

Freedom of testation in relation to discriminatory gender and religious exclusive charitable trusts

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Abstract:

Public policy has been described as one of the founding pillars of common law, playing an influential and sometimes a deciding role in the application of any area of law, be it public or private. It is therefore not surprising that even the law of testate succession and testamentary charitable bequests finds itself ever so affected by the role of public policy and its continued evolving nature. Central to the development of public policy is the influence of the Constitution and human rights instruments in democratic societies such as South Africa, calling for it to be in line with notions of equality and human dignity. Thus even common law concepts of freedom of testation although having a constitutional guarantee under section 25 of the Constitution, must respect and uphold the equality clause and avoid unfair discrimination in the public sphere. This dissertation investigates how freedom of testation in relation to testamentary trusts has been dealt before and after the advent of the Constitution. It examines how discriminatory provisions with restrictions based on gender and religion affect public policy considerations in the post constitutional dispensation. It also considers how notions of public policy in Common Law and Roman-Dutch Law were somewhat lenient in giving effect to trusts which were discriminatory in order to achieve the public benefit which it was created for. It also considers how constitutionalism and public policy are applied in other international jurisdictions and finally evaluate the problem with discriminatory charitable bequests and recommend a way forward when dealing with public benefit trusts.

If:-

If you can keep your head when all about you are losing theirs and blaming it on you,

If you can trust yourself when all men doubt you, but make allowance for their doubting too,

If you can wait and not be tired of waiting;

If you can meet with Triumph and Disaster and treat those two imposters just the same;

Yours is the Earth and everything that's in it, and – which is more – you'll be a Man, my son.

Rudyard Kipling (1865 – 1936) quoted by Willem van der Merwe during the Jacob Zuma rape trial in 2006.

To my sister Andile, thank you for all the Saturdays we missed church to attend to my exams and appointments with Prof, and our darling mom for her continued support throughout this journey.

And;

Special thanks to Professor van der Linder for his support and guidance since the beginning of the programme. All the calls, text messages and arguments motivated me to work harder and understand that in the end only excellence will be rewarded.

Table of Contents

Chapter 1	1
1 1 Introduction	1
1 2 Problem statement	2
1 3 Research questions.....	7
1 4 Purpose and value of the study	8
1 5 Research methodology	9
1 6 Chapter outline	10
Chapter 2: Historical background to the South African law of trusts and freedom of testation	11
2 1 Introduction	11
2 2 The South African trust.....	11
2 3 <i>Braun v Blann and Botha</i>	13
2 4 The Trust Property Control Act 57 of 1988.....	14
2 5 Freedom of testation	15
2 5 1 Limitations on freedom of testation under Roman Law	16
2 5 2 Limitations on freedom of testation in Roman-Dutch Law	17
2 5 3 Further limitations on freedom of testation	17
(a) Common Law	17
(b) Legislation	18
2 6 Conclusion	18
Chapter 3: The Constitution and legislation restricting freedom of testation	20
3 1 Introduction	20
3 2 Legislation restricting freedom of testation	20
3 3 The Constitution and freedom of testation.....	21
3 3 1 Freedom of testation under the property clause.....	22
3 3 2 The Constitution's direct horizontal application	22
(a) The equality clause.....	23
(b) The right to human dignity	24

(c)	The right to freedom of religion.....	24
(d)	Other constitutional rights that must be considered.....	25
3 3 3	The limitation clause	27
3 4	Conclusion	28

Chapter 4: Gender and religious exclusive charitable trusts 29

4 1	Introduction	29
4 2	Public policy, faith clauses and freedom of testation pre-constitutional dispensation.....	29
4 2 1	<i>Aronson v Estate Hart</i>	30
4 3	Charitable trusts, religious and gender discriminatory provisions and the Bill of Rights in the new constitutional era	33
(a)	The validity of a trust	33
(b)	The <i>cy pres</i> doctrine.....	34
4 3 1	<i>Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust</i>	35
4 3 2	Charitable trust cases and public policy in the new constitutional era.....	36
(a)	<i>Minister of Education v Syfrets Trust Ltd</i>	37
(b)	<i>Ex parte BOE Trust Ltd</i>	39
(c)	<i>Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal and Others</i>	41
(d)	<i>In re Heydenrych Testamentary Trust</i>	43
4 4	Conclusion	45

Chapter 5: Gender and religious exclusive charitable trusts and freedom of testation in other jurisdictions – a comparative analysis 47

