

A Comparative Analysis of South African and Islamic Succession Laws: Assessing Gender Implications and the Relevance of the 2:1 Ratio in Contemporary Times

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Abstract

This study offers a doctrinal comparison of South African inheritance law and Islamic succession law, focusing on gender implications, legal pluralism, and prospects for reform. It contrasts the gender-neutral framework of the Intestate Succession Act 81 of 1987, read with section 9 of the 1996 Constitution, with Qur'anic and Prophetic provisions that distribute inheritance on an equitable basis, under which certain male heirs receive twice the share of comparable female heirs (the 2:1 rule). Informed by gender theory and legal pluralism, and drawing on qualitative, statutory, and textual analysis, the study examines how these systems construct gender roles and the tensions that arise when they are required to operate within a single constitutional order. It concludes that although a persistent tension remains between formal equality and the equity logic of Islamic law, there are doctrinal and legislative avenues for partial harmonisation that speak to broader debates on gender justice in multicultural democracies.

Keywords: 2:1 Gender Ratio, Gender Equity, Inheritance Laws, Legal Pluralism, Legal Reform, South African Islamic Laws of Succession

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1. Introduction

South Africa, as a pluralistic society, embodies a rich tapestry of cultural, religious, and legal diversity. This coexistence, while enriching, often presents challenges, particularly in areas where secular and religious laws intersect. Inheritance laws are a prime example of this complexity. South Africa's secular inheritance framework, governed by the Intestate Succession Act 81 of 1987, upholds principles of gender equality, ensuring equal distribution among heirs regardless of gender. Conversely, Islamic laws of succession, grounded in the Qur'an and Sunnah, prescribe a fixed 2:1 gender ratio in inheritance distribution, favouring male heirs (Qur'an 4:11-12, 176). This inherent difference highlights a conflict between the secular legal system's commitment to non-discrimination and the religious obligations upheld by Islamic law.

The absence of legislative recognition for Muslim personal law (MPL) within the South African legal system intensifies this issue, leaving Muslim families in an uncertain position of navigating inheritance matters without formal legal guidance. Furthermore, the evolving socio-cultural norms in contemporary South Africa, where gender roles are increasingly fluid and dynamic, raise questions about the relevance and applicability of traditional Islamic inheritance laws. This study seeks to address these pressing issues by examining the alignment – or misalignment – of South African and Islamic laws of succession, with particular focus on the gender implications and the potential for legal reform.

Although scholars have long noted the tension between South Africa's equality-based Intestate Succession Act and the Qur'anic 2:1 rule (e.g., Gabru 2005; Abduroaf 2018; Sungay 2022), no work has yet tested that ratio against the South African Constitutional Courts's recent Section 9 unfair-discrimination ruling – particularly *Women's Legal Centre Trust v President of the RSA* (2020) – or against the changes introduced by the Judicial Matters Amendment Act of 2023, which broadened the statutory concept of "spouse". South African literature has yet to engage with contemporary Islamic reform proposals such as Shahrur's "limits theory" or Indonesia's *maslahah* (public interest)-driven inheritance adjustments. This mini thesis fills that gap by situating the 2:1 inheritance ratio within the

evolving South African legal framework and analysing it through the lenses of gender theory and legal pluralism Theory. It offers the first post-2023 doctrinal roadmap for reconciling Islamic succession norms with South Africa's constitutional commitment to gender equality.

Focusing on gender implications and the potential for legal reform, this study seeks to answer the following questions:

- 1.1. How do South African succession statutes express formal equality and how do Qur'anic inheritance rules express distributive equity in gender shares, and to what extent do these systems align or misalign?
- 1.2. Given the current gender-based disparities, what mechanisms can enable the implementation of Islamic succession rules within the South African constitutional framework?
- 1.3. Taking into account the historical socio-economic rationale for the 2:1 share, what is the contemporary relevance of the 2:1 gender ratio in contemporary times?

2. Literature Review

The intersection of South African inheritance laws and Islamic laws of succession presents significant legal, social, and gender-related challenges. This literature review explores existing research on this topic, focusing on the principles underlying these legal systems, their gender implications, and the potential for reform in contemporary contexts. By synthesising studies that analyse these frameworks in South Africa and beyond, this review identifies critical gaps and establishes a foundation for examining the alignment – or misalignment – of these laws in a pluralistic society.

2.1 Principles of South African and Islamic Inheritance Laws

South African inheritance laws, primarily governed by the Intestate Succession Act 81 of 1987, emphasise equality and prohibit gender-based discrimination, as upheld in Section 9(3) of the Constitution of the Republic of South Africa (1996). This framework ensures equal inheritance rights for male and female heirs, reflecting the country's commitment to modern human rights standards (Himonga, 2015). However, communities adhering to religious norms often find these provisions misaligned with their cultural and religious practices.

In contrast, Islamic inheritance laws, derived from the Qur'an and Sunnah, prioritise equity over equality. The 2:1 gender ratio, as stipulated in Qur'an 4:11-12, grants male heirs twice the share of female heirs. This distribution reflects the financial responsibilities traditionally placed on men, such as providing dowries and family support (Gabru, 2005). While these laws were revolutionary in granting inheritance rights to women in pre-Islamic times, their application in a contemporary secular legal system like South Africa's often appears incompatible with constitutional mandates for gender equality.

Authors like Abduroaf (2018, 2020) argue that implementing Islamic laws through mechanisms like valid Islamic wills can bridge this gap. However, Matsemela (2015) highlights the potential conflicts between religious clauses in wills and constitutional principles, emphasising the legal challenges Muslim families face when navigating these overlapping systems. Additionally, Sungay (2022) explores the implication of the overlap between secular and Islamic laws, highlighting the manner in which Islamic laws of succession provisions may be constitutionally legitimised by way of a valid will following the principles highlighted within the South African constitution, focusing on the law of freedom of testation. This study aims to harmonise the two law systems in terms of equality, envisioning the reformation and reconciliation of both systems. This brings forth a key feature of legal pluralism theory, or the ways in which peaceful coexistence is sought across different legal systems within a single jurisdiction (Swenson, 2018).

