GD1) of his predeceased son and a daughter (GD2) of his predeceased daughter, the Islamic law distribution would be 1/6 to (M) and 1/2 to the agnatic granddaughter (GD1). The surplus would be distributed proportionately to (M) and (GD1) as per the doctrine of *radd*. The granddaughter (GD2), who is the daughter of the predeceased daughter, would not benefit as she is considered distant

[127] Dangor 'Historical Perspective, Current Literature and an Opinion Survey among Muslim Women in Contemporary South Africa: A Case Study' (2001) 21(1) 109 at 112 and 115.
[128] See §5.3(c).
[129] Omar (n65) 69.

kindred owing to her status as a cognatic relative. The two granddaughters are therefore treated differently due to the gender of their respective parents.

When dealing with the issue of gender discrimination in IIL, most of the literature focuses on the unequal shares between males and females. The rationale for this rule was discussed above. However, cognatic relatives or distant kindred also suffer discrimination as a result of gender. The rationale for this exclusion is a remnant of the pre-Islamic inheritance system, which emphasised inheritance through the male line of descendants only (the agnatic line). This rationale is once again regarded as outdated in contemporary society, which values equally the descendants of both sons and daughters. There have been no cases brought before our courts where a Muslim female heir has challenged the fact that she received half the value of a male heir in terms of a will that has incorporated IIL. There have also not been any cases where a cognatic grandchild of a deceased has challenged his or her exclusion from inheriting in a case where an agnatic grandchild has inherited. It, therefore, remains to be seen how our courts will deal with such a challenge. In section 9.5 below, I deal with the possible approaches. Before doing so, I highlight the last area in IIL that could give rise to a possible discrimination dispute, namely the disqualification of non-Muslim relatives.

9.4 DISCRIMINATION ON THE BASIS OF RELIGION

Non-Muslim relatives of a deceased cannot inherit as Islamic law heirs, irrespective of their relationship to the deceased. Consequently, a spouse, parent, child or any other relative of the deceased who is a non-Muslim will not be entitled to inherit as a Qur'anic sharer heir, an agnate or a distant kindred. IIL is designed to distribute wealth amongst relatives within a Muslim community, and the difference of religion amongst heirs is considered a difference of

communal allegiance and therefore a bar from inheriting.[130] Difference of religion is not a bar to receiving a bequest, and a testator may bequeath up to 1/3 of his or her estate to his or her non-Muslim relatives.[131] In the area of marriage, wives are disproportionately affected by this rule as Muslim men are permitted to marry non-Muslim women but not vice versa.[132] Even though a non-Muslim wife is prevented from inheriting as a matter of right, her husband owes her the same duties of support and maintenance during the marriage that he does a Muslim wife.[133] A non-Muslim wife will also have a claim for maintenance against the estate of her deceased Muslim husband in terms of the MSSA.[134] Furthermore he could leave her (as a non-heir) a bequest of up to 1/3 of his estate and this will have the effect that she acquires greater rights in her deceased husband's estate than a Muslim wife.[135]

In South African law, freedom of testation is not unfettered as the courts will not give effect to testamentary provisions that are considered illegal, contrary to public policy, or too vague or uncertain to be enforced.[136] Conditions that are intended to cause a break up of a marriage by divorce or separation have been treated as unwritten – *pro non scripto*.[137] Similarly, conditions in a will that restrain marriage have been considered contrary to public policy.[138] The Appellate Division, in *Aronson v Estate Hart*[139] ('*Aronson*'), had to decide whether a Jewish faith-based clause was contrary to public policy. In that matter, the testatrix had stipulated in her will: 'I direct that should any of the beneficiaries under this my will marry a person not born in the

[130] Coulson (n66) 186.
[131] Ibid 187.
[132] Ibid 186.
[133] Ibid.
[134] See §8.2(c).
[135] See §5.4(c) and §5.5(b).
[136] Jamneck *et al* (n7)116; Corbett *et al* (n12)129-144; Du Toit (n59) 358-359.
[137] *Kuhn v Karp* 1948 (4) SA 825 (T) at 840-1; *Levy v Schwartz* 1948 (4) SA 930 (W); *Ex parte Isaacs* 1964 (4) SA 606 (GW).
[138] *Levy v Schwartz* 1948 (4) SA 930 (W); *Ex parte Swanevelder* 1949 (1) SA 733 (O) at 737-9; *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T).
[139] 1950 (1) SA 539 (A).

Jewish Faith or forsake the Jewish Faith, then and in such case such beneficiary shall forfeit all benefit or claim which he or she may have under this my will.'[140] The court held, *inter alia*, that the religious forfeiture clause was not void for uncertainty, nor was it contrary to public policy.[141] The decision of the court in *Aronson* was criticised by Hahlo, who argued that:

> 'It is a principle of public policy today that individuals should have unfettered freedom of choice in religion and marriage. How then can it be otherwise than against public policy that a testator should be able to restrict this freedom by means of financial pressure? It is the linking-up of financial considerations with things which should be free from such considerations, which renders religious forfeiture clauses obnoxious…it is repugnant to modern notions that a testator should direct his descendants in matters which, ought to be left to the free and unfettered decision of the individual.'[142]

Although *Aronson* upheld the Jewish race- and faith-based clause, if it arose in the present day, it would be subject to constitutional challenge. Notably, there are material differences between the aforementioned race- and faith-based clause and the bar on non-Muslim relatives inheriting in a standard Islamic will. There is no bar on a Muslim man marrying a non-Muslim woman and no bar to him leaving her a bequest of up to 1/3 of his estate. Similarly, a testator may leave a bequest of up to 1/3 to his or her other non-Muslim relatives who are not entitled to inherit as Islamic law heirs.

Despite the aforementioned criticism by Hahlo, *Aronson* remained the authoritative decision on this issue for many years, as juridical inactivity characterised this area of law.[143] However this has changed in the last 15 years, with various cases challenging the sacrosanct principle of freedom of testation based on constitutional principles and the changing notions of public policy. I discuss most of these cases in the following section and relate these arguments back to the issue of Islamic wills automatically excluding non-Muslim relatives as heirs.

[140] Ibid 548.
[141] Ibid 546.
[142] Hahlo 'Jewish Faith and Race Clauses in Wills' (1950) 67(3) *SALJ* 231 at 242.
[143] Du Toit (n59) 358-359.

9.5 PUBLIC POLICY AND CONSTITUTIONAL CONSIDERATIONS IN TESTAMENTARY DISPOSITIONS

Under the constitutional dispensation, notions of public policy have changed. As Hahlo famously said in his commentary on *Aronson*, '[t]imes change and conceptions of public policy change with them.'[144] In the area of succession, our courts have grappled with the changing notions of public policy under the constitutional dispensation. In addition to considerations of public policy, our courts also have to consider whether provisions of a testamentary instrument are consistent with the rights contained in the Constitution. The IIL, as incorporated in standard Islamic wills, has various provisions that may be considered contrary to entrenched constitutional rights or in contravention of provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act.[145] Such provisions include, *inter alia*: (i) provisions that automatically exclude children born or conceived out of wedlock and adopted children as Islamic law heirs; (ii) provisions that grant unequal shares between certain male and female heirs; (iii) provisions that grant agnatic descendants inheritance rights, whilst excluding cognatic descendants; and (iv) provisions that exclude non-Muslim relatives from inheriting as Islamic law heirs.

Although Muslim testators are free to direct how their estates should devolve, it remains to be seen whether our courts, if confronted with a challenge, will refuse to enforce those provisions of an Islamic will that discriminate against potential beneficiaries on account of their gender, religion, or birth status. Will the aforementioned provisions pass constitutional muster on the basis that they are justified or because they achieve a particular objective? In this section of the chapter, I explore whether the provisions in an Islamic will that differentiate between classes

[144] Hahlo (n142) 242.
[145] Act No. 4 of 2000 ('PEPUDA' or 'the Equality Act').

of beneficiaries can be deemed to be valid. I discuss the various cases that our courts have dealt with in this regard in order to reach possible answers to the aforementioned question.

(a) Case law on provisions in public trusts that are contrary to public policy

As mentioned previously, although South African law guarantees a large degree of freedom of testation, such freedom is limited by the common law,[146] statute,[147] and the Constitution.[148] Constitutional limitations on freedom of testation have come to the fore in various cases that involved trust instruments that have a broader public impact and which contained provisions that were discriminatory. The applicants in these cases requested the courts to amend the offending provisions of the trust instruments in terms of s13 of the Trust Property Control Act ('TPCA').[149] Section 13 of the TPCA allows a court to vary provisions of a trust instrument if the court finds that the consequences of the provisions had not been contemplated by the founder of the trust and if the provisions, *inter alia*, conflict with the public interest.[150] In *Minister of Education v Syfrets Trust Ltd*[151], a testator had created a trust in 1920. The purpose of the trust, which was named 'The Scarbrow Bursary Fund', was to provide bursaries for deserving *white, non-Jewish male* students who wished to study overseas.[152] The Minister of

[146] Under the common law our courts do not uphold provisions in a will that are considered contrary to public policy. In *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T) at 79 (the court held that a provision that places a restraint on a beneficiary from marrying was *contra bonos mores*); in *Levy v Schwartz* 1984 (4) SA 930 (W) (the court held that a provision which prevented a beneficiary from inheriting unless she divorced her husband was *contra bonos mores*).

[147] Examples of legislation that limits freedom of testation are the MSSA, the PFA, the Immovable Property Act (Removal or Modification of Restrictions) 94 of 1965.

[148] For a discussion on constitutional challenges to testamentary bequest see Du Toit 'Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?' (2012) 27 *Tul. Eur. & Civ. LF* 97.

[149] 57 of 1988.

[150] Section 13 of the TPCA stipulates that, '[i]f a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of the trust did not contemplate or foresee and which (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest, the court may, on application of the trustee or any person which in the opinion of the court has sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

[151] 2006 (4) SA 205 (C).

[152] Ibid at [3]-[4].

Education brought an application in the High Court for the removal of the provision on the basis that: (i) s13 of the TPCA granted the courts power to vary trust provisions if the consequences of such provisions were in conflict with public policy and were unforeseen by the trust founder (testator); (ii) the common law prohibits bequests that are illegal, immoral, or contrary to public policy; and (iii) the provision was inconsistent with the Constitution, especially the equality provision as contained in s9 of the Bill of Rights.[153]

The court had to consider whether the provision constituted unfair discrimination and, if answered in the affirmative, whether it was contrary to public policy. After concluding that the provision constituted indirect discrimination on the basis of race and direct discrimination on the basis of religion and gender, the High Court applied the *Harksen*[154] test.[155] It proceeded to balance competing constitutional values and principles of public policy and concluded that the provision was contrary to public policy as reflected in the constitutional values of non-racialism, non-sexism, and equality.[156] The court highlighted that public policy was rooted in the values contained in the Constitution[157] and that the public policy that had to be considered was that which prevailed at the time of the enquiry and not when the trust deed was drafted.[158] The court granted the application for the removal of the discriminatory provision, on the basis that the common law prohibits bequests that are contrary to public policy.[159]

[153] Ibid at [9].
[154] *Harksen v Lane* 1998 (1) SA 300 (CC) at [50]-[53]. In the *Harksen* case, the Constitutional Court laid down the test for determining whether a certain act or legislative provision is unconstitutional owing to its lack of compliance with the equality clause. For a discussion on the *Harksen* test see : Currie and De Waal *The Bill of Rights Handbook* (2013) 216.
[155] *Minister of Education v Syfrets Trust Ltd supra* [33].
[156] Ibid at [47].
[157] Ibid at [24].
[158] Ibid at [26].
[159] Ibid at [16].

The reasoning in *Syfrets* was followed and expanded upon in subsequent similar cases.[160] In *Emma Smith Educational Fund v University of KwaZulu-Natal*[161] ('*Emma Smith Educational Fund*'), the Supreme Court of Appeal ('SCA') had to deal with discriminatory provisions in a charitable public trust. The discriminatory provisions restricted bursaries allocated by the charitable public trust to European girls who were born of British South African or Dutch South African parents and furthermore required that they must have been resident in Durban for a period of three years before being granted a bursary from the said trust.[162] The SCA set aside the discriminatory provisions, in terms of s13 of the TPCA, on the basis that they were contrary to public policy. The court held that removing provisions that were in conflict with public policy took precedence over the principle of freedom of testation.[163] It is important to note that the court emphasised that the trust was a public charitable trust operating in the public sphere and that testamentary dispositions in the private sphere would require a different approach.[164]

In *In re: Heydenrych Testamentary Trust and Others*[165], the Western Cape High Court had to deal with discriminatory provisions in a number of public charitable trusts, which discriminated against potential beneficiaries on the grounds of race, descent, and gender. The court set aside the offending provisions in terms of s13 of the TPCA on the basis that they constituted unfair discrimination on the grounds of race and gender, was in contravention of s9 of the

[160] For a comprehensive discussion on these cases, see Matsemela 'Modern Freedom of Testation in South Africa: Its Application by the Courts' (2015) 2 (1) *Journal of Law Society and Development* 93 at 106-116
[161] 2010 (6) SA 518 (SCA).
[162] *Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) at para [8].
[163] Ibid at [42].
[164] Ibid at [41].
[165] 2012 (3) SA 103 (WCC).

Constitution,[166] and were contrary to the public interest.[167] By removing the offending provisions the court widened the pool of recipients who could benefit from the trusts.

A similar case that dealt with a public charitable trust, but which deviated from the reasoning in *Syfrets* was *Ex Parte: BOE Trust Ltd*[168] ('*BOE Trust*'). In this matter, the Western Cape High Court had to deal with discriminatory provisions in a public charitable trust instrument, which awarded educational bursaries to 'white' South Africans only, who were intending to pursue their postgraduate studies in Europe or in Britain.[169] The trust stipulated that those candidates who were awarded bursaries had to return and work in South Africa on completion of their studies.[170] The trust furthermore provided that if it became impossible for the trustees to fulfil the trust's conditions, the income from the trust had to be distributed to a specified charitable trust. The trust was created by the testator in her will on 14 July 2002. The trustees refused to administer the bursary because of the discriminatory provision. They brought an application to the High Court to amend the trust deed by deleting the word 'white' because *inter alia* it: (i) was discriminatory on the basis of race and colour and therefore contrary to public policy; and (ii) infringed upon the right to equality in s9(1) of the Constitution and s7 of PEPUDA.

[166] Constitution, s9 provides:
'1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. 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.
3. 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.
4. 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.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'
[167] *In re: Heydenrych Testamentart Trust and Others supra* [20].
[168] 2009 (6) SA 470 (WCC).
[169] *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at [2].
[170] Ibid.