5 1	Introduction	47
5 2	Freedom of testation in English law- a common law legal system	47
5 2 1	Charitable trusts in English law	49
5 3	Freedom of testation in German law's Civil (Continental) legal system.....	51
5 4	Discriminatory charitable trusts in mixed jurisdictions: Canada.....	53
5 4 1	<i>Re The Esther G. Castanera Scholarship Fund</i>	54
5 4 2	The South African context compared with <i>Castanera: King v De Jager</i>	56

5 5	Religious-exclusive charitable bequests in both Civil and Common law	61
5 5 1	Is there an exception to private trusts?	62
5 5 2	<i>Harper v Crawford</i>	63
5 6	Conclusion	65

**Chapter 6: Evaluation and lessons that can be adopted to redress .
past injustices 67**

6 1	Introduction	67
6 2	A summary of the South African trust.....	67
6 3	Is there room for fair discrimination in relation to gender exclusive charitable trusts?	68
6 4	Can religious groups benefit members of their faith only?.....	70
6 5	Evaluation and lessons that may be adopted.....	71
6 6	Conclusion	72

Bibliography..... 73

Chapter 1

1 1 Introduction

The principle of freedom of testation fundamentally means that an individual may dispose of his or her property upon death as he or she pleases.¹ It empowers the testator to suspend the rules of the law of intestate succession² and ensure that his or her property devolves in a manner determined by him. In Roman and Roman-Dutch law, the law of testate succession was firmly rooted on the principle of freedom of testation.³ South African law also through the Constitution⁴ protects the principle of freedom of testation with its property clause in section 25 which guarantees the right to own and dispose of property even upon death.⁵

Inherent in freedom of testation is the right to create a testamentary trust as a vehicle to ensure preservation of wealth and ensuring that one's beneficiary are well taken care of beyond the reading of a will for generations to come.⁶ By creating a trust, a testator has the opportunity to leave a lasting legacy and impression, not only on his close relatives, but to other beneficiaries who are not related to him who will meet the requirements set out in the trust document in order to qualify as beneficiaries. This vehicle however, is not always free from criticism as personal preferences on who must benefit always influence the testator and such preferences may not be in line with the law and acceptable notions of "public policy".⁷ In recent post-constitutional judgements, South African courts have been faced with a number of testamentary charitable trusts cases which contained directives based on race, gender and religion in regard to conferring trust benefits.⁸ Our courts have been

¹ De Waal "The Law of Succession and the Bill of Rights" in the *Bill of Rights Compendium Issue* 35 (2015) par 3G7.

² De Waal para 3G7.

³ De Waal para 3G7.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (SCA).

⁶ Pace & van der Westhuizen *Wills and Trusts* (2016) Para B2.

⁷ See Ch 3.

⁸ Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequest – A Good Fit Between Common Law and Civil Law in South Africa's mixed Jurisdiction?" 2012 *Tulane LR* 97; *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (SCA); *Curators, Emma Smith Education Fund v University of Kwa-Zulu Natal* 2010 (6) SA 518 (SCA).

consistent in condemning restrictions based on race, gender and religion.⁹ This dissertation therefore seeks to investigate how recent judgements on public benefit trusts with restrictions on eligibility specifically based on gender and religion have been resolved by the Constitutional Court, taking into consideration notions of “public policy” and freedom of testation. It will also consider cases which did not have a public benefit but had a gift in a will or other testamentary instrument which set conditions or restrictions of a discriminatory nature.

1 2 Problem statement

The problem with charitable testamentary trust comes from the fact that because they are in their nature created for the public benefit, they have to adhere to certain acceptable notions of “public policy”, legislation and the Constitution.¹⁰ This means that although in terms of the principle of freedom of testation and the law of testate succession, a testator may exclude certain classes of people from benefiting from his will. He cannot, however, under a public benefit trust ignore prevailing legislation and social norms when disposing of his property. His freedom of testation will be limited for lack of adherence to the law¹¹ where the testator has set out conditions which are discriminatory in nature. Exclusionary bequests and conditions are an age old problem which dates back to Roman and Roman-Dutch law, and often challenged jurists dealing with testamentary provisions.¹² Under common law discriminatory testamentary bequest, including those devised along racial, gender and religious lines were dealt with a great deal of tolerance.¹³ Tolerance came from the fact that common law used a “two test” approach in order to interfere with testamentary bequests which were discriminatory in nature. The first test required testamentary conditions to be certain and the second test needed bequests to conform to public policy.¹⁴ As a result courts in common law would refrain from finding such bequests to be invalid and rather in the case of charitable trusts rely strongly on the *cy-pres* doctrine, which allows a court to amend or vary the terms of a charitable trust to as closely as possible to the original intention of the testator to prevent the trust from

⁹ Du Toit “Gender-exclusive Charitable trust: Re The Esther G. Castanera Scholarship Fund and recent South African judgments on discriminatory bursary trusts” 2017 *Manitoba Law Journal* 141.