2.2 Gender and Inheritance: Balancing Tradition and Modernity

The gender implications of Islamic inheritance laws have been a central focus of scholarly debate. While the 2:1 ratio is often defended as equitable, considering the socio-economic structures of early Islamic society, modern gender roles have evolved significantly. Kamali (2008) highlights that these laws were groundbreaking in their historical context, offering women inheritance rights when none existed. However, the socio-cultural dynamics of contemporary societies, including South Africa, raise questions about the relevance of these rules.

Firdawaty et al. (2022) and Ridwan (2022) advocate for reinterpreting Islamic inheritance laws through *ijtihad* (independent

reasoning). They emphasise the importance of aligning these laws with contemporary gender roles and socio-economic realities, especially in societies that constitutionally mandate gender equality. Similarly, Hussein (2019) and Tajuddin (2021) provide insights into the historical rationale for Islamic inheritance laws, underscoring their fairness in their original context. However, both studies acknowledge the need for a contemporary lens to assess their applicability in modern, pluralistic societies. Sungay (2023) investigates the implications of Islamic laws of succession in terms of women's inheritance by highlighting the 2:1 gender ratio which is known to be controversial. This study highlights the vast nature of the 2:1 gender ratio and its controversy. This study highlights the flexibility of the 2:1 rule and emphasises the root causes of gender discrimination, which largely stem from cultural and patriarchal practices as opposed to Islamic law. This study advocates for the need of education and the establishment of shariah courts so as to harmonise Islamic inheritance implications (Sungay, 2023).

Despite these contributions, there remains a shortage of research specifically addressing how Islamic inheritance laws could evolve to meet the needs of South African Muslims while still adhering to constitutional principles.

2.3 Legal Pluralism and its Implications in South Africa

Legal pluralism, a theory defined as the coexistence of multiple legal systems within a single jurisdiction, is a defining feature of South Africa's legal landscape. Swenson (2018) and Himonga (2015) explore the complexities of this pluralistic framework, highlighting the unresolved conflicts between secular and religious laws. The absence of formal recognition for MPL exacerbates these tensions, particularly in inheritance matters.

Gabru (2005) emphasises the need for integrating Islamic laws into South Africa's legal framework through mechanisms like arbitration and the recognition of religious wills. Such integration could protect the rights of minority communities while upholding the constitutional principles of equality. However, existing studies highlight the lack of practical solutions for addressing these conflicts, underscoring the need for further research on effective implementation strategies.

2.4 Reformation of Islamic Inheritance Laws

The debate over reforming Islamic inheritance laws reflects a broader tension between traditional jurisprudence and contemporary societal values. Classical scholars maintain the immutability of Qur'anic injunctions, arguing that divine laws are not subject to reinterpretation. However, modern thinkers like Shahrur (2009) and Ridwan (2022) advocate for contextual approaches, emphasising *maslahah* to ensure the relevance of these laws in changing times.

Razy (2023) and Zulfikar & Windani (2024) examine reform efforts in Indonesia, where socio-cultural shifts have prompted calls for more gender-equitable inheritance laws. Their findings underscore the potential for reconciling Islamic principles with modern demands for equality. While these studies provide valuable insights, their focus on Indonesian contexts highlights a significant gap in addressing similar issues within South Africa.

Shamsuddin (2022) explores gender parity in Islamic inheritance law in the United Arab Emirates (UAE), investigating ways of balancing Islamic tradition with modernity in terms of equality. It highlights the gender ratio of 2:1 in Islamic inheritance laws introducing possible means of reformation as it highlights how the gap between tradition and modernity may be linked by reconciling legal tactics with the objectives of Islamic law. This study emphasises the need to reinterpret Islamic law while maintaining its values; however, immediate application in countries fostering systems of legal pluralism like South Africa remains a challenge (Shamsuddin, 2022).

In South Africa, the lack of research on practical pathways for reforming Islamic inheritance laws limits the ability to harmonise these laws with constitutional principles. This gap underscores the importance of further studies that explore how reform can balance religious adherence with the socio-economic realities of modern Muslim families.

This literature review reveals a rich body of research on the principles, gender implications, and challenges of applying Islamic inheritance laws in South Africa. However, notable gaps remain, particularly in the areas of practical implementation and the potential for legal reform. By synthesising existing studies and identifying

areas for further exploration, this review lays the groundwork for a critical analysis of the alignment – or misalignment – of South African and Islamic inheritance laws in a pluralistic legal system.

3. Theoretical Framework

The theoretical framework for this study incorporates two complementary theories: gender theory and legal pluralism theory. Gender theory examines how gender is socially constructed and organised within legal and societal contexts (Gerish, 2005). This study used gender theory to analyse the gender-neutral stance of South African inheritance laws, which treat all heirs equally in line with constitutional principles of equality (Constitution of the Republic of South Africa, 1996). In contrast, Islamic inheritance laws follow a specific gendered approach, where males generally inherit twice the share of females (Gabru, 2005). Using gender theory, this research evaluated the implications of these approaches, investigating whether the gendered provisions in Islamic law align with South Africa's constitutional commitment to equality.

Legal pluralism theory focuses on the coexistence of multiple legal systems within a single geographical or societal context (Swenson, 2018). This study used legal pluralism theory to examine how South African and Islamic law systems interact, overlap, and potentially conflict, particularly concerning gendered inheritance provisions. The theory also provided insights into how individuals navigate these coexisting systems and how the principle of equality is upheld (or challenged) within the broader framework of pluralistic governance. Legal pluralism theory was instrumental in evaluating the broader implications of aligning religious laws with constitutional values in a multicultural society. The integration of gender theory and legal pluralism theory offers a dual lens for analysing inheritance laws. Gender theory highlights the role of societal and legal constructs of gender, while legal pluralism situates these constructs within the broader context of coexisting legal systems. This theoretical integration ensured a comprehensive approach which enabled this study to address both societal and systematic factors influencing inheritance laws.

