

*A few comments on the (possible) revival of
the customary law rule of male
primogeniture: can the common-law
principle of freedom of testation come to its
rescue?*

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The customary law rule of male primogeniture has been declared unconstitutional and invalid, and legal sources of the common law of succession have been tailored to provide for the devolution of estates which were formerly regulated by the customary law of succession. Two questions are addressed in this contribution. Firstly, has the legal development over the last few years left us with a unified system of succession or do we still have parallel systems of succession laws which necessitate the application of choice of law rules to determine which system is relevant where a testator was subject to customary law during his lifetime? The evidence seems to suggest that the law of succession remains, at least in theory, a combined system which will require a choice at some time or other, especially when the applicable legal rules must be determined. When one has to deal with public policy issues, the interaction between the common and customary law of succession brings us to the second question, *viz.* the scope and application of freedom of testation in customary law and, more particularly, the question whether or not a testator living under a system of customary law can revive the rule of male primogeniture by exercising his or her right to freedom of testation. A cursory perusal into this issue reveals that the law as it stands is anything but clear. The application of common-law principles in the customary law of succession and *vice versa* leads to interesting results and anomalies which will challenge future approaches to the law of succession in general and the customary law of succession in particular.

I INTRODUCTION

The mixed¹ pluralistic² legal system of South Africa has had its fair share of issues and conflicts over the years.³ The often volatile relationship

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¹ According to Palmer (VV Palmer 'Introduction to the mixed jurisdictions' in VV Palmer (ed) *Mixed Jurisdictions Worldwide: The Third Legal Family* 2 ed (2012) 7–11), South Africa forms part of a third legal family of mixed jurisdictions. According to him a mixed jurisdiction has at least three characteristics which he calls the 'lowest common denominators'. The first

between the common law⁴ and customary law,⁵ especially within the private law sphere,⁶ has led to the common law gaining a bad reputation

characteristic has to do with the specificity of the mixture which, according to him, can narrowly be construed to include only common and civil law materials. He does not deny that there may be other mixes, for example with indigenous laws, but avers that the mix is generally exclusively Western in nature. Secondly, the mixture is both quantitative (enough presence of the mix to be visible to an outsider) and psychological (both actors within and observers of the system cognitively recognise and regard the system as mixed). In the third place, the mix is structural with the private law predominantly civil in character and the public law predominantly Anglo-American. For an overview of how this mix came about in South Africa, see the discussion by CG van der Merwe et al 'The Republic of South Africa' in Palmer (n 1) 95–106.

² A pluralistic legal system is one where more than one legal system is in operation in one geographical area, for example, the common and customary law in South Africa. GJ van Niekerk 'Legal pluralism' in C Rautenbach, JC Bekker & NMI Goolam (eds) *Introduction to Legal Pluralism in South Africa* 3 ed (2010) 1–13; TW Bennett 'The conflict of laws' in JC Bekker, JMT Labuschagne & LP Vorster (eds) *Introduction to Legal Pluralism in South Africa: Customary Law* (2002) 21–24.

³ Contemporary South African state law comprises of a conglomeration of metaphorical transplanted laws, chiefly a mixture of Roman–Dutch law and English common law, generally referred to as the 'common law', intermingled with indigenous laws, commonly referred to as the 'customary law'. This state of affairs has been described by some commentators as the 'three graces of South African law' (see R Zimmermann & D Visser 'Introduction: South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 9); as a 'three-tiered cake' (see J Church & J Church 'The constitutional imperative and harmonisation in a multicultural society: A South African perspective on the development of indigenous law' (2008) 14 *Fundamina* 1); or as 'potjiekos' (see C Rautenbach 'Mixing South African common and customary law of Intestate Succession: "Potjiekos" in the making' in E Örücü (ed) *Mixed Legal Systems at New Frontiers* (2010) 222. It is also important that the terms 'mixed' and 'pluralistic' should not be confused with each other. The first refers to one legal system made up of different components whilst the latter refers to two or more legal systems in operation within one geographical area. The South African legal system reflects elements of both mixed and pluralistic systems. See J Church, C Schulze & H Strydom *Human Rights from a Comparative and International Law Perspective* (2007) 49–50.

⁴ The term 'common law' used here does not refer to English common law but to the law common to South Africa, which originates from a wide range of sources of law that have not been systematically recorded. The sources include the Constitution, legislation, judicial precedent, common law (in the sense of uncodified law), indigenous laws (customary law), custom, modern textbooks, as well as foreign, international and regional law. Rautenbach (n 3) 222 at note 1; L Kotzé, A du Plessis & J Barnard-Naudé 'Sources of law and legal authority' in T Humby et al *Introduction to Law and Legal Skills in South Africa* (2012) 124–147.

⁵ Zimmermann & Visser (n 3) 12 aptly describe it as follows: 'In keeping with the English colonial approach elsewhere in Africa, the legislature has held indigenous or "customary law" at arm's length. Since the 1980s, official policy has fluctuated from time to time and from area to area.'

⁶ The historical development of retaining the personal laws of indigenous communities in South Africa is briefly discussed by Van der Merwe et al (n 1) 106–108. The Law of Evidence Amendment Act 45 of 1988 defines 'indigenous law' as the 'Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic.' In terms of the Recognition of Customary Marriages Act 120 of 1988 'customary law' is defined as the 'customs and usages traditionally observed among the indigenous African people' and in terms of the Reform of Customary Law of Succession 'customary law means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people.' Section 211(3) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') stipulates that the courts 'must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary

(and sometimes rightly so)⁷ as a bad boy picking on customary law.⁸ Now that the playing ground between these two systems of law has been levelled by the Constitution of the Republic of South Africa, 1996, it is time to explore the benefits of their working closer together instead of being at loggerheads.⁹

One area of private law where the interaction between common and customary laws has been quite prominent over the last few years is the law of succession¹⁰ or, more particularly, the law of intestate succession.¹¹ South Africa's intestate law of succession is a combined system governed by different statutes and legal norms. On the one hand it consists of the common law of succession with European roots, nowadays regulated in terms of the Intestate Succession Act¹² and common (Roman-Dutch) law rules.¹³

On the other hand, the legal framework for the customary law of succession (an intestate system of succession) with its African roots was s 23 of the Black Administration Act¹⁴ and its regulations,¹⁵ as well as

law.' For a brief discussion of the scope and application of this provision, see JC Bekker & C Rautenbach 'Nature and sphere of application of African customary law in South Africa' in Rautenbach, Bekker & Goolam (n 2) 39–41; TW Bennett *Customary Law in South Africa* (2004) 43–44.

⁷ According to D Visser 'Cultural forces in the making of mixed legal systems' (2003–4) 13 *Tulane Law Review* 74, customary law 'has always been treated as a stepchild in the South African legal order and this has obviously disadvantaged the many people who substantively live in accordance with autochthonous law for certain or all purposes.'

⁸ The notorious repugnancy provision contained in the Law of Evidence Amendment Act 45 of 1988 is partly to blame for this state of affairs. Section 1(1) provides that customary rules may not be applied if they are 'opposed to the principles of public policy or natural justice'. This general limitation on the application of customary law allowed the courts to ignore or strike down any customary rule that happened to be in conflict with Western ideas of justice, morality and good order. Although the proviso remains on the statute book it has been condemned as paternalistic and redundant. See *Mthembu v Letsela and Another* 1998 (2) SA 675 (T) 688B–D and *Mabuza v Mbatha* 2003 (4) SA 218 (C) para 32.

⁹ In *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 51 the court stated: 'While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.'

¹⁰ The law of succession comprises legal rules that determine what should happen to a person's estate after his death. The rules identify the beneficiaries and the extent of the bequests they are about to receive. C Rautenbach 'Introduction' in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* 2 ed (2012) 1 and 11.

¹¹ Intestate succession or *successio ab intestato* prescribes the legal rules or norms that determine how succession should take place in cases where a deceased testator failed to execute a valid will during his lifetime. Rautenbach (n 10) 1 and 11; MJ de Waal & MC Schoeman-Malan *Law of Succession* 4 ed (2008) 14; MM Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* 2 ed (2003) 562.

¹² 81 of 1987.

¹³ For example, the common-law rules regarding the legal position of heirs, adiation and repudiation, unworthiness to inherit and collation also apply to the intestate law of succession. Corbett, Hofmeyr & Kahn (n 11) 562.