The court refused to grant the application on various grounds. The court highlighted that the principle of freedom of testation was taken further in South African law than any other Western legal system.[171] It confirmed that the right to freedom of testation is protected under s25(1) of the Constitution[172], which includes the rights of an owner to give directions as to how his or her property should be disposed of on his or her death.[173] The court concluded that the provisions in the trust were not contrary to public policy.[174] Furthermore, although s9(3) of the Constitution prohibits unfair discrimination, '[d]iscrimination designed to achieve a legitimate objective is not unfair. Such legitimate objectives are, for example, the need to redress past injustices based on gender and race.'[175] The discriminatory provision in the trust deed sought to achieve a legitimate objective, which was to avoid skills loss in South Africa, and hence the discrimination was fair.[176] The court also held that since the trust was executed in 2002, which was after the commencement of the Constitution, the testatrix must have foreseen the possibility that the bequest might be regarded as contrary to public policy under the constitutional dispensation. Despite this, she included the provision, which consequently meant that s13 of the TPCA could not be applied to vary the provisions of the trust deed.[177] The court concluded that it was not prepared to rewrite the testamentary provisions simply because the trustees wished to amend them and as the trustees refused to administer the bursary, it became impossible to implement the bequest. As a result, the court ordered the income of the trust to be given to the alternative charity organisation, named in the testatrix's will.[178]

[171] *Ex parte BOE Trust Ltd supra* at [9].
[172] Constitution, s25(1) provides: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'
[173] *Ex parte BOE Trust Ltd supra* [9].
[174] Ibid at [14].
[175] Ibid.
[176] Ibid at [15].
[177] Ibid at [19].
[178] Ibid at [26].

The trustees appealed to the Supreme Court of Appeal, as by then the decision in *Emma Smith Educational Fund* had been handed down, and the trustees sought to rely on that precedent. However, the Supreme Court of Appeal upheld the decision of the High Court and refused to delete the word 'white' from the testamentary provision.[179] The court emphasised the importance of s25 of the Constitution and how it protects an individual's right to dispose of his or her property as he or she deems fit.[180] Erasmus AJA also held that the right to dignity had to be considered because the failure to recognise freedom of testation would '[f]ly in the face of the founding principle of human dignity. The right to dignity allows the living and the dying the peace of mind of knowing that their last wishes would be respected after they have passed away.'[181] The court distinguished *BOE Trust* from *Emma Smith Educational Fund* on the basis that no alternative was provided in *Emma Smith Educational Fund* if the bequest became impossible to implement, as was the case in *BOE Trust*.[182]

The Supreme Court of Appeal judgment in *BOE Trust* has been criticised for incorrectly focusing on the criteria of impossibility of performance as opposed to the unlawfulness of the actual provision, which discriminated between classes of individuals based on race.[183] Modiri furthermore criticises the judgment for its failure to deal with the horizontal application of the Bill of Rights and thereby unwittingly allowing 'apartheid' to live on in the private sphere.[184]

[179] *Ex parte BOE Trust Ltd* 2013 (3) SA 236 (SCA).
[180] Ibid at [26].
[181] Ibid at [27].
[182] Ibid at [25].
[183] Modiri 'Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*' 2013 *PELJ* 583-616.
[184] Ibid at 595-597.

(b) The De Jager case and declaring provisions in private wills unconstitutional

All of the aforementioned cases deal with public charitable trusts, where the courts were asked to vary discriminatory trust provisions in terms of s13 of the TPCA. They can therefore be distinguished from the standard Islamic will, which is restricted to the family members of the testator and is considered a private testamentary instrument.

In the recent case of *King v De Jager*[185] ('*De Jager*'), the Constitutional Court, in a ground-breaking judgment, ruled on the validity of a disinheritance clause in a private will that excluded female lineal descendants from inheriting certain fideicommissary property. I briefly summarise the facts as set out in the *De Jager* judgement. On 28 November 1902, Mr and Mrs De Jager signed a joint will ('the 1902 will') in terms of which they bequeathed certain properties, including farms, to their six children – four sons and two daughters, subject to a *fideicommissum*.[186] The *fideicommissum* was governed by clause 7 of the 1902 will, which *inter alia*, stipulated that beyond the first generation, the fideicommissary property would pass to male descendants only until the third generation.[187] In other words, after the first generation of heirs, the fideicommissary property would devolve upon the agnatic heirs only. One of the sons, Cornelius, had three sons, namely Corrie, John and Kalvyn. When Cornelius died, his three sons each became a fiduciary heir to a 1/3 share in the farms subject to clause 7.[188] The eldest son, Corrie, died childless and his share in the properties devolved equally between John and Kalvyn. When John died in 2005, his share of the properties devolved equally upon his three sons, who were the first to third respondents in the matter. When Kalvyn died in 2015,

[185] *King v De Jager* 2021 (4) SA 1 (CC) (hereinafter "*De Jager*".).
[186] Ibid at [3]. 'A fideicommissum occurs where a testator directs that a series of beneficiaries are to own his or her whole estate or part of it, or specific assets one after the other. The first heir is known as a fiduciary and the succeeding beneficiary as the fidecommissary.': Jamneck *et al* (n7) 160.
[187] *De Jager* at [3]-[4].
[188] Ibid at [6].

he had no sons but had five daughters who survived him, who were the second to sixth applicants in the matter. In terms of clause 7 of the 1902 will, the 1/2 share of Kalvyn (the deceased) could not pass to his daughters even though he had bequeathed it to them in his own will.

The deceased's daughters lodged a claim in the Western Cape High Court against the fideicommissary properties on the basis that the terms of clause 7 were discriminatory because female descendants were excluded from inheriting.[189] Bozalek J dismissed the application on the basis that clause 7 did not have a public character and that as the clause was only intended to operate until the third generation in the De Jager family, it was not indefinite[190] As the clause was only discriminatory against certain descendants and did not prevent all women from inheriting, Bozalek J held that s8 of the Equality Act did not apply[191]. The relevant sub-sections of s8 read as follows:

> '8. Prohibition of unfair discrimination on ground of gender
> Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
> (a) …
> (b) …
> (c) the system of preventing women from inheriting family property;
> (d) any practice, including traditional, customary or *religious practice*, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child…'.[192]

Bozalek J did not consider that this was a case of a testamentary 'system' or 'practice' as contemplated by the Equality Act. [193] The court weighed up the right to equality against the right to freedom of testation and held that the limitation on the second to sixth applicants' right to equality was justifiable given the importance accorded to freedom of testation.[194] Bozalek J

[189] *King v De Jager* 2017 (6) SA 527 (WCC).
[190] Ibid at [81].
[191] Ibid at [80]-[82].
[192] My emphasis.
[193] *King v De Jager supra* [52]-[53]. The court may have decided differently if it was dealing with the Islamic law system, which differentiates between categories of male and female heirs.
[194] Ibid at [80].

relied on *inter alia* the opinion of De Waal, who opined that, [t]he equality clause does not provide a basis for an attack on the validity of a will on grounds such as … the fact that only female descendants have been instituted as heirs.'[195] According to De Waal, a testator's right to freedom of testation could limit a potential beneficiary's right to equality because: (i) to hold otherwise would reduce the concept of freedom of testation to a fiction; (ii) nobody has a right to inherit; (iii) a potential beneficiary only has a *spes* or hope of receiving inheritance; (iv) a testator should be free to choose his or her beneficiaries; and (v) an opposite conclusion would result in insurmountable practical difficulties of the court potentially rewriting the will of a testator.[196] Bozalek J, therefore, dismissed the application resulting in the applicants applying for leave to appeal to the Supreme Court of Appeal, which dismissed the application with no reasons. The applicants applied for leave to appeal to the Constitutional Court, which granted the leave to appeal.

Three judgments were handed down by the Constitutional Court. I restrict my discussion to the first judgment by Mhlantla J and the majority judgment of Jafta J. Both judgments are important to our understanding of how our courts may potentially deal with provisions in an Islamic will that are challenged for being discriminatory.

(i) The Mhlantla judgment

In the first judgment, Mhlantla J (with Khampepe J, Madlanga J and Theron J concurring) granted the leave to appeal, as the matter raised constitutional issues. Specifically, it raised the issue of whether public policy is determinable only through reference to the founding values of the Constitution or whether the matter involves the development of the common law in line

[195] De Waal, MJ 'The Law of Succession and the Bill of Rights' in *Bill of Rights Compendium* (2012) at 3G9.
[196] Ibid.

with the Constitution. Given the novelty of the issue for determination, the prospects of success, and the public interest, leave to appeal was granted.[197]

Mhlantla J noted that a public policy challenge to an out-and-out disinheritance provision in the private sphere was novel.[198] Mhlantla J noted that the matter had to be determined from '[a] common law viewpoint through the lens of public policy as imbued with our constitutional values'.[199] He noted that public policy is deeply rooted in our Constitution and its ingrained values[200] and that the common law had to be developed to '[e]stablish a "constitutionally-founded *boni mores* criterion" to tackle out-and-out disinheritance clauses of this nature where they appear in the private sphere.'[201] He highlighted the fact that the facially neutral principle of freedom of testation reinforces '[p]atriarchal and outdated ideas concerning sex, gender, property, ownership, family structures and norms.'[202] The judge, relying on *Bhe*[203], confirmed that our obligation to counter gender discrimination derives from binding international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women and the African (Bajul) Charter on Human and People's Rights.[204]

Although private testamentary bequests are located in the 'most intimate core of privacy', Mhlantla J was of the view that this particular bequest discriminated against the testator's unknown lineal descendants solely based on the immutable characteristic of womanhood.[205] The judge held that:

> 'It can never accord with public policy for a testator, even in the private sphere, to discriminate against lineal descendants unknown to her or him purely on the ground of gender. No privacy or property right

[197] *King v De Jager* 2021 (4) SA 1 (CC) at [20]-[21].
[198] Ibid at [33].
[199] Ibid at [40].
[200] Ibid at [73].
[201] Ibid at [74]
[202] Ibid at [79].
[203] 2005 (1) SA 580 (CC) at [51].
[204] *King v De Jager and Others supra* at [80].
[205] Ibid at [82]-[85].

> consideration can ever trump that, that is simply the sort of discrimination that our present-day public policy cannot countenance.'[206]

Consequently, Mhlantla J declared clause 7 of the 1902 will unconstitutional, invalid, and unenforceable.[207] The reasoning in Mhlantla J's judgment has far-reaching effects for Islamic wills, especially for those provisions that automatically exclude cognatic descendants of a Muslim testator from inheriting in the presence of agnatic descendants. I discuss these implications in greater detail below.

(ii) The majority judgment by Jafta J

The majority judgment was handed down by Jafta J (Mogoeng CJ, Majiedt J, Mathopo AJ, and Victor AJ concurring), who held that it is not necessary to develop the common law, as provisions in wills that are unlawful or contrary to public policy have always been invalid and unenforceable under the common law.[208] Jafta J also did not agree with the premise that freedom of testation reinforces patriarchal values and outdated ideas concerning sex, gender, property, and ownership.[209] Instead, Jafta J correctly confirmed that the principle of freedom of testation is a neutral principle that allows a testator to dispose of his or her property as he or she pleases, provided that such disposition is lawful and not contrary to public policy.[210] As a neutral principle, there was, therefore, no need to develop the principle of freedom of testation. Instead, the court had to consider whether clause 7 of the 1902 will could be enforced in light of the right to equality entrenched in s9 of the Constitution, as it was common cause among the parties that clause 7 unfairly discriminated against women.

[206] Ibid at [84].
[207] Ibid at [88].
[208] Ibid at [90]. The court cited the *Harvey* judgment at para [65].
[209] Ibid at [92]-[93].
[210] Ibid at [94]-[95].

The court reiterated that nobody has a right to inherit and that testators are still free to choose whom they want to benefit.[211] There is no obligation on a testator to bequeath anything to anybody and a testator is free to disinherit any family member.[212] However, if a provision in a will unfairly discriminates against somebody purely on the basis of one of the grounds listed in s9(3) of the Constitution, such a provision will be unlawful and invalid. The provisions in clause 7 discriminated against the second to sixth applicants on the basis of gender, and the first to third respondents had conceded that said discrimination was unfair.[213]

In addition Jafta J held that the High Court had erred in concluding that clause 7 did not violate s8 of the Equality Act.[214] Although clause 7 did not amount to 'a system of preventing women from inheriting family property', it nevertheless prevented female descendants of the testators from inheriting the fideicommissary property of the De Jager family and therefore fell under the prohibition in s8 of the Equality Act.[215] In any event, s8 expressly states that it is subject to s6 of the Equality Act,[216]which provides for an overriding general prohibition against unfair discrimination.[217] As a result Jafta J held that clause 7 of the 1902 will violated s8 of the Equality Act and was therefore unlawful. In addition, clause 7 was also inconsistent with s9(4) of the Constitution, which also rendered it unlawful and unenforceable.[218] For all of these reasons the court held that there was no need to develop public policy in this regard as clause 7 was clearly unlawful in terms of existing legislation.

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[211] Ibid at [144].
[212] Ibid at [153[– [155].
[213] Ibid at [156].
[214] Ibid at [135]-[137].
[215] Ibid.
[216] PEPUDA, s6 provides:
"Prevention and general prohibition of unfair discrimination
Neither the State nor any person may unfairly discriminate against any person."
[217] *King v De Jager supra* at [135]-[137].
[218] Ibid at [137].

The first to third respondents argued that the unfair discrimination arising from clause 7 was reasonable and justifiable in terms of the justification analysis in s36 of the Constitution.[219] However, Jafta J held that 'the proposition that the unfair discrimination arising from clause 7 is reasonable and justifiable, as contemplated in section 36, is misconceived' because the matter dealt with a clause in a will and not legislation.[220] Section 36 of the Constitution clearly stipulates that a right in the Bill of Rights may only be limited in terms of a law of general application and clause 7 of the 1902 will did not constitute a law of general application.[221] Consequently, the limitations analysis was inapplicable to clause 7. Jafta J held that the High Court incorrectly defined the issue before it as being whether '[t]he impugned provision of clause 7 of the will, can be justified under the limitation clause in section 36 of the Constitution.'[222] He held that had the respondents relied on a law to justify the unfair discrimination, the focus of the challenge would have been directed at that law.[223] This is an interesting point in so far as Islamic wills are concerned, as bodies like the MJC will potentially rely on Islamic law precepts to justify the discrimination based on gender in the Islamic inheritance system.

Jafta J furthermore confirmed that freedom of testation, as a right, is protected in our law, but this does not allow testators to act unlawfully. This was the *status quo* before the Constitution

[219] Constitution, s36(1) provides:
'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.'
[220] *King v De Jager supra* [139].
[221] Ibid at [98].
[222] Ibid citing the High Court judgment above at [7].
[223] Ibid at [139].

came into force.[224] Under the common law, provisions of a will that were unlawful or contrary to public policy were always unenforceable.[225] This principle of the common law is now reinforced by the Constitution, which declares any law or conduct that is inconsistent with it as invalid.[226] Furthermore, s172(1)*(a)* of the Constitution obliges the court to declare any law or conduct that is inconsistent with the Constitution as invalid.[227] Based on these provisions, a court may not enforce provisions in a will or trust deed that are inconsistent with the Constitution.[228] Consequently, if clause 7 of the 1902 will was found to be inconsistent with the Constitution, it could not be enforced and would be declared invalid.