¹⁰ The Constitution, 1996.

¹¹ The Constitution, 1996.

¹² *Aronson v Estate Hart* 1950 (1) SA 539 (A).

¹³ Du Toit 2012 *Tulane LR* 97 99.

¹⁴ Du Toit 2012 *Tulane LR* 97 99.

failing.¹⁵ Thus courts in common law jurisdictions would refrain from invalidating bequests of a discriminatory nature where the conditions imposed were impractical or impossible for the purpose which it was intended.¹⁶ This problem was also manifested by the fact that courts and society as whole were greatly influenced by the need to uphold freedom of testation and give effect to a testator's last wishes.¹⁷ South African testators therefore enjoyed considerable freedom with regard to testamentary trusts which limited beneficiaries based on race, gender and religion.¹⁸ This is evident in the case of *Aronson v Estate Hart*¹⁹ where the then Appellate Division refused to render invalid a religious clause which sought to prevent one from marrying a person not of Jewish faith and stated that this was not against public policy as the testator sought to prevent the tensions in a marriage between a Jew and a non-Jew.²⁰

The problem is also linked to the fact that in most instances when a testator was drafting his last will and testament, either legislation at the time, or the testator's ignorance allowed bequests to be made with conditions which were either racial or gender-biased in nature. These conditions were not considered offensive or against public policy as such because courts took a more subjective approach, which looks at intent, motive or purpose of bequest.²¹ In terms of the subjective approach, a court is empowered by section 13 of the Trust Property Control Act to vary a trust instrument if the court is satisfied that a provision in the trust brings about consequences which the founder did not foresee. Public policy at the time did not deem it appropriate to interfere with bequests whose conditions would be carried out with certainty despite their discriminatory nature.²² In fact the discriminatory nature of the bequest was not always an inquiry which was dealt with thoroughly as the courts would always settle the matter under the first leg of possibility. As a result no extensive inquiry into the public policy notion would be carried out, save to say that varying the restrictions would amount to undesirable result which the testator wanted

¹⁵ https://en.wikipedia.org/wiki/Cy-près_doctrine site visited 2017/05/17 at 11:35am.

¹⁶ Du Toit 2012 *Tulane LR* 97 100.

¹⁷ 1950 (1) SA 539 (A) 548.

¹⁸ Du Toit 2012 *Tulane LR* 97 115.

¹⁹ 1950 (1) SA 539 (A) 560.

²⁰ 1950 (1) SA 539 (A) 560.

²¹ Du Toit 2012 *Tulane LR* 97 109.

²² *Aronson v Estate Hart* 1950 (1) SA 539 (A) 546.

to guard against. For example, in *Aronson Greenberg* JA states that marriage, be it Jew and non-Jew would potentially expose children born in that marriage to so much tension and conflicts that they would end up with no married parents and no direction in life.²³ The position did not change much by the decision in the case of *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Trust*²⁴ where the testator had, in his will executed in 1899, bequeathed to his son the residue of his estate to be applied to the founding and maintaining of a home for destitute “white” children. The president of the church applied for the deletion of the word “white” in terms of both common law and section 13 of the Trust Property Control Act 57 of 1988, which conferred on the Court the power to delete or vary any provision in a trust instrument which defeats the object which was intended for the creation thereof. This decision has been criticised by reason of using the subjective test as stated in Section 13 of the Trust Property Control Act as it gives the courts far more extensive powers to vary trusts than they have under common.²⁵ Such powers conferred upon the courts may also have the effect that the testator’s wishes are no longer carried.²⁶ Criticism further states that the judge in *William Marsh* equated public interest with the interest of the majority of a country. This was incorrect since a trust may also be created for a religious or language group.²⁷

In the post constitutional dispensation, South African courts had to acknowledge that public policy must be founded on the Constitution²⁸ and take into consideration the fundamental rights of beneficiaries when giving effect to any testamentary bequest. The courts were called to decide to what an extent a testator can be allowed to use the power of the purse even when he/she is in the grave.²⁹ Thus our courts held that it was modern day public policy notions, informed by constitutional directives that must be applied even when dealing with wills executed

²³ *Aronson v Estate Hart* 1950 (1) SA 539 (A) 541; Du Toit 2012 *Tulane LR* 97 116.