¹⁴ 38 of 1927.

customary law rules.¹⁶ The general purpose of s 23 read with its regulations was to give effect to the customary law of succession. The legislation prescribed which property (movable property allocated to a house or a wife in a customary marriage and quitrent) had to devolve in terms of the customary law of succession.¹⁷ As pointed out by Langa DCJ (as he then was), the customary law of succession ‘was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community.’¹⁸ Within the extended family context, the customary law of succession served various purposes, such as the maintenance or discipline of family members. Each family member thus had its own specific role to play in the achievement of communal good and welfare.¹⁹ Although the family head was regarded as the owner of the family property, he could not do with it as he pleased because he was under an obligation to administer it for the benefit of the family unit as a whole, with the understanding that these responsibilities would one day pass on to an heir who would have to continue fulfilling them.²⁰ Thus, central to the customary law of succession was the controversial rule of male

¹⁵ Section 23 was supplemented by the ‘Regulations for the Administration and Distribution of the Estates of Deceased Blacks’ framed in terms of s 23(10) – see GN R200 GG 10601 of 6 February 1987 (referred to as ‘GN R200’). These regulations were amended by GN R1501 GG 24120 of 3 December 2002.

¹⁶ Section 23 and its regulations were struck down in their entirety in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (hereafter ‘*Bhe v Magistrate, Khayelitsha*’), and finally repealed on 12 April 2006 by the Repeal of The Black Administration Act and Amendment of Certain Laws Act 28 of 2005. For a discussion of the developments since *Bhe v Magistrate, Khayelitsha*, see C Rautenbach ‘Customary Law of Succession and Inheritance’ in Rautenbach, Bekker & Goolam (n 2) 135–138.

¹⁷ Section 23 provided:

‘(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-s (10).

(3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will. . . .’ Emphasis added.

¹⁸ *Bhe v Magistrate, Khayelitsha* (n 16) para 75. It is interesting to note that he refers to the customary law position in the past tense which may be regarded as authority for a viewpoint that the customary law of succession is no longer in existence.

¹⁹ *Ibid* para 75.

²⁰ *Ibid* para 76. See also similar comments made by Ngcobo J, who delivered the minority judgment, at para 188: ‘The rule of male primogeniture might have been justified by the social and economic context in which it developed. It developed in the context of a traditional society which was based on a subsistence agricultural economy characterised by a self-sufficient family organisation. Within this system, an elaborate network of reciprocal obligations between members of a family existed which ensured that the needs of every member for food, shelter and clothing were provided for. The roles that were assigned to men and women in traditional African society were based on the type of social structure and economy that prevailed then.’

primogeniture, which favoured the eldest son of a deceased to become the one stepping into his father's shoes, and excluded younger and extra-marital sons as well as females from inheritance.²¹ The circumstances have however changed, as aptly put forward by Langa DCJ:

Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.²²

In light of the changed circumstances, judicial and legislative developments since 2004 saw the demise of both s 23 (including its regulations) and the customary law rule of male primogeniture. The legislative provisions and the customary law rule of male primogeniture were declared to be unconstitutional and invalid in the ground-breaking case of *Bhe v Magistrate, Khayelitsha*.²³ In order to fill the void left by the order of

²¹ *Bhe v Magistrate, Khayelitsha* (n 16) para 77: 'The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.'

²² *Ibid* para 80. See also Ngcobo J's comments at para 190: 'The role that women play in modern society and the transformation of the traditional African communities into urban industrialised communities with all their trappings, make it quite clear that whatever role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age. Indeed, there are instances where in practice women have assumed the role of the head of the family. This may be due to the fact that *indlalifa* (family head) is almost always away from the common home, or has decided to establish his home outside the common family home. The rule has therefore lost its vitality to a certain degree.'

²³ Three cases were heard before the Constitutional Court. The first one came before the Constitutional Court as an application for confirmation of an order of the Cape High Court in *Bhe and Others v Magistrate, Khayelitsha, and Others* 2004 (2) SA 544 (C). The second one was also an application for confirmation of an order of the Pretoria High Court in the unreported case of *Shibi v Sithole* (TPD) case no 7292/01 of 21 November 2003. The third case was an application for direct access by both the South African Human Rights Commission and the Women's Legal Centre Trust to apply for relief, which included the constitutional invalidation of the rule of male primogeniture. The *Bhe v Magistrate, Khayelitsha* case elicited many responses from legal scholars and its pros and cons were discussed in detail. See, for example, C Rautenbach 'Male primogeniture unconstitutional: A legal victory for African women in South Africa' July/Sept 2005 *AFLA Quarterly* 30; C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of

invalidity, the court ordered that the Intestate Succession Act²⁴ be applied to all customary law estates, thus effectively replacing the customary law of intestate succession with the rules of the common law of intestate succession, a system of devolution alien to customary law families. The judgment was supplemented on 20 September 2010 by the Reform of Customary Law of Succession and Regulation of Related Matters Act²⁵ (hereafter ‘the Reform of Customary Law of Succession Act’), which confirms that the Intestate Succession Act, with certain modifications, must be applied to all intestate estates of persons living under a system of customary law. In general one could say that the Reform of Customary Law of Succession Act and the order in *Bhe v Magistrate, Khayelitsha* essentially eradicated the customary law of succession by replacing it with the common law of succession. The final outcome is, however, not so straightforward as it sounds. The remaining question is whether this assimilation of customary law into the common law erased the duality of the succession laws and with it the choice of law rules.²⁶

Another important development effected by the Reform of Customary Law of Succession Act is the freedom to make a will, which has now been indirectly afforded to everybody subject to customary law. This freedom has its roots in the common-law maxim *voluntas testatoris servanda est* (the will of the testator must be complied with) and it has generally been limited by means of statute in the case of the customary law of succession until fairly recently.²⁷ This brings us to the focal point of this contribution. Can a person who is subject to customary law revive the rule of male primogeniture by utilising his or her newly acquired freedom of testation?

marriage and succession’ 2005 *Acta Juridica* 82; E Knoetze and M Olivier ‘To develop or not to develop the customary law: That is the question in *Bhe*’ (2005) 26 *Obiter* 126; C Rautenbach, W du Plessis & G Pienaar ‘Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa’ (2006) 22 *SAJHR* 99. The judgment was also considered in detail in the High Court of Botswana in the unreported case of *Mmusi and Others v Ramantele and Another* case no MAHLB-000836–10 of 12 October 2012 paras 141–153, although Dingake J pointed out that there is an important textual difference between the South African and Botswana Constitutions which might have led to another conclusion (at paras 153–154). Although the court made this distinction, it eventually came to the conclusion that the rule of male primogeniture is unconstitutional because it violated a deceased female’s children’s right to equal protection of the law as guaranteed in s 3 of the Constitution of Botswana.

²⁴ This Act applied only to estates which did not devolve in terms of s 23 of the Black Administration Act and its regulations. Section 1(4)(b) of the Intestate Succession Act provided as follows: “[I]ntestate estate” includes any part of any estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act . . . does not apply.’ This provision was also struck down in *Bhe v Magistrate, Khayelitsha* (n 16) para 136 and was amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 to refer only to estates which do not devolve by virtue of a will.

²⁵ 11 of 2009.

²⁶ See the discussion at Part II below.

²⁷ See the repealed s 23(1) of the Black Administration Act, which prevented certain customary property from being bequeathed by means of a will.

In other words, is it possible to circumvent the findings in *Bhe v Magistrate, Khayelitsha* by stipulating in one's will that the estate must be devolved according to the customary law of succession or, more directly, that the rule of male primogeniture must be applied to the devolution of one's estate?²⁸ There could be various reasons why a person might wish to 'restore' the consequences of the rule of male primogeniture in a given situation; for example, to ensure that a close knit family adhering to family traditions in a rural area continues to be provided for after the death of the family head.

The following issues will be explored in order to seek answers to the questions raised. First of all, the issue of whether or not a dual system of succession laws with a choice of law rules remains after the decision in *Bhe v Magistrate, Khayelitsha* is explored.²⁹ Secondly, the scope and application of common-law principles such as freedom of testation and public policy within the customary law of succession is investigated.³⁰ The contribution concludes with a few hypothetical examples which could potentially be utilised to illustrate the endless possibilities of a closer working relationship between the common and customary law of succession.³¹

II THE DUALITY OF LEGAL SYSTEMS: WHEN TO APPLY WHAT?

Any form of legal pluralism could lead to situations where people find themselves subject to overlapping and potentially conflicting situations arising from different normative orders.³² In the words of Schreiner JA in *Ex Parte Minister of Native Affairs: In Re Yako v Beyi*:³³

No doubt when colonisation takes place among a people having their own customary law, and when the law of the colonists becomes the law of the land, difficult questions of policy are likely to arise as to the proper extent of recognition and use, at any particular period, of the customary law of the native inhabitants; and presumably South Africa has not been exceptional in this respect.

In the light of the developments in the customary law of succession over the last few years, we are left with some measure of doubt about whether we still have a dual system of succession laws or whether the statutory and judicial developments have led to a unified system (albeit with differences) of intestate law. Although the answer to this question

²⁸ See the discussion at Part III below.