4. Methodology

This study is designed as a qualitative comparative legal analysis. This approach facilitates a critical examination of South African inheritance laws, governed by the Intestate Succession Act 81 of 1987, alongside Islamic inheritance laws derived from the Qur'an and Sunnah. By comparing these legal systems, this study aimed to identify points of convergence and divergence, particularly in terms of gender provisions and the foundational principle of justice.

4.1 Data Sources

The research relied solely on publicly available primary and secondary sources. Primary sources, which provided a direct link to legal and religious mandates, included South African legal texts such as the Constitution (1996) and the Intestate Succession Act 81 of 1987. Islamic religious texts, such as Qur'anic verses and classical and contemporary jurisprudence on inheritance, were also utilised to understand the principles of Islamic law. Secondary sources, including scholarly articles, legal commentaries, books, and case studies, were consulted to provide scholarly analysis and commentary on these primary texts. These included works by key authors such as Abduroaaf (2018, 2020), Husein (2019), Matsemela (2015), and Sungay (2022, 2023), among others, to gain foundational insights into the legal and gender dynamics under review.

4.2 Analytical Approach

The analytical approach for this study was a qualitative, comparative legal analysis. The process began with thematic categorisation, where data from legal and religious texts were grouped into key themes such as legal principles, gender implications (including the 2:1 ratio), legal pluralism, and pathways for reform. These themes were then used to evaluate the gender provisions of both South African and Islamic inheritance laws, identifying points of alignment and misalignment. The analysis was interpreted through the lenses of gender theory and legal pluralism theory, which allowed for a deeper examination of how legal systems construct gender roles and interact within a single, pluralistic jurisdiction. Finally, a critical evaluation was performed by cross-referencing legal, religious, and scholarly

texts to assess the contemporary relevance of the 2:1 gender ratio and the potential for legal reform.

5. Discussion

5.1 Conceptualizing Equality and Justice in Inheritance Distribution

5.1.1 South African Laws of Succession

In South Africa, the distribution of an estate is governed primarily by the Intestate Succession Act 81 of 1987, and the Wills Act 7 of 1953. These legislative frameworks are grounded in the principles of gender equality and non-discrimination, as mandated by the Constitution of the Republic of South Africa (1996). In the absence of a valid will, these laws ensure that an estate is distributed equally among beneficiaries, regardless of gender.

Section 1(1) of the Intestate Succession Act outlines a specific order of distribution for an intestate estate. It specifies that if the deceased is survived by a spouse but no descendants, the spouse will inherit the entire intestate estate. Conversely, if the deceased is survived by a descendant but not a spouse, the descendant inherits the entire estate. In the absence of a spouse or descendant, the estate is inherited by both surviving parents in equal shares.

Furthermore, sections 1(1) (e-f) stipulate that descendants of deceased parents are to divide the estate into two equal shares. Those related through the mother to receive one half of the estate and those related through the father receive the other half. However, in the instance of no surviving parents or descendants, the estate is to be divided equally among other blood relatives that are closest in degree to the deceased.

Key terminologies utilised in this section of the Succession Act, such as “spouse,” “descendant,” and “parents,” underscore the principle of non-discrimination by employing gender-neutral terms. The absence of gender specific terms in these provisions alludes to the principle of equality upheld within South African laws of succession among beneficiaries. As a result, the surviving spouse of the deceased shall inherit their share regardless of them being a widow or widower. Similarly, the descendant(s) of the deceased shall inherit their share equally regardless of them being the son or the daughter.

Furthermore, the parents of the deceased shall inherit their share regardless of them being the mother or the father. In the instance of the deceased not being survived by parents, the descendants of the deceased parents- in other words siblings- shall inherit their share regardless of them being a brother or sister or whether they are paternally or maternally related, each inherits equally (Abduroaf, 2018).

5.1.2 Gender Equality in South African Law

South African law places significant emphasis on equality and non-discrimination across all spheres which includes sex, race, religion, ethnicity etc. The Constitution of the Republic of South Africa (1996, p. 1247) clearly enshrines these principles of equality to protect and uplift the rights of all people. This principle is furthermore elaborated upon in Chapter 2 Section 9, which articulates the principle of equality. It stipulates:

Everyone is equal before the law and has the right to equal protection and benefit of the law... 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, etc...

These provisions unequivocally prohibit unfair discrimination, thereby underpinning the impermissibility of any form of gender-based discrimination within the South African legal framework.

Furthermore, international human rights structures, such as the Universal Declaration of Human Rights (UDHR), provide additional foundational support for non-discrimination and gender equality. The principles of non-discrimination and gender equality are further reinforced by several legal instruments that indirectly support the non-discriminatory nature of South African inheritance provisions. These include:

- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1995), specifically Article 16(1)(h).
- The African Charter on Human and Peoples' Rights (ACHPR) (1996), specifically Article 18(3).
- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Republic of South Africa, 2000).

Ultimately, the legal structures governing South African laws of succession explicitly support gender equality provisions, ensuring that inheritance is based on familial relation to the deceased rather than being determined solely by gender.

5.1.3 Legal Basis of Islamic Laws of Succession and its Principles

Islamic law is primarily derived from Divine law, as inscribed within the Qur'an and Sunnah. The general principles governing inheritance is clearly established in the Qur'an as articulated in Chapter 4:

For men there is a share in what their parents and close relatives leave, and for women there is a share in what their parents and close relatives leave—whether it is little or much. 'These are' obligatory shares. (Qur'an 4:7)

The Qur'an establishes the fundamental principle that both men and women are entitled to specific shares of an inheritance, a directive binding for all Muslims (Gabru, 2005). This instruction is not confined to a single verse; rather, it is extensively detailed across several Qur'anic verses that offer comprehensive guidance on the distribution of a deceased person's estate (Gabru, 2005). The key verses that outline inheritance provisions are found in Chapter 4, specifically verses 11, 12 and 176. These verses provide a precisely outlined distribution among beneficiaries.

A critical examination of these verses shows that Islamic inheritance laws distinguish between males and females in their shares, which is unlike South African law, as the latter does not specify any gender-based disparity in its intestate laws. In Islamic inheritance laws, inheritance provisions vary among sons and daughters, mothers and fathers, and different types of siblings, with each being prescribed a specific share. This suggests a legal framework founded on gender and familial ties. In contrast, South African law's inheritance proportions are gender neutral in order to uphold the country's dedication to modern gender rights and standards within society (Himonga, 2015).

