



Inheritance and redistribution:

**Exploring the constitutional commitment towards redistribution in the
private law of succession**

By

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CGGJON001

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DECLARATION

I, JONATHAN COGGER, declare that ‘Inheritance and redistribution: Exploring the constitutional commitment towards redistribution in the private law of succession’ is my work and that it has not previously been submitted in whole, or in part, for the award of any degree or qualification at any university. All the sources used, referred to or quoted have been duly acknowledged.

DATED AT CAPE TOWN ON 2 DECEMBER 2020.

Jonathan Cogger

ABSTRACT

The inevitability of the death of all property owners means that the redistribution of property at death is a basic function of the law of succession. In the systems that recognise testamentary freedom (including South Africa), the right to distribute property after death is considered as a natural extension of the entitlements that an owner enjoys while alive. Testamentary freedom is an age-old common law principle that has formed part of our law since time immemorial. This right vests in individual owners, and courts (and functionaries of the State) are obliged to give effect to the clear intentions of testators as expressed in their wills. Ownership therefore forms the basis of the right to make testamentary disposals that become enforceable after death. In this way, a primary role of testate succession law is to extend the rights of owners after death. The question this thesis seeks to answer is whether the common law right to dispose of property after death is a constitutionally protected property right in light of constitutional commitments to redistribution, restitution and historical redress. This involves an interpretation of the nature, purpose and scope of section 25 of the Constitution in the context of the common law of testate succession. In this thesis, I critique the academic and judicial view that ownership is central to the constitutional protection of the common law principle of freedom of testation. I argue that the current interpretation of the property clause represents a one-dimensional view of property rights that ignores accepted constitutional property jurisprudence of the interpretive approach to the property clause, including its dual purpose in protecting as well as transforming property relations and the emphasis on our historical context of past discrimination. In essence, my thesis is a critical evaluation of the nature and scope of testamentary freedom for the purposes of justifying the redistribution of wealth and property at death. My ultimate goal is to show that the redistribution of property through inheritance law is politically and constitutionally justified.

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PREFACE

At the time of submitting this thesis for examination, the Constitutional Court was seized with the important appeal of *King NO and Other v De Jager and Others; Wilkinson and Another v Crawford NO and Others* CCT130/19 11 February 2020. This case relates to the constitutionality of disinheritance in circumstances where testators discriminate on one or more listed grounds in section 9 of the Constitution (the equality clause). The court a quo and the Supreme Court of Appeal held that testators were entitled to do so, and dismissed the applications of family members excluded from inheriting on equal terms of as other family members. It is unfortunate that I will not have the benefit of discussing this judgement but look forward to including it in future academic articles.

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CHAPTER 1

INTRODUCTION

'I believe that the analysis of representations and beliefs systems about income and wealth is an integral and indispensable part of the study of income and wealth dynamics, because these representations ultimately determine the extent of institutional change and the dynamics of inequality.'

Thomas Piketty 'Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century' (2015) 68 *Tax Law Review* 3 633.

1.1 BACKGROUND TO THE STUDY

This dissertation explores the redistributive scope of the right to dispose of property after death. By 'redistributive scope' I mean, the lawful scope to limit the distribution of wealth in a will or trust without this being successfully challenged as an infringement of a testator's constitutionally recognised right to dispose of property after death – otherwise known as freedom of testation. The point of departure for this study is that the inheritance of wealth is a contributing factor towards maintaining intergenerational inequality and poses a long-term barrier towards more equitable enjoyment of property. In the context of a society like South Africa with vast pre-existing wealth inequalities generated on the back of an unjust colonial and apartheid regimes, intergenerational wealth transfers preserve inequalities that undermine a constitutional commitment to equitable access to land and other socio-economic opportunities. Persistent inequalities were recently reflected in 2018 *Land Audit Report conducted by the Department of Rural Development and Land Reform* that shows that 79% of land in South Africa is privately owned and that White people own

the majority of agricultural land at 72%, followed by Coloured people at 15%, Indian people at 5% and African people at 4%.¹

Wills and trusts are the primary legal instruments by which wealth is transferred from one generation to the next. Such transfers are not necessarily the cause of wealth inequalities, but its aid or ally in sustaining it over time.² Inheritance will enable and potentially enhance social injustice in any society that already has pre-existing wealth inequalities.³ Its contributing role towards sustaining intergenerational inequality is, however, often obscured when testamentary disposals are viewed as isolated acts. The long-term impact on inequality is also hidden and obscured when the principle of testamentary freedom itself is valorised as a legal right having constitutional protection. This latter aspect occurs when a legal principle is shrouded in sacrosanctity. A narrow ideological focus on individual intergenerational bequests ignores that inequality is replicated over multiple generations and sometimes only felt across generations, namely from grandparents to grandchildren.⁴

In light of this contributory role and valorised legal position, this dissertation explores the relationship between freedom of testation and intergenerational equity in South Africa. This study is spurred on by the transformative vision of the

¹ *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) at 10. The Land Audit further shows that males own 72% of the total farms and agricultural holdings, followed by females at 13% (accessed at <http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf>).

² S Munzer *A Theory of Property* (1990) at 395; D Halliday *Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (2018) at 6. Wealthy parents are able to provide unfair advantages to their children because of disproportionate opportunities afforded to them by the apartheid regime. Similarly, the majority of black parents are unable to pass on large (even modest) estates to their children because their career and financial opportunities were stunted by racist legislation. The success of parents also determines the life opportunities that children are afforded by the intra-generational transfer of life opportunities, including: education, extra-mural activities, family support, and networking opportunities. When parents die, children are also normally included in a will and depending on the relative success of a parent, children receive extra financial support. The distributive consequences of the rules of succession therefore shield social and economic inequality.

³ D Halliday *Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (2018) at 122; T Piketty 'Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century' (2015) 68 *Tax Law Review* 3 at 632.

⁴ Halliday op cit at 122-23.

Constitution⁵, which invites the critical development and transformation of old common law institutions that have a direct impact on the distribution of wealth in post-apartheid South Africa.⁶ According to Mohamed DP in *Du Plessis v De Klerk*, the development of the common law requires that it should be ‘revisited and revitalised with the spirit ... and with full regard to the purport and objects of [the Constitution].’⁷ Thus the true potential of this constitutional project is that it licenses the systematic interrogation of all pre-existing common law rights, values, principles, concepts and doctrines. This invites critical scrutiny of the old authorities of law and the legitimacy of many of the background values and principles. It also includes challenging the distributive consequences of private law institutions to achieve greater economic equality in South Africa. This approach is supported by one of the major premises for including transformative provisions in the property clause, which was to prevent the persistence of *de facto* privatised apartheid, i.e. the continuation of

⁵ They include: 1) the founding values (Section 1); 2) the mandate of the state to ‘respect, promote, protect and fulfill the rights in the Bill of Rights’ (Section 7(2)); 3) horizontal application of rights to private relations (Section 8(2) and (3)); 4) the right to (substantive) equality (Section 9(2), (3) and (4)); 5) socio-economic rights (Sections 26, 27 and 28); and 6) the limitation clause (Section 36). Together these provisions encapsulate the normative declaration that the apartheid legacy would be countered by an alternative vision of multiculturalism, equality and freedom.

⁶ See K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146 at 150. The theoretical notion of the Constitution as transformative has been furthered by various academics. See C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *SAJHR* 248; S Liebenberg ‘Needs, Rights and Transformation: Adjudicating Social Rights’ (2006) 17 *Stellenbosch LR* 5; D Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *SAJHR* 309; H Botha ‘Metaphoric Reasoning and Transformative Constitutionalism (part 1)’ (2003) 4 *TSAR* 612; H Botha ‘Metaphoric Reasoning and Transformative Constitutionalism (part 2)’ (2003) *TSAR* 20; M Pieterse ‘What Do We Mean When We Talk About Transformative Constitutionalism’ (2005) 20 *SAPR/PL* 155; AJ van der Walt ‘Legal History, Legal Culture and Transformation in a Constitutional Democracy’ (2006) 12 *Fundamina* 1; P Langa ‘Transformative Constitutionalism’ (2006) 3 *Stell LR* 351. See further *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) 490 (CC) paras 73–74; *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) paras 51–52; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) para 100.

⁷ 1996 (3) SA 850 (CC) 86.

⁸ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 86. See further *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) 16–7.

private, and racialised, wealth.⁹ This inevitably should mean that there is no private enclave where the Bill of Rights will have no application.

The law of testate succession is an obvious but undetected suspect for this enquiry. For whatever reason, in twenty-six years since the Constitution was enacted, a full critical study into the constitutional nature and scope of freedom of testation has not occurred. A major side effect of constitutionalising freedom of testation is that it enables continuity in the unequal *status quo* by legitimising its primary function as a mechanism for the transfer of intergenerational family wealth. This thesis is a critique of the academic and judicial recognition of freedom of testation as a constitutional property right during this period. Central to this objective is assessing how taken-for-granted concepts like testamentary freedom obscure and ratify ‘systemic forms of domination and material disadvantage’¹⁰ as a legacy of intergenerational inequality and thus pose a persistent barrier to the constitutional vision of a just and equal society. Through this critique, I explore how the constitutional property clause could rather be used to advance economic redress in society to give effect to the state’s obligation to redistribute property to foster equitable access.¹¹

⁹ Klare (1998) op cit at 150.

¹⁰ S Liebenberg & B Goldblatt ‘The Interrelationship Between Equality and Socio-Economic Rights Under South Africa’s Transformative Constitution (2007) *SAJHR* 335 at 338; S R Smith ‘Freedom of Testation: A Memento of Capitalist Patriarchy’ (unpublished LLM thesis, University of South Africa, 2009) at 2.

¹¹ The state’s obligation towards redistribution, restitution and land reform are contained in sub-sections 25(5) – (9) of the property clause, which state: (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).’

1.2 RESEARCH PROBLEM

There is now widespread consensus among South African succession law academics and courts that the common law principle of freedom of testation is protected as a constitutional right in section 25(1) of the Constitution.¹² This conception of freedom of testation relies on a one-dimensional notion of property exclusivity that affords testators near absolute power to distribute property at death. In the post-apartheid era, litigants have also turned to and used their testamentary freedom to resist transformation.¹³ The basis of this view rests on an assumption that the private common law notion of ownership, which is generally regarded as the most sacrosanct private law right, is central to the protection afforded in the property clause.¹⁴ Based on this opinion, it is therefore generally assumed that as one of its entitlements, the right to alienate (*ius disponendi*), would likewise be constitutionally protected.

The philosophical and jurisprudential conception that underlies the common law notion of property freedom traditionally resists any form of limitations.¹⁵ In South

¹² Section 25(1) of the Republic of South Africa Constitution, 1996, states: ‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’ For cases where this question was raised, see *Minister of Education v Syfrets Trust Ltd NO* (2006) 4 SA 205 (C); *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal 2010 6 SA 518 (SCA)*; *In re BoE Trust Ltd NO and Others* 2013 3 SA 236 (SCA); *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC); *Harper v Crawford* 2017 JDR 1271 (WCC); and *King v de Jager* 2017 JDR 1321 (WCC). For academic literature on this question, see MJ de Waal ‘The law of succession and the Bill of Rights’ in Rautenbach et al *Bill of Rights Compendium* (1998) 3G5; 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 L. Rev.* 222-234; MM Corbett, G Hofmeyer, & E Kahn *The law of Succession in South Africa* (2001) 39; MJ de Waal & MC Schoeman-Malan *Law of Succession* 5 ed (2015) 4; and K Lehmann ‘Testamentary freedom versus testamentary duty: In search of a better balance’ (2014) *Acta Juridica* 9 at 10.

¹³ This is reflected in all the post-apartheid case law on the limits of testamentary freedom, usually when a clause in a will or trust is challenged on the basis that it amounts to unfair discrimination in section 9(4) of the Constitution, which states ‘No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).’ These cases include: *Syfrets Trust supra*; *Emma Smith Educational Fund supra*; *BOE Trust supra*; *Harper supra*; and *King supra*.

¹⁴ See in particular, De Waal (1998) op cit at 3G5 and Du Toit (2001) op cit at 222-234.

¹⁵ See in general, IJ Kroeze ‘Between conceptualism and constitutionalism: private law and constitutional perspectives on property’ (unpublished PhD thesis, University of South Africa, 1997).

Africa, as with other common law and civil law jurisdictions¹⁶, testators can distribute their property at death to whomever they please without any regard to the consequences for wealth transfer on subsequent generations and the overall distribution of wealth in society.¹⁷ Testators are not even obliged to consider the impact of dispositions on heirs well-being, provided that illegal or morally repugnant bequests can be challenged by heirs on the grounds that they violate principles of public policy.¹⁸ Testators can disinherit family members and impose stringent conditions for inheriting property that limit the full enjoyment of property. Corbett *et al* famously stated that the ‘South African law appears to take the principle of freedom of testation further than any other Western legal system.’¹⁹ This conception of testamentary freedom is founded on a ‘thin understanding of the social obligations of private ownership’ based on classic liberalism,²⁰ which is primarily defensive and only incorporates weak affirmative obligation to not offend moral norms in the clearest of cases.²¹ A high value given to the right to dispose of wealth in private succession law inevitably means a corresponding high level of incompatibility with any redistributive obligations. In other words, this conception has a narrow redistributive scope.

The question this thesis seeks to answer is whether, and to what extent, the common law right to dispose of property after death is a constitutionally protected property right in light of constitutional commitments to redistribution, restitution and

¹⁶ I discuss testate succession in the United States of American and Germany in chapter 5.

¹⁷ See JS Mill *Principles of Political Economy* (1848) ch 2 4, who stated that ‘[T]he ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner’s pleasure.’ In the South African context, see MJ de Waal ‘Law, society and the individual: The limits of testation’, in Visser DP (ed) *Essays on the History of Law* (1989) 300-1; Du Toit (2001) *op cit* at 222-234; De Waal (1998) *op cit* at 3G5; Corbett (2001) *op cit* at 39; De Waal & MC Schoeman-Malan (2015) *op cite* at 4; and Lehmann (2014) *op cit* at 10.

¹⁸ The basic premise of this principle is that a person with a lawful entitlement to property has the unilateral right to dispose of it by a will or trust deed, which takes effect after their death.

¹⁹ Corbett (2001) *op cit* at 40.

²⁰ G Alexander ‘The Social-Obligation Norm in American Property Law’ (2009) *94 Cornell LR* 745 at 753.

²¹ Alexander (2009) *ibid*.

historical redress. This question incorporates two preoccupations. The first is to understand the status of freedom of testation as property right, which necessitates an interpretation of the nature, purpose and scope of section 25 of the Constitution in the context of the common law of testate succession. It is also necessary to understand the history of the common law principle of testamentary freedom, since this has formed the basis of its constitutional recognition. The second is to explore the relationship between testamentary freedom and intergenerational inequality, and how certain constitutional conceptions of inheritance either limit or expand its redistributive scope.

There has been extensive academic interest in understanding the impact of the Constitution in terms of the kinds of limitations on freedom of testation.²² These studies however proceed from the premise that freedom of testation is an entrenched property right without first questioning the nature and function of constitutional property, and how this effects testamentary property freedom. There is a vast body of jurisprudence and academic literature on the constitutional nature and function of the property clause, which has not been taken into account in the constitutional recognition of freedom of testation.²³ Viewed as a whole, the property clause

²² See De Waal (1998) op cit at 3G7; and Du Toit (2001) op cit at 222-4; and F Du Toit 'The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law' 1999 *Stell LR* 232 at 233-234.

²³ For academic literature see generally, AJ van der Walt *The Constitutional Property Clause: A comparative analysis* (1999); JW Singer 'Property and social relations: From title to entitlement', in Van Maanen GE & Van der Walt AJ (eds) *Property Law on the Threshold of the 21st Century* (1996); H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Land Ownership in South Africa and Germany* (2002); AJ van der Walt *Property in the Margins* (2009); AJ van der Walt *Property and Constitution* (2012); AJ van der Walt *Constitutional Property Law* 3 ed (2011); FI Michelman 'Socio-Political Functions of Constitutional Protection for Private Property Holdings (In Liberal Political Thought)', in Van Maanen GE & Van der Walt AJ (eds) op cit; H Mostert 'Liberty, Social Responsibility and Fairness in the context of Constitutional Property Protection and Regulation', in Botha H, Van der Walt AJ & Van der Walt J (eds) *Rights and democracy in a transformative constitution* (2003); G Alexander 'The potential of the right to property in achieving social transformation in South Africa' (2007) 8 *ESR Review* 2. For court cases, see *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another*; *First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); *Shoprite Checkers (Pty)*

introduces unique obligations on the State to redistribute land and property for the purposes of promoting equitable access to land, which should, in my view, radically change the constitutional nature and function of testator's rights to dispose of property at death in a manner that impacts a commitment towards intergenerational equity.

While I accept in this dissertation that the constitutional recognition of individual testamentary freedom is not necessarily incorrect, what however has not been recognised is that the nature and function of property freedom has changed with the adoption of the property clause in the Constitution. In constitutional property law, it is now accepted that the adoption of the property clause also changes the relationship between private individuals by introducing a higher level of social responsibility in the way that individual owners exercise the right of ownership.²⁴ This arguably establishes a 'new regime' of post-apartheid property relations that ought to affect all pre-existing common law property rights, including the right to dispose of property by will or trust. Thus, while individual freedom is still considered an important right underlying the protection of property in the property clause, it is also clear that the property clause increases the redistributive scope for limitations that benefit the public good, especially if regulation is intended to transform unequal

Ltd v MEC for Economic Development Eastern Cape and Others 2015 (6) SA 125 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 327 (CC); and *Daniels v Scribante* 2017 (4) SA 341 (CC) 134.

²⁴ In *First National Bank* supra at para 49, Ackerman J specifically links one of the purposes of the property clause to the 'need for ... redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land.' He furthermore states at para 52 that 'property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.' See further *Shoprige Checkers* supra at 50 where Froneman J states that 'the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment.'

power relations.²⁵ These types of limitations – inherent and internal to the protection of property rights generally – are previously unknown in the common law, and thus, it is incorrect to assume that private property rights, including testamentary rights, will function in the same manner. In this context, it is important to assess the extent to which the property clause has actually impacted the common law principle of freedom of testation.

1.3 OBJECTIVES OF THE STUDY

Discussions about inherited wealth quickly descent into debates about inheritance or estate tax.²⁶ Whilst this is no doubt an important debate to have, the focus of this dissertation is on the background constitutional debate about the concepts that would inform this inheritance tax debate. Redistribution also does not always have to be *post facto* by taxing estates. The analysis of the redistributive scope of testamentary freedom in South African (including the comparative analysis with the United States of America and Germany) reveal that these systems imbue notions of redistributive equality that have the potential to make a greater *ex post facto* impact on the distribution of property at death. A concern with intergenerational equality also entails exploring the effects that certain laws, rules and regulations have on the overall distribution of property. It is also, of course, shaped by our sense of morality,

²⁵ Regulation in the public interest could either be effected by courts asked to adjudicate testamentary disputes or through legislation enacted for a socially beneficial purpose. Both of these forms of regulation limit testamentary rights, and thus it is important to understand the nature and scope of this right in the constitutional era.

²⁶ See T Piketty *Capital in the Twenty-First Century* (2014); Piketty (2015) op cit at 631–47; E Wolff *Inheriting Wealth in America: Future Boom or Bust?* (2015); L Batchelder ‘Taxing Privilege More Effectively: Replacing the Estate Tax with an Inheritance Tax’ in J Furman & J Bordoff (eds.) *Paths to Prosperity: Hamilton Project Ideas on Income Security, Education and Taxes* (2007) 345–81; A Atkinson ‘Wealth and Inheritance in Britain from 1896 to the Present’ (2013) *Centre for Analysis of Social Exclusion* 178; A Atkinson *Inequality: What Can Be Done?* (2015); and Munzer (1990) op cit at 380-419.

justice and right and wrong, all of which can loosely be referred to ‘a normative understanding of law.’²⁸ While I discuss inheritance tax as inspirations for more redistributive equality in inheritance in the comparative analysis chapter, I concentrate the background debates that inform inheritance tax, rather than the specifics of such regimes.

a) **Two constitutional approaches to testamentary freedom but with different ‘redistributive scopes’**

The main purpose of this study is to explore the redistributive scope of testamentary freedom in furtherance of the constitutional vision of transformation and redistribution. There are two approaches to property freedom in South African constitutional property law that either limit or widen the scope for redistributive purposes, namely the ‘private ownership approach’ and ‘constitutional property approach.’ The property ownership approach largely reflects the views of leading succession law academics, whereas the constitutional property approach is taken from Constitutional Court judgments and various academics writing on the property clause.²⁹

In private ownership approach, the redistributive scope is limited because its primary function is the protection of individual testamentary disposals.²⁹ As the principle of testamentary disposal is sourced in the common law notion of ownership, which is regarded as the fullest expression of power and control that can be claimed

²⁸ See R Cover ‘Foreward: Nomos and Narrative’ (1983) *Harvard LR* 4-68.

²⁹ See note 22 above for a list of academic and case law authorities.

²⁹ See chapter 3 § 3.3 a); and chapter 3 § 3.6. South African succession law academics and judges have adopted the first approach. Singer refers to this as ‘the ownership model’. See JW Singer *Entitlement: The Paradoxes of Property* (2000) at 3. I argue that the United States has also adopted a private ownership approach. See chapter 5, § 5.2.

over property,³⁰ testamentary freedom allows a property owner maximum scope to dispose of the property ‘in any manner (s)he deems fit.’³¹ As a result, wide testamentary discretion means that even ‘fickle, imaginative, egotistical, and unreasonable’ testamentary conditions are legitimate expressions of testamentary power, and the role of courts is ‘to carry out the wishes of the testator as [they] are embodied in his [sic] will.’³² While this right is by no means absolute³³, in the private ownership approach, the foundational rights of testators are presumptively superior to any regulation or limitation.³⁴ In other words, while regulation or limitations are legally permissible, they are always viewed as temporary and external interferences

³⁰ See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) at 45, 51 and 65. In private property law, it is often said that a real right is enforceable ‘against the whole world’, as in it is enforceable ‘against any person who seeks to deal with the thing to which a real right relates in any manner.’

³¹ Du Toit (2001) op cit at 224. Traditionally, the discretionary scope afforded to testators is wide. Recently Bozalek J stated in *King supra*, that testators should have ‘maximum freedom’ subject to legal constraints. In practice, the redistributive scope is limited because testators have wide discretion to appoint heirs, impose conditions on the use, enjoyment and disposal of bequeathed property, and even the forfeiture of benefits should certain events occur.

³² MJ de Waal & MC Schoeman *Law of Succession: Students’ Handbook* 3 ed (2003) at 87. *Robertson v Robertson’s Executors* 1914 AD 503 507. I discuss the golden rule in chapter 4 § 4.3 and chapter 5 § 5.3 b).

³³ Testamentary provisions can be invalidated by a court if their fulfilment would be illegal, immoral or *contra bonos mores*. See, *Aronson v Estate Hart* 1950 (1) SA 539 (A); *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T). For academic discussion, see MM Corbett et al *The Law of Succession in South Africa* (1980) 129-133; and De Waal & Schoeman-Malan (2003) op cit at 126–129; Erasmus, De Waal and Jamneck in 2001 *Lawsa* vol 31 para 290; HR Hahlo ‘Jewish Faith and Race Clauses in Wills – A Note on *Aronson v Estate Hart*’ 1950 67 *SALJ* 231 240 and; (d) In terms of section 13 of the Trust Property Control Act 57 of 1988, a court may, on application by a trustee or any person who in the opinion of the court has sufficient interest in the trust property, delete or vary a trust provision which brings about consequences which in the opinion of the court, the founder of the trust did not contemplate or foresee. Statutes that limit testamentary freedom include: (a) the removal or modification of restrictions imposed on immovable property in terms of the Immoveable Property (Removal or Modification of Restrictions) Act 94 of 1964; (b) the alteration or termination of restrictions on the subdivision of land in terms of the Subdivision of Agricultural Land Act 70 of 1970 and; (c) the alteration or termination of restrictions on the subdivision of mineral rights in terms of the Minerals Act 50 of 1991; and (d) a surviving spouse’s claim in terms of the Maintenance of Surviving Spouses Act against the estate of a deceased for maintenance. For a detailed exposition of both the background to the Maintenance of Surviving Spouses Act and the Act’s provisions, see Corbett (1980) op cit at 42-47; and J Jamneck et al *The Law of Succession in South Africa* (2012) 123-126. Note that in *Daniels v Campbell NO* 2004 7 BCLR 735 (CC), 2004 5 SA 331 (CC) the Constitutional Court decided that the word ‘survivor’ as used in the Act includes the surviving partner to a monogamous Muslim marriage). See *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 10 for a discussion on the statutory limitations.

³⁴ See LS Underkuffler *The Idea of Property in Law: Its Meaning and Power* (2003) at 45-6; and Singer (2000) op cit at 3 for a discussion of the relationship between the degree of individual property protection *vis-à-vis* the capacity for State regulation in the public interest See chapter 3 § 3.2 a) and b); and chapter 3 § 3.6.

on an otherwise complete right that imposes a higher burden of proof to justify.³⁵ In this paradigm, State regulation is inimical to property freedom.³⁶ State intervention is also not the norm and only done in exceptional circumstances which justify the intrusion, which makes redistribution practically impossible.³⁷ The traditional function of resisting State regulation suggests that any measures introduced to redistribute property after death would need to serve a particularly strong social, economic or constitutional purpose that justifies overriding what a testator intended in their will or trust deed. Alternatively, it must serve a much stronger public interests than what is currently served by promoting individual property and testamentary freedom as a valuable social and political objective. Unless freedom of testation is properly contextualised and understood as a constitutional property right, it is likely that any redistributive measure that would seek to address intergenerational inequalities would be ‘blocked’ or challenged as an unjustified infringement of property freedom.

In comparison, the constitutional property approach regards redistribution as a legitimate constitutional goal and aspiration, and is thus more accommodating of State measures intended for this purpose. This approach views protection of individual property rights and transformative measures to redress inequality as two inherent parts of a single constitutionally founded property system.³⁸ The purpose of section 25 of the Constitution (‘the property clause’) is not solely to protect a private common law doctrinal understanding of property freedom, but to ensure that the State can also regulate the use and enjoyment of property in a constitutionally fair and

³⁵ See chapter 3 § 3.6; and E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (unpublished LLD thesis, University of Stellenbosch, 2015) at 11.

³⁶ I Berlin *Four Essays on Liberty* (1969) at 118. See further M Davies *Property: Meanings, Histories, Theories* (2007) at 17; Badenhorst et al (2006) op cit at 47; and Van der Sijde (2015) op cit at 11.

³⁷ *King* supra at para 43: The general principle is that ‘courts will not authorise the variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy, save in *exceptional circumstances* or under statutory authority.’ (my emphasis).

³⁸ This is called the dual purpose of the property clause. See chapter 4 § 4.2 a).

appropriate manner.³⁹ The text of the property clause confirms that the State can deprive property in terms of a law of general application and on non-arbitrary grounds as well as adopt reasonable legislative or other measures for redistribution, restitution and to promote security of tenure.⁴⁰ Due to this, it has been argued that the purpose and function of the property clause is to strike an equitable balance between protection of pre-existing property rights and transformation for the purposes of equitable redress and reform in the public interest.⁴¹ In a constitutional property approach, the property clause serves a dual purpose in being the supreme source of protection and regulation. This means that common law and statutory limitations are not externally imposed onto but integral to the enjoyment of property.⁴² In other words, limitations are inherent to property and arise from within the property clause and not imposed against it.

b) Comparing the ‘redistributive scope’ of United States and German testamentary succession law

South Africa is not the only country that has had to grapple with constitutional questions of justifiable limits to testamentary freedom. I draw on United States of America (‘the United States’ or ‘America’) and German jurisdictions in order to help

³⁹ See chapter 4 § 4.3 b). The text of the property clause confirms that the State can deprive property in terms of a law of general application and on non-arbitrary grounds as well as adopt reasonable legislative or other measures for redistribution, restitution and to promote security of tenure. In *Reflect-All supra* at para 33 the CC confirmed that the purpose of the property clause is not only to protect private property rights from State interference ‘but to safeguard it from illegitimate and unfair State interference.’ See further, *First National Bank supra* para 50 referring to AJ van der Walt (1999) op cite at 15-16. Thus, in terms of the text of section 25, both the existence of property rights and the authority for regulation are founded in the property clause.

⁴⁰ See chapter 4 § 4.2 a).

⁴¹ Mostert (2002) op cit at 199-200.

⁴² See section 1(c) and 2 of the Constitution; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44; and FI Michelman ‘Property as a constitutional right’ (1981) 38 *Washington and Lee LR* 1097 1097-1114 1098-1099, 1112-1113.

illuminate the different approaches to constitutional protection and regulation of testate succession law in South Africa. At face value, all three jurisdictions approach the protection and regulation of testamentary freedom in similar ways. All recognise the fundamental importance of testamentary freedom as the starting point for testate succession. All likewise, recognise that this protection is not absolute and can be limited by legislation, public policy or interests of third parties.

Despite these common dominators, different conceptions of testamentary freedom legitimate varied forms of legal interventions. The South African and United States common law of testate succession law has been described as recognising near absolute or unlimited conceptions of testamentary disposal. I argue in this thesis that both jurisdictions adopt a private ownership approach to testate succession law.⁴³ In both of these jurisdictions, limitations are in reality functionally inferior to the normative importance of testamentary freedom. While Germany also protects testamentary freedom, the level of protection (or its distributive scope) is inherently limited by a compulsory share in favour of surviving spouse and family dependents as well as by social welfare needs, as a means to protect the familial basis of inheritance strong in German law.⁴⁴ The types of legal interventions that lawmakers are willing to peruse and enact in favour of social justice or the family therefore differ. In South Africa and the United States, the right of free disposition is regarded as integral to private property, which is also defended on economic grounds that resist State intervention as being economically harmful.⁴⁵ In Germany, unlimited testamentary

⁴³ See chapter 3 for the position in South Africa and chapter 5, § 5.2 for the position in the United States.

⁴⁴ Beckert J *Inherited Wealth* (2004) at 8.

⁴⁵ Beckert (2004) *op cit* at 8.

freedom is perceived as ‘unbridled individualism’ and seen as hostile to the institution of the family and the cause of diminishing social cohesion.⁴⁶

The most profound differences between the respective treatment of property in these jurisdictions is that both the German and South African property clauses expand the type of limitations on property to achieve social justice goals. In Germany, state intervention is justified on the grounds of the social obligation clause in Article 14(2) of the Basic Law.⁴⁷ This conception places an inherent limitation on property owners to act socially responsibly.⁴⁸ In this regard, ‘the individual is tied more clearly into a familial and social context.’⁴⁹ And more explicitly, the South African property clause mandates the state to adopt legislation and other measures to promote restitution, redistribution and land reform. This level of state authority in the regulation of property is not evident in the United States context.

A comparative analysis provides valuable insights into how the tension between individual and societal interests is resolved in the context of testate succession. What I seek to show is how the different manners in which this tension is resolved reflect normative and distributive commitments in society.⁵⁰

c) Ultimate objective – explore the constitutional commitment towards redistribution in the private law of succession

In exploring the constitutional nature of freedom of testation (and using a comparative constitutional analysis to do so), I wish to show that the redistributive potential of

⁴⁶ Beckert (2004) op cit at 8, 52.

⁴⁷ G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) at 131-147; Beckert (2004) op cit at 8.

⁴⁸ Beckert (2004) op cit at 8.

⁴⁹ Beckert (2004) op cit at 8.

⁵⁰ Beckert (2004) op cit at 2.

testation has been expressly expanded by countervailing provisions in the South African property clause that commit the state to advance transformation in property relations.⁵¹ I intent to demonstrate that far from being a form of property intrusion (which is a typical liberal reaction to any form of state intervention with property freedom), the constitutional nature of testamentary freedom is infused with an innate social responsibility to promote the public good. Placing the property clause at the centre of both the recognition and regulation of testate succession law also has important consequences for developing the meaning and character of testamentary freedom.⁵² In a constitutional property perspective, the individual and societal aspects of property are mutually dependent on each other.⁵³ Put differently, property is not an individual entitlement that an owner can use against others unfairly but is one that must be used in a socially responsible manner. Under this conception, it is possible that, in the adjudication of testamentary conflicts, limitations for the purpose of achieving some socially just outcome would be inherent to the freedom of testation rather than in direct conflict with it.⁵⁴ It is also possible, according to the constitutional property approach, to view the protective and transformative components of the property clause as two parts of a coherent understanding of property, instead of as playing fundamentally conflicting roles.⁵⁵

In addition, the dual nature and function of testation means that State intervention for redistributive purposes can be regarded as a legitimate purpose of testate succession law.⁵⁶ The state has an obligation to intervene when property

⁵¹ *First National Bank* supra at para 49.

⁵² See concluding chapter § 5.3.

⁵³ G Alexander & EM Penalver 'Properties of Community' (2009) 10 *Theoretical Inquiries in Law* 1 129.

⁵⁴ Van der Sijde (2015) op cit at 151.

⁵⁵ Van der Walt (2011) op cit at 22.

⁵⁶ Michelman (1996) op cit at 441; Mostert (2003) op cit at 138-39; G Alexander (2007) op cit at 9; and Van der Sijde (2015) op cit at 149.

relations structurally favour some over others, as what is clearly the case with property relations in South Africa.⁵⁷ Thus the property clause authorises limitations of individual property rights for the purposes of transforming existing unequal property relations rather than protecting individual property rights used to frustrate state intervention. Once the state's role within the property clause is made clear, the fundamental question in each property dispute is not whether the State can or cannot regulate property rights but rather the extent to which the State can intervene in the public interest and whether such action is constitutionally valid.⁵⁸

1.4 HYPOTHESIS

My thesis is that South African succession law academics and courts have failed to take into account the fundamental differences between a private common law view of individual property (largely reflected in the principle of property ownership) and a constitutional view of property. I argue that in recognising freedom of testation, academics and courts have adopted a traditional private law approach to ownership that has failed to interrogate the new social responsibilities of property ownership in the new constitutional property regime. My primary concern is that this private law conception of testamentary freedom poses a barrier to any reform in testate succession law aimed at equitable redistribution of posthumous wealth.⁵⁹ I therefore show that the property clause imposes new redistributive obligations on testators and the state that fundamentally changes the nature and function of testamentary freedom in the

⁵⁷ Mostert (2003) op cit at 138-39.

⁵⁸ Van der Sijde (2015) op cit at 128; Van der Walt (2011) op cit at 91; and *Reflect-All* supra at 106 (O'Regan minority judgment).

⁵⁹ Michelman referred to a 'possessive' notion of constitutional property rights as 'an antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends.' F Michelman 'Possession vs. distribution in the constitutional idea of property' (1987) 72 *Iowa LR* 1319.

constitution-era. A constitutional conception of testamentary freedom provides the authority for a new judicial approach to testamentary disputes as well as for legislative measures aimed at redressing intergenerational inequalities.

1.5 METHODOLOGY

A theme running through this thesis is that a substantive conception of freedom is a reflection of the social and economic ordering of a society. Inheritance in any society reflects divergent opinions on the nature of various concepts, such as property, family, death, culture, religion.⁶⁰ As a result, there are differing opinions on the degree of protection that should be afforded to inheritance rights.⁶¹ The degree of protection is dependent on the extent to which lawmakers are prepared to intrude on private property rights in order to regulate the manner in which wealth is created and distributed over time (what I have called its ‘redistributive scope’). These questions are closely related to what role the State should have in regulating private property, and as such is also heavily laden with political and legal ideology. This is equally applicable to competing perceptions of individual freedom and social obligation.⁶² As a result, inheritance often reflects the ideological and political commitments of society.⁶³ The reform of inheritance law therefore has to contend with these multifaceted views in society.

The two approaches to testamentary freedom explored and developed in this thesis are distinguishable by the manner in which conflicting values of individual freedom and social justice are resolved. This methodology adopts a comparative

⁶⁰ See generally, Halliday (2018) op cit.

⁶¹ Underkuffler (2008) op cit at 24-28.

⁶² D Reid ‘From the cradle to the grave: Politics, families and inheritance law’ (2008) 12 *The Edinburgh LR* 391 at 392.

⁶³ Ibid at 391-92.

constitutional property analysis based on shared conceptions of property freedom. The assumption underlying this methodology is that perceptions of the regulatory scope of property rights inevitably shape the type of permissible limitations. What I seek to show by comparing these approaches is that it is often not the legitimacy of a particular limitation that determines it as a successful form of regulation but rather the strength of the property right it has to contend with. The conception of property freedom in the private ownership approach typically views freedom of testation as a negative freedom, which generally resists public interest limitations. The South African and United States testate succession law have adopted this approach. In these systems, limitations are considered exceptional and rare, which predictably makes redistribution more radical and more difficult, if not impossible, to defend. I draw on constitutional property jurisprudence by the South African Constitutional Court and the German Federal Constitutional Court in order to show an alternative more flexible and normatively rich approach to property protection and regulation. In this constitutional property approach, the State has explicit constitutional obligations to regulate property for the greater public good. Thus, the parameters for the redistribution of property after death are wider, easier to justify, and less focussed on the concerns of individual ownership entitlements. It is therefore essential to have regard to the conception of property rights adopted to assess the redistributive scope permitted.

1.6 ASSUMPTIONS AND LIMITATIONS

There are two limitations of this thesis. The first is that my analysis is a theoretical and constitutional one of the potential for redistribution of land and property in the

law of inheritance. The aim is to lay the constitutional foundation for other practical legislative and judicial measures to redistribute property after death. While I do draw on case law and statutory examples where these forms of redistribution have occurred, I do not at any point prescribe measures for redistribution in inheritance law. For instance, I discuss estate tax as an easy and effective means to achieve redistribution of wealth in inheritance but do not suggest ways in which this may actually be achieved. This limited purpose is based on the assumption that without a theoretical and constitutional analysis of this possibility, any measures designed for this purpose cannot succeed. The point of departure is that there is a direct correlation between theoretical conceptions of property freedom and practical limitations. While this may seem overly theoretical, it is based on the view that judges and lawmakers are more or less likely to limit testamentary freedom based on an understanding of acceptable constitutional parameters. A different conception of the distributive scope of freedom of testation will then result in a changed distribution of property at death. The aim is therefore not to provide a blueprint for redistribution but rather to argue that posthumous wealth redistribution is constitutionally permissible.

The second limitation is that my analysis is restricted to the common law of succession in South Africa, as opposed to the African customary law of succession, which was up until democracy, governed by the Black Administration Act 38 of 1927.⁶⁴ While it is clear that customary succession law is a major source of succession

⁶⁴ This Act administered the “indigenous affairs” of black South Africans during colonial times, including the law of African intestate succession.⁶⁴ Testamentary succession is unknown to customary laws in South Africa. See MJ de Waal ‘Testamentary Formalities in South Africa’, in K G Reid, M J de Waal & R Zimmermann *Comparative Succession Law: Volume 1: Testamentary Formalities* (2011) at 383. In the 2005 Constitutional Court decision of *Bhe v Magistrate of Khayelitsha* 2005 (1) SA 580 (CC) at para at 17, section 23 of the Act, as the provision underpinning the customary law system, and the principle of male primogeniture was declared unconstitutional. In its place, the Court directed that the Intestate Succession Act 81 of 1987 would regulate all intestate estates, regardless of race or culture. See the Recognition of Customary Marriages Act 120 of 1998, and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. Today, very little is left of the colonial reminiscence of customary succession. See Jamneck (2012) op cit at 3; W du Plessis and C

law in South Africa, its legal principles have not penetrated the common law of succession, which applies without regard to African customary norms. Furthermore, notwithstanding the recognition of African customary law, the two systems of succession are commonly viewed as distinct and separate by legal academics. While it is hoped that my attention to the common law of succession does not entrench this division, the scope of my thesis is concerned with the common law rules for the intergenerational transfer of wealth and their contribution towards the patterning of wealth in society. This is however not to discount that large amounts of wealth have been passed down within black families. Of course, a few black families benefited from the apartheid regime and the generational line continues to live in this fruit. This was however not the norm and the majority of blacks were systematically excluded by apartheid legislation and policies from creating wealth during apartheid. The estates of blacks families subject to succession laws were and still are therefore reduced. In this regard, apartheid laws contributed towards structural inequality with the law of succession playing a facilitating role. In the South African context, large pockets of family wealth have been passed down from generation to generation through common law avenues. In this regard, it is safe to assume that customary law played no role at all.

1.7 STRUCTURE OF THESIS

The structure of this thesis is as follows.

In chapter 2, I trace the historical foundations of the principle of testamentary freedom in the three major sources of the common law of succession, namely in

Rautenbach "Indigenous Law: Law of Succession", in W A Joubert, J A Faris & J Church (eds) *The Law of Succession* vol 32 (2009).

Roman law, Roman-Dutch law, and English law. This chapter also looks at the contemporary understanding of freedom of testation and various interpretations by academics and judges that have grappled with the question of whether this age-old common law principle is a property right in terms of property clause.

In chapters 3, 4 and 5, I dive into an analysis of the redistributive scope of testate succession law. Chapter 3 looks at the private ownership approach in South Africa. In order to draw a direct comparison, chapter 4 looks at a constitutional property approach in South Africa. A comparison of these approaches reveals that there are a lot of gaps in terms of our constitutional understanding of testamentary freedom. Of course South Africa is not the only jurisdiction to contend with the constitutional nature of freedom of testation. In chapter 5, I look for important insights from two other jurisdictions – the United States and Germany – in a comparative foreign law analysis.

I conclude in chapter 6 by collating the lessons from the analysis of the different redistributive scopes in the preceding chapters. Thereafter, I close with a few recommendations for the constitutional development of testamentary freedom.

CHAPTER TWO

THE CONSTITUTIONAL RECOGNITION OF TESTAMENTARY FREEDOM IN SOUTH AFRICA

2.1 INTRODUCTION

There is widespread consensus among South African succession law academics and judges that the common law principle of freedom of testation should be constitutionally recognised based on a strong doctrinal reciprocity with the common law notion of private ownership. In this understanding, the freedom to dispose of property at death is an extension of the liberties an owner enjoys during her lifetime. The purpose of this chapter is to provide an overview of the recognition of freedom of testation in South African law, both historically in terms of the three sources of succession law (Roman law, Roman-Dutch law and English law) and more recently with its recognition as a fundamental property right in section 25 of the Constitution.

The chapter is structured in the following way. In section 2.2, I first briefly sketch the history of the principle of testamentary freedom in South African law with its recognition in Roman law, Roman-Dutch law and English law. These sources reveal a common theme of protecting testamentary freedom albeit with difference distributives scopes. The focus of this chapter is however section 2.3 that deals with the contemporary recognition of testamentary freedom in the Interim and Final Constitution. Included in this section is how academics and judges have interpreted the property clause and recognised freedom of testation as a fundamental constitutional property right. A historical bird's eye overview of freedom of testation shows that the principle of freedom of testation has deep historical roots in South

African common law, and moreover that this understanding continues to form the basis for its protection and enforcement as a constitutional property right. An overall perspective of the principle of freedom of testation also reflects that is far from a fixed concept.

2.2 A BRIEF HISTORICAL OVERVIEW

The sources of the modern South African common law of succession are mixed and drawn from various influences, mainly from Europe.⁶⁵ A long history of successive colonial regimes has ensured that South African lawyers have become adept at importing foreign legal models with the result that its legal system can be characterised as a hybrid, mixed system of laws.⁶⁶ What follows is a historical account of the common law of succession in South Africa (primarily applicable to white immigrants in South Africa), as opposed to the African customary law of succession, which does not recognise the principle of freedom of testation.⁶⁷ This section shows that the fundamental importance of testamentary freedom is reflected in a mutual recognition in all three of its major foreign common law sources: Roman, Roman-

⁶⁵ For a history of South African Law, see generally JW Wessels *History of the Roman-Dutch Law* (1908), and for more recent studies see AB Edwards *The History of South African Law – An Outline* (1996) 65- 101; 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) 2-30.

⁶⁶ F du Bois & D Visser ‘The Influence of Foreign Law in South Africa’ (2003) 13 *Transnational Law and Contemporary Problems* 593 at 593-594. See further I Zajtay & W Hosten ‘The Permanence of Roman Law Concepts in the Continental Legal Systems: with an addendum on the Permanence of Roman Law Concepts in South African Law’ (1969) 2 *The Comparative and International Law Journal of Southern Africa* 181 at 193-194.

⁶⁷ See the Black Administration Act 38 of 1927, which governed African customary law from 1927 until it was declared unconstitutional by the Constitutional Court in *Bhe v Magistrate of Khayelitsha* 2005 (1) SA 580 (CC) at 17. See further W du Plessis and C Rautenbach ‘Indigenous Law: Law of Succession’, in W A Joubert, J A Faris & J Church (eds) *The Law of Succession* vol 32 (2009); and J Jamneck & C Rautenbach *The Law of Succession in South Africa* (2012) at 3; and MJ de Waal ‘Testamentary Formalities in South Africa’, in K G Reid, M J de Waal & R Zimmermann *Comparative Succession Law: Volume 1: Testamentary Formalities* (2011) at 383.

Dutch, and English legal tradition.⁶⁸ All these sources recognise a common idea central to any succession law regime based on private ownership, namely the power to dispose of property after death by means of a will. The recognition of the right of testamentary disposition in private ownership is so strong in South African succession law that, according to leading succession law scholars, it is regarded as one of the most absolute principles in western legal systems.⁶⁹ Despite this strong legal position, this section also shows that over the years, our understanding of freedom of testation has adapted to changed social, economic circumstances as well as with historical political events, like colonialism and rivalry between Afrikaans and English speaking colonists, which has affected the form of testamentary freedom as well as the types to limitations to this freedom.

a) The Roman law recognition of freedom of testation

It should firstly be noted that free testamentary disposition was never a universal norm in the majority of inheritance systems around the world.⁷⁰ The development of wills was peculiar to Roman law, with its recognition in the pre-classic period (450 BC – 510BC) when it was included in the Twelve Tables.⁷¹ In this system of law,

⁶⁸ Wessels (1908) op cit generally; Edwards (1996) op cit at 65- 101; Zimmermann & Visser (1996) op cit at 2-30; Du Bois & Visser (2003) op cit at 593-594; Zajtay & Hosten (1969) op cit at 193-194.

⁶⁹ MM Corbett, G Hofmeyer, & E Kahn *The law of Succession in South Africa* (2001) at 40.

⁷⁰ J Kohler 'Survey of the law of succession', in A Kocourek & JH Wigmore (eds) *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions: Volume 11: Primitive and Ancient Legal Institutions* (1915) at 562-3; and MJ de Waal 'Law, society and the individual: The limits of testation', in Visser DP (ed) *Essays on the History of Law* (1989) at 308-9, 311.

⁷¹ The oldest form of Roman will was when the whole community / tribe was effected by the death of a *pater familias*, which necessitated determining who would succeed the deceased as the religious and legal authority of the family unit, and thus how the family would be regulated. See Gia 2, 101; *Epitome Ulpiani* 20, 2; *Aulus Gellius, Noctes Atticae* 15, 27, 1 and 3; Wessels (1908) op cit at 512; and T Ruffner "Testamentary Formalities in Roman Law", in K G Reid, M J de Waal & R Zimmermann *Comparative Succession Law: Volume 1: Testamentary Formalities* (2011) at 3. This was called *testamentum calatis comitiis*, and its importance as a legal act was evidenced by the requirement that the whole tribe witness it. This will had to be made in public so that there would be no doubt as to how the family property would be devolved. The publicity involved was apparently in the form of a popular

Roman testate succession took preference over intestate succession, even though the latter was an older institution.⁷² Although the Twelve Tables (450BC) recognised both testate and intestate succession, the application of these two modes was mutually exclusive, according to the principle that no person could devolve of their property partly testate or partly intestate.⁷³ The Roman jurists were generally inclined towards the validity of wills (*favor testamenti*) and thus invalid wills were constructed to be valid and the testator's presumed intent.⁷⁴ This highlights the importance that the Romans placed on testamentary succession, as it encouraged testators to devolve of their entire estate by means of a will. If only half of an estate was disposed of, it was

assembly of the people (*comitia curiata*), which was only held twice annually. Apart from this, scant information is available as the form of assembly or whether voting took place. Both T Růfner and G Mousourakis, however argue that it was probable that the popular assembly voted on the wills. See Růfner (2011) op cit at 3, and G Mousourakis *Fundamental Principles of Roman Private Law* (2012) at 285. Other early Roman wills that developed during the pre-classical period, included the *testamentum in procinctu* (soldier's will) and the *testamentum per aes et libram*. The *testamentum per aes et libram* was developed later than the other two forms and was executed by the testator's solemn declaration with oral instructions (*nuncupatio*) on how to distribute his property after death and effected by way of a *mancipatio* (symbolic sale / conveyance). The *mancipatio* was a legal ritual for the conveyance of precious property, including immovable property, slaves, farm animals and the transfer of parental power over children. In order to be legally valid, the ritual had to be performed in the presence of the conveyor (testator), the purchaser (heirs), five witnesses, and the person holding the scales (*libripens*). A piece of copper, symbolising the family estate, would then be transferred to a form of trustee called a *familiae emptor* who would distribute the family estate according to the testator's wishes after his death. See Gia 2, 102. These later Roman wills also required execution by public declaration but the formalities were relaxed to allow for a more convenient way to execute a will, as opposed to the *testamentum calatis comitiis* which could only be executed twice a year. The *testamentum in procinctu* was a will for soldiers before they went into battle. According to Růfner, it relies on the same principles as the *testamentum calatis comitiis* but instead of being made in the people's assembly, a soldier's wishes were declared in the presence of other soldiers and could be made when "there was fear of death", as opposed to just twice a year in the people's assembly. Růfner (2011) op cit at 3-4. The *testamentum per aes et libram*, in particular, became the basis for the future development of wills in Roman law. De Waal (1989) op cit at 305.

⁷² Although the Roman system of law recognized both testate and intestate succession, the latter was an older institution. The order of intestate succession was prescribed by the XII Tables, which prioritized the members of the family (*sui heredes*), then nearest agnatic relatives (*proximi agnati*), and thereafter the deceased's clan (*gentiles*). *Sui heredes* included: the deceased's wife if she had been married to him in *manu*; the deceased's children (*fili familias*), grandchildren, and children born after his death (*postuni*); and children in which emancipation proceedings had been commenced but not finalised. All these heirs inherited equally and were considered necessary heirs (*heredes sui et neccessarii*). Proximi agnati included the nearest agnatic relation through the male line, which included collaterals (brothers and sisters) and uncles and aunts. They each received an equal share of the deceased's estate. When no *sui heredes* or *proximi agnati* could be found, the deceased's intestate estate devolved to the families of common ancestry. Mousourakis (2012) op cit at 280-1; and De Waal (1989) op cit at 302.

⁷³ Mousourakis (2012) op cit at 289.

⁷⁴ Růfner (2011) op cit at 10.

assumed that the testator intended to dispose of the entire estate to the persons designated the half share.⁷⁵

Testate succession was so established that the ability to make a will (*testament factio*) was an essential right of being a Roman citizen.⁷⁶ According to Champlin, will making was regarded as ‘a vessel of truth,’ providing a final determination of the testator's preferences and essential personal character.⁷⁷ The essential purpose of these Roman wills was to appoint a universal successor (*heredis institutio*) from among the available family heirs (*sui heredes*) as the religious head to take control and ownership over the family estate, to the exclusion of other less worthy family heirs.⁷⁸ The universal successor would inherit the assets, liabilities and religious responsibilities of the *paterfamilias* (‘family head’).⁷⁹ The ability to appoint one universal successor to the exclusion of other available family heirs, thereby effectively disinheriting them, is recognised as the formal establishment of testamentary freedom in Roman law.⁸⁰ This was also a basic requirement for the validity of a will.⁸¹ The right to appoint a universal successor was necessitated by the excessive division of family property into unproductive economic units.⁸² Other economic factors that elevated the importance of individual testation was a shift from an agricultural based economy to a commercial one where exchange and trade was

⁷⁵ Rűfner (2011) op cit at 10.

⁷⁶ Ibid.

⁷⁷ E Champlin *Final Judgments: Duty and Emotion in Roman Wills, 200 B.C.-A.D.250* (1991) at 10-11.

⁷⁸ Mousourakis (2012) op cit at 284; and De Waal (1989) op cit at 304.

⁷⁹ Kohler (1915) op cit at 541-3, 554-5.

⁸⁰ F Du Toit ‘The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law’ 1999 *Stell LR* 232 at 233; and F Du Toit ‘Succession law in South Africa – a historical perspective’ in Reid K, De Waal MJ & Zimmermann R (eds) *Exploring the Law of Succession – Studies National, Historical and Comparative* (2007) at 70.

⁸¹ De Waal (1989) op cit at 307. The prominence of the Roman family as an economic and religious unit meant that clear rules identifying a successor was a ‘natural expression of the continuity and solidarity of the early patriarchal family.’ See Mousourakis (2012) op cit at 279.

⁸² Du Toit (1999) op cit at 233; and De Waal (1989) op cit at 304.

more prominent.⁸³ The importance of the universal successor (*heredes institutio*) for the validity of a will points to the vital economic function that testate succession played in ensuring continuity in property ownership after the death of a *paterfamilias*.⁸⁴

There are competing views on the reasons for the formal establishment of Roman wills and whether this was intended to serve individualistic economic and political aspirations or to serve the family as the foundational unit in Roman society. In terms of the latter view, in Roman property system, it is argued that property belonged to the family and not to the individual. Family members were considered the natural heirs under the control of a family head (*paterfamilias*), and thus were entitled to a share of the family estate at his death.⁸⁵ In this early society, membership was not based on individuality but blood relationships within the family. It was also closely linked to the religious basis of succession, where the *paterfamilias* was the religious head of the family unit.⁸⁶ Due to the deeply familial nature of succession in Roman law, the exercise of testamentary freedom was bound and restricted by custom and practice, closely aligned to the rules and principles of familial continuity.⁸⁷ It can be said that due to the familial ownership, property was not transferred to the universal heir but was always maintained within the family.⁸⁸

According to Kohler, an understanding of the Roman form of testamentary freedom was intimately linked to the role of *paterfamilias* in the familial context. He explains that the family was akin to a corporation where the *paterfamilias* was its public officer, enjoying the rights of office but also the duties to his fellow family

⁸³ De Waal (1989) op cit at 307.

⁸⁴ R fner (2011) op cit at 9-10.

⁸⁵ Mousourakis (2012) op cit at 280-1; and De Waal (1989) op cit at 302.

⁸⁶ Kohler (1915) op cit at 542.

⁸⁷ Champlin (1991) op cit at 15.

⁸⁸ De Waal (1989) op cit at 300. See further Smith 'Freedom of Testation: A memento to capitalist patriarchy' (2009) LLM Dissertation for the critique of the Roman law foundations of capitalism and patriarchy.

members.⁸⁸ When the *paterfamilias* died, the universal successor stepped into the representative's shoes (*succedere in locum defuncti*). According to him, the theory of Roman succession was that of 'a man's posthumous existence in the person of his heir'⁸⁹, which explains the notion of universal succession where the heir inherits the rights and obligations of the deceased. Since the family was comparable to a corporation, it never died, which meant that creditors had the same remedies against the new *paterfamilias* as the deceased one.⁹⁰ It could therefore be said that what was inherited was actually the family itself and not the property of the family. Due to the strong familial and religious nature of Roman succession, the right to appoint a universal heir, and the subsequent role within the family thereafter was heavily circumscribed by the duties towards the family.⁹¹ Thus, according to Kohler, the original conception of testamentary freedom in Roman law was not intended to divorce property from the family members but to ensure that better provision could be made for descendants than the proscribed rules of intestacy.⁹²

A contrary view is that the rise of an individual right to dispose of property (and exclude family heirs) is explained as surfacing from the increased political importance of individualism and free will, which slowly replaced the family in its central political and economic role.⁹³ Kohler explains that the predominance of individualism as a socio-political ideal in testate succession law, as opposed to general rules of intestacy, strongly associates with the prospect for unlimited human

⁸⁸ Kohler (1915) op cit at 558.

⁸⁹ Ibid at 560.