²⁹ Part II below.

³⁰ Part III below.

³¹ Part IV below.

³² Bennett (n 2) 24.

³³ 1948 (1) SA 388 (A) 396–397.

might be of only theoretical interest, it may have certain consequences for the status of the two legal systems. One may argue that the equal status of customary law, or more specifically the customary law of succession, will suffer if it is regarded as part and parcel of the common law of South Africa instead of as a system or branch of law on its own. At face value, the developments effected by *Bhe v Magistrate, Khayelitsha*, as supplemented by the Reform of Customary Law of Succession Act, replaced the customary law of succession with the common law of succession, consequently creating one system of succession law, albeit with certain differences (legal diversity).³⁴ A closer look, however, discloses that systems of intestate succession remain within the South African legal system, and the question ‘What law is applicable?’ continues to be relevant. This is evident from the wording of s 2(1) of the Reform of Customary Law of Succession Act:

The estate or part of the estate of any person *who is subject to customary law* who dies after the commencement of this Act and whose estate does not devolve in terms of that person’s will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act subject to subsection (2).³⁵

It is clear from the words ‘who is subject to customary law’ that there are circumstances where the customary law of succession is still relevant or applicable. In order to determine which law is applicable, one has to apply so-called ‘choice of law rules’, a process which has also been referred to as ‘interpersonal conflict of laws’.³⁶ The choice of law rules for intestate succession used to be found in the repealed s 23 of the Black Administration Act (and its regulations) and the amended s 1(4)(b) of the Intestate Succession Act,³⁷ but since 20 September 2010 the only statutory choice of law rule that remains is found in s 2(1) of the Reform of Customary Law of Succession Act, quoted above. Although the words

³⁴ Legal scholars distinguish between legal pluralism and legal diversity. The former gives recognition to the social realities of a diverse society where members of certain communities function in accordance with their own legal norms, whilst the latter describes different legal rules for different groups or situations provided for by one legal order. It is a government’s way of providing for differences within its geographical boundaries. In other words, legal pluralism exists where more than one legal system, such as customary and common law, is contained in one legal order. Legal diversity occurs when different legal rules for different groups or situations are provided for by one legal order. See J Griffiths ‘What is Legal Pluralism’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 11–14.

³⁵ Emphasis added. Subsections (2)(b) and (c) permit certain modifications to allow for circumstances peculiar to customary law, such as seed-raising wives and wives from woman-to-woman marriages.

³⁶ Bennett (n 6) 49–51.

³⁷ See n 24 for the wording of section 1(4)(b). However, since 20 September 2010 this provision has been amended by the Reform of Customary Law of Succession Act to read: “[I]ntestate estate” includes any part of an estate which does not devolve by virtue of a will.’

'who is subject to customary law' provide us with a clue as to whose estates will be regulated by the Intestate Succession Act (read with the Reform of Customary Law of Succession Act), they are not of much use in determining 'who' is subject to customary law.

Another lead is provided in the definition of 'customary law' in the Reform of Customary Law of Succession Act: 'the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people'.³⁸ Without dwelling too much on the shortcomings of this and other similar definitions,³⁹ it suffices to say that very little has been done to assist us in determining when customary law is applicable and when not. In a similar vein, the Constitution compels the application of customary law when it 'is applicable, subject to the Constitution and any legislation that specifically deals with customary law'⁴⁰ but it does not give any guidance as to when customary law will be applicable and when not.

In the absence of the statutory choice of law rules to decide the application of common or customary law, we can take our lead from the judiciary. The judicial decisions are, however, mainly concerned with the process to be followed for selecting the appropriate law and not so much with developing material choice of law rules. *Ex Parte Minister of Native Affairs: In Re Yako v Beyi*⁴¹ dealt with the question as to which law should be applied in the former commissioner courts⁴² and, although the case dealt with former laws and institutions, the principle which can be derived from it remains relevant even today. The court made it clear that the choice between the two legal systems (common or customary law) is a question of fact which falls within the discretion of the presiding judge:

In each case he [the judge] has at some stage to determine which system of law it would be fairest to apply in deciding the case between the parties. I think that he should only finally decide which system of law he is going to apply after

³⁸ See s 1 of the Reform of the Customary Law of Succession Act under the lemma 'customary law'.

³⁹ See Bekker & Rautenbach (n 6) 17–23 for a discussion of some of the issues.

⁴⁰ Section 211(3) of the Constitution.

⁴¹ *Ex Parte Minister of Native Affairs: In Re Yako v Beyi* (n 33).

⁴² Commissioner courts were closed down in 1986 and with their abolition the need for a provision dealing with the application of customary law in these courts also fell away. Thus, s 11(1) of the Black Administration Act was also repealed in the same year. It provided as follows: 'Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving questions of customs followed by natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.'

considering all the evidence and argument as part of his eventual decision on the case⁴³

Bennett points out that the courts have always followed a sense of appropriateness and reasonableness in deciding which law should be applied.⁴⁴ He identifies a number of factors which have been or could be considered in reaching a conclusion on the suitability of a particular legal system, including an express agreement between the parties, the nature of the transaction and the lifestyle of the parties.⁴⁵ In the law of intestate succession, the form of marriage of a deceased is also a determining factor. Although not a hard and fast rule, a deceased married in terms of customary law⁴⁶ will generally be regarded as having lived in accordance with customary law.⁴⁷ If he or she dies intestate, the estate will devolve in accordance with the Intestate Succession Act as modified by the Reform of Customary Law of Succession Act.⁴⁸

Another possibility, which has not received the attention of legal scholars or the judiciary up until now, because wills have either been impossible or have not been the preferred method to effect succession between people living under a system of customary law, is to make one's choice known in a will. Section 2(1) of the Reform of Customary Law of Succession Act makes it abundantly clear that the estate of 'any person who is subject to customary law . . . and whose estate does not devolve in terms of that person's will' must devolve in terms of the Intestate Succession Act.⁴⁹ This provision extends the common-law principle of freedom of testation to testators living under a system of customary law. Thus, there are no more restrictions preventing such a testator from executing a will and making his or her choice as to the system of law which should apply to the devolution of the estate.⁵⁰ It is therefore recommended that a testator

⁴³ *Ex Parte Minister of Native Affairs: In Re Yako v Beyi* (n 33) 397–398.

⁴⁴ Bennett (n 6) 53.

⁴⁵ For a detailed discussion of all the circumstances which may be relevant, see Bennett (n 6) 53–57.

⁴⁶ The marriage could be in terms of customary law rules or the Recognition of Customary Marriages Act.

⁴⁷ This is also the viewpoint taken by the master of the high court – see MM Meyer and MBE Rudolph *Policy and procedural manual: administration of intestate deceased estates at service points* (2002 updated 2011 – master's training note MT 16) 1. Nevertheless, there are examples where someone was married in terms of customary law but preferred to be subject to the common law, because the family followed an urban lifestyle. See *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC).

⁴⁸ For a discussion of some of these modifications, see C Rautenbach & MM Meyer 'Lost in translation: is a spouse a spouse or a descendant (or both) in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?' 2012 *TSAR* 149.

⁴⁹ Emphasis added.

⁵⁰ Where there is a valid will, the general viewpoint is that the common law of succession should apply to the devolution of the estate; however, a clear indication from the testator that the customary law must apply would circumvent this inference. Seeing that testamentary

clearly indicates in his or her will which legal system should apply to the devolution of the estate.

This brings us to the main issue at hand. Can a testator also revive the rule of male primogeniture by exercising his or her freedom of testation?

III FREEDOM OF TESTATION AND THE RULE OF MALE PRIMOGENITURE

(1) *Freedom of testation and the re-evaluation of public policy (boni mores or contra bonos mores)*

As already explained, the common-law principle of freedom of testation refers to the freedom of a person to make any provision in his or her will and the right to have his or her estate divided in whatever manner he or she pleases.⁵¹ In South Africa this freedom is almost borderless and the courts do not have a general authority to alter a will against the wishes of a testator.⁵² A testator may even disinherit his or her spouse and children.⁵³ Freedom of testation is, however, not absolute and is subject to a few common-law and statutory limitations which are discussed in detail in scholarly publications.⁵⁴ De Waal classifies the limitations on freedom of testation in modern South African law in accordance with social or economic considerations.⁵⁵ Another classification distinguishes simply

succession is regulated by the Wills Act 7 of 1953, it would be difficult to argue that the customary law must apply to the formal requirements of the will, but there is no reason why a testator could not choose the customary law for the purpose of the interpretation of bequests made in his or her will. See Bennett (n 6) 60–1.

⁵¹ J Jamneck 'Freedom of testation' in Jamneck & Rautenbach (n 10) 115.

