

A constitutional analysis of an Islamic will within the South African context

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SUMMARY

Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. This paper investigates the constitutionality of an Islamic will left behind by a testator that has the effect of a son inheriting double the share of a daughter. The right to freedom of testation and the right to equality are first looked at by way of introduction. The constitutionality of the Islamic will is then be looked at. The paper concludes with an analysis of the findings and makes concluding remarks.

1 Introduction

Muslims have been living in South Africa for over 300 years.¹ These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African government giving effect to Islamic law.² South African Muslims are able to make use of existing South African law provisions in order to apply

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- 1 The first recorded Muslim arrived in South Africa in 1654. Mahida *History of Muslims in South Africa: A Chronology* (1993) 1.
 - 2 This situation has led to much difficulty for South African Muslims. The most recent example in this regard was where a South African Muslim widow, who was married to her deceased husband (testator) in terms of Islamic law only, challenged the constitutionality of s 2 C(1) of the Wills Act 7 of 1953, as it did not recognise her marriage as a valid marriage for purposes of the section. The section was found to be unconstitutional. See *Moosa v Harnaker* 2017 6 SA 425 (WCC) 39 – and *Moosa v Minister of Correctional Services* 2018 5 SA 13 (CC) 21. See also Abduroaf “An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment” 2019 *Electronic Journal of Islamic and Middle Eastern Law*, for a discussion on this issue. This case illustrates that there is a dire need to enact legislation that governs Islamic law within the South African context. It should be noted that the Western Cape Division of the High Court recently held that the State has failed in its constitutional obligation to enact legislation that recognises marriages concluded in terms of Islamic law. See *Women’s Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* (22481/2014, 4466/2013, 13877/2015) 2018 6 SA 598 (WCC) 252.

certain Islamic laws within the South African context.³ An example of this would be where a testator or testatrix makes use of the South African common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise.⁴ A clause in his or her will would state that an Islamic law expert or Islamic institution should draft an Islamic distribution certificate listing his or her beneficiaries and their shares in terms of the Islamic law of succession.⁵ A matter concerning a will of this nature (referred to hereafter as an Islamic will) was heard in the Western Cape Division of the High Court in *Moosa v Harnaker* during 2017.⁶ The Islamic Distribution Certificate in this case was issued by the Muslim Judicial Council (SA). The certificate stated that each son should inherit 28/208 whereas each daughter should inherit 14/208. It can clearly be seen that the son inherits double the share of the daughter. This is required in terms of Islamic law.⁷ It could be argued that the Islamic law of succession unfairly discriminates against the daughter. It should be noted that unfair discrimination is prohibited in terms of South African law.⁸ It is interesting to note that the issue concerning discrimination against the daughter was not raised in *Moosa v Harnaker*. This paper investigates the constitutionality of an Islamic will left behind by a testator (X) that has the effect of a son (Y) inheriting double the share of a daughter (Z). The right to freedom of testation and the right to equality are first looked at by way of introduction. The constitutionality of Islamic will is then looked at. The paper concludes with an analysis of the findings and concluding remarks.

3 See Abdurroaf 2019 Electronic Journal of Islamic and Middle Eastern Law, for an example of how this is done in terms of the law of succession.

4 South African law recognises the common law principle of freedom of testation. See Jamneck "Freedom of testation" in Juanita & Rautenbach *The Law of Succession in South Africa* (2009) 115 for a discussion on this issue.

5 The Muslim Judicial Council (SA) based in the Western Cape offers the service of drafting Islamic Distribution Certificates as required in terms of Islamic wills. See MJC SA "Distribution Certificates (Estates)" <https://mjc.org.za/2016/06/14/distribution-certificates-estates/> (accessed 2019-05-13).

6 See *Moosa v Harnaker supra* – and *Moosa v Minister of Correctional Services supra*.

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

8 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that "(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."