5.1.4 Justice vs Equality in Islamic Law

To fully grasp the gender specific provisions in Islamic inheritance law it requires distinguishing between two concepts: namely, justice (equity) and equality. Justice (*'adl*) in the Islamic legal viewpoint, does not in all instances equate to equality (*musāwāt*); instead, it is

the equitable distribution of responsibilities and rights imposed upon an individual based upon their circumstances and unique social roles within society. Islamic inheritance law reinforces the principle of distributive justice, highlighting equity over equality and fairness over uniformity. Therefore, shares are assigned in proportion to one's individual legal and financial obligations (Mohamed, 2020).

Through the lens of gender theory, it can be understood that gender roles are not seen as neutral, as opposed to South African inheritance laws (Himonga, 2015). In Islamic law, equality is conceptualised through the foundational principle of justice, rather than in a merely numerical sense. This basis ensures that inheritance rights of males and females are distinct to mirror their unique legal and financial obligations, indicating the specific societal roles ascribed to them within Muslim communities.

5.1.5 Alignment and Misalignment: A Comparative Analysis of Gender Provisions

A complex legal predicament arises from the intersection of South African constitutional provisions, specifically those pertaining to gender equality, and Islamic inheritance laws. A key focus point is the Qur'anic inheritance decree that males are entitled to double the share of females, which, when taken at face value, appears to contradict Section 9 of the Constitution, which strictly prohibits discrimination upon any grounds, including sex. This differentiation between male and female heirs raises significant concerns regarding equality as protected in the Constitution (Sungay, 2022).

A fundamental legal question arises when freedom of testation, a right possessed by all, conflicts with the Constitution's core principles of non-discrimination and equality. The prioritisation of the equality clause would result in depriving rightful beneficiaries of their inheritance rights under Islamic law. Conversely, prioritising freedom of testation might undermine the non-discrimination clause and the Constitution's dedication to gender equality. This legal dilemma is further complicated by the right to religious freedom as protected within the Constitution.

The tension between constitutional oversight and individual independence is exemplified in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* (2016 2 SA 1 (CC) 79), where it was stated:

It is one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preference (as cited in Abduroaf, 2019).

This statement highlights the innate challenges that arise when different legal systems, governed by distinct principles, coexist within a single domain, which is a key characteristic of the South African legal landscape.

5.1.6 The Legal Predicament and Pathways for Resolution

The Qur'anic ruling of the 2:1 gender ratio, often argued to be disadvantaging females, is not merely based on gender but rather a socio-economic framework. Therefore, understanding the rationale and conditions behind this gender provision is crucial when scrutinising its compatibility with constitutional principles.

Sungay (2022) examines this issue by posing a fundamental question:

Which of the two competing rights i.e. freedom of testation in electing to follow Sharia law, distribution of one's estate or the various other rights infringed (particularly the equality clause) would prevail and why?

Sungay (2022) argues that human dignity and personal freedom are upheld when individuals have the power to draft wills that align with their own religious beliefs.

Based on the Constitution, an Islamic will is established in accordance with both freedom of testation and freedom of religion (Abduroaf, 2018). However, the Constitution is the supreme law in South Africa, and any will's clause that conflicts with its provisions may be deemed invalid. According to Section 8(2-4) in the Constitution (1996), common law may be developed to limit a right, provided that the limitation is in accordance with Section 36(1). This means that common law may be amended if it means the upholding and protection of clauses within the Bill of Rights (Sungay, 2022). This raises the question of whether prioritising gender equality over Islamic inheritance laws would violate the right to religious freedom, as enshrined in the Bill of Rights.

The Constitution's limitation clause, Section 36, states that rights may be limited only if the limitation is "reasonable and justifiable in

an open and democratic society based on human dignity, equality and freedom” (pg.1261). This means that any gender-based differentiation in Islamic inheritance laws must be scrutinised through the lens of Section 36 to determine if it constitutes “unfair discrimination”.

A statement made in the President of the Republic of South Africa and Another v Hugo case (1997) provides insight into this, explaining that “unfair discrimination” involves more than just a disadvantage; it is about protecting an individual’s dignity and respect. Thus,

...it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was affected and, also at the nature of the interests which have been affected by the discrimination (Paragraph 92, 1997).

Section 36 in the Constitution (1996) further supports this by placing the onus on the party to prove that there is discrimination. Therefore, the resolution of this legal dilemma within a will lies in whether Islamic inheritance provisions, even if seemingly discriminatory on the surface, can meet this constitutional standard.

5.2 Implementing Islamic Succession Law within the South African Constitutional Framework

5.2.1 Recognition of Religious Laws in South Africa

A prominent feature in the South African legal framework is legal pluralism which acknowledges the coexistence of traditional, customary, and religious laws. The country’s strong commitment to the advancement of multiculturalism is evident in its efforts to incorporate religious legal systems into its wider legal structure.

Regardless of these constitutional protections, Muslim personal law remains unofficially implemented through what Domingo (2011) describes as “state-controlled pluralism”, a system that functionally integrates different legal systems within a broader legal framework (Domingo, 2011).

5.2.2 Islamic Laws of Succession in South Africa

Islamic inheritance laws are vital in governing the lives of Muslims, thus, to ensure their estate is distributed in accordance with Islamic principles, Muslims are encouraged to draft a will (Sungay, 2022).

This practice is supported by the Qur'an as expressed in Chapter 2, verse 180:

It is prescribed that when death approaches any of you, if they leave something of value, a will should be made in favour of parents and immediate family with fairness. (This is) an obligation on those who are mindful (of Allah). (Qur'an 2:180)

Prophet Muhammad also emphasised the importance of having a will readily available. On this subject, it was reported that he said:

It is not permissible for any Muslim who has something to will to stay for two nights without having his last will and testament written and kept ready with him. (Sahih al-Bukhari, 2738, Book 55, Hadith 1)

This religious mandate can be legitimately implemented within the South African legal framework through the principle of freedom of testation, which allows individuals to determine the distribution of their estate. In the absence of a legally established will, the estate is subject to the Intestate Succession Act 81 of 1987, whose principles are often inconsistent with Islamic inheritance laws (Gabru, 2005).