⁵² *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 182–186: '[The court] has no general discretionary power to modify or supplement rights given under a will or to authorise the property of a testator to be dealt with otherwise than in terms of his will.' Writers, such as NJ Van der Merwe & CJ Rowland *Die Suid-Afrikaanse Erfreg* 6 ed (1990) 613, argue that freedom of testation is based on the idea of private property as a basic human right which is, of course, contrary to the customary law idea of communal or family property.

⁵³ The disinheritance of family members is, however, subject to indirect limitations, *viz.* the common-law claim of maintenance of minor children in need against the deceased estate receives preference against the claims of beneficiaries; and the statutory claim for maintenance of a surviving spouse in need in terms of the Maintenance of Surviving Spouses Act 27 of 1990. Corbett, Hofmeyr & Kahn (n 11) 41–43. See also the discussion of F du Toit 'The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law' (2001) 12 *Stell LR* 241–245 which argues in favour of the retention of out-and-out disinheritance.

⁵⁴ See, for example, Jamneck (n 51) 116–127; De Waal & Schoeman-Malan (n 11) 4–7; Corbett, Hofmeyr & Kahn (n 11) 39–48. See also MJ de Waal 'The social and economic foundations of the law of succession' (1997) 2 *Stell LR* 162; F du Toit 'The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law' (1999) 10 *Stell LR* 232; F du Toit 'The limits imposed upon freedom of testation by the *boni mores*: Lessons from common law and civil law (continental) legal systems' (2000) 11 *Stell LR* 358; Du Toit (n 53) 222.

⁵⁵ De Waal (n 54) 169–172. Social considerations would include maintenance claims by minor children and surviving spouses or testamentary conditions which are regarded as *contra*

between statutory and common-law limitations.⁵⁶ The limitation imposed by s 23 of the Black Administration Act (and its regulations) on the freedom of testation of a testator who was subject to customary law is an example of a statutory limitation based on social grounds,⁵⁷ but it was declared invalid with retrospective effect from 27 April 1994.⁵⁸

Under the common law a testator may not make bequests that are vague, illegal or against public policy.⁵⁹ Public policy is guided by public opinion of the day and may thus vary from time to time.⁶⁰ Formerly it was based on Western perceptions and the ideas of a small part of the South African community, mixed with a good dose of conservatism and Christian values.⁶¹ It has been held that public policy is a question of fact and can therefore change if there is a factual change. The Constitution with its Bill of Rights has been hailed as such a change which warrants a re-evaluation of public policy.⁶² In *Minister of Education and Another v Syfrets Trust Ltd NO and Another*,⁶³ the court reiterated with reference to Hahlo⁶⁴ that:

Public policy – like its synonyms *boni mores*, public interest and the general sense of justice of the community – is not a static concept, but changes over

bonos mores, whilst economic considerations would include the restriction against the subdivision of agricultural land in terms of the Subdivision of Agricultural Land Act 70 of 1970. The Act stands to be repealed by the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 but the date of commencement of the repeal has not been published. Du Toit (1999) (n 54) 232–243 illustrates that the impact of social or economic considerations is not a contemporary problem but that it already existed in Roman and Roman-Dutch law.

⁵⁶ Jamneck (n 51) 116–122.

⁵⁷ As already explained in Part I above, s 23 prevented a testator from bequeathing certain customary law property under a will. Under De Waal's classification, this limitation would be categorised as a social one. The purpose of the limitation was to prevent the testator from bequeathing customary law property which had to devolve in terms of the rule of male primogeniture.

⁵⁸ *Bhe v Magistrate, Khayelitsha* (n 16) paras 128 and 129. Other prevailing statutes include the Subdivision of Agricultural Land Act; the Minerals Act 50 of 1991; the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965; and the Maintenance of Surviving Spouses Act.

⁵⁹ Corbett, Hofmeyr & Kahn (n 11) 40; Jamneck (n 51) 117.

⁶⁰ *Ismail v Ismail* 1983 (1) SA 1006 (A) 1013.

⁶¹ C Rautenbach '*Moseneke v The Master* 2001 2 SA 18 (CC): Racial discrimination laws and the interests of justice' (2003) 6(2) *PER* 139, available at http://www.nwu.ac.za/sites/default/files/images/2003x2xrautenb_art.pdf (accessed on 21 May 2013). See also *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307, where the court had to evaluate the stance of public policy against polygamy and held: 'Polygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilized peoples, on grounds of morality and religion . . .'.

⁶² *Ryland v Edros* 1997 (2) SA 690 (C) 704A–C.

⁶³ 2006 (4) 205 (C) (hereafter '*Minister of Education v Syfrets Trust*'). For a discussion of the judgment, see C van der Westhuizen & M Slabbert 'Wysigings van die bepalings van 'n liefdadigheidstrust' 2007 *TSAR* 206; MC Wood-Bodley 'Freedom of testation and the bill of rights: *Minister of Education v Syfrets Trust Ltd NO*' (2007) 124 *SALJ* 687.

⁶⁴ HR Hahlo 'Jewish faith and race clauses in wills' (1950) 67 *SALJ* 240.

time as social conditions evolve and basic freedoms develop. . . . Public policy has in the past been gleaned from the *boni mores*, the general sense of justice of the community, as expressed by its legal policy makers, namely the Legislature and the courts. . . . Since the advent of the constitutional era, however, public policy is now rooted in our Constitution and the fundamental values it enshrines, thus establishing an objective normative value system.⁶⁵

The scope of application of the Bill of Rights on the terrain of the private law has been subject to ongoing debates between legal academics and the judicature,⁶⁶ and similar issues are raised regarding the law of

⁶⁵ *Minister of Education v Syfrets Trust* (n 63) para 24.

⁶⁶ Regarding the Constitution of the Republic of South Africa, Act 200 of 1993 (the transitional Constitution) see, inter alia, PJ Visser 'A successful constitutional invasion of private law: *Gardener v Whitaker* 1995 2 SA 672 (E)' (1995) 58 *THRHR* 745–750; PJ Visser 'Horisontaliteit van fundamentele regte afgewys: Potgieter v Kilian 1995 1 BCLR 1498 (W)' (1996) 58 *THRHR* 510; D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution* (1997) 30–43; G Carpenter and C Botha 'The constitutional attack on private law: are the fears well founded?' (1996) 59 *THRHR* 126; J Kruger and B Currin *Interpreting a Bill of Rights* (1994) 1 *et seq*; J Lourens and M Frantzen 1994 'The South African Bill of Rights – public, private or both: a viewpoint on its sphere of application' (1994) 27 *CILSA* 344; E de Wet '“Indirekte drittwirkung” and the application clause' (1995) 11 *SAJHR* 610; E de Wet 'A German perspective on the constitutional enforceability of children's and labour rights in the interim Bill of Rights with special reference to *drittwirkung*' (1996) 59 *THRHR* 577; H Henderson 'Operation of the Constitution between private actors' Jul 1995 *De Rebus* 439; D Olivier 'Vertikale en horisontale werking van die Grondwet steeds onder die loep' Feb 1995 *De Rebus* 83; HA Strydom 'The private domain and the Bill of Rights' (1995) 10 *SAPR/PL* 52; A Van Aswegen 'The implications of a Bill of Rights for the law of contract and delict' (1995) 11 *SAJHR* 50; JD van der Vyver 'The private sphere in constitutional litigation' (1994) 57 *THRHR* 378; J de Waal 'A comparative analysis of the provisions of German origin in the interim Bill of Rights' (1995) 11 *SAJHR* 1; J Kruger 'Die beregting van fundamentele regte gedurende die oorgangsbedeling' (1994) 56 *THRHR* 396; LM du Plessis 'The genesis of the chapter on fundamental rights in South Africa's transitional Constitution' (1994) 9 *SAPR/PL* 1; DH van Wyk 'The South African Bill of Rights: an evaluation' (1994) 9 *SAPR/PL* 278; AJ Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 *SALJ* 720; *De Klerk and Another v Du Plessis and Others* 1994 (6) BCLR 124 (T) 131E; *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC) 638A; *Potgieter en 'n Ander v Kilian* 1995 (11) BCLR 1498 (N) 1515B; *Gardener v Whitaker* 1994 (5) BCLR 19 (E) 29J; *Mandela v Falati* 1994 (4) BCLR 1 (W) 6H–I; *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D) 380I; *Balow and Others v University of Bophuthatswana and Others* 1995 (8) BCLR 1018 (B) 1021. Regarding the final Constitution see, inter alia, PJ Visser 'Enkele beginsels en gedagtes oor die horisontale werking van die nuwe grondwet' (1997) 60 *THRHR* 296; AJ Kerr 'The Bill of Rights in the new Constitution and customary law' (1997) 60 *SALJ* 348; S Woolman and D Davis 'The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions' (1996) 12 *SAJHR* 361; DH van Wyk 'n Paar opmerkings en vrae oor die nuwe Grondwet' (1997) 60 *THRHR* 377; H Cheadle and D Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *SAJHR* 44; JWG van der Walt 'Perspectives on horizontal application: *Du Plessis v De Klerk* revisited' (1997) 12 *SAPR/PL* 1; JWG van der Walt 'Die toekoms van die onderskeid tussen die publiekreg en die privaatreë in die lig van die horisontale werking van die Grondwet (deel 1)' 2000 *TSAR* 416; JWG van der Walt 'Die toekoms van die onderskeid tussen die publiekreg en die privaatreë in die lig van die horisontale werking van die Grondwet (deel 2)' 2000 *TSAR* 605; R Wollhuter 'Horizontality in the interim and final Constitutions' (1996) *SAPR/PL* 512; JD van der Vyver 'Gelykberegting' (1998) 61 *THRHR* 367; IM Rautenbach 'The Bill of Rights applies to private law and binds private persons' 2000 *TSAR* 296; C Rautenbach