⁹⁰ Ibid at 558.

⁹¹ Ibid at 562.

⁹² Kohler (1915) op cit at 562.

⁹³ Du Toit (1999) op cit at 232. There is, however, no consensus as to whether the individual was freed from family constraints or whether merely less constrained in providing for family members by having the choice as to how to distribute his estate after death. See K Lehmann 'Testamentary freedom verses testamentary duty: in search of a better balance' (2014) *Acta Juridica* 9 at 22-23; Kohler (1915) op cit at 558-60; and H Maine *Ancient Law* (1861) 65, 72.

development.⁹⁵ He argues that ‘great undertakings of mankind’ are only possible if property is subject to the will of its owner.⁹⁶ De Waal argues that freedom of testation, in this context, is also typically viewed as part of the emancipation of the individual from the ‘familial stranglehold.’⁹⁷ An important historical account of the rise of testamentary freedom is thus how, gradually, individuals became central civil and moral agents in society.⁹⁸

Despite these competing viewpoints, by the third century BC, the right to disinherit family heirs had resulted in familial tensions where testators increasingly used it as a form of punishment.⁹⁹ This represents an early example of the tension between individual and familial notions of succession. In order to maintain moral duties towards the family, measures were introduced to ensure that testators exercise their right of testation responsibly. Such measures accorded with the ancient principles of succession that the property should remain in the family.¹⁰⁰ These demands culminated in the formulation of the *quarta legitima partis* or *portio legitima*, entitling a disinherited family heir to a quarter of their intestate share (otherwise known as ‘legitimate portions’).¹⁰¹ The underlying principle is that it would be unfair or undutiful for the testator to disinherit family heirs in favour of non-family members.¹⁰² In such circumstances, disinherited family members could challenge the testator’s will in special courts on the basis that they have been unjustly

⁹⁵ Kohler (1915) op cit at 541. Kohler explains that, due to its attachment to the family, property ‘was transmitted from the dead to the living, not according to the will and choice of the dead, but by virtue of superior rules which religion had established.’ Ibid at 549.

⁹⁶ Kohler (1915) op cit at 549.

⁹⁷ De Waal (1989) op cit at 301.

⁹⁸ JS Mill *Principles of Political Economy* (1848) ch 2 4 at 222. Maine disputes that individualism in Roman testate succession arose to liberate the individual from familial constraints, but rather to allow for *paterfamilias* to better provide for family members after his death. See Maine (1861) op cit at 115.

⁹⁹ Du Toit (1999) op cit at 235; Mousourakis (2012) op cit at 293; and De Waal (1989) op cit at 304, 308.

¹⁰⁰ Kohler (1915) op cit at 551.

¹⁰¹ C 3 28; Inst 2 18; D 5 2.

¹⁰² Mousourakis (2012) op cit at 293; and De Waal (1989) op cit at 308.

deprived of their family inheritance.¹⁰³ It is thus clear that although Roman law recognised testamentary freedom, which may at one stage been abused by testators, this was later moderated by social measures to ensure the protection of disinherited family heirs.¹⁰⁴

b) The introduction of testamentary freedom in Roman-Dutch Law

The Roman form of freedom of testation was introduced into Europe around the seventh century.¹⁰⁵ This principle survived medieval Europe and was introduced in Germanic customs, which eventually formed part of the Roman-Dutch law in the Netherlands. Prior to the introduction of Roman testate succession, the norm in Germanic custom was intestate succession.¹⁰⁶ The order of intestate succession in Germanic custom was not firmly set or codified but the general trend was to distribute the deceased's estate to his sons, brothers, father or uncles. This is not surprising, considering the prominence of the family unit in political and religious affairs and the collective nature of ownership during the time.¹⁰⁷

It was only with Frankish law during the Middle Ages and the influence of the Church that the will once again became an important economic instrument for the devolution of wealth after death. During this period, bequests to the Church were compulsory.¹⁰⁸ The formalities for the valid execution of a will were varied before

¹⁰³ Mousourakis (2012) op cit at 293.

¹⁰⁴ De Waal (1989) op cit at 300.

¹⁰⁵ According to Wessels, the existence of wills in Germanic custom executed in terms of Roman law was noted in the seventh century. However, the practice of wills and testamentary succession is unevenly applied in other parts of Western Europe, including Netherlands, where certain areas only had wills for movable property and not immovable land. This rule was however not applied evenly throughout Netherlands and in some places, the will was not recognized at all. Wessels (1908) op cit at 512-513. See further De Waal (1989) op cit at 308-310.

¹⁰⁶ Kohler (1915) op cit at 562-3.

¹⁰⁷ Wessels (1908) op cit at 512-516.

¹⁰⁸ De Waal (1989) op cit at 311.

being specified in the *Corpus Juris Canonici* of Gregory IX.¹⁰⁹ However, even prior to this a valid will had to be executed before a priest and two witnesses. In many cases, the priest would write and attest to the will as well, as his standing and testimony was great in the ecclesiastical courts.¹¹⁰ The ecclesiastical courts borrowed extensively from the Roman law, which ensured the formalities of a will and its testamentary contents survived in Netherlands.¹¹¹ With increasing secularisation, the clerical will was replaced by the notarial will, which also required two other witnesses.¹¹² The shift from the clerical will to the notarial will signifies the importance that wills be made publicly, to avoid any dispute as to the content of the testamentary dispositions.

During the Middle Ages, the power of testation was heavily conditioned by the expectation that inheritance should benefit the family and the Church.¹¹³ One can only speculate as to why as bequests to the Church became compulsory in Frankish law, but I can think of few probable explanations other than a use of disproportionate power that priests and parishioners held over Canon law. Smith doubts whether the testators had ‘real, actual choice’ in these circumstances, which only developed in the nineteenth century with the recognition of individual rights.¹¹⁴ Prior to this development, the right to appoint heirs is misleadingly referred to as freedom of testation.¹¹⁵ It is arguable that this freedom only applied to personal property after obligations to the family and church had been fulfilled.¹¹⁶ A further important distinguishing feature of Roman-Dutch testate law is that it did not require the institution of one universal heir for the validity of a will as was required in Roman

¹⁰⁹ Wessels (1908) op cit at 515-516.

¹¹⁰ Wessels (1908) op cit at 519.

¹¹¹ De Waal (1989) op cit at 312.

¹¹² Wessels (1908) op cit at 519.

¹¹³ Smith (2009) op cit at 91.

¹¹⁴ Smith (2009) op cit at 90; and De Waal (1989) op cit at 313.

¹¹⁵ Smith (2009) op cit at 90.

¹¹⁶ See chapter X § X, where I discuss the German notion of freedom of testation.

law. This meant that a testator could distribute property to multiple heirs and legacies.¹¹⁷ Despite only applying to personal property, this reflects the expansion of liberty in deciding the fate of property in will making.

c) The introduction of Roman-Dutch law at the Cape

The blend of Roman and Dutch law was introduced into the Cape of Good Hope when Dutch settlers first colonised the southern point of Africa in the mid-seventeenth century.¹¹⁸ Roman-Dutch law in Holland was the primary source of law for the Cape settlers.¹¹⁹ The common law of Holland was accepted as the common law practiced and applied at the Cape. Due to the strong link, Roman-Dutch mores also strongly influenced local customs.¹²⁰ As a result, many of the Roman-Dutch wills, for instance, became part of the South African common law up until 1953 when the Wills Act abolished them.¹²¹

d) The influence of English law

The English took the Cape refreshment station away from the Dutch, first in 1795 and then again in 1806. Initially, the English resolved to keep the Roman-Dutch law in the Cape of Good Hope with the view of adapting it over time. The influence of English Law in the Cape Colony was slow up until 1820s when more English settlers arrived in the Cape and demanded more liberties.¹²²

¹¹⁷ De Waal (1989) op cit at 314.

¹¹⁸ Du Bois & Visser (2003) op cit at 593-594.

¹¹⁹ De Waal (1989) op cit at 313.

¹²⁰ Wessels (1908) op cit at 356-7.

¹²¹ Act 7 of 1953.

¹²² R van den Bergh 'The Remarkable Survival of Roman-Dutch Law in Nineteenth-Century South Africa' (2012) 1 *Fundamina* 71 at 73-4; H Hahlo & E Kahn *The South African Legal System and Its*

The effect of changes however was not total and in some cases left entire areas of Roman-Dutch law, especially private succession law, relatively untouched.¹²³ The changes that the English law did bring to the Roman-Dutch law of succession were mainly (but not confined) to procedural and administrative principles. This is illustrated by the replacement of the Roman-Dutch principle of universal succession (*per universitatem*) with the English system of executorship in 1833.¹²⁴ The effect of this statutory change was that an appointed executor would administer the deceased's estate on the heir's behalf by collecting the debts, paying creditors and thereafter distributing the net assets according to the deceased's will or by the law of intestacy.¹²⁵ For the administration period, the heirs and legatees of the deceased's estate only have a vested right claimable against the executor for their inheritance and not ownership (*dominium*).¹²⁶ It also meant that an heir did not inherit a testator's debts, which is an essential feature of universal succession.

The major exception to the predominately procedural changes to Roman-Dutch law at the Cape was the abolition of legitimate portions on the grounds that this offended the principle of testamentary freedom in English law.¹²⁷ In English law, testators enjoyed a near unfettered freedom to dispose of property to any beneficiary as well as to decide the manner and form those dispositions will take.¹²⁸ This was a

Background (1973) 575; C Botha 'The early influence of the English law upon the Roman-Dutch law in South Africa' 1923 (40) *SALJ* 397 at 403-404; F Du Toit "Roman-Dutch Law in Modern South African Succession Law" (2014) *Ars Aequi* 278 at 279-280; J Sarkin 'The Common Law in South Africa: Pro Apartheid or Pro Democracy?' (2000) 23 *Hastings Int'l & Comp. L. Rev.* 1 at 2.

¹²³ De Waal (2011) op cit at 384.

¹²⁴ Cape Ordinance 104 of 1833.

¹²⁵ Wessels (1908) op cit at 511; Du Toit (2014) op cit at 280; and Corbett (2001) op cit at 8.

¹²⁶ *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A) at 364G.

¹²⁷ English intervention in the Roman Dutch law also removed the *Lex Falcidia* (40 B.C.) and the *Senatusconsultum Trebellianum* (56 A.D.) regarding the reservation of a quarter of a deceased estate in favour of an heir (the Falcidian fourth) and of a quarter of fideicommissary property in favour of the fiduciary heir (the Trebellian fourth) were received into Roman-Dutch law (See Act 23 of 1874 (Cape); Law 7 of 1885 (Natal); Proc 28 of 1902 (Transvaal); Law Book of 1902 (Orange Free State). See Du Toit (2014) op cit at 280. See further R W Lee *An Introduction to Roman-Dutch Law* (1946) at 369.

¹²⁸ J Finch et al *Wills Inheritance and Families* (1996) at 21.

defining point in the conceptual change of freedom of testation in South Africa. Due to this change, for the first time testators in South Africa could dispose of property to whomever they pleased without being challenged by a disinherited family heir. True testamentary freedom was thus only realized when the English abolished legitimate portions in South African in 1820.

Apart from these changes, Roman-Dutch law survives as the foundation of the South African common law of testate succession. Its endurance in South Africa has been described as a ‘remarkable survival’.¹²⁹ The reception and endurance of Roman legal heritage has been subject to widespread research, especially in continental legal systems such as Germany, Netherlands and Hungary (to name the prominent examples).¹³⁰ In these recipient jurisdictions, it has been argued that the essence of Roman legal heritage lies in its ability to ‘lend itself to being “exported”, to being introduced into other laws, and it could be adopted without a simultaneous reception of the rules of Roman law.’¹³¹ In South Africa, the continuity of the Roman-Dutch law has been attributed to a number of historical reasons, including: well-trained legal practitioners at distinguished universities in the Netherlands; the translation of Roman-Dutch legal textbooks into English which made the texts of Grotius, Leeuwen and Van der Linder more accessible to English-speaking legal practitioners; and an emotional attachment to Dutch heritage by many legal practitioners and jurists in the Boer Republics and even after South Africa became a Union in 1910.¹³²

An emotional attachment denotes an attitude that certain legal jurists held towards their heritage and history.¹³³ English law was for many Afrikaans politicians

¹²⁹ Van den Bergh (2012) op cit; and Du Toit (2014) op cit at 278.

¹³⁰ Zajtay & Hosten (1969) op cit at 181-192.

¹³¹ Zajtay & Hosten (1969) op cit at 183.

¹³² Van den Bergh (2012) op cit at 85-87; and Du Toit (2014) op cit at 279.

¹³³ It should be noted that both English speaking and Afrikaans speaking South Africans held an emotional attachment to their respective cultures and heritage.

and legal jurists a grim reminder of English imperialism, and thus there were political motivations for ensuring that Roman-Dutch legal precepts, which were considered the true common law of South Africa, withstood the invasion of foreign principles of law.¹³⁴ In the 1950's, the so-called 'purist movement' – a collection of legal scholars and practitioners – played an active role in this regard by relying more firmly on Roman-Dutch legal sources instead of applying English law ones. The threat of Anglicization during the post-World War II period also coincided with the political victory of the Nationalist Party and the formal start of the apartheid era in 1948. The political atmosphere was accordingly full of nationalist sentiments which encouraged many Afrikaans speaking jurists and practitioners to reject the foreign importation of English legal principles. No doubt university training and education played a significant role in fuelling the political and emotional attachments to either English law authorities or Roman-Dutch ones.¹³⁵

The continuity of Roman-Dutch tradition in the South African legal system can, to a large extent, be explained by a struggle for power and dominance between English and Afrikaans legal scholars. The purist movement was largely successful in restricting the influence of English law in the South African common law and played a significant role in maintaining many of the legal concepts, categories, principles and divisions of private law, including the law of succession, which was deemed as an essential private law institution.¹³⁶ As a result, private law jurists, part of this movement, jealously protected private law principles to ensure that the old sources of Roman-Dutch law survived.¹³⁷

¹³⁴ Zajtay & Hosten (1969) op cit at 195-196.

¹³⁵ Zajtay & Hosten (1969) op cit at 197.

¹³⁶ Du Toit (2014) op cit at 280-281.

¹³⁷ Zajtay & Hosten (1969) op cit at 195-196.

Despite political tensions, free testamentary disposal remained the law of the land and, as shown above, was significantly expanded by procedural changes brought by English colonial administrators. According to De Waal, the changes brought by English law 'did not seriously challenge most of the basic principles applied in Roman-Dutch law.'¹³⁸ English law did not affect the contents of wills and thus De Waal notes that the vast majority of testamentary institutions and provisions originated from Roman law continue to play a role in the modern law of succession.¹³⁹ This left many of the substantive principles of the Roman-Dutch law, and the basic succession framework inherited from Roman law, relatively unchanged.¹⁴⁰ For instance, many of the original Roman law testamentary institutions, including the *fideicommissum*, the usufruct, the accrual, and the massing of estates are still commonly used in modern wills despite the form for the valid execution being prescribed by English law.¹⁴¹

Even though the abolition of legitimate portions was a defining point in the history of testate succession, it is arguable that this only reinforced an existing principle already embedded within Roman and Roman-Dutch law, namely that an individual held the liberty to distribute assets after death (even though this was more heavily conditioned than in English law). The conformity between these two systems of law can be attributed to their mutual recognition of private ownership as the

¹³⁸ De Waal (2011) op cit at 314.

¹³⁹ De Waal (2011) op cit at 384.

¹⁴⁰ Van den Bergh (2012) op cit at 73-76; Sarkin (2000) op cit at 2.

¹⁴¹ Du Toit (2007) op cit at 74. A *fideicommissum* is when property is left to successive generations on the fulfillment of testamentary conditions. A usufruct is when one beneficiary is given use and enjoyment of a property while ownership vests in another beneficiary. Accrual is when co-beneficiaries share in a benefit that the other beneficiary cannot benefit in. Lastly, massing of estates is when two or more testators draft a joint will which will be distributed on the death of the first dying. See further MJ de Waal & MC Schoeman-Malan *Introduction to the Law of Succession* (2003).

foundation of property law.¹⁴² Although it is clear that English law introduced new principles to succession law (with particular emphasis on individual testamentary freedom), the introduction merely added a new storey to an already established edifice, and one that was in harmony with Roman and Roman-Dutch legal principle recognising the dominium of testators to devolve of property through wills.¹⁴³ Lastly, this brief overview of the sources of succession law shows that the principle of freedom of testation is not fixed and been characterised by several political power contests.

e) **The recognition of testamentary freedom in modern South Africa**

As a result of its mutual reinforcement in the three major sources of testate succession law, the principle of freedom of testation finds full expression as a common law principle.¹⁴⁴ Compared to testamentary freedom in Roman law and Roman-Dutch law, testators in contemporary times enjoy the purest form of freedom. This is typically explained as affording testators a near complete freedom to dispose of property to whomever he or she pleases under limitless conditions without any obligation to family members or any other person. As a common law principle, this recognition is regarded as being trite, meaning that it is well-established and commonplace in modern South African law.

¹⁴² J Miller *The Machinery of Succession* (1996) 2-3; and 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 at 360.

¹⁴³ Zajtay & Hosten (1969) op cit at 189. See further IJ Kroeze 'Between conceptualism and constitutionalism: private law and constitutional perspectives on property' (unpublished PhD thesis, University of South Africa, 1997) for a historical overview of the protection of ownership in Roman law, German law, Dutch law and American law.

¹⁴⁴ Corbett (2001) op cit at 39; MJ de Waal 'The law of succession and the Bill of Rights' in Rautenbach et al *Bill of Rights Compendium* (1998) at 3G7.

There is no express reference to freedom of testation that gives effect and recognition to it in any statute. It is however given practical effect to through a number of different legal instruments, namely¹⁴⁵: the Will Act 7 of 1953 that imposes strict formalities for the execution of valid wills; the rule that freedom of testation cannot be contractually limited¹⁴⁶; various legal rules that ensure that testamentary expression is not made under duress, undue influence or mistake¹⁴⁷; the rule against the delegation of testamentary disposition¹⁴⁸; the power that a testator retains during her life to revoke a will¹⁴⁹; and the general rule of judicial interpretation and rectification of wills empowering and obliging courts to give effect to the wishes of the testator as expressed in a will (known as the golden rule of interpretation).¹⁵⁰

South African law does impose limits on free testamentary disposal. Under certain circumstances, courts are empowered to amend, vary or strike down testamentary dispositions that offend public policy.¹⁵¹ These circumstances are, however, exceptional. The general principle, as stated in *Jewish Colonial Trust Ltd v Estate Nathan*¹⁵², is that a court ‘has no general discretionary power to modify or supplement rights given under a will or to authorize the property of a testator to be dealt with otherwise than in terms of his will.’¹⁵³ This does not mean that courts will not impose limits on testamentary bequests if they offend public policy, but rather that this is an exceptional and abnormal judicial incursion.

¹⁴⁵ These are conveniently explained by De Waal (1998) op cit at 3G7.

¹⁴⁶ De Waal explains that the only exception to this rule is the *donatio mortis causa* and an ante nuptial contract. See De Waal (1998) op cit at 3G7; and Corbett (2001) op cit at 39-9; and Jamneck (2012) op cit at 229-231.

¹⁴⁷ De Waal (1998) op cit at 3G7; and Corbett (2001) op cit at 91-4.

¹⁴⁸ Corbett (2001) op cit at 357-365; De Waal (1998) op cit at 3G7; De Waal & Schoeman-Malan (2003) op cit at 46-50; and Jamneck (2012) op cit at 126-28.

¹⁴⁹ De Waal (1998) op cit at 3G7; De Waal & Schoeman-Malan (2003) op cit at 7.

¹⁵⁰ Corbett (2001) op cit at 447; and De Waal (1998) op cit at 3G7.

¹⁵¹ See note 33 above.

¹⁵² 1940 AD 163.

¹⁵³ *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 182–186.

In the pre-constitutional common law era, the following discriminatory bequests that imposed eligibility conditions on the basis of race, religion, gender and nationality were considered not to be against public policy: *Ex parte Robinson*¹⁵⁴ – a trust providing a ‘haven of rest for tired European missionaries’; *Standard Bank v Betts Brown*¹⁵⁵ – a trust ‘for the assistance and encouragement of *bona fide* inventors of British nationality’; *Ex parte Marriott*¹⁵⁶ – a trust for the training of ‘Natal European orphaned girls and boys’; *Ex parte Ratray*¹⁵⁷ – a trust for the erection of homes for ‘destitute children of British parentage’; and *Ex parte Impey*¹⁵⁸ – a trust for the erection of a ‘home of rest for generally trained non-European nurses.’ Finally, in *Marks v Estate Gluckman*,¹⁵⁹ the testator created a bursary for Jewish students (not converted) but stated that it would lapse ‘if the grantee prove religiously inclined’ - in other words, the bursary was intended for moderate Jewish students. The court found that it was not against public policy nor was it void for vagueness. During the pre-constitutional era, courts adopted a very lenient approach to charitable bequests stating that provisions should be maintained rather than invalidated.¹⁶⁰ All of these bequests were aimed at influencing an heir’s personal conduct or dictating the use and enjoyment of a bequest.

There are a number of statutes that also limit testamentary freedom. In terms of section 13 of the Trust Property Control Act 57 of 1988, a court may, on application by a trustee or any person who in the opinion of the court has sufficient interest in the trust property, delete or vary a trust provision which brings about consequences which in the opinion of the court, the founder of the trust did not

¹⁵⁴ 1953 (2) SA 430 (C).

¹⁵⁵ 1958 (3) SA 713 (N).

¹⁵⁶ 1960 SA 814 (D).

¹⁵⁷ 1963 (1) SA 556 (D).

¹⁵⁸ 1963 (1) SA 740 (C).

¹⁵⁹ 1946 AD 289.

¹⁶⁰ Du Toit (2001) op cit at 225-31.

contemplate or foresee. Other legislation also specifically restricts testamentary freedom: the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 and the Subdivision of Agricultural Land Act 70 of 1970 restricts a testator's power to subdivide agricultural land; the removal or modification of restrictions imposed on immovable property is regulated in terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1964; the Minerals Act 50 of 1991 restricts the capacity to subdivide mineral rights;¹⁶¹ a surviving spouse's claim in terms of the Maintenance of Surviving Spouses Act 27 of 1990 against the estate of a deceased for maintenance;¹⁶² and the Pensions Fund Act 24 of 1956 provides that pension fund payments benefits to a deceased member do not form part of the member's estate.

The history of testamentary freedom in the common law shows that it has deep roots in South African law. This is reflected in Roman law, brought through into Roman-Dutch law, and amplified by the recognition of testamentary freedom in English law. It is in this context that I now assess how testamentary freedom has been recognised in the post-apartheid era with the adoption of the Interim and Final Constitutions in 1993 and 1996, respectively.

2.3 THE RECOGNITION OF TESTAMENTARY FREEDOM AS A CONSTITUTIONAL RIGHT

The advent of democracy in South Africa and the adoption of the Interim and Final Constitutions is a defining moment in the history of this country. In terms of property

¹⁶¹ The Act has provisions to ensure that a will or rules of intestate succession will not result in the avoidance of these limitations. See section 21 of Act 50 of 1991.

¹⁶² For a detailed exposition of both the background to the Maintenance of Surviving Spouses Act and the Act's provisions, see Corbett (2001) at 42-47; and Jamneck (2012) op cit at 123-126. Note that in *Daniels v Campbell NO* 2004 (5) SA 331 (CC) the Constitutional Court decided that the word 'survivor' as used in the Act includes the surviving partner to a monogamous Muslim marriage). See *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) at para 10 for a discussion on the statutory limitations.

and testate succession law, it established a new regime for property protection and regulation that fundamentally changes the common law position. As will be discussed in full below, the property clause introduced new redistributive obligations intended to address a legacy of racial discrimination and inequitable access to land and natural resources. These new obligations were intended to fundamentally change the recognition of established and vested property rights.

The adoption of the Interim and Final Constitutions influenced some of the substantive principles of the law of testate succession. It is necessary to discuss how academics and courts dealt with the potential impact of the two Constitutions on testate succession, especially considering just how deeply entrenched the principle of freedom of testation runs in South African legal heritage. In the early days of democracy, the question that preoccupied succession law academics and judges was the impact of the Constitution in terms of: (a) the recognition of the age-old common law principle of freedom of testation as a property right in section 25(1); and (b) how other rights enshrined in the Bill of Rights, particularly the right to equality (section 9), would limit the enforcement of testamentary bequests. The first question though acknowledged was largely under-explored. Far more focus has been paid to the effects of testamentary bequests that unfairly discriminate on the basis of an heir's (or potential heir's) race, gender or religion.¹⁶³ The result of this focus is that the current constitutional understanding of testamentary freedom largely mirrors its protection in the pre-constitutional era. This is not to suggest that the question of how other fundamental rights limit the scope of testamentary freedom is not important. It is

¹⁶³ See Section 9 of the Constitution and how the Court in *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) dealt with this decision. See further 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 L. Rev.* 222 at 283-284 for a discussion of this judgment. These cases include: *Syfrets Trust* supra; *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 2010 6 SA 518 (SCA); *In re BOE Trust Ltd NO and Others* 2013 3 SA 236 (SCA); *Harper v Crawford* 2017 JDR 1271 (WCC); and *King v de Jager* 2017 JDR 1321 (WCC).

however, in my view, a secondary consideration once the nature and function of testamentary freedom has been established.

In the remainder of this chapter, I set out the operational provisions of the property clause, and thereafter provide a substantive explanation of how academics and judges have understood, applied and recognised the common law right of freedom of testation as a property right.

a) **The property clause**

The property clause does not expressly recognise freedom of testation, or any other incident of property ownership.¹⁶⁴ Section 25(1) merely states that ‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’¹⁶⁵ The vague reference to ‘property’ raised the question at the time the Final Constitution was adopted whether an owner’s right to dispose of property after death has constitutional fortification.¹⁶⁶ Before assessing how succession academics and courts have answered this question, it is appropriate to briefly lay out the operational provisions of the property clause.

A reading of the property clause as a whole shows that section 25 contains two distinct types of provisions serving two distinct types of functions, one *protective*, and the other *transformative*.¹⁶⁷ Subsections 25(1) – (3) deals with the protection of existing property rights and interests; whereas subsections 25(5) – (9) places an obligation on the State to adopt legislative or measures to redress past racial discrimination and promote land reform and restitution. The transformative provisions of the property

¹⁶⁴ This is similar to the United States. See chapter 5, § 5.2 a).

¹⁶⁵ Section 25(1) of the Constitution.

¹⁶⁶ De Waal (1998) op cit at 3G5; Du Toit (2001) op cit at 233-234; *Syffrets Trust* supra at 17-18.

¹⁶⁷ See note 11 and 12 above for the full reference to the property clause.

clause are important in establishing the types of constitutional limitations that must be imposed on property ownership generally.¹⁶⁸ They are also clearly intended to promote a property system where there is more equitable enjoyment of land and property. However these provisions only become relevant once it is determined that the particular right or interest is actually a property right, enjoying the protection of section 25(1). This is known as the threshold question.¹⁶⁹

Section 25(1) is the gatekeeper that protects individual property rights. There are three features of section 25(1) in particular that needs to be noted in order to understand how individual property rights are constitutionally guaranteed. The first feature is that section 25(1) does not contain a comprehensive definition of ‘property’. The only guidance as to the type of property that is constitutionally protected is in section 25(4)(b) that states that ‘property is not limited to land.’¹⁷⁰ The second feature is that section 25(1) does not contain an express guarantee of rights of property, including the right to dispose (*ius disponendi*), which freedom of testation is regarded as being a central tenet.¹⁷¹ The wording in the property clause in the Final Constitution should be contrasted with the wording of the property clause in the Interim Constitution that stated ‘[e]very person has the right to acquire and hold rights in property and, to the extent that the nature of the rights permit, to dispose of such right.’¹⁷² The difference is that the Interim Constitution provided an explicit guarantee

¹⁶⁸ I argue in chapter 4 that the transformative limitations have been entirely ignored in understanding the scope of testamentary freedom as a property right.

¹⁶⁹ In terms of the property threshold question, it is therefore necessary for every court to establish whether the nature of the right and the object of the right in question enjoy the protection of section 25. See *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51; AJ van der Walt *Constitutional Property Law* 3 ed (2011) at 108-113.

¹⁷⁰ Section 25(4)(b) of the Constitution.

¹⁷¹ De Waal (1998) op cit at 3G5-3G6 and Du Toit (2001) op cit at 233-4.

¹⁷² The Interim Constitution of the Republic of South Africa Act 200 of 1993. The Interim property clause stated that: ‘Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permit, to dispose of such right.’ See chapter 5, § 5.3 c) for a contrast with the German Property Clause (Article 14(1)).

of the normal incidents of private ownership recognised in the common law, whereas the mere reference to '[n]o one may be deprived of property' does not refer to rights. The phrase in section 25(1) therefore only provides implicit protection of individual property rights.

The third feature is that the formulation of section 25(1) is negatively phrased, which means it does not provide for a positive guarantee over property or land. The negative phrasing only guarantees that no one may be deprived of property, whereas a positive guarantee would allow a person to assert that the property is his or hers. Moreover, positive constitutional claim expressly provides for individual property rights, which could also arguably be regarded as a guarantee of private ownership. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*,¹⁷³ the Constitutional Court however stated that the property clause still provides for the positive protection of property, which has been held to be substantially similar to negative protection. The only difference with a negative phrasing, of course, is that there is no explicit guarantee of the various entitlements of ownership: the right to use, enjoy and dispose of property. This means that the question of whether a traditional incident of ownership is constitutionally recognised cannot be taken for granted but is subject to judicial determination.

These three features of section 25(1) indicate, at least *prima facie*, that the property clause is silent on whether the *ius disponendi* (which is the right to dispose of property said to guarantee private succession) is constitutionally protected as a property right.¹⁷⁴ There is therefore very little indication in the property clause itself as

¹⁷³ 1996 (4) SA 744 (CC) 72. This was confirmed in *First National Bank* supra at para 48.

¹⁷⁴ Section 25(1) of the Constitution.

to the nature of rights to property, what types of property will be protected (other than land), the kinds of property interests, and their level of protection.

b) Succession law academic interpretation of ‘property’ in section 25(1)

The absence of an express positive guarantee of freedom of testation in section 25(1) raised the concern among succession law academics that the property clause would not extend to all common law entitlements of ownership.¹⁷⁵ This is especially since the principle of freedom of testation has historically been guaranteed in all three major sources of the common law of succession, namely: Roman law, Roman-Dutch law and English law.¹⁷⁶ Despite this uncertainty, leading succession law academics took the view that the purpose of the property clause is to protect individual property ownership, the scope of which is wide enough to include freedom of testation as one of its traditional incidents.¹⁷⁷ It is clear from the academic literature (examples of which are provided below) that the private common law notion of ownership is considered to be at the heart of the notion of ‘property’ in the property clause.¹⁷⁸ Based on this opinion, it was generally assumed that as one of its entitlements, the *ius disponendi* would likewise be constitutionally protected.

De Waal was the first to interpret the nature of testamentary freedom in the property clause. He correctly points out that the answer to this question lies in an interpretation of ‘property’.¹⁷⁹ According to De Waal’s interpretation of property:

¹⁷⁵ De Waal (1998) op cit at 3G5; *Syfre’s Trust* supra at 17-18.

¹⁷⁶ Du Toit (2001) op cit at 233-234.

¹⁷⁷ De Waal (1998) op cit at 3G5 and Du Toit (2001) op cit at 222-224.

¹⁷⁸ Ibid.

¹⁷⁹ De Waal (1998) op cit at 3G6.

“‘[P]roperty’ *obviously* includes the right of ownership... [and] ownership embraces, in principle, the right to dispose of the property owned (the *ius disponendi*), [which] is indeed one of the basic tenets of the South African law of property.’¹⁸⁰ [My emphasis]

Based on this reasoning, he concludes with confidence that ownership ‘includes disposal upon death by any of the means recognised by the law, including a last will.’¹⁸¹ The syllogistic reasoning in this interpretation is clear in the step-by-step deduction that the word ‘property’ in section 25 is tantamount to ownership. Due to this assumed link, De Waal argues that property embraces the *ius disponendi* (right to dispose of property) as a constitutional property right. These three steps – from ‘property’ to ‘ownership’ to ‘freedom of testation’ – are not explained.

It is interesting to consider the extent to which De Waal attempts to give meaning to the notion of ‘property’ in the extract below. As stated above, the meaning of property is an elementary question in any legal dispute. The comments were made in the context of the changed terminology of the Interim property clause that provided for ‘rights in property’ to the Final property clause that vaguely refers to ‘property’. He notes that:

‘[t]he question arises whether, despite these differences, section 25(1) also guarantees the institution of private succession and, flowing from that, the principle of freedom of testation. The answer to this question obviously lies in the interpretation of the concept of “property” as used in section 25(1). *For present purposes it is not necessary to embark on such an analysis.* Suffice it to say that, regarding the issue at hand, there is no reason to interpret section 25(1) differently from its predecessor. In other words, the formulation of section 25(1) lends itself to an interpretation in terms of

¹⁸⁰ Ibid.

¹⁸¹ De Waal (1998) op cit at 3G5.

which both the institution of private succession and the principle of freedom of testation are guaranteed along the lines suggested above.’¹⁸² [My emphasis]

Thus while De Waal acknowledged that the meaning of property is central to understanding whether freedom of testation is a constitutional property right, no further analysis is given. Unfortunately, this remains the extent to which the notion of property has been explicitly dealt with in succession law academic literature. The general premise of De Waal’s interpretation rests on the close relationship that testamentary freedom shares with private property ownership.¹⁸³ According to him, ‘a natural and obvious precondition for the existence of any form of testate succession is a notion of individual ownership.’¹⁸⁴ Based on the above, De Waal concludes, ‘[a] system of private succession is nothing less than a *natural consequence* of the acknowledgement and acceptance of a system of private ownership.’¹⁸⁵

This line of reasoning is replicated in other succession law academic interpretations of the property clause. According to Du Toit, freedom of testation is:

‘enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property.’¹⁸⁶

The logic of this interpretation is that there is no reason to question whether the *ius disponendi* is a constitutional right because it is, and has always been, an entitlement protected by private ownership. Constitutional property is considered by Du Toit to be

¹⁸² Ibid at 3G6.

¹⁸³ De Waal states that ‘[t]here can be no doubt that all developed systems of testate succession are based on the premise of freedom of testation: a testator can, in principle, decide who is to inherit his property.’ De Waal (1998) op cit at 3G5.

¹⁸⁴ De Waal (1989) op cit at 300 [emphasis added].

¹⁸⁵ De Waal (1998) op cit at 3G4.

¹⁸⁶ Ibid at 224.

synonymous with the meaning of ownership in the private common law of property. The obvious point made is that, since ownership traditionally protects free testation as a legal principle in the common law, private succession is likewise a constitutional property right.

The language used by various other succession law academics to justify this interpretation also suggests a forceful protection of this point of view. For instance, consider the following justification by Du Toit:

‘The fact that the constitutional guarantee of the right to property is premised upon the traditional meaning attributed to the property concept, leads to the *inescapable* conclusion that both private ownership as well as the resultant *ius disponendi* indeed enjoys constitutional protection in South African law. Such protection *invariably* results in a concomitant (although unexpressed) guarantee of private succession and freedom of testation, and the latter essential to the exercise of the *ius disponendi* by way of testamentary bequest.’¹⁸⁷ [My emphasis]

According to Rautenbach, ‘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.’¹⁸⁸ She also holds the opinion that freedom of testation would be protected on the basis of a relationship with private ownership. Lehmann comments that ‘[f]reedom of property is meaningless if it does not include the freedom to dispose of property, which must include the power to dispose both in life and on death.’¹⁸⁹ Corbett, Hofmeyer and Kahn rightly point out that

¹⁸⁷ Du Toit (2001) op cit at 234.

¹⁸⁸ C Rautenbach ‘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?’ (2014) 1 *Acta Juridica* 132 at 145 (My emphasis).

¹⁸⁹ Lehmann (2014) op cit at 10. While not stated, this statement relies on a deeply held notion that property becomes owned when it is held in person. See further SR Munzer *A Theory of Property* (1990) at 63-7.

‘[t]he right of an individual to dispose of his or her property on death as he or she pleases was recognised in both Roman and Roman-Dutch law and has found full expression in South African law.’¹⁹⁰ The only other justification given is a reliance on Roman-Dutch law as a basis for the constitutional protection of freedom of testation.¹⁹¹ This however seems to be the only basis for its constitutional recognition.

In sum, it is clear from all the above examples that succession law academics generally accept that a close relationship exists between the traditional meaning of private property ownership and ‘property’ in section 25(1). The language used to reach this conclusion also suggestively reinforces an understanding of the nature of testamentary freedom. For instance, the use of the words ‘inescapable’¹⁹², ‘invariably’¹⁹³, ‘obviously’¹⁹⁴, ‘inconceivable’¹⁹⁵ and of ‘a natural consequence’¹⁹⁶ by various succession law academics, all suggest an inevitable, incontrovertible, irresistible, obvious, unchangeable and rigid interpretation of ‘property’ and thus the inevitable constitutional nature of private succession in South African law. The view that ownership is central to the constitutional protection of freedom of testation has been taken directly from the common law protection of testation, which as shown above is clearly deeply entrenched in testate succession academic literature.¹⁹⁷ As a result, academics have projected a notion of testation that is timeless, universal and concrete. I argue in chapter 4 that the fact that academics solely rely on a one-dimensional aspect of Roman and Roman-Dutch law to show a constitutional basis for freedom of

¹⁹⁰ Corbett (2001) op cit at 39.

¹⁹¹ Ibid at 39.

¹⁹² Du Toit (2001) op cit at 234.

¹⁹³ Ibid.

¹⁹⁴ De Waal (1998) op cit at 3G6.

¹⁹⁵ Rautenbach (2014) op cit at 145.

¹⁹⁶ De Waal (1998) op cit at 3G4.

¹⁹⁷ Ibid at 47; and Lehmann (2014) op cit at 10.

testation is fundamentally problematic as it shows that academics have failed to interrogate a constitutional justification for protecting property.¹⁹⁸

c) Judicial interpretation of ‘property’ in section 25

South African courts dealing with testamentary disputes have accepted the academic opinion on the interpretation of ‘property’ as comprising a traditional incident of private ownership. There have been four significant cases so far, all dealing with the limits of freedom of testation in relation to the right to equality and freedom from unfair discrimination. In these cases, the courts were faced with the conflict between the right of a testator to dispose of their property as they wish (argued to form part of the property clause) and the right to equality in section 9 of the Constitution. Two of the cases address the constitutionality of discrimination in a public purpose charitable trust and another two with the constitutionality of so-called ‘out-in-out disinheritance’ (where the testator excludes or disinherits family members on discriminatory grounds). The charitable trust cases are *Syfreys Trust*¹⁹⁹ and *In re BOE Trust Ltd NO and Others*²⁰⁰ (*BOE Trust*).²⁰¹ The out-in-out disinheritance cases are 2017 Western Cape High Court decisions: *Harper v Crawford*²⁰² (*Harper*) and *King v De Jager*²⁰³ (*King*). In discussing these cases below, I will extract the relevant statements made by these judges in relation to the property clause.²⁰⁴

¹⁹⁸ See chapter 4 where I discuss the constitutional property approach.

¹⁹⁹ *Syfreys Trust* supra.

²⁰⁰ *BOE Trust* supra.

²⁰¹ I have not included *Emma Smith Education Fund* supra into this category of charitable trust cases since no statements were made about the relationship between section 25 and the principle of freedom of testation.

²⁰² *Harper* supra.

²⁰³ *King* supra.

²⁰⁴ The Western Cape High Court recently decided the case of *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) on 29 April 2020 that deals with the constitutionality of section 2B of the Wills Act – that imposes a temporary period of assumed revocation for three months after a divorce

The *Syfreys Trust* case was the first case in which the court looked at the relationship between the property clause and the common law principle of freedom of testation.²⁶⁵ In this case, the testator imposed an eligibility condition of a university scholarship that excluded women, Jewish and black applicants.²⁶⁶ Counsel for the *Syfreys Trust* argued that the eligibility condition was not unconstitutional as it formed part of the testator's constitutional right to dispose of property after death as he wished, a right argued to form part of the property clause. The constitutional recognition of the testator's right under section 25 was not disputed by any of the parties and the court was prepared to accept that the principle of freedom of testation is constitutionally protected for the purposes of the case.²⁶⁷

This case illuminates the clash between private property ownership (including testamentary freedom) and the right to equality (not to be unfairly discriminated against). Griesel J noted that that case:

‘brings into sharp focus some of the potential problems that have been foreshadowed by legal authors and scholars since the advent of the South African constitutional era, namely the juxtaposition of the constitutionally guaranteed principle of private ownership, together with its corollaries of private succession and freedom of testation, on the one hand, and the

where ex-spouses are considered as if predeceased. A ‘disinherited’ ex-spouse challenged this provision on the basis that it infringes the testator's (his deceased ex-wife) freedom of testation, constitutionally protected in terms of the property clause. The application was opposed by, among others, the deceased's parents who were her intestate heirs. I do not think that the case deserves much attention for the purposes of this thesis for the primary reason that it confirms existing case law. The case is however significant for one reason in that the court dismissed the constitutional challenge on the grounds that the statutory revocation serves a legitimate social purpose of protecting divorcees whom may be quite overwhelmed immediately after a divorce and not know that express revocation or amendment is necessary to exclude a ex-spouse from a will (see para 37). For this reason I do think that it is important to reflect that social reasons do, on occasion, justify limiting freedom of testation, something that I discuss in more detail in chapter 3, § 3.4.

²⁶⁵ *Syfreys Trust* supra at para 18.

²⁶⁶ *Syfreys Trust* supra at para 18. Scarbrow Bursary Fund Testamentary Trust was established in 1921 for ‘deserving students with limited or no means’ and limited to students of ‘European descent’ and not Jewish or female.

²⁶⁷ *Syfreys Trust* supra at para 18.

constitutional right to equality and freedom from unfair discrimination, on the other.’²⁰⁸

Although Griesel J deals with the limits imposed by the Constitution at length, he does not engage in the reason for recognising, what he calls, ‘the black letter rule’ of the principle of freedom of testation as a constitutional property right. He rather assumes that the common law principle is valid, and thereafter proceeds to balance the testator’s right to property against the equality rights of students excluded from the scholarship.²⁰⁹ This assumption is similar to the academic commentary, which also does not question the validity of the common law foundations of freedom of testation. Although *Syfrets Trust* is widely recognised for its approach to the right to equality in public purpose trusts, it did not explicitly confirm that section 25 protects freedom of testation.

It should be noted, before moving onto the next case, that in *Syfrets Trust*, Griesel J does raise some speculative concerns as to whether a trust as a legal institution can exercise the right to dignity, freedom and privacy as juristic persons.²¹⁰ In his opinion (one that he leaves entirely open-ended), only natural persons can rely on these rights. To the extent that juristic persons have rights, he states it ‘can never be as intense as those of human beings and juristic persons are thus entitled to a reduced level of protection.’²¹¹ It is clear that Griesel J has some reservations about extending rights posthumously since, as he notes, the testators are dead. He also suggests some nuance in the level of property protection depending on the identity of the right holder. But rather than probing this complex legal and philosophical

²⁰⁸ *Syfrets Trust* supra at para 12.

²⁰⁹ Ibid at 17-18.

²¹⁰ *Syfrets Trust* supra at para 41.

²¹¹ Ibid at para 41.

question, he reverts to accepted common law principles that do allow for testamentary disposals through legal instruments like wills and trusts.

The constitutional protection of testamentary freedom as a property right was, however, expressly accepted in *Ex parte BOE Trust*.²¹² In this case, the constitutionality of an eligibility condition created for ‘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’ was challenged.²¹³ In this case, the primary scholarship bequest was considered impossible to give effect to because all universities refused to administer it on account that it unfairly discriminated on the basis of race. Due to foreseen problems that the universities would have with administering the discriminatory bursary, the testatrix’s attorney advised that she provide for an alternative bequest to devolve to charitable organisations in event that the primary bequest be declared unlawful. As a result of the impossibility, the Supreme Court of Appeal (SCA) gave effect to the secondary bequest to other charitable organisations.

With regards to the constitutional protection of freedom of testation, the *court a quo* in *Ex parte BOE Trust* held that:

‘Insofar as it may be necessary to seek confirmation that the right to freedom of testation remains protected under the Constitution, reference may be made to s 25(1) of the 1996 Constitution. In my opinion, it is clear that the right to property includes the right to give enforceable directions as to its disposal on the death of the owner.’²¹⁴

²¹² *Ex parte BOE Trust* supra at para 9 (Ex Parte BOE Trust).

²¹³ A further condition was that students had to return to South Africa. The objective was to prevent emigration of white chemistry graduates to avoid skills loss.

²¹⁴ *Ex parte BOE Trust* supra at 9.

On appeal to the SCA (on a different issue), Erasmus AJA accepts the academic view that freedom of testation is ‘enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property.’²¹⁵ He notes with approval that this ‘serve[s] as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.’²¹⁶ Based on the support for the academic opinion, it is clear that the mere fact that common law protects ownership is considered sufficient for the constitutional recognition of testamentary freedom in the property clause. In addition to guaranteeing property rights of testators, Erasmus AJA held that testamentary freedom further accords with the right to human dignity, in that it allows ‘the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.’²¹⁷

In the *Harper* case, Dlodlo J confirms the central position of the concept of ownership to free testation.²¹⁸ This case deals with the constitutionality of a testamentary exclusion of adopted grandchildren in a will.²¹⁹ In this case, the testator (the late Louis John Druiff) executed a trust for the benefit of his ‘four children’, and on their death, the trust benefit should be paid to his or her ‘descendants per stirpes, in equal shares.’ Clause 5 of the testator’s will provided that, if any of his children ‘dies without leaving issue, his or her one-fourth share shall devolve upon the remaining children.’²²⁰ At the time of executing the trust deed, one of the testator’s daughters

²¹⁵ *BOE Trust* supra at para 26 quoting Du Toit (2001) op cit at 224.

²¹⁶ *Ibid.*

²¹⁷ *BOE Trust* supra at para 27.

²¹⁸ *Harper* supra at para 143.

²¹⁹ *Ibid.*

²²⁰ The full clause 5 reads: ‘If the whole of the capital has not been applied for the benefit of the beneficiaries, as provided in paragraph 4 hereof, the Trust shall remain in force until the death of the said four children of the donor, namely, as each of the said four children dies his or her one-fourth share of the capital of the Trust shall be paid to his or her descendants per stirpes, in equal shares. If at such time any of the descendants, who is entitled to receive a share of the capital, is under the age of 28 years, such share of the capital shall continue to be held in trust and the revenue thereof paid to such

(Dulcie Harper) had been unable to fall pregnant. The option of adoption was discussed between the testator and Dulcie, but the testator advised that she should wait. Subsequent to the testator dying, she then adopted a child.²²¹ The question in this case was whether the words ‘children’, ‘descendants’, ‘issue’ or ‘legal descendants’ used in the trust deed were intended to include the testator’s adopted grandchild. Dlodlo J had regard to the legal fiction created by the Children’s Act²²² whereby adopted children are deemed to be the legitimate children unless a contrary intention is expressed.²²³ Apart from arguing that the testator had intended to benefit her adopted children, Dulcie argued that the exclusion is unconstitutional as it amounts to unfair discrimination on the grounds of birth.²²⁴ By inferring an intention of the testator at the time the trust deed was drafted and using the ordinary rules of interpreting a will, Dlodlo J, however, held that the testator intended to benefit only biological or natural descendants.²²⁵ Accordingly, it was held that the testator had intended to exclude adopted children.²²⁶

In determining the nature of the conflicting constitutional rights in issue in the *Harper* case, Dlodlo J comments that ‘one must, perhaps, first and foremost, briefly consider the *ambit of ownership*.’²²⁷ He then uses the accepted common law definition of ownership used in the private law of property to reinforce this view:

descendant or beneficiary, or to his or her guardian until he or she attains the age of 28 years, when the capital shall be paid to him or her. If any of the said four children of the Donor dies without leaving issue, his or her one-fourth share shall devolve upon the remaining children and shall form portion of the capital of the Trust and be subject to the terms and conditions of the Trust.’ See *Harper* supra 3.

²²¹ Ibid para 21.

²²² Children’s Act 30 of 2005.

²²³ *Harper* supra at para 20, 25.

²²⁴ Section 9 (3) of the Constitution.

²²⁵ *Harper* supra at para 24-5.

²²⁶ Ibid para 26.

²²⁷ *Harper* supra at para 27.

‘[O]wnership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by public and private law.’²²⁸

The recognition of the weight of *ius disponendi*, he goes on, is ‘so central to the concept of ownership in our law that it forms part of the very definition of ownership.’²²⁹ In other words, while ownership in private common law is comprised of a number of entitlements, the right to dispose is itself a ‘manifestation of the right of ownership.’²³⁰ This case cements the constitutional recognition of freedom of testation firmly within the common law notion of private ownership. In fact, these two notions seem indistinguishable. Dlodlo J’s order was appealed to the Supreme Court of Appeal (SCA). On appeal, both the minority and majority judgments confirmed the centrality of the private law notion of ownership to the constitutional protection of freedom of testation.²³¹ The minority referred to freedom of testation as a ‘deeply entrenched principle of our law’²³² and the majority to it as a ‘fundamental principle of the law of succession.’²³³ The fact that the position has not changed in the Constitution was also made clear.²³⁴

Like the previous case, in the *King* case testamentary freedom is regarded as affording testators a constitutional right to exclude beneficiaries on discriminatory grounds. In this case, the testators (Carel and Catherina de Jager, Dutch settlers in the

²²⁸ Ibid referring to PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) at 91.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ *Harvey NO v Crawford NO* (1016/2017) [2018] ZASCA 147 at para 22 (minority judgment) and (for convenience I refer to the SCA decision as ‘Harper SCA’). See further *Moosa NO and others v Minister of Justice and Correctional Services and others* 2018 (5) SA 13 (CC) para 18.

²³² *Harper SCA* supra at para 22.

²³³ *Harper SCA* supra at para 41, 56. In *JW* supra at para 78, Sher J refers to testamentary expressions as ‘the bedrock of the law of testate succession.’

²³⁴ *Harper SCA* supra at para 56.

Cape) drafted a will in 1902, which created a *fideicommissum* limited to descendants of the male gender. This meant that their entire estate (comprising a number of farms in Oudtshoorn in the Western Cape) would devolve to their children (four sons and two daughters), and thereafter their sons, and their great-grandsons – the last two categories all male descendants. The various farms passed to each male descendant over three generations except for one grandson who only had female descendants (daughters). These female descendants challenged the constitutionality of the testator's will 114 years after the testator's death on the basis that it amounted to unfair discrimination on the grounds of gender.²³⁵ The excluded female descendants sought to inherit the farms on an equal basis as the male descendants.

In determining the constitutional challenge, Bozalek J accepted that the testamentary exclusion constituted direct discrimination and thus was presumed unfair in terms of sections 9(4) and (5) of the Constitution.²³⁶ He thus noted that the question is whether, in the absence of a person's right to inherit, the testamentary discrimination is 'legally relevant'.²³⁷ In other words, whether disinheritance on the basis of gender can be constitutionally justified and thus constitute fair discrimination. After careful analysis, Bozalek J dismissed the great granddaughters' application on the basis that courts have limited authority to intervene with, and 're-write', the private wishes of testators. And more specifically, because the choice of beneficiaries goes to the heart of free choice that all property owners have when deciding how their assets and wealth should be distributed after their death. Allowing courts to re-write wills would, according to Bozalek J, subject testamentary freedom to the overriding

²³⁵ *King* supra at para 20.

²³⁶ *King* supra at para 58. Section 9(4) reads 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.' Section 9(5) states 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

²³⁷ *Ibid.*

power of the courts to amend wills, a result which would ‘amount to a far-reaching inroad upon the right to freedom of testation and set a weight precedent.’²³⁸ Speaking generally about the power of courts to re-write wills, he speculated that this proposition would open ‘a Pandora’s box of litigation’ and ‘would make a court the final arbiter in the choice of beneficiaries in testamentary dispositions of a non-public nature in a particularly private and personal area, namely, one’s last wishes as to how and to whom to dispose of one’s property.’²³⁹

In the final analysis, *Bozalek J* confirms the already accepted premise in testamentary succession that there is ‘no basis in legal principle for a court to purport to exercise a surrogate basis any person’s *ius disponendi*.’²⁴⁰ He further held that free testamentary disposal affirms the dignity of testators (section 10 of the Constitution²⁴¹), and forms part of their rights to privacy (section 14 of the Constitution²⁴²), free expression (section 16 of the Constitution²⁴³), and freedom of association (section 18 of the Constitution²⁴⁴).²⁴⁵

²³⁸ *King* supra at para 60 and 74. See further Honoré (1987) op cit at 173 who refers to this as ‘a radical step.’

²³⁹ *King* supra at para 61. See the concluding chapter § 5.3 b) where I reconsider this question.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid*. Section 10 of the Constitution states: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

²⁴² Section 14 of the Constitution states: ‘Everyone has the right to privacy, which includes the right not to have - (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.’

²⁴³ Section 16 of the Constitution states: (1) Everyone has the right to freedom of expression, which includes - (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to - (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.’

²⁴⁴ Section 18 of the Constitution states: ‘Everyone has the right to freedom of association.’

²⁴⁵ *King* supra at para 55.

2.4 CONCLUSION

It took seventeen years after the enactment of the Constitution for the SCA in *BoE Trust* to confirm that the property clause guarantees freedom of testation as a constitutional property right.²⁶ There are a number of preliminary observations to be made from this constitutional recognition. First, the principle of testamentary freedom has firm roots in all three sources of testate succession law. Not all these sources protect freedom of testation in the same way. Moreover, the mere fact that this principle was introduced into South Africa through various colonial administrations (and only applicable to minority white population) depicts its contested nature. Second, it is clear that the basis for the constitutional protection of testamentary freedom is a similarity between private property ownership and freedom of testation. In the common law, testamentary freedom is a traditional incident of private ownership. This notion is protected as timeless and static. Third, it is far from clear from the wording of the property clause that the right of freedom of testation is protected. Very little justification and very few reasons have been advanced by academics and judges for recognising the individual right of testation beyond the premise that ownership in the common law includes *ius disponendi* as a traditional incident. The result is that we know very little about the constitutional nature of freedom of testation.

At the time of writing, the *King* and *Harper* cases have been appealed to the Constitutional Court but have not yet delivered their judgment. This represents a good opportunity to second-guess some of the assumptions underlying the constitutional recognition of testation as a property right. As will be shown in chapter 4, this is not

²⁶ *BOE Trust* supra at para 26.

the approach to the interpretation of ‘property’ adopted by the Constitutional Court in other property law cases.²⁴⁷ Furthermore, the accepted academic and judicial recognition of testamentary freedom relies only on the wording of subsection 25(1). This interpretation does not take into account the inherent tension in the property clause between protection and redistribution. Succession law academics and judges only seem to be concerned with the protection of individual testation as a common law right and not how the property clause introduces new redistributive obligations.

²⁴⁷ See chapter 4 § 4.2 a).

CHAPTER THREE

THE PRIVATE OWNERSHIP APPROACH TO FREEDOM OF TESTATION

‘[O]wnership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by public and private law.’²⁴⁸

Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s
The law of property* 5th ed (2006) at 91.

3.1 INTRODUCTION

The constitutional recognition of testamentary freedom in South Africa is founded on the individual right of ownership. As shown in the previous chapter, such recognition is based on the ‘trite’ common law principle that ownership entitles a testator to dispose of their property after death (*ius disponendi*) in any manner they deem fit.²⁴⁹ South African succession law lawyers do not explain the relationship between private property ownership and the constitutional recognition of freedom of testation as a property right. They are more concerned with developing an understanding of the limits to testation, which means that the constitutional nature and function of testamentary freedom is assumed and underdeveloped.²⁵⁰ In this chapter, I use the four general or common characteristics of private property ownership (otherwise also

²⁴⁸ Referred to in *Harper v Crawford* 2017 JDR 1271 (WCC) at para 27.