In discussing the remedy to be granted, Jafta J nevertheless noted that historically courts were reluctant to change the terms of a will or trust.[229] Courts have also drawn a distinction between public and private trusts and are more willing to amend public trust deeds to remove terms that are unfairly discriminatory.[230] However, Jafta J was of the view that this distinction lacks substance, as a public trust deed or will that violates the values of the Constitution has the same impact as a private trust deed or will that violates the same provisions of the Constitution.[231] The supremacy of the Constitution would render both equally invalid. According to Jafta J, '[t]o hold otherwise would subvert the supremacy of the Constitution and would suggest that the Constitution does not reach individual conduct in the private sphere, despite the horizontal

[224] Ibid at [123]-[128].
[225] Ibid at [127], the court cited *Cool Ideas v 1186 CC Hubbard* 2014 (4) SA 474 (CC).
[226] Constitution, s2 provides:
'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.'
[227] Constitution, s172 provides:
'When deciding a constitutional matter within its power, a court
a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; …'
[228] *King v De Jager supra* [128].
[229] Ibid at [146].
[230] Ibid at [146]-[148].
[231] Ibid at [150].

application of the Bill of Rights'.[232] This view, expressed by Jafta J, has far-reaching implications for Islamic wills and private wills generally, which I discuss in greater detail hereunder.

Jafta J further held that the principle of freedom of testation does not empower a testator to violate the rights of members of his or her family, by unfairly discriminating against them.[233] Therefore, a party who wishes to challenge the validity of a will on the basis of discrimination has the onus of proving that the discrimination is unfair in terms of s9(4) of the Constitution and that it is based on one of the listed grounds in s9(3) of the Constitution.[234] Jafta J concluded that because the condition created by clause 7 was unlawful and contrary to public policy, it was to be treated as *pro non scripto* (as if it was never written), and the relevant property, which had formed part of the applicants' father's estate, was free of the discriminatory condition.[235] Consequently, the second to sixth applicants could inherit the relevant property in accordance with their deceased father's will.

The *De Jager* case is the first case where the Constitutional Court intervened to strike down a discriminatory provision in a private testamentary instrument. It is a judgment with far-reaching implications for the laws of testate succession. On the one hand, we have the court confirming: (i) that nobody has a right to inherit; (ii) the importance of freedom of testation; (iii) that the Constitution does not require a testator to treat his or her family equally when gifting them with property; and (iv) that the Constitution does not oblige a testator to leave his or her family property.[236] On the other hand, the court concludes that the Constitution prohibits

[232] Ibid at [151].
[233] Ibid at [153]
[234] Ibid at [155].
[235] Ibid at [159]-[161].
[236] Ibid at[153].

unfair discrimination on the part of a testator when disposing of his or her property. If one extends the court's reasoning to its logical conclusion does it mean a property owner could be guilty of unfair discrimination if in his lifetime he gifts each of his sons immovable property and nothing to his daughters?

(c) Lessons from *Bhe v the Magistrate, Khayelitsha*

The *De Jager* case is the most recent and also the most instructive case when considering how our courts might deal with a challenge to provisions of a standard Islamic will, which discriminate against beneficiaries on one of the grounds listed in s9(3) of the Constitution. The Constitutional Court has made it clear that it will not hesitate to pierce the veil that envelopes private wills as it regards the distinction between public and private testamentary instruments as an artificial construct. Consequently, any provision in a private will that unfairly discriminates against beneficiaries on one of the listed grounds can be declared unlawful and unenforceable. This is more likely to occur if the said provision forms part of a religious practice that undermines equality between men and women, as is envisioned in s8(d) of the Equality Act.[237]

When incorporating IIL into a will, the testator intends religious precepts and practices to apply to the devolution of his or her estate. The various Islamic law examples cited above all constitute some form of discrimination against beneficiaries based on the grounds listed in s9(3) of the Constitution. Excluding a child who was conceived or born out of wedlock from inheriting as an Islamic law heir would be discrimination based on the ground of birth. In *Bhe* the court had the following to say about discrimination based on birth:

> 'The prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born.

[237] See (n192) for provisions of Equality Act.

> As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society….Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.'[238]

It is difficult to imagine such an exclusion in IIL passing constitutional muster. A mitigating factor, as mentioned above, is that the testator may leave a voluntary bequest to such a child. The exclusion of a non-Muslim relative from inheriting as an Islamic law heir would be discrimination based on the grounds of religion and belief. Once again, such a relative is entitled to receive a voluntary bequest from the testator. The blanket exclusion of all cognatic descendants is an exclusion based on gender and may not stand up to constitutional scrutiny if the *De Jager* judgment is relied upon. Once again, this group of family members is entitled to receive bequests, but this, like the previous examples, is subject to the goodwill of the testator. The rule that certain male heirs receive double the share of their female counterparts also amounts to discrimination on the basis of gender. According to the majority of scholars, as Islamic law heirs, these female heirs are not entitled to receive bequests from a testator. If this opinion, which is the accepted opinion of the MJC, is adopted there is no way to mitigate the lesser share being received by these female heirs.

At face value, all the aforementioned provisions that are incorporated into standard Islamic wills are discriminatory as they differentiate between relatives based on immutable characteristics that are listed in s9(3) of the Constitution. The next step would be to establish whether the discrimination amounts to unfair discrimination in terms of s9(4) of the Constitution.[239] It could be argued that it does not amount to unfair discrimination, based on the reasoning cited by Chaudry above[240]and the fact that it is founded on religious precepts.

[238] *Bhe v the Magistrate*, *Khayeliysha supra* at [59].
[239] See reasoning of Jaftha J in *De Jager* at [129]-[132] and [154]-[156].
[240] See discussion in §9.3(a).

This is what distinguishes provisions in a standard Islamic will from the discriminatory provision in the *De Jager* 1902 will. A Muslim testator is obliged to distribute his or her estate according to the precepts of IIL, and the system of distribution is based on a well-established system of law couched in its own objectives, values, and ethics. If these provisions had to be challenged, the court would have to balance the right to equality with not only the rights to privacy, dignity, and property as in the previous cases cited, but also the right to religious freedom and belief. Muslim testators are exercising their right to religious freedom, guaranteed in s15 of the Constitution, when incorporating IIL into their wills and the courts might be more circumspect in striking down provisions that are based on established religious practices.

However, in *Bhe* the established African customary practice of male primogeniture did not survive constitutional scrutiny. The rule of male primogeniture was described in *Bhe* as follows:

> 'The general rule is that only a male who is related to the deceased qualifies as 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.'[241]

The eldest male relative would step into the shoes of the deceased and manage the family property. He was regarded as the owner of the family property and would administer the property for the benefit of the family unit. Langa DCJ highlighted that the customary law of succession 'was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community.'[242] However, because modern urban communities and families have changed and are no longer structured along traditional customary lines, the succession of the eldest male relative to all the assets of a deceased does not necessarily

[241] *Bhe v the Magistrate, Khayeliysha supra* at [77].
[242] Ibid at [75].

translate into him fulfilling his concomitant responsibilities of maintenance and support to all the dependants of the deceased.[243] Ngcobo J, in his partly dissenting judgment, had the following to say about the rule of male primogeniture:

> 'The role that women play in modern society and the transformation of the traditional African communities into urban industrialised communities with all their trappings, make it quite clear that whatever role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age.'[244]

Consequently, the rule of male primogeniture was found to discriminate unfairly against women and children born out of wedlock and was declared unconstitutional and invalid.[245] The court ordered that the ISA be applied to all customary law estates, thereby replacing the customary law of intestate succession with the rules of the common law of intestate succession.[246] Subsequently, the Reform of Customary Law of Succession and Regulation of Related Matters Act[247] ('RCLSA') was implemented to regulate all intestate estates of persons living under a system of customary law. The RCLSA replicates the court order in *Bhe* and for the most part, duplicates the ISA, with certain modifications. Some scholars have noted that the RCLSA effectively eradicated the customary law of succession and replaced it with the common law of intestate succession.[248] This, in turn, has widened the gap between the lived reality of how customary law is practised within communities and the precepts of the RCLSA.[249]

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[243] Ibid at [80].
[244] Ibid at [190].
[245] Ibid at [95]-[97] and [136] order 4..
[246] Although the judgment has been commended for furthering gender equality and the rights of children born out of wedlock, it has been criticised on the basis that the ACL of succession was not developed sufficiently by the court and that the common law rules of succession were unjustifiably privileged over ACL succession rules. In this regard, see Sibanda and Mosaka '*Bhe v Magistrate, Khayelitsha*: A cultural conundrum, Fanonian alienation and elusive constitutional oneness' (2015) *Acta Juridica* 256 at 278. See also Himonga (n126); Weeks 'Customary Succession and the Development of Customary Law: the *Bhe* Legacy' 2015 *Acta Juridica* 215; Knoetze and Olivier 'To develop or not to develop the customary law: That is the question in *Bhe*' (2005) 26 *Obiter* 126; Rautenbach *et al* 'Is primogeniture extinct like the dodo, or is there any prospect of it raising from the ashes? Comments on the evolution of customary succession laws in South Africa' (2006) 22 *SAJHR* 99.
[247] 11 of 2009.
[248] See Sibanda and Mosaka (n246) and also Rautenbach 'A few comments on the (possible) revival of the customary law rule of male primogeniture: can the common-law principle of freedom of testation come to its rescue' (2014) 1 *Acta Juridica – South African Law of Succession and Trust* 132 at 137.
[249] Himonga (n126) 7-8.

Bhe can be distinguished from a challenge that may be brought against provisions in a standard Islamic will, in various respects. In *Bhe,* female relatives and extra-marital children were completely excluded under the customary rule of male primogeniture. This is not the case in Islamic law, where different female relatives are entitled to compulsory shares and where children born out of wedlock may inherit as legatees, although not as Islamic law heirs. *Bhe* dealt with intestate customary laws, whereas standard Islamic wills fall into the realm of testate succession. Rautenbach has questioned whether the rule of male primogeniture could be revived through its inclusion in a testator's will, whereby a testator could for instance, stipulate: 'I bequeath the whole of my estate in terms of the rule of male primogeniture'.[250] She concludes that although there are no statutory limitations preventing a testator from doing so, the preamble to the RCLSA makes it clear that the Act has been enacted to eradicate all inequalities in the customary law of succession.[251] She, therefore, notes that it would be difficult, if not impossible, for a testator to revive the rule of male primogeniture in this explicit manner in his or her will.[252]

Rautenbach explores another option, namely the scenario where a testator creates the same consequences that may arise as a result of the rule of male primogeniture, but lists them in detail in his or her will, without referencing the rule of male primogeniture.[253] For instance, a testator stipulates that his or her estate must devolve upon the eldest son in its entirety, to the exclusion of all other relatives, which is in essence a manifestation of the customary rule of male primogeniture. In this instance, the courts would be hard pressed to strike down the

[250] Rautenbach (n248) 152.
[251] Ibid 155.
[252] Ibid.
[253] Ibid.

bequest, because in terms of the common law, no beneficiary enjoys the fundamental right to inherit and the principle of freedom of testation has to be upheld.[254]

The same scenario could potentially unfold with Islamic wills. Even if the courts had to declare certain provisions that are incorporated in Islamic wills as unconstitutional and unenforceable, nothing precludes a testator from including provisions in his or her will in terms of which he or she specifically identifies his or her Islamic law heirs by name and their stipulated shares, without the incorporation by reference of IIL. It would essentially be a similar format to some of the Archive wills discussed in chapter six above.[255] In those wills, the testator identified his Islamic law heirs by name and allocated them their shares that they were entitled to in terms of Islamic law by allocating to his sons double the share of his daughters.[256] It is difficult to imagine a court setting aside such provisions, even if the sons of a testator were to receive double the share of his or her daughters.

(d) Balancing of rights and issues of doctrinal entanglement

In a pluralistic and multiculturalist society like South Africa, our courts will always be tasked with balancing rights of equality with the rights of religious or cultural groups to exercise their religious or cultural beliefs and practices. In *Christian Education South Africa v Minister of Education*[257] a group of Christian private schools applied for an exemption from legislation prohibiting corporal punishment from being administered in schools on the grounds that it was against their Christian beliefs and violated their religious freedom. The Constitutional Court held that individuals have no automatic right to be exempt from generally applicable laws on

[254] Ibid.
[255] See §7.2.
[256] See discussion §7.2(a)(i) Will one and (ii) Will two.
[257] 2000 (4) SA 757 (CC).

the grounds of religious beliefs.[258] The court rejected the claim for an exemption as the legislation served an important objective, namely the protection of children from abuse, degradation and indignity.[259] The court held that the child's best interests are of utmost importance.[260] The Islamic law provisions that exclude adopted children or children conceived and born out of wedlock as Islamic law heirs may therefore fail constitutional scrutiny as the courts may regard them as contrary to the best interest of children, notwithstanding the fact that they are based on religious precepts.

In *Prince v President of the Law Society of the Cape of Good Hope*[261] ('*Prince*'), the court had to determine whether a Rastafarian lawyer was entitled to use marijuana as part of his religious and cultural practices. The court remarked that:

> 'Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.'[262]

In *Prince,* the court was reluctant to interrogate whether a particular practice was central to a religion or not.[263] This approach shifted in *Member of the Executive Council for Education: Kwazulu-Natal v Pillay*[264] ('*Pillay*'), where Langa CJ held that a court was required to determine whether a religious practice or belief was central to a particular claimant, and whether the claimant was sincere in his or her belief and practice.[265]

[258] Ibid at [35].
[259] Ibid at [50].
[260] Ibid at [41].
[261] 2002 (2) SA 794.
[262] Ibid at 813.
[263] Ibid.
[264] 2008 (2) BCLR 99 (CC).
[265] Ibid at 119.

