

THE APPLICABILITY OF THE ISLAMIC LAW OF SUCCESSION IN SOUTH AFRICA

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SUMMARY

Islamic law is divine law since it is based on the totality of the commands of *Allah* as embodied in the Holy *Qur'an*. The non-recognition of Muslim personal law has resulted in great prejudice for Muslims residing in South Africa. The general principles of the Islamic law of succession are prescribed in the *Qur'an*. The *Qur'an* fixes the shares of each individual. The shares of the heirs as determined by the *Qur'an* are binding on all Muslims. In accordance with *Shari'ah* the testator is allowed to bequeath one-third of his estate.

The focus of this article is to give an overview of the Islamic law of inheritance with the aim of increasing awareness that South African Muslims can implement the Islamic law of inheritance by means of drafting a valid will, without any difficulty.

1 INTRODUCTION

Islamic law¹ is divine law since it is based on the totality of the commands of *Allah*² as embodied in the Holy *Qur'an* and the *Sunnah*.³ The most fundamental meaning⁴ and concept of Islam and Islamic law is *Tawhid*, which means belief in the unity and oneness of Almighty God.

A further important aspect of the nature of Islamic law is that it is inextricably intertwined with the belief system and the moral values of Islam. The Islamic way of life advocates that the human being is the trustee of *Allah*

¹ *Shari'ah* covers all aspects of the Islamic faith, including beliefs and practices. *Shari'ah* is derived primarily from the *Qur'an* (the primary source of Islamic values). Muslims believe that the *Qur'an* is the exact word of Allah (One Supreme Being) revealed to the prophet Muhammad through the angel Gabriel and the *sunnah* (what the prophet did, said or tacitly approved of) is known from the *hadith* (documented narrations of the prophet). The *Shari'ah* is also formulated through *ijtihad* (interpretation of new cases through inferential analysis form the primary sources of Islamic law) applied by Muslim scholars. The presentation of Islamic perspectives on any issue must be based upon these sources, particularly the first two. See in this regard Doi *Shari'ah The Islamic Law* (1984) 2-111.

² An Arabic word encapsulating the oneness and magnificent qualities of God Almighty, one Supreme Being, God. See fn 1 above.

³ See fn 1 above.

⁴ Meaning serving as a foundation or core, primary rule or principle.

on planet earth and that the primary duty of every human being is to fulfil God's trust.⁵ As *Allah's* trustee, the human being lives his or her life according to clearly established spiritual and moral values and principles. These values and principles are found in the sources of *Shari'ah*.

The *Qur'an* describes the objectives of the *Shari'ah* as follows:⁶

"O mankind, a direction has come to you from God; it is a healing for the ailments in your hearts and it is a guidance and a mercy for the believers."

The *Shari'ah* aims at safeguarding people's interests in this world and the next.⁷ In order to attain these objectives, the three primary objectives of the *Shari'ah* are to:

- (a) educate the individual;
- (b) establish justice (*Adl or qist*); and
- (c) consider the public interest (*maslahah*).

The second and the third objectives are of particular interest. *Adl* literally means placing things in the right place. The second objective is, therefore, to establish a balance by fulfilling rights and obligations and by eliminating excess and disparity in all spheres of life. This in essence is distributive justice and social justice. The concept of justice characterises the *Qur'anic* message, for example, "When you judge between human beings, judge with justice"⁸ and again, "When you speak, speak with justice".⁹

Elsewhere the *Qur'an* demands justice alongside benevolence (*ihsan*), for example, "Surely *Allah* enjoins justice and doing good to others".¹⁰ The juxtaposition of justice and benevolence opens the scope to considerations of equity and fairness.

Muslim scholars are in agreement that the overriding objective of the *Shari'ah* is the public interest,¹¹ which is wide enough to encompass all measures that are beneficial to society. The five essential benefits are life, faith, intellect, property and lineage.

The non-recognition of Muslim personal law has resulted in great prejudice for Muslims residing in South Africa.¹² Muslims are not able to implement the *Shari'ah* in relation to issues pertaining to marriages, divorce, custody of minor children, maintenance as well as aspects within the

⁵ Gokul, Berhard, Du Plessis, Goolam and Heyns "General Foundations" in Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* (2002) 15 (hereinafter referred to as "*Legal Pluralism*").

⁶ The *Qur'an* ch 10 verse 75.

⁷ Gokul *et al* 15.

⁸ The *Qur'an* ch 4 verse 58.

⁹ The *Qur'an* ch 6 verse 152.

¹⁰ The *Qur'an* ch 16 verse 90.

¹¹ See Doi 11; and Hammudah *The Family Structure in Islam* (1977) 15-18.

¹² See Gabru "The Dilemma of Muslim Women with Regards to Divorce in South Africa" 2004 2 *PER* at <http://www.puk.ac.za/law/per/issind.htm>.

administration and distribution of estates. It is the opinion of some scholars¹³ that the non-recognition of Muslim personal law does not only affect the personal and social life of Muslims residing in South Africa, but also the economic areas of their lives since marital status can impact on the manner of taxation of such persons, upon their estates in the case of insolvency as well as other insurance policy benefits. Therefore, South African Muslims adopt a dual identity: one, to pursue and conduct their affairs in accordance with the secular law, and the other an Islamic personality.¹⁴

The focus of this article is to give an overview of the Islamic law of inheritance¹⁵ with the aim of increasing awareness that the Islamic law of inheritance can be implemented by South African Muslims without any difficulty, by means of drafting a valid will.