²⁴⁹ 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* 222 at 224.

²⁵⁰ Du Toit (2001) op cit at 231.

referred to as ‘shared assumptions’²⁵¹), as understood and applied in the private property law, to explain an approach to testate succession founded on a private property ownership. I refer to this as ‘the private ownership approach to freedom of testation’ or merely as ‘the private ownership approach’. These general characteristics of private property ownership are: firstly, ownership protects an individual right to exclude; secondly, it is hierarchical in that it values real rights of testators over limited real rights and personal rights of heirs; thirdly, it is absolute in principle; and fourth, limitations are exceptional.²⁵²

I argue that an uncritical and habitual reliance on a private law concept of ownership by South African succession lawyers has profound and far-reaching ramifications for the regulation of testation as a constitutional property right, the adjudication of testamentary disputes, and the development of testate succession law. I also seek to show that a general conception of testamentary freedom largely determines where its limitations drawn rather than *vice versa*.²⁵³ My claim is that the centrality of individual ownership in the system of testate succession limits its redistributive scope because it creates a hierarchal ordering of property rights where ownership is presumptively superior to any type of limitation.²⁵⁴ This does not mean that testamentary interests (or the deceased’s wishes) always, as a matter of course,

²⁵¹ IJ Kroeze ‘Between conceptualism and constitutionalism: private law and constitutional perspectives on property’ (unpublished PhD thesis, University of South Africa, 1997) at 9.

²⁵² T Honoré *Making Law Blind: Essays Legal and Philosophical* (1987) at 165-192.

²⁵³ Kroeze (1997) op cit at 164.

²⁵⁴ I rely on AJ van der Walt’s work on the centrality of ownership. See generally, AJ van der Walt ‘Property and marginality’ in GS Alexander & EM Penalver (eds) *Property and Community* (2010) 83; and AJ van der Walt *Property in the Margins* (2009). See further, AJ Van der Walt ‘Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu’ (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305; AJ Van der Walt ‘The South African law of ownership: A historical and philosophical perspective’ (1992) 25 *De Jure* 457; AJ Van der Walt ‘Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law’ (1995) 100 *SAJHR* 169; AJ Van der Walt ‘Marginal notes on powerful(l) legends: Critical perspectives on property theory’ (1995) 58 *THRHR* 396; AJ Van der Walt ‘The fragmentation of land rights’ (1992) 8 *South African Journal on Human Rights* 429; AJ Van der Walt ‘Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership’ (1993) 56 *THRHR* 569.

prevail or are absolute in the strict sense of the word, but rather that ownership structures a certain way of thinking in testate succession law that habitually favours testamentary wishes as the stronger ownership right as opposed to other interests. A strong conceptual and doctrinal reliance on ownership in testate succession common law reinforces the meaning of the constitutional right of freedom of testation that systematically favours individual testamentary freedom *vis-à-vis* regulation in the public interest in a general, abstract (context-free) and hierarchical way.²⁸⁵

The structure of this chapter is based on the four general characteristics of ownership stated above. In section 3.2, I discuss the individualistic nature of freedom of testation based on the characteristic that ownership protects an exclusive right. In section 3.3, I discuss the hierarchical arrangement between different rights and interests in testate succession based on the understanding private ownership protects real rights of testators and not limited real rights, personal rights of heirs or general public interest. In section 3.4, I explain how a strong reliance of individual ownership heavily restricts the scope for limitations in the public interest. Lastly, in section 3.5, I discuss the notion that ownership is absolute in principle, which means that the role of the State is to preserve and protect individual testation as far as possible. I conclude by arguing: firstly, that the private law concept of individual ownership plays a strong doctrinal role in shaping the function of testate law in South Africa; and secondly, that this conception significantly limits the redistributive scope in testate succession law.

I should note, finally, that there are a lot of similarities between testate succession law in South Africa and the United States (discussed in depth in chapter 5). While I note some these similarities in passing in this chapter, I reserve a fuller comparison of all the jurisdictions studied in this dissertation for chapter 6.

²⁸⁵ See Kroeze (1997) op cit at 10.

3.2 FREEDOM OF TESTATION IS INDIVIDUALISTIC

The first and most prominent characteristic of ownership in testate succession law is the testator's right to exclude others in the disposal of property after death.²⁵⁶ I have called this the individualistic nature of freedom of testation. In private property law, ownership is generally regarded as being a valuable and important property right because it provides the power to exclude others (including the State) from infringing upon the enjoyment of property.²⁵⁷ In testate succession, this typically means that testators are afforded wide discretion in distributing their property at death to whomever they please with virtually limitless conditions. The protection and enforcement of this right has reached the point where it is readily acceptable for testators to make 'fickle, imaginative, egotistical, and unreasonable'²⁵⁸ testamentary disposals. In the administration of a deceased estate, this means that the mere presence of clear and lawfully executed testamentary wishes in a will is generally the determining factor in the distribution of property to heirs. Due to this, clear and lawfully executed testamentary wishes are also the determining juristic fact in the adjudication of testamentary conflicts.²⁵⁹ The principle of testamentary freedom is thus doctrinally rooted in an understanding of private property ownership that affords an exclusive right of owners to use and dispose of property.²⁶⁰

Due to a strong doctrinal relationship with private ownership, it has been remarked that the modern conception of testamentary freedom in South Africa takes

²⁵⁶ JD van der Vyver 'Ownership in constitutional and international law' 1985 *Acta Juridica* 146 at 134; CG van der Merwe *Sakereg* 2 ed (1989) at 175; and Van der Walt (2010) op cit at 447. See further SR Munzer *A Theory of Property* (1990) at 90-8.

²⁵⁷ Badenhorst (2006) op cit at 81; and Kroeze (1997) op cit at 127-8.

²⁵⁸ MJ de Waal & MC Schoeman *Law of Succession: Students' Handbook* 3 ed (2003) at 87.

²⁵⁹ This may seem like an obvious point (especially to the seasoned common law scholar), but the centrality of deceased wishes in testate succession has certain doctrinal consequences that are often not openly expressed. This is discussed in § 3.3 c) later on in this chapter.

²⁶⁰ This is typically justified by the endorsement of a *laissez-faire* notion of testamentary freedom introduced into South African law by the English in 1820.

the right to dispose of property by will further than most other legal systems.²⁶¹ (Interestingly, the same comment is made about testamentary disposal in the United States).²⁶² The problem with using a conception of ownership to justify the constitutional protection of freedom of testation is that it tells us very little about the reasons why it should be protected at all.²⁶³ It is clear from court cases and academic commentary (discussed in chapter 2²⁶⁴) that the conception of ownership is so taken-for-granted in private property and testate succession law that its underlying justification is often not expressly stated. Such explanations regard the principle of freedom of testation as an ends in-and-of-themselves without attempting to justify its potential intrinsic worth or instrumental value.²⁶⁵ Alexander aptly explains that:

‘Property rights are epiphenomenal. They are not ends in themselves but rather an instrument designed to instantiate and serve deeper substantive values, such as wealth maximization, personal privacy, and individual self-realization. In this sense property rights are never “fundamental.” Only the substantive interests they serve can be.’²⁶⁶

What ought to have occurred immediately after the adoption of the Final Constitution was a thorough investigation of the societal reasons for wanting to afford freedom of testation constitutional protection. According to Champine, ‘[t]he most prevalent

²⁶¹ MM Corbett, G Hofmeyer & E Kahn *The law of Succession in South Africa* (2001) at 40.

²⁶² See R Sitkoff ‘Trusts and Estates: Implementing Freedom of Disposition’ (2014) 58 *St Louis ULJ* 643 at 643-44 discussed below in chapter 5, § 5.2 a) (ii).

²⁶³ See Munzer (1990) op cit generally and Kroeze (1997) op cit at 77-103 for an excellent account on the reasons for private and public property.

²⁶⁴ See chapter 2, § 2.3 b) – c).

²⁶⁵ Mill states that ‘property is only a means to an end, not itself the end.’ See Mill JS *Principles of Political Economy* (1848) at ch 2 4. See further Munzer (1990) op cit at 99.

²⁶⁶ G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) at 102. See further the statement made by the New Jersey Supreme Court in *Shack v State* 277 A.2d 369, 372 (N.J. 1971): ‘Property rights serve human values. They are recognized to that end, and are limited by it.’ See further, G Alexander ‘Property, Dignity, and Human Flourishing’ (2019) 104 *Cornell LR* 4 991 at 1018; F Michelman ‘Liberties, Fair Values, and Constitutional Method’ (1992) 59 *University of Chicago LR* 91 at 99.

justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior.’²⁶⁷ Even if we may not agree that a utilitarian view is the best way to justify property, it is still necessary to describe some of the functional or instrumental considerations that may potentially justify an exclusive individual testamentary right.²⁶⁸

There are a number of instrumental reasons for protecting exclusive testamentary disposal that I explore below, including that it promotes: individual self-development, human dignity (respect for deceased’s wishes), happiness (social welfare for testator), utility (efficient estate planning), and incentives wealth creation based on market principles.²⁶⁹ As I noted in the introduction, I do not pretend to provide an exhaustive account of all the reasons to recognise free testation. The list below, although brief, will hopefully ignite further study of the reasons below or other reasons.

a) Individual self-development

Exclusivity accords with the highly personal nature of freedom of testation.²⁷⁰ In a will, a testator articulates and declares his or her intentions for the arrangements after death. It affords a level of agency to plan according to his or her needs, wants,

²⁶⁷ P Champine ‘My Will Be Done: Accommodating the Erring and the Atypical Testator’ (2001) 80 *Neb LR* 387 at 432. For utilitarian writers, see D Hume *A Treatise of Human Nature* (1888) ed (LA Selby-Bigge (1960) at 484-519; J Bentham *The Theory of Legislation* (1931) at 109-23 and 148-98. For discussion, see further Munzer (1990) op cit at 191-223.

²⁶⁸ D Kelly ‘Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications’ (2013) 82 *Fordham LR* 1125 at 1135.

²⁶⁹ These justifications primarily arise from the academic and judicial opinions in United States.

²⁷⁰ Munzer argues that there is a difference between exclusiveness and excludability. See Munzer (1990) op cit at 89.

motives, dispositions, and inclinations.²⁷¹ Due to the personal character of testamentary declarations, a testator can choose any words to indicate his or her intentions, which means that a will can be a highly personalised document. According to this view, the autonomous choices of individuals should be legally protected because we value personal freedom as a political and normative ideal.²⁷² The intrinsic value or usefulness for the living is knowing that their posthumous plans will be both respected and legally binding on their descendants.²⁷³ From the individual's perspective, this ensures certainty and stability in financial and estate planning during one's life in preparation for their death. This is illustrated by how it empowers a person to 'suspend the rules of the law of intestate succession',²⁷⁴ and thus the operation of standard rules of intestate succession. In short, it empowers people to take control over their own lives and plan with certainty. The inherent value of recognising posthumous wishes is consequently the acknowledgement of individual self-fulfilment.

b) Human dignity

There is a close relationship between individual self-development and human dignity.²⁷⁵ The protection and enforcement of testamentary wishes is more than an acknowledgement of agency but by implication, also their personal choices.²⁷⁶ Even

²⁷¹ Munzer (1990) op cit at 79-80.

²⁷² Section 1(a) of the Constitution enshrines freedom as a founding value. See further KR Smolensky 'Rights of the dead' (2009) 6 *Arizona Legal Studies* 1 at 5; and Munzer (1990) op cit at 79-80.

²⁷³ *In re BoE Trust Ltd NO and Others* 2013 3 SA 236 (SCA) at para 27. See further NG Henderson 'Drafting dispositive provisions in wills' (1997) 43 *Practical Law* 33 at 33.

²⁷⁴ MJ De Waal 'The Law of Succession and the Bill of Rights' in Rautenbach et al *Bill of Rights Compendium* (1998) at 3G7.

²⁷⁵ M Radin 'Property and Personhood' (1982) 34 *Stanford LR* 957. See further S Braun 'Historical entitlement and the practice of bequest: Is there a moral right of bequest?' (2010) 29 *Law and Philosophy* 695 at 697. See further chapter 4, § 4.4 and chapter 5, § 5.3 c) (iii).

²⁷⁶ As held in *BOE Trust supra*, private succession powerfully resonates with the dignity of the testator. In Constitutional jurisprudence, freedom and human dignity 'are inseparably linked'. See *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 49; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at

though the enforcement occurs after death, the express wishes are made while the owner is still alive. The instrumental value is the acknowledgment that wishes will be enforced. This knowledge, according to Erasmus AJA in *BOE Trust*, allows ‘the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.’²⁷⁷ According to Robert Lamb:

‘[I]t certainly seems far less intuitively difficult to accept that individuals can, while alive, benefit from things that they can be assured will happen after their death, that ... they can have real interests in making posthumous arrangements that reflect their values and conception of the good. The honouring of the right that represents the interest will obviously take place after death, but the actual benefits to be gained from the decisions made and the intentional states that motivate those decisions concern only the living.’²⁷⁸

Shelly Kreiczer-Levy explains the deep interconnected nature of human dignity and property after death that may illuminate Erasmus AJA in *BOE Trust*²⁷⁹ comments above. She holds the opinion that:

‘[T]he property she leaves [in a will] represents her choices, influence and persona, she remains part of the world of her receivers through her property and through the choices she has made regarding it. Her decision reflects her opinion of the receiver, her view of the receiver’s personality, as well as their relationship. The receiver gets a bequest charged with meaning, with the giver’s preferences, decisions and personhood.’²⁸⁰

para 49; and confirmed in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape and Others* 2015 (6) SA 125 (CC) at para 44-45.

²⁷⁷ *BOE Trust* supra at para 27. See further, *King v de Jager* 2017 JDR 1321 (WCC) at para 65; and *JW v Willams-Ashman NO and Others* 2020 (4) SA 567 (WCC) at 60.

²⁷⁸ R Lamb ‘The Power to Bequeath’ (2014) 33 *Law and Philosophy* 629 at 649.

²⁷⁹ *BOE Trust* supra para 27.

²⁸⁰ S Kreiczer-Levy ‘The riddle of inheritance: Connecting continuity and property’ (2011) 10 *SSRN Electronic Journal* 1 14. See further S Kreiczer-Levy & M Pinto ‘Property and Belongingness: Rethinking Gender-Based Disinheritance’ (2011) 1 *Texas Journal of Women and the Law* 21 119 at 130; S Kreiczer-Levy ‘Property’s Immortality’ (2016) 23 *Cardozo Journal of Law & Gender* 1 at 137.

Lehmann confirms this point of view, arguing that the combination of freedom of property, testamentary freedom and human dignity is the acknowledgment of a testator's life choices.²⁸¹ Friedman goes even further and states that '[t]he power of disposition is felt psychologically to constitute an essential element of power over property.'²⁸² A bequest reflects what the testator valued while she or he was alive. In this way, a bequest can be made to maintain or restore a testator's life choices after death. A testator's will then represents the last representation of their personhood. It is a reflection of what they cherished in life, their perception of good, and 'something that marks out their individuality within a community.'²⁸³ The closeness between personhood and property shows that notions of property, personality, memory and legacy are all powerfully and intrinsically connected in the enforcement of exclusive deceased wishes. Due to the strong personal connection to property, a will is therefore given effect to as if the testator was still alive. By giving effect to a deceased person's last wishes, a court is in a way giving effect to posthumous legal personality.

c) Happiness

Related to human dignity is the notion that testamentary freedom promotes subjective happiness of a testator. While testamentary freedom by its nature allows testators extensive power to elect heirs and thus disinherit family members²⁸⁴, it also affords testators the satisfaction and comfort in knowing that family members will be

²⁸¹ K Lehmann 'Testamentary freedom verses testamentary duty: in search of a better balance' (2014) *Acta Juridica* 9 at 10.

²⁸² Friedman LM 'The Law of the Living, The Law of the Dead: Property, Succession, and Society' (1966) *Wisconsin LR* 340 at 355.

²⁸³ Lamb (2014) *op cit* at 647.

²⁸⁴ The right to disinherit is explained below in § 3.3 b).

supported after death.²⁸⁵ According to Friedman, a will is a ‘product of love and affection’ - ‘a document of sentiment and emotion, embodying too (from the standpoint of the testator) a sense of mortality – the precision and proximity of death.’²⁸⁶ Others have likened testation to theories gift giving.²⁸⁷ In this sense a will provides a ‘great source of comfort and satisfaction.’²⁸⁸ It also has the potential to cement social bonds.²⁸⁹ It is thus arguable that the general enforcement of wills promotes general societal well-being. According to Hallbach:

‘[A] society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.’²⁹⁰

Clearly the benefit of enforcing testamentary wishes is not for the deceased alone since he or she is dead, but rather for society at large to know that people and institutions will respect the posthumous wishes.²⁹¹ This suggests that respecting

²⁸⁵ M Glover ‘A Therapeutic Jurisprudential Framework of Estate Planning (2012) 35 *Seattle U LR* 427 at 443-46. It also explains why people without wealth also support the notion the idea. D Halliday *Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (2018) at 1.

²⁸⁶ Friedman (1966) op cit at 373. See further Munzer (1990) op cite at 381.

²⁸⁷ J Baron ‘Gifts, Bargains, and Form’ (1989) 64 *Indiana LJ* 155; J Baron ‘Do We Believe in Generosity?: Reflections on the Relationship Between Gifts and Exchange’ (1992) 44 *Florida LR* 355; M Eisenberg ‘The World of Contract and the World of Gift’ (1997) 85 *California LR* 821; M Fellows ‘His to Give; His to Receive; Hers to Trust: A Response to Carol M. Rose’ (1992) 44 *Florida LR* 329, 334-36; R Frank ‘The Differences between Gifts and Exchange: Comment on Carol Rose’ (1992) 44 *Florida LR* 319; R Kreitner ‘The Gift Beyond the Grave: Revisiting the Question of Consideration’ (2001) 101 *Columbia LR* 1876, 1944-47; E Posner ‘Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises’ (1997) *Wisconsin LR* 567; C Rose ‘Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchange and (More Importantly) Vice Versa’ (1992) 44 *Florida LR* 295.

²⁸⁸ Glover (2012) op cit at 415. See further AJ Hirsh & WKS Wang ‘A Qualitative Theory of the Dead Hand’ (1992) 68 *Indiana Law Review* 1 at 8.

²⁸⁹ Kreiczler-Levy (2016) op cit at 128; S Kreiczler-Levy ‘The Mandatory Nature of Inheritance’ (2008) 53 *American Journal of Jurisprudence* 105.

²⁹⁰ E Halbach, Jr. *Death, Taxes and Family Property* (1977) at 7.

²⁹¹ Adam Smith makes the similar point with the acknowledgement that ‘we would be distressed to see [our] last injunctions not performed.’ A Smith *Lectures in Jurisprudence* (1762-66) at 466-67.

testamentary wishes plays a personal preference satisfaction role, which in turn promotes general societal well-being.²⁹²

d) Efficient estate planning

Allowing testators maximum freedom of dispose of property allows for idiosyncratic estate planning. At the heart of this wide scope for testamentary disposition is the desire to ‘control’ the fate of assets beyond death.²⁹³ As the person most intimately aware and connected to their property, a testator is best placed to evaluate the personal circumstances of their own lives and family dynamics in order to make decisions that produce the greatest utility and benefit for the disposing of assets after death.²⁹⁴ A testator is also best placed to appreciate the special needs of dependent or vulnerable members of her family. It is assumed that personal choice and freedom of property promote a more efficient estate plan and thus incentivises individual financial planning.²⁹⁵ Allowing courts to re-write wills would, according to Bozalek J in *King*, subject testamentary freedom to the overriding power of the courts to amend wills, a result which would ‘amount to a far-reaching inroad upon the right to freedom of testation and set a weighty precedent.’²⁹⁶ In this sense, it violates the reasonable expectations that individuals can rely on the rules of the game to plan their lives accordingly.²⁹⁷ The system of individual estate planning, according to the above individual economic considerations, promotes a more efficient and productive disposal of assets at death.

²⁹² Kelly (2013) op cit at 1127; Hirsh & Wang (1992) op cit at 51; Munzer (1990) op cit at 4, 196-98.

²⁹³ Munzer (1990) op cit at 91-8.

²⁹⁴ Glover (2012) op cit at 412, 416; Hirsh & Wang (1992) op cit at 12-3; Kelly (2013) op cit at 1136-37.

²⁹⁵ Kreczner-Levy (2011) op cit at 8; and J Singer *Entitlement: The Paradoxes of Property* (2000) at 119.

²⁹⁶ *King* supra at para 60 and 74.

²⁹⁷ Bentham (1931) op cit at 111-12; Munzer (1990) op cit at 79-80, 221-24; Honoré (1987) op cit at 199; and Singer (2000) op cit at 118-123.

e) A solution to the problem of death

At a macro-economic level, succession ‘governs the orderly transfer of economic interests from generation to generation.’²⁹⁸ An exclusive right of testamentary bequest is said to be essential for efficiency and ‘continuation of economic life in spite of the death of people.’²⁹⁹ In this sense, it is a simple and eloquent solution to human mortality. According to Friedman, individual control in the disposal of assets is ‘extremely convenient if not absolutely necessary in a legal system which lays heavy stress on the market and the transferability of property.’³⁰⁰ While economic continuity can also be achieved without an individual’s testamentary freedom, by instead devolving all deceased estates intestate, it is reasoned that an individual estate plan contributes towards an efficient estate administration as a whole.³⁰¹ The ‘continuation of economic life’ after death is thus said to be more efficient if individuals, instead of standardised rules of intestacy, are applied.³⁰² Allowing a testator to direct the manner in which his or her estate is distributed after death is thus said to contribute towards legal certainty, stability and efficiency in the smooth transfer of ownership of property to succeeding generations.

²⁹⁸ Friedman (1966) op cit at 340.

²⁹⁹ MJ De Waal ‘The Social and Economic Foundations of the Law of Succession’ (1997) 8 *Stell LR* 162 at 164. De Waal describes a will as ‘an instrument by means of which wealth is transferred.’ (at 166).

³⁰⁰ Friedman (1966) op cit at 357.

³⁰¹ According to D Davis et al. ‘Introduction to estate planning’, in *Estate Planning* (2016) Lexis Nexis at 1.1, estate planning is more than just drafting a will but includes ‘the preparation and implementation of a plan of wealth disposition during the lifetime of the client and secondly the implementation of the client’s plan following his or her death.’ See also J Farr & JW Wright *An Estate Planner’s Handbook* (1979) at 30-31.

³⁰² Intestate succession is considered less efficient since heirs and property have to be identified by an executor and then appointed by the Master of the High Court. Testate succession, in contrast, is considered more administratively efficient since the individual owner has already elected executors to wind up his or her estate and appointed heirs to inherit property. This adds to overall legal certainty and continuity of economic life.

f) Incentives wealth creation and maximization

A number of micro-economic justifications are also advanced for why exclusivity in individual testation is justified, including that an exclusive right of testamentary disposal incentivises economic productivity, initiative, creativity, and wealth creation and maximisation.³⁰³ Maximum testamentary freedom is consistent with free market principles. It is argued that the more freedom owners have, the more wealth they are likely to generate.³⁰⁴ An economic justification for testamentary freedom is that individual liberty over property is an incentive to work, save and invest, which is good for wealth creation and maximization.³⁰⁵ The converse is that people will not be incentivised to make money if there exists a probability that their plans cannot be guaranteed.³⁰⁶ As a result, it is more economically beneficial to rely on an individual's testamentary choices than imposing default rules. Kohler even goes as far as to say that free testation 'increases the instinct of acquisition, and causes a man to strive with all his might to obtain the means of carrying out his will, even after death.'³⁰⁷ It is argued that this also maximizes social welfare as interference with individual choices may have adverse consequences for productivity and the creation of wealth.³⁰⁸ If a testator knows that courts will not enforce certain bequests, he or she during their lives will either have less incentive to enlarge their estate, consume, transfer or donate

³⁰³ J Kohler 'Survey of the Law of Succession', in Kocourek A & Wigmore JH (ed) *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions: Volume 11: Primitive and Ancient Legal Institutions* (1915) at 541; De Waal (1997) op cit at 164; ML Ascher 'Curtailling Inherited Wealth' (1990) 89 *Michigan LR* 69 at 100; Halliday (2018) op cit at 55; and Munzer (1990) op cit at 414-15.

³⁰⁴ Friedman (1966) op cit at 345-355.

³⁰⁵ Glover (2012) op cit at 412; Kelly (2013) op cit at 112, 1135-6.

³⁰⁶ Munzer (1990) op cit at 79-80.

³⁰⁷ Kohler (1915) op cit at 541.

³⁰⁸ Kelly (2013) op cit at 112, 1137-8; Glover (2012) op cit at 412.

the property before death, thereby decreasing the value of their estate.³⁰⁹ If testator owns less, heirs will inherit less property.³¹⁰

g) Critique against exclusive individualism

Although unarticulated, the traditional justification for exclusive individualism in testate succession is informed by the liberal philosophical conception of an economic agent.³¹¹ The theoretical liberal premises are based on the fictional behaviour of an economic agent otherwise known as *homo-economicus*.³¹² According to this understanding, human behaviour in the marketplace is assumed to be self-interested and competitive and undertaken to achieve the rational maximisation of personal utility.³¹³ These characteristics epitomise personal identity in many western legal and economic cultures. According to this understanding, testamentary freedom best promotes the idea of a free and independent economic person because it provides a testator with the widest scope of possibilities for the distribution of his or her estate after death. This understanding is also heavily premised on the notional absence of State regulation in private property affairs. In this fictional setting, a testator would be able to exercise a choice in the most rational, efficient and beneficial manner that best caters for their individual or family's immediate and long-term needs.

These theoretical postulations of *homo-economicus* are based on economic truisms or assumptions. While some of these may be valid, these generalisations should not be taken-for-granted. Others have extensively explored these underlying

³⁰⁹ Hirsh & Wang (1992) op cit at 8; Kelly (2013) op cit at 1150-1.

³¹⁰ Kelly (2013) op cit at 1129, 1136.

³¹¹ See chapter 6, § 6.2 (d) for further discussion.

³¹² Brion 'Norms and values in law and economics' (1999) *Washington and Lee University* 1042; G Alexander & EM Penalver 'Properties of Community' (2009) 10 *Theoretical Inquiries in Law* 1 132. See further chapter 6, § 6.2 d).

³¹³ *Ibid.*

assumptions and it is not my intention to repeat these.³¹⁴ I briefly mention a few fallacies in these arguments below and return to these in later chapters.³¹⁵

First, some of the assumptions for wealth maximisation wildly exaggerate the general impetus to create wealth and the motivations for why people work hard and accumulate wealth. It is claimed that people acquire wealth only to pass it on after death. It could equally be claimed that individuals accumulate wealth for a myriad of other reasons. These may include: economic and/or political status, prestige, power, greed, control over others, self-interested or egotistical reasons, economic security, immediate survival, cultural habits or expectations, and/or a sense of enjoyment or achievement.³¹⁶ The contribution of wealth maximisation for the purposes of bequests as a motivation may be minor compared to these other financial and psychological reasons for material prosperity. Therefore, it could be argued that someone might gain as much proprietary satisfaction during their life if they did not enjoy an exclusive right to dispose of property after their death.

Second, even if we accept that many parents are motivated to work hard to provide a legacy for their children (which I do admit is not a negative motivation), the more immediate concerns of livelihood, healthcare and education may supersede intergenerational bequest motives.³¹⁷ While it may be plausible that parents may work hard to support economic dependents after their death, it is unlikely that this is a person's primary motivation. As noted in the first criticism, people are motivated to create wealth for a myriad of reasons. The necessary link for creating wealth after

³¹⁴ See further J Wedgwood *The Economics of Inheritance* (1929) 215-16; Kreiczer-Levy (2016) op cit at 113; Hirsh & Wang (1992) op cit at 7-12.

³¹⁵ I pick up some of these arguments later in the thesis, at chapter 4, § 4.3 and 4.4; and chapter 6, § 6.2 c) and d).

³¹⁶ Hirsh & Wang (1992) op cit at 8; D Duff 'Taxing inherited wealth: A philosophical argument' (1993) 6 *Canadian Journal of Law and Jurisprudence* 3 at 33-37; Kreiczer-Levy (2011) op cit at 8; Ascher (1990) op cit at 100. In fact, only post-Revolution France and Russia have ever attempted to abolish testamentary freedom and no modern empirical studies can conceivably impute the economic patterns of eighteenth century feudal economies to modern capitalist ones in the twenty-first century.

³¹⁷ Ascher *ibid* at 101.

death has not been fully substantiated. The same logic applies to giving gifts as a measure of a testator's love and affection for heirs. Testation is not the only way for a parent or anyone to show care, gratitude or love.³¹⁸

Third, inheriting wealth may have unintended reverse consequences for heirs. It could be argued that the expectation of receiving a large inheritance can also induce laziness, wastefulness, and unnecessary luxury on the part of the heirs who did not materially contribute towards the testator's estate.³¹⁹ A ready-made life through inherited wealth and property could confer disincentives to work hard; cause increased frivolous spending; and the improper transfer of economic power.³²⁰ Inheriting wealth may be a curse rather than a windfall.³²¹ Various other authors have negatively referred to inherited wealth as 'a passport to arrogance and snobbishness'³²²; as breeding 'a class of "idle rich"'³²³ and causing unhappiness and lulling the faculties.³²⁴ Munzer also suggests that inherited wealth may cause the rich to have a 'diminished sense of humanity', in that it causes a distorted sense of self-esteem, and lead to undesirable traits such as 'smugness, haughtiness, and unconcern.'³²⁵ For the majority of society that does not inherit wealth, seeing others receive undeserved windfalls may also cause societal resentment, envy, discontent, hopelessness or malaise.³²⁶

Fourth, at a broader socio-economic level, inherited wealth also contributes towards income inequality. Inequality of wealth furthermore can also have several socio-economic ills, including crime and higher imprisonment, drug use, economic

³¹⁸ Munzer (1990) op cit at 412.

³¹⁹ Duff (1993) op cit at 34; and Hirsh & Wang (1992) op cit at 9.

³²⁰ Ascher (1990) op cit at 99; HR Hahlo 'The Sad Demise of the Family Provision Bill 1969' (1971) 88 *SALJ* 201.

³²¹ A Carnegie 'Wealth' (1889) 148 *North American Review* 653 at 658.

³²² G Myers *The Ending of Hereditary American Fortunes* (1939) at 372.

³²³ Wedgewood (1929) at 194-95.

³²⁴ Ascher (1990) op cit at 99.

³²⁵ Munzer (1990) op cit at 397.

³²⁶ Bentham (1931) op cit at 177-87; Munzer (1990) op cit at 396.

stagnation, wasting of government resources and various mental or psychological disorders.³²⁷ From this point of view, it is recognised that the enduring nature of wealth inequalities could be detrimental for society as a whole, both economically and socially.³²⁸

Fifth, an overemphasis on an exclusive individual testamentary freedom raises ethical concerns.³²⁹ An exclusive individual right to dispose of property after death assumes that individuals are ontologically superior and prior to the collective.³³⁰ Singer argues that the interpretative framework centred around the concept of ‘ownership’ means that ‘we are invited to live as if [owners] were the only ones that mattered’,³³¹ and furthermore, that ‘[w]e are invited to live as if we were alone.’³³² Despite limitations imposed on testamentary freedom in the public interest, as long as the conception of freedom is premised on the idea of individual freedom, it invites owners to only think of themselves. It elicits a testator to create a self-serving despotic ‘little kingdom’³³³, which represents his or her last and indisputable testament and declaration to the world. The ‘life of the owner’ is the abstracted conceptual perspective in which property relations in society are framed. In other words, the very purpose of property ownership is that it entitles an owner to a ‘bounded sphere’ of exclusive control and power of property – representative of his or her individual autonomy – which others are legally obliged to respect.³³⁴

Sixth, the primary characterisation of an exclusive individual right to freedom of testation exaggerates the need for negative protection from the State and others that

³²⁷ R Wilkinson & K Pickett *The Spirit Level: Why Equal Societies Almost Always Do Better* (2009) at 67.

³²⁸ CR Chester ‘Inheritance and Wealth Taxation in a Just Society’ (1977) 30 *Rutgers LR* 62 at 93.

³²⁹ I discuss this in more detail in chapter 4, § 4.4 and chapter 6, § 6.2 c) and d).

³³⁰ Alexander & Penalver (2009) op cit at xxi.

³³¹ Singer (2000) op cit at 6.

³³² Ibid.

³³³ *Barclays Bank, DC v Anderson* 1959 (2) SA 478 (T) at para 48. See § 3.3 b) (ii) b.

³³⁴ LS Underkuffler *The Idea of Property in Law: Its Meaning and Power* (2003) at 39-40.

misrepresents the true nature of testation, which is in reality already limited and also entirely dependent on heirs in order for testamentary wishes to be fulfilled.³³⁵ This inevitably results in scepticism and distrust, not just towards government, but also towards other private individuals. In a seminal and influential article on the social and economic foundations of testamentary succession, De Waal explains that one of the basic functions of free testation (together with private property generally), is that a will ‘is a mechanism by which the individual can demonstrate his or her own freedom *from the state and society*.’³³⁶ Thus, the primary purpose of fundamental rights in classic legal liberal thought is that rights serve to insulate the individual from State intrusion.³³⁷ This in turn reinforces individual exclusivity. An important consequence of this conception of bounded individual autonomy is that, once established, any subsequent interference is seen as a diminution of the assumed freedom that testators enjoy. In this paradigm, State regulation is inimical to property freedom.³³⁸ The State is only recognised in terms of guaranteeing negative freedom – how it protects and safeguards property freedom from outside intervention.³³⁹ Thus, the default position is that any regulation should enhance property freedom, which ultimately means ensuring relatively peaceful and harmless property protection.³⁴⁰

³³⁵ F Michelman ‘Possession vs. distribution in the constitutional idea of property’ (1987) 72 *Iowa LR* 1319. See chapter 4 § 4.3 and the concluding chapter § 6.2 c) and 6.3 a) where I argue that the State has an obligation to transform the legacy of unequal intergenerational wealth. See further chapter 4, § 4.4.

³³⁶ De Waal (1998) op cit at 164 (my emphasis).

³³⁷ HR Hahlo attributes South Africa’s acceptance of free disposition to an overtly ‘individualistic and *laissez faire* attitude’ prevailing in nineteenth century English law. Quoting Joseph Gold with approval, Hahlo accepts that the natural law view of inheritance is ‘now untenable [compared] with the recognition that private property is also a function of society and should not be employed to the detriment of its interests.’ J Gold ‘Family testation’ (1937) 1 *Modern Law Review* 296, as quoted by HR Hahlo ‘The case against freedom of testation’ (1959) 76 *South African Law Journal* 436 at 442. Based on these observations, Hahlo favours ‘a more socially minded approach’ that protects family members from unfettered testamentary power.

³³⁸ Underkuffler (2003) op cit at 68.

³³⁹ I Berlin *Four Essays on Liberty* (1969) at 118; Singer (2000) op cit at 3.

³⁴⁰ *Harper* supra para 35.

The Judiciary also reflects classic liberal fears of unwarranted State intrusion. This is particularly evident in *BOE Trust*.³⁴¹ Without giving further reasons for protecting freedom of testation, Erasmus AJA in *BOE Trust* held that the contrary (of not affording constitutional protection) would mean that ‘the courts, and the state, would be able to infringe a person’s property rights after he or she has passed away.’³⁴² It would also, according to him, be unfair if the State were to ‘benefit from someone’s death.’³⁴³ The anxiety of State intrusion (perhaps even the nationalisation of deceased estates) is clear, otherwise it would not have been necessary for Erasmus AJA to emphasise that the State should not benefit from death as the only real justification for constitutionalising testamentary freedom.³⁴⁴ It would seem that the primary motivation for protecting testamentary freedom in the property clause arises from a concern that the State will abolish or impose unjustified limitations thereby infringing individual freedom. There is no attempt to justify testamentary freedom on its own terms without introducing the threat of State intervention.

h) Concluding remarks

An over-emphasis on the ownership as the conceptual, normative and ideological basis for an exclusive right of testamentary disposal means that unconscious assumptions and blind-spots have filtered into an understanding and application of succession laws. This has created a manner of thinking about testate succession that

³⁴¹ *BOE Trust* supra.

³⁴² Ibid at para 26.

³⁴³ Ibid.

³⁴⁴ See further *Harper* supra at para 31 where Dlodlo J states that ‘[w]hat the Constitution actually primarily guarantees is the freedom of individuals (the citizens of this country) from undue State interference.’ (at para 31) Although unarticulated, the justifications given in *Harper* (and by other courts that have recognised freedom of testation as a fundamental right) rely on classic liberal justifications for rights in modern democratic societies. The underlying premise of liberal rights is that they ‘establishes sphere of private autonomy which government is bound to respect.’ Underkuffler (2003) op cit at 39 referring to *Prune Yard Shopping Center v Robins* 447 US 74 (1980) 93.

pinpoints and privileges the interests of individual, isolated owners. That said, there are still valid reasons for protecting an individual testation, including: it promotes self-determination through efficient estate planning; respect for the human dignity of the deceased; and a social function in caring for dependent family members. The difficulty is how to distinguish between the negative attributes that promote isolated individualism and the positive attributes that promote individual self-determination.³⁴⁵

3.3 THE HIERARCHICAL NATURE OF OWNERSHIP

The second characteristic of ownership in private property law is the superiority of an individual owner's right in relation to other rights and interests.³⁴⁶ This is called the hierarchical nature of ownership.³⁴⁷ In South African private property law, the real right of ownership is often described as the 'mother right', or 'the pinnacle private law right', in the hierarchy of property rights from which limited real rights and personal rights flow.³⁴⁸ A real right to property accords with what Blackstone infamously stated is the 'sole and despotic dominion which one man [sic] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'³⁴⁹ To corroborate this view, in South African private property law, it is often said that a real right is enforceable 'against the whole world', as it is enforceable 'against any person who seeks to deal with the thing to which a real right relates in

³⁴⁵ See chapter 4, § 4.4; and chapter 6, § 6.2 c) and d) for further discussion on how such a distinction could be drawn.

³⁴⁶ This is discussed further in chapter 5.

³⁴⁷ See further Kroeze (1997) op cit at 55. Honoré refers to this as the '*Residual Character*'. See Honoré (1987) op cit at 175.

³⁴⁸ Badenhorst (2006) op cit at 92-3. Van der Walt also describes ownership in the hierarchy of rights as 'a kind of model-right that influences the way in which we think and argue about rights and law in general.' See Van der Walt (2010) op cit at 83. See further, *Daniels v Scribante* 2017 (4) SA 341 (CC) at para 134.

³⁴⁹ W Blackstone Commentaries on the Law of England (1765) at 2. Honoré defines ownership as 'the greatest possible interest in a thing which a mature system of law recognizes'. See Honoré (1987) op cit at 162.

any manner.’³⁵⁰ As ‘a manifestation of the right of ownership’³⁵¹, freedom of testation is similarly recognised in South Africa as a ‘founding principle’³⁵² and fundamental incident of property ownership of the law of testation. Ownership is then the fullest and ultimate expression of power and control that can be claimed over property, even after death. Until death and full transfer has been affected, an heir’s right to inheritance is subordinate to the testator’s right.

Following on from the previous section, I show that a strong reliance on exclusive testamentary disposal in South African testate succession law creates a hierarchy of rights with rights of testators occupying the pinnacle. In this arrangement, other rights, such as limited real rights, personal rights and obviously non-rights holders, are conceptually formatted in stages of inferiority, or otherwise referred to as rights ‘less than ownership’.³⁵³ Other rights and interests may include but are not limited to: an heir’s right to receive a bequest without onerous conditions or without any conditions, or society’s interests in social justice and equality. This latter interest may include giving more consideration to redistributive justice like an estate tax that ensures that large estates are redistributed for general needs of society. This hierarchy is readily apparent in how other rights and interests are less important than testamentary wishes, and also strikingly represented in a testator’s absolute right of disinherit family members or condition bequests.³⁵⁴

In this section, I first discuss the general superiority of testamentary freedom in testate succession law below. Thereafter, I discuss two manifestations of this hierarchical arrangement when testators ‘disinherit’ heirs and when they condition bequests. For the moment in this section, it must be emphasised that I am only

³⁵⁰ Badenhorst (2006) op cit at 51.

³⁵¹ *Harper* supra at para 27 (*my emphasis*: full quote does not omit the ‘s’ at the end of ‘manifestations’).

³⁵² Du Toit (2001) op cit at 224 and De Waal (1998) op cit at 3G7.

³⁵³ Badenhorst (2006) op cit at 45, 65; Honoré (1987) op cit at 175-77.

³⁵⁴ This is discussed in § x below.

concerned with the normal functioning of testamentary succession, whereby courts routinely enforce wills as an expression of testamentary intent – i.e. when public policy conflicts are not in issue.³⁵⁵ While courts are empowered to strike down testamentary clauses that are too onerous and against public policy and have used provisions of the Constitution to expand the types of impermissible testamentary disposals, the case law only reflects circumstances where testamentary disposal and conditions were arguably against public policy, and a court had to adjudicate that dispute.³⁵⁶ The case law is silent on how testamentary wishes are routinely given effect to as a matter of general course. These types of cases are neither usually reported nor highlighted in the academic literature. The case law and academic literature thus do not reflect the general supposition that testation pivots on a hierarchical ordering of property interests whereby ownership rights dictate the use, enjoyment and disposal of bequeathed property even after the owner's death. My claim is simply that the normal application and enforcement of testamentary bequests reinforce the hierarchical relationship between the real right of testators and other rights and interests in testate succession.

a) Subservience of other rights and interests

The subservience of other rights and interests in testate succession stems from the fact that the only a testator, as the property owner, has the right to dispose of property after death.³⁵⁷ Unlike continental succession law systems (Germany included³⁵⁸), there is

³⁵⁵ See section below for a discussion of the limitations on testamentary freedom.

³⁵⁶ See J Jamneck et al *The Law of Succession in South Africa* (2012) at 117-122 for examples of cases where the testamentary bequest was against public policy.

³⁵⁷ According to De Waal, it is 'a sound proposition, both as a matter principle and common sense that a testator or testatrix should, within the limits set by social and economic considerations, be free to institute beneficiaries of his or her choice.' See De Waal (1998) op cit at 3G9.

no equivalent real right to inherit in South Africa.³⁵⁹ At best in South African testate succession law, a potential heir only has a hope (called a *spes hereditatis*) of benefiting from intergenerational wealth.³⁶⁰ The United States also not recognise a right to inherit.³⁶¹ This means that a testator generally has the final say in the distribution of their estate and a beneficiary's interest is always subservient to the wishes of the testator. Stated differently, a testator controls the distributive outcome of his or her estate.

The superiority of testators' rights is evident before the death of a testator and after.³⁶² Du Toit summarises the position in South Africa before the death of a testator:³⁶³

³⁵⁸ See chapter 5, § 5.3 b) (ii).

³⁵⁹ See chapter 2, § 2.3 b). *King* supra at para 63; and *Harper* supra at para 33.

³⁶⁰ Du Toit (2001) op cit at 242. In Roman law, certain male descendants inherited automatically as a right on the death of the *paterfamilias* (the *heredes sui et necessarii*). A *paterfamilias* who wishes to disinherit these heirs that deviated from the automatic right had to expressly disinherit them, failing which the will was invalid and devolved intestate. G Mousourakis *Fundamental Principles of Roman Private Law* (2012) at 280. Even in Roman law, although disinheritance of family members was legally valid, the power to do so was strictly regulated and failure to comply with the specific words, especially for sons under the power of the *paterfamilias*, resulted in the entire will being invalid. R Zimmermann 'Compulsory Heirship in Roman Law', in Reid KG, De Waal MJ & Zimmermann R (ed) *Exploring the Law of Succession* (2007) at 31. According to a Justinian enactment, disinheritance also required justification. Nov 115, 3. See T Rűfner 'Testamentary Formalities in Roman Law', in KG Reid, MJ de Waal & R Zimmermann *Comparative Succession Law: Volume 1: Testamentary Formalities* (2011) at 21.

³⁶¹ See further chapter 5, § 5.2 b) (iv).

³⁶² Glover notes that 'because a will becomes effective only upon death, the donor retains full ownership over her property, maintaining the right during life to do with her property as she pleases.' Glover (2012) op cit at 286.

³⁶³ In South Africa, due to the hierarchical classification of rights to property, the testator (having a vested real right of ownership) is granted the power to determine the manner in which his or her estate will be devolved after death. The earliest moment in which an heir (either named in a will or by the law of intestacy) acquires a personal right to inherit is at the time of death. Legally, this moment is when the estate 'falls open' and a beneficiary acquires a vested personal right (otherwise also known as *dies cedit*). Jamneck (2012) op cit at 10 define *dies cedit* as 'the day will come.' Meaning that '[t]he time when a beneficiary obtains a vested right to claim delivery of the bequeathed property unconditionally (whether or not the exercise of this right is delayed until some future date which is certain in time.)' There is a difference between acquiring a vested right at *dies cedit* and being able to enforce a right, which is known as *dies venit*. The latter is the moment when an heir can enforce the vested right. See further Paleker M 'Succession', in Du Bois F *et al Wille's Principles of South African law* 9 ed (2007) at 668; 703-705. The legal principles of vesting of rights in relation to the administering of a deceased estate were set out in *Greenberg* supra at 32. The legal authority is, however, clear that an heir does not acquire full ownership. The nature of the right, after death and prior to delivery of the bequest, is personal in nature. This is distinguished from *dies venit*, which is the moment the heir obtains a real right and can enforce delivery of the inheritance. See Jamneck (2012) op cit at 10. For authority that a vested right (before *die venit*) is a personal right (*jus in personam ad rem acquirendam*), see Grotius

‘The hope or expectation to inherit does not constitute a legal claim to the estate assets of the estate owner (testator) nor does it form an asset in the estate of the potential beneficiary himself. The exclusion of a beneficiary from a will therefore results in the mere frustration of such hope or expectation and does not bring about the encroachment upon or the termination of an existing right of a potential beneficiary.’³⁶⁴

In terms of this principle, selecting beneficiaries is a unilateral act, unlike a contract between two contracting parties. Prior to death, when a testator revokes or amends a will this does not affect named heirs since heirs only have a hope or expectation of being included in a will. While it may seem obvious that testamentary freedom is a superior right, it is not always acknowledged that this inevitably means that other rights are inferior or subservient to ownership.

The subservience of other rights and interests is also evident after death in the normal functioning of the adjudicative process, which predominantly serves to protect real rights of testators.³⁶⁵ As a general point of departure, the central juristic exercise in the adjudicative process is for a court to ascertain and enforce the clear and lawful wishes expressed in a will or trust. While limitations are imposed on testamentary freedom, compliance with a valid last will and testament is the determining consideration in the distributing of a deceased estate.³⁶⁶ To use the frequently quoted ‘golden rule’ of interpretation, formulated in the South African case of *Robertson v Robertson's Executors*:

2.8.5; Voet 30.39,41.1, 41; *Booyesen v Trustees of the Colonial Orphan Chamber* (1880) Foord 48 at 51; *Haupt v Van den Heever's Estate* (1880) 6 SC 49 at 51; *Union Government (Minister of Justice) v Bolam* 1927 AD 467 at 472. See further Paleker op cit at 672-673.

³⁶⁴ Du Toit (2001) op cit at 242. See further De Waal (1998) op cit at 3G9.

³⁶⁵ JC Sonnekus ‘Property law in South Africa: Some aspects compared with the position in some European civil law systems – The importance of publicity’ in Van Maanen GE & Van der Walt AJ (ed) *Property Law on the Threshold of the 21st Century* (1996) at 298-99.

³⁶⁶ See chapter 4 § 4.4 for a discussion of this in relation to the *BOE Trust* supra.

‘The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so.’³⁶⁷

This is represented in the maxim *voluntas testatoris servanda est*, which literally translates to ‘it is made will be kept’.³⁶⁸ The primary judicial role of courts in South African (as with the United States³⁶⁹) is to facilitate and adopt an interpretation of a will that gives the fullest expression to the wishes of the testator embodied in his or her will.³⁷⁰ Bozalek J stated in *King* that courts should proceed from ‘the starting point that a testator has maximum freedom to dispose of his or her property upon their death as he or she sees fit subject to existing rules of law as set out in case law and any statutory constraints which exist.’³⁷¹ In *Harper*, Dlodlo J notes that the ‘starting point must be that an individual right to freedom must be defined as widely as possible.’³⁷² In other words, courts enforce testamentary wishes to the maximum degree. The general function of testate succession thus shows a clear superiority of testator’s rights over other rights and interests.

Having outlined the hierarchical ordering of rights in testate succession, I now turn to discuss two incidences of this hierarchy. I first discuss the right to disinherit as the most drastic manifestation of testamentary superiority and thereafter the conditions that a testator can include in her will.

³⁶⁷ *Robertson* supra at 507.

³⁶⁸ *Ibid* at 503.

³⁶⁹ See chapter 5, § 5.2 b) (i).

³⁷⁰ R Brown ‘The Holograph Problem-The Case Against Holographic Wills’ (2006) 74 *Tenn LR* 93 at 96; A Gulliver & C Tilson ‘Classification of Gratuitous Transfers’ (1941) 51 *Yale LJ* 1 at 2; M Leslie ‘Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract (1999) 77 *NC LR* 551 at 552-53 n.1.

³⁷¹ *King* supra at para 62.

³⁷² *Harper* supra at para 32.

b) The right to disinherit

The first manifestation of hierarchy in testate succession is the absolute power to elect heirs.³⁷³ At its extreme, the superiority of individual testation allows testators to disinherit close family members, and as will be discussed in the South African cases of *Harper* and *King* below³⁷⁴, testators can even disinherit based on one of the listed discriminatory grounds in section 9 of the Constitution.³⁷⁵ In South Africa, there is no legal impediment to disinheriting family members.³⁷⁶ Even the notion of disinheritance is misleading since, as pointed out above, there is no recognised right to inherit. In *Ex Parte BOE Trust*, Mitchel J explained the inherent supposition that if ‘no one has a right to receive a benefit under a will or trust, it seems ... that, in principle, the freedom of testation must include the right to benefit a particular class of persons, and not others.’³⁷⁷ The right to elect heirs is thus regarded as an intrinsic element of free testation.

It should however be noted that while testators can ‘disinherit’ family members, certain classes of persons, notably surviving spouses and dependent minor children, can claim maintenance from the deceased estate.³⁷⁸ This would disrupt the testator’s

³⁷³ See chapter 5, § 5.2 b) (iv) for a discussion of disinheritance in the United States, and § 5.3 b) (ii) for a discussion in Germany.

³⁷⁴ A third case of *JW* supra is also an example of disinheritance but in this case a statutory one for a period of 3 months following a divorce.

³⁷⁵ Section 9(3) of the Constitution includes the following as a non-exhaustive list of grounds of discrimination: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁷⁶ Hahlo was the biggest critic of absolute right to disinherit family members. See HR Hahlo ‘Validity of holograph will’ (1958) 75 *SALJ* 126 at 126.

³⁷⁷ *Ex parte BOE Trust* supra at para 16.

³⁷⁸ The current legal position in South Africa is that while a testator is equipped to distribute her estate as she pleases, legislative intervention – in the form of the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA) – allows surviving spouses to claim maintenance after the death of a breadwinner. This however depends on the surviving spouse challenging the testamentary exclusion in the High Court and a judge determining a reasonable amount for maintenance. Nothing prevents a testator from excluding a spouse in his or her will. There is also common law duty on the testator to maintain children, which heavily restricts the distribution of deceased estate, but not the freedom to exclude children when the testator drafts his or her will. Lehmann (2014) op cit at 93.

distributive intentions. An important qualification of the nature of these claims is that the maintenance must be claimed by the relevant persons or representative and thus do not accrue automatically after death. This maintenance claim does act as an overriding limitation that can significantly affect the testator's intention of his or her estate.³⁷⁹ While the claim does provide some reprieve for qualifying beneficiaries, it does not allow these persons to challenge their 'disinheritance' on the basis that they deserve to be an heir. This is still the final choice of the testator.

(i) *The Harper and King cases*

The constitutionality of disinheritance is currently subject to challenge in two South African cases currently before the Constitutional Court. These cases highlight the inherent problems with the hierarchical nature of testate succession where testamentary freedom conflicts with the family members excluded from a will on discriminatory grounds. If testation, by its nature, allows for a choice of beneficiaries, the mere differentiation between groups of people is not generally invalid.³⁸⁰ The question in these cases is rather whether the differentiation discriminates *unfairly* on one or more grounds in section 9 of the Constitution.³⁸¹ This question was left

³⁷⁹ Friedman (1966) op cit at 360.

³⁸⁰ *Syfrets Trust* supra at para 48.

³⁸¹ Section 9 of the Constitution states: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

unanswered by our judiciary until the recent cases of *Harper*³⁸² and *King*.³⁸³ These cases confirm that it is the absolute, exclusive, unilateral, and discretionary power afforded to owners to exclude classes of persons, even on discriminatory grounds listed in the equality clause. I discuss these cases in depth below to illustrate this point.

In *Harper*, the question was whether a testator had intended to disinherit adopted grandchildren in a trust executed for the benefit of his ‘four children’, and on their death, their ‘descendants per stirpes, in equal shares.’³⁸⁴ Dlodlo J relied extensively on De Waal for the academic authority that disinheritance based on gender, birth, race, sexual orientation, conscience, belief, and religion are acceptable exercises of testamentary freedom.³⁸⁵ He described the process of choosing beneficiaries as a ‘process of selection’ where ‘the inevitable exclusion of other hopefuls is unavoidable.’³⁸⁶ Dlodlo J does not seem to be concerned that beneficiaries are often described collectively using one or more ‘suspect classification of race, gender, religion, [or] language.’³⁸⁷ He held that judicial meddling with the choice of heirs would result in freedom of testation becoming ‘so restricted as to be almost meaningless.’³⁸⁸ On appeal, the SCA confirms that the necessary implication of freedom of testation is the absolute right to expressly exclude biological children.³⁸⁹ Ultimately, the court refers to a bequest as ‘a free gift to which no person has any entitlement.’³⁹⁰

The second case of *King* also confirmed the absolute power of testators to choose heirs, and even discriminates against one class of persons on a listed ground in

³⁸² *Harper* supra.

³⁸³ *King* supra.

³⁸⁴ See chapter 2, § 2.3 c) for an explanation of the facts in this case.

³⁸⁵ *Ibid* para 33.

³⁸⁶ *Ibid* para 31.

³⁸⁷ *Ibid*.

³⁸⁸ *Ibid*.

³⁸⁹ *Harper SCA* supra at para 64.

³⁹⁰ *Harper SCA* supra at para 64.

the equality clause.³⁹¹ This case dealt more squarely with express discrimination whereby all female descendants were excluded from inheriting in terms of a *fideicommissum* in a will.³⁹² Bozalek J accepted that the testamentary exclusion constituted direct discrimination and thus was presumed unfair in terms of sections 9(4) and (5) of the Constitution.³⁹³ He thus noted that the question is whether, in the absence of a person's right to inherit, whether disinheritance on the basis of gender can be constitutionally justified and thus constitute fair discrimination. Following Dlodlo J in *Harper*, he held that courts have limited authority to intervene with, and 're-write', the private wishes of testators. He thus confirms the supposedly unproblematic assumption that a testator's choice of beneficiaries goes to the heart of free choice in testate succession law. Allowing courts to exercise this choice would 'amount to a far-reaching inroad upon the right to freedom of testation and set a weight precedent.'³⁹⁴ In the final analysis, Bozalek J confirms the already accepted premise in testamentary succession that there is 'no basis in legal principle for a court to purport to exercise a surrogate basis any person's *ius disponendi*.'³⁹⁵

Ultimately, the *Harper* (both court *a quo* and appeal) and *King* cases confirm that testators' individual choice is too innate to the personal act of selecting potential heirs for any court to say otherwise. It would seem that this is an absolute power that testators can exercise regardless of the type or level of discrimination.³⁹⁶ These cases, however, also reflect the presumptive superiority of the right to elect heirs over competing rights of heirs and the public interest. Bozalek J best captures the superior

³⁹¹ *King* supra at para 20.

³⁹² See chapter 2, § 2.3 c) for a full explanation of the facts in this case.