2 Freedom of testation versus the right to equality

Section 25(1) of the Constitution guarantees a person the right to own private property.⁹ A person may dispose of the property during his or her lifetime or after he or she has died (in terms of an Islamic will). The right to dispose of property in terms of a will was noted by the Supreme Court of Appeal in *In re: BOE Trust*.¹⁰ It was argued in this case that section 25(1) of the Constitution guarantees the right to freedom of testation.¹¹ The court held that freedom of testation is linked to the constitutionally guaranteed right to human dignity.¹² It also held that a court must give effect to the wishes of a testator or testatrix unless it is prevented from doing so in terms of law.¹³ It could be argued that the wish of X, at the time of drafting his will, was that the Islamic law of succession should apply.

The Constitution and legislation that flows therefrom prohibits unfair discrimination. Section 1 of the Constitution states that our democratic State is founded on a number of values that include the achievement of equality.¹⁴ It also includes the advancement of human rights and freedoms. Section 8(2) of the Constitution states that the provisions found in the Bill of Rights are binding on natural persons.¹⁵ It could therefore be applicable to a Muslim testator or testatrix when he or she drafts an Islamic will. It could be argued that the fact that Y inherits double the share of Z is an example of unfair discrimination.

The right to equality is guaranteed in terms of section 9 of the Constitution. Section 9(4) of the Constitution states that a “person” may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in terms of section 9(3) of the Constitution which include “race, gender, sex, pregnancy, marital status, ethnic or

9 See s 25(1) of the Constitution.

10 *In Re BOE Trust Ltd* 2013 3 SA 236 (SCA) 26.

11 See De Waal & Schoeman-Malan *Law of Succession* (2015) 4.

12 *In Re BOE Trust Ltd supra* 27.

13 *King v De Jager* 2017 4 All SA 57 (WCC) 55.

14 See s 1 of the Constitution where it states that “[t]he Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

15 See s 2 of the Constitution where it states that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”¹⁶ It could be argued that Z is partially disinherited based on her sex.¹⁷ This type of discrimination is specifically prohibited in terms of section 9(3) of the Constitution.¹⁸

Section 39(1)(b) of the Constitution states that international law must be considered when interpreting the Bill of Rights.¹⁹ The South African government ratified international and regional human rights instruments that prohibit discrimination. These instruments are looked at in order to see what obligations the South African government has to fulfil regarding the elimination of discriminatory practices.²⁰ The South African government ratified the United Nation’s Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 15 December 1995.²¹ Article 16(1) of CEDAW obliges States Parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations ...” Article 16(1)(h) of CEDAW states that States Parties are to ensure equal rights between men and women concerning the acquisition of property.²² The fact that Y inherits double the share of Z would be problematic as far as this provision is concerned. The South African government subsequently ratified the African Charter on Human and Peoples’ Rights (ACHPR) on 9 July 1996.²³ Article 18(3) of the ACHPR states that “[t]he State shall

16 See s 9(3)-(4) of the Constitution where it states that “(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

17 The term partial disinheritance is used in this chapter to refer to a situation where a female inherits less favourably than her male counterpart. An example of this would be where a daughter inherits less favourably than a son in the event where they inherit as intestate beneficiaries.

18 See s 9 of the Constitution.

19 See s 39(1)(b) of the Constitution where it states that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum – ... (b) must consider international law ...”

20 See s 39(1) of the Constitution where it states that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

21 See CEDAW, 1989 United Nations General Assembly Resolution 34/180 (1979). Signed by South African Government on 29 January 1993 and ratified by the South African Government on 15 December 1995.

22 See art 16(1)(h) of CEDAW, 1979 United Nations General Assembly Resolution 34/180 (1979).

23 See ACHR. The Charter was ratified by the South African Government on 9 July 1996. The South African Government deposited the instrument of ratification on 9 July 1996. See African Commission on Human and Peoples’ Rights “Ratification Table: African Charter on Human and Peoples’ Rights” <http://www.achpr.org/instruments/achpr/ratification/> (accessed 2017-12-25).

ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman ...” It could be argued that “every discrimination” includes discrimination against Z. The South African government later ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African WR Protocol) on 17 December 2004. Article 21(2) of the African WR Protocol states, that both women and men shall have the right to inherit from the property of their parents in equitable shares.²⁴ It is quite interesting that the wording in the article refers to equitable shares and not equal shares.²⁵ The South African government has also enacted legislation in order to prevent unfair discrimination.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was enacted in accordance with section 9(4) of the Constitution.²⁶ This is also in line with CEDAW, ACHPR, and the African WR Protocol. Section 8(c) of PEPUDA prohibits “unfair” discrimination based on a “system” that “prevents” women from inheriting family property.²⁷ It could be argued that the Islamic will drafted by X is based on a system, as the clause in the will states that the estate must be distributed in accordance with the “Islamic law of intestate succession” when he dies. The situation would be different if a testator or testatrix bequeaths 2/3 of his or her estate in favour of his or her son and 1/3 of his estate in favour of his or her daughter.²⁸ In this case no reference would be made to the “Islamic law of intestate succession” even though the consequences would be the same. It would be difficult, if not impossible, to prove that the will is based on a “system” of discrimination. It should be noted that section 8(c) of PEPUDA prohibits unfair discrimination that “prevents” women from inheriting family property.²⁹ The unequal distribution of shares in terms of the

24 See African WR Protocol. The South African Government ratified the African WR Protocol on 17 December 2004 and deposited the instrument of ratification on 14 January 2005. See African Commission on Human and Peoples’ Rights “Ratification Table: African Charter on Human and Peoples’ Rights” <http://www.achpr.org/instruments/achpr/ratification/> (accessed 2017-12-25).

25 It should be noted that equity refers to the quality of being fair; fairness, impartiality, and even-handed dealing, whereas equality refers to the quality of being equal in quantity, amount and value. See Herrera LM “Equity, Equality and Equivalence – A contribution in search for conceptual definitions and a comparative methodology” 13 2007 *Revista Española de Educación Comparada* 322. It could be argued that a son inheriting more favourably than a daughter would be equitable if he has more financial responsibilities than her.

26 See PEPUDA. See also s 9(4) of the Constitution where it states that “[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

27 See s 8(c) of PEPUDA where it states that “... no person may unfairly discriminate against any person on the ground of gender, including ... (c) the system of preventing women from inheriting family property...”

28 See s 8(c) of PEPUDA.

29 See s 8(c) of PEPUDA.

Islamic law of succession does not prevent Z from inheriting property from X's estate. Z is, however, partially disinherited as she inherits half the share of Y. An example of a "system" where females are "prevented" from inheriting family property is found in the rule of male primogeniture. The rule of male primogeniture was found to be unconstitutional in *Bhe v Magistrate Khayelitsha* "to the extent that it excludes or hinders women and extra-marital children from inheriting property."³⁰ This was based on a system found in customary law.

Section 8(3)(a) of the Constitution states that a court must develop the common law if it does not give effect to a right found in the Bill of Rights.³¹ It must do so to the extent that legislation does not give effect thereto. Section 8(3)(b) of the Constitution states that a court may develop the common law to limit a right.³² The common law principle of freedom of testation can technically be developed based on these constitutional provisions in order to prevent the enforceability of discriminatory provisions found in wills.³³ The development of the common law is subject to section 36(1) of the Constitution which states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ..."³⁴ No challenges have (to date) been made regarding the constitutionality of the Islamic will, based on section 8 of the Constitution.