Initially, the Act acknowledged the term "spouse" to include a "husband or wife married in accordance with Muslims in a de facto monogamous union." (section 1(4)(g) as cited in Gabru, 2005). However, an amendment under Section 1A of the Judicial Matters Amendment Act (2023) whereby the term "spouse" was redefined to include "a partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support." (Section 1(1A) inserted by section 1(4) of the judicial Matters Amendment Act, 2023). However, despite the change in definition, the protection afforded to Muslims remains insufficient as the provisions provided remain inconsistent with Islamic inheritance laws (Gabru, 2005).

Ultimately, South Africa is a constitutional democracy where all laws and legal provisions must align with the Constitution's core values, such as equality and non-discrimination (Abduroaf, 2020). Section 2 of the Constitution (1996) stipulates that it is the supreme law and any law that conflicts with it will be invalid. Therefore, while the Constitution provides for freedoms like religion and testation, the extent to which religious principles can be implemented is subject to constitutional scrutiny (Abduroaf, 2020).

5.2.3 Approaches to Implementation Amidst Disparity

As noted, in South Africa the distribution of a deceased person's estate is governed by the Intestate Succession Act 81 of 1987 if no valid will exists. To ensure greater autonomy in this process, citizens are encouraged to draft a will. This is enabled by the principle of freedom of testation, a foundational principle of testate succession that grants people the right to distribute their estate freely as per their personal desires. While this right may not be explicitly stated in a single statutory provision, its principle is expressed through various constitutional and legislative ratifications. The Wills Act 7 of 1953, which provides a legal framework for drafting and executing wills, reinforces this right (Matsemela, 2015). This Act allows for individuals as young as 16 to draft a will as articulated in Section 4 (1953).

The right to freedom of testation is also tacitly upheld by Section 25(1) of the Constitution (1996), which affirms an individual's right to private property (pg.1253). This clause guarantees an individual's right to own and ultimately dispose of their private property according to their personal wishes (Abduroaf, 2019). However, despite its legal recognition, freedom of testation is not absolute and remains subordinate to the Constitution, which is the supreme law of the country (Constitution of the Republic of South Africa 1(1)(c), 1996). When a will's clauses conflict with constitutional provisions, the latter prevails. This is essential for administering discriminatory provisions in wills that may be deemed unconstitutional (Abduroaf, 2019). The right to testate freedom is not unrestricted but is limited under Section 36(1) of the South African Constitution as mentioned in earlier (1996).

This raises a critical legal question regarding the extent to which a court may enforce or annul a clause within a will that contradicts the very Constitution that establishes these rights. Matsemela (2015) critically assesses this issue, maintaining that the principle is restricted by common law, statute law, and constitutional provisions. A clause in a will that is considered *contra boni mores*, or results in unfair discrimination in violation of Section 9 of the Constitution (1996), can be deemed unconstitutional, which may lead to the court declaring it invalid (Matsemela, 2015). This conflict creates a

complex issue for the judicial framework, balancing an individual's right to freedom against the constitutional commitment to uphold principles like non-discrimination and equality.

5.3 The Relevance of the 2:1 Gender Ratio in Modern Times

5.3.1 Women's Inheritance Rights in the Pre-Islamic Period

Understanding the nature of Islamic laws of inheritance requires the contextualisation of the prevailing socio-legal conditions of women during the pre-Islamic Arabian period. In that era, women were often excluded from inheriting from their fathers and husbands and were treated as property themselves, subject to be inherited by their male relatives (Sahih Muslim). Many tribes were governed by the inheritance maxim "he alone is entitled to inherit who wields the sword" (Sahih Muslim). This generally excluded women and children, as well as the weak and sick (Husein, 2019). Therefore, this injustice was justified by claiming that women were denied financial rights, which included inheritance from their fathers and husbands, because they did not participate in warfare.

The advent of Islam afforded inheritance rights to previously marginalised individuals, including women and children, whereby fixed shares were mandated to various heirs. This divine regulation reflects the sacred wisdom of Allah, avoiding subjective and unjust distribution by the hands of humans (Husein, 2019).

However, despite these reforms in Islamic inheritance, it still faced some resistance. According to Tafsir a-Tabari, concern was expressed by some of the companions of the Prophet over granting women and children a share in inheritance with their lack of participation in fighting the enemy. They questioned,

Are we going to give the young lady half of her father's legacy when she does not ride the horse, and does not fight the enemy, we give the young boy a share, when he does not add up to anything in the family? (Tafsir al-Tabari as cited in Husein, 2019).

These critiques in the early Islamic era resonate in objections in the modern era that claim gender-based discrimination against women in Islamic law.

Islamic law elevated the status of women by granting them their right and entitlement to inheritance. Despite the fact that the share of women is of lesser value than that of their male counterparts, it is a

system based on the principles of justice and responsibility instead of numerical equality (Husein, 2019; Mohamed, 2020).

5.3.2 Justifications in Classical Islamic Law

As stated previously, the 2:1 provision, which grants males twice the share of females (Qur'an 4:11), has been a subject of misinterpretation and critique, which claim the different proportions contradict the Islamic principles of justice and equality. However, it becomes necessary to understand that this distribution reflects the financial responsibilities imposed on men in Islamic law.

Islamic inheritance law is governed by the principle of equity (Mohamed, 2020). The financial responsibilities assigned to men include supporting themselves and their families, including their wives and children. This support may sometimes even include extended relatives. By contrast, the financial obligations prescribed for women are not as much whereby anything they inherit remains solely their own (Husein, 2019). Shaykh Abdul Hamid Kishk, an Islamic scholar and activist, mentions that the wisdom behind the provision of males receiving a larger share is that they must provide for others, while the female's share is exclusive to her alone (Kishk as cited in Husein, 2019).