³⁹³ *King* supra at para 58.

³⁹⁴ *King* supra at para 60 and 74.

³⁹⁵ *Ibid.*

³⁹⁶ *Harper SCA* supra at para 64.

status of the real right to dispose over the mere hope of inheriting where he notes that the case involved:

‘a choice between the lesser of two evils: perpetuating gender discrimination or undue interference with the right to freedom of testation. However, whilst the terms of the *fideicommissum* discriminate against the testators’ female descendants simply on the grounds of their gender, allowing the right to equality to trump the right to freedom of testation in the present circumstances, although superficially equitable, would produce an arbitrary result. At the same time it would represent a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.’³⁹⁷

This shows that, as a matter of general course, freedom of testation is determinative in the adjudication of testamentary disputes because courts lack the legal competence to override testamentary choices (as far as disinheritance is concerned). It shows that in a conflict of rights, even when freedom of testation perpetuates gender discrimination over multiple generations, freedom of testation trumps other weaker rights and public policy considerations. As far as the right to disinherit is concerned, testamentary freedom is seemingly a right without limitation or restriction.³⁹⁸

c) The right to condition bequests

The second manifestation of hierarchy in testate succession is the extensive power to condition bequests.³⁹⁹ In my view, the most absurd feature of testamentary freedom is the power to condition bequest subject to the fulfilment or realisation of future

³⁹⁷ *King* supra at para 69. Note further that when he referred to the right to equality, Bozalek J states that ‘[t]he right to equality or to equal treatment, although fundamental, is a broadly stated right and must, in appropriate instances, give way to competing rights.’ (at para 73).

³⁹⁸ *King* supra at para 62.

³⁹⁹ For a discussion in the United States, see chapter 5, § (v).

circumstances.⁴⁰⁰ In both South Africa (as with many other jurisdictions around the world, including the United States and Germany) testators are not only afforded the power to distribute property to elected heirs, but also impose restraints on the enjoyment, use, transfer or forfeiture that significantly impacts the ownership of bequeathed property. The hierarchical structure of testate succession is replicated through the number of conditions that a testator can impose on inherited property. This extensive posthumous power is reflected in both the ‘lawful’ conditions that a testator can impose on bequests as well as in cases that where testamentary conditions test the limits of public policy. I consider these two examples below.

(i) *Lawful testamentary conditions*

There are a variety of testamentary devices and conditions that can be imposed on the inheritance of property that affects the vesting of rights.⁴⁰¹ A detailed description of the types of testamentary conditions and their effect on vesting of rights is a technical discussion and beyond the scope of this section.⁴⁰² However, even brief overview provided below still exemplifies the point that ownership dominates the hierarchical ordering in testamentary succession, which affords the right to impose multiple restrictions on the use, enjoyment or disposal of bequeathed property even after the testator’s death. It exemplifies the point that this is the ‘normal’ nature of testate succession.

⁴⁰⁰ Honoré refers to the power to condition in ownership as the ‘incident of absence of term’. See Honoré (1987) op cit at 173. For arguments against the power to condition bequests, see J Sherman ‘Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices’ (1999) *University of Illinois LR* 1273 at 1301; Ascher (1990) op cit.

⁴⁰¹ Other testamentary conditions, such as *usufructs* and *fideicommissum* are also conditions that a testator can impose on the full enjoyment of an inheritance. These are registered, as limited real rights subject to real right of ownership that vests in the ultimate beneficiary, named by the testator in her will. Paleker (2007) op cit at 706-711.

⁴⁰² *Ibid.*

There are two types of conditions that a testator can impose: a conditional bequest to postpone an inheritance to the occurrence or non-occurrence of an uncertain future event (called a suspensive condition), or to terminate on the occurrence or non-occurrence of an uncertain future event (called a resolutive condition).⁴⁰³ With suspensive conditions, vesting of bequest depends (is postponed) on the occurrence of uncertain future event. A legatee does not obtain a vested right (no *dies cedit* or *dies venit*). A regular example of a suspensive condition used in wills is where the testator disposes of property to a legatee ‘if he obtains the age of 21’, or ‘if he becomes an attorney of the High Court.’ With resolutive conditions, the bequest terminates on occurrence of uncertain future event. A normal use of a resolutive condition is where the testator disposes of property ‘to his wife on condition that should she remarry, the property goes to my niece.’⁴⁰⁴ An heir may have a vested right to the bequeathed property, but it will be subject to a restrictive condition that prevents full enjoyment, as prescribed in the testator’s will. Thus a bequest may be subject to the occurrence or non-occurrence of an uncertain future event that could mean that the beneficiary may not inherit.⁴⁰⁵ It can either be a suspensive or resolutive condition.

Depending on the intention of the testator and the (non)occurrence of life events, full vesting of the bequest may not occur. The question depends entirely on the language used in the will.⁴⁰⁶ The reach of a testator’s stronger ownership right is

⁴⁰³ See Jamneck (2012) op cit at 142; Paleker (2007) op cit at 704-5.

⁴⁰⁴ Paleker (2007) op cit at 704-5.

⁴⁰⁵ Such conditions are referred to as ‘conditional interests’. See Voet 28.7.7; Corbett (2001) op cit 122. A conditional interest is distinguished from a future interest where the future event is more certain. For example, if a testator leaves her property to her children subject to the division not taking place until the death of a spouse. Such a bequest to the children forms part of their own estate but only the full enjoyment thereof is limited before the death of the other spouse. See Paleker (2007) op cit at 704-5.

⁴⁰⁶ Jamneck (2012) op cit at 133. Jamneck remarks, a testator ‘may stipulate whatever he or she wishes in a will, and may use any wording that he or she pleases.’ The judicial determination of the nature of the right of an heir therefore depends on the wording in the will. Consider the clause in dispute in *Re Canada Trust Co. v Ontario (Human Rights Commission)* (1990) 69 DLR (4th) 321 para 326, where

thus reflected in the number of conditions that can be imposed on bequeathed property. While it is a technical discussion on the process of transferring ownership after the death of an owner, it shows that an heir's rights are always inferior to the right of a testator to determine the manner of testamentary disposition.

(ii) *Conditions that test public policy*

The superiority of testamentary wishes is represented in cases where conditions test public policy considerations.⁴⁰⁷ Below I discuss two case law examples that illustrate the extent of a testator's power to condition bequests.

The first case is a pre-democracy decision in *Barclays Bank, DC v Anderson*.⁴⁰⁸

In this case, the testator left portions of his farm to his children on condition that the female descendants personally and permanently occupy their bequeathed portion.⁴⁰⁹

Two further conditions, which were not in issue, was that the husband of any female descendent must assume the surname of 'Mostert', being the family name of the deceased; and that if any of his descendants were to remarry, they could only marry a 'South African', defined as a white European born in South Africa.⁴¹⁰ However, due to

the testator set up an *iter vivos* educational trust that limited recipients of scholarships to, among others, 'a British Subject of the White Race and of the Christian Religion in its Protestant form.' It stated further that 'the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines' and that 'the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion.'

⁴⁰⁷ Du Toit (2001) op cit.

⁴⁰⁸ 1959 (2) SA 478 (T).

⁴⁰⁹ See clause 12 (c) of the Will, which defines permanent occupation as 'occupation of the land by the beneficiary as his or her usual home or place of abode without, however, depriving such beneficiary of the right of casual temporary absence on business or a trip or the like.' See *Barclays Bank* supra at 37.

⁴¹⁰ See clause 12 (d) of the will: 'It is my wish and desire that should any of my daughters or female descendants who may become entitled to any portion of Rietbult Estate, marry, the husband of such daughter or descendant shall, in proper legal form, assume the surname of 'Mostert' but should such husband decline to discard his surname, I direct that the name of 'Mostert' shall be suffixed to his surname, provided, however, that the name 'Mostert' must be the last of the suffixed names. Should any such husband be unwilling to comply therewith, then that daughter or female beneficiary shall receive

health reasons and their husbands' business commitments elsewhere in the country, the daughters could not permanently occupy their portions of the farm. The testator's daughters challenged the terms of the will after the executor sought to enforce the forfeiture provisions of the will. In a judgment dismissing the daughters' application, Williamson J noted that the testator's intention was patent, in that he 'desired to create in perpetuity a little Mostert kingdom, peopled only by Mosterts or by persons who have accepted the name Mostert on marriage.'⁴¹¹ In other words, despite the clear disapproval, Williamson J upholds the power of the testator to create the 'little Mostert kingdom' that outweighs the interests, wellbeing and health and therefore his responsibility and duty towards its Mostert subjects. Extending Mr Mostert's real right after death means that the personal rights and interests of his heirs are always inferior to his wishes, despite clear conflict and disharmony caused.

The second case is *BOE Trust*, where the testator created scholarship for 'white South African students'.⁴¹² The universities refused to administer the scholarship assigned to them on the grounds that it was racially discriminatory. Due to this, Supreme Court of Appeal (SCA) held that the primary bequest become impossible and gave effect to the secondary bequest, which was made to other charitable organisations. The reasoning was that the testatrix's intentions were clear in the event that the primary bequest become invalid or impossible, and as such, courts are obliged to give effect to the testatrix's clear wishes.

Modiri argues that the effect of Erasmus AJA's choice to not delete the word 'white' from the trust clause and thus invalidate the racist testamentary bequest can be seen as an implicit endorsement of the racists and exclusionary wishes of the

no benefit whatsoever under this my will. It is my desire that the Rietbult Estate shall be a purely Mostert Estate.' See *Barclays Bank* *ibid*.

⁴¹¹ *Ibid* at 43.

⁴¹² See chapter 2, § x for a disucssion of the facts of this case.

deceased.⁴⁴³ Erasmus AJA in fact says the testatrix's wishes must be given effect to 'whether we agree with her exercise of that right or not.'⁴⁴⁴ He goes on to say that the primary goal of the court is 'to see at least whether there is a way in which to interpret her will so as that it does not offend public policy.'⁴⁴⁵ By failing to invalidate the discriminatory bequest all other students were denied an opportunity to further their postgraduate studies abroad. The effect of viewing the case as one of impossibility (because all South African universities refused to administer the bequest) rather than unlawfulness (against public policy) meant that the charitable organisations received the benefit rather than deserving black, coloured, Indian or Asian MSc students wanting to pursue post-graduate degrees. By doing nothing to deny the exclusionary provision Erasmus AJA confirms and validates the underlying intention of the testatrix to advantage and benefit historically privileged white students.

These decisions showcase the entrenched superiority of testamentary power even in circumstances where public policy considerations are at play.

d) Concluding remarks

As a manifestation of private ownership, testamentary freedom occupies a controlling position in the hierarchal structure of testate succession. In this structure, the rights of

⁴⁴³ JM Modiri 'Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in BOE Trust Limited' (2013) 5 *PER* 582.

⁴⁴⁴ *BOE Trust* supra at para 25.

⁴⁴⁵ *BOE Trust* supra at para 25. This is in spite of the testamentary bequest not only violating section 9 of the Constitution but also section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), enacted to give effect to the equality clause. Section 7 (c) states that unfair racial discrimination on the grounds of race includes 'the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group.'(Section 7(c) of PEPUDA) Sub-section (e) furthermore defines unfair racial discrimination as 'the denial of access to opportunities.'(Section 7(e) of PEPUDA). Giving effect to testamentary choice as an exercise of her right to property protected in the Constitution is clearly viewed as more important than furthering the constitutional vision of 'non-racialism' and transformation.

heirs and the public interests are subservient to the rights of testators. This is evident before and after death. In the conflict of rights, testamentary freedom is generally determinative. While the hierarchy of property interests are never openly stated in judicial cases and academic writing, they are clearly evident in the normal (and apparently neutral) rules of testamentary interpretation and the adjudication of the limits to freedom of testation imposed by statute and common law principles of public policy. The common law rules of interpretation confine courts to the narrow wording, and subjective preferences, in a testator's will. This reinforces the centrality (and exclusivity) of individual freedom in the hierarchical ordering of property interests relevant to testate succession law.

3.4 LIMITATIONS ARE EXCEPTIONAL

The third characteristic of ownership in private property law is that limitations are considered exceptional.⁴¹⁶ The presumptive superiority of testamentary freedom, as an incident of property ownership, means that testamentary wishes will not be scrutinised on the grounds that a court disagrees with the testator's choice. The threshold for scrutinising testamentary wishes in South Africa is much higher.⁴¹⁷ As stated previously, under certain circumstances, courts are empowered to amend, vary or strike down testamentary dispositions that offend public policy⁴¹⁸ or are specifically limited by statute.⁴¹⁹ Notwithstanding this, the effect of the general principle, as stated

⁴¹⁶ Singer (2001) op cit at 3.

⁴¹⁷ As will be shown in chapter 5, this is very similar to the position in the United States (see § 5.2 b (i)).

⁴¹⁸ The principle that testamentary provisions are considered void if its fulfilment would be illegal, immoral or *contra bonos mores*.

⁴¹⁹ See chapter 2, § 2.2 e) above.

in *Jewish Colonial Trust Ltd v Estate Nathan*⁴²⁰, is that a court ‘has no general discretionary power to modify or supplement rights given under a will or to authorize the property of a testator to be dealt with otherwise than in terms of his will.’⁴²¹ In *King*, Bozalek J clarified that the ‘general principle’ means that ‘exceptional circumstances’ or ‘statutory authority’ are pre-requisites for variation of a will.⁴²² Dlodlo J in *Harper* suggests that courts should act with extreme caution not to override testator’s wishes in holding the view that effect should ‘always be given to the wishes of the testator.’⁴²³ Dlodlo J compares the judicial competence to intervene with private wills with declaring contractual terms against public policy, noting that ‘this occurs in the rarest and most extreme of cases.’⁴²⁴ The general principle is thus firmly established in the common law, which has been applied the courts in the constitutional dispensation. This does not mean that courts will not impose limits on testamentary bequests if they offend public policy but rather that this is an exceptional and abnormal judicial incursion. In the words of Underkuffler, the presumptive superiority of property rights ‘can be changed – public interests can override property rights – [but] only in the most dire and unequivocal of circumstances.’⁴²⁵

The exceptional nature of limitations in South African testate succession law infers that statutory and common law restrictions are considered external to the nature of freedom of testation.⁴²⁶ A statutory example of an external temporary limitation on

⁴²⁰ 1940 AD 163.

⁴²¹ *Jewish Colonial Trust* supra at 182–186.

⁴²² *King* supra para 43.

⁴²³ *Harper* supra para 34 (my emphasis). This was confirmed on appeal, see *Harper* SCA supra at para 53.

⁴²⁴ Ibid para 31. See further *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) at para 60.

⁴²⁵ Underkuffler (1998) op cit at 46. See further Singer (2001) op cit at 5.

⁴²⁶ Of course, this does not mean that testamentary freedom is entirely an unrestricted or unlimited right as regulation is (and has always been) a normal feature in both South Africa. De Waal and Du Toit furthermore show that not only have restrictions on freedom of testation been imposed since Roman law times, but also that social and economic considerations influence the type of limitations imposed by the judiciary and legislature. De Waal (1998) op cit; and Du Toit F ‘The impact of social and economic factors on freedom of testation in roman and roman-dutch law’ 1999 *Stell LR* 232 at 232.

testamentary freedom is section 2B of the Wills Act that disinherits ex-spouses if a deceased ex-spouse died within 3 months of the divorce. This amendment to the Wills Act was made pursuant to recommendations from the 1991 South Africa Law Commission report, which noted that a number of foreign jurisdictions had introduced limitations as a result of a rise in the divorce rate since 1969.⁴²⁷ It is worth noting that, even though the majority of foreign jurisdictions adopted permanent disinheritance following divorce, the Commission favoured the least restrictive statutory limitation in order to preserve testamentary freedom.⁴²⁸ A disinherited ex-spouse recently challenged the constitutionality of section 2B on the grounds that it violated the deceased property rights.⁴²⁹ In *JW v Williams-Ashman NO and Others*, the Western Cape High Court dismissed the application on the grounds that it serves a societal purpose in protecting divorcees from the emotional turmoil immediately after a divorce. While it is significant that the societal benefit of section 2B outweighed testamentary freedom, the court was only upholding a temporary incursion into testamentary freedom and one that is comparatively less intrusive than other countries. Judge Sher was also at pains to show that, in reality, only a small percentage of people will be affected by this provision considering its short timeframe and the small pool of people that die testate in a country where the majority die intestate.⁴³⁰ One of the reasons for upholding the limitation thus seems to be motivated by the fact that it ‘is rarely applicable.’⁴³¹

The external nature of statutory and common law limitations means that such restrictions are not regarded as intrinsic to the enjoyment of testamentary freedom but rather inadvertently seen as an impositions or as intrusions to this right. This

⁴²⁷ See *JW supra* at para 27 for a discussion of section 2B of the Wills Act.

⁴²⁸ *Ibid* at para 29-35.

⁴²⁹ *JW supra*.

⁴³⁰ *JW supra* at para 113-14.

⁴³¹ *Ibid* at para 113.

perception stems from the rule / exception structure of testate succession law, whereby the rule is the norm and the exception a rare imposition. If limitations are always viewed as being external features on an otherwise complete right, every intrusion requires special justification since it erodes the normal use and enjoyment of property.⁴³² In this vein, limitations are regarded as presumptively illegitimate and inefficient.⁴³³ Any infringement of this freedom is automatically viewed as harmful and a derogation of a state of principled and absolute enjoyment of ownership rights.⁴³⁴ Bozalek J makes this clear in *King*: ‘Any *incursion* will also inevitably create uncertainty in the minds of some testators as to whether their testamentary dispositions will be fully executed or not ... [which is] in itself an inherently unsatisfactory situation.’⁴³⁵ The centrality of individuality in testate succession invariably signifies that individual testamentary wishes are the primary concern and all other considerations are located ‘outside’ or considered peripheral.

Hahlo, in a 1971 article lamenting the failure of Parliament at the time to adopt legislation protecting surviving spouses, wrote:

‘Obviously, if one starts off with the premise that freedom of testation must be kept inviolate under all conditions, any departure from it, however fair and reasonable, must necessarily be objectionable. But is the premise sound? Ownership is the most extensive private right known to law, and no one in South Africa would want it different [*presumably*], but there have been restrictions on it since the days of ancient Rome.’⁴³⁶

⁴³² Singer (2001) op cit at 4.

⁴³³ Singer (2001) op cit at 5.

⁴³⁴ Ibid at 3.

⁴³⁵ *King* supra at para 67 (my emphasis).

⁴³⁶ Hahlo (1971) op cit at 202 (my emphasis).

Despite his efforts and others, it took a further twenty-two years to adopt legislation protecting surviving spouses from being disinherited by their deceased spouses.⁴²⁷ Forty-six years later, Dlodlo J in the *Harper* case fails to see the underlying problem that Hahlo identified, by stating that the ‘starting point must be that an individual right to freedom must be defined as widely as possible.’⁴²⁸ The implicit result is that ‘anything detracting from that freedom [is], pejoratively, “interference” with, or “restriction” of, that freedom.’⁴²⁹

Thus, even though it is quite clear that limitations on private succession exist and can be justified, the process of intruding on the space of testamentary freedom is done restrictively and cautiously. The point is not that limitations of testamentary freedom should escape scrutiny and not be subjected to constitutional review. However, it is different if every incursion is viewed with suspicion that results in the inability of the State to regulate property rights in the public interest. Hahlo’s comment illuminates the normative resilience of testamentary freedom as a concept in succession law and the irony that, even though restrictions have always been part of testate succession law (even reality accepted in Roman and Roman-Dutch law), lawmakers and judges are still hesitant to depart from the individual testamentary choice.

⁴²⁷ See Maintenance of Surviving Spouses Act 27 of 1990. See further Lehmann (2014) op cit at 12-21.

⁴²⁸ *Harper* supra at para 32.

⁴²⁹ RF Croucher ‘How free is free? Testamentary Freedom and the Battle between ‘Family’ and ‘Property’ (2012) 37 *Australian Journal of Legal Philosophy* 9 at 25.

3.5 OWNERSHIP IS ABSOLUTE IN PRINCIPLE

The fourth and final characteristic of ownership in private property law is that individual freedom is assumed to be absolute.⁴⁴⁰ This characteristic is closely linked to the previous characteristic, in that the exceptional nature of limitations to property ownership confirms a strong underlying principled assumption that property ownership is absolute. The term ‘absolute’ does not mean that property is unregulated. ‘Absoluteness’ is the principle that unless the contrary is proven, ownership allows an owner to exercise her entitlement to the fullest extent possible.⁴⁴¹ This typically means that a single owner can, in principle, do whatever she desires with her property, which includes all the recognised incidents of property: to use, enjoy fruits, consume, destroy, possess, dispose of, claim and exclude.⁴⁴² Until the contrary is proven, it is typically assumed that an owner enjoys not just one or two of these powers but all incidents of ownership. Thus, the exceptional and absolute nature of limitations on testamentary freedom works in tandem to reinforce the underlying premise of an unregulated right.⁴⁴³

The testate succession case law in South Africa shows that testamentary freedom is absolute as far as the right to disinherit is concerned. It is arguable that this

⁴⁴⁰ This assumption has various sub-characteristics relating to the types of entitlement; the holder of the title; when the presumption yields to other titles or rights; and how long a title can last. See Singer (2001) op cit at 28-9; Honoré (1987) op cit at 189-90. See further, DP Visser ‘The ‘absoluteness’ of ownership: The South African common law in perspective’ (1985) *Acta Juridica* 39; and Kroeze (1997) op cit at 105-7.

⁴⁴¹ AJ van der Walt *Constitutional Property Law* 3 ed (2011) at 171. See further Singer (2000) op cit at 4, 28.

⁴⁴² Ownership comprises the following list: ‘the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the thing (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it (*ius vindicandi*) and or to resist any unlawful invasion of the thing (*ius negandi*).’ *LAWSA* 27(2) ‘Ownership’ 135 ‘Content’. See also Badenhorst (2006) op cit at 92-3; and Honoré (1987) op cit at 161-92.

⁴⁴³ See § 3.4 b) (i). See further, Badenhorst (2006) op cit at 47; and E Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (unpublished LLD thesis, University of Stellenbosch, 2015) at 11.

stems from the understanding that the right to elect heirs is untouchable, which confirms the premise of absoluteness.⁴⁴⁴ This has created a strong presumption against regulation that will generally (but not always) ‘trump’ all other weaker and non-existent property rights.⁴⁴⁵ Ultimately this means that in the absence of a competing right or sufficiently compelling public interests limitation, property disputes are systematically and routinely resolved in favour of individual owners.⁴⁴⁶ The main implication of the absoluteness thesis is not that ownership is unregulated, as a matter of practical reality, but rather that at its very core freedom of testation is unregulated.⁴⁴⁷

The strength or threshold of justifiable grounds for limitations depends how close it affects the core nature of testamentary freedom.⁴⁴⁸ In post-apartheid case law, the trend largely depends on whether a bequest is of private or public nature. Cases too close to the private core of testamentary freedom are dismissed, whereas cases on in public sphere often succeed. For instance, in the charitable bequest cases (*Syfrets Trust Ltd*⁴⁴⁹ and *Emma Smith Educational Trust*⁴⁵⁰), the public nature of the charitable bequest was an overriding consideration in invalidating the discriminatory clauses. In *Syfrets Trust Ltd*, the Scarbrow Bursary Fund Testamentary Trust was established in 1921 for ‘deserving students with limited or no means’ and limited to students of ‘European descent’ and not Jewish or female. In deciding whether the trust provision was against public policy, Griesel J considered that the private trust was actually ‘an institution of public concern’.⁴⁵¹ The public nature of the charitable bequest was also a

⁴⁴⁴ *Ex parte BOE Trust* supra at para 16; AJ van der Walt (2011) op cit at 171; Singer (2000) op cit at 4, 28.

⁴⁴⁵ Van der Walt (2009) op cit at 6-7, 28-29; and Singer (2000) op cit at 3.

⁴⁴⁶ See Badenhorst (2006) op cit at 45, 51 and 65.

⁴⁴⁷ Singer (2000) op cit at 3.

⁴⁴⁸ This is very similar to the United States, see chapter 5, § 5.2 b) (ii).

⁴⁴⁹ *Syfrets Trust* supra.

⁴⁵⁰ *Emma Smith Education Fund* supra.

⁴⁵¹ *Syfrets Trust* supra at para 45. Griesel J stated: ‘What also serves to ‘outweigh’ the principle of freedom of testation, is the fact that one is dealing, in this instance, with an ‘element of state action’, in

decisive factor in *Emma Smith Educational Fund*.⁴⁵² The SCA held that ‘in the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster.’⁴⁵³

What is clear in both *Syfreys Trust Ltd* and *Emma Smith Educational Fund* is that the testator intended for the bequest to be public in nature administered by a public institution and therefore the SCA held provisions to a higher standard of scrutiny. The distinguishing factor in *BOE Trust*⁴⁵⁴ is that the testator was forewarned by her attorneys that the racist bequest would be challenged and therefore expressly made provision for the bequest to a list of privately administered charitable organisations (*albeit* with a public purpose). In the court a quo, Mitchell AJ stated that the trustees (who challenged the discriminatory bequest) ‘may take comfort from the fact that, as far as I am aware, all of the institutions lists as substitute beneficiaries are run on non-racial lines and accordingly that public policy will not be offended by the distribution of the trust income of these beneficiaries.’⁴⁵⁵ Therefore, in the absence of an alternative bequest, public bequests will be overridden to the extent that they are against public policy considerations.

In the *Harper*⁴⁵⁶ and *King*⁴⁵⁷ cases, the bequests were made in the private sphere (within the family) and did not affect the public or benefit the public or public bodies as with the public charitable cases above.⁴⁵⁸ The private nature of the bequest was a decisive factor in the weighing-up process to determine whether the discrimination in

the sense that ‘the institution appointed to distribute the rewards of the testator’s beneficence’ is a public agency or quasi-public body, i.e. the university.’

⁴⁵² *Emma Smith Education Fund* supra.

⁴⁵³ *Emma Smith Education Fund* supra at para 38, 42-43. The SCA also dismissed the argument advanced by the curators that the administration of the scholarship could be transferred to private body, thus eliminating the concern that a public body would be associating itself with racially discriminatory practices.

⁴⁵⁴ *BOE Trust* supra.

⁴⁵⁵ *Ex parte BOE Trust* supra at para 29.

⁴⁵⁶ *Harper* supra.

⁴⁵⁷ *King* supra.

⁴⁵⁸ *Harper* supra at para 22, 30; and *King* supra at para 47.

issue was unfair in terms the equality clause and against public policy.⁴⁵⁹ Dlodlo J stated in *Harper* that in the weighing-up process ‘the public element of the discrimination in the respective will trusts afforded greater weight to the right to equality than to the right to freedom of testation.’⁴⁶⁰ Dlodlo J warns that the ‘closer courts get to the personal and intimate sphere, the more they enter into the inner sanctum and thus interfere with our privacy and personal preference.’⁴⁶¹ The majority court in *Harper SCA* held that ‘the divide between public and private sphere should be the deciding factor if freedom of testation is to be taken seriously.’⁴⁶² In *King*, it was held that:

‘As regards the nature and extent of the limitation, weight must be given to the fact that the discriminatory provisions of the will occur in the private and limited sphere of the testators and their direct descendants. It thus affects only a limited number of persons, is of limited duration and is not manifestly directed at infringing the complainants’ dignity.’⁴⁶³

Added to the private nature of the bequests was the fact that the testamentary bequests went to the very heart of testamentary freedom (which includes the choice of beneficiaries in a will) that precluded the courts from interfering with the terms of the wills. Since excluded persons had been written out of the will, the relief sought asked the court to effectively ‘rewrite’ the testator’s will. In *Harper*, Dlodlo J stated that this was a significant distinguishing factor. As opposed to the relief sought in the previous public charitable trust cases of *Syfrets Trust* and *Emma Smith Educational Trust*, which he held ‘did no more than widen the pool of prospective applicants for the

⁴⁵⁹ This was confirmed on appeal in *Harper SCA* supra at para 23.

⁴⁶⁰ *Harper* supra at para 30.

⁴⁶¹ *Harper* supra at para 34, referring to *De Lange v Methodist Church* 2016 (2) SA 1 (CC). This position was confirmed in *Harper SCA* supra at para 62.

⁴⁶² *Harper SCA* supra at para 52.

⁴⁶³ *King* supra at para 64

bursaries'⁴⁶⁴, the relief sought in a testamentary exclusion asked the court to take away certain benefits conferred to particular class of beneficiaries and confer them onto others.⁴⁶⁵ In both *Harper* and *King*, the courts held that overriding a will in such a manner would be 'a far-reaching proposition'⁴⁶⁶ and 'represent a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.'⁴⁶⁷ On appeal, the majority court in *Harper SCA* noted that the relief sought by the applicants far exceeded the extent to which courts had previously intervened in wills.⁴⁶⁸

A further distinction that impacts the threshold for intervention is between disinheritance and conditional bequests. Our courts have been more inclined to set aside testamentary bequests that require the beneficiary to act in a particular way or influences them in some way.⁴⁶⁹ The effect is that the bequest is received free of the impugned condition – an easier and more palatable form of judicial incursion. The relief is complicated by disinheritance since the particular beneficiary had not been elected in the first place, which required the court to rewrite a testator's will. Quoting De Waal, the majority court in *Harper SCA* confirm that disinheritance (evenly expressly discriminatory) 'are immune to attack.'⁴⁷⁰

Clearly in the private sphere, the basis for upholding the testamentary exclusion was that the judges felt more constrained in interfering with the personal preferences of the testator, especially since the choice of heirs goes to the heart of

⁴⁶⁴ *Harper* supra at para 22.

⁴⁶⁵ Ibid at para 22. *King* supra at para 64, 68. In *King*, Bozalek J further distinguished testamentary exclusion from circumstances where testators impose prescriptive conditions that may influence the behaviour or conduct of a beneficiary. In the latter case, a beneficiary is already elected in the will and the only question relates to the fairness of the condition attached. With the former case of testamentary exclusion, the court is asked to determine 'whether the property should have been bequeathed to a particular person.' (at para 61.)

⁴⁶⁶ *King* supra at para 61.

⁴⁶⁷ *King* supra at para 69.

⁴⁶⁸ *Harper SCA* supra at para 52.

⁴⁶⁹ *Harper SCA* supra at para 65.

⁴⁷⁰ *Harper SCA* supra at para 68.

testation.⁴⁷¹ Individual choice, according to this conception of freedom, represents the inner sanctum of freedom of testation that means it is afforded disproportionate protection. The track record of cases confirms that the authority to overturn discriminatory bequests adheres in the nature of the exercise of property right (whether public or private in nature) as opposed to competing public policy considerations or the rights of persons not to be unfairly discriminated against. For instance, the fact that gender discrimination was in issue in both the *Syfreys Trust* and the *King* cases was not the reason why it was invalidated in the former case and not the latter. This shows clearly that freedom of testation is at its core a private right exercised in the private sphere, and therefore beyond the concern of public life. However, once a bequest is outside the sphere of personal autonomy and has a public element, the threshold of judicial intervention is lower and judges more readily intervene. This confirms the presumption that freedom of testation is virtually absolute in principle until otherwise disproven.

3.6 CONCLUSION

As shown in this chapter, the current constitutional recognition of freedom of testation in South Africa is based a private notion of ownership that affords testators a near unrestricted right to distribute property and wealth after death. This chapter explored the relationship between private property ownership and one of its fundamental incidents – the right to dispose of property after death. While succession law academics and the courts have acknowledged this relationship, it has not been fully explored. Using the four general characteristics of ownership in private property law,

⁴⁷¹ *King* supra at para 75.

I have shown that such an understanding is premised on the exclusive, subjective and arbitrary choices of a testator, which are routinely and habitually upheld and enforced by courts. Due to a high priority afforded to individualism, limitations are also regarded as rare and exceptional occurrences. Testators can avoid the distributive consequences of their choices as a constitutionally endorsed expression of property freedom.⁴⁷² As a result, there is very little redistributive scope within the current constitutional understanding of testamentary freedom. Judicial intervention depends on a testamentary bequest having a public character and imposing a condition that limits the behaviour or rights of listed or eligible beneficiaries. Even in such circumstances, the presence of an alternative bequest could be an overriding consideration in bypassing the impugned unconstitutional bequest. All these cases have been determined based on an understanding of freedom of testation in terms of the private ownership approach to property. This structure is relevant for my argument since such an understanding of testamentary freedom inevitably means that the threshold for State intervention aimed at addressing intergenerational inequality is extremely high. It is thus likely that redistributive measures will be challenged by a narrow view of the constitutional protection afforded to freedom of testation.

⁴⁷² While restrictions are recognised in South African, the balance swings strongly in the favour of protecting individual testation, which as shown in the previous chapter, means testators can disinherit family members on whatever terms (even if this infringes another constitutional right). See *Harper* supra; and *King* supra. It also allows testators to avoid the impugned constitutionality of discriminatory bequests by providing alternative testamentary provisions. See *BOE Trust* supra.

CHAPTER FOUR

A CONSTITUTIONAL PROPERTY APPROACH TO FREEDOM OF TESTATION

‘Our choice of a conception of property ... has a very real impact on the way that conflicting individual and collective claims are – as a practical matter – legally resolved. It also has more subtle impacts on the ways in which we regard and resolve these claims.’

Laura Underkuffler

The Idea of Property in Law: Its Meaning and Power (2003) 62.

4.1 INTRODUCTION

It is apparent from the previous chapters that freedom of testation is widely regarded as an individual constitutional property right. While I agree that it should be protected as a property right, it has been assumed that freedom of testation is constitutionally protected in section 25(1), based entirely on property ownership as conceptualised in the private law, without substantive interrogation of the property clause as a whole. The approach adopted by the judiciary and academics has also focused on developing the limitations to freedom of testation based on constitutionally inspired *boni mores*.⁴³ The effect of this approach is that we have an idea of some of the constitutional limits to testamentary freedom without a deeper understanding of what makes it a constitutional property right. It is also apparent that this one-dimensional conception of testamentary freedom significantly limits the redistributive scope of testate

⁴³ 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* 222 at 231.

succession, which in turn means that it could be used to block any constitutional reform in inheritance intended to achieve intergenerational equality.

In order to fill this gap, I examine Constitutional Court jurisprudence on the property clause in order to develop a constitutional property approach to freedom of testation.⁴⁴ This examination is broken into parts. I start in subsection 4.2a) with the Constitutional Court's historical contextualisation of property relations. Thereafter, in section 4.2b), I turn to the purposive interpretation adopted by the Constitutional Court in ascertaining the function of the property clause. In section 4.2c), I assess the normative stance adopted by the Constitutional Court in developing a constitutional basis for property rights. In section 4.3, I show how the private ownership approach has failed to take into account each salient characteristics of the constitutional property approach. I also show some of the consequences of failing to adopt such an interpretative approach. I conclude this chapter in section 4.4 by summarising the

⁴⁴ For court cases, see *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another*; *First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape and Others* 2015 (6) SA 125 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 327 (CC); and *Daniels v Scribante* 2017 (4) SA 341 (CC) 134. For academic literature see generally, T Roux 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 3 (2 ed OS 2003); AJ van der Walt *The Constitutional Property Clause: A comparative analysis* (1999); JW Singer 'Property and social relations: From title to entitlement', in Van Maanen GE & Van der Walt AJ (eds) *Property Law on the Threshold of the 21st Century* (1996); H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Land Ownership in South Africa and Germany* (2002); Van der Walt AJ & Kleyn DG 'Duplex dominium: The history and significance of the concept of divided ownership' in DP Visser (ed) *Essays on the History of Law* (1989); AJ van der Walt *Property in the Margins* (2009); AJ van der Walt *Property and Constitution* (2012); AJ van der Walt *Constitutional Property Law* 3 ed (2011); FI Michelman 'Socio-Political Functions of Constitutional Protection for Private Property Holdings (In Liberal Political Thought)', in Van Maanen GE & Van der Walt AJ (eds) op cit; H Mostert 'Liberty, Social Responsibility and Fairness in the context of Constitutional Property Protection and Regulation', in Botha H, Van der Walt AJ & Van der Walt J (eds) *Rights and democracy in a transformative constitution* (2003); G Alexander 'The potential of the right to property in achieving social transformation in South Africa' (2007) 8 *ESR Review* 2.

central differences between the private ownership and constitutional property approaches to freedom of testation, adopted in South Africa. Like the previous chapter, I make passing references to the similarities between the South African Constitutional Court and German Federal Constitutional Court approach to property, but reserve a fuller comparative analysis for chapter 6.

4.2 THE CONSTITUTIONAL COURT'S APPROACH TO 'PROPERTY'

a) Historical context of property relations in South Africa

The Constitutional Court has repeatedly emphasised that past dispossessions of land and natural resources is directly relevant to understanding property relations in post-apartheid South Africa. The emphasis on the impact of colonialism and apartheid illustrates an adjudicative approach to the property clause that should be adopted in all property law cases, including testate succession law cases. In the first interpretation of the property clause, Ackermann J in *First National Bank* held that 'one should never lose sight of the historical context in which the property clause came into existence.'⁴⁵ In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*⁴⁶ it was held that 'property rights under our constitutional dispensation cannot be properly understood outside its historical context, formulation and social framework.'⁴⁷

⁴⁵ *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 64.

⁴⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) at para 33.

⁴⁷ *Reflect-All* supra at 33.

This type of historical contextualisation is very different to that adopted by succession law academics, which as shown in chapter two, simply reflects a historical account of the principle of freedom of testation without necessarily delving into the manner in which property relations often reflect deeper societal power dynamics and inequalities. As will be argued more fully in section 4.5 (where I assess the private ownership approach), this conception of testamentary freedom is presented in an apolitical, context-free and in purely principled terms, which has the effect of obscuring social and economic reality in which testamentary disputes play out. From various Constitutional Court judgments I summarise that paying attention to the colonial and apartheid history of property relations in South Africa in any property related dispute – including in testate succession law – is important for a number of reasons.⁴⁷⁸

The first reason is that it is expressly provided for in the property clause. The reference to land reform, restitution, security of tenure and equitable redress of land and property dispossession in subsections 25 (5), (6) and (7) is a clear indication of the importance of history of land dispossessions, forced removals, and unequal access to property.⁴⁷⁹ All of these provisions were included to ensure that the State takes positive steps to address the legacy of inequitable enjoyment and access to land that resulted from past discrimination. Thus, it is imperative that a post-apartheid constitutional property law restores land and resources to those dispossessed of such

⁴⁷⁸ The Constitutional Court has not expressly set out these reasons as I have done but in an attempt to understand their approach, I have distilled them below.

⁴⁷⁹ This includes a constitutional obligation on the state to adopt ‘reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis’ (Section 25 (5) of the Constitution); to enact legislation that entitles a person or communities whose land became insecure ‘as a result of past racially discriminatory laws or practices ... either to tenure which is legally secure or to comparable redress’ (Section 25 (6) of the Constitution); and entitles a person or communities “dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices ... either to restitution of that property or to equitable redress’ (Section 25 (7) of the Constitution).

rights by an unjust regime.⁴⁸⁰ The Constitutional Court has warned that a view of property, divorced from this context, threatens this constitutional project.⁴⁸¹

The second reason is that our history also informs why individual property protection is important. It is sometimes assumed that the individual protection of property in section 25(1) was only adopted as a result of the political compromise to protect minority white property interests. While I have no doubt this was a motivating factor among some of the politicians at the time of drafting the property clause, it would be naïve to suggest that individual protection is not an important safeguard for all South Africans especially considering the brazen disregard for property interests of the black majority by a minority white government during apartheid.⁴⁸² In *Port Elizabeth Municipality*, Sachs J explains that ‘[t]he blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the State and by private persons.’⁴⁸³ Viewed in this historical context, protecting property rights against arbitrary State intervention is necessary precisely because the Constitution seeks to move away from the type of authoritarian, draconian laws and policies of the apartheid regime. Its role is also positive, in that as a constitutional democracy with an enshrined Bill of Rights, the ideal goal is a society where everyone has equal access to property and where property rights are meaningfully enjoyed.⁴⁸⁴ In short, property should be protected because it is an important social and legal institution.⁴⁸⁵

⁴⁸⁰ K Illes ‘Property’, in I Currie & J De Waal *The Bill of Rights Handbook* (6th ed) (2013) at 559.

⁴⁸¹ *Agri South Africa v Minsiter of Minerals and Energy* 2013 (4) SA 1 (CC) at para 63.

⁴⁸² *Reflect-All* supra at para 33; *Port Elizabeth Municipality v Various Occupiers 2005* (1) SA 217 (CC) at para 15.

⁴⁸³ *Port Elizabeth Municipality* supra at para 15.

⁴⁸⁴ J Waldron *The Right to Private Property* (1988) at 329.

⁴⁸⁵ G Alexander ‘Property, Dignity, and Human Flourishing’ (2019) 104 *Cornell LR* 4 991; G Alexander & EM Penalver ‘Properties of Community’ (2009) 10 *Theoretical Enquiries in Law* 127; SR Munzer *A Theory of Property* (1990); H Dagan *A Liberal Theory of Property* (2020) (forthcoming book); J Singer *Entitlement: The Paradoxes of Property* (2000); Waldron (1988); T Honoré *Making Law Blind: Essays Legal and Philosophical* (1987); JE Penner *The Idea of Property in the Law* (1997); AJ Van der

The third reason is that a historical contextualisation of property relations sets the tone for any constitutional property dispute. The Constitutional Court has employed this effect in a number of cases where it has emphasised that property relations being inherently contested due to the history of dispossession.⁴⁸⁶ The contested nature of property goes to the core of South Africa's property system. Significantly, in *First National Bank*, Ackermann J works off the premise that the interpretative background of property law in South Africa 'is one of *conquest*, as a consequence of which there was a taking of land in circumstances which, to this day, are a source of pain and tension'.⁴⁸⁷ Madlanga J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape* expands on this important source of property relations in South Africa:

'For centuries after conquest, ours has been a painfully unequal society; the white minority not only subjugating the black majority but actively taking steps calculated to advantage themselves in diverse human endeavours and simple existence to the disadvantage of the black majority. Of particular significance was the incidence of the dispossession of the majority of their property, notably land. Needless to say, the approach of our courts to the protection of the property right must bear that context in mind.'⁴⁸⁸

This type of contextualisation breaks the façade of a timeless, apolitical, and universal concept of property often projected in private ownership approach, which has

Walt 'The South African law of ownership: A historical and philosophical perspective' (1992) 25 *De Jure* 457; AJ Van der Walt 'Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership' (1993) 56 *THRHR* 569; AJ Van der Walt 'The Modest Systemic Status of Property' (2014) 1 *Journal of Law, Property, and Society* 15.

⁴⁸⁶ *Shoprite Checkers* supra at para 138. See further Singer (2000) op cit at 55.

⁴⁸⁷ *First National Bank* supra at para 64. See further *Reflect-All* supra at 33, the CC stated that 'property rights under our constitutional dispensation cannot be properly understood outside its historical context, formulation and social framework.'

⁴⁸⁸ *Shoprite Checkers* supra at para 137.

profound consequences for how we view and define ‘property’.⁴⁸⁹ It ultimately means that judges should decide property disputes with reference to the Constitution itself⁴⁹⁰ and should resist relying on ‘preconceived notions of property not rooted in the Constitution.’⁴⁹¹ In *Shoprite*, Froneman J refers to this as ‘our own conception of constitutional property.’⁴⁹² In this endeavour, he cautions that judicial complacency would ‘inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms.’⁴⁹³ This is a conscious reminder to judges to develop a constitutional notion of property unique to South Africa.

The fourth reason (which is closely allied to the third reason) is that the Constitutional Court’s approach to history specifically problematises the manner in which race and class inequalities are often neutralised (and not openly expressed) in private law terminology and doctrines.⁴⁹⁴ As shown in chapter 3, this is not a primary concern of the private ownership approach. In *Port Elizabeth Municipality v Various Occupiers*, Sachs J warns that abstract principles of property law were and still are used in a way that ignores broader context in which access to property is still structured along racial lines:

‘Differentiation on the basis of race was ... not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones. The principles of ownership in the Roman-

⁴⁸⁹ See chapter 2, § 2.2.

⁴⁹⁰ *Shoprite Checkers* supra para 46; and *First National Bank* supra para 52.

⁴⁹¹ *Shoprite Checkers* supra para 36.

⁴⁹² *Shoprite Checkers* supra para 36.

⁴⁹³ *Shoprite Checkers* supra para 46.

⁴⁹⁴ J Singer *Entitlement: The Paradoxes of Property* (2000) at 164.

Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies.’⁴⁹⁵

Sachs J makes it clear that we should not underestimate the impact that past racial discrimination has had on private property law. He also makes it clear that constitutional property law should be concerned with the distributive outcomes of property disputes and its impact on broader access to property. According to this view, the constitutional impact on private law is also more sinister than simply removing the overtly discriminatory statutes and laws. A commitment to transformation and historical redress means understanding the subtle ways white property interests were systematically advantaged through the normal application of seemingly neutral, impartial and technical private law rules, principles and procedures. As Sachs J points out above, the normal functioning of property law is built upon an existing foundation of State-orchestrated racial privileging that materially benefitted the white population. It seems clear that this should be relevant in all property disputes.

The last reason why historical contextualisation is important to property disputes is that this powerfully informs present day socio-economic inequalities. The effect is to position property disputes at the centre of a number of political, social and economic tensions that, as a result of our past, constitute significant barriers to justice.⁴⁹⁶ In *Shoprite*, Madlanga J and Froneman J refer to property relations in South Africa’s colonial history and present socio-economic context as ‘fiercely contested.’⁴⁹⁷ Froneman J notes that there ‘is, as yet, little common ground on how we conceive of

⁴⁹⁵ *Port Elizabeth Municipality* supra at para 10. See further *First National Bank* supra at 50-52.

⁴⁹⁶ *Shoprite Checkers* supra at para 138. Madlanga J in the same case echoes the sentiment that ‘centuries of dispossession and disadvantage continue to have tangible effects that are yet to be addressed.’

⁴⁹⁷ *Shoprite Checkers* supra at para 4.

property under section 25 of the Constitution, why we should do so, and what purpose the protection of property should serve.’⁴⁹⁸ The magnitude of this question is such that according to Froneman J, it ‘exposes a potential fault line that may threaten our constitutional project.’⁴⁹⁹ Froneman J explains further in the judgment what he means by ‘fault line’. He notes that:

‘[t]he explanation lies in our history and in the pre-constitutional conception of property, which entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably also explains the concerns both the previously-advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.’

These five reasons remind us that the social character of property is deeply contested and often represents a place of significant tension and pain for a post-colonial and post-apartheid society. Importantly, it means that as far as possible courts should scrutinise the meaning of property rights in private ownership in order to develop a constitutional notion of property.⁵⁰⁰ By explicitly noting that property relations in South Africa are inherently ‘contested’ as a result of past ‘conquest’, the Constitutional Court has also specifically acknowledged the historical nexus between past racial discrimination and present realities.⁵⁰¹ A historical contextualisation of property

⁴⁹⁸ *Shoprite Checkers* supra at para 4.

⁴⁹⁹ *Shoprite Checkers* supra at para 34

⁵⁰⁰ See §§ 4.3 and 4.4 below for an in depth explanation of what a constitutional notion of property means.

⁵⁰¹ In *Agri South Africa* supra at para 65 Mogoeng CJ held that ‘The historical inextricable link between landownership and mineral rights ownership equally explains why the vast majority of black people do not have access to the mineral and natural resources of our land.’

relations is therefore essential to position property relations, which would otherwise be devoid of the link between past and present inequalities and injustices.

b) A purposive approach to the property clause

The Constitutional Court has held that the constitutional function of the property clause must be ascertained with due regard to the operational tension between protection and redistribution.⁵⁰² Even a cursory reading of all the subsections of the property clause reveals that it contains two parts, namely: the protection of individual property rights in subsections 25(1) – (3); and the imposition of a mandatory obligation on the State to adopt measures to redress past racial discrimination and promote land reform and restitution in subsections 25(5) – (9) (herewith referred to as ‘redistribution’). The German property clause also contains a similar tension.⁵⁰³ At a broad level, the conflict between individual and redistributive sub-sections of the property clause represent a clash between a testator’s ‘right to exclude’ and non-owner’s and public’s ‘right of access’. It is imperative to understand the relationship between these subsections, and how this may impact the constitutional recognition of freedom of testation and the scope for introducing public interest limitations.

In order to resolve the inherent tension between protection and redistribution, the Constitutional Court has adopted a purposive interpretation, which means that its approach to property rights disputes (and the meaning of ‘property’) is informed by the underlying purpose of the property clause.⁵⁰⁴ In *First National Bank*, it stated that

⁵⁰² In the first property law case in the post-apartheid era, the Constitutional Court in *First National Bank* stated that the property clause ‘must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole.’ *First National Bank* supra para 49.

⁵⁰³ See chapter 5, § 5.3 c) (ii) and (iii).

⁵⁰⁴ According to Du Plessis ‘purposivism’ is defined as “attribut[ing] meaning to a legislative provision in the light of the purpose that it seeks to achieve in the context of the instrument of which it forms part”. Du Plessis *Re-Interpretation of Statutes* (2002) 96–97.

that '[t]his tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'⁵⁰⁵ It stated further that the meaning of property should be derived from the dual purpose of the property clause, which is to strike an equitable balance between individual protection and redistribution.⁵⁰⁶ Due to this, it has been argued that the purpose and function of the property clause is to strike an equitable balance between protection of pre-existing property rights and transformation for the purposes of equitable redress and reform in the public interest.⁵⁰⁷

The introduction of redistributive measures in the South African context significantly impacts the protection of individual property by imposing far-reaching restrictions in order to achieve social reform. The redistributive function is expressly confirmed by the internal definition of 'public interest' in section 25(4)(a) as 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.'⁵⁰⁸ The explicit reference to land reform in the definition of 'public interest' reinforces the constitutional commitment to transformation and redistribution. The purpose of the property clause is to mediate between competing interests inherent in a property system that both protects vested property rights and seeks to transform the unequal distribution of property. If anything, such an intertwined reference should normalise the need for change in property relations in post-apartheid South Africa. Furthermore, it also recognises the general public nature of property as an institution, which ought to benefit society as a whole not merely individual owners.⁵⁰⁹ As a matter of textual interpretation of section

⁵⁰⁵ *First National Bank* supra para 50.

⁵⁰⁶ *First National Bank* supra para 50.

⁵⁰⁷ Mostert (2002) op cit at 199-200.

⁵⁰⁸ Section 25(4)(a) of the Constitution.

⁵⁰⁹ See § 4.4 below.

25, the constitutional limits to property protection are thus wider than recognised by the private ownership approach.

The changed purpose of property in our constitutional democracy has been repeatedly emphasised by the Constitutional Court. Ackermann J in *First National Bank* emphasised that, when giving content and meaning to constitutional property, it is necessary:

‘to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices of entrenched constitutional values.’⁵¹⁰

In *Shoprite Checkers*, Madlanga J affirms the core purpose related to property reform.

He states:

‘The centuries of dispossession and disadvantage continue to have tangible effects that are yet to be addressed. So, we must be wary of overbroad protection of property interests as that may interfere with the transformative agenda permeating the Constitution.’⁵¹¹

The threat that individual rights might be used to frustrate societal change was also alive in the ‘collective minds’ of the constitutional drafters.⁵¹² The underlying concern was that, without an explicit land reform component, property rights would entrench existing unequal access to property by acting as a defensive barrier to State regulation in the private sphere.⁵¹³ The intention was to grant a wider legislative and judicial

⁵¹⁰ *First National Bank* supra para 51 referring to Van der Walt op cit at 11.

⁵¹¹ *Shoprite Checkers* supra at para 138.

⁵¹² *Shoprite Checkers* supra para 4 and 34.

⁵¹³ This intention is clear in section 25 (8) which provides: ‘No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to

scope to redefine property rights and interests in order to achieve constitutional transformation and restitution objectives.⁵¹⁴ Froneman J in *Daniels v Scribante*⁵¹⁵, in my view, appreciates the extent to which we are required to question the common law understanding of public interest limitations. According to this view the:

‘traditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to ... purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property.’⁵¹⁶

This view strongly accords with the meaning of ‘public interest’ in the property clause, which is clearly intended to promote and advance transformation and equality in access to land and property.

The fact that the property clause introduces novel redistributive commitments does not, however, inevitably mean that individual rights are worthless and can be overridden thereby making section 25(1) meaningless. While it may be argued that a fundamental purpose of including property rights in the Bill of Rights is to provide a safeguard against arbitrary deprivations of property and there are important historical reasons for this, as Van der Walt notes, the individual protection in section 25(1) does ‘not imply that private rights in general are privileged as against the public interest or

redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).’

⁵¹⁴ I discussed the legislative and judicial duty to develop freedom of testation in § 6.3 a) and b) of the concluding chapter.

⁵¹⁵ 2017 (4) SA 341 (CC).

⁵¹⁶ *Daniels v Scribante* 2017 (4) SA 341 (CC) at para 136 citing AJ van der Walt *Property in the Margins* (2009) at 16.

that they are insulated against legitimate State limitation.⁵¹⁷ Thus, it is clear that the sole purpose of constitutionally recognising property (including testamentary freedom) cannot be to insulate these disposals from the transformative vision of the property clause and the Constitution as whole.⁵¹⁸ Moreover, the level of protection afforded to individual property cannot be so excessive, which results in regulatory incursions being exceptional and rare. In *Law Society of South Africa v Minister for Transport and Another*⁵¹⁹, the Constitutional Court suggested that the ‘equitable balance’⁵²⁰ could be struck as follows:

‘[T]he definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth.’⁵²¹

In *Reflect-All*⁵²² the CC held the same view that the purpose of the property clause is not primarily to protect private property rights from State interference ‘but to safeguard it from illegitimate and unfair State interference.’⁵²³ The State’s authority to regulate property is one that it inherently enjoys due to its law-making making function. A plain interpretation of section 25(1) of the property clause makes it clear that the State enjoys regulatory authority to determine the parameters of all property

⁵¹⁷ AJ van der Walt *Constitutional Property Law* 3 ed (2011) at 176. Ackermann J in *First National Bank* supra at para 64 further stated ‘the purpose of section 25 is not merely to protect private property but also to advance the public interest in relation to property.’

⁵¹⁸ See chapter 3 § 3.2 (b). As shown in the private ownership approach, a strong adherence to individual autonomy in testate succession law has resulted in a highly restrictive approach to regulation. While it cannot be said that testation is unlimited, such regulatory incursions are exceptional and rare. A one-dimensional view of freedom of testation as a property right has resulted in circumstances where judges are reluctant to violate the property clause. The testate succession case law show how a one-dimensional view of testamentary freedom as a property right creates a strong presumption in favour of enforcing testamentary wishes, which means that property rights will generally trump conflicting interests of heirs or public interest.

⁵¹⁹ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 327 (CC).

⁵²⁰ See *First National Bank* supra at para 50.

⁵²¹ Ibid at para 83-4.

⁵²² *Reflect-All* supra at 33.

⁵²³ Ibid.

rights. This is apparent in that only a ‘law of general application’ can deprive a person of property and only a ‘law’ may permit arbitrary deprivation of property. Nkabinde J expresses the same notion that ‘[P]roperty rights ... are determined and afforded by law and can be limited to facilitate the achievement of important social purposes.’⁵²⁴ Froneman J acknowledges this in the following terms: ‘All property is subject to the law and regulation by the law. In that wide sense, *the holding of all property is dependent on state “largesse”*’.⁵²⁵ This also confirms the point made by Madlanga J in *Law Society of South Africa*, which is essentially that in the absence of such an overriding authority, it would be legally impossible for the State to regulate property in the over benefit of the whole.⁵²⁶ It is also clear that while the scope for regulating property rights is much wider in the constitutional property approach, property limitations should not arbitrary if the purpose is to achieve an equitable balance between individual protection and redistribution.

c) **A normative approach to the meaning of ‘property’**

The Constitutional Court has sought to establish a constitutional notion of property that promotes the objective values of individual property with specific reference to the Constitution itself.⁵²⁷ It has stated that the meaning of ‘property’ (which includes the individual protection of property in section 25(1) of the property clause) should be derived from the dual purpose of the property clause, which (as stated above) is to

⁵²⁴ See *Reflect-All* supra para 33. This conception of property rights should be contrasted with the private ownership approach that implicitly regards freedom of testation as a naturalized, pre-law and pre-political right.