²⁴ *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Trust* 1993 (2) SA 697 (C).

²⁵ Cronje & Roos *Casebook on the Law of Succession* (2002) 371.

²⁶ Cronje & Roos (2002) 371.

²⁷ Van der Spuy “*Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Trust* 1993 (2) SA 697 (C)” 1993 *De Jure* 447.

²⁸ The Constitution, 1996.

²⁹ Hahlo “*Jewish Faith and Race Clauses in Wills: A Note on Aronson v Estate Hart*” 1950 *SALJ* 231.

decades earlier, in times when different policy considerations were applied.³⁰ This meant that courts had an influx of wills and charitable trusts which fell short of the standards required in terms of the Bill of Rights.³¹ Issues of gender and religious exclusive charitable trusts were carefully considered in the following cases: In *Minister of Education v Syfrets Ltd*³² the court was called to struck down a condition from a testamentary bursary that limited eligibility to qualifying students “of European descent, not of Jewish descent, and not female”. Griesel J found that the exclusion of Jews and women constituted direct discrimination based on religion and gender respectively.³³ Further that the contested provisions did not promote marginalized groups but discriminated against them, and that the trust did not promote one religious group and exclude all others but targeted members of one religious group for exclusion on the basis of their descent rather than their beliefs.³⁴ In *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal*³⁵ the fund was created to benefit South African women needed financial support for a tertiary education. Because of the racially and gender exclusive nature of the bequest, the Fund, instead of being depleted, had grown exponentially. The university argued that it had become an embarrassment in performing its duties as trustees due to the discriminating nature of the bequest and that such discrimination was unfair. The university opined that it is a public institution funded by the government and is committed to non-racialism, yet the majority of its students did not qualify for the Emma Smith bursary.³⁶ The court held that it was bound by the Constitution to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust and that must take precedence over freedom of testation.³⁷

These cases, Du Toit³⁸ points out were consistent in acknowledging freedom of testation, variance only came with the limitation thereof. Such adherence can even

³⁰ *Minister of Education v Syfrets* 2006 (4) SA 205 (C); Du Toit 2012 *Tulane LR* 97 117.

³¹ Ch 2 of the Constitution, 1996.

³² 2006 (4) SA 205 (C) para 5.

³³ 2006 (4) SA 205 (C) para 33.

³⁴ 2006 (4) SA 205 (C) para 34.

³⁵ 2010 (6) (SCA) 518.

³⁶ *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal* 2010 (6) (SCA) 518 para 13.

³⁷ *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal* para 42.

³⁸ Du Toit *Manitoba Law Journal* 2017 141 151.

be seen in the case of *Ex parte BOE Trust Ltd*³⁹ where the court refused to grant an application for the removal of the word “white” which was used to identify the group of students entitled to benefit from a trust. The will had a proviso that in the event it should become impossible for the trustees to carry out the terms of the trust, then the income generated by the trust should be used to provide donations to a number of listed charitable organisations. Modiri further states that the judge should have relied on unlawfulness rather than impossibility in order to achieve the objective of the trust deed. The fact that the testator foresaw that this provision would not be carried out amounts to a dictation to the court the terms of interpretation that will resolve all future problems generated by the will.⁴⁰

Modiri’s criticism of the judgment cannot be wholly accepted as one also needs to consider the will in its entirety. It would arguably, be incorrect of the court to ignore the substitution clause and simply grant the application for the deletion of the word “white” from the trust instrument. Would his argument be altogether different if the trust was created to benefit black women or a small religious group that has never received recognition? It is for this reason that one needs to consider the case of *In re Heydenrych Testamentary Trust*⁴¹ where the applicant was the administrator of three charitable testamentary trusts, The applicant prayed for the deletion of reference to race and colour from the three will and did not seek an order regarding gender restrictions because it was of the opinion that such discrimination should be treated more circumspectly than direct discrimination on the grounds of race and colour, and that the freedom of testator to impose gender-based conditions should remain unfettered.⁴² Thus the court held that restrictions on the Heydenrych and Houghton wills resulted in unfair discrimination on the grounds of gender and violated the Constitution’s equality clause as well as public interest.⁴³ Further that these unfair discriminatory provisions brought about consequences which the testators did not foresee as the wills were executed before the advent of the South African constitutional democracy. As a result the purpose which the trusts were established could not be realised and the court unlike, in the *BOE* case could not rely

³⁹ 2009 (6) SA 470 (WCC).