In *Pillay,* a Hindu female student wished to wear a nose stud at her public school as an expression of her Hindu beliefs, but the school asked her to remove the nose stud as it was contrary to the school's dress code. The court granted the student an exemption under the school code of conduct to wear a nose ring to school as part of her religious and cultural traditions. The court furthermore held that where a religious practice or belief was central to a particular claimant, it would be granted protection, whether such belief or practice was mandatory or voluntary.[266] The court justified its position by stating that:

> '…protection of voluntary as well as mandatory practices conforms to the Constitution's commitment to affirming diversity: that differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it, and that this falls short of our constitutional project which not only affirms religious diversity but promotes and celebrates it.'[267]

The court held that the claimant, Ms Pillay, was discriminated against on the grounds of religion and culture in terms of s6 of the PEPUDA , by not being allowed to wear her nose stud to school, which she considered part of her religious and cultural practice. What was relevant, according to the court, was not whether a practice was central to a religion or culture, nor whether it was characterised as mandatory or voluntary. Rather, of significance was the meaning of the practice to the particular claimant. This is considered a subjective standard of review in matters of this kind.[268] As a consequence of this subjective test, an affected claimant simply has to show that *he or she believes* that a particular practice forms a central part of his or her religion or culture, for it to be classified as such and be protected by the law in South Africa. (my emphasis) In *Department of Correctional Services v POPCRU*[269] the Labour Appeal Court held that the employer unfairly discriminated against prison security guards on the grounds of religion and culture by dismissing them for refusing to cut their dreadlock for

[266] Ibid.
[267] Ibid.
[268] Mhango 'Recognising Religion: Emerging Jurisprudence in South Africa' (2012) 5 (2) *Journal for the Study of Religion* 23 at 36.
[269] [2012] 2 BLLR 110 (LAC).

religious and cultural reasons. These cases provide a backdrop to the way our courts may deal with provisions in an Islamic will that are considered discriminatory. [270]

Muslims in South Africa, as a minority religious group, have always practised and implemented their MPLs in the private sphere, especially in the realm of marriage, divorce and inheritance as they believe this is required of them in Islam. According to my empirical research, this remains the case in modern-day South Africa, with testators choosing to incorporate IIL into their wills, as they wish to comply with the tenets of their religion in the distribution of their estates. Clearly, being able to practise MPL is exceptionally important to Muslims, and they are entitled to do so under the current constitutional democracy. This entitlement stems from their rights to equality[271], dignity[272], privacy[273], and religious freedom and beliefs[274], as well as their minority rights.[275] In the context of testate succession, this entitlement also derives from their right to dispose of their property freely during their lifetime and upon death,[276] subject to certain limitations, as mentioned previously. [277]

Whilst the courts are at pains to protect religious or cultural practices that are deemed important to a claimant, it is not certain how our courts will deal with religious practices, as contained in testamentary instruments, that are contrary to public policy or provisions of the Constitution

[270] For further discussions on these cases see Du Plessis 'Apartheid, Religious Pluralism, and the Evolution of the Right to Religious Freedom in South Africa' (2016) 40(2) *Journal of Religious History* 237; Osman 'Legislative Prohibitions of Wearing a Headscarf: Are they Justified?' (2014) 17(4) *PELJ* 1317.
[271] Constitution, s9. It is also an application of the principle of ensuring equality to 'diverse citizenry' such as we find in South Africa.
[272] Constitution, s10.
[273] Constitution, s14.
[274] Constitution, s15(1) and (3); s13(1).
[275] See Art 27 of International Covenant on Civil and Political Rights 999 UNTS 171 (ICCPR), to which South Africa is a signatory. Art 27 provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'
[276] Constitution, s25.
[277] See §9.5(a).

and the PEPUDA.[278] All of the aforementioned potentially discriminatory IIL provisions[279] are established legal rulings within Sunnī Islamic law and have been implemented in Muslim communities in South Africa and beyond for many centuries. Rautenbach notes that the right to equality on the one hand and cultural and religious rights on the other are often incompatible, especially in the case of cultural practices that violate women's rights.[280] It is not certain whether the courts will regard these issues as matters of doctrine and therefore steer clear of becoming entangled in these disputes, even where they entail discriminatory practices.

The 'doctrine of entanglement' has been endorsed by our courts in various cases.[281] The doctrine entails minimum interference by our courts in matters relating to doctrine or faith.[282] In *De Lange v Presiding Bishop, Methodist Church of Southern Africa*[283] ('*De Lange*'), the appellant, an ordained minister of the church, was suspended from the ministry owing to her pending same-sex union, which was considered to be against the doctrines of the church. She challenged her dismissal as unfair. The Supreme Court of Appeal had the following to say:

> 'As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.'[284]

[278] The discriminatory testamentary provision in *De Jager* was not couched in any religious or cultural beliefs and practices. In any event the respondents in *De Jager* conceded that the provision unfairly discriminated against female heirs.
[279] Discussed in §§9.2 to 9.4.
[280] Rautenbach 'The Modern-Day Impact of Cultural and Religious Diversity: Managing Family Justice in Diverse Societies' (2014) 17(1) *PELJ* 521 at 531.
[281] *Rylands v Edros* 1997 (2) SA 690 (C) at 85-86; *Worcester Muslim Jamaa v Valley* 2002 (6) BCLR 591 (C); *Strydom v Nederduiste Gereformeerde Gemeente, Moreleta Park* (2009) 30 ILJ 868 (EqC*)* at [11]; *De Lange v Presiding Bishop, Methodist Church of Southern Africa* 2016 (1) SA 106 (SCA) at [39].
[282] According to some writers the doctrine found its way into South Africa jurisprudence through US precedents and academic texts. See Woolman & Zeffert 'Judging Jews: Court Interrogation of Rule-Making and Decision taking by Jewish Ecclesiastical Bodies (2012) 28 (2) *SAJHR* 196 at 206 n20.
[283] 2016 (1) SA 106 (SCA).
[284] Ibid at [39].

The court reiterated its position, albeit *obiter*, that it abstains from interfering in doctrinal issues. As the Appellant did not base her claim on unfair discrimination but rather on an entitlement to fair administrative action,[285]the Court found it unnecessary to address '[t]he collision between the rights to freedom of association and religious freedom on the one hand, and the right to equality on the other…'.[286]

The Western Cape High Court expressed similar sentiments in *Taylor v Kurstag*[287], where it stated that, '[a]lthough the decisions of the Beth Din are subject to judicial scrutiny, just as those of any other faith are, the values embodied in the doctrines of entanglement and the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded.'[288] Du Plessis correctly notes that in these cases, the courts showed significant respect for religious freedom and advocated for the State not to become entangled in religious matters.[289] Similarly, according to Du Plessis, the judgments of the Constitutional Court and other courts display great tolerance towards and protection of the 'religious other'.[290]

It remains to be seen how our courts will deal with a challenge to provisions incorporated in a standard Islamic will, which are based on Islamic law rulings, but which are *prima facie* discriminatory. If our courts remain devoted to the doctrine of entanglement, they will be unlikely to strike out Islamic law provisions that to many Muslims are considered sacrosanct, being based on the two primary Islamic law sources of the Qur'an and Sunnah. Those litigants

[285] The Appellant was unsuccessful in her claim. For a detailed discussion on the case see De Freitas 'Doctrinal sanction and the protection of the rights of religious associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* [2014] ZASCA 151' (2016) 19 (1) *PELJ* 1.
[286] *De Lange supra* at [19].
[287] 2005 (1) SA 362 (W).
[288] *Taylor v Kurstag supra* at [61]. For a discussion on this case see Woolman & Zeffert (n282).
[289] Du Plessis 'Apartheid, Religious Pluralism, and the Evolution of the Right to Religious Freedom in South Africa' (2016) 40(2) *Journal of Religious History* 237 at 255.
[290] Du Plessis 'Affirmation and Celebration of the 'Religious Other' in South Africa's Constitutional Jurisprudence on Religion and Related Rights: Memorial Constitutionalism in Action?' (2008) 8 *African Human Rights Law Journal* 376 at 399.

defending these provisions would have to illustrate that the discrimination is not unfair, based on the religious rationale for these rulings. In other words, they would have to rely on the *maqāsid* (the higher objectives) of the Sharī'ah, as well as the broader context of marriage and family maintenance laws to justify the continued existence of these rulings. Based on these justifications and our courts' general hands-off approach to doctrinal issues, these legal provisions in Islamic wills might therefore pass constitutional muster.

9.6 CONCLUSION

My discussion in this chapter illustrates that there are numerous provisions in IIL that may be challenged as being unconstitutional and contrary to public policy. The courts have declared invalid provisions in public testamentary instruments that are unconstitutional or considered contrary to public policy. In the case of *De Jager*, the Constitutional Court adopted a similar approach to a private testamentary instrument. However, these cases did not involve provisions in testamentary instruments that are based on religious laws and precepts. In its reluctance to be involved in issues of doctrinal entanglement, the courts may well be more reticent to declare invalid potentially discriminatory provisions in an Islamic will.

CHAPTER TEN

CONCLUSION

10.1 INTRODUCTION

In this thesis, I addressed three main research questions, namely: (i) How are Islamic inheritance laws ('IILs') implemented in the South African legal system? (ii) What are the challenges encountered when implementing IIL within the existing common law of succession framework? and (iii) What are the potential conflicts that may arise between the implementation of IIL and the values enshrined in the Constitution?

10.2 SYNOPSIS OF THESIS

I have discussed the status of Muslim personal law ('MPL') within the South African legal system and have contextualised how IIL fits into that system.[1] When discussing the overall framework of Islamic law, I have demonstrated: (i) the overall objectives of Islamic law;[2] (ii) that Islamic law is based on more than the two primary sources of the Qur'an and the Sunnah;[3] (iii) that Islamic law is largely jurist-based law and therefore not immutable; and (iv) that differences of opinion in legal matters are common and acceptable, including in the area of IIL.[4] In chapter three, I showed that the Islamic laws of marriage and divorce are interconnected with IIL. I demonstrated how the South African courts have interpreted Islamic divorce laws in the context of inheritance disputes.[5] I highlighted the difficulties that arise as a result of Muslim divorces not being uniformly regulated and how this impacts a widow's right to inherit.

[1] See §2.2.
[2] Ibid.
[3] See §2.3(b).
[4] See §2.3.
[5] See §3.5.

In chapter four, I discussed the historical development of IIL. I highlight the dissenting opinions by jurists who hold that the bequest verses were abrogated by the inheritance verses. Based on these dissenting opinions, I argue that Islamic legal heirs are entitled to bequests without the consent of the other heirs and that[6] a widow is entitled to maintenance and accommodation for a year after the death of her husband in addition to her compulsory share.[7]

Chapter five provides an overview of the principles that govern IIL as well as a breakdown of the Islamic law heirs and their respective shares. I illustrate the differences of opinion amongst Islamic jurists in various inheritance matters based on their interpretation of the Qur'anic verses and the *ahādith*. These differences of opinion belie the idea that the application of IIL is a mechanical process.

Chapter six is an extensive chapter that deals with my empirical research on how IIL is practically applied within the Cape Muslim community by the relevant role players. There is limited empirical socio-legal research in this area of law, and chapter five contributes new and interesting insights into the application of IIL in South Africa. It, therefore, answers the research questions on how IIL is implemented in South Africa by the Muslim community and what legal challenges are encountered when implementing IIL within the existing common law of succession framework. My empirical research demonstrated that, by and large, Muslims who wish to have their estates devolve according to Islamic law incorporate IIL by reference into their wills through a standard incorporation provision.[8] They do not stipulate specific Islamic law provisions or specific Islamic law heirs, and they do not indicate a particular legal school. They simply indicate that IIL should apply to the devolution of their estates. They furthermore

[6] See §4.2(c).
[7] See §§4.2(c)- (d).
[8] See §§6.4(b); 6.8(a); 6.9(b); 6.10(b).

instruct a Muslim judicial body ('MJB') to determine their Islamic law heirs and shares.[9] MJBs, like the MJC, fulfil the role of determining the Islamic law heirs of a testator and set this out in a distribution certificate, which is accepted by the Master's office.[10] According to my research, these Islamic wills are drawn up for the Muslim public by attorneys, the MJC or an Islamic bank.[11] My analysis in chapter six demonstrated some of the legal challenges that arise as a result of the MJC drafting wills on behalf of Muslim testators.[12]

In chapter seven, I demonstrated how testators historically included IIL in their wills, based on three wills retrieved from the South African Archives.[13] The testators in the retrieved wills did not incorporate IIL wholesale by reference into their wills, nor did they delegate their testamentary powers to MJBs to determine their Islamic law heirs.[14] I highlighted some of the challenges that may have arisen with this approach in terms of South African succession laws.[15] I then showed how the existing practices of incorporating IIL by reference into wills and delegating the Muslim testator's testamentary powers to a third party were in contravention of black-letter common-law rules. I argued that the common law should be developed to accommodate the current form of Islamic wills.

In chapter eight, I discussed the inheritance rights of surviving widows and the different mechanisms that can be used to secure greater rights for a widow on the death of her spouse. In the second part of chapter seven, I discussed the legal implications of various issues that I identified in my empirical research.

[9] Ibid.
[10] See §§6.8(c); 6.9(c); 6.10(b).
[11] See §§6.8(a); 6.9(b); 6.10(b).
[12] See §§6.5 and 6.11.
[13] See §7.2*(a)*.
[14] Ibid.
[15] See §§7.2(a)(i)-(iv).

In chapter nine, I delved into questions of public policy and constitutionality that may arise in respect of the implementation of certain IIL rulings in the South African legal system. I highlighted various provisions in Islamic wills, which *prima facie* discriminate on the grounds of birth, religion, and gender. It is uncertain whether these provisions, if challenged, will survive constitutional scrutiny. I discussed the approach our courts have taken to succession cases where discriminatory provisions have occurred in public trust and in private wills. I also discussed the approach our courts have taken to discriminatory practices that occur in the African customary law of succession. Thereafter, I postulated the approaches our courts might adopt to Islamic inheritance provisions that are perceived as discriminatory. If these provisions are considered unfair discrimination, then the question that arises is whether the right to freedom of religion can rebut this unfairness. I briefly touched on arguments of doctrinal entanglement that might arise when weighing the rights to religious freedom and belief against other constitutional rights, such as the right to equality and human dignity.

In this concluding chapter, I set out my recommendations for the various role players.

10.3 RECOMMENDATIONS

In 1994, after the coming into force of the Interim Constitution[16] there was huge optimism that Muslim marriages would finally be recognised. To date, we have no legislation recognising Muslim marriages in South Africa. This, is despite years of advocacy for the passing of such legislation and despite our courts highlighting the prejudice suffered by Muslim women as a result of the non-recognition of Muslim marriages.[17] Numerous reasons have been proffered

[16] Act 200 of 1993.
[17] See discussion in §2.2 on the *WLC* case.

for this lack of legislation, and it is beyond the scope of this thesis to delve into these reasons.[18] But what it does illustrate is that it is highly improbable that the State will legislate IIL in the foreseeable future. In the absence of legislation, IIL will continue to be administered and regulated informally by MJBs. This can be problematic for the reasons I have highlighted in my thesis. For this reason, this thesis is useful as it will enlighten various stakeholders on what to look out for. I furthermore provide recommendations for the various role players, in order to ensure that the rights to religious freedom and belief guaranteed in s15(1) of the Constitution are fully realised in the context of Islamic inheritance. These recommendations derive from the discussions in the thesis.

(a) The individual testator

If IIL is not regulated by statute it will fall upon the individual testator to include IIL in his or her will. A Muslim testator will have two options. Firstly, he or she could adopt a similar approach as in the sample wills retrieved from the South African Archives, as discussed in chapter six.[19] The testator could expressly stipulate the Islamic law heirs in his or her will, by allocating to each family member, alive at the time of executing the will, their respective compulsory shares. In order to ensure that his or her estate devolves strictly according to IIL, a testator should include substitution provisions in the event of one of his or her Islamic law heirs predeceasing him or her.[20] The testator could also award bequests to his or her adopted children or children conceived out of wedlock. However, this option can be cumbersome as it assumes a high degree of technical knowledge, and can potentially result in mistakes, which

[18] For a detailed description on the struggle for the recognition and regulation of Muslim marriages in South Africa see Moosa and Dangor 'Introduction to Muslim Personal Law in South Africa: Past to Present' in Moosa and Dangor (eds) *Muslim Personal Law in South Africa - Evolution and Future Status* (2019).
[19] See discussion on Archive wills in §§7.2(a)(i)-(iii).
[20] See §7.2(a)(iv).

will lead to problems in the interpretation of wills thereby frustrating the intention of the testator.