⁵²⁵ *Shoprite Checkers* supra at para 60. See further T Honoré *Making Law Blind: Essays Legal and Philosophical* (1987) at 166 who develops the same argument.

⁵²⁶ D Schwab ‘Eigentum’ in Otto Brunner, Werner Conzer & Reinhart Koselleck ed *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (1975) 65-115 at 106 (Stuttgart: Klett-Cotta).

⁵²⁷ *Shoprite Checkers* supra at para 50. For a comparison with Germany, see chapter 5, § 5.3 c) (i).

strike an equitable balance between individual protection and redistribution.⁵²⁸ In this regard, the Constitutional Court has borrowed extensively from German constitutional property law.⁵²⁹ Froneman J in *Shoprite Checkers* has referred to this balance in normative terms as the attainment of ‘socially-situated individual self-fulfilment.’⁵³⁰ He explains that:

‘The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good.’⁵³¹ [My Italics]

According to Van der Walt the normative basis for constitutional property rights depends on how it creates space for ‘individual [to] take responsibility for her own life’ within the broader social and constitutional context.⁵³² This fundamental import of this approach is that the very notion of individual property infuses rights (entitlements) with social responsibility.⁵³³ In trying to define ‘property’, the Constitutional Court has attempted to promote the underlying benefits or values of individual property, which is immediately distinguishable from the private ownership approach, which as stated in chapter 2, assume this point without further normative interrogation.⁵³⁴

⁵²⁸ *First National Bank* supra at para 50.

⁵²⁹ See chapter 5, § 5.3 c) (i).

⁵³⁰ *Shoprite Checkers* supra at para 50

⁵³¹ *Shoprite Checkers* supra at para 50.

⁵³² AJ van der Walt *Property and Constitution* (2012) at 143. See further, Munzer SR *A Theory of Property* (1990) at 5. This approach echoes the normative, value-driven conception of property in German law.

⁵³³ See further *First National Bank* supra at para 49.

⁵³⁴ See chapter 3, § 3.2 a) – h).

Similarly, the Constitutional Court has also adopted an institutional understanding of constitutional property based on its objective character, as opposed to determining protection based on the subjective interest of the owner or its economic value.⁵³⁵ In Germany, this is referred to as *Einrichtungsgarantie*.⁵³⁶ The objective assessment of what constitutes property was confirmed in *Shoprite Checkers*. Froneman J stated that the purpose of protecting property is ‘not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others.’⁵³⁷ An objective assessment of the property interests at stake is moral and normative in nature. It does not entirely depend on whether a property interest satisfies a subjective preference but rather how it promotes individual autonomy and human dignity in an objective and distinctively moral sense.⁵³⁸ Thus, the meaning of property in the property clause is based on an objective, purpose drive approach.

4.5 AN ASSESSMENT OF THE PRIVATE OWNERSHIP APPROACH

Having established how the Constitutional Court has interpreted and applied ‘property’ in various judgments, I now assess the private ownership approach. I do so in the same way that I discussed the Constitutional Court’s approach, namely: I first assess its approach to historical contextualisation; thereafter the purpose or function

⁵³⁵ First National Bank supra at para 56: ‘Neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, having regard to the other terms of the agreement, can determine the characterisation of the right.’

⁵³⁶ See chapter 5, § 5.3 c) (i).

⁵³⁷ Shoprite Checkers supra at para 50.

⁵³⁸ Alexander (2002) op cit at 745.

of the property clause; and lastly a normative understanding of testamentary freedom as a property right.

a) Historical contextualisation

(i) Freedom of testation and intergenerational inequality

If freedom of testation is to be regarded as a property right, worthy of protection in section 25(1) of the Constitution (which I believe it should), it is important that such protection be informed by the history of property relations in South Africa. As shown in chapter two and three, the constitutional recognition of freedom of testation is based on a timeless or universalistic appreciation of testator's rights with deep roots in the historical sources of testate succession law.⁵⁹⁹ Like property law, many of the rules in testate succession law developed as value-neutral, objective rules that were not expressly used to advantage predominantly white male property interests during the colonial and apartheid eras. When viewed as an abstract common law principle, it is largely recognised that a testator should be afforded maximum freedom to distribute property death, regardless of the border societal distributive consequences. Put another way, the overall distribution of property after death (even if unequal and unjustly spread) is regarded as being neutral or agnostic to the overall distribution of wealth in society. This much is also clear from the hierarchical structure of property and testate succession law, which (as shown in chapter 3) valorises the importance of abstract individual property ownership in a way that reduces the relevance of broader contextual factors such as socio-economic inequality. In the long run, a narrow focus

⁵⁹⁹ See chapter 2, § 2.2. See further Kroeze (1997) op cit at 10.

on individual intergenerational bequests ignores that inequality is replicated over multiple generations.⁵⁴⁰

While the colonial and apartheid governments did not intentionally use testate succession law to perpetuate racial inequality in South Africa, testamentary freedom forms part of a property system that had the overall effect of benefiting a white minority population to the exclusion of black majority. This effect needs to be informed by layers of other discriminatory laws in South Africa history that prevented black ownership of land and thus maintained racial inequality. To be clear all of these laws, while publicly administered, had an overall effect in the distribution of wealth. For instance, the Black Land Act, 27 of 1913 ('the Black Land Act') prohibited the ownership of land by black people outside of scheduled native areas.⁵⁴¹ Black people were only permitted to reside in urban areas as temporary labourers with valid labour tenant contracts.⁵⁴² This reduced the status of black person living in white designated areas to either a transient worker or a criminal.⁵⁴³ This significantly limited the socio-economic livelihoods of Black people. In addition, the Development Trust and Land Act 18 of 1936 limited land allocated for black occupation to 13% of the country's total surface area and secured the remaining 87% of the land for the white minority's unfettered use and occupation.⁵⁴⁴ Together with the Black Land Act, these laws were instrumental in depriving black people of meaningful economic livelihoods in urban areas. Their presence was solely to serve the functional needs of the white economy.

When viewed as isolated individual acts of testamentary disposal, it could be argued that the freedom of testation played no role in furthering racial inequality.

⁵⁴⁰ D Halliday *Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (2018) at 122-23.

⁵⁴¹ Section 1 and 2 of Black Land Act 27 of 1913. These were the forerunners to apartheid Bantustans.

⁵⁴² Section 6 read with s 2 of Black Land Act 27 of 1913. The Black Service Contract Act 24 of 1932 regulated labour tenancy in South Africa during the pre-apartheid period. J van Wyk *Planning Law 2* ed (2012) 43.

⁵⁴³ Section 5 read with s 2 of Black Land Act 27 of 1913.

⁵⁴⁴ Section 10(1) of the Development Trust and Land Act 18 of 1936.

There were no specific statutory or common law limitations on freedom of testation that prohibited the disposal of wealth to a person of another race. Neither did any law compel the distribution of wealth within racial groups, like there were provisions that precluded black ownership outside designated areas. On the converse, the very notion of testamentary freedom (as shown in the previous chapter) entails the freedom to dispose of property to whomever the testator pleases, and for whatever purpose (albeit within the limits of public policy). There was also no reason to limit testamentary freedom, as it was unlikely that testators would dispose of property outside family circles, which generally are racially and culturally defined. The effect was that wealth acquired over a lifetime generally remains within certain familial circles.

Testamentary disposals were (and are still) considered part of a just property regime, which remain valid outside a socio-economic context they are applied and understood. Put differently, the disposal of wealth created during apartheid is generally not considered relevant since it is generally accepted that testator has a right to dispose property indiscriminately in any manner they deem fit. The fact that the principle of testamentary freedom is only a by-product or contributing factor of the overall unequal distribution of property should not mean that it is not integral in maintaining inequality over time. Intergenerational transfers of wealth enable and sustain social and economic inequalities for present and future generations.⁴⁵ Wealth inequalities, through inheritance broadly, perpetuate existing racial and class segregation and hinder the goals of section 25(5) to promote equitable access to land. It is for this reason that freedom of testation should be informed by a broader historical context beyond the abstract, apparently neutral, principles of the testate succession common law.

⁴⁵ Halliday (2018) op cit at 108-09.

(ii) *A critique of the testate succession case law*

The best way to apply the Constitutional Court's approach is to re-assess existing testate succession case law in the constitutional-era. The judicial record shows that courts have acknowledged the systematic impact of discrimination has had on certain vulnerable members of society, but these enquiries have only been in relation to public policy limitations. Focusing only on those impacted by testamentary disposals, in my view, means that our courts have not questioned why testators have such extensive power in the first place.⁵⁴⁶ I deal first with the public charitable trust cases and thereafter with the disinheritance cases.

In *Syfrets Trust* and *Emma Smith Educational Trust*, the courts do acknowledge that discriminatory charitable bequests unfairly discriminate against certain classes of people, infringing the right to equality in section 9 of the Constitution.⁵⁴⁷ What these judgments specifically fail to do is engage in a thorough historical analysis of the nature of freedom of testation in the property clause. As a result, these judgments fail to acknowledge the causal nexus between historical forms of discrimination and the rules of testate succession which empower testators to freely dispose of property in any manner they deem fit. This is evident in *Emma Smith Educational Fund*. The Court's articulation of the issues comes close to recognising the role that freedom of testation may have played in perpetuating present unequal access to property arisen from past wrongs:

'The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to

⁵⁴⁶ *Minister of Education v Syfrets Trust Ltd* NO (2006) (4) SA 205 (C); and *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal* 2010 (6) SA 518 (SCA).

⁵⁴⁷ *Syfrets Trust* supra at para 27 – 37.

benefit prospective students in need ... 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.’⁵⁴⁸

What is silent in the SCA’s judgment in *Emma Smith Educational Fund* is how colonial and apartheid laws and policies contributed to unequal access to property in South Africa, and how this has contributed to the vast estate that the testator acquired throughout his life. In fact, this conclusion is not implausible considering the facts of the case. Sir Charles George was an English settler in the then Natal Province in the late 1800s. He was a wealthy and successful industrialist, who founded CG Smith and Company (involved in the sugar industry) now incorporated as Illovo Sugar, a shipping line that later became part of Unicorn Shipping.⁵⁴⁹ Involved in these industries, we can assume that he benefitted from discriminatory colonial and apartheid laws that advantaged white business interests and forced black and Indian workers into low-income labour intensive jobs. Sir George was also politically involved and was a friend of General Jan Smuts. Although we cannot say for certain we can assume that he was invested in safeguarding a white minority government.

While the facts in *Emma Smith* may not have altered the ruling in any significant respects, a historical contextualisation of the testamentary disputes frames the respective interests that need to be balanced. The manner in which Sir George acquired and accumulated land and wealth are historical events directly relevant to the manner in which he disposed of his wealth at death. The private ownership approach is indifferent to these events because the primary juristic fact is the choice of disposal

⁵⁴⁸ *Emma Smith Education Fund* supra at para 42.

⁵⁴⁹ *Emma Smith Education Fund* supra at para 4.

See <https://www.illovosugarafrika.com/UserContent/Documents/History-MilestonesBooklet.pdf>

– ignoring the context of this wealth before disposal and the consequences thereafter.⁵⁵⁰

In a testamentary dispute, the exercise of a testamentary disposition should be viewed as the source of the discrimination yet courts have rather focused on the impact of the discrimination on beneficiaries or members of the public impacted from the discrimination. Courts have ironically failed to question the nature and function of testamentary freedom itself, which has left the nature of testamentary freedom unquestioned and unchanged from the pre-existing common law.

The impact of adopting a neutral stance to testamentary wishes was more strikingly seen in *BOE Trust*.⁵⁵¹ As already argued in Chapter 3⁵⁵², the testator’s alternative bequest was enforced since the universities refused to administer the racist scholarship provisions, thereby making the primary bequest impossible. Such a conclusion however upheld the underlying racism in the primary testamentary disposal, as it did not strike the offending clause down. Ultimately, the SCA’s failure to scrutinise the bequest itself and whether this should be allowed in terms of the property clause meant that it did nothing to challenge a racist provision that could have otherwise been used to rectify and correct the racially exclusive trust provision.⁵⁵³ Moreover, this judicial avoidance implicitly confirmed the testator’s racist intention not to benefit black, coloured and Indian post-graduate students.

An ahistorical, neutral view of testamentary disposals has also been adopted in the disinheritance cases. The primary consequence of viewing testamentary freedom as an isolated – ahistorical – act of disposal is that this pacifies and obscures patterns of systemic exclusion and inequality in access to land and property over time. This was particularly evident in the *King* case. In this case, the question was whether the

⁵⁵⁰ See Singer (2000) op cit at 174.

⁵⁵¹ *In re BoE Trust Ltd NO and Others* 2013 3 SA 236 (SCA).

⁵⁵² See chapter 3, § 3.3 c)(ii).

⁵⁵³ JM Modiri ‘Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*’ (2013) 5 *PER* 582 591.

testamentary exclusion of females could be viewed as a ‘system’ in section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁵⁴ (PEPUDA), which states that ‘no person may discriminate against any person on the ground of gender, including – (c) the system of preventing women from inheriting family property.’⁵⁵⁵ Bozalek J held that this section did not apply to private wills:

‘The present matter, however, does not involve any testamentary ‘system’ or ‘practice’ which prevents women from inheriting family property or impairs their dignity. Notwithstanding the fact that the fideicommissary structure in the pending matter has endured for more than a 100 years it would be a strained interpretation thereof to describe it as ‘system’ or ‘practice’ as is contemplated by sec 8(c) of [PEPUDA] as opposed to a once-off, private testamentary disposition by the testators.’⁵⁵⁶

The testator’s right to property (considered a fundamental constitutional property right) was treated as timeless and separate from a colonial history where the testator (and subsequent male beneficiaries) were afforded an unfair advantage to gain access to significant farming land. This case fails to recognise that the historical allocation, and subsequent transfer, of property through generations has been unfair and unequal and the role that colonial and apartheid laws and policies played in systematically advantaging predominantly white male interests. It also ignored the systemic exclusion and marginalisation of women in property relations. It consequently neglects to acknowledge the impact that the system of male ownership of land (embedded in a system of patriarchy) has had on females over successive

⁵⁵⁴ Act 4 of 2000.

⁵⁵⁵ Section 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

⁵⁵⁶ *King v de Jager* 2017 JDR 1321 (WCC) at para 47.

generations.⁵⁵⁷ The conclusion that a private will is not a ‘system’ thus fails to view the rights of testators in a context of historically unequal intergenerational access to property and opportunities. This understanding of freedom of testation would have been different had *Bozalek J* had regard to the purpose of the property clause to rectify and redress the legacy of past discrimination. As will be shown below, according to the constitutional property approach, the protection of an individual freedom of testation should not be used to resist limitations but should rather be regarded the authority to limit discriminatory bequests.⁵⁵⁸

A critique of the testate succession case law shows that it is important that the historical framing of the issues occurs from both the perspective of the person challenging the bequest (a student who does not meet the eligibility criteria for a scholarship of a discriminatory trust deed, a disinherited family member, or an heir) and from the perspective of the testator who seeks to exercise their rights in this manner. This is not to suggest that all property acquired as a result of past discriminatory laws should not be respected by the courts but rather that a historical framing can assist in understanding the respective interests in a testamentary dispute.⁵⁵⁹ A court has a duty to interrogate and acknowledge the historical context in which property was acquired and disposed of in a will or trust deed. Included in this historical acknowledgement should be the potential manner in which testamentary dispositions and inherited property and land has systematically advantaged predominantly white male property interests and opportunities at the expense of the

⁵⁵⁷ *King* supra para 47.

⁵⁵⁸ This is contrasted to the private ownership approach that views the nature of freedom of testation as an exclusive individual right. See chapter 3 § 3.5. I discuss this further in § 4.3 below and in the concluding chapter § 6.3 c).

⁵⁵⁹ See chapter 6, § 6.3 f) for recommendations in this regard.

majority black population over successive generations.⁵⁶⁰ Framing a testamentary dispute within this context allows judges to scrutinise the manner in which free transfer of property across generations has contributed to, or at least been complicit, in perpetuating existing inequalities. It allows a court to come to a just and equitable balance of rights and interests involved in a testamentary dispute.

b) A purposive approach to testamentary freedom

As noted above, the property clause incorporates two components (individual protection and redistribution) that are central to determining the meaning of ‘property’ (i.e. what proprietary interests deserve constitutional property protection) and how these will be regulated, and if necessary transformed to achieve redistributive obligations. The Constitutional Court has adopted a purposive interpretation in order to: 1) resolve the inherent contradiction between these functions of the property clause; and 2) establish a constitutional understanding of ‘property’ that appropriately recognises an equitable balance between the benefits of individual property rights and redistribution to achieve greater equality. The current constitutional recognition of testamentary freedom in South Africa is based on a disjunctive interpretation of subsection 25(1) that ignores the operational context of the property clause as whole.

A recent notable exception to this disjunctive interpretation is the case of *JW v Willams-Ashman NO and Others*.⁵⁶¹ In this case, Judge Sher directly applies the purposive interpretation (as instructed by the Constitutional Court in various

⁵⁶⁰ According to Griesel J, the express exclusion of black people, woman and Jews from educational opportunities by any bursary policy ‘can never be in the public interest of a society founded on “the achievement of equality”.’ *Syfrets supra* at para 34. Although this statement was made in the specific facts of the *Syfrets Trust Bank* case, the sentiment is not far off from the reality where unequal access to wealth and inheritance structurally favour advantaged (minority white) population to the exclusion of previously disadvantaged and marginalised groups of peoples. Without legislative intervention, unequal inheritance patterns contribute towards sustaining a privatised apartheid.

⁵⁶¹ 2020 (4) SA 567 (WCC).

judgments⁵⁶²) to the issue of whether a temporary statutory disinheritance of an ex-spouse within 3 months of the other spouse's death violates section 25(1) of the property. Sher J rightly notes that property clause creates a tension between individual property rights and societal interests where testatory freedom (as an incident of property) is not absolute but subject to societal considerations.⁵⁶³ The societal considerations in this instance was the concern that divorcees undergo 'emotional upheaval' during divorce proceedings and 'might not appreciate that a prior will which they had made in favour of their former spouse, during happier times, would have to be given effect to notwithstanding the divorce' unless expressly amended or revoked.⁵⁶⁴ In balancing exercise, Sher J held that societal reasons outweighed the temporary limitation of the deceased's will and enforced the ex-spouses's disinheritance.

Despite this recent exception, which upheld a statutory limitation against freedom of testation, the majority of prior testate succession cases ignored the internal tension within the property clause. There are a number of consequences for adopting a disjunctive interpretation of the property clause for the nature, function and meaning of freedom of testation. Firstly, the purpose of the property clause is not solely intended to protect individual property rights. The purpose is also redistributive. A disjunctive interpretation reinforces the understanding of testamentary freedom as a form of negative protection primarily geared towards warding off State intervention.⁵⁶⁵ This interpretation mischaracterises the purpose of the property clause, which Madlanga J in *Shoprite Checkers* warned is wary of the 'overbroad protection of

⁵⁶² See § 4.2 b) above.

⁵⁶³ See *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) at para 85 and 95.

⁵⁶⁴ *Ibid* at para 37.

⁵⁶⁵ See chapter 3, § 3,4 and 3.5.

property interests' that makes achieving transformative measures difficult.⁵⁶⁶ The meaning of freedom of testation as a property right should rather be derived from the manner in which courts are guided by the tension between protection and redistribution.⁵⁶⁷ In this tension, individual protection of testamentary disposals should be balanced with the imperatives of transformation and redistribution. This widens and recharacterises the nature and meaning of testamentary rights from a private law view of individual protection to a public law view.⁵⁶⁸ While this has other consequences discussed further in chapter 6⁵⁶⁹, the principal difference in adopting a purposive interpretation is that the function of testamentary succession will not always be to protect individual testamentary disposals. The value and benefit of testamentary disposals have to be measured systematically in terms of how these promote constitutional values and goals.⁵⁷⁰ It may even create a public interest obligation on testators to dispose of property in a way that supports and nurtures the conditions for more equitable access to property.⁵⁷¹

Secondly, the disjunctive interpretation fails to recognise the increased legislative and judicial scope to interfere with individual testamentary disposals. It is incorrectly assumed that the property clause acts as a barrier or a trump card that can prevent regulation or intervention. In fact, incorporating a redistributive component within the property clause should, if anything, make transformative measures more readily justifiable. It is arguable that the explicit reference to 'land reform' and 'reforms to bring about equitable access to all South Africa's natural resources' in the

⁵⁶⁶ *Shoprite Checkers* supra at para 138.

⁵⁶⁷ H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Land Ownership in South Africa and Germany* (2002); AJ van der Walt *The Constitutional Property Clause: A comparative analysis* (1999) at 55.

⁵⁶⁸ *First National Bank* supra para 51 referring to Van der Walt (1999) op cit at 11.

⁵⁶⁹ See chapter 6, § 6.3.

⁵⁷⁰ See further chapter 6, § 6.2 d)(i).

⁵⁷¹ See chapter 6, § 6.3 d).

definition of ‘public interest’ in section 25(4) normalises the constitutional commitment to transformation and redistribution. This explicit reference alone expands the traditional parameters of public policy considerations to interfere with testamentary disposals. It also suggests that there should be more scrutiny of the distributive consequences of testamentary disposals, especially if these contribute towards unequal property relations and are inimical to the redistributive obligations in the property clause.

Thirdly, the general authority to overturn or regulate testamentary disposals arises from the dual nature of ‘property’ in the property clause itself. A disjunctive interpretation mistakenly assumes that the only way to limit this power is when it conflicts with another right or when the legislature specifically imposes restrictions.⁷² This assessment of conflicts of rights or interests are always external to freedom of testation, which as shown in chapter 3, is invariably limited and almost always resolved in favour of the individual testator. Adopting a purposive approach means that limitations are not external impositions onto individual property protection but rather inherent, and even considered definitional, to the protection of property. It would also not require an exceptional case to justify the limitation on testamentary freedom. A purposive interpretation thus impacts the manner in which limitations are imposed as well as the level of justification that is required to restrict the protection afforded to individual property rights. It is arguable that it loosens the presumptive superiority that giving effect to testamentary wishes currently enjoys. Rather limitations to testamentary freedom are an inherent component, which are constitutive of an overall understanding of testamentary rights. An inherently limited testamentary right might even mean that tensions are an inevitable part of the system of testate

⁷² See for instance, Du Toit (2001) *op cit* at 233 who argues for the introduction of a ‘constitutionally-inspired boni mores’ approach to limitations to freedom of testation.

succession that should be accommodated and addressed rather than actively avoided by hard-and-fast rules that always favour testamentary wishes.

Lastly, the increased scope in the property clause for overturning testamentary disposals is not meant to be a form of punishment. While there are good reasons to be sceptical of State action, which evidently has the potential to abuse power, it is equally important to recognise that the State has a positive role to play in regulating property in a fair and equitable way for the common good. Thus, the purpose of State regulation is not to punish individual property owners but rather to maintain and promote general societal acceptance of property as a public institution.⁵⁷³ In modern societies, regulation is a reality that must occur to ensure overall fairness.⁵⁷⁴ A more pro-active role of the State, envisioned in the constitutional property approach, directly counter-acts the private ownership view of freedom of testation, which immunises it from State regulation. Rather, the source of property protection and the limits imposed on it are creations of the property clause, which means that the State ought to be at liberty to define and limit to serve the general public.⁵⁷⁵

b) The normative basis of testamentary freedom

The Constitutional Court's normative approach to property approach is distinguishable from the private ownership approach. Recall that succession law academics and judges have identified that the constitutional meaning of 'property' is

⁵⁷³ See G Alexander 'Property as a Fundamental Constitutional Right? The German Example' (2002) 88 *Cornell LR*. 733 at 747-8 and P Krause *Eigentum an Subjektiven öffentlichen Rechten* (1982) at 65-6 who explains this in the German constitutional context.

⁵⁷⁴ J Fichte *Der geschloßne Handelsstraat* [1800] 1979 at 15.

⁵⁷⁵ I rely on German author, A Wagner 'Grundlegung der politischen Ökonomie' (1894) (3rd ed) Part 2 *Volswirthschaft und Recht, besonders Vermögensrecht* at 12 for this view.

an important question but not fully explored this issue.⁵⁷⁶ As shown in chapter 2, some of the normative basis for the recognition of freedom of testation as a fundamental property right is based on core constitutional values of freedom, dignity, privacy, freedom of expression, and freedom of association.⁵⁷⁷ The expectation that wishes will be protected after death resonates with the underlying reasons for protecting inheritance from an individual testator's perspective, which of course correlates with the close connection that property shares with individual freedom. These reasons, and others, are socially significant and justified reasons to protect individual expectations that a will be enforced after death. Other values that freedom of testation protects include, but are limited to, autonomy, personhood, security, self-realisation, utility, and liberty. Thus, while I agree that these are important reasons to protect the right to dispose of property after death, more can be done to flesh out why these are important to promote individual self-fulfilment.⁵⁷⁸

While the normative stance adopted in the private ownership approach is not entirely incorrect, it fails to reflect the justification for property as a dual right inherently subject to a social obligation towards the public good. As shown in chapter 3, due to a strong doctrinal relationship with private ownership in the common law, South African succession law academics and judges have incorrectly assumed that the sole constitutional function of freedom of testation is to protect and enforce individual testamentary wishes.⁵⁷⁹ The level of protection afforded to testators also seems to tolerate even the worst form of egocentric possessive individualism. This form is entirely based on the subjective preferences of testators, which could be far removed

⁵⁷⁶ See chapter 2 § 2.3 b) – c).

⁵⁷⁷ See chapter 2 § 2.3 c).

⁵⁷⁸ See chapter 3 § 3.2.

⁵⁷⁹ See chapter 2, § 2.3 b) and c).

from an objective understanding of property that promotes self-determination and human dignity.

The private ownership approach also fails to recognise that individual protection of testamentary freedom is inherently limited by (and should be balanced with) the transformative function of the property clause. The extent to which the private ownership notion imposes obligations on testators is only to refrain from harming third parties or the public interest. This obligation is negative in nature and does not actively promote social responsibility towards the public good. In fact, the private ownership conception of testation does not promote positive duties of testators. As long as testators do not harm the public good – which is narrowly defined and does not incorporate broader redistributive obligations – most disposals will be allowed and upheld. This is clear from two judgments. First, in *BOE Trust*⁵⁸⁰ Erasmus AJA affirms that the property clause protects testamentary bequests but then goes further to point out:

‘For if the contrary were to obtain, a person’s death would mean that the courts, and the state, would be able to infringe a person’s property rights after he or she has passed away unbounded by the strictures which obtains while that person is still alive. It would allow the state to, in a way, benefit from someone’s death.’⁵⁸¹

Second, in *King Bozalek J* also makes this clear: ‘[a]ny *incursion* will also inevitably create uncertainty in the minds of some testators as to whether their testamentary dispositions will be fully executed or not ... [is] in itself an inherently unsatisfactory

⁵⁸⁰ *BOE Trust* supra.

⁵⁸¹ *BOE Trust* supra at para 26.

situation.’⁵⁸² The comments by Bozalek J and Erasmus AJA fail to reflect the dual nature of the property clause, which is intended to be both individual and societal. The expectation that wishes will be protected after death clearly resonates with the underlying reasons for protecting testation as a property right. And understandably, the threat of unwarranted intervention with testamentary wishes would cause some anxiety or lack of peace prior to death. But, this justification seems to be motivated by an underlying fear of total State intrusion (justifying negative protection), which fails to recognise that the State is empowered to intrude into the private property rights for reasons stated in the property clause.⁵⁸³ The State has a legitimate purpose in adopting measures that promote equal access to property and land. Thus, while human dignity and individual freedom are clearly relevant as a normative constitutional basis to protect a testator’s dying wishes, the courts reflect a characteristically one-dimensional view of the protection needed for testation that borders on extreme distrust for all judicial or State intervention.⁵⁸⁴ This, in turn means that the approach adopted has failed to reflect the true constitutional nature and function.

It is arguable that a constitutional notion of freedom of testation means that disposals should only be exercised in the public interest.⁵⁸⁵ This means that the right to exercise testamentary freedom, as a constitutional property right, is not a stand-alone right that a testator can use against the public but rather one that is imbued with an internal obligation to respect and promote public norms. The dual nature of the property clause means that individual testation should be assessed both in terms of

⁵⁸² *King* supra at para 67. This understanding of the purpose of property (and other constitutional rights that reinforce testation as a property right) is repeated *Harper* supra, where Dlodlo J states: ‘[w]hat the Constitution actually primarily guarantees is the freedom of individuals (the citizens of this country) from undue State interference.’

⁵⁸³ See chapter 3 § 3.2 f).

⁵⁸⁴ I Berlin *Four Essays on Liberty* (1969) at 118. See further Singer (2000) op cit at 3; and Van der Walt (2009) op cit at 39.

⁵⁸⁵ See further chapter 6, § 3.3 for further argument on this point.

how it promotes values of individual self-fulfilment and human dignity as well as the public interest in protecting family members and not offending public norms. Promoting the public interest would also mean ensuring that inherited wealth does not inhibit important constitutional objectives of land reform, restitution, equitable access to land and housing and security of tenure.⁵⁸⁶

4.5 CONCLUSION

The central difference between the private ownership approach and constitutional property approaches to the property clause is that the former adopts a narrow one-dimensional view of freedom of testation as an instrument of individual control, whereas the latter adopts a multi-dimensional view of testation within a broader historical, socio-economic and political context. Importantly, the constitutional property approach explicitly recognises the transformative and redistributive role of property as inherent characteristics of the constitutional right to dispose of property after death, which empowers the State to redress intergenerational inequalities in inheritance law. In this chapter, I have argued that the current private ownership approach fails to reflect the normative and functional nature of constitutional property as an institution designed both to give expression to individual autonomy and self-fulfilment and advance significant constitutional goals of restitution, redistribution and historical redress. As it is currently understood, the right to freedom of testation is not regarded as being in tension with any social justice obligation towards the public good. Applied specifically to the post-apartheid context, this interpretation of the property clause misses that two fundamental components (protection and

⁵⁸⁶ Van der Walt (2012) op cit at 143.

redistribution) make up both the nature of property as well as its function in a constitutional society. A major consequence of a disjunctive interpretation is that it fails to acknowledge the constitutional obligation that the State has an obligation to intervene and regulate the unequal consequences of intergenerational distribution of property in testate succession.

CHAPTER FIVE

A COMPARATIVE ANALYSIS OF THE CONSTITUTIONAL RECOGNITION OF TESTAMENTARY FREEDOM IN THE UNITED STATES AND GERMANY

5.1 INTRODUCTION

In this chapter, I compare the constitutional recognition of freedom of testation in South African to that of the United States and Germany. All three jurisdictions have different property clauses that protect and limit property rights in different ways. I have specifically chosen the United States and Germany as these jurisdictions have adopted two competing approaches towards the recognition of testamentary freedom in their respective constitutional property clauses. The protection of property in the United States Constitution is silent on the status of freedom of testation as a fundamental right. It is however widely accepted that individual testamentary freedom is an important right of private property ownership, which is primarily intended to give effect to the wishes of testators. This is very similar to the common law understanding of freedom of testation that has formed the basis for constitutional recognition in South Africa. While this right is not unlimited, its redistributive scope is drastically limited because testamentary disposal is such a jealously guarded right. In contrast, the German property clause explicitly guarantees inheritance.³⁸⁷ The basis of this protection is both as an individual guarantee of freedom of testation and as a source of protection of the family unit, of which certain members are protected

³⁸⁷ See Art. 14(1) of the German Basic Law. The passage states: '(1) Das Eigentum und das Erbrcht warden gewährleistet. Inhalt und Schranken warden durch die Gesetze bestimmt. (2) Eigentum verpflichtet. Sien Gebrauch soll zugleich dem Whole der Allgemeinheit dienen.'

against disinheritance. As a familial-based civil law system, German jurists have been deeply critical of ‘unbridled individualism’ and thus have resisted a form of testamentary disposal that would allow property owners to subvert their duties towards the family and the public.⁵⁸⁸ Due to this, the redistributive scope of testamentary disposals is constitutionally limited by a countervailing importance of the family.

These competing understandings of the constitutional nature and scope of testamentary freedom will be used to assess and analyse the position in South Africa.⁵⁸⁹ Insights into these competing approaches will also help understand the redistributive scope of testamentary freedom in South Africa, i.e. how much other jurisdictions value testamentary freedom vis-à-vis other compelling societal needs.⁵⁹⁰ My main point is to draw out the anomaly that South Africa and United States have similar testate succession law systems in spite of the fact that the former property clause introduces new redistributive obligations. In theory, the redistributive scope of testamentary freedom in South Africa should be radically increased. A comparison with Germany shows that the express inclusion of social obligations should act as an over-riding limitation on testation to achieve important constitutional goals. This, of course, has not happened in South Africa, hence the reason why it is important to draw attention to this anomaly.

⁵⁸⁸ The basis of this criticism is led by the works of GF Hegel *Elements of the Philosophy of Right* [1821] (1991) Ed Allen Wood at 178.

⁵⁸⁹ The manner in which these jurisdictions navigate the protection and limitation of freedom of testation reflects a similiar tension in South African testate succession law between the protection of the principle of testamentary freedom, on the other hand; and the need to advance the financial interests of surviving spouses and minor children and promote principles of equality and social justice, on the other hand. See further, J Beckert *Inherited Wealth* (2004) at 22; LM Friedman ‘The Law of the Living, The Law of the Dead: Property, Succession, and Society’ (1966) *Wisconsin Law Review* 340 at 340; Friedman LM *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (2009).

⁵⁹⁰ J Beckert *Inherited Wealth* (2004) at 22; LM Friedman ‘The Law of the Living, The Law of the Dead: Property, Succession, and Society’ (1966) *Wisconsin Law Review* 340 at 340; Friedman LM *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (2009).

The structure of this chapter is as follows. In section 5.2, I first discuss the constitutional recognition of testamentary freedom (referred to as ‘testamentary disposal’) in the United States Constitution. Thereafter, in section 5.3, I discuss the recognition of freedom of testation in Germany in Article 14 of the German Basic Law (‘the German property clause’). Through an analysis of each jurisdiction, I pay specific attention to the text of their respective property clauses as well as their general constitutional approach to the tension between protection of individual testation and limitations in the public interest. I leave a direct comparison between all jurisdictions for the last chapter.

5.2 FREEDOM OF TESTATION IN THE UNITED STATES

In this section, I describe the constitutional position of freedom of testation in the United States Federal Constitution and its approach to public interest limitations. There is uncertainty whether freedom of testation is a constitutional property right. Notwithstanding this, there are very few limitations on a testator’s power to distribute their property after death.

a) Is freedom of testation a constitutional right?

The United States Federal Constitution does not explicitly protect the right to dispose of property death, otherwise referred to as ‘freedom of disposition’. Property is protected and regulated generally through the Fourteenth Amendment (due process clause) and the Fifth Amendment (takings clause).⁹⁰ The unified textual treatment of

⁹⁰ See full quotation below.

the protection of property in the South African⁵⁹² and German⁵⁹³ constitutional property clauses is contrasted to the disjointed textual treatment of property in the United States Constitution.⁵⁹⁴ The ‘due process clause’ provides that the State shall not ‘deprive any person of life, liberty, or property, without due process of law.’⁵⁹⁵ The ‘takings clause’ provides that no person shall be ‘deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.’⁵⁹⁶ The question, similar to the South African Constitution, is whether the word ‘property’ embraces all the incidents of property ownership, including the right to dispose of property by will or trust deed. The answer lies in other statute and case law authority.

(i) *The Statute of Wills, 1540*

The recognition of free disposition in Anglo-American legal tradition dates back to 1540 with the enactment of the Statute of Wills in England⁵⁹⁷, which recognises the right of testamentary disposal as follows:

⁵⁹² See chapter 2, § 2.3 a).

⁵⁹³ See § 5.3 c) below.

⁵⁹⁴ G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) at 99-100.

⁵⁹⁵ Section 1 of the Fourteenth Amendment (1868) states: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

⁵⁹⁶ The Fifth Amendment (1791) states: ‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.’ See further AJ Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) at 399-403. Like the South African property clause (and unlike the German one), the protection of property is phrased negatively, which is in line with idea that fundamental civil rights should act as a defensive guard against undue state interference.

⁵⁹⁷ Statute of Wills 1540. 32 Hen. VIII c.1; *Statutes of the Realm*, vol III, p. 7 (untr.).

‘That all and every person and persons having, or which hereafter shall have, any manors, lands, tenements or hereditaments ... *shall have full and free liberty, power and authority to give, dispose and devise, as well by his last will and testament in writing* or otherwise by act or acts lawfully executed in his life ...’⁵⁹⁸ (my emphasis)

It is important to acknowledge that free testamentary disposal over land (real estate) only emerged in England with the promulgation of the Statute of Wills. Prior to this point, land was disposed by the rule of primogeniture, which afforded the firstborn son the right to succeed to his father’s land.⁵⁹⁹ The scope of testamentary disposal was limited to movable property, which were administered by the ecclesiastical courts. Disposals of personal movable property were however limited by a compulsory forced share (known in Roman law as *legitim*) in favour of descendants (sons and daughters having an equal share).⁶⁰⁰ As stated above, the Statute of Wills recognised the right to dispose of land by will for the first time in English history. By the seventeenth century, the institution of *legitim* over personal movable property had also fallen into disuse.⁶⁰¹ The effect was that owners in England had wide discretion to dispose of land and personal property to descendants and others by the seventeenth

⁵⁹⁸ Ibid. Section states ‘That all and every person and persons having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in socage or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the king our sovereign lord by knight's service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knight's service from the twentieth day of July in the year of our Lord God 1540 shall have full and free liberty, power and authority to give, dispose and devise, as well by his last will and testament in writing or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding.’

⁵⁹⁹ J Tate ‘Caregiving and the Case for Testamentary Freedom’ (2008) 42 *Public Law and Legal Theory* 129 at 149; and JH Baker *An Introduction to English Legal History* 4th ed. (2002) at 267.

⁶⁰⁰ F Pollock & F W Maitland *The History of English Law Before the Time of Edward 1* (1968) 2nd ed at 350-51; and Tate (2008) op cite at 151.

⁶⁰¹ RH Helmholz *Legitim in English Legal History* (1984) *University of Illinois LR* 659 at 670.

century. This was the general legal position when inheritance law was received into the American colony.⁶⁰²

(ii) *Recognition of testamentary disposition in American common law*

The Statute of Wills was adapted into American law without substantial changes.⁶⁰³ It is clear from a number of judicial pronouncements and academic commentary that the protection of freedom of disposition lies in its close relationship with property ownership as well as the ‘trite’ common law principle that ownership entitles a testator to dispose of their property in any manner they deem fit.⁶⁰⁴ For instance, various court decisions during the nineteenth century have described freedom of disposition as: ‘an incident of ownership’⁶⁰⁵; ‘a property right’⁶⁰⁶; and ‘one of the most sacred rights attached to property’⁶⁰⁷, and as an ‘inherent right.’⁶⁰⁸ In *Kaiser Aetna v United States*, it was recognised that ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.’⁶⁰⁹ In *Hodel v Irving*, the ‘right to exclude’ incorporated the right to dispose of property

⁶⁰² C Priest ‘Creating an American Property Law: Alienability and Its Limits in American History’ (2006) 120 *Harvard LR* 385 394-95 at 441; GL Haskins ‘The Beginnings of Partible Inheritance in the American Colonies’ (1942) 51 *Yale LJ* 1280 at 1280; and C Shamma ‘English Inheritance Law and Its Transfer to the Colonies’ (1987) 31 *American Journal of Legal History* 145 at 153-57.

⁶⁰³ BF Hall *The Land Owner’s Manual* (1847) at 173; J Kent *Commentaries on American Law* (1830) 492-94; JB Thorton *A Digest of the Conveyancing, testamentary and Registry Laws of all the States of the Union* (1854) 58; T Jarman *A Treatise on Wills* (1845) 27-36; E Williams *A Treatise of the Law of Executors and Administrators* (1841) 13; and S L Blumenthal ‘The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America’ (2006) 119 *Harvard LR* 960 at 971.

⁶⁰⁴ This position is similar to South African Constitution, which has recognized freedom of testation based on an implicit relationship with property ownership. Many of the same justifications for testamentary disposal discussed in § 3.2 chapter 3 are equally applicable to U.S. testate succession law.

⁶⁰⁵ *In re Foss’s Estate* 160 Me 214 202 A2d 554 (1964); and *In re Martinson’s Estate* 29 Wash 2d 912 190 P2d 96 (1948).

⁶⁰⁶ *Warren v Sears* 303 Mass 578 22 NE2d 406 (1939); *DiBrell v Morris’s Heirs* 89 Tenn 497 15 SW 87 (1891); *Martin v Stovall* 103 Tenn 1 52 SW2d (1899).

⁶⁰⁷ *Foss’s Estate* supra at 554.

⁶⁰⁸ *Nunnemacher v State* 129 Wis 190 108 NW 627 (1906) at 629-30. The court in *Nunnemacher* also rejected the majority opinion in American inheritance jurisprudence that inheritance is a statutory right that can be abolished by the legislature.

⁶⁰⁹ *Kaiser Aetna v United States* 444 US 164 at 176 (1979).

at death, which was held to be so essential to property ownership that its total abolition would constitute a taking in terms of the fourteenth amendment.⁶¹⁰ In *Hodel*, the United States Supreme Court declared the Indian Land Consolidation Act of 1983 unconstitutional as it abolished the right of Native Americans from disposing of small parcels of land at death.⁶¹¹ It was held that a complete abolition of testamentary disposition without just compensation violates the takings clause.⁶¹²

A number of academic writers have commented on the fundamental importance of testamentary freedom. Glover explains that '[t]estamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession.'⁶¹³ Monopoli further identifies that testamentary disposition is 'frequently identified as paramount jurisprudential touchstones in the area of trusts and estates.'⁶¹⁴ According to Weisbord, '[t]he most fundamental guiding principle of American inheritance law is testamentary freedom – that the person who owns property during life has the power to direct its disposition at death.'⁶¹⁵ Lastly, Sitkoff recognises testamentary disposal 'as a separate stick in the bundle of rights called property'⁶¹⁶ and notes that testate succession in the United States embraces free testation 'to an extent

⁶¹⁰ *Hodel v Irving* 481 US 704 (1987) at 716 [7, 8], 717 [1b, 9]. For academic commentary on this case, see R Chester 'Is the Right to Devise Property Constitutionally Protected? - The Strange Case of *Hodel v. Irving*' (1995) 24 *Sw ULR* 1195-1198. See further, *In re Estate of Malloy*, 949 P.2d 804, 806 (Wash. 1998); A Hirsch 'The Problem of the Insolvent Heir' (1989) 74 *Cornell LR* 587 at 632; Singer JW *Entitlement: The Paradoxes of Property* (2000) at 47.

⁶¹¹ *Hodel* supra at 1198.

⁶¹² *Hodel* supra at 1198.

⁶¹³ M Glover 'A Therapeutic Jurisprudential Framework of Estate Planning' (2012) 35 *Seattle ULR* 427 at 444-45.

⁶¹⁴ P Monopoli 'Toward Equality: Nonmarital Children and the Uniform Probate Code' (2012) 45 *University of Michigan Journal of Law Reform* 995 at 1010 n. 94. See further E Spitko 'Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration' (1999) 49 *Case W Res. LR* 275 at 278.

⁶¹⁵ R Weisbord 'Wills for Everyone: Helping Individuals Opt Out of Intestacy' (2012) 53 *BC LR* 877 at 882-85.

⁶¹⁶ R Sitkoff 'Trusts and Estates: Implementing Freedom of Disposition' (2014) 58 *St Louis ULJ* 643 at 643-44.

that is unique among modern legal systems.’⁶¹⁷ It is clear from these samples of commentators that testamentary disposition is the ‘bedrock principle’⁶¹⁸ of American law of succession. It is perhaps not surprising that the freedom of disposition has been described as a ‘jealously guarded right.’⁶¹⁹

It must be noted that the view that freedom of disposition is an inherent right and an essential stick in the bundle of ownership entitlements is contrasted with various contrary academic and judicial remarks that free testation is a statutory right, which could even be abolished by State legislatures.⁶²⁰ The historical writings of William Blackstone and Thomas Jefferson were very influential in shaping this view. Blackstone famously said with regard to right to devise a testament that ‘[w]e are apt to conceive, at first view, that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom.’⁶²¹ For this reason, he regarded testament as a civil as opposed to a natural right, and remarked that although it is ‘wise and effectual’, it is clearly a ‘political’ right of property.⁶²² As ‘creatures of civil or municipal laws’, he also recognised the authority of the State to regulate testament.⁶²³ Blackstone also controversially believed that death is the natural cut-off for the enjoyment of property wherein ‘[a]ll property must ... cease upon death.’⁶²⁴ According to Blackstone:

⁶¹⁷ Ibid at 643-44. Compare with Corbett MM, Hofmeyer G, & Kahn E *The law of Succession in South Africa* (2001) at 40 in South African context.

⁶¹⁸ M Glover ‘A Social Welfare Theory of Inheritance Regulation’ (2018) 2 *Utah LR* 411 at 414.

⁶¹⁹ *American Committee for the Weizmann Institute of Science v Dunn*, 883 NE.2d 996 at 1002 (N.Y. 2008).

⁶²⁰ Chester (1995) op cit at 1195-96; Glover (2018) op cit at 288; AJ Hirsh & WKS Wang ‘A Qualitative Theory of the Dead Hand’ (1992) 68 *Indiana Law Review* 1 at 6-7.

⁶²¹ W Blackstone *Commentaries on the Law of England* (1765) at 10.

⁶²² Ibid at 10-13.

⁶²³ Ibid at 10-13.

⁶²⁴ Ibid at 12.

‘[T]here is no foundation in nature or in natural law why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.’⁶²⁵

Thomas Jefferson also notably stated that “the earth belongs in usufruct to the living;” that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society.’⁶²⁶ The basis of this positive conception is not that testation should not be protected but rather that as a right created by law, the State is authorised to regulate it for the public good.

This positive law conception has been recognised in various court decisions. The court in *Dillard v New Mexico Tax Commission* which stated that ‘[n]o one has a vested interest in property after death. The power of disposition during his lifetime, to become effective after his death, may be given or taken away, at the will of the legislature.’⁶²⁷ The court in *Sturgis v Ewing*⁶²⁸ even went so far as to say that the right to dispose was considered to lapse at death. The basis for protection of property according to the court was the physical ability to ‘posses, control or enjoy’ property, wherein after we can determine what happens to what we have acquired. Taking a strong Blackstonian view, the court in *Sturgis v Ewing* held that: ‘As mortals we then cease to be, and all connection with earth and our acquisitions terminates.... When we acquire property, we do not acquire with it, and as a part of it, the right to devise it in

⁶²⁵ Blackstone (1765) op cit at 2.

⁶²⁶ Letter to James Madison by Thomas Jefferson,– *The Papers of Thomas Jefferson* 392-93 (J Boyd ed 1958).

⁶²⁷ *Dillard v New Mexico Tax Commission* 53 NM 12 21 201 P2d 345 351 (1944).

⁶²⁸ *Sturgis v Ewing* 18 Ill 176 (1856).

any particular mode, or even to devise it at all.’⁶²⁹ This has caused a number of American academics to argue that the enjoyment of property ends at death, and thus there is nothing objectionable in abolishing or imposing strict limits on inheritance without defeating the freedom that property owners enjoy while alive.⁶³⁰ This was confirmed in *Heckler v. United Bank of Boulder*, which held that ‘right to testamentary disposition and the right to succession by will of property within the jurisdiction of a state exists only by statutory enactment by such state so providing and may be regulated, limited, conditioned, or wholly abolished by such state.’⁶³¹

The view that testamentary disposition is not a constitutional but merely a statutory right has been confirmed by a number of courts seized with inheritance tax issues. The United States Supreme Court has, as early as 1850, expressed the opinion that an inheritance tax is ‘nothing more than an exercise of the power which every state and sovereignty possesses.’⁶³² In *Magoun v Illinois Trust & Savings Bank*, it was stated that ‘the right to take property by devise or descent is the creature of the law, and not a natural right – a privilege, and therefore is the authority which confers it may impose conditions upon it.’⁶³³ The United States Supreme Court confirmed this position half a century later in *Irving Trust Co v Day*, by noting that the rules of succession are creation of statutes and therefore nothing prevented the legislature from limiting, conditioning or even abolishing the power of testamentary disposition.⁶³⁴ State courts have confirmed this view. In *Eyre v Jacobs* the court went as far as to say that if the legislature wished ‘absolutely repeal the statute of wills ...

⁶²⁹ *Sturgis* supra. See further DJ Kornstein ‘Inheritance: A Constitutional Right?’ (1983) 36 *Rutgers LR* 741 at 766-7, 789-91; DW Haslett ‘Is Inheritance Justified?’ (1986) 15 *Philosophy & Public Affairs* 122.

⁶³⁰ Kornstein (1983) op cit at 769. R Chester *Inheritance, Wealth and Society* (1982) at 12.

⁶³¹ *Heckler v. United Bank of Boulder* 476 F.2d 838, 841 (10th Cir. 1973).

⁶³² *Mager v Grima* 49 U.S. (8 How.) 490, 493 (1850).

⁶³³ *Magoun v Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1897). See further, *Keeney v Comptroller of N.Y.*, 222 U.S. 525, 535 (1912); and *Maxwell v Bugbee*, 250 U.S. 525, 541 (1919).

⁶³⁴ *Irving Trust Co v Day* 314 US 556 562 (1942). See further, *In re Becker's Estate* 263 NYS.2d 22 at 27 (NY Sur 1965); and *Eyre v Jacobs* 55 Va 526 (14 Gratt 422) 1858.

and declare that upon the death of a party, his property shall be applied to pay his debts, and the residue appropriated to public uses.’⁶³⁵ Moreover, in *Fullam v. Brock*, it was confirmed that ‘[t]he right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and it is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by statute.’⁶³⁶

(iii) *Constitutional implications*

While testamentary freedom is clearly an important right either derived from statute and common law protection of ownership, it is not clear that it constitutes ‘property’ for the purposes of due process and takings clauses.⁶³⁷ The opinion whether the right of testamentary disposition is a constitutionally protected right is theoretically relevant for determining the justification for State regulation. If it is protected, any measures that limit freedom of disposition would be subject to the due process and takings clauses. It must be noted that, even despite some contradictory judicial opinions, the practical consequences of testamentary freedom having constitutional protection may not be so significant. This is due to the manner in which the due process and takings clauses are phrased, which makes it clear that even if free testamentary disposal is constitutionally protected, its protection would not be unlimited and State legislature would be empowered to regulate if certain requirements (discussed below) in the due process and takings clauses are met.⁶³⁸

⁶³⁵ *Eyre* supra 1858.

⁶³⁶ *Fullam v. Brock*, 155 S.E.2d 737, 739 (N.C. 1967).

⁶³⁷ See *Foss’s Estate* supra at 554; *In re Martinson’s Estate* 29 Wash 2d 912 190 P2d 96 (1948); Warren supra at 406; *DiBrell* supra 87; Martin supra; *Nunnermacher* supra at 629-30. See Kornstein (1983) op cit at 745, who has reservations as to whether inheritance can be expropriated when the owner is deceased. Compare to South African approach to this topic in chapter 6, § 6.3 e).

⁶³⁸ *Hodel* supra at 717.

There are two types of State regulation of private property, namely its police power (regulation of the use of property in the public interest) and its power of eminent domain (expropriation of property for public purpose).⁶³⁹ With regards to the State's police power, interferences can cause substantial loss to private owners, as long it can be justified by the circumstances and the public interest.⁶⁴⁰ The purpose of the power of eminent domain is to ensure that takings are for a public purpose and accompanied by commensurate compensation, and thus not to inhibit the taking of private property entirely.⁶⁴¹ Due to the emphasis placed on questioning the legitimacy of State interferences (either as police power or eminent domain), there is not much emphasis placed on developing a definition of 'property' in the property clause.⁶⁴² There is also very little inclination to justify property rights. As a result, a very wide meaning has been attributed to conception of property, which has been described by the Supreme Court as extending beyond conventional ownership to 'a broad range of interests.'⁶⁴³ Such interests include acquisition, ownership, use, enjoyment, and transfer.⁶⁴⁴ This is a further indication that the question of whether freedom of testation constitutes a property right may not be as important as in other jurisdictions.⁶⁴⁵ Based on this, the question of whether freedom of disposition is constitutionally protected may not, in the end, be very significant.

⁶³⁹ Van der Walt (2011) op cit at 403.

⁶⁴⁰ See for example *Miller v Schoene* 276 US 272 (1928). See further Van der Walt (2011) op cit at 410-23.

⁶⁴¹ *Dolan v City of Tigard* 114 S Ct 2309 (1994).

⁶⁴² Van der Walt (1999) op cit at 441.

⁶⁴³ *Perry v Sindermann* 408 US 593 601 (1972). See further *Board of Regents v Roth* 408 US 564 571-72 (1972).

⁶⁴⁴ Kornstein (1983) op cit at 768.

⁶⁴⁵ W Stoebuck 'A general theory of eminent domain' (1972) 47 *Wash LR* 553 at 599ff; Van der Walt (1999) op cit at 441.

(iv) *The Restatement (Third) of Property: Wills and Other Donative Transfers*

Despite some differing opinions about its constitutional protection in the due process and takings clauses, it is beyond doubt that freedom of disposition plays a centring role in contemporary American testate succession.⁶⁴⁶ This role is captured in the American Restatement (Third) – regarded as non-binding persuasive collections of case law principles and rules – which confirms that:

‘The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.’⁶⁴⁷

While its recognition in the Restatement only has persuasive value in the common law, its reference to testamentary freedom as the ‘organizing principle’ speaks volume to its functional importance in American succession law. The fact that it refers to the principle in the singular is also very telling as it centres all focus on individual freedom. In more recent times, the Court in *Cantrell v Cantrell*⁶⁴⁸ has stated that ‘[a] fundamental principle of the law of wills is that a testator is entitled to dispose of the testator's property as he or she sees fit, regardless of any perceived injustice that may result from such a choice.’⁶⁴⁹ The level of protection seems exaggerated, with one court even recognising that ‘[i]f one has the capacity to make a will, then he [sic] may make it as eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate.’⁶⁵⁰ It

⁶⁴⁶ T Gallanis *Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests* (2011) 5th ed.

⁶⁴⁷ The Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1. cmt. c (American Law Institute 2003) (‘The Restatement (Third) of Property’). See further Weisbord (2012) op cit at 882-85.

⁶⁴⁸ *Cantrell v Cantrell* No. M2002- 02883-COA-R3-CV, 2004 WL 3044907 at 5 (Tenn. Ct. App. Dec. 30, 2004).

⁶⁴⁹ See furthermore Weisbord (2012) op cit at 882-85.

⁶⁵⁰ *Hiler v Cude* 455 S.W.2d 891, 899 (Ark. 1970).

would seem that the subjective (even if wild and egoistic) schemes of testators have become an acceptable point of reference for the enforcement of wills.⁶⁵¹ The high value placed on testamentary freedom is especially significant when I discuss the various forms of limitations on testamentary disposal below.

b) Limitations on freedom of testation

It is necessary to consider how the absence of a clear constitutional protection of freedom of testation has impacted the types of restrictions imposed on wills and trusts. As will be shown below, there are very few limitations on the manner in which testators are allowed to dispose of property on death due the high level of protection afforded to free disposition by various State courts. This, however, does not seem to stem from a reluctance to intrude on a constitutional right, but rather from widespread recognition of the fundamental importance of free testamentary disposal to American testate succession law.⁶⁵²

(i) The general rule for limitations

As is the case in every succession law system, freedom of disposition in the United States is not absolute. To the extent that there are limitations, the Restatement (Third) of Property explains that '[t]he main function of the law [of testate succession] ... is to facilitate rather than regulate.'⁶⁵³ American legal scholars understand this passivity in the role of testate succession law to mean that the main function is to enhance or

⁶⁵¹ S Kreiczler Levy & M Pinto 'Property and Belongingness: Rethinking Gender-Based Disinheritance' (2011) 1 *Texas Journal of Women and the Law* 21 119 at 121.

