EQUAL RIGHT TO INHERIT? A SOUTH AFRICAN PERSPECTIVE

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Abstract - South Africa's racial discrimination past has led to the drafting of the Constitution with the Bill of Rights for the people of South Africa. The Bill of Rights prohibits the state from unfairly discriminating directly or indirectly on certain grounds, one of which is race and another is gender. This has forced changes to the law of succession. The customary law rule of male primogeniture was abolished to ensure that women were not excluded from the intestate succession of the male head of the family in 2005. It was said that this rule cannot be reconciled with the notions of equality and human dignity contained in the Bill of Rights. The freedom of testation has further come under fire in South Africa, where it was found to be unfair discrimination and against public policy to exclude a specific gender (women) from inheriting in a private will. Although no one has the right to inherit in South Africa, any person with an interest can approach the court alleging that a right in the Bill of Rights has been infringed. A will that is found inconsistent with the South African Bill of Rights then cannot be enforced. Recent case law found that to leave out a specific gender (women) from a will, based entirely on the fact that they are of said specific gender, is in contravention of the Constitution and should, therefore, be declared invalid. It was said that the courts should take a transformative constitutional approach when equality rights are affected. Otherwise, the historical and insidious unequal distribution of wealth in South Africa will continue along the fault lines such as gender. This decision has opened the debate on the extent to which the state can interfere with the private autonomy of an individual who is deceased. Some of these arguments will be discussed including the ambit of public policy in this regard.

Keywords - Equality, discrimination, succession, public policy.