It might therefore be unrealistic to expect lay testators to stipulate this level of detail in their Islamic wills. It assumes an in-depth knowledge of IIL and the different opinions that exist within this sphere of law. Based on the findings in my empirical research the average Muslim testator does not have the level of legal knowledge to understand and implement the different nuances that occur in IIL.[21] Both laypersons and attorneys defer to the MJC to provide them with guidance on the correct application of IIL. In addition, the Master's office has a preference for distribution certificates compiled by the MJC.[22]

The second option is for a Muslim testator to continue with the existing practice of incorporating IIL by reference into his or her will. This would entail delegating his or her testamentary power to an MJB to determine his or her Islamic law heirs and their respective shares. Ideally, a testator should indicate which legal school of thought should govern the interpretation of his or her will; alternatively, which legal opinion should be adopted in the allocation of compulsory shares to certain family members so as to avoid any ambiguity in scenarios where differences of opinion occur. By way of example, if testator X, at the time of drafting her Islamic will, has her mother, father and husband present, then she could dictate that the opinion of 'Ibn Abbas should apply when her mother's share is determined. This would require the relevant MJB to allocate 1/2 of her estate to the husband (as she had no descendants), 1/3 of the net estate to the mother, and the residue of 1/6 would accrue to the

[21] See §§6.10(a)-(e) and 6.11. The attorneys interviewed were not aware of the differences of opinions amongst jurists in the sphere of inheritance.
[22] See §6.9(c).

father.[23] Once again, this assumes a certain level of pre-existing knowledge on the part of the testator, which is improbable.

The second option also falls foul of the black-letter common-law rules against incorporation by reference and the delegation of testamentary powers by a testator. Although it has become customary to draft Islamic wills in this manner, they are still subject to a potential legal challenge. If this occurs, the courts will have to adopt a robust approach to developing these common-law rules in order to preserve a testator's right to freedom of testation and freedom of religious beliefs and practices.[24]

(b) Recommendations for the MJC

The MJC has been delivering extensive services to the Muslim community in Cape Town for almost 70 years in its capacity as administrator of MPL. It conducts, *inter alia*, marriage counselling services, divorce courts, will drafting services, and the provision of distribution certificates on the death of a Muslim testator. It provides all of these services at a nominal fee to the public.[25] With respect to the MJC's will drafting service, it assists hundreds of members of the Muslim public who are not able to secure the services of an attorney.[26] The MJC, therefore, plays an invaluable role in the community and should be commended for its service. Because it fulfils the role of administering a parallel family law system to the State system, the MJC has responsibilities at multiple levels. The recommendations below will assist the MJB in fulfilling these responsibilities in the area of Islamic inheritance.

[23] See §5.3(b)(ii) on the different opinions on the mother's share when a deceased is survived by a spouse and both parents only.
[24] See §7.4.
[25] See findings in §6.8(a).
[26] Ibid.

It is recommended that a crucial role of the MJC should be to educate and raise awareness amongst the public, including the attorneys' profession, on the full scope of IIL. This should include disseminating minority opinions that exist in different aspects of IIL. These opinions include, and are not limited to, the following:

- that a husband can donate any assets, including immovable property or shares in his immovable property, to his wife during his lifetime[27];
- that a husband in his will can instruct that his surviving wife be paid maintenance from his estate for one year after his demise on condition that she remains living in the family home[28];
- that a bequest of up to 1/3 of the estate can be made to Islamic law heirs, including a surviving spouse, without the consent of the other heirs being required[29];
- that a surviving wife can claim any outstanding dower from her deceased's husband's estate before the payment of a bequest or inheritance[30];
- that a surviving wife can submit a claim for arrear maintenance against the estate of her deceased husband, for the three years prior to his death that she maintained herself and their family during the course of their marriage (on condition that she did not waive her right to claim the arrear maintenance)[31];
- that heirs are not obliged to settle the religious liabilities of a testator from the inheritance they receive[32]; and

[27] See §8.2(b).
[28] See §§4.2(d) and 8.2(a).
[29] Ibid.
[30] See §§5.5(a) and 8.2(c).
[31] Ibid.
[32] See §5.5(a) for the Hanafī view on debts to God.

- that in order to avoid fragmentation of immovable property, heirs can enter into *takhāruj* agreements after the death of a testator[33] and that this should expressly be stipulated in the will of the testator.

When providing a will drafting service to the Muslim public, it is recommended that the MJC:

- complies with all the formalities of the Wills Act[34];
- avoids any potential forms of conflict of interests when assisting the testator in drafting his or her will[35];
- not oust the courts' jurisdiction in disputes arising from Islamic wills[36];
- not include provisions that are clearly in contravention of South African legislation, by for instance, allowing minors to administer their inheritance before they reach the age of majority[37];
- advises testators on different opinions that exist within IIL on various matters, including minority opinions, which may benefit more vulnerable family members;[38]
- ensures that provisions in wills are clearly drafted without any ambiguity or obscurity when for instance, creating testamentary trusts for minors;[39]
- ensures that each will caters to the needs of the individual testator as opposed to using one generic template;

[33] See discussion on redistribution agreements in §8.5.
[34] Act 7 of 1953. See discussion in §6.4(c) and §6.5.
[35] See discussion in §6.5.
[36] Ibid.
[37] Ibid.
[38] See discussion on minority opinions in the case of calculating gestational periods to determine legitimacy in §5.2(b); and §5.3(b)(ii) for the view of Ibn Abbas that only three or more brothers would reduce the mother's share from 1/3 to 1/6.
[39] See the analysis of findings in §6.5.

- avoids drafting separate agreements to a will on behalf of a testator, which may not be enforceable on the death of the testator[40];
- avoids including provisions that are impractical and realistically unenforceable by the MJB or the executor of the estate (such as the inclusion of the religious liability provision)[41]; and
- has a legally trained professional, in wills and estates, assist testators in drafting their wills.

When issuing *fatāwa*, it is recommended that the MJC:

- ensures that such *fatāwa* are not contrary to provisions in South African legislation, as is the case with its *fatwa* on pension pay-outs forming part of a Muslim testator's estate[42];
- ensures that it considers the Islamic values of justice, equality, freedom, human dignity, mercy, and compassion[43];
- takes into account considerations of public interest[44];
- undertakes empirical research (prior to issuing *fatāwa*) within the community to establish the effects of IIL on vulnerable members[45];
- takes into account the lived reality of vulnerable groups, like widows and wives in polygynous unions on the death of their husbands, before issuing *fatāwa* on issues like the permissibility of bequests in favour of wives or spouses entitling them to any surplus in an estate (*radd*); and

[40] See discussion on succession agreements in §8.4.
[41] See discussions in §§6.4(f); 6.8(f); 6.10(d).
[42] See discussion on MJC Fatwa 2 in §8.3.
[43] See discussion on *maqāsid al-sharīah* in §2.3.
[44] See discussion on 'Consideration of public interest' in §2.3(b)(v).
[45] See §2.3(b)(ix).

- considers comparative jurisprudence of countries who have introduced reforms in the area of IIL.[46]

Lastly, the MJC has the responsibility to:

- educate the public about the consequences of different types of Islamic divorces and how they impact a spouse's right to inherit[47]; and
- follow standardised processes for confirming a *talāq* or granting a *faskh* so as to avoid any uncertainty about a couple's marital status on the demise of one of the spouses.[48]

(c) The role of attorneys

As can be gleaned from my empirical research, attorneys play a critical role in assisting Muslim testators to have their estates devolve according to IIL. Attorneys who assist clients with the drafting of Islamic wills and winding up of their estates should:

- educate themselves about the different interpretations and opinions in IIL;
- advise their clients on the various options available within IIL; and
- give their clients the choice on how best to structure their estates in a way that secures greater rights for their surviving spouses whilst at the same time remaining true to the object of the Sharī'ah.

Attorneys also need to be made aware that advising their clients to simply incorporate IIL by reference into their wills and delegate their testamentary powers to MJBs is a contravention of

[46] In this regard see §5.3(b) on how certain jurisdictions allow a surviving spouse to benefit from *radd*. See also §9.2(d) on how certain jurisdictions introduced reforms, which allow the children of a predeceased son or daughter of a deceased to inherit up to a maximum of 1/3 of the net estate.
[47] See §3.4.
[48] See §§3.4-3.5.

black-letter common-law rules. Although it has become customary practice in South Africa, this does not detract from the fact that it is in contravention of the common law and can potentially be challenged in the future.

If an attorney decides not to incorporate IIL by reference into the will of a testator but to rather list the Islamic law heirs of the testator who are alive at the time of executing the testator's will, the attorney should take into account the same considerations mentioned in paragraph *(a)* above. This would require a level of training in IIL and its application within the South African common-law system of succession.

(d) The role and responsibility of various State bodies

The primary responsibility for regulating systems of personal law lies with the State. Section 15 of the Constitution not only provides for recognition of such systems but envisages that appropriate legislation will be passed to recognise them.[49] I therefore provide recommendations for the relevant State entities.

(i) The legislature

Our courts have confirmed that the non-recognition of Muslim marriages is a violation of the constitutional rights of women and children.[50] I demonstrated in chapter three that the Islamic laws of marriage and divorce are integrally related to each other. In the absence of clear legislation regulating Islamic divorces and their consequences, the marital status of spouses on death could lead to legal disputes about whether a surviving wife is entitled to inherit from her deceased husband's estate.[51] The legislature has the power to enact legislation recognising

[49] See §1.1.
[50] See discussion in §2.2 on the *WLC* case.
[51] See §§3.4-3.5.

'systems of personal and family law under any tradition or adhered to by persons professing a particular religion.'[52] The legislature, therefore, has a responsibility to pass legislation as speedily as possible.

Clark notes that, 'Any system of family-law pluralism within the liberal state must establish institutional mechanisms to ensure that legal pluralism does not become a toll with which to deprive individual of their rights.'[53] Provision should be made in this legislation for regulating the role of MJBs in Muslim marriages and divorces. These bodies are very influential within the Muslim community, and their *fatāwa* has a moral persuasive value within the community. Because they play such an influential role in various aspects of MPL, including the area of IIL, there should be a certain level of oversight by the State on the actions of these MJBs. I have highlighted in this thesis the various challenges that arise in Islamic wills and estates, so the legislature would be well placed in the future to know what issues need to be addressed.

(ii) The Master's office

The Master's office plays a pivotal role in the administration of Muslim estates.[54] My empirical research highlighted the fact that the Master's office defers to the distribution certificates issued by the MJC.[55] This was also confirmed in the cases discussed in chapter three.[56] The Master's office has a responsibility to ensure that it is in possession of all the relevant information, when overseeing the administration of a Muslim estate. Where there is a dispute about the marital status of parties, the Master's office should obtain evidence from all the affected parties, especially when the validity of a *talāq* is in dispute. Where spouses were married by Muslim

[52] S15(3)(a)(ii) of the Constitution.
[53] Clark 'Legally Pluralistic and Rights-based Approaches to South African and English Muslim Personal Law-A Comparative Analysis' (2020) 53 (2) *Comparative and International Law Journal of Southern Africa* 18-19.
[54] See findings in §6.7(b).
[55] See §§6.8(a) and (c); 6.9(c) and 6.10(b).
[56] See the discussion of the *Hassam* case and the *Faro* case in §3.5.

rites only and one of the heirs avers that a *faskh* had been granted ending the marriage before the death of one of the spouses, then the Master's office has to insist on a *faskh* certificate. The Master's office should also potentially conduct educational workshops, on the foundations of the Islamic laws of marriage, divorce, and inheritance.

(iii) The judiciary

Many of the issues raised in this thesis have not come before our courts for litigation. It therefore remains to be seen how our courts will deal with any challenges in this regard. I have shown in my thesis that our courts are obliged to develop the common law, where the interests of justice require it.[57] It is my recommendation that the courts should develop the common law, when it comes to allowing the incorporation by reference of IIL into Islamic wills as well as allowing testators to delegate their testamentary powers to MJBs. Not doing so will bring the law of succession into conflict with s15 and s25 of the Constitution.[58]

Our courts may also be tasked with legal challenges to provisions of the IIL that are *prima facie* discriminatory. The question is whether our courts will declare these provisions to be a form of unfair discrimination and declare them invalid for being either in contravention of the Constitution and/or public policy. We currently only have two precedents, where our courts have struck down disinherison provisions in private testamentary instruments, for being contrary to public policy and in contravention of the Constitution.[59] However, both these cases can be distinguished from the case of Islamic wills, as they did not deal with testamentary provisions that were based on religious precepts. The courts were therefore not required to weigh the principles of unfair discrimination against principles of religious freedom and

[57] See §7.4.
[58] Ibid.
[59] See discussions on *Wilkinson v Crawford* 2021(4) SA 323 (CC) in §9.2(c) and *De Jager* in §9.5(d).

freedom of testation. As the doctrine of entanglement is not part of our law, our courts will be mindful of bringing people's religious beliefs in conflict with the Constitution. The courts would be reticent of disregarding people's religious beliefs. Furthermore, the danger of declaring Islamic inheritance provisions unconstitutional and invalid is that these practices would simply go 'underground'. The State would then lose administrative control of Muslim estates, resulting in a loss of revenue through estate taxes. It could also potentially be detrimental to vulnerable groups.

When these matters come before the courts, the courts should bear in mind that historically our courts have always tried their utmost to give effect to the intention of the testator. This has been considered the golden rule of interpreting wills. The intention of a Muslim testator in an Islamic will is to have his or her estate distributed according to the tenets of IIL. A court should therefore try its utmost to give effect to this intention. In conclusion, freedom of testation is a cornerstone of our law of testate succession and our courts will do well to heed the caution expressed by Majiedt J in his minority judgment in *Wilkinson v Crawford*.[60] Majiedt J noted the following:

> 'Self-evidently, a measure of judicial reticence is required in respect of bequests in private testamentary instruments. Courts must intervene sparingly and only in those cases where public policy contraventions warrant judicial intrusion in a testatrix's private sphere'.[61]

[60] See discussion on Majiedt J's minority judgment in §9.2(c).
[61] *Wilkinson v Crawford supra* 129.