2 GENERAL PRINCIPLES OF ISLAMIC LAW OF SUCCESSION

The general principles of the Islamic law of succession are prescribed in the *Qur'an* in the following verse:

“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 large or small. A share made compulsory.”¹⁶

The following principles are evident from the above verse:

(a) Those nearest related

The criteria for determining the legal heirs and their proportionate shares are based on the law of proximity of relation to the deceased. This proximity is also determined by *Allah* and is not left to the fallible and subjective discretion of man.¹⁷ It is clear that *Allah* has accordingly specified the shares of beneficiaries based on the law of proximity of relationship and not on the material needs of the beneficiaries.

(b) A share for men and a share for women

The verse clearly indicates that both men and women are entitled to inherit. It is important to note that during the pre-Islamic era, only those who could fight and defend the family name were entitled to inherit. Women and

¹³ See Ebrahim “Aspects Related to the Implementation of Muslim Personal Law in Non-Muslim Countries and Contextualization Within the South African Chapter” at www.fatwa.org accessed on 21 October 2004.

¹⁴ This dual identity is illustrated by the dual legal status of children born from a marriage concluded in terms of the *Shari'ah* only – in terms of the Islamic identity the children will be legitimate, but in terms of the South African legal identity the children will be classified as illegitimate.

¹⁵ The scope of this article is confined to the traditional Sunni Islamic law.

¹⁶ *Qur'an* ch 4 verse 7.

¹⁷ See in this regard the *Qur'an* ch 4 verse 11 where it is stated: “Between your fathers and sons, you do not know which of them is nearer to you in benefit. Allah is undoubtedly most knowledgeable and most wise.”

children were thus naturally excluded from the estate. In South African law the principle of freedom of testation enables a testator to beneficiate whoever he or she wishes. Women are not guaranteed a share from the estate; this is in contradiction to Islamic law where women and children are guaranteed a right to inherit.

(c) A share made compulsory

The *Qur'an* has fixed the share of each individual. These cannot be altered or changed by man. The shares of the heirs as determined by the *Qur'an* are binding on all Muslims.¹⁸

3 THE QUR'ANIC GUIDANCE WITH REGARDS TO THE ADMINISTRATION OF THE ESTATE¹⁹

When a Muslim passes away there are four duties which need to be performed.²⁰ These are:

- (a) Payment of funeral expenses;
- (b) Payment of his/her debts;
- (c) Execution of his/her bequests; and
- (d) Distribution of the remaining estate amongst the heirs according to *Shari'ah*.

A brief explanation follows with regards to the first three duties. The fourth duty is analysed in greater detail in paragraph 4 below.

3.1 Payment of funeral expenses

Islam preaches simplicity, particularly so when one dies. Everyone is given a seamless shroud. Consequently, funeral expenses must be reasonable, and are paid from the estate of the deceased.

3.2 The settlement of debts

Islam aims to erect a society free from excessively rich or poor people because it seeks to establish social justice and honourable living for all its members. *Allah* tells in the *Qur'an* that "wealth and children are an ornament of life of the world".²¹ There are a number of verses in the *Qur'an* that deal with debt and the repayment thereof. In Islam debt is a trust which should be

¹⁸ See par 4.3 below. It should be noted that a person may freely donate his assets during his lifetime to any person. Such a disposition will not have any effect on the distribution of the estate after death.

¹⁹ A detailed discussion in this regard falls beyond the scope of this article. In this regard refer to Doi 271-346; Fysee *Outlines of Muhammadan Law* (1999) 355-467 and Hammudah 250-273.

²⁰ See in this regard the *Qur'an* ch 4 verses 11 and 12.

²¹ *Qur'an* ch 18 verse 46.

returned to its owner.²² The *Qur'an* has guided Muslims in respect of lending and borrowing in Chapter Two in the following manner:

“O, you who believe! When you deal with one another, in lending for a term named, write it down,²³ and let a scribe write it down justly between you, and let not the scribe refuse to write according to what *Allah* has taught him. Let him fear *Allah*, his Lord, and diminish nothing from it.²⁴ But if the person, who owes, be insane or infirm or unable himself to dictate, then let his guardian dictate justly. And call to witness two witnesses of your men, but if both be not men then a man and two women of those who agree upon a witness, so if one of the two makes an error, the one thereof shall remind the other, and let not witnesses refuse when they are called on. And be not weary of writing it down, be it small or big, with the term thereof. This is the most equitable in the sight of *Allah* and the most confirmatory of testimony and nearest that you may doubt, except when it be ready merchandise that you circulate between you,²⁵ for then there shall be no blame on you if you do not write it down. And call witnesses when you bargain with one another, and let not the scribe come to harm, nor the witnesses, and if you do,²⁶ verily it will be wickedness in you. Fear *Allah* and *Allah* teaches you, and *Allah* is the *Allah* – All Knower”.²⁷