⁴⁰ Modiri “Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited* *PER* 2013 588.

⁴¹ 2012 (4) SA 103 (WCC).

⁴² *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) para 6.

⁴³ 2012 (4) SA 103 (WCC) para 20.

on a substitution clause. Although this decision considered the gender and race eligibility in all the three trusts in question, it did not deal with the issue of religion which was the basis of the George King Trust whose eligibility was also limited to members of the Protestant Faith. And the question still remains whether a charitable trust which seeks to benefit women only or a religious group will be accepted? Du Toit⁴⁴ suggests that from the reasoning of *Emma Smith's* judgment, it is most likely that a court would uphold a gender-exclusive trust such as the one in *In re The Esther G. Castenera Scholarship Fund*⁴⁵ which restricts bursary eligibility to women only.

1 3 Research questions

The following research questions will be addressed:

1. What was the position regarding freedom of testation in testamentary trusts in Roman and Roman-Dutch law?⁴⁶
2. How was the principle of freedom of testation dealt with before the constitutional dispensation?⁴⁷
3. What is the role of policy in relations to charitable trusts and how is it determined?⁴⁸
4. Are there common law limitations on freedom of testation and are there statutory limitations?⁴⁹
5. How are discriminatory provisions in trust instruments post 1996 dealt with by the courts?⁵⁰
6. Does the Constitution have direct horizontal application with regards to succession related matters?⁵¹
7. Is freedom of testation protected in the Constitution? If so, is this right an absolute right or can it be limited?⁵²
8. On what grounds can freedom of testation be limited?⁵³

⁴⁴ Du Toit 2017 *Manitoba Law Journal* 141.

⁴⁵ 2015 *MBQB* 28; see discussion on Ch 5.

⁴⁶ Ch 2.

⁴⁷ Ch 2.

⁴⁸ Ch 2.

⁴⁹ Ch 2.

⁵⁰ Ch 3.

⁵¹ Ch 3.

⁵² Ch 3.

⁵³ Ch 3.

9. What is the effect of a testamentary disposition to a charitable trust specifically excluding certain beneficiaries on any ground in section 9 of the Constitution?⁵⁴
10. What will the position be if the beneficiaries are females?⁵⁵
 - 10.1 What if the beneficiaries are white females only?⁵⁶
 - 10.2 What if the beneficiaries are black females only?⁵⁷
11. What will the position be if the beneficiaries of the charitable trusts are for example black males?⁵⁸
12. Can the beneficiaries of a charitable trust be limited to a specific faith?⁵⁹
13. Is it permissible for a member of a religious community to set up a trust for the benefit of other members of that faith, or a member of a club to set up a trust for the children of fellow club members only excluding other members of the public?⁶⁰
14. Can benefits be restricted to inhabitants of a particular city, region, university or be limited to a specific field of study or interest?⁶¹
15. What will the effect be of a so-called "substitution clause"?⁶²
16. How is the concept of freedom of testation dealt with in other foreign jurisdiction?⁶³
17. Is there foreign case law that can provide guidance on how to deal with charitable trusts with discriminatory provisions?⁶⁴
18. Is there a possibility that South African courts will give effect to a gender or religious exclusive charitable trust?⁶⁵

1 4 Purpose and value of the study

The purpose of this dissertation is to discuss how the Constitution has extended the scope of the limitations on freedom of testation and how the changing moral