APPENDICES

Appendix 1: Ethical Clearance Certificate Dated 13 February 2018

Appendix 1

Faculty of Law
Research Ethics Committee

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa
Room 6.29 ▪ Kramer Building ▪ Middle Campus
Tel: +27 021 650 3080 Fax: +27 021 650 5660 Fax2Email : 086 572 1093
E-mail: lamize.viljoen@uct.ac.za
Internet: www.law.uct.ac.za

13 February 2018

Ms Fatimah Essop – ESSFAT001
c/o Department of Private Law
Level 4, Faculty of Law
Kramer Law Building, UCT

Contact information
Mobile Contact: Mobile: +27 072 694 3965 or via email: fessop@mweb.co.za

Re: Clearance Process Report for L0066-2017: "The Intersection between South African Law of Succession and Islamic Law of Succession and how it pertains to the Muslim Community in South Africa"

Thank you for your revised application submitted. The Law Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and confirm that all ethical issues have been adequately addressed.

Ethics clearance is hereby granted as of 13 February 2018 for a period of 12 months and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

Please do quote reference number above on all communication to the committee.

With best wishes,

Dr Kelley Moult
CHAIRPERSON: REC LAW FACULTY

cc: Professor M Paleker – Supervisor – Private Law Department, UCT

"Our Mission is to be an outstanding teaching and research university, educating for life and addressing the challenges facing our society."

Appendix 2: Ethical clearance certificate dated 9 April 2019

Appendix 2

Faculty of Law

Research Ethics Committee

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa
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Tel: +27 021 650 3080 Fax: +27 021 650 5660 Fax2Email : 086 572 1093
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Internet: www.law.uct.ac.za

09 April 2019

Ms Fatimah Essop (ESSFAT001)
c/o Department of Private Law
Level 4, Faculty of Law
Kramer Law Building, UCT

Contact information
Mobile Contact: Mobile: +27 072 694 3965 or via email: fessop@mweb.co.za / fatima.essop@uct.ac.za

I have reviewed your request for an extension of your ethics clearance for your research entitled:
"The Intersection between South African Law of Succession and Islamic Law of Succession and how it pertains to the Muslim Community in South Africa"

An extension of ethics clearance is hereby granted from **08 April 2019 for a period of twelve months.**

Ref: L0066-2017

With best wishes,

Associate Professor Kelley Moult
REC: CHAIRPERSON

Please note that any material changes to the proposal will need to be cleared as an amendment.

Please do quote reference number above on all communication to the committee.

cc: Professor M Paleker – Supervisor – Private Law Department, UCT

Appendix 3: List of interview questions

APPENDIX 3

INTERVIEW QUESTIONS FOR PARTICIPANTS

Categories of Participants

A. Muslim Judicial Council
B. Master of the High Court
C. Attorneys

A. Interview questions for administrator in wills department at the MJC

1. Can you tell me a little about yourself, like your name and your role at the MJC?
2. How long are you working at the MJC?
3. What role does the MJC play in the community?
4. How is the MJC perceived within the Cape Muslim community?
5. What are your qualifications?
6. Do you have any South African legal qualifications in wills and estates?
7. How many people work in your department?
8. What are the services your department provide?
9. In your experience do Muslims in Cape Town draw up wills?
10. If yes, do they include Islamic inheritance laws in their wills?
11. If yes to (10), how do they include Islamic inheritance laws?
12. Does the MJC provide a will drafting service? If yes how and at what cost?
13. Does the MJC provide the Muslim public with distribution certificates?
14. Who request these distribution certificates from you? The family or the executor of an estate?
15. If yes, who draws up this certificate at the MJC?
16. How are the Islamic heirs determined?
17. Does the MJC include children born out of wedlock in its distribution certificate?
18. How does the MJC approach the situation where children were potentially conceived out of wedlock?
19. Does anyone ever challenge the allocation in the MJC distribution certificate?
20. Which schools of law does the MJC follow in legal rulings?
21. Do they stick to one school of law in inheritance matters?
22. Who issues the legal rulings (*fatāwa*) in your department?
23. Are these rulings binding on the Muslim public?
24. In your experience do Muslim testators leave bequests in their wills?
25. Who do they commonly leave bequest to?
26. Do they ever leave bequest to heirs?
27. Do Muslim testators make provision for usufructs in their wills? How?
28. In your experience are Muslims in Cape Town married according to Muslim rites only or by civil law too?
29. Do Muslin testators make provision for testamentary trust in their wills?
30. In your experience is the family home usually the main asset in the estate when assisting testators with drafting wills?

31. Do you know if Islamic law heirs even enter into redistribution agreements after the death of the testator?
32. Do heirs often sell the family home to realize the Islamic law shares?
33. What is the MJC's position on the pension benefits of a testator?
34. What is the MJC position on religious liabilities?
35. What are the testators main religious liabilities?
36. Does the MJC reflect religious liabilities in distribution certificate? If so, how is it determined?
37. Do spouse submit maintenance claims if their inheritance shares too little?
38. Do testators ever make special provision for their spouses?
39. If yes to 38, what measures do they take in their wills?
40. Can a spouse inherit the *radd* (surplus)?

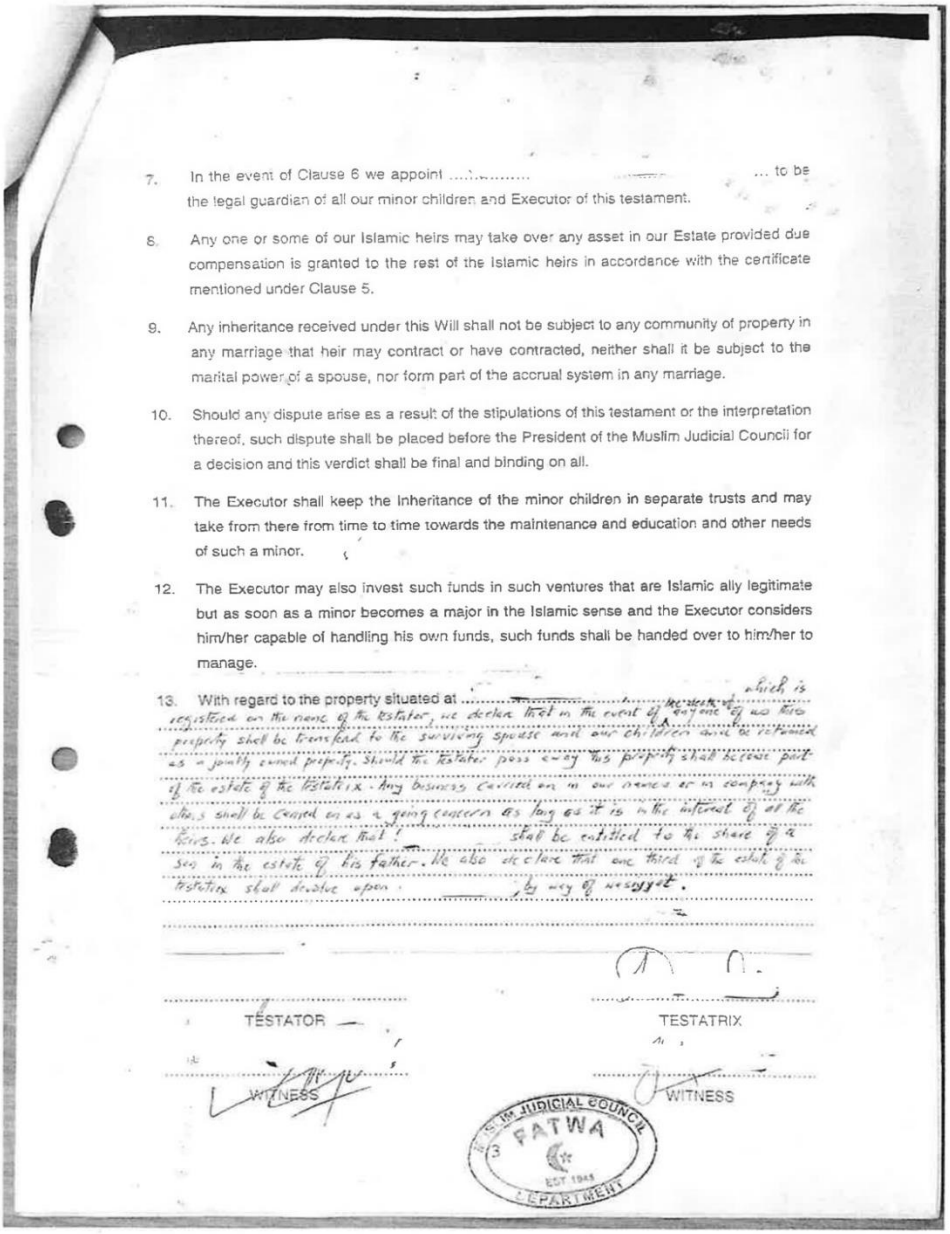
B. Interview questions for Assistant Master of the High Court

1. Can you tell me a little about yourself, like your name and your role at the Master's office?
2. How long are you working at the Master's office?
3. How many estate files do you process a day?
4. Is there a way to determine Muslim estates?
5. In your experience when dealing with estates do you find Muslims still dying intestate?
6. Are more Muslims drafting wills?
7. How familiar are you with Islamic inheritance laws?
8. Have you encountered estates with Islamic wills?
9. How do testators include Islamic inheritance laws in wills?
10. How does Master's office deal with wills that include Islamic inheritance laws?
11. Which organisations do you accept distribution certificates from?
12. Do you ever question the allocation to shares in distribution certificates?
13. In your experience are Muslims mostly married by Muslim or by Muslim rites and civil law?
14. Do Muslim testators leave bequests in their wills?
15. Do they ever leave bequest to their Islamic law heirs?
16. If yes to 13, to who do they leave bequest?
17. Do Muslim testators make provision for usufructs in their wills? If yes, in favour of whom?
18. How are religious liabilities dealt with in Muslim estates?
19. How are children born out of wedlock dealt with when winding up the estate?
20. Do surviving spouses ever submit maintenance claims against an estate?
21. In your experience is the family home usually the main asset in the estate when winding up an estate?
22. How does the Islamic fractional shares affect the winding up of an estate?
23. Do Islamic law heirs enter into redistribution agreements?
24. If yes to 23, how does this usually occur?
25. Are provisions made for testamentary trust in Islamic wills?

C. Interview questions for Attorneys

1. Can you tell me more about yourself, like your name and how long you working as an attorney?
2. What is your position in the law firm?
3. What are the main areas of work in the law firm?
4. What area of work do you specialize in?
5. How familiar are you with Islamic laws of inheritance?
6. In your experience when dealing with estates do you find Muslims still dying intestate?
7. Are more Muslims drafting wills now than earlier in your practice?
8. How familiar are you with Islamic inheritance laws?
9. Do you assist testators in drafting Islamic wills?
10. How do you include Islamic inheritance laws in wills?
11. Do all your Muslim clients request Islamic wills?
12. Do Muslim testators leave bequests in their wills?
13. If yes to 12, to whom and how much of their estate will they bequeath?
14. Do they ever leave bequest to their Islamic law heirs?
15. Do they ever try to equalize shares between their male and female children?
16. In Islamic wills, which organisations do you rely on for distribution certificates?
17. Do you ever question the allocation of shares in the distribution certificates?
18. How are children born out of wedlock dealt with when winding up the estate?
19. Are you aware of different opinions with regard to determining whether a child was conceived in or out of wedlock?
20. In your experience are Muslims mostly married by Muslim or by Muslim rites and civil law?
21. Does polygamy still occur?
22. Do spouse submit maintenance claims if their inheritance shares too little?
23. Do testators ever make special provision for their spouses?
24. If yes to 23, what measures do they take in their wills?
25. How does Islamic divorce affect inheritance ?
26. Do Muslim testators make provision for usufructs in their wills? If yes, in favour of whom?
27. In your experience is the family home usually the main asset in the estate when drafting Muslim wills?
28. How does the Islamic fractional shares affect the winding up of an estate?
29. Do Islamic law heirs enter into redistribution agreements? How?
30. Are provisions made for testamentary trust in Islamic wills?
31. Do Muslin testators make provision for testamentary trust in their wills?
32. Do you make reference to the religious liabilities of a testator in a Muslim will?
33. If yes to 32, which religious labilities?
34. How are these religious liabilities dealt with when winding up a Muslim estate?
35. Does the MJC reflect religious liabilities in distribution certificate? If so, how is it determined?
36. How are pension benefits dealt with in Muslim estates?

Appendix 4: MJC 4 – Bequest provision



7. In the event of Clause 6 we appoint .... to be the legal guardian of all our minor children and Executor of this testament.

8. Any one or some of our Islamic heirs may take over any asset in our Estate provided due compensation is granted to the rest of the Islamic heirs in accordance with the certificate mentioned under Clause 5.

9. Any inheritance received under this Will shall not be subject to any community of property in any marriage that heir may contract or have contracted, neither shall it be subject to the marital power of a spouse, nor form part of the accrual system in any marriage.

10. Should any dispute arise as a result of the stipulations of this testament or the interpretation thereof, such dispute shall be placed before the President of the Muslim Judicial Council for a decision and this verdict shall be final and binding on all.

11. The Executor shall keep the inheritance of the minor children in separate trusts and may take from there from time to time towards the maintenance and education and other needs of such a minor.

12. The Executor may also invest such funds in such ventures that are Islamic ally legitimate but as soon as a minor becomes a major in the Islamic sense and the Executor considers him/her capable of handling his own funds, such funds shall be handed over to him/her to manage.

13. With regard to the property situated at ..... which is registered on the name of the testator, we declare that in the event of ... of us the property shall be transfered to the surviving spouse and our children and be retained as a jointly owned property. Should the testator pass away this property shall become part of the estate of the testatrix. Any business carried on in our names or in company with others shall be carried on as a going concern as long as it is in the interest of all the heirs. We also declare that ..... shall be entitled to the share of a son in the estate of his father. We also declare that one third of the estate of the testatrix shall devolve upon ..... by way of usufruct.