This verse on the injunction of debt and its repayment is amongst the most detailed verses of commandments. The above verse provides that:

- 1 When money or something is lent for a specific term, it should be reduced to writing.
- 2 The scribe who is called upon to write should not refuse since *Allah* has gifted him with the art of writing. He should write exactly what is dictated.
- 3 The person taking oath should dictate.
- 4 Supposing such a person is ignorant of the ordinances or statutes and if he does not know what dictation is or cannot dictate well or he is of an immature age or senile or a foreigner who is ignorant of the language of the land, then his guardian or agent should dictate justly.
- 5 Two male witnesses from amongst the Muslims should be called upon to witness the deed. They must be adults and of unimpaired reason and good character. Disputes, if any, are to be decided on the testimony of these witnesses and not on the strength of the written document, the role of which is only secondary or subsidiary.
- 6 If two male witnesses are not available, then one Muslim male and two Muslim women²⁸ should be invited as witnesses. When one compares this with the Jewish code where testimony of a woman is inadmissible, it

²² See Imaam al-Bukhari, Bukhari vol III.

²³ In a document.

²⁴ From what he owes.

²⁵ Hand to hand and not in credit.

²⁶ Cause harm to the scribe and the witnesses.

²⁷ *Qur'an* ch 2 verse 282.

²⁸ According to an Egyptian author, Shaikh Muhammed Abduh, the stipulation that two women may be substituted for one male witness does not imply any reflection on women's moral or intellectual capabilities: it is obviously due to the fact that generally women are less familiar with business procedures than men, and therefore, more liable to commit mistakes in this respect. See also Rashid *Tafsir al-Manar* Vol 1 (1972) 228.

is evident that in this respect Islam has granted greater allowances.²⁹
The Islamic view is more practical in contemporary society.

- 7 In the entire affair the parties concerned should fear *Allah* and do justice.

Another verse of the *Qur'an* reads as follows:

“O you who believe, do not eat your wealth among yourselves unjustly, except that it be a transaction with mutual happiness.”³⁰

This prohibition on “unjustly eating wealth” includes dishonouring debt.³¹ *Allah* and the prophet of *Allah* have announced serious warnings and punishments for dishonouring debts. The following quotations from the *Sunnah*³² and *Qur'an* are relevant:

- 1 “And whosoever does that (unjustly eats the wealth of others) we will soon burn him in the fire.”³³
- 2 “Abdullah Ibn Umar narrated that the Prophet said every sin of a martyr is forgiven but debts.”³⁴
- 3 According to Abu Hurairah, when the *janaza*³⁵ of a deceased who owed money to people was brought to the Prophet, the Prophet would enquire as to whether the deceased estate had wealth in the form of money or not, so as to honour the debts of the deceased. It was only once the debts were honoured that the prophet would perform the *janaza salah*.³⁶ The deceased would then be buried.
- 4 According to Abu Hurairah, the prophet of *Allah* said that the undue delay of a wealthy person in paying his debts is oppression.³⁷

From the above verses of the *Qur'an* and the *Sunnah*, the rules of Islam with regard to debt are clear. Every attempt should be made to pay the creditors the full amount that is due to them. In the event of death overtaking a person before his debt has been paid, the debt must be settled from the estate, and this is the responsibility of the administrator of the estate.

3 3 Execution of his/her bequests

After payment of the funeral expenses and the debts, the third duty of the administrator of the estate is to attend to the bequests of the deceased. The bequests of the deceased include all the gifts that are made during the death-sickness of the deceased, since the majority of the jurists consider

²⁹ Cohen *Everyman's Talmud* (1963) 326. It says “the witnesses must be men, not women or minors”. See also *Jewish Encyclopaedia* Vol V (1901) 177.

³⁰ *Qur'an* ch 4 verse 29.

³¹ <http://www.alinaam.org.za/fataawa/bliiquidate.html> accessed on 2004-10-23.

³² Refer to fn 1 above.

³³ *Qur'an* ch 4 verse 29.

³⁴ Karim *Al Hadis Mishkaat ul-Masabih* Vol II (1940) 204.

³⁵ Arabic word referring to the deceased.

³⁶ Arabic word referring to the prayer for the deceased before he is buried.

³⁷ Karim 251.

such gifts to be within the bequests. Both the bequests and the gifts must not exceed one-third of the estate of the deceased unless consented to by the heirs.

4 DISTRIBUTION OF THE REMAINING ESTATE

4 1 Introduction

The fourth duty of the administrator of the estate is firstly, to determine which of the relatives of the deceased are entitled to inherit and secondly, to determine the quantum share entitlement of each of the heirs concerned.

To understand the Islamic laws of inheritance from a holistic viewpoint, it is necessary to consider the system of inheritance that operated within the Arabian Peninsula prior to the revelation of the *Qur'anic* injunctions on inheritance.

4 2 The system of inheritance in Arabia prior to Islam

Although the exact details of the system that operated prior to the *Qur'anic* revelations are unknown, it is known that the system of inheritance was confined to the male agnate relatives³⁸ of the deceased.