⁶⁵² This is one of the noteworthy differences between South African and United States approach to testate succession. See chapter 6, § 6.2 a).

⁶⁵³ The Restatement (Third) of Property. See Sitkoff (2014) op cit at 644.

maximise individual testamentary freedom.⁶⁵⁴ A passive regulatory role certainly accords with the prevailing understanding of the role and function of testate succession in American legal tradition. This is particularly evident in the judicial role in the interpretation and enforcement of wills. Like the golden rule of interpretation explained in the South African case of *Robertson*⁶⁵⁵, as explained by the Supreme Court of Mississippi in *Deposit Guarantor National Bank of Jackson v First National Bank of Jackson*:⁶⁵⁶ ‘[t]he paramount and controlling consideration [of will interpretation] is to ascertain and give effect to the intention of the testator.’⁶⁵⁷ This judicial mandate is also affirmed in the Unified Probate Code, which states that ‘the testator’s intention controls the legal effect of his or her disposition’⁶⁵⁸, as well as in the Restatement (Third), which states ‘[t]he controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.’⁶⁵⁹ The testator’s intention is ascertained from the ‘clear, definite, and unambiguous’⁶⁶⁰ language of the will. Once this is ascertained, ‘the court must give effect to the language its clear import.’⁶⁶¹ The general function of testate succession thus shows a clear superiority of testators’ rights over other rights and interests in the distribution of property after death.

⁶⁵⁴ Glover (2018) op cit at 412; Kelly (2013) op cit at 1135; M Glover ‘Freedom of Inheritance’ (2017) *Utah LR* 283 at 288-92; The Restatement (Third) of Property. See further A Newman ‘Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative (2000) 49 *Emory LJ* 487; and G McCouch ‘Who Killed the Rule Against Perpetuities?’ (2013) 40 *Pepp LR* 1291.

⁶⁵⁵ See chapter 3, § 3.4.

⁶⁵⁶ *Deposit Guarantor National Bank of Jackson v First National Bank of Jackson* 352 So. 2d 1324, 1327 (Miss. 1977).

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Unified Probate Code § 2-601 (amended 2010).

⁶⁵⁹ The Restatement (Third) of Property.

⁶⁶⁰ *Bullard v Bullard* 97 So. 1 2 (Miss. 1923). See further in *In re Estate of Cole* 621 N.W. 2d 816 818 (Minn. Ct. App. 2001), where it was held that: ‘[T]he court is to avoid doing any violence to the words employed in the instrument and to distrust the reliability of looking to sources outside the instrument for information about its meaning.’

⁶⁶¹ *Bullard* supra at 2. See further *Tinnin v First United Bank of Miss* 502 So. 2d 659 663 (Miss. 1987). Friedman refers to testamentary intent as ‘the sole, authentic voice of a man who is dead.’ Friedman (1966) op cit at 374.

Similar to South Africa⁶⁶², in the United States, the superiority of testamentary freedom as an organising principle in testate succession is replicated through the number of conditions that a testator can impose on inherited property.⁶⁶³ This is reflected in both the ‘normal’ (i.e. not unlawful) conditions that a testator can impose on bequests as well as in cases that where testamentary conditions test the limits of legality and public policy.⁶⁶⁴ The general rule for conditional bequests in the United States is that testators ‘should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees.’⁶⁶⁵ Scalise Jr has commented that the ‘range of conditions is as great as are the people who make them.’⁶⁶⁶ The Colorado Supreme Court has stated in *Breeden v Stone* that the scope of testamentary power is that ‘a testator “may dispose of his property as he pleases, and that [he] may indulge his prejudice against his relations and in favor of strangers, and that, if he does so, it is no objection to his will.”’⁶⁶⁷

Courts are not afforded the general authority to question testamentary disposals provided that these do not offend public policy.⁶⁶⁸ The general passivity of courts to

⁶⁶² See chapter 3, § 3.3 c) (i) and (ii).

⁶⁶³ Waldron refers to ownership as the ‘organizing idea’. See J Waldron *The Right to Private Property* (1988) at 60.

⁶⁶⁴ For a comparison to South Africa, see chapter 3, § 3.3 c) (i) and (ii).

⁶⁶⁵ *Ransdell v Boston* 50 NE 111 at 114 (111. 1898). See further, *In re Estate of Gehrt* 480 NE2d 151 151 (111A. pp. 1985). Conditions can be either ‘precedent’ or ‘subsequent’. A ‘condition precedent’ is a when condition vests upon an event occurring or not occurring. A ‘condition subsequent’ is when an estate which has already vested depends upon further on an event happening or not happening. See W J Bowe & D H Parker *Page on the Law of Wills* (1901) 488 (The W.H. Anderson Co. 2005).

⁶⁶⁶ R Scalise Jr ‘Public Policy and Antisocial Testators’ (2011) 32 *Cardozo LR* 1315 at 1316. See further RF Storrow ‘Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction’ (2005) 56 *Case W Res. LR* 65 at 100.

⁶⁶⁷ *Breeden v Stone* 992 P2d 1167 1170 (Colo. 2000) (quoting *Lehman v. Lindenmeyer*, 48). Colo. 305, 313 (1909)). In Georgia, it was held that a testator ‘may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused.’ Georgia Code Ann § 113-106 (1959). The Illinois Supreme Court in *Ransdell* supra at 114 stated that ‘it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees.’

⁶⁶⁸ See *Shelton v. King*, 229 U.S. 90, 100 (1913). Which held that ‘there is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to public policy.’ See further, *Harris Tr. & Say. Bank v. Donovan*, 582 N.E.2d 120, 123 (Ill. 1991); and *In re*

invalidate testamentary restrictions demonstrates a strong public policy commitment towards giving effect to the intent of the deceased as an expression of testamentary freedom.⁶⁶⁹ The Restatement (Third) states that ‘American law does not grant courts any general authority to question the, wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.’⁶⁷⁰ In *In re Rahn's Estate*, the Court noted that testamentary restrictions should only be invalidated as against public in only very clear circumstances, noting that:⁶⁷¹

‘[N]o act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.’⁶⁷²

While testate succession law in the United States is functionally deferential to individual testamentary disposition, it does impose certain limitations discussed in the next section, for instance, by requiring certain transfers to surviving spouses and dependent minor children and prohibiting illegal bequests.⁶⁷³ Limitations are imposed in an effort to balance conflicting respect for the testator's freedom and public policy considerations, including ‘dead hand control’, equal protection, and the rule of law.

Estate of Matthews, 948 N.E.2d 187, 191 (Ill. App. Ct. 2011). This is similar to South Africa, see chapter 3, § 3.4.

⁶⁶⁹ Gulliver & Tilson (1941) op cit at 2. See further, Glover (2018) op cit at 417.

⁶⁷⁰ The Restatement (Third) of Property. See further, R Madoff *Immortality and the Law: The Rising Power of the American Dead* (2010) at 6-7 (New Haven: Yale University Press).

⁶⁷¹ See similar remark by Bozalek J in *King v de Jager* 2017 JDR 1321 (WCC) at para 43.

⁶⁷² *In re Rahn's Estate*, 291 S.W. 120, 123 (Mo. 1926). This view of public policy was confirmed in *Muschany v. United States*, 324 U.S. 49, 66 (1945).

⁶⁷³ Glover (2018) op cit at 413. Unified Probate Code § 2 – 201 (as amended); J Dukeminier & R Sitkoff *Wills, Trusts, and Estates* (2013) 9th ed at 512-6.

These limitations can be divided into those of a public nature involving State action and common law principles of public policy. Below, I discuss the various types of limitations on testamentary bequests to provide a taste of the extent to which freedom of disposition is enforced in American testate succession law.

(ii) *The state action doctrine and the Equal Protection Clause*

Discriminatory testamentary bequest can be scrutinised under the Equal Protection Clause (the Fourteenth Amendment) if State action is involved. This follows the landmark 1948 Supreme Court decision in *Shelley v Kramer* that established the State action doctrine, in terms of which a racially discriminatory residential housing covenant was invalidated on the grounds that the State is prohibited from unequal treatment.⁶⁵⁴ In the testate succession context, according to this doctrine, the Equal Protection Clause is applicable if State agency or a public official is involved in administering or enforcing the terms of the public trust.⁶⁵⁵ For instance, the Supreme Court has invalidated the creation of a trust for a school for ‘poor white male orphans’ where the City of Pennsylvania acted as a trustee.⁶⁵⁶ Similarly, in *Evans v Newton*⁶⁵⁷, a

⁶⁵⁴ *Shelley v Kramer* 334 U.S. 1 (1948).

⁶⁵⁵ For a comprehensive overview of the state action doctrine applied to trusts, see FW Roisman ‘The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers’ (2002) 53 *Alabama LR* 463 (2002); KF Voyer ‘Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts’ (1999) 7 *William & Mary Bill Rights Journal* 943; AS Klein ‘Annotation, Validity and Effect of Gift for Charitable Purposes which Excludes Otherwise Qualified Beneficiaries Because of their Race or Religion’ (1969) 25 *Alabama LR* 736; E Clark ‘Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard’ (1957) 66 *Yale LJ* 979 980-81; M Galston ‘Public Policy Constraints on Charitable Organizations’ (1984) 3 *VA. Tax Review* 291 302; R Adams ‘Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions’ (1976) 25 *Cleveland ST. LR.* 1 8-10; G S Alexander ‘The Dead Hand and the Law of Trusts in the Nineteenth Century’ (1985) 37 *Stanford LR* 1189 1241.

⁶⁵⁶ *Pennsylvania v Board of Directors* 353 U.S. 230, 231 (1957). In *Coffee v. William Marsh Rice University* 408 S.W.2d 269, 271 (Tex. Civ. App. 1966), a scholarship for ‘the instruction of the white inhabitants of the City of Houston, and State of Texas’ was invalidated, not on the basis of the Fourteenth Amendment, but public policy considerations. Compare with *Moore v City of Denver* 292 P.2d 986 (Colo. 1956) where a trust for the benefit of ‘poor, white male orphans’ was upheld with no

State Senator bequeathed land to a local municipality ‘to be used “as a park and pleasure ground’ for white people only.”⁶⁷⁵ This, too, was invalidated, as it required the involvement of the State in the public domain and thus subject to the Equal Protection Clause that prohibited the State from discriminating on the grounds of race.⁶⁷⁶ After this decision, the City of Pennsylvania was later removed as a trustee and replaced by private trustees, and the entire trust terminated on the grounds that the original purpose was to ensure racial segregation, which could obviously not be achieved if the park was accessible to all races.⁶⁷⁷ This decision was again challenged but the Supreme Court held that the State action doctrine no longer applied.⁶⁷⁸ A contrary decision was arrived at in *Milford Trust Co. v. Stabler*⁶⁷⁹, which involved a trust created for the benefit of ‘white boys and girls’ to attend a public school, even though trust itself did not require government involvement.⁶⁸⁰

The Equal Protection Clause, however, does not prohibit private forms of discrimination in private trusts.⁶⁸¹ There are a host of decisions where discriminatory bequests – for instance to ‘poor, white male orphans’⁶⁸²; ‘deserving, white, male, Protestant student[s]’⁶⁸³; and for ‘the maintenance, support and care of sick and infirm patients in said [“Protestant Christian” non-profit] Hospitals, born of white parents in

assessment of state action involved in administration of trust. The same outcome was reached in *Bank of Delaware v Buckson* 255 A.2d 710 (Del. Ch. 1969), wherein a trust for ‘white youths or young men’ residing and attending high school in Wilmington, Delaware, administered by a committee with a representative of the state, was invalidated using general public policy principles than on the state action doctrine. See further, *Dunbar v Board of Trustees* 461 P.2d. 28 (Colo. 1956).

⁶⁷⁵ *Evans v Newton* 382 U.S. 296 (1966).

⁶⁷⁶ *ibid* at 297.

⁶⁷⁷ See further *In re Potter's Will* 275 A.2d 574, 581 (Del. Ch. 1970) where a trust for ‘poor white citizens’ of Kent County, Delaware was declared to violate the Equal Protection Clause as it authorized the Chancellor of the State of Delaware to sell the testator's residuary real estate.

⁶⁷⁸ *Evans v Abney* 165 S.E.2d 160, 163-64 (Ga. 1968).

⁶⁷⁹ *Evans v Abney* 396 U.S. 435, 439 (1970).

⁶⁸⁰ *Milford Trust Co. v. Stabler* 301 A.2d 534 (Del. Ch. 1983).

⁶⁸¹ *Ibid* at para 537.

⁶⁸² For instance, in *In re Estate of Wilson* 45 N.E.2d 1228 (N.Y. 1983), a trust for the creation of a scholarship to first three top male students not invalid. See *King v South Jersey National Bank* 330 A.2d 1,4 (N.J. 1974) for criticism of the false dichotomy between private and public trusts.

⁶⁸³ *Moore supra* at 986.

⁶⁸⁴ *In re Weaver's Trust* 43 Pa. D. & C.2d 245 (1967).

the United States of America’⁶⁸⁷ – were all upheld as they did not involve State action and thus the application of the Equal Protection Clause.⁶⁸⁸ The rationale is that in these circumstances, the State is not authorising discrimination but merely applying normal trust law that allows private discrimination as an expression of testamentary choice.⁶⁸⁹ Like the South African decision of *BOE Trust Ltd*⁶⁹⁰, there are also circumstances where testators provide alternative bequests in the event that their discriminatory trust bequest are challenged. For instance, in *Connecticut Bank & Trust Co. v Johnson Memorial Hospital*⁶⁹¹, the testator created a trust to fund a private hospital room to ‘be used only by patients who are members of the Caucasian race’⁶⁹² but directed, in the alternative, that the fund form part of the residue of the estate ‘if by their terms said trusts either violate any law or are not effective due to a lack of sufficient directions.’⁶⁹³ The court was obliged to give effect to the alternative provision and not entertain the challenge to the racist bequest on account of the hospital refusing to administer the trust.⁶⁹⁴

It should be noted that courts often use other trust principles, like the doctrine of *cy prés* or deviation, to delete or vary discriminatory trust provisions for purely private trust that do not involve State action.⁶⁹⁵ The application of these doctrines

⁶⁸⁷ *First National Bank of Kansas City v Danforth* 523 S.W.2d 808 (Mo. 1975).

⁶⁸⁸ For a comparison with South Africa, see chapter 3, § 3.5.

⁶⁸⁹ *Estate of Wilson* supra at 1228.

⁶⁹⁰ See chapter 3, § 3.3 c) (ii) for a discussion of *In re BoE Trust Ltd NO and Others* 2013 (3) SA 236 (SCA).

⁶⁹¹ *Connecticut Bank & Trust Co. v Johnson Memorial Hospital* 294 A.2d 586 (Conn. Super. Ct. 1972).

⁶⁹² *Ibid* at para 588.

⁶⁹³ *Ibid* at para 591.

⁶⁹⁴ See further, *Home for Incurables of Baltimore City v Univ. of Md. Med. Sys. Corp.* 743 A.2d 245 (2000).

⁶⁹⁵ Discriminator trust bequests can also be varied or deleted from a trust deed using the *cy prés* doctrine, which holds that: ‘If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.’ In terms of the deviation doctrine: ‘The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not

entails an assessment as to whether a specific discriminatory trust bequest is impossible or illegal but still compatible with the overall trust deed. If a racist or gender discriminatory bequest does not render the entire trust illegal or impossible to implement, a court will delete the specific word ‘white’ or ‘male’ to enable the trust to operate more widely.⁶⁹⁶ Usually courts use these devices because it provides a more acceptable middle ground between leaving discriminatory trust intact and applying constitutional law remedies.⁶⁹⁷

The line between what constitutes a private and public trust and when the State facilitates or acquiesces to discriminatory bequests in State trust law seems very blurred and indeterminate.⁶⁹⁸ This is especially complicated when a court adjudicates disputes arising from trust provisions, and relies on ‘normal principles of construction’⁶⁹⁹ applicable to ‘neutral and non-discriminatory state trust laws’⁷⁰⁰ to frame and interpret the testator’s wishes. Voyer argues that the State is involved in the administration of trusts as courts (as an arm of the State) routinely appoint trustees,

anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust. See Restatement (Second) of Trusts § 381 (1959).

⁶⁹⁶ A list of cases wherein offensive words were removed using the *cy pres* or deviation doctrines, include: *Bank of Delaware* supra – ‘white youths or young men’; *Dunbar* supra – ‘poor, white, male orphans between the ages of 6 and 10’; *Wooton v Fitz-Gerald* 440 S.W.2d 719 (Tx. Civ. App. 1969) – ‘for a home for aged white men in Midland Co., Texas’; *Potter’s Will* supra – ‘poor white citizens’ of Kent County, Delaware even though the court held that the trust provision violated the Equal Protection Clause; *Wachovia Bank & Trust Co. v Buchanan* 346 F. Supp. 665 (D.D.C. 1972) – ‘white boys and girls who reside in Alamance County’ to attend the University of North Carolina; *Lockwood v Killian* 425 A.2d 909 (Conn. 1979) – ‘caucasian boys graduating from high schools in Hartford County who profess themselves to be Protestant Congregationalists’; *Tinnin* supra – ‘make loans to students of a state college or university of and operated by the State of Mississippi, who are found worthy and who are of the Caucassian [sic] race and to none other’; and lastly, *Hermitage Methodist Homes of Virginia v Dominion Trust Co.* 387 S.E.2d 740 (Va. 1990) – a trust created for creation of private school, called the Prince Edward School Foundation, on condition that ‘[s]o long as [it] . . . admits . . . only members of the White Race’ intended so that whites can avoid attending desegregated schools.

⁶⁹⁷ For an overview of cases where this doctrine was applied to racist trusts, see Roisman (2002) op cit at 484-501; A M Johnson Jr. & R D Taylor ‘Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation’ (1989) 74 *Iowa LR* 545 584.

⁶⁹⁸ See *Shelley* supra; and *Shapiro v Columbia Union National Bank & Trust Co.* 576 S.W.2d 310, 318 (Mo. 1978). For further criticism, see Kreiczler-Levy & Pinto (2011) op cit at 121; and Roisman (2002) op cit at 484-501.

⁶⁹⁹ Evans supra at 296.

⁷⁰⁰ Ibid.

adjudicate and enforces trust provisions, which authorises trustees to act on discriminatory bequests.⁷⁰¹ Despite a 1948 Supreme Court decision *Shelley v Kramer*⁷⁰² that judicial enforcement of private residential covenant does involve State action, the prevailing view is that the judicial interpretation of a trust does not arise to the level of State action required to succeed on an Equal Protection Clause challenge.⁷⁰³ In sum, the application of the State action doctrine to testamentary bequests has significantly limited scope. It is merely applicable when a public agency or official implements trusts and would not be applicable to private discrimination.

(iii) *'Dead hand control' and public policy considerations*

It is generally accepted that testamentary wishes, made privately and with no State involvement, will only be enforced if they are not against public policy.⁷⁰⁴ There is no exact definition of public policy, but like in South Africa (and other jurisdictions), it has been referred to as 'the unwritten common concerns and values of the people'⁷⁰⁵ as embodied in 'all Constitutions, statutes, and judicial decisions.'⁷⁰⁶ A persistent public concern in American inheritance law is that testators will manipulate the conduct and behaviour of heirs after death. The spectre of 'dead hand control' or 'ruling from the

⁷⁰¹ Voyer (1999) op cit at 946-47.

⁷⁰² *Shelley* supra.

⁷⁰³ *Home for Incurables of Baltimore City* supra at 245.

⁷⁰⁴ The United States Supreme Court in *United States v. Trans-Missouri Freight Association* 166 U.S. 290 340 (1897). See chapter 5, § 5.3 b) (i) for a similar position in Germany.

⁷⁰⁵ C T Elmore 'Public Policy or Political Correctness: Addressing the Dilemma of Applying Public Polity to Inheritance Issues' (2009) 2 *Estate Planning & Community Property Law Journal* 1 199 at 214.

⁷⁰⁶ *Pittsburgh v Kinney*, 115 N.E. 505, 507 (Ohio 1916), the court held that: 'Public policy is the cornerstone - the foundation - of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them.' *Black's Law Dictionary* 1267 (8th ed. 2004) defines public policy as the 'principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.'

grave' is a common rhetorical consideration for limiting some overbroad testamentary restrictions.⁷⁰⁷

Despite the potential that public policy has to control testamentary power, it must be emphasised that testate succession is functionally deferential to testamentary wishes. The Restatement (Third) describes the role of limitations as restrictions on 'freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.'⁷⁰⁸ Certain general restrictions (discussed below) are then further defined in a non-exhaustive list, which include: 'spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.'⁷⁰⁹ Thus, while it is clear a strong adherence to testamentary freedom is opposed by various limitations that attempt to curb 'dead hand' control,⁷¹⁰ at the same time, the true character of testamentary freedom should be measured by the scope afforded to testators to distribute property privately, without the involvement of the State.

(iv) A near absolute right to disinherit

The first public policy restriction that I discuss is the absence of a restriction to provide financially for family members. With the exception of the State of Louisiana, there is no legal impediment to disinheriting family members. The natural implication

⁷⁰⁷ The Restatement (Third) of Trusts § 29 (2003) cmt. c (American Law Institute 2003).

⁷⁰⁸ The Restatement (Third) of Property. The term 'rule of law' is used broadly to mean 'rules and principles derived from the U.S. Constitution, a state constitution, or public policy; rules and principles set forth in federal or state legislation or in municipal ordinances; rules and principles of the common law and of equity; and rules and principles contained in governmental regulations.'

⁷⁰⁹ The Restatement (Third) of Trusts § 29 (2003) cmt. c (American Law Institute 2003).

⁷¹⁰ *In re Estate of Feinberg* 919 NE2d 888 (Ill. 2009) at 894.

for endorsing freedom of testation is that testators can disinherit family members for ‘any reason or no reason.’⁷¹¹ In *Shapira v Union National Bank*, the Ohio Court held that ‘[i]t is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children.’⁷¹² In *Sloger v Sloger*, it was held that ‘[t]he fact that the testator's property was divided unequally between those presumably having a claim on his bounty may be attributed to any number of reasons, either fair or unfair.’⁷¹³ While the most common way for a parent to disinherit a child is merely to not include them in the terms of the will, it has been recognised that a parent can disinherit a child for discriminatory reasons, if they wish to do so. In *Clapp v Fullerton*, the court noted that ‘[t]he right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning.’⁷¹⁴

An express disinheritance is also final. With the exception of the State of Louisiana, no other State allows a disinherited descendent a claim against the deceased estate.⁷¹⁵ The power to disinherit does not however extend to surviving spouses, which many States recognize as a special class.⁷¹⁶ Without confirming that this was a testator’s constitutional entitlement, it is certainly generally acknowledged that the ‘rule allowing disinheritance of descendants extends this concept of absolute

⁷¹¹ Tate (2008) op cit at 137. The rule with regards to disinheritance is subject to the limitation that a child is born or adopted after a will is made has a claim as a ‘pretermitted’ (overlooked) child if the testator failed to make such provision. See Uniform Probate Code § 2-302 (1990). See § 5.3 b) (ii) below for a comparison with Germany.

⁷¹² *Shapira* supra at 825. In this case a testator conditioned the inheritance for his son only if he had married to a Jewish woman at the time of the testator's death, or if the son married a Jewish woman within seven years of the testator's death. This condition was held as not against public policy. See further *In re Silverstein's Will*, 155 N.Y.S.2d 598 (1956), *Gordon v Gordon*, 124 N.E.2d 228 (Mass. 1955) for similar conclusions in different states.

⁷¹³ *Sloger v. Sloger*, 186 N.E.2d 288, 290 (Ill. 1962). See further *In re Liberman*, 18 N.E.2d 658, 660 (N.Y. 1939).

⁷¹⁴ *Clapp v Fullerton* 34 N.Y. 190, 197 (1866).

⁷¹⁵ Tate (2008) op cit at 137.

⁷¹⁶ This protection is in the form of reserving a portion of the communal estates called, which is referred to generally as ‘Elective-Share Statutes’. See Tate (2008) op cit at 137; and T L Turnipseed ‘Why Shouldn’t I Be Allowed to Leave My Property to Whomever I Choose at Death? (or How I Learned to Stop Worrying and Start Loving the French)’ (2006) 44 *Brandeis LJ* 737 at 739-40.

ownership beyond the grave, favoring the right of the individual owner over familial responsibilities.⁷¹⁷

(v) *Bequests to control beneficiary's behaviour, especially conjugal choices*

Testators often attempt to control or influence the behaviour of beneficiaries by imposing certain conditions on bequests. The Restatement (Third) proscribes certain restraints on testamentary disposal, which reflect a desire to limit this form of abuse. At a general level, a testator may not make a testamentary disposal that encourages illegal conduct, for instance a bequest on condition that person X kills person Y.⁷¹⁸ While a testator may bequeath property to a convicted murderer, any bequest that conditions illegal activity will be unenforceable.⁷¹⁹ By far the most common example of testamentary conditions is disposals that interfere with conjugal choices.⁷²⁰ Such bequest can either be in the form that limits the heirs ability to marry⁷²¹ or because it encourages divorce.⁷²² An example of a complete restraint is where a testator bequeaths

⁷¹⁷ Tate (2008) op cit at 160. For criticism, see D Batts 'I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance' (1990) 41 *Hastings LJ* 1197 at 1197-98.

⁷¹⁸ The Restatement (Third) of Property; Unified Probate Code §§ 2-901 to -902, 8 U.L.A. pt. I, at 465-66; Glover (2018) op cit at 426; Dukeminier & Sitkoff (2013) op cit at 12.

⁷¹⁹ See Glover (2018) op cit at 426; and Kelly (2013) op cit at 1162.

⁷²⁰ For cases that invalidated complete prohibitions on marriage, see *Mahar v O'Hara* 9 Ill 424 (1847); *Maddox v Maddox* 52 Va 804 (1854); and *Glass v. Johnson*, 130 N.E. 473, 474 (Ill. 1921). See the following cases where a time constraint was imposed on marriage, see *Estate of Gehrt* supra; *Succession of Ruxton* 78 So 2d 183 (La. 1955). See cases where testator intended to encourage or prohibit marriage to a particular person or type of person: See, e.g. *Taylor v Rapp* 124 SE2d 271 (Ga. 1962); *Estate of Feinberg* supra. Lastly where divorced was made conditional on receiving a bequest, *In re Estate of Gerbing* 337 NE2d 29 (Ill. 1975). In the past, various States had legislation that prohibited inter-racial marriages. See P Sptkard *Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America* (1989) at 374.

⁷²¹ Dukeminier & Sitkoff (2013) op cit at 11-12; Glover (2018) op cit at 426; M Begleiter 'Taming the "Unruly Horse" of Public Policy in Wills and Trust' (2012) 26 *Quinnipiac Probate LJ* 125 at 127-28. According to Dukeminier & Sitkoff, this rule is subject to the exception that 'provision that is meant to provide support in the event of separation or divorce is valid.' (ibid at 12).

⁷²² Dukeminier & Sitkoff (2013) op cit at 12; Glover (2018) op cit at 426; and Singer (2000) op cit at 49.

property on condition that a beneficiary never marries.⁷²³ These bequests are generally contrary to public policy because it disrupts or interferes with familial bonds and interferes with the right to marriage.⁷²⁴

The wide scope of testamentary disposal is however evident in the types of partial restraints of marriage upheld by various courts. As a general rule, a partial restraint is not invalid, as it does not unreasonably restrict the freedom to choose a spouse.⁷²⁵ These include instances where a testator imposes a time limit on marriage or re-marriage. The enquiry into whether a condition partially restrains marriage or remarriage is an objective one and assessed using a reasonableness standard.⁷²⁶ According to the Restatement (Third), the likelihood of a condition restraining marriage is a factual question to be assessed from the circumstances of the case.⁷²⁷ In such an enquiry, courts investigate the circumstances of the restraint, the manner in which the condition is employed, the relationships involved, and the purpose sought to be achieved by the restraint.⁷²⁸ Courts will also generally look at whether the restraint unreasonably limits the pool of available spouses in determining whether the limitation is complete or partial.⁷²⁹ In each case, the Courts have to balance conflicting public policy commitments towards giving effect to testamentary wishes, as a necessary incident of an owner's right to property, and the general desire to limit the impact that overzealous bequests have on the choices of beneficiaries. There are

⁷²³ In *Watts v. Griffin*, 50 S.E. 218, 220 (N.C. 1905) a condition that a beneficiary may not marry 'common women' was regarded as invalid as a general restraint on marriage.

⁷²⁴ *Dukeminier & Sitkoff* (2013) op cit at 12; *Watts* supra at 219; *Glass* supra at 474; and *Loving v Virginia* 388 U.S. 1, 12 (1967).

⁷²⁵ *United States National Bank v Snodgrass* 275 P.2d 860, 867-68 (Or. 1954); *Turner v Evans* 106 A. 617, 617 (Md. 1919)

⁷²⁶ E LeFevre 'Annotation, Validity of Provisions of Will or Deed Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith' (1956) 50 *ALR* at 740.

⁷²⁷ The Restatement (Third) of Property; Kelly (2013) op cit at 1171.

⁷²⁸ *Harbin v Judd* 340 S.W.2d 935, 939 (Tenn. Ct. App. 1960); and *Crawford v Thompson* 91 Ind. 266, 273 (1883).

⁷²⁹ For commentary on courts approach, see Scalise Jr (2011) op cit at 1329; and Sherman (1999) op cit at 1273.

various categories of contentious conjugal conditional bequests in the case law, which I briefly describe below.

The first category is where testators make it a condition that a beneficiary obtains the consent from a third party to marry.⁷³⁰ For instance, in *Lieberman*, the testator bequeathed money to his son on condition that his siblings approve of his choice of a proper spouse.⁷³¹ These types of conditions are regarded as against public policy because, as explained in *Lieberman*, ‘the natural tendency ... is to restrain all marriages and for that reason it is void.’⁷³² The second category is where testators impose a time limit to get married or remarried. In *Hall v Eaton*, attempts by parents to prevent their unmarried children from marrying certain named individuals, marrying prior to a certain age or from marrying without consent, were considered valid and enforceable.⁷³³ The time limit is usually to ensure that the descendant reaches an appropriate age to marry⁷³⁴ or to ensure that there is enough financial support until a descendant marries.⁷³⁵ These are however only valid if, in the words of the Illinois Supreme Court, it does not ‘impose perpetual celibacy upon the objects of his bounty.’⁷³⁶ In other words, that it does not impose an absolute restraint on marriage for an unreasonable period of time. The third category is attempts by testators to

⁷³⁰ The Restatement (Second) of Property: Donative Transfers § 6.2 cmt. E (1983) uses the following example to explain this type of testamentary condition: ‘O, by an otherwise effective will, bequeaths \$200,000 to T in trust to pay the income thereof ‘to my daughter D for her life, but if she ever marries without the consent of T, said income shall be paid to my son S for his life.’

⁷³¹ *Lieberman* supra at 659.

⁷³² *Ibid* at 662.

⁷³³ *Hall v Eaton* 631 N.E. 2d 805 (11. App. Ct. 1994). See further, *In re Stone's Estate*, 57 Pa. D. & C. 284, 288-98 (1947).

⁷³⁴ For example, see *Shackelford v Hall* 1857 WL 5691, at 1 (Ill. Dec. 1857), where the will imposed a condition that the beneficiary reach the age of twenty-one to receive the inheritance.

⁷³⁵ See for example, *Mann v Jackson* 24 Atl. 886, 888 (Me. 1892).

⁷³⁶ *Fletcher v Osborn* 118 N.E. 446, 452 (Ill. 1917).

pressurise beneficiaries to divorce their current spouses.⁷³⁷ According to various sources, these conditions are invalid.⁷³⁸

The last category, and certainly the most controversial, is where testators impose conditions that require beneficiaries to marry within a certain religion, race or culture or social class.⁷³⁹ The Restatement (Third) provides a generic category to invalidate these types of bequest if ‘divert distributions or administration from the interests of the beneficiaries to other purposes that are capricious or frivolous.’⁷⁴⁰ There are a host of conflicting case law decisions. I sample a few to illustrate how this category has been dealt by different State jurisdictions. A number of courts have held that these conditions are not against public policy. In *U.S. National Bank of Portland v Snodgrass*, a conditional bequest requiring an heir to refrain from marrying a Catholic man before her thirty-second birthday was upheld as it did not unreasonably restrict freedom of the beneficiary's choice and was not against public policy.⁷⁴¹ Similarly a condition prohibiting marriage to a Scotsman⁷⁴², outside of the Jewish religion⁷⁴³ or outside of the Protestant faith⁷⁴⁴ have all been upheld as valid. Courts have

⁷³⁷ For instance, in *Estate of Gerbing* supra at 31, a father bequeathed property to his son on condition he obtain a divorce and remain divorced for two years). See further, *Mau v Heller* 159 N.W.2d 82, 84 (Wis. 1968).

⁷³⁸ The Restatement (Third) of Trusts § 29 cmt. j (2003), notes that a trust provision may not ‘confer a beneficial interest upon a beneficiary if he or she obtains a divorce or legal separation’. The Restatement (Second) of Property: Donative Transfers § 7.2 (1983) moreover notes that these clauses are ‘invalid where the dominant motive of the transferor was to promote such a separation.’ This was confirmed in *Gerbing* supra at 33.

⁷³⁹ *In re Estate of Keffalas* 233 A.2d 248, 250 (Pa. 1967) where the testator conditioned that his children marry individuals of Greek culture.

⁷⁴⁰ The Restatement (Third) of Property. In *Evans* supra at 302, it was held that bequests that discriminate on the basis of race or another protected category are also invalid.

⁷⁴¹ *Snodgrass* supra at 862. See further, *Lberman* supra at 661, where the Court held that ‘whether a condition in restraint of marriage is reasonable depends, not upon the form of the condition, but upon its purpose and effect under the circumstances of the particular case.’ See *Lasnier v Martin* 171 P. 645 (Kan. 1918); and *Maddox* supra at 804 that held that to conditions to marry within a certain religion was void for uncertainty.

⁷⁴² *Perren v Lyon* (1807), 9 East 170, 103 E. R. 538.

⁷⁴³ *Hodgson v Halford* (1879), 11 Ch. D. 959; *Gordon* supra at 231-33; and *Estate of Feinberg* supra at 891. See *Maddox* supra 817-18 for a contrary outcome that found a testamentary provision requiring a beneficiary to marry a member of a religious society as void. The basis of this decision was that the pool of available spouses was very small.

⁷⁴⁴ *Re Knox* 23 L.R. Ir. 542 (1889).

also upheld testamentary conditions restraining an heir from marrying a person of a lower economic or social class.⁷⁴⁵ In other examples within the familial context, courts have invalidated bequests that interfere with the relationship between a mother and child⁷⁴⁶ and sibling relationships.⁷⁴⁷

The most infamous case law example of a partial restraint on marriage however is that of *In re Feinberg Estate*.⁷⁴⁸ In this case it was held that the testamentary restriction clause, which prevented testator's descendant grandchildren from inheriting if they married outside the Jewish faith or to a non-Jewish spouse that did not convert to Judaism within one year of marriage, was valid and enforceable.⁷⁴⁹ The testator sought to 'encourage and support Judaism and preservation of Jewish culture' and thus conditioned the receipt of the inheritance on the basis that his descendants marry spouses of the Jewish faith.⁷⁵⁰ Only one grandchild had complied and the restriction clause was challenged by the remaining disinherited grandchildren who had married non-Jewish spouses. The matter came before the Illinois Supreme Court, who noted that the case reflects the 'broader tension between the competing values of freedom of testation on one hand and resistance to "dead hand" control on the other.'⁷⁵¹ It however confirmed that as matter of public policy that 'there is nothing illegitimate about a testator's preference for supporting a particular cause, value, or personal interest over the interests of potential beneficiaries, so long as the condition stated in

⁷⁴⁵ See *Greene v Kirkwood* 1 I.R. 130 (Ir.) (1895); and *In re Harris' Will* 143 N.Y.S. 2d 746, 748 (1955). See *Keily v Monck* 3 Ridg. P. C. 205,205 (1795) for a contrary view.

⁷⁴⁶ *In re Carples' Estate* 250 NYS 680 at 681-89 (Sur Ct 1931).

⁷⁴⁷ *Girard Trust Co v Schmitz* 20 A.2d 21 at 27-37 (NJ Ch. 1941).

⁷⁴⁸ *Estate of Feinberg* supra 888.

⁷⁴⁹ *Estate of Feinberg* supra at 891. The restriction clause states in full that: 'A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage.'

⁷⁵⁰ *Estate of Feinberg* supra at 893. The will created a condition precedent, meaning that the condition that the grandchildren had to marry a Jewish spouse or a non-Jewish spouse who converted within one year of marriage before they could inherit.

⁷⁵¹ *Estate of Feinberg* supra at 894.

the will or trust does not, at the relevant time, violate public policy.’⁷⁵² The court found that the restriction clause did not encourage or provide an incentive to the descendants to divorce a current non-Jewish spouse or to remarry a Jewish spouse. It furthermore found that the condition did not purport to exercise ‘dead hand control’ as the condition had to be met by the grandchildren at the time of the testator’s death.⁷⁵³

(vi) *The Rule against Perpetuities*

Testamentary dispositions are also limited by time through the rule against perpetuities.⁷⁵⁴ This rule limits the length of time of a bequest to twenty-two years after ‘the death of all lives in being at the time of the transfer.’⁷⁵⁵ While the time period depends on the circumstances of each case, the average time constraint is about one hundred years.⁷⁵⁶ The basic thrust of the rule of perpetuities is to strike a balance between dynastic rule of the dead hand and the principle of testamentary freedom.⁷⁵⁷ A time restriction is said to serve a number of purposes and functions. The primary reason lies in the very reason why freedom of testation is protected and endorsed by society, namely, it allows for the efficient disposal of property after death, as opposed to rigid rules of intestacy. Sir Hobhouse as explains the rationale for the Rule of Perpetuities:

‘A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see.

⁷⁵² Ibid at 904.

⁷⁵³ Ibid at 903.

⁷⁵⁴ The Restatement (Third) of Property.

⁷⁵⁵ Glover (2018) op cit at 429. See further Freidman (1966) op cit at 356.

⁷⁵⁶ Dukeminier & Sitkoff (2013) op cit at 880. Note that not all states impose the rule of perpetuity. See further, R Sitkoff & M Schanzenbach ‘Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes’ (2005) 115 *Yale LJ* 356 at 359.

⁷⁵⁷ Freidman (1966) op cit at 356.

Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.’⁷⁵⁸

The rule is intended to apply to those that a testator knew as well as the next generation.⁷⁵⁹ The second reason for the Rule against Perpetuities is to avoid land and property being tied up beyond circumstances that are not reasonably foreseeable.⁷⁶⁰ The alienation of property is considered important to keep property available to commerce and industry.⁷⁶¹ A third reason for imposing a time restraint on dead hand control is to keep property marketable.⁷⁶² The fourth and final reason is to curb ‘dynastic and aristocratic concentrations of wealth’⁷⁶³, which from a historical perspective was seen as antithetical to republican political values established after the American Revolution against British rule.⁷⁶⁴ There was a real concern that aspects of feudalism in the English system of inheritance concentrated too much wealth and power in a few individuals or families, which threatened a republican commitment to equal freedoms.⁷⁶⁵ The Rule against Perpetuities therefore stems from a political stand in favour of individual liberty against an antiquated social system and unjustified concentrations of power.⁷⁶⁶

⁷⁵⁸ A Hobhouse *Dead Hand: Address on the Subject of Endowments and Settlements of Property* (1880) at 188.

⁷⁵⁹ Sitkoff (2014) op cit at 667.

⁷⁶⁰ SJ Horowitz & RH Sitkoff ‘Unconstitutional perpetual trusts’ (2014) 6 *Vanderbilt LR* 67 1769 at 1796-97.

⁷⁶¹ Singer (2000) op cit at 48; and Horowitz & Sitkoff (2014) op cit at 1796.

⁷⁶² See A Smith *Lectures in Jurisprudence* (1978) at 70, 469; Horowitz & Sitkoff (2014) op cit at 1796; and Sitkoff (2014) op cit at 667.

⁷⁶³ Horowitz & Sitkoff (2014) op cit at 1796; Singer (2000) op cit at 149-50.

⁷⁶⁴ GS Alexander ‘Time and Property in the American Republican Legal Culture’ (1991) 66 *New York University LR* 273 at 294-96. According to Alexander, ‘[T]he device that American republican lawyers who despised English landed aristocracy associated most closely with the landed English family dynasty was the entailment of land.... American legal writers’ republican concern for corruption prompted their hatred of primogeniture and especially of entailments of land, which appeared to be the most glaring vestiges of a corrupt past.’ See further, Halliday (2018) op cit at 28-29.

⁷⁶⁵ Horowitz & Sitkoff (2014) op cit at 1798; Singer (2000) op cit at 147-52.

⁷⁶⁶ According to Halliday (2018) op cit at 29: ‘The rejection of entail was perhaps a prototype for a concern to eliminate social hierarchies similar to those that might be maintained by the replication of very large distributive inequalities down the generations.’

(vii) *Estate tax in the United States*

Despite the very strong support for testamentary freedom, there is also a rich tradition within American political discourse in favour of effecting redistributing of inherited wealth (otherwise referred to as ‘dynastic wealth’) through progressive taxes.⁷⁶⁷ In 1919, in the post-World War I climate, the United States Congress introduced a steep progressive inheritance tax for estates below the \$1.5 million.⁷⁶⁸ In 1924, the rate of estate tax ranged from 1% for estates valued at \$50 000 to 40% for estates over the value of \$10 million. In 1929, in an effort to find revenue during the Great Depression, the rate was increased to 45% and the exemption for lower value estates was halved.⁷⁶⁹ In 1934, a rate of 70% was levied on estates over \$50 000. The progressive rates and low exemption of estates of inheritance tax continued during the 1950s and 1960s.⁷⁷⁰

The proponents of estate tax in the United States rely on the principle of equality of opportunity and concerns about the concentrations of wealth to advocate for a tax on an estate.⁷⁷¹ According to a 2003 study, an estimate of \$41 trillion in the United States will pass across generations between 1998 and 2052.⁷⁷² In this regard, intergenerational wealth is regarded as ‘the threat of dynastic wealth’, that is contrary to republican values, the principle of equality of opportunity, and endangers democracy itself.⁷⁷³ Blackstone and Jefferson argument that property ceases at death

⁷⁶⁷ Beckert (2004) op cit at 190.

⁷⁶⁸ Ibid at 185.

⁷⁶⁹ Ibid at 188.

⁷⁷⁰ Beckert (2004) op cit at 193-5.

⁷⁷¹ A Alstott ‘Equal Opportunity and inheritance Taxation’ (2007) 121 *Harvard LR* 469; Chester (1982) and R Clignet *Death, Deeds and Descendants: Inheritance in Modern America* (1992).

⁷⁷² J Havens & P Schervish ‘Why the \$41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Comments’ (2003) 7 *Journal of Gift Plan* 11.

⁷⁷³ Beckert (2004) op cit at 171-2.

finds strong support among those who support an estate tax on the above grounds.⁷⁷⁴ According to Ascher, there is fundamental irony in America society that, on the one hand, preaches that '[a]ll men are born equal', yet on the other hand, endorses inheritance of large wealth.⁷⁷⁵ Cox even referred to inherited wealth as 'un-American'.⁷⁷⁶ President Franklin Roosevelt famously captured this view in a speech to Congress in 1935, wherein he stated: 'The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideal and sentiments of the American People.'⁷⁷⁷ He went further to state that the inheritance of economic power perpetuates a system of minority rule by a few wealthy individuals, and cannot be justified on the grounds of familial support. Without going into detail, he advocated for a 'reasonable inheritance'.⁷⁷⁸ This notion has been explored further by other academics. In 1974, Kristol advocated for an inheritance ceiling of \$1 million for one person as an estimate of a reasonable inheritance.⁷⁷⁹ In 1990, Ascher recommends that \$250 000 would constitute a reasonable inheritance.⁷⁸⁰

Attempts to reform estate tax in America have been hampered by a strong reliance on testamentary freedom, and as a result, the extension of a strong conception of property rights after death.⁷⁸¹ Nozick argues that inheritance tax infringes the principles of just transfer of assets, and due to this is an illegitimate form of

⁷⁷⁴ See, for instance, O Brownson 'The Labouring Classes' 1978b [1840] at 24 (Delmar: Scholars' Facsimiles Reprint) who argued that property rights terminate at death and revert to society. After a spouses' half share is allocated, the remaining estate should be transferred to the state.

⁷⁷⁵ ML Ascher 'Curtailing Inherited Wealth' (1990) 89 *Michigan LR* 69 at 83.

⁷⁷⁶ Beckert (2004) op cit at 183. See further I Kristol 'Taxes, Poverty, and Equality' (1974) 37 *Public International* 26 at 28.

⁷⁷⁷ Roosevelt, speech to Congress 19 June 1935, as cited in Beckert (2004) op cit at 190.

⁷⁷⁸ Roosevelt, speech to Congress 19 June 1935, as cited in Beckert (2004) op cit at 190.

⁷⁷⁹ Kristol (1974) op cit at 28.

⁷⁸⁰ Ascher (1990) op cit at 73.

⁷⁸¹ Ascher (1990) op cit at 73. The counter-argument was that an estate tax actually does not impose restriction on the enjoyment of property while alive. See Ascher (1990) at 92. See further Munzer SR *A Theory of Property* (1990) at 411-19 for a discussion of further counter-arguments.

governmental intervention.⁷⁸² It should be noted that in another publication, Nozick takes a different view on the inequalities that arise from inherited property across multiple generations.⁷⁸³ He argues that only property that has either been personally acquired or created should be allowed to be bequeathed after death.⁷⁸⁴ This is due to the closeness between the personal efforts involved in holding the property. He also regards the inheritance of wealth as an expression of inter-personal bonds between the testator and heir.⁷⁸⁵ A further counter-argument is that inheritance tax creates an incentive for more asset consumption, which reduces the total value of an estate at death.⁷⁸⁶ This in turn results in less financial investment and economic growth, less job creation and lower incomes.⁷⁸⁷ In terms of economic policy, a progressive inheritance tax system lessens general welfare in the long term. For the opponents of an inheritance tax, State interference has economically dysfunctional consequences. It has also been argued that there is no conclusive evidence that estate tax actually achieves or contributes towards greater economic equality.⁷⁸⁸

According to Beckert, by the 1970s, support for a progressive estate tax had waned and most, if not all, in Congress, did not support the use of estate taxes to effect distributive justice.⁷⁸⁹ In her assessment of the political debates, the liberal economic justification for the right to testamentary disposal plays a central role in reforms for a more lenient estate tax policy. In 1981, the Economic Tax Act increased

⁷⁸² R Nozick *Anarchy, State and Utopia* (1974) 168.

⁷⁸³ R Nozick *The Examined Life: Philosophical Meditations* (1989) (New York: Simon Schuster)

⁷⁸⁴ Nozick (1989) op cit at 30-1

⁷⁸⁵ Ibid at 30.

⁷⁸⁶ Beckert (2004) op cit at 198. Inheritance tax creates an incentive for more consumption, which reduces the total value of an estate at death. See M Friedman & R Friedman *Chancen, die ich meine* (1980) (Berlin: Ulstein). For a counter-argument, see M Levy 'Liberal Equality and Inherited Wealth' (1983) 11 *Political Theory* 545 at 549-50. See further W Blum & H Kalven 'The Uneasy Case for Progressive Taxation (1952) 19 *University of Chicago LR* 417; and J Langbein 'The Twentieth-Century Revolution in Family Wealth Transmission (1988) 86 *Michigan LR* 722.

⁷⁸⁷ Beckert (2004) op cit at 198.

⁷⁸⁸ J Stiglitz 'Notes on Estate Taxes, Redistribution, and the Concept of Balanced Growth Path Incident' (1978) *Journal of Political Economy* 86 at 137.

⁷⁸⁹ Beckert (2004) op cit at 201-3.

the exemption rate, also exempting transfer to spouses, and scaled back the progression rate. This reduced the estates subject to a tax from 7.67% in 1976 to 0.88% in 1989.⁷⁹⁰ In 2001, Congress passed legislation that phased out estate tax gradually with increases in the taxable threshold amount and decreased the tax rate.⁷⁹¹ In sum, while estate tax has historically been premised on the need to redistribute wealth, this motivation waned from the 1970s onwards to the point that, today, there is little evidence that estate tax plays this role at all.

c) **Concluding remarks**

While testamentary bequests are in theory subject to public interest considerations, and can be overturned in various circumstances described above, in practice these are inferior to the overriding importance of individual testamentary disposition.⁷⁹² As illustrated above, public interest limitations are permissible only in the clearest and obvious of cases, for instance: where State action is involved; if it involves a charitable public purpose trust; to protect financial security of dependent surviving spouses; to safeguard equally important private law institutions like the marriage, religion (but only when absolutely threatened); or where perpetuity itself threatens economic marketability of land and freedom of testation itself. A testator's right to discriminate on the grounds of race, gender, religion, ethnicity, and/or culture in the disposal of his property pertinently illustrates the disconnect between an in principled moral commitment to equal treatment and the legal enforcement of such principles

⁷⁹⁰ Ibid at 203.

⁷⁹¹ Dukeminier (2013) op cit at 20.

⁷⁹² *Raln's Estate* supra at 123.

and obligations.⁷⁹³ In sum, limitations are functionally deferential and only imposed in exceptional and rare circumstances.

5.3 GERMANY – EXPLICIT CONSTITUTIONAL RECOGNITION OF INHERITANCE

The recognition of inheritance in the German Basic Law serves a dual purpose in protecting individual testamentary freedom as well as ensuring societal protection for the family.⁷⁹⁴ Like the redistributive obligations in the South African property clause, Article 14 of the German Basic Law expands the scope of property protection by imposing a social obligation on owners. As shown below, this is entirely absent in the United States Constitution. In this section, I first provide a brief overview of the history of German inheritance law and thereafter describe the constitutional protection of inheritance in Article 14 of the German Basic Law.

a) Conflict between individualism and societal considerations

In Germany, the legal protection of inheritance straddles the legal and societal commitments to individual autonomy (reflected in the right to dispose as an incident of property ownership) and the family as an important institution.⁷⁹⁵ On the one hand, proponents of free testation (*Testierfreiheit*) argue that its protection is essential for

⁷⁹³ G Alexander ‘The Social-Obligation Norm in American Property Law’ (2009) *94 Cornell LR* 745 at 818.

⁷⁹⁴ Article 14 of the German Basic Law.

⁷⁹⁵ Beckert (2004) *op cit* at 50. This justification relies on similar liberal rationale used in both the United States and South Africa, which is essentially that the right to dispose of property after death is a natural extension of the protection of private property that as a result safeguards individual autonomy.

self-development integral to the protection of individual property ownership.⁷⁹⁶ On the other hand, critics argue that the basis for the protection of individual testamentary freedom is alien to the historical foundation of German inheritance law, which is based on the protection family members and heirs.⁷⁹⁷ According to Beckert, '[t]he moral function of inheritance lies in strengthening the family as the moral foundation of society against an individualism that was regarded as immoral and on the rise.'⁷⁹⁸ The protection of the family is seen as the need to guard against 'excessive individualism' that found expression in the Roman law institution of the will, imported into German law.⁷⁹⁹ At various times in the historical development of German inheritance law, one side has weighed more heavily than the other.

Before the eighteenth century, the justification for inheritance was chiefly based on private property grounds. Jurists, such as Hugo Grotius and Immanuel Kant saw the right to dispose of property as a natural right derived from private property, and thus validated by natural law. Grotius saw testamentary freedom as embedded in the natural rights theory of freedom of testation, which 'belongs to the law of nature.'⁸⁰⁰ For Kant, the foundation of inheritance law was the right of a dying person to transfer possessions to survivors through a will.⁸⁰¹

⁷⁹⁶ Beckert (2004) op cit at 50. See further R Zimmermann 'The Compulsory Portion in German Law', in KG.C. Reid, MJ de Waal & R Zimmermann, *Comparative Succession Law*, III, (2020) forthcoming book.

⁷⁹⁷ Beckert (2004) op cit at 50, 54. F Wegmann 'Die Begündung des Erbrechts im 19. Jahrhundert' (1969) Dissertation, University of Münster at 4; U von Lübtow *Erbrecht* (1982) at 1ff (Berlin, Duncker & Humblot).

⁷⁹⁸ Beckert (2004) op cit at 50.

⁷⁹⁹ H Roggendorf 'Indefeasible Family Rights: A Comparative View on the Restrictions of Testamentary Freedom' (2018) *The Edinburgh Law Review* 22.2 211 at 217; Beckert (2004) op cit at 50; and A Röthel 'Law of Succession and testamentary freedom in Germany' in M Anderson & E Arroyo i Amayuelas (eds) *The Law of succession: testamentary freedom: European perspectives* (2011) 155 at 163.

⁸⁰⁰ H Grotius *De Jure Belli Ac Pacis Libri Tres* (1625, reprint 1993) Lib II Cap VII X at 265.

⁸⁰¹ Immanuel Kant *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* [1797] (1965) at 34 Indianapolis: Bobs-Merrill; Beckert (2004) op cit at 51. The natural law theory was countered by the works of Samuel Pufendorf who argued that right of ownership expires at death, and thus is not an instituted derived from natural law. See further J Fichte 'Foundations of Natural Right: According to the Principles of the Wissenschaftslehre' [1796] 2000 ed Frederick Neuhouser at 318.

During the nineteenth century, jurists began to counter the individualistic rationale for inheritance law, largely derived from Roman law, in favour of the familial foundations of inheritance law in German tradition.⁸⁰² In this conception of inheritance, the family was a moral institution that should form the foundation of inheritance law and the rise of individual testament was perceived as a threat to social cohesion.⁸⁰³ The most influential jurist against the individualistic conception of inheritance was Georg Friedrich Hegel.⁸⁰⁴ His critique on individual testation was two-fold: first, property in Germany essentially forms part of the common, which belongs to the family unit⁸⁰⁵; and second, on the unethical nature of arbitrary individualism divorced from concerns for the common good. For him, the regulation of posthumous transfers of property should be based on non-arbitrary rules. Since a subjective wish is at the heart of individual dispositions central to the enforcement of wills, it could not supersede the ethical relationship to the family. According to Hegel:

‘The natural dissolution of the family through the death of the parents, particularly of the husband, results in inheritance of the family’s resources. Inheritance is essentially a taking of possession by individual as his own property of what in themselves are common resources.’⁸⁰⁶

At the heart of Hegel’s conception of inheritance is the notion of common property belonging to the family as whole. The arbitrariness of individual testation (imported from Roman Law) was regarded as incompatible with the German roots of inheritance

⁸⁰² HP Tschäppeler *Die Testierfreiheit zwischen Freiheit des Erblassers und Gleichheit der Nachkommen* (1938) 60; Wegmann (1969) op cit at 10; Beckert (2004) op cit at 50.

⁸⁰³ Beckert (2004) op cit at 52.

⁸⁰⁴ Ibid at 54.

⁸⁰⁵ GF Hegel *Elements of the Philosophy of Right* [1821] (1991) Ed Allen Wood at 178: “These [family resources] are common property, so that no member of the family has particular property, although each has the right to what is held in common.” At 171. See further Roggendorf (2018) op cit at 217, 224, and G Pelletier Jr & M Sonnenreich ‘A Comparative Analysis of Civil Law Succession’ (1966) 11 *VILL. L. REv.* 323 at 325.