succession, especially the potential influence of the Bill of Rights on the freedom of testation.⁶⁷ The Bill of Rights is, however, not only significant for a re-evaluation of the limitations on the freedom of testation but also for the re-examination of the notion of private ownership, a right which seems to be the main catalyst for the continuation of private succession and its upshot, freedom of testation.⁶⁸ There are arguments supporting a broad interpretation of s 25(1) of the Constitution⁶⁹ to guarantee not only the right to private ownership but also the right to dispose of such property *inter vivos* or *mortis causa* (by means of a will).⁷⁰ Griesel J in *Minister of Education v Syfrets Trust*⁷¹ considered the argument without making a firm finding to this effect.⁷² Although the court hinted in that direction,⁷³ it is inconceivable to think that the right to private ownership becomes obsolete upon the death of the owner, stripping him or her of the power to do with the property as he or she pleases. It is more likely that the right to property affords the owner the right to dispose of his or her property either *inter vivos* or *mortis causa* as he or she chooses subject to certain limitations such as public policy. As a matter of fact, Mitchell AJ in

'A commentary on the application of the Bill of Rights to customary law' (1999) 20 *Obiter* 113; C Sprigman and M Osborne 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *SAJHR* 25–51; D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution* (1997) 45–50; K Govender 'Horizontality revisited in the light of *Du Plessis v De Klerk* and clause 8 of the Republic of South Africa Constitution Bill 1996' (1996) 3 *Human Rights and Constitutional LJ of Southern Africa* 20; AJ Jeffery 'The dangers of direct horizontal application: a cautionary comment on the 1996 Bill of Rights' (1997) 1 *Human Rights and Constitutional LJ of Southern Africa* 10; AS Butler 'Private litigation and constitutional rights ss 8 and 9 of the 1996 Constitution – assistance from Ireland' (1999) 116 *SALJ* 77; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T).

⁶⁷ MJ de Waal 'The law of succession and the Bill of Rights' in *Bill of Rights Compendium* (2002 loose-leaf) 3G1–3G15 investigates the influence of the Bill of Rights on the law of succession in general and the principle of freedom of testation in particular. He points out at 3G2 that the horizontal application of the Bill of Rights in the area of private law is still a matter of much speculation. See also the trilogy of articles published by Du Toit in note 54 above. Du Toit (n 53) 223, 231 and 234–235 contends that at least some of the rights contained in the Bill of Rights enjoy horizontal application, which will undoubtedly have an influence on traditional views regarding freedom of testation, and provides a list of the rights which he thinks have the potential to apply horizontally (at 235–239). See also Corbett, Hofmeyr & Kahn (n 11) 47–48.

⁶⁸ Corbett, Hofmeyr & Kahn (n 11) 47.

⁶⁹ This provision provides: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

⁷⁰ Corbett, Hofmeyr & Kahn (n 11) 47; MC Schoeman-Malan 'Recent developments regarding South African common and customary law of succession' (2007) 10(1) *PER* 114 available at http://www.nwu.ac.za/sites/default/files/images/2007x1x_Schoeman_Malan_art.pdf (accessed 21 May 2013).

⁷¹ See n 63 para 18.

⁷² The court's finding that even if there was a deprivation of property it was not arbitrary is criticised by Wood-Bodley (n 63) 689–690.

⁷³ Without pronouncing a firm viewpoint on the matter, the court doubts that property rights can be invoked on behalf of a deceased testator. See *Minister of Education v Syfrets Trust* (n 63) paras 20 and 41.

*Ex parte BOE Trust Ltd*⁷⁴ unmistakably favoured an interpretation to the effect that the ‘right to property includes the right to give enforceable directions as to its disposal on the death of the owner.’ An in-depth exploration of this issue, however, falls outside the scope of this discussion, and I return to the issue of the influence of the Constitution on freedom of testation.

Since the commencement of the transitional and final Constitutions,⁷⁵ the opportunity to re-examine the concept of freedom of testation in the light of constitutional considerations has presented itself only three times in the higher courts. All three cases dealt with discriminatory clauses contained in testamentary charitable trusts. The first case, already referred to above, was *Minister of Education v Syfrets Trust*.⁷⁶ The testator executed a will in 1920 supplemented by a codicil in the same year in which he created a trust fund to be established after his death with the purpose of providing bursaries to deserving white, non-Jewish, male students.⁷⁷ The Minister of Education brought an application requesting the deletion of the discriminatory provisions on the ground that they infringed the common-law prohibition against bequests that are contrary to public policy and the Constitution. Griesel J pointed out that freedom of testation is not absolute but may be limited by public policy which, according to the court, refers to public policy of the day and not to public policy at the time of the execution of the will.⁷⁸ The court held that the limitations on freedom of testation are based on considerations of public policy, which need to be re-considered, especially in the light of the values and rights contained in the Constitution.⁷⁹ The court considered the question of public policy rooted in the Constitution and the values that the Constitution protects, *viz.*: human dignity, the achievement of equality and the advancement of non-racialism and non-sexism. With reference to the much celebrated words of Mahomed J (as he then was) in *S v Makwanyane and Another*,⁸⁰ the court rejected any arguments to the

⁷⁴ 2009 (6) SA 470 (WCC) at para 9 (hereafter ‘*Ex Parte BOE Trust*’).

⁷⁵ The transitional Constitution commenced on 27 April 1994 and the final Constitution on 4 February 1997.

⁷⁶ *Minister of Education v Syfrets Trust* (n 63) paras 47–49.

⁷⁷ *Ibid* paras 3 and 4. The contested provision initially read ‘deserving students with limited or no means of either sex (but European descent only)’, but was later modified by codicil to exclude Jews and females.

⁷⁸ *Ibid* para 22.

⁷⁹ *Ibid* para 22.

⁸⁰ 1995 (3) SA 391 (CC) para 262: ‘. . . [The transitional Constitution] retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the

effect that the public policy which prevailed when the will was executed was relevant for the interpretation of the offending clauses in the trust document.⁸¹ The sticky situation of dealing with the horizontal application of the Bill of Rights in the private law was once again avoided by the court, with Griesel J stating that he had ‘chosen to deal with the present application on the basis of the common law (thus indirect application), rather than a direct application of the Constitution’.⁸² Following an evaluation of the equality jurisprudence⁸³ the court came to the conclusion that the offending words in the trust amounted to unfair discrimination. The outcome of the case was abundantly clear – the offending provisions in the trust were discriminatory and not even a careful balancing act between the self-same values of private ownership and equality could save them.⁸⁴ The court concluded that the words in question constituted unfair discrimination and were therefore ‘contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality.’⁸⁵ The judgment illustrates the radiating effect or ‘normative influence’, as the court calls it, of the Constitution on firmly entrenched common-law principles such as freedom of testation.⁸⁶ In the light of this decision, prospective testators need to reconsider potentially discriminatory provisions in their wills in order

need for a “new order . . . in which there is equality between . . . people of all races”. Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour (subject only to the obvious limitations of section 33). The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. . . . Such a jurisprudential past created what the postamble to the Constitution recognizes as a society “characterized by strife, conflict, untold suffering and injustice”. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting “future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.

⁸¹ *Minister of Education v Syfrets Trust* (n 63) para 26.

⁸² *Ibid* para 32. Although the court explained at the outset that it adjudicated the case on the basis of the common law, rather than a direct application of the Constitution, Van der Westhuizen & Slabbert (n 63) 212–213 argue convincingly that the absence of an in-depth discussion of the old authorities conveys another message. They also criticise the court’s avoidance of the question of whether or not the Constitution indeed applied retrospectively to the facts *in casu*.