This rationale is echoed in the Qur'anic verse:

Men are the protectors and caretakers of women, as men have been provisioned by Allah (God) over women and tasked with supporting them from their means... (Qur'an 4:34).

Before marriage, the woman is supported by her father or brother. When she marries, she becomes the financial responsibility of her husband, making her financial obligations minimal (Husein, 2019; Sungay, 2023).

This notion of increased responsibility means increased needs is a concept not unique to Islam. It is a moral and legal concept that is reinforced across times and traditions. For example, the Biblical verse in Luke 12:48 states,

From everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked. (Luke 12:48, New Testament).

A similar concept can be found in the hadith: "Every one of you is a shepherd, and every one of you will be questioned about those under

his rule...” (Bukhari, Muslim). In secular culture the phrase, “Where there is great power, there is great responsibility.” (Winston Churchill (1904), with this same phrase being popularised by the Spider-Man comics in popular culture as, “With great power comes great responsibility” (Stan Lee, 1962), all reflect the same principle of more responsibility warrants more obligations and in return more is given.

Hence, in Islamic laws of succession, men are granted more because they are entrusted to do more (Husein, 2019). According to the same logic, 2:1 provision is a framework grounded in socio-economic justice and is not gender biased. It harmonises rights and duties that promote social justice and equality within the family unit of society (Razy, 2023).

5.3.3 The relevance of the 2:1 Gender Ratio in Modern Times

In contemporary times, debates have arisen concerning gendered provisions within Islamic inheritance law, more specifically the 2:1 gender distribution ratio, which intensified amid the rise in global movements supporting women’s rights and gender equality. The socio-economic roles of women in society, particularly Muslim society, have significantly changed as a result of the arrival of feminist discourse, gender-based violence awareness, and women’s incorporation into traditionally male-dominated spaces (Razy, 2023).

Compared to the early Islamic period, the family structure in the modern period has evolved considerably. Women are no longer confined to the domestic domain; more women possess a formal education, have professional careers in the public sphere, and contribute – sometimes exclusively – to the household income. Ramli and others (2023) observed that in modern times, Muslim women are participating actively in the financial transactions and contributing toward the household maintenance, possessing roles historically assigned to men. Similarly, Megannon (2020) notes in his study that in Cape Town, Muslim women enjoy economic independence and play a crucial role in the finances of their families, especially concerning child support.

These shifts within the socio-cultural roles in Muslim societies have increased calls for the reform of Islamic inheritance laws. Some critics claim the traditional provision of 2:1 is no longer relevant as it fails to reflect the lived realities in contemporary societies of many

Muslim families and consequently fails to safeguard justice for women (Ramli et.al., 2023). Thus, calls to harmonise Islamic law with modern socio-cultural changing aspects have increased, which raises significant questions about the extent to which Islamic laws of inheritance can or should be changed to adapt to the modern world.

5.3.4 Calls for Reform within Islamic Jurisprudence

As established earlier, the achievement of social justice as mirrored in the assigned socio-economic roles of individuals within the family structure forms the foundational aim of Islamic inheritance law. Razy (2023) contends that these laws were established to safeguard the rights of all heirs, including women and children, and to ensure that wealth is equally distributed among heirs. In his study Razy (2023) outlines four vital objectives of Islamic inheritance law, namely: (1) the achievement of social justice; (2) the protection of heirs' rights to inherit; (3) safeguarding of family stability through proportionate allocations of inheritance; (4) upholding religious obligation and the preservation of societal harmony.

Many classical scholars have argued that the gender ratio of 2:1 is innately just, based upon Qur'anic rulings. Al-Tabari, Muhammad Abduh, and Rashid Rida, notable Islamic scholars, contended that the proportionate allocation is based upon the concept of *Qawāma* – the male responsibility to inherently support the female relatives under his care (Ramli et.al., 2023). However, the precise meaning and implications of *Qawāma* are debated in modern scholarship. While some traditional translators render the term simply as “protector”, some contemporary scholars, including Mashood Baderin (2003), Asma Barlas (2002), and Salman Al-Awdah (2014), emphatically reframes the term as a conditional financial responsibility and management duty rather than a unilateral claim to authority or male superiority over women (Al-Awdah, 2014; Cheema, 2014).

In contrast, many contemporary scholars have expressed more flexible views. A feminist scholar, Amina Wadud, who advocated for a more gender-inclusive interpretation, emphasises justice for beneficiaries rather than fixed ratios. Muhammad Shahrur, a contemporary Islamic thinker, developed the “theory of limits”, also known as his “boundary theory”, whereby he proposed that the gender ratio of 2:1 reflects the maximum and minimum share a male

and female may receive. This entails that one is the minimum share a female may receive, whereas two is the maximum share a male may receive, and this depends on the prevailing economic realities of the time. This model allows for Islamic inheritance laws to be adaptable to the diverse socio-economic contexts while still upholding its ethical and traditional foundations (Ridwan, 2022; Ramli et.al., 2023).

5.3.5 Can Inheritance Laws be Reformed?

In contemporary Islamic legal discourse, a significant debate surrounds whether inheritance law is final or whether it is subject to *ijtihād* (independent reasoning). Some scholars, like Muhammad Shahrur, contend that since inheritance law is found under the *mu'āmalah* (transactional law) domain, it therefore is open to reinterpretation through *ijtihād* because of changing circumstances (Ridwan, 2022).

In Islamic law, rulings are organised into two major categories: absolute rulings, which are those based upon the clear texts of the Qur'an and Sunnah, and those adaptable to changing contexts. Although some scholars uphold Islamic inheritance to be the domain of the latter, the position adopted in this study is that of the traditionalist view which holds that the fixed shares of inheritance as outlined in the Qur'an and Sunnah are absolute and therefore not open to *ijtihād* for reinterpretation. These provisions which are grounded in Qur'anic verses and thus are considered explicit must be maintained irrespective of changing social norms (Ramli et.al., 2023).