TESTATOR

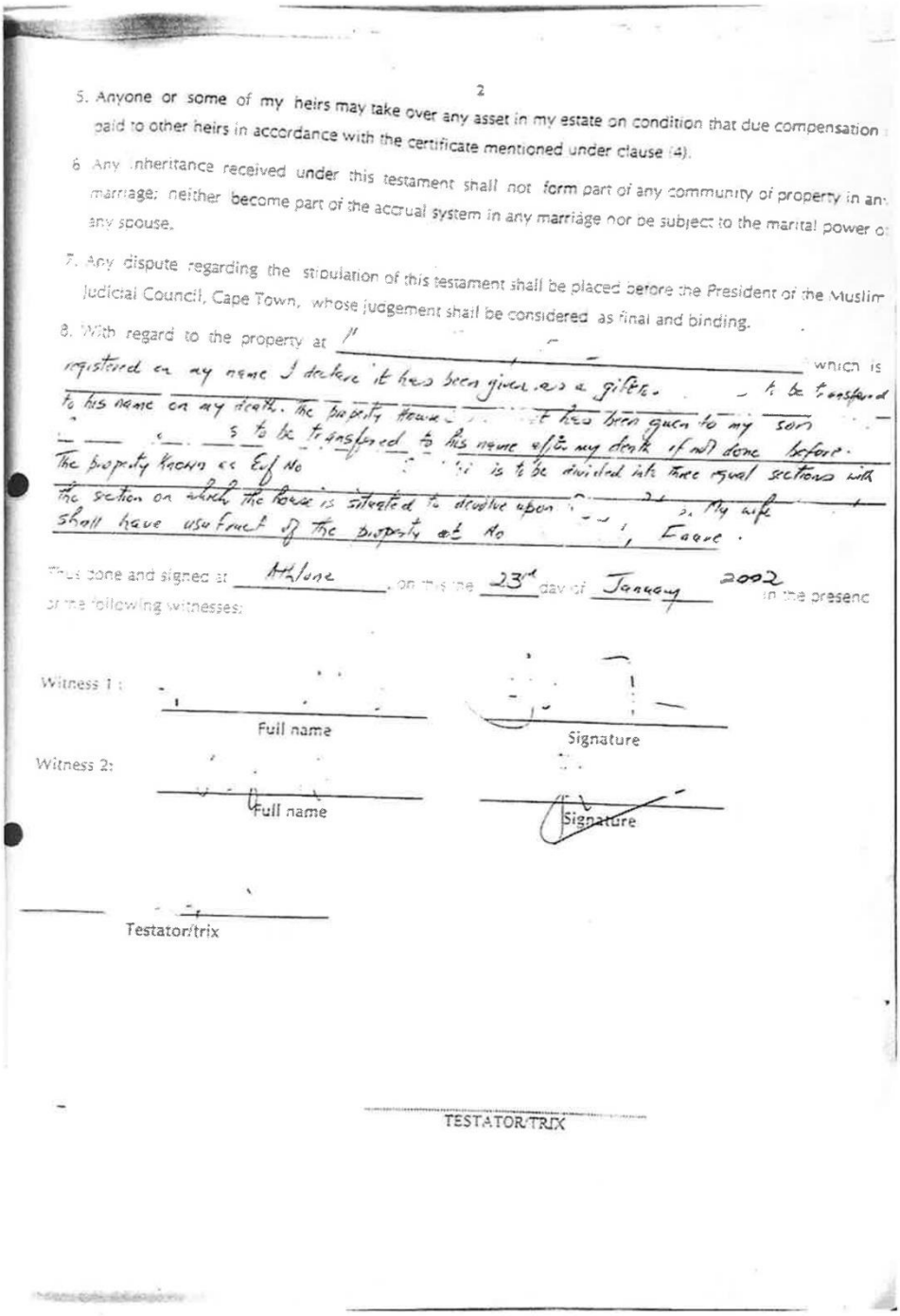
TESTATRIX

WITNESS

WITNESS

MUSLIM JUDICIAL COUNCIL FATWA EST 1945 DEPARTMENT

Appendix 5: MJC 5 – Usufruct and house as a gift provision



2

5. Anyone or some of my heirs may take over any asset in my estate on condition that due compensation
paid to other heirs in accordance with the certificate mentioned under clause (4).

6. Any inheritance received under this testament shall not form part of any community of property in an
marriage; neither become part of the accrual system in any marriage nor be subject to the marital power o
any spouse.

7. Any dispute regarding the stipulation of this testament shall be placed before the President of the Muslim
Judicial Council, Cape Town, whose judgement shall be considered as final and binding.

8. With regard to the property at 1" which is
registered on my name I declare it has been given as a gifte. It be transferred
to his name on my death. The property House it has been given to my son
is to be transferred to his name after my death if not done before.
The property known as Erf No is to be divided into three equal sections with
the section on which the house is situated to devolve upon 2. My wife
shall have usufruct of the property at No Eaare.

Thus done and signed at Athlone on this the 23rd day of January 2002 in the presenc
of the following witnesses:

Witness 1 :

Full name

Signature

Witness 2:

Full name

Signature

Testator/trix

TESTATOR/TRIX

Appendix 6: MJC 6 - House as a gift provision

10. With regard to the property situated at Nanuberg, which is registered on my name, I declare that on 28.6.2004 I have given and granted this property as a free gift to my daughters , and on this condition that I shall be allowed to continue to reside in the premises and that I shall remain responsible for all payments on the property as well as repairs and that transfer to their names shall take place after my demise.

Thus done and signed at Cathlone, on this the 28th June 20.04 in the presence of the following witnesses:

Witness 1: .....
Full name

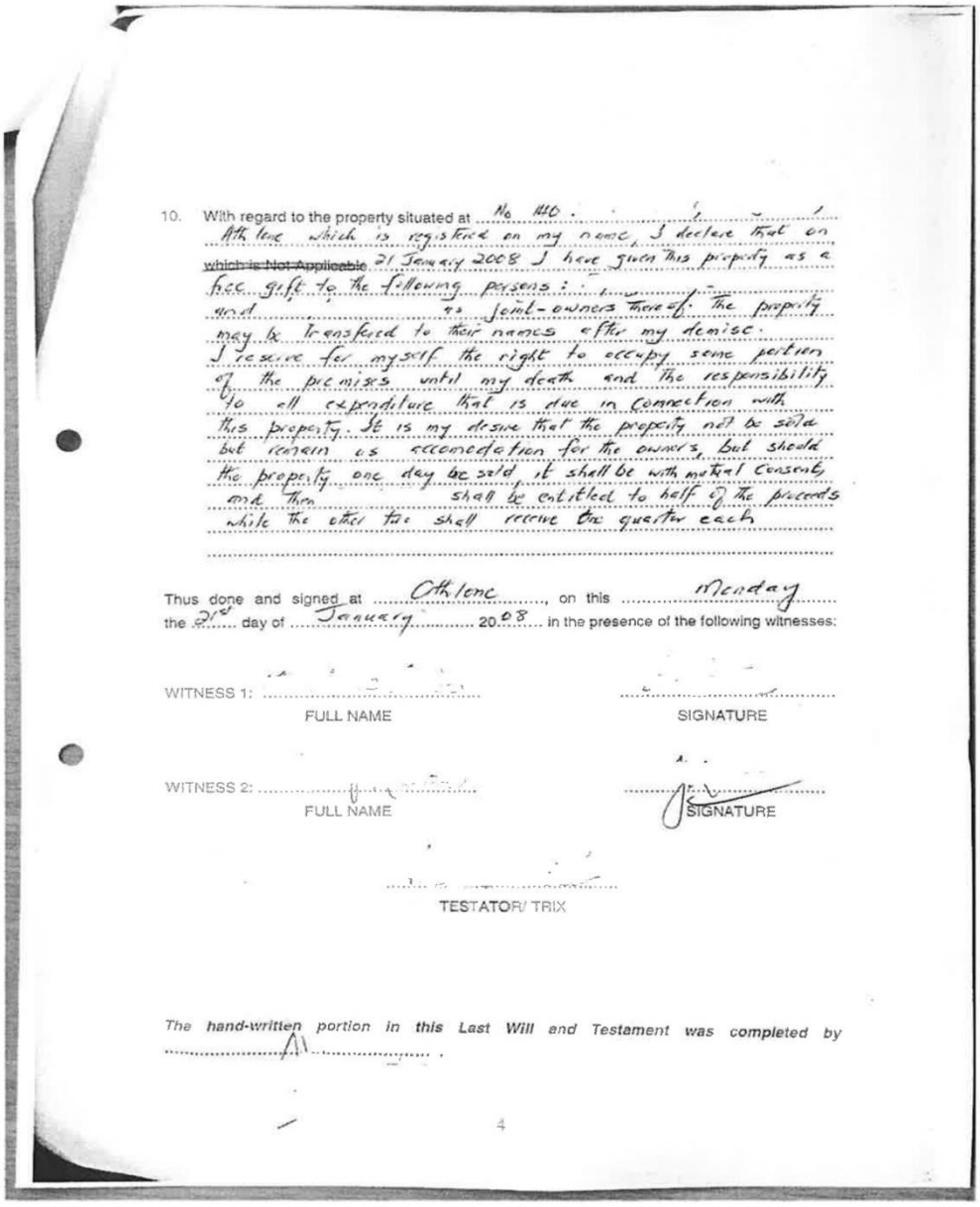
.....
Signature

Witness 2: .....
Full name

.....
Signature

.....
Testator/trix

Appendix 7: MJC 7 – House as a gift provision



10. With regard to the property situated at No 440. Athlone which is registered on my name, I declare that on ~~which is Not Applicable~~ 21 January 2008 I have given this property as a free gift to the following persons: [illegible] and [illegible] as joint-owners thereof. The property may be transfered to their names after my demise. I reserve for myself the right to occupy some portion of the premises until my death and the responsibility to all expenditure that is due in connection with this property. It is my desire that the property not be sold but remain as accomodation for the owners, but should the property one day be sold it shall be with mutual consent and then [illegible] shall be entitled to half of the proceeds while the other two shall receive one quarter each.

Thus done and signed at Athlone, on this Monday the 21st day of January 20 08 in the presence of the following witnesses:

WITNESS 1: [illegible]
FULL NAME

[illegible]
SIGNATURE

WITNESS 2: [illegible]
FULL NAME

[illegible]
SIGNATURE

[illegible]
TESTATOR/ TRIX

*The **hand-written** portion in **this** Last Will and Testament was completed by* [illegible].

4

Appendix 8: MJC Fatwa 1

2. **Questions**

2.1. Children conceived out of wedlock

2.1.1. When a child is conceived out of wedlock but born more than 6 months after marriage has been contracted between the biological parents, the child is regarded as legitimate.[1]

2.1.2. Accordingly, the inheritance of such a child is not dependent on a bequest.

2.1.3. In calculating the minimum period of 6 months, the lunar calendar will be considered.

2.1.4. The madhāhib differ in respect of precisely when the minimum gestation period ought as a rule to be calculated:

2.1.4.1. The Mālikīs and Ḥanbalīs calculate it from the moment of first possible sexual contact between the married couple. (It should be noted, however, that neither of these schools permit marriage to a pregnant woman, even to the man who impregnated her.)

2.1.4.2. The Ḥanafī madhhab calculates it from the moment of contract itself.

2.1.4.3. The Shāfi'ī madhhab considers the moment of first seclusion *(khalwah)* as the starting point.[2]

2.1.4.4. As a rule the MJC subscribes to the Shāfi'ī position.

2.1.5. In view of the fact that it is the dominant custom in our society for newly married couples to begin living together immediately after marriage has been contracted, the difference between the Shāfi'i and Ḥanafī schools on this point would have negligible practical consequences.

2.1.6. In view of certain situations, we believe that discretionary consideration ought to be given to the view that where a child has been conceived out of wedlock by an unmarried woman, the child becomes legitimate (with all the consequences that flow from legitimacy) if the father claims paternity (*istilḥāq*), even if the child was born before the passage of 6 months from marriage.[3]

2.2. Paternal grandfather and siblings

Our position, in line with the view of the majority of Fuqahā—'Umar, 'Alī, 'Uthmān and Zayd ibn Thābit رضي الله عنهم among the Ṣaḥābah, and Mālik, al-Shāfi'ī, Aḥmad, Abū Yūsuf and Muḥammad ibn al-Ḥasan رحمهم الله among the jurists—is that the paternal grandfather shares with the siblings in inheritance, and does not exclude them.

2.3. Lifelong usufruct

2.3.1. Although the separation of usufruct from corpus in gifts that continue posthumously is not supported by the Shāfi'ī, Ḥanafī or Ḥanbalī school, it is recognized that a social need exists to provide relief, especially to widows.

2.3.2. The required relief may be found in utilizing the institution of *'umrā* as envisaged in the Mālikī madhhab. By means of *'umrā* a usufructuary can be granted lifelong use of a property, with that property then reverting to the estate of the grantor upon the demise of the usufructuary.

2.3.3. The MJC supports and encourages the use of *'umrā* where recognizable need exists.

2.4. Proceeds of pension fund, provident fund or retirement annuity

2.4.1. The proceeds of funds such as the above are typically made up of two portions: (a) a portion that came from deductions from the employee's salary; and (b) the portion that would have been contributed by the employer.

2.4.2. On each of these two portions there would also be growth that accumulated through investment over the years.

2.4.3. Unless Sharī'ah compliance was ensured, the part of the payout that originated from returns on investment would have been contaminated to a certain degree.

2.4.4. Before inheritance may be considered, purification of the payout should first be undertaken by removing from the growth on the fund any amounts that accrued from investment in prohibited avenues. Where actual facts and figures are accessible they should be used; otherwise discretionary percentages should be resorted to.

2.4.5. The portion of the purified payout that is subject to inheritance is only that which represents deductions from the employee's salary and growth thereupon, since his claim to ownership thereof is rooted in remuneration for labour.

2.4.6. The independence and separateness of the legal structure used to house the fund (eg. a trust) amounts to a legal fiction which, in a manner strongly reminiscent of the company, is resorted to for expedience, but does not alter the underlying reality of ownership.

2.4.7. Employers' contributions and growth on it will not form part of the estate since the deceased did not at any moment up to his death have the type of entitlement to it that amounts to ownership in the Sharīʿah.

2.4.8. On the portion represented by employers' contribution and growth on it, the beneficiaries by law may come to a settlement among themselves in which they are not necessarily guided by the strictures of the Islamic law of succession.

2.5. Community of property and the accrual system

2.5.1. It is difficult, if not impossible, to reconcile community of property as a consequence of marriage with ownership and transfer of property under the Sharīʿah.

2.5.2. While a case might be made for the voluntary sharing of existing assets, the effect of community of property upon any possible future assets violates the Sharīʿah's ban on *gharar* (uncertainty).

2.5.3. The attempt to justify community of property on *shirkat al-mufāwaḍah* as conceived of in the Ḥanafī madhhab is abortive in that it ignores the conditions of *mufāwaḍāh* in the Ḥanafī madhhab—conditions through which *mufāwaḍah* is turned into a most unwieldy instrument, and upon the absence of any of which *mufāwaḍah* is converted into *ʿinān*.

2.5.4. Where a will states that the estate is subject to community of property, or it is well known and documented that the deceased was married in community of property, the Sharʿī heirs will succeed to half of the estate.

2.5.5. The remaining half, which in terms of South African law is ceded to the surviving spouse, forms a point of tension and divergence between the Sharīʿah and South African law.

2.5.6. The heirs whom this clash of laws deprives of their share in that half have the option of willingly ceding their shares to the surviving spouse, thereby defusing the tension, or standing by their claim to it. They may not be forced to forgo their Shar'ī claim, despite the fact that it cannot be satisfied in a South African court of law.

2.6. The accrual system

2.6.1. As an agreement at the beginning of a marriage to share assets still to be acquired during the subsistence of that marriage upon its dissolution through death or divorce, the accrual system entails the same violation of *gharar* as community of property.

2.6.2. Under the accrual system, the situation that obtains upon death is similar in the most essential aspects to a case of community of property.

2.6.3. The same that is said for community of property may therefore be said for the accrual system. It creates a bifurcation of legal perspectives whereby the Sharīʿah takes a view of ownership different to that of South African law.

2.7. Interest, unlawful investments and insurance

2.7.1. Interest received under any sort of contractual structure is never owned by the recipient, and must be given away as an obligatory charity. Since it was never owned by the deceased, it cannot be inherited from him.