⁸³ *Minister of Education v Syfrets Trust* (n 63) para 27 *et seq*.

⁸⁴ *Ibid* paras 39–46.

⁸⁵ *Ibid* para 47. Wood-Bodley (n 63) criticises the court for not having applied the limitations test in terms of s 36 of the Constitution. He argues that the test must be applied regardless of whether the Constitution applies directly or indirectly to freedom of testation. Van der Westhuizen & Slabbert (n 63) 213 also critique the court’s equalisation of the situation in contract law and testate law and argue persuasively that such an analogy may lead to legal uncertainty.

⁸⁶ *Minister of Education v Syfrets Trust* (n 63) para 15.

to avoid costly and time-consuming legal actions which may lead to the depletion of their estates. Important also is the fact that the court did not create a *carte blanche* limitation on freedom of testation where differentiation between different groups is involved, but only required each and every case to be adjudicated on its own merits. It should be clear, however, that no clause that constitutes unfair discrimination will be saved by the principle of freedom of testation.⁸⁷

The second case, *Ex Parte BOE Trust Ltd*,⁸⁸ also dealt with the validity of certain provisions of a testamentary charitable trust with its main object being to provide bursaries to:

*White South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain.*⁸⁹

One of the conditions for the awarding of the bursary was that the candidate had to return to South Africa for a period stipulated by the selectors.⁹⁰ The applicants (the trustees) applied for an order for the deletion of the word 'White' on a number of grounds,⁹¹ the first being s 13 of the Trust Property Control Act,⁹² which allows the court to delete or vary provisions in a trust under certain circumstances. The second was that the common law prohibits bequests that are contrary to public policy, and the third was a direct application of the Constitution's equality and anti-discrimination provisions. In dealing with the consideration of public policy as a limitation on freedom of testation, the court confirmed that public policy is not static and that it has been shaped by the transitional and final Constitutions.⁹³ A noteworthy aspect of the decision is the fact that Mitchell AJ recognised a truth which is often lost sight of:

⁸⁷ Ibid para 48: "This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored; it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the *present conditions – which discriminate unfairly on the grounds of race, gender and religion – are invalid*. There are many other examples of differentiation in this field, which will have to be considered by another Court on another occasion.' Emphasis added. See also J Jamneck & C Rautenbach (n 10) 118.

⁸⁸ See n 74. The facts of the case are discussed by MJ de Waal 'The law of succession (including the administration of estates) and trusts' 2009 *Annual Survey of South African Law* 1065–70.

⁸⁹ *Ex Parte BOE Trust* (n 74) para 2. Emphasis added.

⁹⁰ They were the four Organic Chemistry Professors at the universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfrets Trust Limited. *Ex Parte BOE Trust* (n 74) para 2.

⁹¹ *Ex Parte BOE Trust* (n 74) para 7.

⁹² 57 of 1988.

⁹³ *Ex Parte BOE Trust* (n 74) para 12.

public policy 'is a matter on which individual opinion might differ'.⁹⁴ His views on the offending provisions were not as gloomy as those of the trustees and he reckoned that the results that the testator wanted to achieve with the conditions of the bursary served a legitimate purpose,⁹⁵ viz.: to prevent the brain-drain of white graduates from South Africa.⁹⁶ In addition, the court pointed out that 'no one has a right to receive a benefit under a will or trust' and, consequently, 'the freedom of testation must include the right to benefit a particular class of persons, and not others.'⁹⁷ However, because of the court's finding of impossibility (see below), the court did not make a final finding on this point.⁹⁸ The applicants' reliance on s 13 of the Trust Property Control Act likewise failed.⁹⁹ Section 13 provides that a court may delete or vary a trust provision:

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest.

Section 13 allows a court to enter the mind of the testator by interpreting the trust instrument to determine if it 'contains any provision which brings about consequences which in the opinion of the court' the testator did not contemplate or foresee. In the opinion of the court this is the 'jurisdictional fact' that forms the basis of the court's power to delete or vary a trust provision.¹⁰⁰ *In casu*, the applicants did not prove that 'circumstances unforeseen by the testator have had any effect on the implementation of the bursary bequest' which could 'justify an interference by the court'.¹⁰¹ The testator executed her will eight years after South Africa's new constitutional dispensation and would thus have been fully aware of the discriminatory nature of the trust provision. In its final analysis of the facts, the court came to the conclusion that the testator had foreseen that the bursary bequest might become impossible to carry out, although it was doubtful that she envisaged that the attitude of the trustees (their refusal to distribute the bursaries to white students only) would be

⁹⁴ *Ibid* para 13.

⁹⁵ The court had in mind s 9(3) read with ss 9(5) and 36(1) of the Constitution, which recognise that discrimination designed to achieve a legitimate purpose is not unfair. *Ex Parte BOE Trust* (n 74) paras 14 and 15.

⁹⁶ *Ex Parte BOE Trust* (n 74) paras 14 and 15.

⁹⁷ *Ibid* para 16.

⁹⁸ *Ibid* para 17.

⁹⁹ *Ibid* paras 18–20.

¹⁰⁰ *Ibid* para 20.

¹⁰¹ *Ibid* para 22.

the cause of its impossibility.¹⁰² In highlighting the importance of freedom of testation once more, the court pointed out that it could not rewrite wills or testamentary trusts and emphasised that ‘effect must be given to the express wishes of the testator, except in the circumstances set out in the Trust Property Control Act’.¹⁰³ Consequently, the application for the deletion of the word ‘White’ had to fail. The trustees thus remained with the difficult decision to either comply with the trust provisions or to continue with their refusal to participate in the selection process as required by the trust provisions, in which case the bursary bequest would become impossible to carry out and the trust income would be divided among a list of charitable institutions. The court warned that there is always a danger that a court may declare wills or trust provisions void as being contrary to public policy in the absence of a ‘jurisdictional fact’, resulting in undesired outcomes, such as the failure of the will or trust *in toto*. As pointed out by the court, a finding that a provision in a will or trust is contrary to public policy does not give the court the power to vary the offending provision *per se* and the desired outcome (an alteration of the offending provision) might not always be obtained.¹⁰⁴

The third judgment was delivered by the Supreme Court of Appeal in *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others*,¹⁰⁵ a case which also dealt with an offending provision in a testamentary charitable trust, this particular trust having been created in 1938. The trust was intended to provide funding for the higher education of poor ‘European girls born of British South African or Dutch South African parents, who have been resident in Durban for a period of at least three years immediately preceding the grant’.¹⁰⁶ The University, the trustee of the fund, relied on s 13 of the Trust Property Control Act to argue that the racially discriminatory provision in the trust which, according to it, was contrary to public policy, had to be deleted.¹⁰⁷ The court concluded that

¹⁰² Ibid para 24.

¹⁰³ Ibid para 26: ‘The court is not at large to rewrite testamentary dispositions (or other trust instruments) simply because the trustees (or, for that matter, the beneficiaries) wish this to be done. Recognition of the right to freedom of testation must imply that effect must be given to the expressed wishes of the testator, except in the circumstances set out in the Trust Property Control Act, if it is possible to establish the jurisdictional fact . . .’.

¹⁰⁴ Ibid para 27: ‘In the absence of such jurisdictional fact, the court may declare a provision in a trust instrument void as being contrary to public policy. This may result in the failure of the trust *in toto*, or the excision of the offending provision to the extent that it is severable from the remaining provisions of the trust instrument.’ See also para 19.

¹⁰⁵ 2010 (6) SA 518 (SCA) (hereafter ‘*Curators, Emma Smith Educational Fund v University of Kwazulu-Natal*’). The facts of the case are discussed by MJ de Waal ‘The law of succession (including the administration of estates) and trusts’ 2010 *Annual Survey of South African Law* 1192–1198.

¹⁰⁶ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 8.

¹⁰⁷ Ibid para 22.

both sub-ss (a) and (c) of s 13 found application for two reasons – the racially restrictive nature of the trust prevented the testator’s (the founder’s) objectives from being achieved, and it was in conflict with the public interest (or public policy).¹⁰⁸ However, the court did not address the ‘jurisdictional fact’ – the requirement which entails a subjective enquiry into the mind of the testator, namely whether he contemplated or foresaw the discriminatory consequences when the trust was created. If he did not, the court would be able to delete or vary the relevant trust provisions. The main focus of the court was to consider whether the offending provisions were against the public interest, and it did not pursue the matter of ‘jurisdictional fact’ any further.¹⁰⁹ A number of considerations played a role in the court reaching its conclusion. They were, for example, the right to equality,¹¹⁰ public policy,¹¹¹ existing case law,¹¹² and the fact that the trust was a public charitable fund administered by a public institution (a university) with the mandate to redress past inequalities and not to discriminate unfairly in any way.¹¹³ The curators took the point that in the absence of a hierarchy of rights, the right not to be deprived of property,¹¹⁴ which is intertwined with freedom of testation, is equally as important as other fundamental rights.¹¹⁵ The court held:

The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need, administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past.¹¹⁶

Considerable emphasis was placed on the fact that the trust was a public charitable one which operated in the public sphere where there ‘can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster.’¹¹⁷ The court conceived that there might be private charitable trusts which might require a totally different approach.