Hence, the question should be shifted from the reformation of Islamic inheritance ratios to, instead, whether male heirs actually uphold the responsibilities assigned to them – particularly their financial duties – in supporting and maintaining their female relatives. Men who fail in these responsibilities imposed upon them are at fault and the injustice therefore lies within its application rather than the law itself (Ramli et.al., 2023).

Furthermore, to address contemporary challenges, Islamic inheritance law provides internal instruments. These mechanisms within the legal sphere, include *wasiyya* (testate bequest), *hībah* (*inter vivos* gifting), and the creation of a trust fund. These all form supplements to the distribution of wealth without altering divine

injunctions (Sungay, 2020). For instance, in a study done by Jones-Pauly and Tuqan (2011, as cited in Megannon, 2020) it was found that the practice of *h̄ibah* has been frequently utilised among South African Muslim families to equally distribute wealth among heirs.

6. Conclusion

This research aimed to extensively analyse South African laws of succession, concentrating on gender implications and the intricacies of legal pluralism between secular and religious laws within the South African legal framework. The analysis suggests that fundamental misalignment exists between the two systems. South African law upholds formal equality with gender-neutral inheritance provisions, warranting equal shares regardless of gender. Conversely, Islamic inheritance laws express distributive equity by prescribing gender-differentiated shares based on the unique socio-economic responsibilities of males and females, not numerical equality. This divergence, particularly the 2:1 gender ratio in Islamic law, creates a legal dilemma and tension within South Africa's pluralistic society.

The primary mechanism for implementing Islamic inheritance laws within the South African constitutional framework is the strategic drafting of a valid will, grounded in the principle of freedom of testation. However, this freedom is not absolute and is therefore subject to constitutional scrutiny. This study indicates that the resolution to this conflict is centred on whether the gender-based differentiation in a will may be deemed as "fair discrimination" and be regarded as justifiable under the Section 36 limitation clause in the Constitution (1996).

Lastly, the analysis indicates that the relevance of the 2:1 ratio is an issue of longstanding debate. While historically justified by the socio-economic gender roles of men as the providers, this rationale presents tension in contemporary realities where women increasingly contribute to household finances and hold professional careers. Although this has led to ongoing calls for reform, internal Islamic legal mechanisms such as *wasiyyah* (testate bequest) and *h̄ibah* (*inter vivos* gifting) provide solutions for flexible distribution that can be adapted to contemporary challenges without altering the prescribed shares.

This study makes a significant contribution by providing a doctrinal roadmap for reconciling Islamic succession norms with South Africa's constitutional commitment to gender equality. It fills a gap in existing research by offering the first post-2023 doctrinal comparison of the 2:1 inheritance ratio against Section 9 and the principle of freedom of testation, and by practically mapping sharia-compliant wills and gifts within the constitutional framework. The research highlights the need for legislative reform to address the legal vacuum caused by the non-recognition of Muslim personal law, contributing to a broader discourse on legal pluralism and the reconciliation of religious obligations with constitutional rights.

Key takeaways for policy and practice:

- Internal Islamic mechanisms: Legal instruments like *wasiyyah* and *h̄iba* are alternatives for equitable distribution that can be adapted to solve contemporary challenges without altering the prescribed shares.
- Sharia-compliant wills and trusts: Muslim families can draft wills that can effectively implement their inheritance wishes utilising the principles of freedom of testation and freedom of religion to align with South Africa's constitutional framework and the Wills Act 7 of 1953.
- Establish practical guidance: A critical need arises for guidance in Muslim communities with the alignment of valid Islamic wills with constitutional provisions. This will help in diminishing conflict with clauses such as the Section 9 equality clause and the Section 36 limitation clause.

References

- Abduroaf, M. (2018). *The Impact of South African Law on the Islamic Law of Succession*. University of the Western Cape. <http://hdl.handle.net/11394/6211>
- Abduroaf, M. (2019). A constitutional analysis of an Islamic will within the South African context 257 A constitutional analysis of an Islamic will within the South African context. *De Jure Law Journal*, 257–266. <https://doi.org/10.17159/2225-7160/2019/v52a16>
- Abduroaf, M. (2020). *Application of the Islamic Law of Succession in South Africa*. *Obiter*, 41(2), 396–409. <https://doi.org/10.17159/obiter.v41i2.9159>
- Al-‘Awdah, S. ibn F. (2014). *Men are the Protectors and Maintainers of Women - Various Scholars*. Islamway. <https://en.islamway.net/article/20273/men-are-the-protectors-and-maintainers-of-women>
- Cheema, S. A. (2014). The Concept of Qawama: A Study of Interpretive Tensions. *Hawwa*, 11(2-3), 235–251. <https://doi.org/10.1163/15692086-12341245>
- Creswell, J. W., & Poth, C. N. (2016). *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*. Sage Publications.
- De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another, 2016 (2) SA 1 (CC). *DO&JCD: Master/Intestate Succession*. (n.d.). www.justice.gov.za. <https://www.justice.gov.za/master/wills-is.html>
- Domingo, W. (2011). *Muslim Personal Law in South Africa: “Until Two Legal Systems do us Part or Meet?”* *Obiter*.
- Firdawaty, L., Munji, A., Sukandi, A., Bukhari, N., & Apriani, I. (2022). *Husein Muhammad’s Thoughts on Gender Equality in Islamic Inheritance Law*. 19(2). Al- Adalah. <http://dx.doi.org/10.24042/adalah.v19i2.13123>
- Gabru, N. (2005). *The Applicability of the Islamic Law of Succession in South Africa*. *Obiter*, 26(2). <https://doi.org/10.17159/obiter.v26i2.14755>