30 See *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) 36.

31 See s 8 of the Constitution where it states that "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right..."

32 See s 8 of the Constitution where it states that "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) ... a court - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

33 See 8(3) of the Constitution where it states that "[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1)."

34 See s 36(1) of the Constitution where it states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

3 The constitutionality of an Islamic will

This section investigates whether Z can successfully challenge the constitutionality of her partial disinheritance. It could be argued that the discrimination against Z is not unfair as she has less financial obligations in comparison to Y, in terms of Islamic law.³⁵ This could be seen as discrimination based on her sex because of her gender. It should be noted that X applied his constitutional right to freedom of testation by executing an Islamic will.³⁶ The right to freedom of testation is, however, not absolute. The South African Constitution also includes the right to freedom of religion. The right to practice ones religion is also one of the fundamental rights entrenched in the Constitution.³⁷ It could be argued that this would include the right of X to draft an Islamic will. The question now remains as to whether the provision in the Islamic will that has the effect of Y inheriting double the share of Z would pass constitutional muster. It will be accepted for purposes of this enquiry that Y inherits double the share of Z based on sex because of gender.

The first question that is needed to be answered is whether the Constitution applies to the provision in the Islamic will. Section 8(2) of the Constitution states that “[a] provision of the Bill of Rights binds a natural ... person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”³⁸ This provision clearly states that a private person may not infringe the constitutional rights of another private person.³⁹ Upon this confirmation, three enquiries must be done. The first enquiry is to look at whether the Bill of Rights is capable of being applied to the provision in the Islamic will that partially disinherits a daughter.⁴⁰ It could be argued by Z that she is being discriminated against based on her sex because of her gender role and that her constitutional right to equality as found in section 9 of the Constitution is being infringed upon. The Bill of Rights would therefore be applicable to this scenario as it is capable of being applied. The second enquiry is to look at whether the provision found in the Islamic will violates the equality provisions found in section 9 the Constitution. Section 9(4) of the Constitution states that “[n]o person may unfairly discriminate directly or indirectly against anyone on

35 See Khan *The Noble Qur'an* where it states that “[l]et the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease.”

36 See s 25(1) of the Constitution.

37 Currie & De Waal *The Bill of Rights Handbook* (2013) 316-317.

38 See s 8(2) of the Constitution where it states that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

39 Rautenbach and Malherbe *Constitutional Law* (2012) 295.

40 See Rautenbach and Malherbe 297.

one or more grounds in terms of subsection (3).⁴¹ Section 9(3) of the Constitution includes both sex and gender as listed grounds.⁴² Section 9(5) of the Constitution states that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”⁴³ The conclusion that must be reached in this regard is that the provision in the Islamic will would be presumed to be unfair discrimination unless it can be established that it is fair. Section 8(3) of the Constitution states that “when applying a provision of the Bill of Rights to a natural ... person in terms of subsection (2), a court ... (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).”⁴⁴ The third enquiry is to look at whether the Islamic will meets the requirements of section 36(1) of the Constitution which deals with limitations to rights. Section 36(1) of the Constitution states that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application ...”⁴⁵ The Islamic will was executed based on the principle of freedom of testation which is established in terms of the common law. The principle of freedom of testation is also general in its application as all South Africans have the right to execute wills, based on this principle. Section 36(1) of the Constitution further states that unfair discrimination would be justified if it is deemed “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.” These factors include “(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) [whether there are] less restrictive means to achieve the purpose”,⁴⁶ in question. The following points should be noted before continuing with the section 36 enquiry. A distinction must be made between a testamentary disposition that applies in the public sphere and a testamentary disposition that applies in the private sphere.⁴⁷ Provisions in wills that apply in the public sphere were heard in a number of cases in South African courts with regard to testamentary provisions in public charitable trusts.⁴⁸ The relief sought in those cases was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries.⁴⁹ This is quite different to the consequences that flow from the Islamic will where Y inherits double the share of Z. Changing the consequences of the Islamic will would mean taking benefits away from Y and giving it to Z. This would render the principle of freedom of testation as guaranteed in the

41 See s 9(4) of the Constitution.

42 See s 9(3) of the Constitution.

43 See s 9(5) of the Constitution.

44 See s 8(3) of the Constitution.

45 See s 36(1) of the Constitution.

46 See s 36(1) of the Constitution. See also Currie & De Waal 216.

47 *Harper v Crawford* 2017 4 All SA 30 (WCC) 22.