54 Ch 4.
 55 Ch 4.
 56 Ch 4.
 57 Ch 4.
 58 Ch 4.
 59 Ch 4.
 60 Ch 5.
 61 Ch 5.
 62 Ch 5.
 63 Ch 5.
 64 Ch 5.
 65 Ch 5.

perception of the legal community have influenced “public policy”. It will examine how charitable trusts as a vehicle of benefitting others has been affected by the Constitution, and the implications of having a testamentary trust that has discriminatory provisions for eligibility. It will look at public benefit trusts which have gender and religion as the basis for qualifying as a beneficiary under a particular trust. It will consider the position of freedom of testation in relation to public benefit trust in Roman and Roman-Dutch law and whether common law did limit a testator’s last wishes. Thus purpose of this dissertation is to highlight that the Constitution has direct horizontal application in succession related matters and that unfair discrimination on the grounds listed under section 9 will not be tolerated in the new democratic era. It will highlight how the courts need to consider the Bill of Rights when developing and implementing legislation. As a result the Trust Property Control Act will be examined in great detail in so far as it relates to the court’s power to vary or amend a testator’s will, and how it has been applied by the courts. It aims to answer the question whether there is still a place for trusts with conditions imposing certain restrictions on beneficiaries based on gender or religious groups. And further examine the place of charitable bequests in modern society and whether trusts which were created pre-constitutional dispensation should not as a general rule be regarded as invalid unless evidence to the contrary has been advanced to the court, showing cause that the bequest was made in line with acceptable *boni mores* of the society as enshrined in the Constitution. This dissertation will also consider how other countries recognize freedom of testation and to what an extent it is limited. This will also be highlighted by considering international literature also dealing with the similar notion of freedom of testation and limitations on a beneficiary’s right to enforce or challenge a bequest.

1 5 Research methodology

This paper will give a historical analysis of the development of the South African law’s freedom of testation and bequests imposing conditions and/or limitations on the kind of beneficiary that can access the benefit on the basis of race, gender and religion and any other grounds of discrimination currently listed under section 9 of the Constitution. It will also provide a critical analysis of relevant case law, especially on the aspect of gender and religious exclusions. It will then do a comparative

analysis and consider how other jurisdictions have dealt with the issue of restrictions imposed by the testator when bequeathing property to his heir and beneficiaries.

1 6 Chapter outline

Chapter 2: will deal with the concept of freedom of testation and how it was applied to conditions which were against public policy. It will also deal with freedom of testation in relation to charitable trusts. It will consider the position in Roman and Roman-Dutch law and also highlight the problems, restrictions and limitations imposed by common law and legislation.

Chapter 3: will examine how exclusionary provisions in the constitutional era are dealt with by the courts. It will consider whether the Constitution has direct horizontal application with regards to succession matter, and whether freedom of testation is protected by it, and if so, can freedom of testation be limited.

Chapter 4: will deal with the effect of trusts that have exclusionary provisions on the grounds listed in section 9 of the Constitution, but specifically look at gender and religion as limitations for eligibility. It will consider how benefitting certain groups or classes of persons may be considered fair discrimination.

Chapter 5: will consider foreign case law and how the issue of benefitting certain classes of persons has been handled in relation to public benefit trusts. This chapter will conduct a comparative analysis of freedom of testation and trusts in other jurisdictions and lessons that can be adopted.

Chapter 6: will conclude this study by giving a summary of the South African trust and answer two questions: is there a place for gender exclusive charitable trusts in South Africa? And; can a trust be created to benefit members of a particular religious group? It will also give recommendations for dealing with discriminatory charitable trusts.

Chapter 2: Historical background to the South African law of trusts and freedom of testation

2 1 Introduction

This chapter will briefly discuss the historical development of the South African trust and the principle of freedom of testation in relation to discriminatory testamentary dispositions and how it was applied to conditions which were against “public policy”. It will also consider the position in Roman and Roman-Dutch law and will highlight the problems, restrictions and limitations imposed by common law and limitations imposed by legislation will briefly be mentioned. This chapter therefore attempts to answer the first four research questions.

2 2 The South African trust

Traditionally the trust has been used as an example of an institution which can only be found in jurisdictions that are based on the English common law.⁶⁶ As a result the trust that first appeared in South Africa was the English trust, during the first half of the nineteenth century through British settlers and officials who came to South Africa with part of their legal and intellectual baggage.⁶⁷ Thus the South African trust law can also be described as a hybrid between English common law on the one side, and the civil law on the other side, where the majority of it is still influenced by Roman-Dutch law.⁶⁸ Although it is generally accepted that Roman law did not have the trust as such, it has been shown that there are signs in Roman law of “trust-like devices” and “trustee-like persons”.⁶⁹ Although there are all these influences from the English common law, Roman law and Roman-Dutch, what eventual emerged and settled in South African is something quite unique to our legal system.⁷⁰

⁶⁶ Pace & van der Westhuizen *Wills and Trusts* (2016) 11.

⁶⁷ Pace & van der Westhuizen (2016) 76.

⁶⁸ Du Toit 2012 *Tulane LR* 97.