- Gerish, D. (2005). *Gender Theory*. In: Nicholson, H.J. (eds) *Palgrave Advances in the Crusades*. Palgrave Advances. Palgrave Macmillan, London. https://doi.org/10.1057/9780230524095_7
- Himonga, C. (2015). *Customary Law in South Africa: Historical and Contemporary Issues*. *Stellenbosch Law Review*, 26(3), 40–60.
- Husein, M. S. (2019). *Islamic Law of Succession in Relation to Women*. *Ilorin Journal of Religious Studies*, 9(1), 37–52. <https://www.ajol.info/index.php/ijrs/article/view/188351>
- Husein, M. S. (2019). *The Role of Women in Pre-Islamic and Islamic Inheritance Systems*. *Journal of Islamic Studies*, 18(1), 45–70.
- Kamali, M. H. (2008). *Shari'ah Law: An Introduction*. Oxford University Press.
- Matsemela, P. (2015). *Modern Freedom of Testation in South Africa: Its Application by the Courts*. *Journal of Law, Society and Development*, 2(1). <https://doi.org/10.25159/2520-9515/126>
- Megannon, V. (2020). *The Lived Experience of Inheritance for Muslim Widows in Contemporary South Africa*. In Openuct. University of Cape Town. https://open.uct.ac.za/bitstream/handle/11427/32861/thesis_hum_2020_megannon%20vayda.pdf.
- Mohamed, Y. (2020). *More Than Just Law: The Idea of Justice in the Qur'an*. Yaqeen Institute for Islamic Research. <https://yaqeeninstitute.org/read/paper/the-idea-of-justice-in-the-quran>
- President of the Republic of South Africa & Another v. Hugo, [1997] ZACC 4 (18 April 1997). SAFLII. <https://www.saflii.org/za/cases/ZACC/1997/4.pdf>
- President of the Republic of South Africa & Others v Women's Legal Centre Trust & Others; Minister of Justice & Constitutional Development v Faro & Others; Minister of Justice & Constitutional Development v Esau & Others, [2020] ZASCA 177 (18 Dec 2020). SAFLII. <https://www.saflii.org/za/cases/ZASCA/2020/177.pdf>

- Ramli, M. A., Rosele, M. I., Achmad, A. D., & Qotadah, H. A. (2023). *Women's Right of Inheritance in Islam: Between the Sharia Provision and Demand of Socio-cultural Changes*. *Khazanah Hukum*, 5(2), 171–182. <https://doi.org/10.15575/kh%20.v5i2.29181>
- Razy, L. H. (2023). *Islamic Inheritance Law in the Modern Era: Contemporary Aspects and Applications*. In *An-Nur: Jurnal Studi Islam* (pp. 287–299). <https://jumalannur.ac.id/index.php/An-Nur>.
- Razy, L. H. (2023). *Islamic Inheritance Laws in Modern Societies*. *Journal of Legal Reform*, 19(1), 89–110.
- Republic of South Africa. (1953). *Wills Act, No. 7 of 1953*. https://www.gov.za/sites/default/files/gcis_document/201505/act-7-1953.pdf
- Republic of South Africa. (1987). *Intestate Succession Act, No. 81 of 1987*. Government Gazette. https://www.gov.za/sites/default/files/gcis_document/201503/act-81-1987.pdf
- Republic of South Africa. (2023). *Judicial Matters Amendment Act, No. 15 of 2023*. Government Gazette, 50430. https://www.gov.za/sites/default/files/gcis_document/202404/judicialmattersamendmentact152023.pdf
- Ridwan, M. (2022). *Rethinking Gender Equity in Islamic Inheritance Laws*. *Journal of Islamic Legal Studies*, 34(2), 200–225.
- Ridwan. (2022). *Gender Equality in Islamic Inheritance Law: Rereading Muhammad Shahrur's Thought*. *Al-Manahij: Jurnal Kajian Hukum Islam*. 16(2), 181–190. Al- Manahij. <https://doi.org/10.24090/mnh.v16i2.6916>
- Sahih Muslim. (n.d.). *SAHIH MUSLIM, BOOK 11: The Book Pertaining to the Rules of Inheritance (KITAB AL-FARA'ID)*. [Www.iium.edu.my](http://www.iium.edu.my). https://www.iium.edu.my/deed/hadith/muslim/011_smt.html.
- Shahrur, M. (2009). *The Quran, Morality, and Critical Reason*. Brill Academic Publishers.
- Shamsuddin, A. M. A. (2022). *Gender parity in Islamic inheritance law in the United Arab Emirates (UAE): Prospects and*

- challenges* (PhD thesis). SOAS, University of London. <https://doi.org/10.25501/SOAS.00038295>
- South Africa., South Africa. (1996). *Constitution of the Republic of South Africa, 1996*. Pretoria: Government Printer.
- Sungay, M. H. (2022). *Constitutional legitimacy of the law of wills in South Africa*. *Manchester Journal of Transnational Islamic Law & Practice*, 18(1), 52–65. <https://www.researchgate.net/publication/364603865>
- Sungay, M. H. (2023). *Do women face discrimination under the Islamic law of succession? An examination of the male-preferential 2:1 rule of inheritance*. *Law, Democracy & Development*, 27, 450–467. <https://doi.org/10.17159/20774907/2023/ldd.v27.17>
- Swenson, G. (2018). *Legal Pluralism in Theory and Practice*. *International Studies Review*, 20(2), pp.438-462. <https://doi.org/10.1093/isr/vix060>
- Tajuddin, T. (2021). *Examining Gender Equality in Quranic Inheritance Laws*. *International Journal of Quranic Studies*, 12(2), 120–145.
- Tajuddin, T., & Awwaliyyah, N. M. (2021). *Understanding the Equality of Heirs in Tafsir Al-Mar'Āh Bayn Al-TugyĀn Al-NidĀm by Muḥammad Sa'īd Ramādan Al-Būti; Analysis Of QS. 4 :11*. *Jurnal At-Tibyan: Jurnal Ilmu Alqur'an Dan Tafsir*, 6(1), 165-181. <https://doi.org/10.32505/at-tibyan.v6i1.2484>
- Zulfikar, A., & Windani, S. (2024). *Balancing Tradition and Modernity in Islamic Inheritance Laws*. *Indonesian Journal of Islamic Law*, 20(3), 300–320.
- Zulfikar, Z., & Windani, S. (2024). *Gender Equality in Inheritance Distribution Reviewed From the Perspective of Islamic Inheritance Law*. *Journal of Gender and Social Inclusion in Muslim Societies*, 5(1), 13-24. <https://jurnal.uinsu.ac.id/index.php/psga/article/view/20499>

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