2.7.2. With unlawful investments, the originally invested capital will form part of an estate, but the growth that resulted from prohibited investment must be treated in the same manner as interest received.

2.7.3. As much of an insurance payout as equates to the total of premiums paid in will constitute part of the estate.

2.7.4. What is to be done with the remainder depends on the type of insurance in question. Where it happens to be commercial insurance, it is unlawful and must be given in charity.

2.7.5. If it is cooperative insurance (and to the best of our knowledge only one company in South Africa, namely PPS, offers a cooperative type of life cover) the designated beneficiaries may benefit from it without compunction.

2.8. Road Accident Fund

2.8.1. The Road Accident Fund is funded primarily from a levy raised on fuel. This levy is collected from oil companies and refineries by SARS who passes it to the RAF via the National Treasury and the Department of Transport. The cost is passed to the consumer as part of the purchase price of fuel.

2.8.2. The levy is neither a direct charge to the consumer, nor is it held in trust for him in person. His personal entitlement ends the moment he pays it as part of the purchase price for fuel. As such, no vestige of personal and individual ownership remains over the funds in the RAF.

2.8.3. Payments from the RAF to the estate of a deceased person will therefore not be subject to the Islamic law of inheritance. Those laws apply only to what was already owned by the deceased at the moment of death.

2.8.4. If the distribution of payments from the RAF are regulated by existing laws, those laws should be followed in apportioning it between surviving dependants; otherwise those dependants may come to a settlement between themselves, in which settlement they are not bound by the rules of inheritance.

2.9. Public treasury

2.9.1. The MJC deems neither itself nor any other public Muslim organization in South Africa as a quasi-treasury that fulfils the role of the *bayt al-māl*.

2.9.2. The phenomenon of an inefficient *bayt al-māl* has been recognized in the Shāfi'ī madhhab as early as in the 4th century. The view of Ibn Kajj of Dīnawar (died 405AH) and his contemporary Ibn Surāqah of Baṣrah that instead of giving inheritance to an inefficient treasury, *radd* should be resorted to, has formed the basis of fatwā in the madhhab ever since. The same holds true today.[4]

2.9.3. In the case of only a daughter as heir she will receive the entire estate: half as *farḍ* and the other half by way of *radd*.

2.9.4. More interesting than the case of a lone daughter as heir is the following case on which we had to pronounce fatwā of recent:

2.9.4.1. In making his will, a revert to Islam has the following persons to consider: a Muslim wife, and a mother and a sister who are both non-Muslims.

2.9.4.2. To his mother and sister he may leave one third ($^4/_{12}$) by way of *waṣiyyah*. His wife would take a quarter ($^3/_{12}$). But since there is *ijmā'* that the wife is precluded from *radd*, $^5/_{12}$ of the estate is left without recipient.

2.9.4.3. Taking our cue from the Ḥanafī madhhab, we ruled that *radd* to the wife under these circumstances is permitted, and that this position does not violate the *ijmā'* cited in this context. The text of this fatwā is given in the addendum.*

والله تعالى أعلم

And Allah knows best.

MUSLIM JUDICIAL COUNCIL FATWA EST. 1945 DEPARTMENT

النصوص الفقهية المستند إليها في هذه الفتوى

١. أما المذهب الشافعي، فجاء في كتاب العدد من **غاية تلخيص المراد من فتاوى ابن زياد**، المطبوع بذيل **بغية المسترشدين** ص٢٩٦ من طبعة دار الفكر سنة ١٤١٤/١٩٩٤، ما نصه:

نكح حاملا من الزنا، فأتت بولد لزمن إمكانه منه، بأن ولدت لستة أشهر ولحظتين من عقده وإمكان وطئه، لحِقه. وكذا إن جهلت المدة ولم يدر هل ولدته لمدة الإمكان أو لدونها على الراجح. وإن ولدته لدونها لم يلحقه.

وأما المذهب الحنفي ففي باب ثبوت النسب – وهو الباب السابع عشر من أبواب كتاب الطلاق – من الفتاوى الهندية ٥٦٤/١ من طبعة دار الكتب العلمية سنة

ولو زنى بامرأة فحملت، ثم تزوجها فولدت، إن جاءت به لستة أشهر فصاعدا ثبت نسبه؛ وإن جاءت به لأقل من ستة أشهر لم يثبت نسبه، إلا أن يدعيه ولم يقل إنه من الزنا. أما إن قال: إنه مني من الزنا فلا يثبت نسبه ولا يرث منه. كذا في الينابيع.

٢. جاء في الموسوعة الفقهية ١٤٤/١٨:

وهذه المدة تحسب من وقت الزواج وإمكان الوطء عند الجمهور، ومن وقت عقد الزواج عند الحنفية، ومن وقت الخلوة بعد العقد عند الشافعية.

٣. قال الدكتور عبد العزيز الفوزان في رسالته **حكم نسبة المولود إلى أبيه من المدخول بها قبل العقد** ص ٢١:

اختلف العلماء في استلحاق ولد الزنا إذا لم تكن أمه فراشا على قولين:

القول الأول: أن ولد الزنا يلحق بالزاني إذا استلحقه، ولم تكن أمه فراشا لزوج أو سيد. وهذا مذهب عروة بن الزبير، وسليمان بن يسار [انظر المغني ١٢٣/٩ وزاد المعاد ٤٢٥/٥]، ذكر عنهما أنهما قالا: «أيما رجل أتى إلى غلام يزعم أنه ابنه، وأنه زنا بأمه، ولم يدَّع ذلك الغلام أحدٌ، فهو ابنه.» [رواه الداري رقم ٣١٠٦، ٤٨٢٢]. وهو قولٌ

Appendix 9: MJC letter requesting documents from executor

Appendix 9

مجلس القضاء الإسلامي

MUSLIM JUDICIAL COUNCIL(SA)

FATWA COMMITTEE

لجنة الفتاوى

Headquarters
20 Cashel Avenue
Athlone 7764
South Africa

Postal Address
P.O.Box 38311
Gatesville
South Africa

www.mjc.org.za
Tel no. (021) 684 4600 Email: fatwa@mjc.org.za Fax: (021) 696 8502

بسم الله الرحمن الرحيم FATWA NO.

السلام عليكم ورحمة الله و بركاته

The MJC Fatwa Department requires the following documentation to facilitate the drawing up of an Islamic Distribution Certificate

1. Certified copy of deceased's Death Certificate.
2. Copy of Deceased's Muslim Marriage Certificate (All Muslim marriage certificates if the deceased was male and married more than once).
3. Copy of the Last Will and Testament of the deceased.
4. Completed Next of Kin Affidavit (attached) 2012
5. Copies of deceased's children's Identity Documents.
6. Any other documentation relevant to the Estate and determination of Heirs.

On receipt of the above documentation the MJC Fatwa Department will endeavor to furnish the Islamic Distribution Certificate within 7 working days.

The cost of the Islamic Distribution Certificate is R 300.00. The Islamic Distribution Certificate must be collected at the MJC Chambers. This fee is payable COD (cash on delivery) or via EFT (electronic funds transfer). Kindly find address and banking details below

ADDRESS

MJC Fatwa Department
20 Cashel Avenue
Athlone
7764
Cape Town

BANKING DETAILS

Muslim Judicial Council
Al-Baraka Bank
Branch Code 800 000
Account number 78600202803
Reference Name of Estate Late

مجلس القضاء الإسلامي EST. 1945 MUSLIM JUDICIAL COUNCIL (SA)

(Admin) MJC Fatwa Department

Appendix 10: MJC distribution certificate

مجلس القضاء الإسلامي

MUSLIM JUDICIAL COUNCIL (SA)

FATWA COMMITTEE

لجنة الفتاوى

HEADQUARTERS
20 CASHEL AVENUE
ATHLONE 7764
SOUTH AFRICA

TEL: (021) 684 4600

EMAIL: fatwa@mjc.org.za
www.mjc.org.za

POSTAL ADDRESS
P.O. BOX 38311
GATESVILLE 7766
SOUTH AFRICA.

FAX: (021) 696-5154 / 696 8502

بسم الله الرحمن الرحيم

FATWA NO:

ISLAMIC DISTRIBUTION OF ESTATE

NAME OF DECEASED:
ID NUMBER:

Islamic distribution:

- To the surviving Spouse
  - = 1/8
- To the surviving Sons
  - = 7/32
  - = 7/32
- To the surviving Daughters
  - = 7/64
  - = 7/64
  - = 7/64
  - = 7/64

Total 100,00%

*We declare that to the best of our knowledge and in accordance with the information supplied by the Executor as well as in accordance with the Last Will and Testament the above is the correct distribution certificate of the estate of the late Ismail Moosa Vallie.

Signed: .....

Dated: 17-09-2015.

Stamp: MUSLIM JUDICIAL COUNCIL FATWA EST 1945 DEPARTMENT

Appendix 11: MJC Fatwa 2

مجلس القضاء الإسلامي

MUSLIM JUDICIAL COUNCIL (SA)

FATWA COMMITTEE

لجنة الفتاوى

Headquarters:
20 Cashel Avenue
Athlone 7764
South Africa

Tel: 021 684 4600

www.mjc.org.za

Postal Address:
P.O. Box 38311
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E-mail: fatwa@mjc.org.za

Re: Inclusion of usus/usufruct/habitatio in a will

1. The need of your client would appear to best satisfied by using the structure of *'ūmrā* (عُمْرَى) as conceived of in the Mālikī school.
2. The Mālikī school conceives of the *'umrā* as a gift uniquely distinct from ordinary gifts in several aspects:
   a. It entails the transfer of only the *manfa'ah*, or usufruct,[1] of an asset, and not the asset itself.
   b. The *manfa'ah* is transferred for the duration of the lifespan of the recipient.
   c. Upon the death of the recipient it returns to the giver, or in case the giver has already died by that time, to those who were the giver's heirs on the day of the giver's death.
3. The Mālikī jurist Abu l-Barakāt Aḥmad ibn Muḥammad al-Dardīr (died 1201AH/1786CE) states in his larger commentary on the *Mukhtaṣar* of Khalīl:

> **(وجازت العمرى)** وهي كما قال ابن عرفة: تمليكُ منفعةٍ حياة المُعْطَى بغير عوض إنشاءً، فخرج تمليك الذات بعوض وبغيره... **(ورجعت)** العمرى بمعنى الشيء المعمَر إذا مات المعمَر بالفتح ملكا **(للمعمِر)** بالكسر **(أو وارثه)** إن مات، والمراد وارثه يوم موت المعمِر بالكسر، لا وارثه يوم المرجع.
>
> ***'Umrā* is permissible.** In the words of Ibn 'Arafah, it entails the transfer of ownership of a usufruct [of an asset] for the duration of the recipient's lifetime, with or without recompense, as an inception. Transfer of [the tangible] asset itself thus stands excluded. Ownership of it—that is, of the thing given as *'umrā*—**returns to the giver** upon the death of the recipient, **or to his heir** if he [the giver]

[1] In using the word *usufruct* as the equivalent of *manfa'ah*, consideration went to the general meaning of the word as denoting "the right to enjoy the use and advantages of another's property short of the destruction or waste of its substance," and not to the more restricted legal structure in which it was used alongside *usus* and *habitatio* in your question.

has died. This means his heir on the day he died, and not his heir on the day of the return.[2]

4. The *ʿumrā* recipient's ownership of the right to use the property is not restricted to merely inhabiting the property, but is inclusive of the right to benefit from it in all ways short of alienating the physical asset or destroying its substance.
5. The *ʿumrā* recipient remains responsible for maintenance of the property for the duration of the *ʿumrā*.[3]
6. Opting for the position of a madhhab other than the madhhab of one's general practice is sanctioned, and would even be meritorious where such departure is motivated by the need to alleviate a recognizable need.[4]
7. If the testatrix is motivated by the need to provide stable living arrangements for her husband in a situation where this need appears at risk of jeopardy or instability, it constitutes an act of merit.
8. However, in arranging the inclusion of an *ʿumrā* into the will, what must be taken into acute consideration is that the transfer of the *manfaʿāh* should occur within the testatrix's lifetime,

---

[2] al-Dardīr, *al-Sharḥ al-Kabīr ʿalā Mukhtaṣar Khalīl* (on the margins of al-Dasūqī's *Ḥāshiyah*) vol. 4 p. 108.

[3] Though we could not find explicit mention of this point in the Mālikī texts at our disposal, clauses 107 and 108 of the Moroccan statute *Mudawwanat al-ʿḤuqūq al-ʿAyniyyah* (as amended in November 2013) places the responsibility for maintenance and general expenses upon the recipient. It is assumed that this statute draws directly from the Mālikī fiqh. They state:

مادة 107: يجب على المعطَى له أن يعمّر العقار موضوع الحق بأن يقيم فيه بنفسه أو يأخذ غلته، ولا يجوز نقل هذا الحق إلا للمعطِي أو لورثته.

مادة 108: يجب على المعطَى له أن يبذل في المحافظة على العقار موضوع العمرى العناية التي يبذلها الشخص الحريص على ملكه، وتقع عليه النفقات اللازمة لحفظه وصيانته. ويتحمل أيضا التكاليف العادية المفروضة على هذا العقار.

[4] The rules of departure from madhhab are set out in the following quotation:

قال ابن حجر الهيتمي في تحفة المحتاج 109/10:

فروع في التقليد يضطر إليها مع كثرة الخلاف فيها.

وحاصل المعتمد من ذلك أنه يجوز تقليد كل من الأئمة الأربعة، وكذا من عداهم ممن حفظ مذهبه في تلك المسألة ودُوِّن حتى عرفت شروطه وسائر معتبراته. فالإجماع الذي نقله غير واحد على منع تقليد الصحابة يحمل على ما فقد فيه شرط من ذلك. ويشترط لصحة التقليد أيضا أن لا يكون مما ينقض فيه قضاء القاضي. هذا بالنسبة لعمل نفسه، لا لإفتاء أو قضاء، فيمتنع تقليد غير الأربعة فيه إجماعا كما يعلم مما يأتي، لأنه محضُ تشهٍّ وتغريرٌ، ومن ثم قال السبكي: إذا قصد به المفتي مصلحة دينية جاز، أي: مع تبيينه للمستفتي قائل ذلك. وعلى ما اختل فيه شرط مما ذكر يحمل قول السبكي: ما خالف الأربعة كمخالف الإجماع.

and should not be deferred to the time of the testatrix's death. There should ideally be a document separate from the will, executed in the testatrix's lifetime, in which the *'umrā* is recorded, to which retrospective reference would be made in the will.

9. If the *'umrā* is not validly executed during the testatrix's lifetime, its inclusion into the will becomes a matter of *waṣiyyah*. As a *waṣiyyah* to a *wārith* (statutory heir) it would then become complicated by issues such as quantification to ascertain whether it exceeds one-third, and where it does, ratification by the remaining heirs.

والله تعالى أعلم

And Allah knows best.

MT Karaan

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