¹⁰⁸ Ibid para 40.

¹⁰⁹ Ibid paras 34–40.

¹¹⁰ Ibid paras 35–37. Section 9 of the Constitution and s 7 (and its schedule) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹¹¹ Which ‘is now rooted in the Constitution and the fundamental values it enshrines’: *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 38.

¹¹² Such as *Minister of Education v Syffrets Trust* (n 63). See *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 38.

¹¹³ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 39.

¹¹⁴ As enshrined in s 25 of the Constitution.

¹¹⁵ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 20.

¹¹⁶ Ibid para 42.

¹¹⁷ Ibid paras 38–41.

For example, a testator who is a member of a congregation might wish to benefit the members of his faith.¹¹⁸ The court accordingly dismissed the appeal against the deletion of the offending words save for the appeal against the deletion of the name 'Durban,' which also formed part of the application.¹¹⁹ The question of whether or not the Constitution applies directly to the law of succession was left unanswered.

As has already been pointed out, all three decisions dealt with offending provisions in testamentary public charitable trusts – but that is where the similarities end. In *Minister of Education v Syfrets Trust*, the court addressed the issue from the viewpoint of the law of succession and more specifically the role of public policy (as informed by constitutional values) in limiting a testator's freedom of testation, before coming to the conclusion that the offending provision of the trust was *contra bonos mores* and void. In *Ex Parte BOE Trust*, the court applied both the law of succession (public policy) and the law of trusts (s 13 of the Trust Property Control Act) to come to the conclusion that it was not in a position to remove the offending provisions from the trust. In *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* the court confronted the problem from the viewpoint of the law of trusts by applying s 13 of the Trust Property Control Act, albeit also from the viewpoint of public policy (or public interest). Although different approaches were followed in the cases, they led to more or less the same results, except for *Ex Parte BOE Trust*, where the court held that the trust had failed because of the attitude of the trustees.

Against this background, the next question to deal with is whether or not a testamentary provision that revives the rule of male primogeniture would be regarded as being against public policy and thus void.

(2) *Public policy and the revival of the rule of male primogeniture*

For the purpose of the examination that follows, it is important to bear in mind that the statutory limitation on freedom of testation imposed by s 23 of the Black Administration Act (and its regulations) no longer exists. Testators living under a system of customary law are no longer precluded from making wills with regard to customary law property and they have exactly the same freedom to make wills as their common-law counterparts. Thus, at first blush it seems that a testator subject to customary law has the freedom to reinstate the rule of male primogeniture by means of a testamentary provision, for example by stating: 'I bequeath the whole of my estate in terms of the rule of male primogeniture.' Presently there are no statutory limitations preventing a testator from making such a

¹¹⁸ Ibid para 41.

¹¹⁹ Ibid para 50.

provision in a will. The only question that remains is whether he or she can be stopped from doing so by the common-law limitation of public policy or, in the alternative, a direct application of the Bill of Rights. For now I think we can assume that a direct application of the Constitution to the law of succession is unlikely – that much we can infer from the three judgments dealt with in the previous section. Moreover, the three cases discussed in the previous section dealt with trust provisions operating in the public sphere, whilst a testamentary provision instituting the rule of male primogeniture will most likely remain in the private sphere. The fact that a testator discriminates against other beneficiaries in an out-and-out private sphere might lead courts to draw a different conclusion to the ones the courts reached in the three trust decisions.

Nevertheless, a few useful guidelines have emerged from the three cases. First and foremost is the fact that the principle of freedom of testation is still alive and strong.¹²⁰ In *Minister of Education v Syfrets Trust* the court pointed out that its declaration of invalidity of the offending provisions did not mean that:

. . . the principle of freedom of testation is being negated or ignored; it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions – which discriminate *unfairly* on the grounds of race, gender and religion – are invalid. There are many other examples of differentiation in this field, which will have to be considered by another court on another occasion.¹²¹

The second guideline which can be deduced from the three cases is that charitable trusts operating in the public sphere by public institutions will be judged more strictly than those in the private sphere.¹²² Thirdly, the Constitution will in all likelihood not be applied indirectly to the law of succession but it will nevertheless play a role in influencing common-law principles such as public policy by obliging the judiciary to consider constitutional values and rights in its application of the *boni mores*. Lastly, it is unlikely that provisions whose discrimination is based on past patterns of disadvantage would survive the scrutiny of a court, although this assumption is a bit shaky. In *Minister of Education v Syfrets Trust* those groups included 'blacks, women and Jews'.¹²³ However, in *Ex Parte BOE*

¹²⁰ See *Minister of Education v Syfrets Trust* (n 63) para 48; *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) paras 41–42; *Ex Parte BOE Trust* (n 74) para 26.

¹²¹ *Minister of Education v Syfrets Trust* (n 63) para 48.

¹²² De Waal (n 105) 1198.

¹²³ *Minister of Education v Syfrets Trust* (n 63) para 34. See also De Waal (n 105) 1198, who argues that it is unlikely that any differentiation based on race would survive the scrutiny of the court.

Trust the court was of the opinion that the word ‘White’ in the trust provisions had a legitimate purpose.¹²⁴ The reference to ‘European’, ‘British or Dutch South African’ evoked the wrath of the court in *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal*¹²⁵ and was deleted because of its discriminatory nature, but the court had no quibbles with the reference to ‘women’ in the same provisions.

How then must one approach a provision in a will that gives effect to the rule of male primogeniture? Three scenarios may prevail. To begin with, a testator may stipulate that his or her estate must devolve in terms of customary law on the assumption that the rule of male primogeniture would apply. In the light of *Bhe v Magistrate, Khayelitsha*, in which the court declared the customary law rule of male primogeniture unconstitutional, such a provision would in all probability be regarded as a mistaken assumption¹²⁶ resulting in the partial or *in toto* failure of the will.¹²⁷ In the event of this happening, the testator should take alternative measures such as providing substitution provisions in his or her will. If the will cannot be saved, the testator will die intestate and the estate will devolve in terms of the Intestate Succession Act read with the Reform of Customary Law of Succession Act.¹²⁸

The second possibility is for the testator to make a direct provision stipulating that his or her estate must devolve in accordance with the rule of male primogeniture. As is the case with any other testator, a testator subject to customary law has freedom of testation which may be limited by laws of general application only. It has already been established that there is no direct legislation limiting the ability of a testator to make such a provision in his or her will, but there are other considerations such as the Constitution and public policy which remain relevant. Two questions may be asked: firstly, can the Constitution be applied directly to the offending testamentary provision and, secondly, can a testator be prevented from devolving his or her estate in accordance with the rule of male primogeniture? To date, neither of these issues has been considered by the judiciary and one can only speculate on what the outcome would be. Regarding the first question, it can be argued that the case authority¹²⁹

¹²⁴ *Ex Parte BOE Trust* (n 74) para 15.

¹²⁵ *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105) para 46.

¹²⁶ Corbett, Hofmeyr & Kahn (n 11) 93.

¹²⁷ Also, if the contents of a will do not comply with the law in some or other way, the will is substantially invalid and of no force and effect: Corbett, Hofmeyr & Kahn (n 11) 89.

¹²⁸ As a result of the developments of the last few years, the position of the testator can be divided into three periods, namely before 27 April 1994, since 27 April 1994 but before 20 September 2010, and since 20 September 2010 to date. For the relevance of the periods, see M Paleker ‘Intestate succession’ in Jamneck & Rautenbach (n 10) 29.

¹²⁹ None of the cases discussed applied the Constitution directly – see *Minister of Education v Syfrets Trust* (n 63); *Ex Parte BOE Trust* (n 74); *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* (n 105).

does not favour a direct application of the Constitution when matters of freedom of testation are evaluated, and there is no compelling reason why the situation must be different just because the testator is subject to customary law. The answer to the second question is less straightforward and will depend on the interpretation of the common-law restriction that a testamentary provision is void if it is contrary to public policy. In this scenario, public policy is shaped not only by the Constitution but also by other considerations. In *Bhe v Magistrate, Khayelitsha*¹³⁰ the court found that the 'customary-law rule of male primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution.' There is thus direct authority on the issue of the constitutionality of the rule of male primogeniture, and ignoring this authority will certainly be contrary to public policy. Another consideration is the Reform of Customary Law of Succession Act. The Act does not contain an express provision excluding the rule of male primogeniture, but the preamble does declare an intention to give effect to the Constitutional Court's declaration of the rule's invalidity. It provides:

SINCE a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession;

AND SINCE certain children born out of a customary marriage do not enjoy adequate protection under customary law;

AND SINCE section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law;

AND SINCE social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members;

AND SINCE the Constitutional Court has declared that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights;

Parliament of the Republic of South Africa therefore enacts as follows.