48 See *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) – *Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 6 SA 518 (SCA) – *Ex Parte BOE Trust Ltd* 2013 3 SA 236 (SCA).

49 *Harper v Crawford supra* 22.

Bill of Rights to be meaningless.⁵⁰ It would also mean that the court would have the final say as to who the beneficiaries of X would be. This could lead to situations where a court would be second-guessing the testator or testatrix without having any knowledge as to why the testator or testatrix executed the private will in the way he or she did.⁵¹ It should be noted that no person has a fundamental “right” to inherit as a testate beneficiary in terms of South African law. The exclusion of a person as a testate beneficiary does not encroach upon or take away existing rights of a person.⁵² If Z were to succeed in her challenge, it would take away the existing right of Y to inherit his more favourable share.⁵³ There would be a number of difficult choices that a court would have to make if the daughter succeeds in her challenge. Should the court re-write the Islamic will of X in order to increase the share of Z? Should Z inherit the same share as Y even though Y is entitled to inherit a more favourable share in terms of the Islamic will? Should the will of X (Islamic Will) be declared invalid? Should the estate of X now be distributed in terms of the South African law of intestate succession and not the Islamic law? Does this mean that persons who were excluded in terms of Islamic law can now also challenge the Islamic will?⁵⁴ These are but a few of the difficult decisions that would have to be made.

When one looks at the nature of the rights in question it is noted that two of the three values stated in section 36 were engaged when X executed the will in terms of the right to freedom of testation. The listed rights are human dignity and freedom. X also engaged his right to freedom of religion that is entrenched in section 15(1) of the Constitution.⁵⁵ The right to equality is, however, broadly stated and should at times give way to competing rights.⁵⁶ When one looks at the importance of the limitation in question, it can be seen that X exercised the constitutional right to practice religion based on the right to freedom of testation in terms of religious principles. If Z is successful in her application, then it would mean that the right to freedom of testation would be deemed meaningless.⁵⁷ When one looks at the nature and extent of the limitation in question it is noted that the discriminatory provisions apply in terms of a private will as well as in the private sphere. It affects only Y and Z. It does also not apply to an unknown amount of people. 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.”⁵⁸ It is quite clear that the purpose behind the limitation of

50 See De Waal & Schoeman-Malan 5-6.

51 *King NO v De Jager supra* 61.

52 See De Waal & Schoeman-Malan 5-6.

53 *King v De Jager supra* 63.

54 See De Waal & Schoeman-Malan 6.

55 See s 15(1) of the Constitution.

56 *King v De Jager supra* 73.

57 See *King v De Jager supra* 74.

58 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 2 SA 1 (CC) 79.

the right to equality of Z is in order to give effect to a number of constitutionally entrenched rights that apply to X. It would be quite difficult to conceive a less restrictive means in order to achieve the same purpose. Based on the above, it would seem quite unlikely that Z would succeed in her quest to challenge the constitutionality of the Islamic will based on discriminatory grounds.

4 Conclusion

This paper has investigated the constitutionality of an Islamic will. The findings have shown that the Islamic will is subject to constitutional challenge. The investigation has shown that the right to freedom of religion, the right to freedom of testation, and the constitutional right to own property would more likely than not trump the right to equality of a beneficiary who is discriminated against based on her sex because of her gender. The findings have also shown the constitutionality of an Islamic will has (to date) not been tested by South African courts. If, for some reason, the Islamic will is found to be unconstitutional, I would recommend that the consequences of Islamic law of succession be incorporated into the will of the testator or testatrix without any reference to Islamic law. It would then be highly unlikely or even impossible to challenge the will as there would be no strong basis for the challenge.