In this old customary system only the male agnates were entitled to inherit. Amongst the male agnates there were rules of priority, which determined which of the surviving male agnates were entitled to inherit. It is the opinion of some scholars³⁹ that it is likely that the rules of priority that operate amongst the *asaba* in *Shari'ah* are a carry-over of the old customary agnatic system. In Islamic law the son takes priority over the father, who in turn takes priority over the brothers, who in turn take priority over the paternal uncles.⁴⁰

4 3 The Islamic heirs

4 3 1 Introduction

It should be noted that the *Qur'an* does not expressly state the share of the male agnate relatives as such. However, it does make clear the injunction that the share of the male is twice that of a female.⁴¹ The Sunni⁴² jurists take

³⁸ They were referred to as *asaba*. See in this regard Fyzee 1-6.

³⁹ Hussain *The Islamic law of inheritance* <http://www.gzastorm.i12.com/islam/inheritance.html> accessed on 2004-10-20.

⁴⁰ See Minty "The Attorney's Guide to Islamic Inheritance Law" 2004 *De Rebus* 37-38; Goolam "Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings" 2001 *Stell LR* 210-212.

⁴¹ See *Qur'an* ch 4 verse 11. See also Moosa "Women and the Islamic Law of Intestate Succession" 1994 5 *African Law Review* 25-30.

⁴² Within the first century after the Prophet's demise, Muslims segmented into two main divisions – the *Sunni* and the *Shia*. A full discussion of this segmentation falls beyond the scope of this article.

the view that the intention of the *Qur'anic* injunctions was not to completely replace the old customary agnatic system entirely, but merely to modify it with the objective of improving the position of female relatives. Therefore, the *Sunni* Islamic law of inheritance is an amalgamation of the *Qur'anic* law superimposed upon the old customary law to form a complete and cohesive system. The rights of the *asaba* were recognised by the Prophet Muhammad himself.⁴³

4 3 2 The shares of the heirs

The *Qur'an* mentions the following as heirs:⁴⁴ the mother, father, husband, widow, daughter, uterine⁴⁵ brother, full sister, uterine sister and consanguine⁴⁶ sister. The paternal grandfather, maternal grandmother and agnatic grand-daughter have been added by juristic method of analogy, and together with the heirs mentioned in the *Qur'an*, form a group of heirs called *Qur'anic* heirs or sharers. These heirs are given their fixed shares and the remaining estate is inherited by the residuaries.

Under Islamic law some of the *Qura'nic* heirs, namely the father, paternal grandfather, daughter, agnatic granddaughter, full sister, consanguine sister and the mother, can also inherit as residuaries under certain circumstances. Certain heirs referred to as primary heirs are always entitled to a share of the inheritance; they are never totally excluded.⁴⁷ These primary heirs consist of the spouse relict, parents, the sons and the daughters. All remaining heirs can be totally excluded by the presence of the primary heirs.

In order to understand the position with regards to *Qur'anic* heirs, an analysis of the verses as contained in the *Qur'an* that deal with these follows below.

4 3 3 The *Qur'anic* heirs

The *Qur'an* contains only three verses⁴⁸ which give specific details of inheritance shares. Using the information in these verses together with the traditions of the Prophet Muhammad as well as methods of juristic reasoning, the Muslim jurists have expounded the laws of inheritance in such meticulous detail that large volumes of work have been written on this subject.⁴⁹

⁴³ This is clear from the *hadith* which states: "Abdullah ibn Abbas reported that the Prophet Muhammad said: 'Give the Faraid (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased'" (Sahih al-Bukhari).

⁴⁴ Ch 4 verses 11 and 12.

⁴⁵ Children of the same mother but not of the same father.

⁴⁶ Children of the same father but not of the same mother.

⁴⁷ See Doi 271-346; Fyzee 355-467; and Abdal 250-273.

⁴⁸ See *Qur'an* ch 4 verse 11; ch 4 verse 12; and ch 4 verse 176.

⁴⁹ See in this regard Doi 271-346; Fyzee 355-467; and Abdal 250-273, as well as the various authorities contained therein.

This first principle refers to males and females of equal degree and class. This is clear from the following verse: "Allah commands you regarding your children. For the male a share equivalent to that of two females."⁵⁰

It is clear from the above verse that a son inherits a share equivalent to that of two daughters, a full (germane) brother inherits twice as much as a full sister, a son's son inherits twice as much as a son's daughter and so on. However, this principle is not universally applicable,⁵¹ due to the fact that the descendants of the mother, notably the uterine brother and uterine sister, inherit equally, as do their descendants.

The *Qur'an* states in chapter 4 verse 11 as follows: "If (there are) women (daughters) more than two, then for them two-thirds of the inheritance; and if there is only one then it is half."

It must be noted that "women" in this context refers to daughters. The *Qur'an* gives the daughter a specific share. In legal terminology the daughter is referred to as a *Qur'anic* heir.⁵²

It follows that if there are no sons, the share of the daughter(s) is now fixed because it is no longer determined by the principle that a son inherits twice as much as a daughter.⁵³ In the absence of any daughters, this rule is applicable to agnatic granddaughters.⁵⁴

If there is only a single daughter or agnatic granddaughter, her share is a fixed one-half; if there are two or more daughters or agnatic granddaughters, then their share is two-thirds. Two or more daughters will totally exclude any granddaughters. If one daughter and agnatic granddaughters are present, then the daughter inherits one-half share and the agnatic granddaughters inherit the remaining one-sixth, making a total of two-thirds. If there are agnatic grandsons amongst the heirs, then the principle that the male inherits a portion equivalent to that of two females applies.