The preamble makes it abundantly clear that the Act has been enacted to erase all inequalities in the customary law of succession. It will be difficult, if not impossible, against this backdrop, to argue that a testator can revive the rule of male primogeniture through the exercise of his or her freedom of testation.

There is one more scenario which needs to be considered. A testator may unpack the consequences of the operation of male primogeniture on his estate and list them in detail, without reference to the rule of male primogeniture. It would be precarious to conclude that the testator intended to reinstate the rule of male primogeniture with such a bequest.

¹³⁰ *Bhe v Magistrate, Khayelitsha* (n 16) para 100.

What if a testator makes a bequest which might simply by chance coincide with what the bequest would have looked like if male primogeniture had been in operation? Surely such a bequest cannot be contested merely because of its commonalities with an unconstitutional customary law rule? A testator may surely stipulate that his or her estate must devolve upon the eldest son in its entirety, thereby effectively disinheriting the rest of his family members. Legal scholars seem to agree that out-and-out disinheritance in the common law should not be contestable, for a number of reasons, most notably because no beneficiary enjoys a fundamental right to inherit and because of the importance of the principle of freedom of testation.¹³¹ Disinherited family members can, however, protect themselves against patrimonial detriment either by way of a common-law claim for maintenance awarded to a deceased's dependent children or by way of a statutory claim for maintenance awarded to surviving spouses. The application of these two protective mechanisms is a bit fuzzy, however, when it comes to the customary law of succession, but a detailed investigation of these issues falls outside the scope of this contribution.¹³²

As already explained, the customary law of succession was not primarily concerned with the distribution of the deceased's estate but rather with the

¹³¹ De Waal (n 67) 3G22–3G23.

¹³² Seeing that the categories of children and, as it turns out, the categories of wives are much broader in customary law than in the common-law context, these issues warrant further investigation. Rautenbach & Meyer (n 48) 149 have already argued that the inclusion of seed-raising wives and wives from woman-to-woman marriages as descendants in terms of the Reform of Customary Law of Succession Act is problematic for various reasons. Could these additional categories of women also qualify as the children of a deceased in order to claim maintenance from the deceased estate (in terms of the common-law claim), because they are regarded as descendants in terms of the Reform of Customary Law of Succession Act? A further problem arises. A descendant in terms of the Act is also regarded as someone who 'was accepted by the deceased person in accordance with customary law as his or her own child'. The vagueness of this provision raises alarm bells, and it is just a matter of time before a situation occurs where someone claiming to be a descendant in this category presents her- or himself. The position of the seed-raising or woman-to-woman wife in terms of the Maintenance of Surviving Spouses Act is equally ambiguous. In terms of s 2(1) of the Maintenance of Surviving Spouses Act a 'survivor' shall have a claim against the estate of a deceased spouse for the provision of reasonable maintenance until his or her death or remarriage 'in so far as he is not able to provide therefor from his own means and earnings.' The Act was amended by the Reform of Customary Law of Succession Act to provide for the spouses of a customary marriage, and the term 'survivor' is defined in s 1 of the former as 'the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929'. The definition makes no mention of a seed-raising wife or a wife from a woman-to-woman marriage, nor does the Recognition of Customary Marriages Act recognise these kinds of unions as valid customary marriages. The Recognition of Customary Marriages Act defines a customary marriage as one 'concluded in accordance with customary law' and one could argue that such marriages are therefore regarded as customary marriages in terms of customary law. But the situation is by no means certain. Most likely, if such women were to be disinherited by will, they would not qualify as surviving spouses in terms of the Maintenance of Surviving Spouses Act.

protection and continuation of the family unit. As a result, the distribution of the collectively owned family property after the death of the family head had to proceed in a certain way. As explained by Langa DCJ:

The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit.¹³³

The rule of male primogeniture was the main feature of this process, because it was the eldest son, or in his absence, the nearest male member in the male line, that inherited the deceased's property and thus assumed the responsibility to maintain and support the members of the family.¹³⁴ While male primogeniture has been found to be unconstitutional, nothing has been said about the male's responsibility to maintain and support the members of the family. One could possibly argue that the responsibility to maintain and protect was so intertwined with the rule of male primogeniture that it too fell away when the rule was declared to be unconstitutional and invalid, but to date nothing has come to the fore to test this contention. But there are also alternatives to the rule of male primogeniture that may achieve similar aims, and which might not be so objectionable, such as the *fideicommissum* or a *modus* – both common-law instruments, which will shortly be referred to in the conclusion by way of example.

IV CONCLUSION AND POSSIBILITIES

For the most part, the customary law of succession has been replaced by statutes which are generally based on common-law principles. These changes, however, did not unify the common and customary law entirely. Under certain circumstances, it would still be necessary to determine if a person who died intestate was subject to customary law in order to apply the modifications prescribed in the Reform of Customary Law of Succession Act. In order to remove any doubt as to which law is applicable, it is recommended that a person clearly indicate in his or her will which legal system should apply to the deceased estate.

Although the judiciary and the legislature may be criticised for their decision not to develop the customary law of succession but instead to

¹³³ *Bhe v Magistrate, Khayelitsha* (n 16) para 76.

¹³⁴ *Ibid* para 77.

replace it with statutes based on common-law principles, the fact remains that people subject to customary law have gained the power to execute wills, and this could be used to their advantage. There seems to be nothing preventing a testator living under a system of customary law from applying his or her newly acquired freedom of testation to indirectly revive the rule of male primogeniture through a testamentary provision. Typically such a provision will be considered by a family head who wishes to retain the customary law property within the family living under a system of customary law. In order to ensure continuation, he might even consider applying common-law concepts such as substitution and *modus*. One can only begin to imagine the options open to such a testator. Consider the following clause in the will of a testator who is involved in a monogamous customary marriage:

I bequeath my property to my eldest son. If he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my second son. If my second son also predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my third son (and so on). If I die without any sons in the male line, my property must pass to my father and if he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to the male descendants of my father related to him in the male line in descending order until one is found which will exclude all other surviving descendants from inheritance.

A similar provision, with specific reference to the wife whose sons must inherit in similar order, could be executed in the case of a polygynous customary marriage. It is difficult to imagine that such a provision would be considered unconstitutional on the sole basis that the outcome would in effect be the same as that of male primogeniture. One could even ensure that the property is carried over to the next generation, as follows:¹³⁵

I bequeath my property to my eldest son. If he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my second son. . . . On the death of the one who inherits the property, the property that remains must pass to his eldest son [and so on].¹³⁶

To add some more flavour to the broth, one could even burden the bequest to the male beneficiaries with a *modus*. For example:

I bequeath my property to my eldest son. If he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my

¹³⁵ Provided that the provisions of the Subdivision of Agricultural Land Act and the Immovable Property (Removal or Modifications of Restrictions) are kept in mind.

¹³⁶ Thus creating a *fideicommissum residui*.

second son. . . . The bequest is subject to the responsibility of the heir to maintain my family members, X, Y and Z, until they die or marry.

The possibilities are legion and all that is needed is an innovative drafter of wills who knows both the common and customary law of succession. There is no compelling reason why the common and customary law should remain uninfluenced by each other or why we cannot eventually have a more integrated system of law where the two systems borrow from each other what is needed or desirable. As pointed out by late Chief Justice Mahomed, the influence of Roman-Dutch law and customary law works both ways. He declared:

Southern Africa will be poorer without the sound discipline, effectiveness and historical experience of Roman-Dutch law . . . [and] will also be poorer without the spiritualising, humanistic and bonding values of Customary law.¹³⁷

Former Justice Sachs also recognised that what is developing in South Africa should be called South African law because ‘. . . Roman Dutch law will survive in the future by fusing itself with African law, shedding its name, and becoming an integral part of a new South African law’.¹³⁸ I have argued before that ‘[b]y putting all of the different laws into one big pot, letting it simmer and infuse all of the ingredients with all the different flavours, we might eventually have a wonderfully integrated “potjiekos” mix, distinctly South African, to be enjoyed by all.’¹³⁹

¹³⁷ I Mahomed ‘The future of Roman-Dutch law in Southern Africa, particularly in Lesotho’ (1985) *Lesotho Law Journal* 363.

¹³⁸ A Sachs *Protecting Human Rights in a New South Africa* (1990) 91.

¹³⁹ Rautenbach (n 3) 240.