⁸⁰⁶ Hegel (1821) op cit at 178.

law,⁸⁰⁷ which rests on the need to safeguard the inter-familial bonds that are so often attached to property, like a family home or treasured heirlooms.⁸⁰⁸ Since the family was a normal context in which a person relates to property, bequeathing it to others would violate the bonds within the family. Karl Röder explains the familial bond to property in the following way:

‘Above all, a right of inheritance belongs to those who already before the death had a closer right with respect to the material assets left behind, because only they were most intimately bound to the deceased – through all of life and in all his purposes and needs – into one and the same closer circle of life, such as marriage and family, by the bond of personal love and gratitude.’⁸⁰⁹

What makes individual testation unethical, according to this view, was that it grants a testator unlimited scope to violate intimate personal bonds created within the family. Due to this, Hegel and others argued that the principle of testamentary freedom ‘contains nothing which deserves greater respect than the right of the family.’⁸¹⁰ This does not mean that the right to dispose of property was not recognised in German Law but rather that its very existence is inseparable from family context, in which property was most practically relevant to society.⁸¹¹ In the end, Zimmerman explains that ‘the idea of a family succession and of freedom of testation had to be reconciled with, or

⁸⁰⁷ R Schröder *Abschaffung oder Reform des Erbrechts: Die Begründung einer Entscheidung des BGB-Gesetzgebers im Kontext Sozialer, ökonomischer und philosophischer Zeitströmungen* (1981) at 449.

⁸⁰⁸ W Muller-Freienfels ‘Family Law and the Law of Succession in Germany’ (1967) 16 *Int’l & Comp. L.Q.* 409 at 415.

⁸⁰⁹ K David August Röde *Grundzüge des Naturrechts oder der Rechtsphilosophie* [1846] (1860) (2nd ed) at 524. This view is also reflected by Hegel: “The simple direct arbitrariness of the deceased cannot be made the principle of the right to make a will, especially if it is opposed to the substantial right of the family; for the love and veneration of the family for its former member are primarily the only guarantee that his arbitrary will be respected after his death. Such arbitrariness in itself contains nothing which deserves greater respect than the right of the family itself – on the contrary.” Hegel (1821) *op cit* at 180.

⁸¹⁰ Hegel (1821) *op cit* at 180.

⁸¹¹ German jurists, such as Eduard Gans and Friedrich Julius Stahl argued that the German roots of inheritance in family should mean that testamentary freedom plays a secondary role to intestate succession rules. See Schröder (1981) *op cit* at 443; FJ Stahl *Die Philosophie des Rechts. Rechts- und Staatslehre* (1845) Part 1, vol 2.1 at 383; and Beckert (2004) *op cit* at 53.

balanced against, each other, and the obvious way to do that was the recognition of a compulsory share that had to go to certain close family members, no matter whether this was in line with the testator's wishes or not.'³¹²

The tension between testamentary freedom and family commitments, reflective in the historical development (comprising the two competing versions of succession in German law), appears in both the Civil Code (BGB) and the Basic Laws (GG), which I discuss in turn below.³¹³ As will be shown, the idea that inheritance can be both individual and familial is inscribed within the legal foundations of German inheritance law. This has a direct impact on the manner in which individual testamentary disposals are balanced with public interest considerations.

b) The German Civil Code (Bürgerliches Gesetzbuch, BGB)

The drafters of the German Civil Code (Bürgerliches Gesetzbuch, BGB) rejected the idea that succession had to conform to either unlimited freedom of testation as represented in the Anglo-American legal tradition or the family view adopted in other civil law jurisdictions. Between 1874 and 1900 two Commissions were established to codify inheritance law of the German States.³¹⁴ The Civil Code (BGB) was adopted in 1900.³¹⁵ Gottfried Von Schmitt, who provided a Preliminary Draft for the (First) Commission is said to have adhered to an individualist conception of succession law,

³¹² R Zimmerman 'The Compulsory Portion in German Law' (2020) 19 *Max Planck Private Law Research Paper* 1 at 8. See further, D Klippel 'Familie versus Eigentum: Die naturrechtlich-rechtsphilosophische Begründungen von Testierfreiheit und Familienerbrecht im 18. Und 19.' (1984) *Jahrhundert' Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 101 at 167; Roggendorf (2018) op cit at 224.

³¹³ Zimmerman (2020) op cit at 8.

³¹⁴ H Mertens *Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht* (1970) 1 at 5; and Roggendorf (2018) op cit at 217.

³¹⁵ Beckert (2004) op cit at 64. It is interesting to note that according to Article 154 of the Weimar Constitution: 'The right of inheritance is guaranteed according to civil law. The state's share in the inheritance is determined by the laws.'

and thus was more inclined to favour free testation over compulsory share.⁸¹⁶ However, due to the fact that compulsory share was recognised by a number of German States, he settled for the fact that individual testamentary succession would have to be inherently limited by family succession law.⁸¹⁷

The Civil Code, adopted in 1900, was nevertheless subject to criticism, especially by commentators influenced by Hegel, who held Roman law with disdain and regarded family succession as the true roots of German inheritance.⁸¹⁸ Gierke was one critic who argued that it ‘is self-evident [that] the foundation of this law of succession is purely individualistic’⁸¹⁹, referring to the framing of the Civil Code and alluding to the philosophical inclinations of its drafter. Despite this criticism, the Civil Code did retain compulsory portion in favour of descendants, parents and surviving spouses.⁸²⁰

⁸¹⁶ The Preliminary Drafts have been reprinted by W Schubert *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches*, 15 vols (1980–1986). The two volumes by W Schubert entitled *Erbrecht Teil 1* (1984) and *Erbrecht Teil 2* (1984) contains the reprint of Gottfried von Schmitt drafts (hereinafter referred to as ‘von Schmitt’). See Zimmerman (2020) op cit at 9.

⁸¹⁷ Zimmerman (2020) op cit at 9.

⁸¹⁸ Beckert (2004) op cit at 59-63; Röthel (2011) op cit at 157; H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Land Ownership in South Africa and Germany* (2002) at 211; and Roggendorf (2018) op cit at 217.

⁸¹⁹ O von Gierke *Der Entwurf eines Bürgerlichen Gesetzbuchs und das deutsche Recht* (1889) at 505.

⁸²⁰ § 2303 BGB states: ‘Person entitled to a compulsory share of the estate; amount of the share (1) If a descendant of the testator is excluded by disposition mortis causa from succession, he may demand his compulsory share from the heir. The compulsory share is one-half of the value of the share of the inheritance on intestacy. (2) The parents and spouse of the testator have the same right if they have been excluded from succession by disposition mortis causa.’ For a comparison with intestate succession in the Civil Code, see § 1924 (1) BGB and § 1925 (1) BGB. According to the *Gesetz über die eingetragene Lebenspartnerschaft* (translated in English as ‘the Act on the Registered Lifelong Partnership’), same-sex civil partners are treated the same as spouses.

(i) *Codified provisions for protection and limitation of testamentary freedom*

The structure of inheritance in the Civil Code has been described as ‘a compromise’⁸²¹ between the individualism of Roman testamentary freedom and the German tradition of familial inheritance.⁸²² On the one hand, while testamentary freedom is not expressly stated, various provisions give it practical relevance. It grants a person the right to appoint an heir (§ 1937 BGB)⁸²³, disinherit a person entitled to a compulsory share (§ 1938 BGB)⁸²⁴, and obligate a person to perform a certain act by imposing testamentary burdens (§ 1940 BGB).⁸²⁵ While the compulsory portion is one aspect that limits testamentary freedom, testators are still afforded extensive scope in disposing their estate through legal institutions such as the fideicommissum⁸²⁶ and the execution of a will.⁸²⁷ Testamentary dispositions are also protected by the rules of interpretation recognised in (§§ 2084 – 2086 BGB), which contribute towards giving effect to the testator’s expressed wishes in her will.

However, on the other hand, various provisions also limit testamentary freedom. It is limited if it violates a statutory prohibition⁸²⁸ or is contrary to public policy or morality.⁸²⁹ Testamentary disposals are subject to public policy requirement

⁸²¹ Beckert (2004) op cit at 64; Roggendorf (2018) op cit at 218.

⁸²² M Kleensang ‘Strukturmerkmale des Erbrechts - historisch betrachtet - zugleich eine Besprechung von Beckert: Unverdientes Vermögen – Soziologie des Erbrechts’ (2007) *MittBayNot* (Mitteilungen des Bayrischen Notarvereins) 471 at 472.

⁸²³ § 1937 BGB states: ‘The deceased may appoint an heir by a unilateral disposition mortis causa (will, testamentary disposition).’

⁸²⁴ § 1938 BGB states: ‘The deceased may by will exclude a relative, his spouse or his civil partner from intestate succession without appointing an heir.’

⁸²⁵ § 1940 BGB states: ‘The deceased may by will oblige his heir or a legatee to perform an act without giving another person a right to the performance (testamentary burden).’

⁸²⁶ §2100 ff. BGB.

⁸²⁷ §2197 ff. BGB.

⁸²⁸ According to § 134 BGB ‘A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.’

⁸²⁹ § 138 BGB. D Solomon ‘The Law of Succession’, in J Zekol & G Wagner (3rd) *Introduction to German Law* (2019) at fn 29.

of ‘good morals’.⁸³⁰ According to § 138(1) BGB: ‘A juristic act which is contrary to the good morals, is void.’⁸³¹ § 138(2) further specifies that ‘a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.’⁸³² Judges are not entitled to question the morality of testamentary bequests on the basis of their own sense of morality and justice.⁸³³ Rather the test is objective in nature, which requires a judge to ascertain whether the bequest offends the ‘legal convictions of all reasonable and right minded people.’⁸³⁴ Two phrases are used to describe the objective test of legal convictions, namely ‘*Anstandsgefühl aller billig und gerecht Denkenden*’, which according to Du Toit translates to the ‘legal convictions (pertaining to what is property and decent) of all reasonable and right minded people’; and ‘*Anschauung des anständigen Durchschnittsmenschen*’, which according to the same author means the ‘consideration of the decent average person.’⁸³⁵ As a result of this lenient approach, testators can impose conditions on testamentary bequests.⁸³⁶ In the case of *House of Hohenzollern*, the testator imposed a condition that heirs marry ‘befitting to their rank’ (*standesgemäß*). The condition was challenged on the basis that it exerted unreasonable pressure on heirs that infringe their constitutional liberty to marry but upheld.⁸³⁷

⁸³⁰ §138 BGB.

⁸³¹ § 138(1) BGB. Translation by F du Toit ‘The Limits of upon Freedom of Testation by the Boni Mores: Lessons from Common Law and Civil Law (Continental) Legal Systems’ (2000) *Stel LR*. 358 at 382.

⁸³² §138(2) BGB.

⁸³³ BGHZ 140, 118, 129 – Hohenzollern.

⁸³⁴ Du Toit (2000) op cit at 382.

⁸³⁵ Du Toit (2000) op cit at 382.

⁸³⁶ This is similar to South Africa (see chapter 3, § 3.3 c)) and the United States (see above § 5.2 b) (iii) and (v)).

⁸³⁷ BGHZ 140, 118, 129 – Hohenzollern.

(ii) *Compulsory portion ('Pflichtteil')*

The limitation on freedom of testation in favour of compulsory portion claimants is by far the most dominant form of limitation of testamentary disposal in German Law. As such, it provides a useful way to analyse the tensions between two competing versions of inheritance law. According to this system, dependents, parents and spouses are entitled to a personal claim as a compulsory fixed portion of the deceased's estate, calculated in terms of a half share of the intestate share.⁸³⁸ The claim for a compulsory share is justified in terms of a natural obligation that parents owe to their offspring.⁸³⁹ According to von Schmitt, parents implicitly forego complete testamentary freedom in favour of their descendants, which he refers to as comprising 'the highest quality of relationship.'⁸⁴⁰ This claim arises from the law of obligations and thus these claimants are not considered heirs.⁸⁴¹

According to Zimmerman, the fact that a claimant is a claimant and not an heir is testament to 'the paramount importance of testamentary freedom.'⁸⁴² The distinction, which he points out, is that with the former, a testator is at liberty to dispose of his property and, thus, take into account the personal qualities of his heirs. In these circumstances, the compulsory share claimants (descendants, spouses or ascendants) are entitled to claim against the deceased estate.⁸⁴³ This system means that a testator is not compelled to write these claimants into his or her will but free to dispose of his or her

⁸³⁸ BGB § 1975 (first draft). § 2303 (1) second sentence BGB. It is a claim sounding in money to receive the value of a certain part of the estate. See further Zimmerman (2020) op cit at 2.

⁸³⁹ Interestingly, writing in the English context, John Locke also posits a similar view that children have a limited right to inherit due to their economic role in the family combined with a parent's obligation to provide 'Nourishment and Education, and the things nature furnishes for the support of Life'. J Locke *Two Treatises of Government* (2009) 1.93.

⁸⁴⁰ Von Schmitt (1982) op cit at 674, and 170.

⁸⁴¹ Röthel (2011) op cit at 163.

⁸⁴² Zimmerman (2020) op cit at 16.

⁸⁴³ Ibid at 16.

property, which may later be subject to compulsory share claim.⁸⁴⁴ The compulsory share is protected against testators by-passing the requisite amount a claimant is entitled to, for instance, if the testator bequeaths less than the claimant's compulsory share, she can claim the remainder from other heirs.⁸⁴⁵ It thus super-imposes a familial safeguard into testamentary disposals.

The BGB also includes an elaborate set of rules for when a testator may deprive a claimant of their compulsory share. In very exceptional cases, according to § 2333 BGB, a descendant's compulsory share can be deprived if the descendant: attempted to kill the testator or the testator's spouse; is found guilty of the intentional physical maltreatment of the testator or the testator's spouse; fails to maintain the testator in violation of a statutory obligation to do so; or leads a disreputable or immoral life contrary to the wishes of the testator.⁸⁴⁶ The circumstances in which an ascendant or spouse can be disinherited relate to misconduct set out in § 2333 nos. 1, 3 and 4 (namely all the forms of misconduct except the latter that relates to a disreputable or immoral life contrary to the wishes of the testator).⁸⁴⁷

The BGB also regulates the manner and proof that is required for disinheritance. It states that '[t]he reason for the deprivation must exist at the time when the disposition is made' and must be expressly stated in a testator's will.⁸⁴⁸ A deprivation on the grounds of a disreputable or immoral life is ineffective if the descendant has permanently ceased to lead a disreputable or immoral life. This form of conduct has caused some difficulties as social morals and perceptions have

⁸⁴⁴ Ibid at 16.

⁸⁴⁵ § 2305 BGB. See further Zimmermann R 'Compulsory Heirship in Roman Law', in Reid KG, De Waal MJ & Zimmermann R (ed) *Exploring the Law of Succession* (2007) at 56.

⁸⁴⁶ §2333-7 BGB. For a discussion of compulsory share, see S Anton 'Germany' (1990) *International Legal Practice* 24; Zimmermann (2007) op cit at 70-2; and F Bartolini & FP Patti 'The freedom to disinherit children' (2018) *ZEUP (Zeitschrift für Europäisches Privatrecht)* at 438-9.

⁸⁴⁷ §2334-5 BGB.

⁸⁴⁸ § 2336 BGB. This is not the position in either South Africa or the United States (see chapter 3, § 3.3 b) and § 5.2 b) (iv) above).

changed over time.⁸⁴⁹ Apart from the latter form of deprivation (which is assessed at the time of inheritance), the burden of proof of the reasons for deprivation for the misconduct listed at § 2333 lies with the testators.⁸⁵⁰ Placing the burden of proof on the testator shows the extent to which German inheritance law seeks to protect close family relatives. It serves to protect the familial unit by depriving those claimants that commit the types of misconduct that violate the bonds of the family.⁸⁵¹

As will be discussed in more detail in the next section below, the Federal Constitutional Court has affirmed the familial bond between a testator and his or her children that reinforces the long-life communal nature of inheritance whereby children are granted minimum participation in the parent's estate.⁸⁵² While the social importance of the family justifies imposing higher restrictions on freedom of testation, there have been circumstances where this has been abused and courts have been reluctant to deprive descendants of their compulsory share. In one case, a son who had assaulted and subsequently killed his mother succeeded in a claim for his compulsory portion in the Regional Court and the Regional Supreme Court of Cologne on account the court declared him insane at the time of the murder.⁸⁵³ These courts held the deprivations of § 2333 nos. 1, 3 and 4 did not apply as the son lacked fault at the time of the murder of his mother. The Federal Constitutional Court overturned this decision on the basis that the son's intention to kill his mother did not have to exist in a technical criminal law sense but rather it had to be shown that the son be seen to 'have been out to kill her', or 'make an attempt on her life'.⁸⁵⁴ This case shows a

⁸⁴⁹ Zimmerman (2020) op cit at 40.

⁸⁵⁰ § 2336(3)-(4) BGB. This section does not state that it is the testator but the wording makes it clear that it would in the normal circumstances be the testator depriving family members of a compulsory share. The wording of § 2336(3) BGB states: '(3) The burden of proving the reason lies on the person who asserts the deprivation.'

⁸⁵¹ Zimmerman (2020) op cit at 42.

⁸⁵² BGH of 21 March 1990 BGHZ 111 36 (39).

⁸⁵³ BVerfGE 112, 332 (336–9).

⁸⁵⁴ BVerfGE 112, 332 (358–61).

relaxing of the requirements for deprivation in circumstances where a testator should have the right to deprive his abusive descendants.

It should be noted that following this case, a new rule has been added where deprivation occurs if a person has been convicted of an intentional criminal act to imprisonment of at least one year and such criminal act is regarded as unacceptable by testator.⁸⁵⁵ Furthermore, the deprivations requirements for descendants who are out to kill the testator or his or her spouse in § 2333(2) no.1 BGB has been amended to include ‘persons similarly closely related’.⁸⁵⁶ Further reforms include the deletion of the misconduct of ‘leading a disreputable or immoral life’ and the intentional physical ill-treatment of the testator or his spouse as reasons for such deprivation. Zimmerman notes that these reforms have ‘shifted the balance between freedom of testation and family solidarity only very slightly in the direction of freedom of testation.’⁸⁵⁷

c) Article 14 of the German Basic Law (*Grundgesetz*)

The tension or compromise between testamentary freedom and social responsibility is reflected in the constitutional recognition of inheritance. Article 14 of the German Basic Law (*Grundgesetz*) consists of three clauses (two of which are relevant for our purposes). Article 14 (1) and (2) states:

‘(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws. (2) Property entails obligations. Its use should also serve the public interest.’⁸⁵⁸

⁸⁵⁵ §2333(1) no 4 BGB

⁸⁵⁶ §2333(2) no 1 BGB.

⁸⁵⁷ Zimmerman (2020) op cit at 49.

⁸⁵⁸ Art. 14(1) of the German Basic Law.

Article 14 is unique as far as the jurisdictions assessed in this thesis is concerned in that it expressly guarantees the right of inheritance.⁸⁵⁹ Below, I discuss the meaning of both ‘property’ and ‘right of inheritance’ in Article 14; how a positive institutional guarantee of property affects the level of protection afforded to individual owners; and lastly the implications of including special constitutional obligations included in Article 14(2). It is noteworthy that even though the protection of ‘property’ and the ‘right of inheritance’ appear in the same sub-section, these are typically treated as distinct legal subjects.⁸⁶⁰ My analysis of Article 14 below proceeds from the premise that property and inheritance are intertwined and should be assessed alongside each other. This is especially since ‘right of inheritance’ is generally regarded as an extension of property rights enjoyed during the lifetime of an owner.⁸⁶¹

(i) *The meaning attributed to ‘property’ and ‘right of inheritance’*

It is important to note that the use of the terms ‘Property’ (*Eigentum*) and ‘right of inheritance’ (*Erbrcht*) are not defined in Article 14(1) GG. The meaning attributed to these terms is drawn from private law sources. ‘Property’ is defined in § 903 Civil Code (Bürgerliches Gesetzbuch, BGB) as:

‘[Entitlements of the owner] The owner of a thing (res) can, as far as the law or rights of third parties do not prohibit, act with that thing (res) at will and can exclude others from interfering with it.’⁸⁶²

⁸⁵⁹ See further for a comparative analysis of other foreign property clause IJ Kroeze ‘Between conceptualism and constitutionalism: private law and constitutional perspectives on property’ (unpublished PhD thesis, University of South Africa, 1997).

⁸⁶⁰ The exception is J Wieland in Horst Dreier (ed), *Grundgesetz: Kommentar* vol I (2013) 3rd ed Art 14, no 78 .

⁸⁶¹ Zimmerman (2020) op cit at 29.

⁸⁶² Translated by Mostert (2002) op cit at 214. Original: ‘[Befugnisse des Eigentümers] Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und von jeder Einwirkung ausschließen.’

For private property lawyers, the use of the word *Eigentum* in Article 14 implies that ownership is fortified by the liberal tradition of Roman law, imported into Germanic Law.⁸⁶³ Article 14(1) has been regarded as protecting property ownership and the incidents related to ownership, such as the right to transfer property.⁸⁶⁴ According to Zimmerman, it is not coincidental that the terms ‘property’ and ‘right of inheritance’ are used in the same sentence, which accordingly gives a strong indication of an inter-linking relationship.⁸⁶⁵ He notes that while an exact translation is difficult, the closest meaning of *Erbrcht* is probably ‘the law of (private) succession.’⁸⁶⁶ Much like the manner in which testamentary freedom is regarded as an incident (although implicit) incident of ownership in South African and American law, Zimmerman comments that:

‘This is taken to entail, *inter alia*, an individual, or subjective, right: everyone is free to dispose of his property for the time after his death as he pleases. Freedom of testation thus supplements, or extends, everyone’s right to dispose over his property during his lifetime which is inherent in the guarantee of ‘property’ - it is not coincidental that both guarantees have been placed side by side.’⁸⁶⁷

⁸⁶³ The meaning and implication for the use of a private law term in a constitutional document has given rise to debate between private law and public law oriented academics and lawyers. The same term (*Eigentum*) is used in both private property law and constitutional property law, with considerable differences between them. Mostert (2002) op cit at 211, 220; Alexander (2006) op cit at 125; F Ossenbühl & M Cornils *Staatshaftungsrecht* (6th ed 2013) at 160; P Badura *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 217. In terms of section 90 BGB only movable and immovable corporeal things (*Sachen*) qualify as being owned.

⁸⁶⁴ R Kurt *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (1978) ed Leipold vol 9 at 26.

⁸⁶⁵ R Zimmermann ‘The Compulsory Portion in German Law’, in KGC Reid, MJ de Waal and R Zimmermann (eds) *Comparative Succession Law Vol III: Mandatory Family Provision* (forthcoming, Oxford University Press, 2020); Zimmerman (2020) op cit at 29.

⁸⁶⁶ Zimmerman (2020) op cit at 29.

⁸⁶⁷ Zimmerman (2020) op cit at 29.

Commenting on the comparisons to South African law, De Waal echoes the point that the importance of the guarantee of inheritance is apparent from ‘the fact that it appears in the same article as the guarantee of private ownership.’⁸⁶⁸ He also notes that this explains the use of the term ‘private succession’ (*Privatebrecht*) which he describes as ‘a system primarily aimed at ensuring that, wherever possible, the property owned by the deceased will eventually again fall into private hands.’⁸⁶⁹ Thus, while Article 14(1) does not explicitly protect the principle of testamentary freedom, the right to transfer property after death is widely seen as a necessary incident of property ownership, which as stated, above is guaranteed.⁸⁷⁰

The German Federal Constitutional Court has recognised that freedom of testation is inherently limited by compulsory portion in favour of spouses and close relatives.⁸⁷¹ Put differently, it recognised that family succession in the form of a compulsory share forms part of the guarantee of ‘the right of inheritance’.⁸⁷² The Court held that a child’s economic participation in a deceased’s estate is a structural principle of compulsory share that should be protected as a right of inheritance regardless of a child’s need.⁸⁷³ This has been recognised as a constitutional principle, which is guaranteed by the institution of private inheritance⁸⁷⁴ and protection of marriage and the family in Art 6(1) GG.⁸⁷⁵ This case therefore implicitly recognises that the constitutional nature of inheritance is both individual and familial.⁸⁷⁶

⁸⁶⁸ De Waal MJ ‘The Law of Succession and the Bill of Rights’ in Rautenbach et al *Bill of Rights Compendium* (1998) at 3G4.

⁸⁶⁹ Ibid at 3G4.

⁸⁷⁰ The German Federal Constitutional Court has confirmed this interpretation of Art 14(1). BVerfGE 67, 329 (341), and BVerfGE 58, 377 (398).

⁸⁷¹ BGH of 21 March 1990 BGHZ 111 36 (39).

⁸⁷² See Zimmerman (2020) op cit at 30 for further analysis.

⁸⁷³ BVerfGE 112, 332 (349-50).

⁸⁷⁴ BVerfGE 112, 332, see further D Leipold ‘Ist unser Erbrecht noch zeitgemäß?: Gedankensplitter zu einem großen Thema’ 2010 Juristen Zeitung 802 at 806; and Roggendorf (2018) op cit at 213.

⁸⁷⁵ Röthel (2011) op cit at 162; and De Waal (1998) op cit at 3G4.

⁸⁷⁶ See Zimmerman (2020) op cit at 30 for criticism of the judgment.

The German Federal Constitutional Court's decision has been subject to criticism. Zimmerman notes that recognising compulsory share as a constitutional inheritance right, that a descendant is entitled to regardless of need, mischaracterises the position in the German Civil Code. As noted above, the system of compulsory share is not a mandatory system that automatically limits the testator's freedom to dispose of property at death. It rather entitles a claimant to a certain share of the deceased's estate. Zimmerman notes that the German Federal Constitutional Court's decision creates a right in which 'the children really *inherit* part of the estate'⁸⁷⁷ – which is more akin to a mandatory compulsory share system where 'the closest relatives enjoy a latent kind of co-ownership during the lifetime of the deceased which is merely actualized at the moment of the latter's death.'⁸⁷⁸ The Federal Constitutional Court uses the term *Familienvermögen* ('family property') to describe the nature of a descendant's right.⁸⁷⁹ The distinction is slight but significant in respect to the finer balance between the two competing forms of individual and family succession achieved in German inheritance law. Despite criticism of the nature of the claim to compulsory share, it is beyond doubt that these competing conceptions play a role in shaping the contours of the German inheritance law.

(ii) *An institutional guarantee in Article 14(1)*

A further aspect of Article 14(1) GG that impacts the form of constitutional protection for property and inheritance is the use of the word '*gewährleistet*' ('guaranteed'). This guarantee is both individual (*Individualgarantie*) and institutional

⁸⁷⁷ Zimmerman (2020) op cit at 32.

⁸⁷⁸ Zimmerman (2020) op cit at 31-2.

⁸⁷⁹ BVerfGE 112 332 (352 f).

(*Einrichtungsgarantie*).⁸⁸⁰ The latter guarantee is a reference to a system of rules, principles, norms and practices that make up a property and inheritance law.⁸⁸¹ An institutional function means that property serves a greater societal purpose beyond protecting individual subjective proprietary interests.⁸⁸² The institutional guarantee of inheritance ensures that the basic essential character of private succession is guaranteed in law. Article 14(1) GG also provides an individual guarantee of property (*Bestandsgarantie* or *Individualgarantie*) aimed at protecting individual property owners against State interference with their property. The individual guarantee plays the ‘classic’ negative role in providing a safeguard against improper State interference, either by defending herself against invalid or illegitimate regulations or expropriations of property.⁸⁸³ The institutional guarantee of property has to do with upholding the existence and usefulness of property as a system as a whole as opposed to protecting individual property rights.⁸⁸⁴ Both the institutional and individual guarantee is however informed by a normative conception of property freedom, applicable to property law and inheritance law (discussed below).

The institutional protection of property (including testamentary freedom) is closely associated with the normative approach to property in German constitutional property law.⁸⁸⁵ The social function of constitutional property in German society is strongly informed by a general societal commitment to individual freedom, and the level of self-determination that ownership affords to individuals to pursue their own

⁸⁸⁰ Van der Walt (1999) op cit at 128.

⁸⁸¹ Van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (unpublished LLD thesis, University of Stellenbosch, 2015) at 160; Zimmerman (2020) op cit at 30.

⁸⁸² Mostert (2002) op cit at 220-1, 242.

⁸⁸³ Ibid.

⁸⁸⁴ Van der Walt (1999) op cit at 129-30.

⁸⁸⁵ D Solomon (2019) op cit.

goals.⁸⁸⁶ The German approach to property is essentially a value-driven approach, whereby every aspect of property rights is determined in relation to that fundamental purpose.⁸⁸⁷ In other words, whether a particular proprietary interest is protected in terms of Article 14(1) GG depends on how it serves the constitutional purpose of safeguarding personal liberty.⁸⁸⁸ This is not assessed in terms of subjective personal goals but rather objectively and holistically in terms of the aspirational values of society.⁸⁸⁹

According to Alexander, the German property guarantee ‘underscores the fact that the constitutional right to property in Germany has neither a libertarian nor a utilitarian (that is, social wealth-maximising aim).’⁸⁹⁰ The function of constitutional property is rather moral and civic, in that it protects property to enable individuals to develop as autonomous moral agents.⁸⁹¹ Van der Walt distils the ‘fundamental purpose’ of Article 14 and aspirational values of German society as comprising: (a) human dignity, (b) meant to secure (c) a sphere of personal liberty (d) in patrimonial terms (e) to allow her to take individual responsibility for self-development (f) within a broader social and legal context; and (g) as members of a larger community.⁸⁹² This is reflected in the term *Freiheitsrecht*, which means that the protection of fundamental

⁸⁸⁶ H Westerman *BGB-Sachenrecht* (1994) 9th ed at 42; H Seiler ‘§ 903’ and ‘§ 904’ in J Staudinger *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (Drittes Buch Sachenrecht §§ 903 – 924)* (1996) 13th ed at 6 (Berlin: Sellier-de Gruyter); G Alexander ‘Property as a Fundamental Constitutional Right? The German Example’ (2002) 88 *Cornell LR*. 733 at 738. See further, Mostert (2002) *op cit* at 220. This approach has been adopted by the South African Constitutional Court, see chapter 4, § 4.4.

⁸⁸⁷ Van der Walt (1999) *op cit* at 125.

⁸⁸⁸ Badura (2003) *op cit* at 2; Mostert (2002) *op cit* at 226; Van der Walt (1999) *op cit* at 122.

⁸⁸⁹ This much is clear from the language of Article 14 GG that does not protect individual entitlements of owners but the rather the institution of property itself.

⁸⁹⁰ Alexander (2006) *op cit* at 115.

⁸⁹¹ *Ibid* at 115, 127.

⁸⁹² Van der Walt (1999) *op cit* at 124. According to Mostert, property protection should ‘enable the individual to act on his own initiative and to take responsibility for his or her actions, while participating in the development and functioning of the broader social and legal community.’ Mostert (2002) *op cit* at 226. See further Alexander (2006) *op cit* at 112-14, 125 (fn 139). BVerfGE 24, 389; BVerfGE 50, 290.

rights is to allow individuals to freely take responsibility for their lives, thereby contributing to the promotion of overall social welfare.⁸⁹³

At the heart of the German constitutional conception of property envisions a close nexus between property protection and self-development.⁸⁹⁴ In the *Hamburg Flood Control Case*, the German Federal Constitutional Court stated:

‘Article 14(1) of the Basic Law guarantees property both as a legal institution and as a concrete right held by the individual owner. To hold property is an elementary constitutional right that must be seen as sharing a close nexus with the protection of personal liberty. Within the general system of constitutional rights its function is to secure for its holder a sphere of liberty in the economic field in which he or she can lead a self-governing life.’⁸⁹⁵

This personal conception of property as self-development is closely related to the works of Hegel.⁸⁹⁶ Of particular importance to the constitutional is the principle of human dignity (*Menschenwürde*).⁸⁹⁷ Article 1 of the Basic Law states that ‘[t]he dignity of man is inviolable. It is to be respected and safeguarded with the full authority of the State.’⁸⁹⁸ The Federal Constitutional Court has described the principle of human dignity as the supreme value, which is the foundation of all other fundamental rights as well as the basis of the objective value system of the Basic Law.⁸⁹⁹ The German approach to property is not a ‘value-neutral’ one but based an

⁸⁹³ Mostert (2002) op cit at 242.

⁸⁹⁴ Alexander (2006) op cit at 112-3.

⁸⁹⁵ BVerfGE (1968) 24 367 (*Hamburg Flood Control Case*). See further, BVerfGE 58, 339-345; Alexander (2006) op cit at 113, 140 (fn 221, 222).

⁸⁹⁶ Alexander (2006) op cit at 113. See Radin M ‘Property and Personhood’ (1982) 34 *Stanford LR* 957.

⁸⁹⁷ Alexander (2006) op cit at 110.

⁸⁹⁸ Alexander (2006) op cit at 110; Van der Walt (1999) op cit at 125.

⁸⁹⁹ Alexander (2006) op cit at 110-11; Article 79(3) GG, which states: ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, the participation in principle of the *Länder* in Legislation, or the balancing principle laid down in Articles 1 and 20 shall be inadmissible.’ See cases BVerfGE 6, 32 (36, 41); BVerfGE 27, 1 (6); BVerfGE 45, 187 (227).

objective order of norms and values, the protection of human dignity as its focal point.⁹⁰⁰

Based on a normative conception of property, the German Courts distinguish between private property interests, whose purpose is merely profit-driven, from those interests implicating the right to personal dignity and individual self-fulfilment.⁹⁰¹ This is reflected in an approach called *Abstufung der Sozialpflichtigkeit*, which establishes a sliding scale of protection that should be afforded to certain property interests fundamental to personal freedom (self-determination and development) as opposed to general and excessive wealth. It is similarly based on a balancing principle according to which property receives different levels of protection depending on its proximity to the individual property interests or the public interest involved.⁹⁰² For instance, State interference with the family home would be significantly restricted because of its personal character, whereas the State would be afforded more leeway in regulating natural resources, such as land, due to its public effect.⁹⁰³ In this sense, the degree of State regulation is associated to the function of property.⁹⁰⁴ Explained in terms of the normative standard expressed above, the closer to the property is to a personal dignity and liberty the more restricted scope for regulation in favour of public interest. But the furtherer away dignity and liberty, the more scope for regulation in the public interest and for the State to impose social obligations.⁹⁰⁵ The protection of property

⁹⁰⁰ 7 Bverfge 198; 1 BvR 400/51 (1958), para. 1 (translated by Tony Weir).

⁹⁰¹ Schwebel op cit at 15.

⁹⁰² See Alexander (2009) op cit at 816-7 for an application of this concept to American case law, referring to it as the social-obligation theory; and H Dagan 'The Social Responsibility of Ownership' (2007) 92 *Cornell LR* 1255 at 1264-65 for criticism of this approach.

⁹⁰³ For a further explanation, see Alexander (2002) op cit at 740; AJ van der Walt Constitutional Property Law 3 ed (2011) at 103; and Van der Sijde (2015) op cit at 161.

⁹⁰⁴ Mostert (1999) op cit at 297. Froneman J implicitly adopted this approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape and Others* 2015 (6) SA 125 (CC) at para 60: 'The intensity of regulation may depend on the purpose for which the property is held and the purpose for which regulation is considered necessary. The purpose for which property is held may have a close relationship with a person's fundamental rights.'⁹⁰⁵ [My Italics]

⁹⁰⁵ Mostert (1999) op cit at 297.

therefore depends on whether the interest at stake serves exclusively economic – wealth creation and maximisation – ends or whether the interest enhances the owner’s status as an autonomous moral and political agent.⁹⁰⁶

(iii) *The social obligations of inheritance in Article 14(2)*

Notwithstanding the individualist focus of Article 14(1), it is apparent from a contextual interpretation of Article 14 as whole that individual ownership is not the entire basis for property protection, and that Article 14(1) should be read with subsection (2).⁹⁰⁷ Constitutional property lawyers argue that, while individual ownership is undoubtedly an important component of German Law (both in the BGB and Article 14 GG), the relationship between individual protection and social obligation represented in Article 14(1) and (2) represent dual functions that has been described as an ‘inherent tension.’⁹⁰⁸ In other words, they argue that the recognition of individual autonomy should be balanced with the social obligations of property.⁹⁰⁹ Two factors that point to this is: first, the protection of ownership and the power to limit it appear in the same subsection; and second, the use of the words ‘entails’ and ‘also’ in Article 14(2) means that the subsections cannot be read in isolation. This is amplified by the use of the same term ‘Property’ (*Eigentum*) in both subsections. The Federal Constitutional Court has decided that the constitutional concept of property is wider

⁹⁰⁶ Relying on dicta from the *Hamburg Flood Control Case* (1968) 24 BVerfGE 367 (translated in Kommers and Miller above n 76 at 632), Froneman J stated in *Shoprite* that the ‘core purpose of the constitutional protection of property was not economic, but personal and moral.’ See *Shoprite Checkers* supra.

⁹⁰⁷ BVerfGE 58, 300. See further Alexander (2006) op cit at 123.

⁹⁰⁸ Ibid at 123; Mostert (1999) op cit at 46; Van der Walt (1999) op cit at 122.

⁹⁰⁹ Mostert (1999) op cit at 247, Mostert argues that it is ‘not the civil law rules themselves, but rather the underlying principles of classical property law, that are noticeable in the constitutional concept of ownership.’ See further W Leisner ‘Eigentum’ in J Isensee & P Kirchhof *Handbuch des Staatsrecht der Bundesrepublik Deutschland* (1989) 1023 – 1097 at 73-4.

than the private law one, the scope of which must be ascertained from the meaning and context of the property clause itself.⁹¹⁰

According to Kimminich, Article 14 GG is one of the few sections that contains references to duties, as opposed to merely rights.⁹¹¹ Like the Civil Code BGB, Article 14 GG represents a compromise between complete freedom of testation and a family-oriented limitation through compulsory portion.⁹¹² According to Mostert, Article 14 ‘reflects the dichotomy between liberal private ownership and the social obligation inherent in property.’⁹¹³ This representation of ownership and inheritance reflects this inherent tension that is also apparent from German legal history. Alexander supports this view, who argues that the ‘social obligation norm’ in Article 14(2) reflects a long German legal tradition.⁹¹⁴ The tension between Article 14 (1) and (2) also enjoins the legislature to establish an equitable balance between a guarantee of individual property and social interests in regulating the property system for the public interest.⁹¹⁵

(iv) *Inheritance tax in Germany*

Compared to South Africa and United States, Germany imposes a tax on inheritance *received* rather than estate *transferred*. In Germany, inheritance tax is justified as a means to finance social policies, and due to the strongly familial nature of inheritance, rejected as an interference with the family.⁹¹⁶ The familial nature of inheritance means

⁹¹⁰ BVerfGE 51, 193 (1975) 218.

⁹¹¹ Kimminich *Eigentum Enteignung Entschädigung* (1979) m.n. 8.

⁹¹² Mostert (1999) op cit at 46; Van der Walt (1999) op cit at 122.

⁹¹³ Mostert (1999) op cit at 54. According to Rittstieg, Article 14 also reflects the dichotomy between liberal and socialist ideologies. See Rittstieg *Eigentum als Verfassungsproblem – zu Geschichte und Gegenwart des Bürgerlichen Verfassungsstaates* (1976) at 280.

⁹¹⁴ Alexander (2006) op cit at 98.

⁹¹⁵ Van der Walt (1999) op cit at 133.

⁹¹⁶ Beckert (2004) op cit at 170.

that the progressivity of the tax rates is based on closeness to the deceased: surviving spouses, children and other close family members are taxed at low rates.⁹¹⁷ Distant family heirs and non-relations are taxed at up to 70%. The role of inheritance tax takes on a social justice element in providing finance for social policies of the State. Revenue generated from these taxes is used to address social problems that arise from inequalities in the distribution of wealth in society. The inequality in access to property was regarded as a threat to the social order, thus justifying intervention by the State to enforce corrective social policies.⁹¹⁸ The thrust of the debate was however not premised on equality of opportunity as was the case in United States, but rather raising revenue for social welfare.⁹¹⁹ The State's role was not meant to usurp the role of the family in being the primary basis of support. The passing of wealth through the family played an important role in providing familial support. It was due to the recognition that level of familial support was unequally spread that justified other forms of support. The social obligations inherent in the constitutional notion of inheritance itself did warrant State intervention when this primary function fell apart and there was a need for a secondary social safety net.⁹²⁰ The function of inheritance tax in providing revenue for social welfare policies has also increased with less reliance on the traditional family structure.⁹²¹ As society modernised, the State replaced the supportive role of that the family traditionally played.⁹²²

⁹¹⁷ Ibid at 209.

⁹¹⁸ Ibid at 212.

⁹¹⁹ Ibid at 242.

⁹²⁰ Beckert (2004) op cit at 214.

⁹²¹ Ibid at 230.

⁹²² Ibid at 230.

d) Concluding remarks

It is clear that the history of German inheritance law lies in how various jurists sought to balance conflicting commitments to individual testation and family members.⁹²³ While in the United States and South Africa, the balance swings more in favour of testamentary freedom, which is regarded as paramount, in Germany, the starting point is the socially-situated context of the family. It can be said that the freedom that testators exercise are informed and constrained by the familial context.⁹²⁴ This may seem somewhat ironic since Article 14 expressly recognises individual ownership (and inheritance) while the United States and South African property clauses are not only silent on the detail of property rights but also framed in the negative. Lastly, it expressly recognises rights and duties as opposed to the vague term ‘property’.

⁹²³ Klippel (1984) op cit at 117-68, 165-166.

⁹²⁴ Otto von Geirke *Das deutsche Genossenschaftsrecht* [1889] (1948) Vol 2 at 29-30.

CHAPTER 6

LESSONS AND RECOMMENDATIONS FOR THE CONSTITUTIONAL DEVELOPMENT OF FREEDOM OF TESTATION IN SOUTH AFRICA

6.1 INTRODUCTION

A comparative analysis of the constitutional recognition of freedom of testation in the United States and Germany reveals a number of important insights for the constitutional nature and function of testate succession in these jurisdictions. The main insight is that while all three jurisdictions recognise the principle of freedom of testation⁹²⁵, there are varying degrees of importance afforded to testamentary rights when these conflict with other public interest imperatives. Lessons from these jurisdictions helps understand the normative nature of testamentary freedom and its redistributive scope, namely, the scope that lawmakers are prepared to explore when considering public interest limitations on testamentary disposals. I argue that the threshold to overturn testamentary disposals depends on the value and sanctity afforded to private ownership in testate succession. In South Africa and the United States, this is almost insurmountable because private ownership is a highly prized legal institution. The scope for redistribution changes if other constitutional imperatives are recognised. This is more so if these obligations are located within the property clause itself, as is the case in the German and South African constitutions.

⁹²⁵ For the position in South Africa, see chapter 2, § 2.3 b) and c) and chapter 3, § 3.2. For the position in the United States, see chapter 5, § 5.2 a) (ii). For the position in Germany, see chapter 5, § 5.3 a), b) and c).

This suggests that an understanding of the constitutional nature and function of testamentary freedom is absolutely vital to determining when it will yield to public interest limitations.

In section 6.2, I first collate all the lessons from the three previous chapters (chapters 3, 4 and 5), singling out specific points of comparison between these testate succession law systems. The objective of this section is to show that the approaches in the United States and Germany broadly correlate with the two conflicting approaches to freedom of testation in South Africa I have already sketched out in chapters 3 and 4 respectively, namely: the United States has adopted a private ownership approach (chapter 3)⁹²⁶, and Germany has adopted a constitutional property approach (chapter 4).⁹²⁷ Once I have drawn on lessons from these other jurisdictions, in section 6.3, I make specific recommendations for the constitutional development of freedom of testation in South Africa.

6.2 LESSONS FROM THE UNITED STATES AND GERMANY

The lessons I draw from the comparative analysis interrogate the lawful scope to limit the distribution of wealth in a will or trust based on countervailing public policy considerations – what I have referred to as the redistributive scope of freedom of testation. There may be other points of comparison and reasons to explore these jurisdictions further. However, my main focus is how a constitutional guarantee of testamentary freedom either expands or limits its redistributive scope.

⁹²⁶ Testate succession law in the United States has been described as recognising near absolute or unlimited conceptions of testamentary disposal that are very rarely overridden to achieve social justice.

⁹²⁷ J Beckert *Inherited Wealth* (2004) at 8. In Germany testamentary freedom is constitutionally limited by a compulsory share in favour of surviving spouse and family dependents as well as by social welfare needs. Limitations are more readily achieved in Germany, as the purpose of constitutional protection of inheritance law is to achieve an equitable balance between individual protection of testamentary rights and limitations to promote social justice.

a) **Constitutional protection of freedom of testation in all three jurisdictions**

The first aspect to clarify is which of the jurisdictions recognise freedom of testation as a constitutional property right. As noted in chapter 2, this was a specific concern for South African academics immediately after the adoption of the South African Constitution in 1996. Of the three jurisdictions, only the German property clause contains an express guarantee of private succession.⁹²⁸ This is generally understood as serving a dual purpose in protecting both an individual testamentary disposal and a compulsory share for familial claimants. This constitutional protection confirms an already established position in the German Civil Code, which remains the main vehicle for the practical administration of inheritance law.⁹²⁹ As shown in a discussion on the topic, the compromise between individual testamentary freedom and familial responsibility has deep historical roots.⁹³⁰ The scope of a testator's distributive power ought to be viewed in the overriding context of the importance of the family in German society. While constitutional protection is still important, it reflects rather than adds to the existing codified position. An important consequence of constitutional recognition in Germany is that the compulsory share is expressly protected and cannot be abolished. This reinforces the two-dimensional character of inheritance as its defining feature.

The South African and American property clauses are silent on whether freedom of testation (as an incident of private property ownership) is itself a property

⁹²⁸ See chapter 5, § 5.3 c).

⁹²⁹ See chapter 5, § 5.3 b) (i).

⁹³⁰ See chapter 5, § 5.3 a), b).

right.⁹⁰¹ These property clauses merely reference ‘property’ as deserving of protection, without specifying the type of property or what rights within the bundle or incidents of property entitlements deserve constitutional fortification. The silence has however played out in different ways. The silence in the American property clause does not seem to have any practical consequences.⁹⁰² While there is a longer history of questioning the status and role of testamentary freedom, especially among earlier writers critical of the English feudal system, it is widely accepted that testamentary freedom is a statutory right, administered at the individual State level. Freedom of testation is also fiercely protected in the common law as a fundamental organising principle of testate succession, which suggests that it has the same level of protection as a constitutional right.⁹⁰³ As a jealously guarded private law right, it is unlikely that it could be afforded any further stringent protection as a constitutional right.

The silence in the South African property clause, in comparison, was only a technical barrier for concluding that the common law principle of testamentary freedom ought be constitutionally protected. As shown in chapter 3⁹⁰⁴, it has been assumed that the common law principle of testamentary freedom is identical to the constitutional protection of property. The effect is that there has been no significant change in our understanding of testamentary freedom in the constitutional era. This is perhaps not surprising considering the lack of any substantive analysis of the constitutional foundations of freedom of testation since the inception of the Constitution.

A comparison on this point of all three jurisdictions studied in this thesis leads to a rather unfortunate conclusion that constitutional protection seems to have played

⁹⁰¹ For a discussion on the South African property clause, see chapter 2, § 2.3 a); and chapter 5, § 5.2 a) for a discussion in the United States.

⁹⁰² See chapter 5, § 5.2 a) (iii).

⁹⁰³ See chapter 5, § 5.2 a) (iv) and b).

⁹⁰⁴ See chapter 2, § 2.3 b) and c).

no major role in distinguishing a different type of protection. These all largely mirror the position in either the civil code or common law. This is particularly apparent considering the substantial overlap between testate succession law in South Africa and the United States.⁹⁵⁵ The similarities between these jurisdictions is in spite the fact that in one system, freedom of testation is a constitutional right and the other it is not.⁹⁵⁶ It is also surprising considering the fact that the constitutional protection of property in South Africa, generally, should be very different to its American counterpart in light of its express redistributive objective. The similarity between these systems of testate succession only reinforces my hypothesis that the redistributive aspects of testation in South Africa have not been taken into account. This form of protection is indistinguishable to the common law, whereas a proper reading and consideration of the South African property clause as a whole should distinguish the nature and function of testate succession in South Africa. I suggest some recommendations below to remedy this and develop a constitutional notion of freedom of testation.⁹⁵⁷

b) The role of individual property ownership

All three jurisdictions recognise the principle of freedom of testation.⁹⁵⁸ Despite this similarity, there are varying degrees of importance afforded to testamentary rights. South Africa and the United States take the protection of individual testation to the

⁹⁵⁵ In these jurisdictions, freedom of testation is an exclusive property right that trumps other rights and interests in almost all circumstances. To the extent that limitations are allowed, these are exceptional and only imposed in the clearest of cases, affording testators a wide distributive power.

⁹⁵⁶ See the South African position at chapter 2, § 2.3 and the American position at chapter 5, § 5.2 a) (iii).

⁹⁵⁷ See § 6.3 b) – f) below.

⁹⁵⁸ For the position in South Africa, see chapter 2, § 2.3 b) and c) and chapter 3, § 3.2. For the position in the United States, see chapter 5, § 5.2 a) (ii). For the position in Germany, see chapter 5, § 5.3 a), b) and c).

extreme, affording testators almost unlimited power to dispose of property after death, even when private bequest offend public policy considerations.⁹³⁹ The core function of testate succession, in terms of the private ownership approach, is to preserve, enforce and insulate testamentary wishes from competing demands of society.⁹⁴⁰ As a foundational right, testamentary freedom holds a privileged status in the hierarchical arrangement of interests that make up inheritance law. This is particularly apparent in both systems where the bequests are purely private, i.e. where the State or a public institution is not administratively involved.⁹⁴¹ It is also apparent in how testators can avoid the public consequences of a bequest through providing alternative provisions.⁹⁴² While limits are recognised, these are exceptional to the prevailing norm of testamentary freedom with the result that lawmakers are passive in nature, deferential to individual testation and cautious to impose any limitations without very clear lawful authority to do so.⁹⁴³ It takes a special and compelling case to overturn the presumptive superiority of giving effect to testamentary wishes.

This can be compared to Germany that expressly recognises a compulsory portion as an internal constitutional safeguard against the abuse of individual testamentary disposals. The point of departure is already a compromise between two competing societal versions of inheritance⁹⁴⁴, which means that while freedom of testation is also recognised as a fundamental principle of property ownership, it is less

⁹³⁹ The position in South Africa is epitomized by the disinheritance cases. See *Harper v Crawford* 2017 JDR 1271 (WCC) and *King v de Jager* 2017 JDR 1321 (WCC). See chapter 5, § 5.2 b) (iii), (iv) and (v) for a discussion in the United States.

⁹⁴⁰ G Alexander 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell LR* 745 at 746.

⁹⁴¹ See chapter 5, § 5.2 b) (ii) for the position in the United States and chapter 3, § 3.4 and 3.5 for the position in South Africa.

⁹⁴² See chapter 3, § 3.4; and chapter 5, § 5.2 b) (ii).

⁹⁴³ See chapter 3, § 3.3 and 3.4 for position in South Africa; and chapter 5, § 5.2 b) (i). See further, Alexander (2009) op cit at 746; D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685 at 1737; and J Singer *Entitlement: The Paradoxes of Property* (2000) at 3.

⁹⁴⁴ See chapter 5, § 5.3 a).

expansive and less tyrannical than in South Africa and the United States.⁹⁴⁵ Even when German testators are empowered to deprive a person of a compulsory share, he or she bears the burden of proving the reasons for such deprivation. This is significantly different to South Africa and the United States where testamentary freedom is uncompromising and can 'disinherit' family members for no reason at all. Thus, even the quality of ownership, while still recognised, is subtly different.

A compromise in Germany ensures that inheritance law serves a dual purpose in protecting individual testamentary freedom and the family unit. This position has a lot to do with the historical tension between Roman law and Germanic law, and the insistence that a compromise could be sustained.⁹⁴⁶ German property law is also generally also more socially minded, recognising that property owners owe a social obligation. As Samter puts it, German inheritance law also has 'societal quality about it.'⁹⁴⁷ This compromised view of freedom of testation means that social reforms, albeit mostly to protect the family, were not regarded as illegitimate incursions into testamentary freedom because such reforms are built on an already established role for inheritance law in society. The legitimacy of familial unit means that limitations are not exceptional, but constitutive, of German inheritance law.

Like the German property clause, the protection and limitation of property in South Africa (which includes testation) is a compromise between two equally important constitutional goals (individual protection and redistribution). These two components are integral to the nature and function of testamentary freedom. I make

⁹⁴⁵ Singer calls an absoluteness form of ownership without any obligations a form of dictatorship. See Singer (2000) op cit at 209.

⁹⁴⁶ See chapter 5, § 5.3 b).

⁹⁴⁷ A Samter *Das Eigenhum in seiner sozialen Bedeutung* (1879) at 253.

some recommendations on how the constitutional notion of testamentary could be developed to reflect this compromise below.⁹⁴⁸

c) The normative significance of the individual testator

Closely linked to the previous section is a comparison in how the different systems of testate succession law conceptualise individual autonomy. This can be differentiated in terms of ‘freedom from’ and ‘freedom to’ conceptions of individual autonomy.

(i) ‘Freedom from’- testation

In South Africa and the United States, freedom is primarily viewed as the right of non-interference with testamentary wishes. Because this liberal notion is so deeply embedded in these systems, testamentary freedom is treated as self-evident.⁹⁴⁹ This conception is primarily regarded as ‘freedom from’ with no attempt to define its substantive interests.⁹⁵⁰ As explained in chapter 3, there are various substantive interests that are, in my view, worthy of protection, including: promoting individual self-determination, individual happiness and human dignity, efficient estate planning, incentivising wealth creation, and caring for dependent family members.⁹⁵¹ These justifications are important ‘ends’ that should be kept in mind when recognising and developing the constitutional content of testamentary freedom.

The fundamental importance of testamentary freedom is thus not that it promotes freedom of owners in an abstract and conceptually self-evident way (which

⁹⁴⁸ See § 5.3 below.

⁹⁴⁹ T Honoré *Making Law Blind: Essays Legal and Philosophical* (1987) at 221.

⁹⁵⁰ Singer (2000) op cit at 3.

⁹⁵¹ See chapter 3, § 3.2. See further chapter 4, § 4.4 where this is compared to the constitutional property approach in South Africa.

is repeatedly suggested in the South African context), but rather how it allows the individual to fulfil deeply held desires for her property after death. In the post-apartheid era, the opposite has occurred; namely, a strong, unsubstantiated claim to property ownership has obviated the need for normative debate on the value of testamentary freedom as a right. One particularly negative consequence of assuming that freedom of testation is a fundamental right is the tendency of removing the subject from democratic deliberation. Some of the most prominent objections to incorporating a right to property as a fundamental constitutional right are based on this negative consequence. Nedelsky argues that social nature of property is that it enhances values, such as life, liberty and security of a person, that are epiphenomenal values to property.⁹⁵² These values are also fundamental democratic values that have implications for distributive justice and allocation of scarce resources.⁹⁵³

The inherent danger with an expansive undefined liberal freedom is there is no internal check or mechanism to scrutinize the subjective motivations for individual behaviour.⁹⁵⁴ The very nature of this form of individual freedom is that it allows for a wide range of idiosyncrasies, which in turn means that courts will be unwilling to question extreme manifestations of individual will.⁹⁵⁵ On the one hand, it allows for socially benevolent bequests to: charitable causes; dependent family members so that

⁹⁵² See chapter 3, § 3.2. J Nedelsky 'Should property be constitutionalized? A relational and comparative approach' in GE van Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) at 417-432, 420; J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 93-99, 107-110; and G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) at 102. See further the statement made by the New Jersey Supreme Court in *Shack v State* 277 A.2d 369, 372 (N.J. 1971): 'Property rights serve human values. They are recognized to that end, and are limited by it.' See further, G Alexander 'Property, Dignity, and Human Flourishing' (2019) 104 *Cornell LR* 4 991 at 1018; F Michelman 'Liberties, Fair Values, and Constitutional Method' (1992) 59 *University of Chicago LR* 91 at 99.

⁹⁵³ AJ van der Walt 'The modest systemic status of property' (2014) 1 *Journal of Law, Property, and Society* 15 94.

⁹⁵⁴ See chapter 3, § 3.2 f). See further SR Munzer *A Theory of Property* (1990) at 63, 144.