The *Qur'an* stipulates the share of one's parents as follows: "And for his parents for each of them there is one-sixth of the inheritance if he has a child, but if he does not have a child and the parents are the heirs then for the mother one-third."⁵⁵

One should keep in mind that the Arabic word "*walad*" has been variously translated as child, son, children and offspring. However, there is universal

⁵⁰ *Qur'an* ch 4 verse 11.

⁵¹ This is becomes clear when one studies the verse contained in the *Qur'an* in ch 4 verse 12.

⁵² Or sharer (*ashab al-faraid* – "those having specified shares"). The *Qur'an* mentions nine such obligatory sharers. Muslim jurists have added a further three by the juristic method of analogy. Consequently, in Islamic jurisprudence there are a total of twelve relations who inherit as sharers.

⁵³ See par 4 3 1 above.

⁵⁴ The term "agnatic granddaughters" refers to the daughter of a son. It must be noted that the agnatic granddaughter has been made a *Qur'anic* heir (sharer) by Muslim jurists by analogy.

⁵⁵ *Qur'an* ch 4 verse 11.

agreement amongst the Sunni Muslim jurists⁵⁶ that “*walad*” here refers to any child or agnatic grandchild.⁵⁷

If there is a child or agnatic grandchild amongst the heirs, then each of the parents inherits one-sixth. In the absence of a child or agnatic grandchild, the mother inherits one-third; the share of the father is not mentioned under these circumstances. The father in fact inherits as a residuary.⁵⁸

Verse 11 in Chapter 4 of the *Qur’an* continues and states: “but if he has brothers (or sisters) then for the mother one-sixth”.

The consensus of opinion is that the word “*akhwatun*” used in the *Qur’anic* text means two or more brothers or sisters of any kind. Any combination of full, consanguine or uterine brothers and sisters, if two or more, will mean that the mother inherits a one-sixth share.

Verse 12 in Chapter 4 states as follows: “And for you there is one-half of what your wives leave behind if there is no child, but if they leave a child then for you there is one-fourth of what they leave behind; ...”

Again, according to Islamic law the word “*walad*” here is interpreted as child or agnatic grandchild. The husband, another *Qur’anic* heir, inherits one-half in the absence of a child or agnatic grandchild and one-quarter in the presence of a child or agnatic grandchild.

With regards to the wife, the *Qur’an* mentions as follows: “And for them one-fourth of what you leave behind if you did not have a child, but if you have a child then for them one-eighth of what you leave behind; ...”⁵⁹

This statement gives the ruling on the share of the wife. The share of the wife is one-quarter in the absence of a child or agnatic grandchild and one-eighth in the presence of a child or agnatic grandchild. Two or more wives share equally in this prescribed share.

Chapter 4 verse 12 states: “And if a *kalala* man or woman (one who has neither ascendants nor descendants) is inherited from, and he (or she) has a (uterine) brother or (uterine) sister then for each of them (there is) one-sixth. But if they (uterine brothers and sisters) are more than that then they are sharers in one-third (equally).”

The interpretation of the second half of verse 12 in Chapter 4 of the *Qur’an* has been a source of controversy, one reason being the meaning of the word “*kalala*”. “*Kalala*” may mean “one who leaves neither parent nor child” or “all those except the parent and child”. It is generally taken to mean the former.

It is universally agreed that the siblings referred to in this verse are uterine siblings. The uterine siblings only inherit in the absence of any descendants

⁵⁶ See the works of Imam Hanafi, Shafi’i, Maliki and Hambali in this regard.

⁵⁷ The term “agnatic grandchild” refers to the son of a son.

⁵⁸ A residuary heir gets whatever remains of the inheritance after the *Qur’anic* sharers have been allocated their shares. Residuary heirs are generally male agnates under these circumstances. The maternal grandmother and paternal grandfather have been added by analogy to the two *Qur’anic* heirs, namely the mother and father. The maternal grandmother substitutes the mother in the latter’s absence.

⁵⁹ *Qur’an* ch 4 verse 12.

or ascendants. If there is only one uterine sibling, he or she inherits a one-sixth share. If there are two or more uterine siblings, they together inherit a one-third share equally.

4 3 4 *A practical problem*

Suppose a woman dies leaving behind a husband and both parents as the only heirs. It is certain that the husband inherits one-half of the estate. If the mother receives a one-third share then the father is left with only one-sixth. The question is whether the male (father) does not get twice the share of the female (mother) of equal degree and class?

A similar problem arose during the caliphate of Umar bin Khattab.⁶⁰ After consultation with the learned companions the majority opinion was that the father should get twice the share of the mother; that is to say, the principle that the male inherits the share of two females is upheld. Consequently, the father inherits one-third and the mother one-sixth.

In light of this ruling, the sentence of verse 4:11 on this matter which reads, "but if he does not have a child and the parents are the heirs then for the mother one-third" is interpreted to mean "but if he does not have a child and the parents are the (only) heirs then for the mother one-third".

4 3 5 *Rules of exclusion*

There are several rules which determine the exclusion of some heirs by the presence of others.⁶¹ The rules are briefly as follows:

- (a) a person (eg brother) who is related to the deceased through another (ie father) is excluded by the presence of the latter;
- (b) an individual nearer in degree (proximity) to the deceased excludes the one who is remoter within the same class of heirs (eg, son excludes all grandsons); and
- (c) full blood excludes half-blood through father (so a full brother will exclude a consanguine brother but not a uterine brother).

The majority view is that the full and consanguine brother is not excluded by the paternal grandfather. However, the *Hanafi fiqh*⁶² allows the paternal grandfather to totally exclude the agnatic siblings.⁶³

4 3 6 *Impediments to succession*

Heirs may be prevented from inheriting by disqualification.⁶⁴ The only two practical situations that are causes of disqualification are difference of religion and homicide.

⁶⁰ He was the third leader of the Muslims after the demise of the Prophet.

⁶¹ For a full discussion see Fyzee 395-397; and Doi 288-291.

⁶² Referring to Muslims that follow the *Hanafi* school of thought. A full discussion on the four different schools falls beyond the scope of this article. In this regard see Doi 85-111.

⁶³ Doi 291-294.

The Prophet said that “[a] Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim”.⁶⁵ Generally speaking, and this is also the majority view, a Muslim cannot inherit from a non-Muslim. The *Hanafi fiqh* does allow a Muslim to inherit from an apostate.⁶⁶

It was reported that the Prophet also stated that “[o]ne who kills a man cannot inherit from him.”⁶⁷ All the jurists agree that intentional or unjustifiable killing according to *Shari’ah* is a bar to inheritance because if such people are allowed to kill and then benefit from the estate of the victim, it will encourage incidents of homicide.

It is important to note that in Islam only relatives with a legitimate blood relationship to the deceased are entitled to inherit from the deceased. Therefore, illegitimate children according to Islamic law and adopted children have no part in inheritance. Legal adoption as practised in the Western world is forbidden in Islam.

5 DISPOSAL OF PROPERTY

On disposal of property, the *hadith*, reported on the authority of Sa’ad bin Abi Waqqas,⁶⁸ determines as follows:

“I was taken very ill during the year of the conquest of Mecca and felt that I was about to die. The Prophet visited me and I asked: ‘O Messenger of Allah I own a good deal of property and I have no heir except my daughter. May I make a will, leaving all my property for religious and charitable property?’ He replied: ‘No’. I again asked: ‘May I do so in respect of 2/3 of my property?’ He replied: ‘No’. I asked: ‘May I do so with one half of it?’ He replied: ‘No.’ I again asked: ‘May I do so with 1/3 of it?’ The Prophet replied: ‘Make a will disposing of one third in that manner because one third is quite enough of the wealth that you possess. Verily if you die and leave your heirs rich is better than leaving them poor and begging. Verily the money that you spend for the pleasure of Allah will be rewarded, even a morsel that you lifted up to your wife’s mouth’.”⁶⁹

The Islamic law in respect of inheritance and bequest can further be clarified as follows:

- (a) The bequest can be made only for one-third of the entire property and no more.
- (b) No one can make a bequest in respect of any legal *Qur’anic* heir. In other words, for those relatives whose portions are fixed in the *Qur’an*, one cannot increase or decrease their portions through bequests, nor can one deprive a legal heir of his benefit through any bequest.⁷⁰

⁶⁴ A full discussion on the impediments to succession falls beyond the scope of this article. For a full discussion see Doi 288-291.

⁶⁵ Shahih al-Bukhari.

⁶⁶ See in this regard Doi 288-291; and Fyzee 394.

⁶⁷ Tirmidhi and Ibn Majah.

⁶⁸ One of the Muslims that lived during the lifetime of the Prophet of Islam.

⁶⁹ Bhukhari ch 55 *Hadith* 2.

⁷⁰ See Doi 329.

Under certain circumstances, after allocation of the estate amongst all the heirs with fixed shares there is a residue left without residuaries. This residue is called *al-radd*. It is to be returned to those sharers who are entitled to it, in proportion to their original shares.⁷¹ Conversely a situation may arise where the total sum of the assigned shares of the heirs with fixed shares is greater than unity. In this situation all the shares are abated proportionately, which involves decreasing the fractional shares to a common denominator, and increasing the denominator in order to make it equal to the sum of the numerators.⁷²

The amalgamation of the old customary agnatic law and the *Qur'anic* law has led to a number of problems which Muslim jurists have solved with great ingenuity. Such a problem occurred during the caliphate of Umar bin Khattab. A woman died leaving behind a husband, mother, two uterine brothers and two full brothers. By systematically applying the rules, Umar bin Khattab gave the *Qur'anic* heirs their shares, husband half, mother one-sixth and the two uterine brothers a third. The two full brothers acting as residuaries received nothing because there was no residue. The two full brothers, who would have been the sole heirs under the old customary agnatic system, argued that even if their father was a donkey or a stone cast into the sea and they had no paternal relationship, they still had the same and equal relationship with the deceased as the uterine brothers through the same mother. Umar ibn Khattab reconsidered his ruling and allowed the full brothers to inherit equally with the uterine brothers in the share of one-third.