⁹⁵⁵ See chapter 5, § 5.2 b) (iv) and (v), and particularly *Hiler v Cude* 455 S.W.2d 891, 899 (Ark. 1970); and chapter 3, § 3.3 c) (ii) and MJ De Waal & MC Schoeman *Introduction to the Law of Succession* (2003) at 87.

the death of a breadwinner does not financially cripple the family; or to one child who may need it more than another. On the other hand, the same freedom fully entitles testators to be selfish, possessive, egotistical and even vindictive and vengeful. The inherent anomaly is that it allows for possessive, selfish and vindictive bequests which may also be self-fulfilling and empowering for the individual testator.

(ii) *'Freedom to'-testation*

The 'freedom from' liberal conception of testamentary freedom can be compared to the 'freedom to' conception.⁹⁵⁶ This latter conception has been developed by the German Federal Constitutional Court and South African Constitutional Court in their attempt to redefine the notion of property freedom as self-fulfilment.⁹⁵⁷ In Germany, liberal testation has been referred as 'unbridled individualism' and rejected in favour of a system that recognises the inter-dependency and connectedness of individuals within a social context, in this case, within the familial unit. These courts have sought to define property objectively (as an individual and institutional guarantee⁹⁵⁸) in terms of how it promotes human potential, particularly how it promotes innate human dignity.⁹⁵⁹ Freedom as self-fulfilment can be characterised as the positive benefits of holding property and how these promote socially desirable values, like human dignity, happiness, efficiency and empowerment of self and others.⁹⁶⁰ The constitutional notion of property is also objectively defined and thus is not solely intended to protect subjective personal interests. While this conception may also promote individual

⁹⁵⁶ Singer (2000) op cit at 143.

⁹⁵⁷ See chapter 4, § 4.3 and 4.4; and chapter 5, § 5.3 c) (ii) and (iii).

⁹⁵⁸ See chapter 4, § 4.4 and chapter 5, § 5.3 c) (ii).

⁹⁵⁹ See chapter 4, § 4.4; and chapter 5, § 5.3 c) (ii) and (iii)..

⁹⁶⁰ H Dagan *Liberalism and the Commons* (2019) at 5, 7 (forthcoming) Available at SSRN: <https://ssrn.com/abstract=3391912> or <http://dx.doi.org/10.2139/ssrn.3391912>.

independence and should, in the appropriate circumstances, be used as a shield to ward off unwanted incursions, it is not automatically predisposed to act as a bulwark to any interference from the State or third parties.⁹⁶¹ In fact, this conception of testamentary freedom is more empowering and autonomy-enhancing than the narrow liberal conception with its flimsy childish premise of ‘its mine, therefore leave me alone.’⁹⁶²

A positive objective understanding of testamentary freedom may be one way to disregard and filter out narcissistic testamentary bequests.⁹⁶³ This may be the case, especially when a certain bequest is clearly spiteful or discriminatory and in no way promotes the objectively defined socially desirable reasons for protecting testation. As will be shown in the recommendations section below, this would require courts to develop an objective normative standard to measure testamentary bequests, which currently does not exist in South African law.

d) Thin v thick versions of social responsibility

The three jurisdictions can also be assessed in terms of the expectations on testators to act responsibly towards others. South Africa and the United States adopt a thin version of social responsibility, whereas a thick version of social responsibility has been recognised in Germany and by the South African Constitutional Court. At the heart of this distinction is what it means to be a free person in community.

⁹⁶¹ Munzer (1990) op cit at 93; Dagan (2019) op cit at 3; Alexander (2019) op cit at 1000-01.

⁹⁶² Dagan (2019) op cit at 3; G Alexander (2019) op cit at 1000-01.

⁹⁶³ Munzer (1990) op cit at 95-6.

(i) *Thin social responsibility*

The approaches adopted in South Africa and the United States relies on a thin understanding of social responsibility premised on a liberal contractual vision of common good or community.⁹⁶⁴ Testators in these jurisdictions are only obliged to dispose of property in a way that does not harm the public good. There are accordingly no affirmative positive obligations for testators to promote the social good.⁹⁶⁵ As Singer puts it, owners in this conception of ownership ‘abhors obligation’.⁹⁶⁶ To the extent that there are obligations to act in the public interest, these are privatized forms of charity and benevolence that cannot be mandated by the State.⁹⁶⁷ This approach supposedly encourages gifts and charity because these will be willingly and freely given as opposed to being directed to some State measure.⁹⁶⁸

A liberal contractual idea of community creates the reasonable expectation that the testate succession laws and rules will uphold individual autonomy as far as possible.⁹⁶⁹ Because these laws – the rules of the game – have been in place for significant time, they do however provide the level of certainty and stability for individuals to meaningfully exercise their agency.⁹⁷⁰ As long as a bequest does not offend public norms, then there is no other obligation to dispose of property in any other way.⁹⁷¹ Anything more would be regarded as unacceptable since individuals are programmed to realise and forecast their own life choices and expect as much support for this freedom as possible. A thin social responsibility is also defended on the

⁹⁶⁴ See chapter 3, § 3.2 f); and chapter 5, § 5.2 b) (iv) and (v).

⁹⁶⁵ Munzer (1990) op cit at 63; Singer (2000) op cit at 3, 5; Honoré (1987) op cit at 174, 191.

⁹⁶⁶ Singer (2000) op cit at 6.

⁹⁶⁷ Singer (2000) op cit at 16.

⁹⁶⁸ See Munzer (1990) op cit at 110-12 for a criticism of the view that charity is an effective form of redistribution of property.

⁹⁶⁹ See chapter 3, § 3.2 d); Dagan (2019) op cit at 4; Singer (2000) op cit at 119-20.

⁹⁷⁰ Munzer (1990) op cit at 79-80.

⁹⁷¹ In both South Africa and the United States, this has been defined as requiring the participation of a public institution or having a public character. See chapter 3, § 3.4; and chapter 5, § 5.2 b) (ii).

grounds that imposing only negative obligations on testators is also far less onerous and administratively burdensome as the individual has the onus to determine the distributive scheme appropriate to her life circumstances as well as those of her beneficiaries.⁹⁷²

The starting point for a thin version of social responsibility is an idealised complete and absolute freedom that has shaped the notion of testamentary freedom, i.e. the absence of any limitations or affirmative obligations to promote communal well-being.⁹⁷³ Because the individual is the metric of social value, the common good is achieved in a liberal vision of society only insofar as it promotes individual autonomy.⁹⁷⁴ The public good is treated ‘as derivative of the good of individuals’.⁹⁷⁵ This is the inescapable paradigm in which all other aspects of testate succession are measured.⁹⁷⁶ According to this understanding, freedom of testation is acceptable as a principle not because it promotes collective social welfare, but because it is assumed that each individual desires the right to control where the property he or she have acquired throughout their lives goes at death. This has been referred to as individual preference satisfaction in law and economic theory of law.⁹⁷⁷ The fact that the protection of freedom of testation may promote broader policy goals and values is

⁹⁷² D Kelly ‘Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications’ (2013) 82 *Fordham LR* 1125 at 1127; AJ Hirsh & WKS Wang ‘A Qualitative Theory of the Dead Hand’ (1992) 68 *Indiana Law Review* 1 at 51; H Dagan *A Liberal Theory of Property* (2020) (forthcoming book).

⁹⁷³ See chapter 3, § 3.2 e) and f); G Alexander & EM Penalver ‘Properties of Community’ (2009) 10 *Theoretical Inquiries in Law* 1 132; Honoré (1987) op cit at 190.

⁹⁷⁴ Alexander (2009) op cit at 759; H Dagan *Takings and Distributive Justice* (1999) 6 *Virginia Law Review* at 791-2; Alexander & Penalver (2009) op cit at 130; A Sen *Development as Freedom* (1999) at 67-68.

⁹⁷⁵ Alexander & Penalver (2009) op cit at 134. Singer (2000) op cit at 6 refers to this as ‘the life of the owner’.

⁹⁷⁶ Munzer (1990) op cite at 198; Singer (2000) op cit at 6.

⁹⁷⁷ Brion ‘Norms and values in law and economics’ (1999) *Washington and Lee University* 1042; chapter 3, § 3.2 e) and f) for a discussion and critique; Alexander & Penalver (2009) op cit at 130; Munzer op cit at 98.

itself not something that is assessed collectively and accumulatively, but rather with the idealised autonomous personae in mind.⁹⁷⁸

It would be foolish not to recognise that the private ownership does permit some redistribution and also does recognise that testators are not obligation-free.⁹⁷⁹ As illustrated with South Africa and the United States, limitations that redirect a testator's wealth to others are perfectly permissible. A public interest limitation, even in the narrow private law sense, is a tool that has always been available to overturn illegal or immoral bequests. Protecting dependent family members, such as surviving spouses and minor children, is also a limitation aimed at redistributing a private estate. The disagreement is rather with the types of limitations and the goals sought to be achieved.⁹⁸⁰ The point is not that testation is absolute but rather, as Dagan aptly captures, 'even the most traditional justifications of property reject Blackstone's description of ownership as "sole and despotic dominion," and necessitate incorporating some dimension of social responsibility into the concept of property.'⁹⁸¹ While Dagan is correct that any social responsibility towards others is narrowly defined, the point is that in these systems, a strong individualistic understanding of testate succession drastically limits its redistributive scope.⁹⁸² It still insists that at its core, freedom of testation is unlimited. A more accurate conception of the thin social responsibilities of private ownership is thus that while redistribution is permissible, it is strongly opposed by attributing a high value to testamentary choices in the distribution of property at death.

⁹⁷⁸ See chapter 3, § 3.2 a) – e).

⁹⁷⁹ Honoré (1987) *op cit* at 190.

⁹⁸⁰ Singer (2000) *op cit* at 18.

⁹⁸¹ Dagan (2007) *op cit* at 1259.

⁹⁸² Alexander (2009) *op cit* at 753-4.

(ii) *Thick social responsibility*

The thin version of social responsibility can be compared to a thick form that measures testamentary freedom in terms how bequests *promote* the public good.⁹⁸³ German and South African constitutional conceptions of property expressly recognise that owners owe social responsibilities towards the public good.⁹⁸⁴ These social obligations arise from human dependency at different levels of relationships: interpersonal, familial, communal, institutional, and nation.⁹⁸⁵ These are the mediating vehicles in which wealth and property are acquired during a testators lifetime, which otherwise would not make it possible to dispose of wealth at death.⁹⁸⁶ Its starting point is an acknowledgment that the social world is far more complex and nuanced than what is presumed in the ownership approach.⁹⁸⁷ A thick social responsibility recognises our communal inter-dependency and the need for a more enriched ‘other-regarding’⁹⁸⁸ conception of individual freedom.⁹⁸⁹ It is often stated that ‘we are not islands onto ourselves’ or we live in isolation.⁹⁹⁰ Most humans desire and rely on social connection and cooperation to survive and thrive in society.⁹⁹¹ An ownership understanding of testation is incompatible with these core human desires. As Singer puts it ‘there is no

⁹⁸³ Mill adopted the view that bequests should be limited when it conflicts with the ‘permanent interests of the human race’. JS Mill *Principles of Political Economy* (1848) at 226.

⁹⁸⁴ See chapter 4, § 4.4; and chapter 5, § 5.3 c) (iii).

⁹⁸⁵ Alexander (2009) op cit at 766; R Bellah et al *Habits of the Heart: Individualism and Commitment in American life* (1996) 2nd ed; M Sandel *Liberalism and the Limits of Justice* (1998) 2nd ed; C Taylor *The Makings of the Modern Identity, Sources of the Self* (1989); Honoré (1987) op cit at 221-23; S Krecizer-Levy ‘Property’s Immortality’ (2016) 23 *Cardozo Journal of Law & Gender* 1 at 107; D Hacker ‘The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought’ (2010) 7 *Journal of Empirical Legal Studies* 322; M Leslie ‘Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract’ (1999) 77 *NC LR* 551.

⁹⁸⁶ G Alexander ‘Intergenerational Communities’ (2014) 8 *Law & Ethics of Human Rights* 21 at 25.

⁹⁸⁷ Honoré (1987) op cit at 209.

⁹⁸⁸ Singer (2000) op cit at 4; Alexander (2019) op cit at 1002. Munzer (1990) op cit at 85 refers to this as ‘self-integration’.

⁹⁸⁹ Singer (2000) op cit at 16.

⁹⁹⁰ J Nedelsky ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 *Yale JL and Feminism* at 7; Singer (2000) op cit at 131; H Arendt *The Human Condition* (1958) at 7.

⁹⁹¹ Munzer (1990) op cit at 106.

core of property we can define that leaves owners free to ignore entirely the interests of others.’⁹⁹²

Mutual dependency is even more strikingly apparent in inheritance where a testator’s intent for a particular item cannot be fulfilled with cooperation from heirs.⁹⁹³ As Alexander has argued, communal dependency in the inheritance context has intergenerational dimensions.⁹⁹⁴ Kreiczler-Levy also aptly makes the point that ‘[s]uccession is a clear manifestation of interconnection’ between giver and receiver of a bequest.⁹⁹⁵ It is impossible to define the rights of testators in the absence of: overall human dependency; a societal structure in which ownership of property is possible; and lastly, the effects that testamentary disposals have on others.⁹⁹⁶ In this relational dynamic, the social responsibility is not measured exclusively from the testators perspective as a barrier to free disposal but rather from the public good perspective in terms of how bequests could promote shared goals and objectives.⁹⁹⁷ A thick social responsibility is a way of promoting a positive vision of the public good as opposed to harming individual rights. This is a fundamentally different positive way of looking at the relational dynamic between freedom of testation and public interest limitations.

In Germany, a compulsory portion claim is a substantial limitation on testamentary freedom, which arises from inter-personal ties created within the family unit. The Federal Constitutional Court has acknowledged this form of dependency by

⁹⁹² Singer (2000) op cit at 18.

⁹⁹³ Kreiczler-Levy (2016) op cit at 125; S Kreiczler-Levy ‘The Riddle of Inheritance: Connecting Continuity and Property’ (2011) 10 *SSRN Electronic Journal* 1 at 14; Alexander (2014) op cit at 34.

⁹⁹⁴ Alexander (2014) op cit.

⁹⁹⁵ Kreiczler-Levy (2016) op cit at 110. See further JP Rosenfeld ‘Disinheritance and Will Contests’ in (ed) J Cates & M Sussman *Marriage Family Review: Family Systems and Inheritance Patterns* (1982) 75 at 77.

⁹⁹⁶ Singer (2000) op cit at 88, 146, 204.

⁹⁹⁷ See Nedelsky (2011) op cit; M Minow ‘Essay, Interpreting Rights: An Article for Robert Cover’ (1987) 96 *Yale L.J.* 1860; R West ‘Jurisprudence and Gender’ (1988) 55 *University of Chicago LR* 1 for a relational theory of property.

affording children a share of their parent's estate.⁹⁹⁸ A communal dependency within the family context thus restricts how parents may dispose of their property. It, in a sense, makes testamentary disposals contingent on the effects that it has on compulsory claimants. While testators are still free to dispose of their property in a variety of ways (similar to South Africa and United States), a specific compulsory portion limitation acts to ameliorate the inherent danger that this may be abused at the expense of an equally important social institution. Put another way, it pre-empts the inherent danger that testamentary disposals may subvert or threaten established obligations towards others.

A thick version of social obligations of testators is not yet defined in South Africa. One critical factor that sets apart our notion of the public good is the expanded meaning of public interest in section 25(4) of the Constitution. A national commitment to land reform and equitable access to land redefines our mutual dependency as individuals in a constitutional democracy. As a collective, we are all publicly committed to 'land reform, and to reforms to bring about equitable access to all South Africa's natural resources.'⁹⁹⁹ This is reinforced by section 25(5) that advances a long-term vision of a society that enables citizens to enjoy equal access to property.¹⁰⁰⁰ These sections expand the parameters for limitations in the public good that could have fundamental consequences for the parameters of individual testamentary freedom. Just as a German parent is limited in the disposal of property, a public commitment to land reform and equitable redress could act as a limitation on testation that subverts or jeopardizes this public good. This provides clear grounds to expand social obligations of property owners generally in South Africa.

⁹⁹⁸ See chapter 5, § 5.3 (b) (ii) and c) (iii).

⁹⁹⁹ Section 25(4) of the Constitution.

¹⁰⁰⁰ Section 25(5) of the Constitution.

e) Seeds of dissent and reform of testamentary succession

While testate succession in the United States currently has a narrow redistributive scope, this has not always been the case. Writers such as Jefferson and Blackstone have espoused radical views that has galvanised debate on the nature of testation. This has roused a rich tradition in favour of progressive estate taxes and the rule against perpetuities in an effort to resist dynastic intergenerational wealth.¹⁰⁰¹ Even though support for estate taxes has waned in recent years, at some point it was justified and encouraged, which means that lawmakers were prepared to introduce substantial limitations in the name of equal opportunities. The sentiment that ‘the earth belongs in usufruct to the living’¹⁰⁰², in particular, has also ensured that the view of testation as a statutory right subject to democratic reform has triumphed as the dominant understanding of the right of testamentary disposal.¹⁰⁰³ Essentially what it means is that property has a public quality and should perform a public function. At the very least, this means that testator’s rights are not set in stone and subject to reform (even though this is probably unlikely considering the longstanding common law protection of testamentary freedom). In theory, this provides enough latitude for State legislatures to introduce progressive reforms that limit, or even abolish, testamentary succession without this being challenged as a violation of a constitutional property right.¹⁰⁰⁴

In Germany, the justifications for the protection of the family has served as a secondary justification ‘that inheritance be used for social reforms aimed at achieving

¹⁰⁰¹ See chapter 5, § 5.2 b) (vi) and (vii).

¹⁰⁰² Letter to James Madison by Thomas Jefferson,– *The Papers of Thomas Jefferson* 392-93 (J Boyd ed 1958).

¹⁰⁰³ See chapter 5, § 5.2 a) (vi) and (vii).

¹⁰⁰⁴ This view has Federal Supreme Court of Appeal approval. See *Irving Trust Co v Day* 314 US 556 562 (1942). See further, *In re Becker's Estate* 263 NYS.2d 22 at 27 (NY Sur 1965); and *Eyre v Jacobs* 55 Va 526 (14 Gratt 422) 1858. See further, Kornstein (1983) op cit at 769. R Chester *Inheritance, Wealth and Society* (1982) at 12

greater *social justice*.¹⁰⁰⁵ This also stems from a public-oriented understanding of inheritance, powerfully captured by Hegel who believed that property should be held in common.¹⁰⁰⁶ In this sense, the recognition and realisation of property is, in reality, dependent on social bonds. State intervention for social reforms was more easily justified because property serves both individual protection and social justice commitments. Whilst in Germany, these were primarily used to safeguard the family, it belies an interesting notion which stems from the dual character of property, inherent in the German understanding of property protection.¹⁰⁰⁷ This opens the door to other forms of State intervention based on other socio-economic considerations beyond the narrow view of the family lens.¹⁰⁰⁸ It also leads to the view that individual testation should always be exercised and recognised within a given social context.¹⁰⁰⁹

6.3 RECOMMENDATIONS FOR THE CONSTITUTIONAL DEVELOPMENT OF FREEDOM OF TESTATION

In what circumstances does the extreme inequality in property in South Africa trump the right to dispose of property after death?¹⁰¹⁰ According to Munzer, unequal access to property is only justified if everyone has minimum level of property and inequality does not undermine human potential.¹⁰¹¹ The South African constitutional property system is morally just since it mandates the State to actively foster the conditions for equal access to property so that individuals and groups may meaningfully participate

¹⁰⁰⁵ Beckert (2004) op cit at 52, 57.

¹⁰⁰⁶ GF Hegel *Elements of the Philosophy of Right* [1821] (1991) Ed Allen Wood at 178.

¹⁰⁰⁷ Samter (1879) op cit at 253.

¹⁰⁰⁸ H Ahrens *Naturrecht oder Philosophie des Rechts und des Staates* (1871) 6th ed; R Schröder *Abschaffung oder Reform des Erbrechts: Die Begründung einer Entscheidung des BGB-Gesetzgebers im Kontext Sozialer, ökonomischer und philosophischer Zeitströmungen* (1981) at 444-5.

¹⁰⁰⁹ Beckert (2004) op cit at 57.

¹⁰¹⁰ Alexander & Penalver (2009) op cit at 146.

¹⁰¹¹ Munzer (1990) op cit at 5, 100-03, 117-19, 191, 227-47. See further, Singer (2000) op cit at 144, 163; and Honoré (1987) op cit at 195.

in society in a dignified manner.³⁰² It is however safe to say that a minimum standard of living – represented in a fair distribution of property – has not been adequately attained to justify present levels of inequalities. In fact, it's safe to say that inequality in South Africa is chronic and systemic – possibly the worst in the world.

High levels of inequality have dehumanising consequences for the propertyless (largely represented by poor black, coloured and Indian majority) as well as for property owners (largely wealthy white minority).³⁰³ On the one side of the material spectrum, the propertyless are deprived of a minimum level of property – and other basic necessities such as food, shelter, education, health care, and employment – to lead decent humane lives. On the other side, while materially well off, property owners try in vain to escape a reality of chronic poverty, imprison themselves behind high security fences or gated estates, and lead fearful insecure lives, all of which ultimately impair their sense of belonging and common humanity. Worse, the inability of this latter group 'to recognize freely the property rights of others undermines the rights of those who have property.'³⁰⁴

A misconceived property ownership model that invites testators to be self-absorbed and ignore larger distributive consequences of their disposals bolsters these pervasive societal divisions, which invariably mean that property rights *in toto* are insecure. These conditions perpetuate existing unjust concentrations of property and significantly impair the capacity of all individuals to live full lives in society. Eventually, the right to dispose – as part of system of property ownership – will be meaningless if the long-term consequences of such disposals undermine the

³⁰² Alexander (2009) op cit at 768.

³⁰³ See chapter 3, § 3.2 f); chapter 4, § 4.2 a) – c).

³⁰⁴ JWG van der Walt 'The Twilight of Legal Subjectivity: Towards a Deconstructive Republican Theory of Law' 166-67 (Doctor of Laws Thesis, Rand Afrikaans University, 1995). See further F Michelman 'Liberties, Fair Values, and Constitutional Method' (1992) 59 *University of Chicago LR* 91 at 99; Singer (2000) op cit at 140-41.

conditions for property ownership to thrive in a functioning society. In the absence of a voluntary contribution by testators towards redressing and reconciling these differences, the State has an obligation in terms of section 25(5) to adopt measures to promote equitable access to property in testate succession law to, at the very least, ensure that testamentary disposals do not maintain current levels of inequality.¹⁰⁵ Thus, far from being a protection against redistribution, the property clause empowers the State to redistribute intergenerational wealth. Below, I discuss the implications for legislature and the judiciary.

a) The State has an obligation to adopt legislation or other measures to redress intergenerational inequality

Any meaningful change in the distribution of wealth in South Africa is more likely to be effected through the adoption of legislative measures that regulate testamentary disposals in a uniform manner. The property clause includes explicit provisions to eradicate and reverse the legacy of inequality and poverty in society by mandating the State to adopt legislation or other measures aimed at this purpose. As argued in chapter 4, testate succession forms part of a legacy of an unjust property regime designed to serve interests of minority white population.¹⁰⁶ An important underutilised measure is section 25(5) that provides that the State must foster conditions for equitable access to property. By implication, this obligation ensures that the State should not just be content with the fact that individuals have the freedom to dispose of property but also the structure of conditions in society that allow individuals to

¹⁰⁵ See S Swartz *Another Country: Everyday Social Restitution* (2016) who argues for a voluntary contribution. See further Singer (2000) op cit at 18 who argues that some moral obligations should be made mandatory legal obligations.

¹⁰⁶ See chapter 4, § 4.2 b).

meaningfully enjoy this right.¹⁰¹⁷ This section is broad enough to empower the State to enact new legislation or amend current legislation that imposes limitations on the disposal of property after death for the purposes of reversing the legacy of intergenerational inequality. To put it a different way, this section could be employed to close the gap of persistent intergenerational inequalities in post-apartheid South Africa. It is also clear that the State enjoys the inherent authority to regulate and, if necessary, reform testate succession in terms of this section.¹⁰¹⁸

There are a number of measures the State could introduce, the most obvious being an estate duty. Currently, in South Africa, a 20% estate duty is levied in terms of the Estate Duty Act 45 of 1955, as amended, on the estate of every person who died on or after 1 April 1955.¹⁰¹⁹ As shown in the discussion of American estate tax, the use of the tax system to achieve a more equitable distribution of wealth has been a consistent theme among liberal and socialist thinkers for over two hundred years.¹⁰²⁰ Like the general clash between individual will and social responsibility that is invoked whenever a restriction is imposed on testamentary freedom, inheritance and estate tax is bound up in a complex web of conflicting socio-political values.¹⁰²¹ There is certainly, in my view, a strong constitutional property argument in favour of a progressive estate tax as a means of equitable redress of property. The efficacy of

¹⁰¹⁷ Singer (2000) op cit at 168.

¹⁰¹⁸ See chapter 4, § 4.3.

¹⁰¹⁹ In terms of regulation 5(1)(h), promulgated under section 103 of the Administration of Estates Act 66 of 1965, a deceased estate liquidation and distribution account must contain a subsection entitled "estate duty". The Estate Duty Act is administered by the Commissioner of the South African Revenue Service ("SARS"). According to section 2(2), 'Estate duty shall be charged upon the dutiable amount of the estate calculated in accordance with the provisions of this Act and shall be levied at the rate set out in the First Schedule.' Estate duty is currently under review by the Davis Tax Committee, but has not recommended an increase: 'To this end, the DTC recommends that the current flat rate of 20% should not be increased, particularly in the light of the retention of both CGT and estate duty/donations tax being levied on capital transfers.'
<http://www.taxcom.org.za/docs/20160428%20DTC%20Final%20Report%20on%20Estate%20Duty%20-%20website.pdf> (access on 22 November 2018).

¹⁰²⁰ See generally, Beckert (2004) op cit at 167.

¹⁰²¹ Beckert (2004) op cit at 169.

such a system would however depend, not only on its political legitimacy, but also its economic viability and effectiveness and its practical administration.¹⁰²² My study has shown at the very least that political and constitutional legitimacy should not be barrier.

Another possible measure could be legislation that imposes a reasonable monetary limitation on what can be disposed of, thus limiting bequests to a certain defined value of an estate.¹⁰²³ In the administration of an estate, an executor would give effect to bequests to the extent of the limit and liquidate the remaining assets to be transferred to the State.¹⁰²⁴ Or Parliament could introduce legislation that disqualifies certain beneficiaries from inheriting property on the basis that the property is not needed. For example, exclude all bequests to economically independent adults. This would ensure that only minor children, economically dependent adults and other vulnerable persons receive inheritance on the basis of actual need. Another option is that legislation could be introduced that effectively reserves a certain portion of a deceased estate for the State or for a prescribed list of public benefit organisations.

I reiterate that these are loose ideas that would require further research and investigation. Ultimately whatever legislative or other measures are adopted to redistribute property after death, freedom of testation, properly understood within the operational context of the property clause, is not a trump card that can be used against measures adopted to transform intergenerational inequality. I have argued in this thesis that such a conception is narrow and fails to reflect the nature and purpose of the property clause. It is necessary to refute this narrow view of freedom of testation since it is likely that a constitutional challenge against such legislation would use a

¹⁰²² Munzer (1990) op cit at 215-16.

¹⁰²³ See further Munzer (1990) op cit at 403-11; DW Haslett 'Is Inheritance Justified?' (1986) 15 *Philosophy & Public Affairs* 122.

¹⁰²⁴ If there are concerns about money be transferred to the State, a mandatory requirement for all testators to bequeath property to a list of credible non-profit organisations.

narrow conception of property rights to protect and safeguard a person's assets from any redistributive measure. At the same time, testation is not meaningless and any redistributive measures should take cognisance of its socially desirable attributes, its values and social purpose it promotes in society.¹⁰²⁵

b) The courts should develop the constitutional meaning of freedom of testation in terms of section 39(2) of the Constitution

Even though redistribution will likely be more effective through legislative measures, the courts still have a constitutional duty, in terms of section 39(2), to develop the common law to 'promote the spirit, purport and objects of the Bill of Rights.'¹⁰²⁶ The common law principle of freedom of testation has remained stagnant and unchanged in the constitutional era. This is probably due to the fact that most academics and courts have focused on developing the limitations to testamentary freedom than understanding the nature of testamentary rights. However, as shown in chapter 3¹⁰²⁷, the type of testamentary disposal determines the success of a limitations challenge rather than the other way round. This conception also has a highly restrictive redistributive scope and would, in all probability, be the first defence used to resist any redistributive measures. It thus begs the question why we should defer to this model, if the very same justifications help maintain past racial discrimination rather than

¹⁰²⁵ See chapter 3, § 3.2 a) – e).

¹⁰²⁶ According to section 39 (1): 'When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

¹⁰²⁷ See chapter 3, § 3.5.

build the foundations of a more socially just testate system that assists in the redistribution of wealth in South Africa.¹⁰²⁸

The Constitutional Court has held that an interpretation of ‘property’ – as with all constitutionally protected rights – needs to be informed by the interpretive and normative framework set out by the interpretation clause.¹⁰²⁹ It is clear from section 39 (3) of the Constitution that the private law notion of ownership (as a pre-existing common law right and freedom) will only be applied to the extent that it is compatible and consistent with the Bill of Rights.¹⁰³⁰ And from section 39 (2), it is clear that private property rights and interests must be interpreted in a manner that promotes ‘the spirit, purport and objects of the Bill of Rights.’¹⁰³¹ Thus, to the extent that it has been shown in chapter 4 that the private ownership conception of freedom of testation is inconsistent with the property clause, courts have a duty to develop it.

The aspects of the principle of freedom of testation that should be developed are discussed in the remainder of this thesis. In my view, these are: the recognition of courts’ general authority to scrutinise testamentary bequests; a normative constitutional understanding of testamentary freedom; and a relaxation of the general presumptive superiority of testamentary wishes in the enforcement of wills in favour of a balancing of interests approach. I discuss each of these aspects in further detail below.

¹⁰²⁸ Singer (2000) op cit at 164.

¹⁰²⁹ *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 49. See chapter 4 § 4.2 a).

¹⁰³⁰ See section 39(3) of the Constitution.

¹⁰³¹ See section 39(2) of the Constitution.

c) Courts should recognise that the authority to limit testamentary bequests stems from within the property clause

Courts currently do not have the general authority to second-guess testamentary wishes in the interpretation and enforcement of wills. This rule stems from a long adherence to testamentary freedom as a natural expression of property ownership that typically is used to resist limitations. These limitations are also always external to an individual testamentary right. The courts approach to the enforcement of testamentary bequests needs to be brought in line with the constitutional purpose of property. An important characteristic of framing property in this manner is that property is inherently regulated, meaning that the limitations in favour of others or for the public interests are intrinsic to the very notion of property. As a part of the protection and regulation of constitutional property, the enforcement of testamentary wishes should be based on the dual purpose of the property.¹⁰³² The dual nature should mean that individual testamentary freedom should accommodate tensions between individual testamentary wishes and interests of the collective (other heirs or public policy).¹⁰³³ The inherently limited nature of testamentary disposals provides courts with the authority to examine, and if necessary overturn, private testamentary bequests for their compliance with public interest limitations. Therefore, when it imposes limitations, a court does not act against testation, narrowly defined as an individual right, but in fact upholds and supports a system of testate succession. This means that the imposition of limitations should no longer be considered an exceptional or rare exercise but rather

¹⁰³² Van der Walt AJ *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) at 15-16. This was confirmed in *First National Bank* supra at para 16.

¹⁰³³ LS Underkuffler *The Idea of Property in Law: Its Meaning and Power* (2003) at 52. See further, LS Underkuffler 'On Property: An Essay' (1990) 100 *Yale LJ* 127; LS Underkuffler 'When Should Rights "Trump"?: An Examination of Speech and Property' (2000) 52 *Maine LR.* 2 311.

part and parcel of the very function of giving effect to the dual function of the property clause.

d) The enforcement of wills should be based on objective normative understanding of testamentary freedom

The enforcement of a will is currently based entirely on the intention of the testators according to a subjective understanding of property, namely: how it benefits an individual testator's testamentary scheme, even if, as shown above, these verge on an idiosyncratic morally grey world view. A possible way to filter these types of bequests is for courts to develop a moral view of testamentary freedom grounded in values and objectives of the Constitution. In the constitutional context, this would mean developing an understanding of testamentary freedom in light with the prevailing notion that constitutional protection is intended to serve objective normative values rather than individual preferences.¹⁰³¹ Simply put, the enforcement of testamentary bequest should be based on how it achieves objective societal values of individual autonomy, dignity, privacy, and freedom of association. As an important legal institution, our understanding of freedom of testation should not be fixed in time but dependent on human values, periodically assessed and revalued.¹⁰³²

Protection of testation should take into account the inherent social obligations that testators have towards the public (family members, heirs, and non-heirs), derived from the dual nature of the property clause.¹⁰³³ Social obligations can be also viewed from the viewpoint of our mutual respect for individual self-fulfilment and human

¹⁰³¹ See chapter 4 § 4.4.

¹⁰³² Underkuffler (1990) op cit at 128; and Singer (2000) op cit at 37.

¹⁰³³ See chapter 4, § 4.3.

dignity.¹⁰³⁷ These values should be measured both individually and collectively in terms of how we treat each other.¹⁰³⁸ If we accept that a commitment to individual freedom requires active promotion, testators should be duty bound to dispose of property in a way that promotes the self-determination and human dignity of others.¹⁰³⁹ Without this obligation, it may be difficult, if not impossible, for beneficiaries to enjoy access to property in a self-fulfilling and dignified manner.¹⁰⁴⁰ It should be entirely unacceptable in society for a testator to demand that the State and others respect his or her testamentary wishes without simultaneously giving respect to heirs. Respect for liberty and human dignity is a two-way street or ‘bi-focal’ as Kreichzer-Levy refers to it.¹⁰⁴¹ This reciprocal respect for each other’s dignity requires that each of us recognise and treat each other as self-determining persons.

The exercise of testamentary freedom is part of a system of property relations in South Africa that are, regrettably, highly contested and bordering on total collapse. While it only plays a silent indirect role in the overall distribution of property, a near absolute power to distribute property has had, and will continue to have, unjust consequences for present and future generations. It is imperative that we develop a conception suitable to changed circumstances and how individual disposals contribute towards reconciliation and redistribution of wealth. Taken a step further, testamentary disposals should be subject to the State’s duty to foster the conditions for equitable access to property. The testate succession system should be judged by how it aligns with the States obligation to progressively realise a property system that promotes

¹⁰³⁷ Munzer (1990) op cit at 68; Singer (2000) op cit at 17.

¹⁰³⁸ Alexander (2019) op cit at 998.

¹⁰³⁹ Alexander (2014) op cit at 45.

¹⁰⁴⁰ Honoré (1987) op cit at 225; Alexander (2009) op cit at 768.

¹⁰⁴¹ Kreichzer-Levy (2016) op cite at 124-36. See further, Alexander (2019) op cit at 1029.

conditions for equal access to opportunities.¹⁰⁴² It should, to put it simply, be judged by its distributive consequences.

At a minimum, all individuals should have access to basic fundamental necessities – those firmly established and recognised as socio-economic rights in the Bill of Rights¹⁰⁴³ – that all human beings require to live a decent life.¹⁰⁴⁴ Or viewed in the converse, individuals should be able to live free of the conditions that undermine their ability to live a dignified life.¹⁰⁴⁵ It could be argued that this creates a public interest obligation on testators to dispose of property in a way that supports and nurtures the conditions in society for intergenerational equality.¹⁰⁴⁶ Aspiring to this level of well-being should be all of our collective constitutional inheritance – a promise of just and equal society.¹⁰⁴⁷ This is not only important to address the intergenerational legacy of inequality in South Africa, but also advance opportunities for individual self-fulfilment and realization of human dignity of all citizens. Thus, the constitutional promise of an equal property system provides the glue that binds inter-generational communities to a just vision of society.¹⁰⁴⁸

The development of an objective, as opposed to a subjective, form of bequests would require courts to determine how an individual bequest achieves the objective normative purpose of constitutional property. The judicial assessment of an individual bequest, in other words, should take guidance from the function or purpose of holding property, which Froneman J holds must serve the attainment of ‘socially-situated

¹⁰⁴² See host of socio-economic rights that impose a positive obligation on the state to progressively realize access to resources. See sections 9, 24, 25 and 27 of the South African Constitution.

¹⁰⁴³ The list could include other ‘background conditions’. See Alexander (2014) op cit at 45.

¹⁰⁴⁴ See further Munzer (1990) op cit at 242-43; Alexander (2014) op cit at 45.

¹⁰⁴⁵ Munzer (1990) op cit at 247.

¹⁰⁴⁶ Alexander (2009) op cit at 769 - 770.

¹⁰⁴⁷ Kreiczler-Levy (2016) op cite at 135; Alexander refers to this as ‘intergenerational communities’ at Alexander (2014) op cit.

¹⁰⁴⁸ Alexander (2014) op cit at 29-33.

individual self-fulfilment.’¹⁰⁴⁹ This would ultimately mean that the enforcement of bequests depends on how, on the one hand, it promotes individual self-fulfilment and a dignified end of life but also, on the other hand, how it acknowledges the socially-situated nature of testamentary disposals and how individual testation is instilled with an inbuilt ‘social obligation not to harm the public good.’¹⁰⁵⁰ This would entail establishing what, in general, is normatively compelling about individual testation and then to reconcile the subjective wishes contained in the will with that objective standard. The practical implication for this suggestion would be that the role of the Court is not always to give effect to individual testamentary freedom but only when these are consistent with the objective standard.

e) Consider the impact of death on the enforcement of property rights

An important step in the development of an objective standard for testamentary disposals understands how death impacts property rights.¹⁰⁵¹ Death technically creates a ‘gap in property ownership’¹⁰⁵² that the law of testate successions fills by extending a testator’s right to dispose beyond her mortality. Godwin has argued that testation is ‘the most extravagant fiction, which would enlarge the empire of the proprietor beyond his natural existence, and enable him to dispose of events, when he is himself no longer in the world.’¹⁰⁵³ Ironically, neither the private ownership nor constitutional

¹⁰⁴⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape and Others* 2015 (6) SA 125 (CC) at para 50. See chapter 4 § 4.4.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ See some remarks in the United States context that question the impact of death on property ownership: *Dillard v New Mexico Tax Commission* 53 NM 12 21 201 P2d 345 351 (1944); *Sturgis v Ewing* 18 Ill 176 (1856). See further Kornstein DJ ‘Inheritance: A Constitutional Right?’ (1983) 36 *Rutgers LR* 741 at 766-7, 789-91; Chester (1982) *op cit* at 12.

¹⁰⁵² Kreiczler-Levy (2016) *op cite* at 133.

¹⁰⁵³ Godwin *Enquiry Concerning Political Justice* (1793) at 718.

property approaches take death into account in determining the nature of an individual property right.¹⁰⁵⁴ The quality of an owner's the right to dispose during life is, according to both approaches canvassed in this thesis, indistinguishable to the disposal at death, even though owner is dead. The fact that death plays no impact at all in changing the nature and quality of the property rights seems instinctively wrong. Below, I briefly sketch two polarising views on how death impacts individual rights. The first perspective seemingly ignores the impact of death on legal rights, whereas the second position takes death as the end of individual rights. This subject presents a host of complex metaphysical and moral questions that should be studied further. Centlivres CJ in *Greenberg* has described the exercise of ascertaining the dominium of a deceased estate immediately after death as one of futility.¹⁰⁵⁵ I do however offer some recommendations, but only very loose ones, that should not be regarded as a comprehensive attempt to resolve this issue.

The first plausible explanation for the fictitious extension of ownership after death is based on the notion that a will is regarded as the legitimate expression of a property owner's last wishes that are enforceable at the moment of death. These last wishes are, in terms of ownership principles, the testator exercising her right of alienation, or what Honoré refers to as 'transmissibility'.¹⁰⁵⁶ De Waal argues that '[t]he law of succession, like every other branch of the law, serves the living and not the dead.'¹⁰⁵⁷ Wills are given effect to since they are considered the wishes of a person who

¹⁰⁵⁴ International scholars have pointed it out. See W Blackstone *Commentaries on the Law of England* (1765) at 10-11, as quoted in Kornstein (1983) op cit at 769; R Lamb 'The Power to Bequeath' (2014) 33 *Law and Philosophy* 629 at 629; E Partridge 'Posthumous Interests and Posthumous Respect' (1981) 91 *Ethics* 243 at 243-264; J Feinberg 'Harm and Self-Interest', in Hacker PMS & Raz J (eds.) *Law, Morality and Society* (1977) at 285-309; S Braun 'Historical Entitlement and the Practice of Bequest: Is there a Moral Right of Bequest' (2010) 29 *Law and Philosophy* 695 at 695; Honoré (1987) op cit at 172; Kreiczler-Levy (2016) op cite at 107; Alexander (2014) op cit at 21.

¹⁰⁵⁵ *Greenberg v Estate Greenberg 1955 (3) SA 361 (A)* at para 29/365.

¹⁰⁵⁶ Honoré (1987) op cit at 172.

¹⁰⁵⁷ De Waal MJ 'The Law of Succession and the Bill of Rights' in Rautenbach et al *Bill of Rights Compendium* (1998) at 3G1.

was living but is now deceased. Thus, notwithstanding the fact that the testator is dead, testate succession law regards the will as the directions and instructions of a living person.¹⁰⁵⁸ This explanation relies on all the reasons for protecting ownership, discussed elsewhere in this thesis.¹⁰⁵⁹

The counter-argument is that death extinguishes legal personality and thus property entitlements at death.¹⁰⁶⁰ This argument is based on the notion that the protection of property rights presupposes that ‘someone’ is legally entitled to and responsible for that property.¹⁰⁶¹ Limiting testamentary freedom after death may be entirely consistent with the ability of an owner to use and enjoy property while she or he is alive since a limitation does not actually inhibit the testator before death. This is especially considering that many of social benefits of testamentary freedom, individual self-fulfilment, human dignity and wealth maximization, are personal characterises that have a direct bearing on living testators. It is reasonable therefore to

¹⁰⁵⁸ Friedman states that ‘[t]he power of disposition is felt psychologically to constitute an essential element of power over property.’ Friedman (1966) op cit at 355. According to Lamb (2014) op cit at 647, ‘something that marks out their individuality within a community’. Due to the strong personal connection to property, a will is therefore giving effect to as if the testator was still alive. By giving effect to a deceased person’s last wishes, a court is in a way giving effect to posthumous legal personality.

¹⁰⁵⁹ Chapter 3, § 3.2.

¹⁰⁶⁰ S Luper ‘Posthumous harm’ (2004) 41 *American Philosophical Quarterly* 63–71; Wellman C *Real Rights* (1995) 146–157; Baum (1984) op cit at 407–419; Partridge (1981) op cit at 243–264; Feinberg (1977) op cit at 285–309; Lamb (2014) op cit at 629. It is important to note that academic literature on the nature of posthumous legal personality is a vast and complicated area of philosophy. A central question in this area is whether the dead can be harmed. A number of theories have been presented that attempt either to justify the extension of posthumous interests or ‘rights’ after death or that present counter-arguments against this proposition. While these theories are relevant to this thesis, the main focus of these theories is harm or benefit to the dead, which painstakingly engages with questions around the nature of: personhood, death, rights discourse, subjectivity, and interests. To avoid being engulfed by tangential issues, I will focus on a core question to testate succession: how testamentary ‘intentions’ expressed in a will is extended after the death of a person. Although the answer to the question of whether the dead can be harmed is relevant, there is a difference to harm to the person (the domain of delictual action) and ‘harm’ to property rights. As such, I will not attempt to answer whether the dead can be harmed but rather how their will and subjective preferences in a last will and testament is extended beyond their own mortality.

¹⁰⁶¹ Kornstein (1983) op cit at 745; and Partridge (1981) op cit at 248. Partridge points out that ‘[d]eath cancels not only the possibility of satisfaction but also the very point of fulfilment.’ (at 246).

argue that a deceased logically cannot be a bearer of property rights after death.¹⁰⁶² It is then a small jump to conclude that any regulation or limitation of a deceased's estate cannot be considered a violation of a testator's property rights. At the extreme, the fictitious nature of posthumous property rights opens up the question of why freedom of testation should not be heavily regulated or even abolished.

The challenge with testamentary rights, which are posthumous in nature, is how to reconcile the paradox of the dead having enforceable interests (or having some moral significance) when, as Feinberg notes, they are '[w]ithout awareness, expectation, belief, desire, aim and purpose.'¹⁰⁶³ In order to tentatively resolve the anomaly and without offering a firm recommendation, I suggest that a distinction be made between the values applicable to testamentary succession before and after death. Prior to death, a testator exercises his or her free choice to dispose of assets in any manner he or she deems fit (subject of course to inherent limitations justly imposed for the benefit of the public interest). At death, the nature of considerations for protecting and enforcing individual property rights and ownership changes. After death, the enforcement of testamentary wishes has more to do with respect, honour, cultural and religious piety and allowing some to die with dignity than with enforcing the autonomous wishes of the testator. All of these values resonate more with the social importance human dignity than with an individual right that is fundamentally about control over property.

¹⁰⁶² The argument is corroborated by the fact that in South African law, it is unclear who owns a deceased estate. Centlivres CJ in *Greenberg* supra at para 29/365 has described the exercise of ascertaining the dominium of a deceased estate immediately after death as one of futility. The fact that neither the executor nor anyone else owns a deceased estate means that immediately after death there is in fact a void of ownership. Over the years, various options have been explored but as it stands, the legal character of a deceased estate is unclear in South African law. M Paleker 'Succession', in Du Bois F *et al Wille's Principles of South African law* 9 ed (2007) at 668; MJ De Waal & MC Schoeman-Malan *Introduction to the Law of Succession* (2003) at 10-11; and MM Corbett, G Hofmeyer, & E Kahn *The law of Succession in South Africa* (2001) at 16-17. See Honoré (1987) op cit at 188-89.

¹⁰⁶³ Feinberg (1977) op cit at 61.

The distinction between property rights before and after death is that in the latter case, the considerations are more societal than individual.¹⁰⁶⁴ The effect of distinguishing between the natures of property before and after death is that death transforms the enforcement of wills into a public exercise. It loosens the grip of a testator's entitlement from the purely private sphere (where he may feel entitled to discriminate on arbitrary grounds – even though these should also be challenged) into the public sphere where policy considerations abhor this attitude. Slowly testators will learn that there is no private enclave where discriminatory practices will be tolerated and adjust their testamentary distributive schemes accordingly.

This is not to suggest that testamentary wishes should not be protected as an expression of property freedom, but rather that death impacts the objective considerations involved. A total abolition of freedom of testation would, in my view, be morally reprehensible.¹⁰⁶⁵ The freedom to make and end life plans, even if they only have an effect after death, reinforces self-determination and free will. Presumably this is what Erasmus AJA in *BOE Trust Ltd* referred to as the 'the peace of mind of knowing that [a testator's] last wishes would be respected after they have passed away.'¹⁰⁶⁶ The benefit of testamentary succession is the certainty that posthumous plans will be enforced. Thus, the freedom to pursue and direct one's plans is morally significant and therefore ought to be legally protected.¹⁰⁶⁷ It allows individuals to take responsibility for their own lives. As a last declaration and testament, it also accordingly allows a testator the satisfaction to envision and imagine the finalisation of their life plan. Whether these are respected and enforced, however, should depend on whether these meet the objective standard for testamentary disposals. As long as

¹⁰⁶⁴ A Smith *Lectures in Jurisprudence* (1762-66) at 63-64 and 466-67.

¹⁰⁶⁵ See chapter 2 § 2.3 and chapter 4 § 4.3 c) (ii). See further, J Feinberg 'The rights of animals and unborn generations,' in W Blackstone (ed) *Philosophical and Environmental Crisis* (1974) 43-68 at 57.

¹⁰⁶⁶ *In re BoE Trust Ltd NO and Others* 2013 (3) SA 236 (SCA) at para 27.

¹⁰⁶⁷ Nozick R *Anarchy, State, and Utopia* (1974) at 49.

the objective standard is readily ascertainable or determinable in some general way, there is no reason why testators should not derive as much satisfaction and enjoyment from their property during their lives with the reasonable expectation that, if their bequests meet the objective standard, they will be enforced.¹⁰⁶⁸

f) Courts should adopt a balancing of interests approach to the enforcement of wills

It is absolutely imperative to acknowledge that a constitutional approach to testate succession does not just expand the types of public interest limitations that may be used to promote public norms but the very balance of individual vis-à-vis public involved.¹⁰⁶⁹ This impacts the relational importance of individual testamentary wishes and competing demands of society. A constitution can incorporate the most progressive redistributive obligations and still largely fail to achieve greater redistributive equality if it does not simultaneously understand how and when to overturn testation to achieve this purpose. At stake is ‘working out the contours of an owner's rights becomes the delineation of the proper relationship between the individual and the community around her.’¹⁰⁷⁰

The dual nature of property should have a profound effect on the adjudication of conflicting rights and interests in a testamentary dispute. While the common law recognises the power to invalidate bequests that offend principles of public policy, as shown in chapter 3, courts will only exercise this authority in exceptional circumstances.¹⁰⁷¹ While this has not been difficult for bequests of a public nature

¹⁰⁶⁸ Honoré advances this argument. See Honoré (1987) op cit at 173.

¹⁰⁶⁹ See *Daniels v Scribante* 2017 (4) SA 341 (CC) at para 136, citing Van der Walt (1999) op cite at 16.

¹⁰⁷⁰ Alexander & Penalver (2009) op cit at 128.

¹⁰⁷¹ See chapter 3 § 3.4.

administered by public bodies, the precedents in *BOE Trust*, *Harper* and *King* cases have the effect of insulating private discrimination from judicial scrutiny poses a very real challenge to the vision of an equal society. This judicial exercise also treats testamentary wishes as if the testator is still alive, which ignores that the nature and quality of ownership is impacted by death. Thus, a further way that freedom of testation should be developed in accordance with the dual nature of the property right is that courts should relax the presumptive superiority that individual testamentary freedom enjoys over conflicting limitations in the public interest. This changes the golden rule of interpreting wills that mandates courts to give effect to the subjective intention of testators and only intervene in rare or exceptional circumstances.¹⁰⁷²

In the relaxation of the presumptive superiority of testamentary wishes, courts should also simultaneously be willing to recognise the importance of conflicting rights and interests.¹⁰⁷³ At the heart of the dual notion of freedom of testation is the recognition that inherited wealth is more than just about how it should be disposed after death but also who receives that property, how it is used and how it benefits an heir's life and the public at large.¹⁰⁷⁴ It involves a relational dynamic that cannot be accommodated if a unitary, one-dimensional understanding of testamentary freedom as an individual entitlement is insisted upon. As shown in chapter 4, it is also important to have regard to the historical context in which many testamentary disputes are played out.¹⁰⁷⁵ Regrettably, testators still seek to impose their prejudices in the disposal of assets at death. Courts are not passive observers of this history. The enforcement of racists, sexists, or otherwise bigoted testamentary bequests – even if as purely private bequests – is an affront to the public at large.

¹⁰⁷² See chapter 3, § 3.3 a) for a discussion on the golden rule of interpretation.

¹⁰⁷³ Singer (2000) op cit at 7.

¹⁰⁷⁴ Kreiczler-Levy (2016) op cite at 109, 125.

¹⁰⁷⁵ See chapter 4, § 4.2 b) and c).

When a judge adjudicates over a testamentary conflict, like it or not, he or she is lording over a relational dispute. Determining the boundaries of this dispute involves a value judgment in favour or against a particular interest or right, often involving a complex array of conflicting values that ought not to be dumbed down and suppressed.¹⁰⁷⁶ *Ipsa facto*, the outcome also has distributive consequences. The balancing of interests required should be informed by a deeper and pluralistic understanding of testate succession as a multi-faceted legal institution with bearings on individual power, family responsibility, economic prosperity, social mobility and intergenerational well-being. The exercise of individual testamentary freedom is imbued with an inherent social duty towards others. The interests of heirs and public are intrinsic to the institution and thus cannot be ignored in the interpretation and adjudication of wills.¹⁰⁷⁷ The reorientation towards the interests of the collective as a precursor to enforcing the wishes of the dead on the living is, in fact, in line with the already prevailing cultural orientation of succession laws, which recognises the interests of the dead to orient the behaviour of the living.¹⁰⁷⁸ What it does, ultimately, is balance out the conflict between the testator's right to exclude and public's right of access in a way that, at the very least, ensures that the right to exclude can more readily yield when the circumstances call for it. When a judge chooses to do so, it does not limit testamentary wishes, but gives effect to a testate succession system that promotes a free and open democratic society where all individuals are treated with equal respect, human dignity and common decency.

In this new role, courts should become more adept at balancing the inherent conflict between exclusion (individual protection) and equitable access

¹⁰⁷⁶ Singer (2000) op cit at 35; Honoré (1987) op cit at 213.

¹⁰⁷⁷ Kreiczler-Levy (2016) op cit at 110.

¹⁰⁷⁸ M Sussman et al *The Family and Inheritance* (1970) at 7.

(redistribution) at the heart of the constitutional conception of freedom of testation.

‘The judicial function in these circumstances’, according to Sachs J in *Port Elizabeth Municipality*:

‘is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.’¹⁰⁷⁹

This is arguably also relevant in the testate succession law context where testamentary exclusion, as the stronger right, abstractly trumps weaker or lesser rights of equitable access.¹⁰⁸⁰ Sachs J’s reference to ‘interests’ infers that the type of considerations involved extend beyond a strict conflict of rights approach. This suggests that when interpreting and enforcing wills courts should not privilege ‘in an abstract and mechanical way’ the wishes of testators over competing rights or interests. Rather courts should play a pro-active engagement with the terms of a testator’s will to ensure that some of the unwanted reminiscences of past discrimination do not continue to be condoned in the constitutional era. The role of the courts in the constitutional era cannot merely be to give effect to individual testamentary wishes, regardless of the distributive consequences for the type of society envisioned in the founding values of the Constitution.¹⁰⁸¹ In order for this vision of society espoused in

¹⁰⁷⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 23.

¹⁰⁸⁰ See chapter 3 § 3.3 b).

¹⁰⁸¹ Section 1 of the Constitution lists the founding values of the Constitution. These are:

‘(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 (b) Non-racialism and non-sexism.
 (c) Supremacy of the constitution and the rule of law.
 (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

the Constitution to have any meaningful impact on the distribution of property through private wills, courts have to be willing to scrutinise testamentary bequests. The difficulty, as a parting note, will be establishing enough certainty in the enforcement of wills so that testators know which bequests will be upheld.

6.4 CONCLUSION

In this thesis, I have been concerned with two interlinking pre-occupations: the first being whether the common law principle of freedom of testation is a property right in terms of section 25 of the Constitution; and the second, if so, how far lawmakers can regulate this right for the purposes of redistributing property at death. In order to answer these questions, I have juxtaposed two approaches to the constitutional protection and regulation of freedom of testation as a property right, namely the private ownership approach and the constitutional property approach. The former approach is shaped by centuries of testate succession law that traditionally functions as a guarantor of vested ownership rights against State intrusion; whereas the latter newer constitutional property approach seeks to increase reform, regulation and transformation of pre-existing vested rights to ensure equitable access to property holding, historical redress and redistribution. I have argued that there is an inextricable link between the substantive conception of property rights and the scope of the regulatory power of the State. A narrow view of the constitutional protection of testamentary freedom, adopted by the private ownership approach, restricts limitations; whereas a constitutional understanding of property rights incorporates and recognises regulation as an inherent function of constitutional property and increases the regulatory authority of the State to enact legislation that imposes substantial

limitations on intergenerational wealth transfers. A narrow private ownership approach inevitably regards all interferences with the right to freedom of testation as exceptional and rare occurrences, and because it fails to recognise the transformative objective of the property, it neglects to give effect to its true purpose and design.

In the final analysis, I conclude in my exploration of inheritance and redistribution that the individual right to dispose of wealth is in principle valid but has in the context of extreme inequality in South Africa produced unintended or unseen and unrecognised consequences for maintaining and producing intergenerational inequality. Due to this, we all, but especially the State, owe a duty to question and formulate reforms to address intergenerational inequality.

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