The reader will have noticed that uterine (or cognate) relatives have not figured in the discussion thus far. This group of potential heirs contains all those relatives who are neither *Qur'anic* sharers nor male agnates and constitute the largest group within the context of inheritance. They are referred to as *dhawu al-arham*.⁷³ The majority view is that they are entitled to inherit when there are no residuaries and no sharers entitled to *al-radd*. Only the traditional *Maliki fiqh*⁷⁴ does not allow the distant kindred to inherit; any residue is given to the public treasury.

6 ISLAMIC LAWS OF INHERITANCE IN SOUTH AFRICA

Moosa comprehensively outlines the current position with regards to the recognition of Muslim personal law,⁷⁵ and as such it will suffice to state that at present no official recognition is given to Muslim personal law in South

⁷¹ A full discussion of *al-radd* falls beyond the scope of this article. For a full discussion see Doi 322-324. See also Minty 2004 *De Rebus* 39-40.

⁷² See Doi 314-318.

⁷³ Or distant kindred. The rules of inheritance amongst the distant kindred are relatively complex and fall beyond the scope of this article. For a detailed discussion see Doi 324-325.

⁷⁴ Referring to Muslims who follow the *Maliki* school of thought. A full discussion with regards to the four different schools falls beyond the scope of this article. In this regard see Doi 85-111.

⁷⁵ Moosa "Muslim Personal Law – To Be or Not To Be?" 1995 *Stell LR* 417-424.

Africa. Therefore, the execution of a will and the administration of the estate of South African Muslims will be governed by South African statutory law.⁷⁶

It is submitted that the Islamic law of succession as discussed above can be legitimately accommodated and practically implemented within the South African legal realm by way of a valid will. In fact, a will becomes an essential necessity for South African Muslims, so as to prevent the distribution of their estates in terms of the Intestate Succession Act,⁷⁷ due to the fact that the system of distribution of the estate as defined in this Act, is in direct conflict with the Islamic law of inheritance. In paragraph 7, guidelines are provided to enable practitioners to assist Muslim testators with the drafting of a will acceptable in both *Shari'ah* and statutory law.

7 A SHARI'AH WILL ACCEPTABLE IN SOUTH AFRICAN LAW

(a) Revocation clause

It is recommended that a will should contain a revocation clause. It will suffice if the clause states: "I, Mr X, revoke all previous wills, codicils and testamentary writings made or executed by myself and declare this to be my last will and testament."

(b) Nomination of executor(s)

The testator should appoint the executor who will be responsible for the administration of the estate and will have to comply with the provisions of the Administration of Deceased Estates Act. It is advisable to include in the will the fact that the testator exempts the executor from providing security to the Master for the administration of the estate in terms of the relevant legislation.

(c) Discharge of debts and religious obligations

The testator should make mention of the fact that the executor is obliged to first pay all the lawful debts of the testator.⁷⁸ The testator can then specify the amount that has to be paid in terms of discharging his religious debts.⁷⁹

⁷⁶ The Wills Act 7 of 1953, the Administration of Deceased Estates Act 66 of 1965 and the Intestate Succession Act 81 of 1987 are some of the statutes that may be applied.

⁷⁷ Intestate Succession Act 81 of 1987.

⁷⁸ The testator can specify in the clause that the debts will include the payment of outstanding dowry, funeral expenses, debts contracted during his lifetime, as well as costs pertaining to the administration of the estate.

⁷⁹ This may include an amount for unkept fast, or unpaid *zakaat* (2.5 % of the net wealth of a Muslim person that has to be paid to over to poor Muslims every year). The attorney drafting the will should ascertain from the testator what the unpaid religious debt is and its amount. This should then be specified in the will and should be paid before any distribution is made to any heirs.

(d) Bequests

In accordance with *Shari'ah*, the testator is allowed to bequeath one-third of his estate.⁸⁰ The testator can thus include a clause in the will indicating to whom the bequest is made.⁸¹

It is suggested that the clause read as follows:

"I hereby bequeath as free and absolute legacy to the following person(s) or institution(s) the following:

(i) Crescent of Hope R 20 000.00

Provided that a legatee named in this clause is not a person who qualifies as a legal heir according to the Islamic law of succession at the time of my death in terms of clause (f) hereof. Provided further that the total value of such legacies does not exceed one-third of the net value of my estate after the discharge of my debts. In the event that the total value of such legacies, including my religious obligations in terms of clause (d) above, so exceeds one third of the net value of my estate, the amount thereof will abate proportionately."

(e) The residue of the estate

This clause should state that the entire residue of the estate is bequeathed to the heirs and heiresses to be determined at the time of death in accordance with the provisions specified in the Islamic law of succession. It could provide that the executor is required to file with the Master a certificate issued by a recognised Islamic authority, indicating the heirs and the amount due to each.

(f) Minor beneficiaries⁸²

It is important for the testator to make provisions for the administration of the inheritance of minors.⁸³ If not, the benefit will have to be paid into the Guardians' Fund in terms of the law.

(g) Married beneficiaries

It is important to note that in terms of Islamic law, when a person marries, his or her property remains his or her own separate property. Thus it is advisable to state in a clause that any inheritance and income in terms of the will shall be exempted from the joint estate arising from a marriage in community of property.

⁸⁰ See par 5 above.

⁸¹ The laws regarding to whom the testator is entitled to bequeath the one-third of his estate should not be transgressed.

⁸² It is important to note that a minor in South African law and a minor in terms of Islamic law are not the same. In terms of Islamic law a person attains majority at the time of maturity. For a girl it will be when she begins her monthly period, and for a boy, when he begins to show physical signs of maturing. In the case of South African law majority is usually attained at the age of twenty-one.

⁸³ That is, in terms of South African law a person under the age of twenty-one.

8 THE INTESTATE SUCCESSION ACT AND THE MUSLIM PERSON

8.1 Introduction

In South Africa, when a person passes away without disposing of his or her assets in a valid will, his or her estate will be administered in terms of the Intestate Succession Act.

Section 1 of the Act provides for the manner in which the estate will be distributed. In short it states that if a spouse,⁸⁴ but not a descendant, survives the deceased, such a spouse shall inherit the intestate estate.⁸⁵ In the event that a descendant, but not a spouse, survives the deceased, such descendant shall inherit the intestate estate.⁸⁶ However, in the event that the deceased is survived by a spouse as well as a descendant, such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette,⁸⁷ and such descendants shall inherit the residue (if any) of the intestate estate.⁸⁸

8.2 *Daniels v Campbell NO*⁸⁹

The issues which arose for determination in this case were as follows:

- (i) Whether the word "spouse", as utilised in the Intestate Succession Act and in the Maintenance of Surviving Spouses Act,⁹⁰ can be interpreted to include a person in the position of a husband or wife married in terms of Muslim rites in a *de facto* monogamous union.
- (ii) If, on a proper construction of these Acts, a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union cannot be regarded as a "spouse" for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, whether the failure to provide for such persons is unconstitutional and invalid and, if so, whether such invalidity can be "cured" by "reading in" the provisions proposed by the applicant.

Firstly, the court decided that the word "spouse", as used in the Intestate Succession Act and the Maintenance of Surviving Spouses Act, could not be interpreted so as to extend to a husband or wife in a *de facto* monogamous marriage in accordance to Muslim rites. However, the provisions were deemed to discriminate unfairly against persons in the position of the

⁸⁴ It is important to note that the court extended the definition of spouse in its decision in *Daniels v Campbell NO* 2003 9 BCLR 969 (C), by making an order to the effect that the word "spouse" shall include a husband or a wife married in accordance with Muslim rites in a *de facto* monogamous union.

⁸⁵ S 1(a).

⁸⁶ S 1(b).

⁸⁷ S 1(c)(i).

⁸⁸ S 1(c)(ii).

⁸⁹ A full discussion of this case falls beyond the scope of this article.

⁹⁰ 27 of 1990.

applicant on the grounds of religion, belief and culture. The court concluded that the provisions in question were in breach of the constitutional guarantees of equality, and that the limitations so brought about could not be justified in terms of the limitations clause in the Constitution.⁹¹

Furthermore, the court was of the opinion that pending the statutory recognition and application of the Islamic law of succession in a manner which was consistent with the fundamental values underpinning the South African constitutional order, the only appropriate way in which the applicant and others in a like position could be afforded effective relief was by a suitable reading-in order.

Consequently, the court ordered that section 1(4) of the Intestate Succession Act is to be read as though it included the following definition of "spouse":

"(g) 'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union."

It is clear from the above case that Muslim spouses have now been granted a right to inherit intestately from each other in terms of the Intestate Succession Act. Even though this affords some protection to spouses, it is submitted that these provisions are not consistent with the tenets of Islam.

9 CONCLUSION

Many scholars have appreciated the divine justness and equitability of the Islamic laws of inheritance.⁹² In South Africa, due to the non-recognition of Muslim personal law⁹³ at present, it is of utmost importance for Muslims to realise that they are able to draft a will which is in compliance with both the *Shari'ah* and the law of the land. It is true that the courts have offered a certain degree of protection to Muslim spouses who find themselves in a monogamous marriage, and who are married in terms of Islamic law only, by allowing such spouses to inherit from each other in terms of the intestate succession law.⁹⁴ It is submitted that this distribution, although offering a certain degree of protection to the surviving spouse, is in conflict with Islamic law. Therefore, Muslims are advised to rather regulate succession by will.

⁹¹ Act 108 of 1996.

⁹² Rumsey *Mohummudan Law of Inheritance* 1880 Preface iii: "Muslim law of inheritance comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilised world."

⁹³ It is to be noted that in May 2000 the South African Law Commission Project Committee 59 on Islam Marriages and Related Matters released Issue Paper 15 containing initial law reform proposals for the recognition of Islamic marriages and Muslim personal law. Further discussions are available at <http://www.law.wits.ac.za/salc/discussion/dp101.doc>.

⁹⁴ *Daniels v Campbell NO supra*.