⁶⁹ Johnson “Trusts and Trust-like devices in Roman Law” in Helmholz & Zimmermann *Herera Fiduciare* 45; Pace & van der Westhuizen 65.

⁷⁰ Corbett *et al The Law of Succession* (2001) 15.

The essential nature of the South African trust therefore, is distinct from English law, nor can it be assimilated to the Roman *fideicommissum*.⁷¹ In early Roman law, the testament, being an institution of the *jus civile*, was only available to citizens (*cives*), and a citizen (*civis*) could not appoint an alien (*peregrinus*) as his heir. In order to overcome this obstacle, a citizen who wished to devolve his estate upon an alien would appoint a *civis* whom he trusted, as his formal heir, with directions not to keep the estate for himself but to hand it on to the alien.⁷² This arrangement was enforced during Augustus's time with the appointment of a special praetor *fideicommissum* in order to avoid the heir from keeping the property for himself and to see to it that the conditions of stated by the testator were executed.⁷³ As a result the trust was born, although there was no splitting of ownership, there was the separation of title and benefit which is its main feature.⁷⁴

Earlier cases in the construction and effect of the South African trust created by a will include *Estate Kemp v Macdonald's Trustee*⁷⁵ where a testator had executed a will in which he purported to bequeath certain property on trustees in a trust for the benefit of his granddaughter. The granddaughter survived the testator but died before the residue of the estate had become vested in her. At the time of her death, her estate was sequestrated as insolvent. The question before the court was whether her interest in the trust fell into her insolvent estate. The then Appellate Division answered the question in the affirmative and Innes CJ stated:⁷⁶

"The English law of trusts forms, of course no portion of our jurisprudence, nor have our courts adopted it, but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect in terms of our law."

This was in light of the fact that the will and subsequent trust were created in England but the testator had settled in the Cape. Solomon JA concurred and cautiously stated that it was not necessary for purposes of the present case to determine to what an extent, if any have we incorporated the English law of trusts.

⁷¹ *Braun v Blann and Botha* 1984 2 SA 850 (A).

⁷² Hahlo "The trust in South African law" 1961 SALJ 195 196.

⁷³ Hahlo 1961 SALJ 195 196.

⁷⁴ Hahlo 1961 SALJ 195 196.

⁷⁵ 1915 AD 491.

⁷⁶ *Estate Kemp v Macdonald's Trustee* 1915 AD 491.

What was of important legal impact was to give effect to the intention of the testator regardless of whether it was expressed in South African law or the English law.⁷⁷ This matter was settled by the leading case below.

2 3 *Braun v Blann and Botha*⁷⁸

The testator in her last will had bequeathed the residue of her estate in trust to her administrators. She also conferred upon the administrators *inter alia* the power to appoint in their discretion the income as well as the capital beneficiaries from a class of persons she had identified. She also stipulated that when the trust shall dissolve, the administrators were empowered to apply the remaining capital in the formation of a new trust as the administrators shall deem fit. The testator's daughter, the appellant, applied for an order declaring that the residue of the estate should devolve in terms of intestate succession. She challenged the validity of the trust on the ground that a power of appointment could not be conferred upon a trustee. The application was opposed by the administrators of the trust. The court *a quo* dismissed the application and the appeal against the decision also failed. The court stated that although many of the functions performed by the Roman *fideicommissum* could have been performed by the trust had it been known to the Romans, the fact remains that historically and jurisprudentially the *fideicommissum* and the trust are separate and distinct legal institutions, each of them having its own set of legal rules. Strictly speaking the trust is a legal institution *sui generis* and in South Africa, which has a civil legal system, the trust was introduced in practice during the 19th century by usage without the intervention of the Legislature. The court continued to state that the English law of trusts with dichotomy of legal and dual ownership was not received into our law. The English conception of dual ownership distinct from, but co-existing with, the legal ownership is foreign to our law.⁷⁹ Joubert JA⁸⁰ concluded by stating that it is both historically and jurisprudentially wrong to identify the trust with *fideicommissum* and to equate a trustee to a fiduciary. In order to avoid the confusion these legal concepts should technically be applied correctly.

⁷⁷ *Estate Kemp v Macdonald's Trustee* 1915 AD 491.

⁷⁸ 1984 2 SA 850 (A).

⁷⁹ *Braun v Blann and Botha* 859.

⁸⁰ *Braun v Blann Botha* 865.

Therefore it would be more correct to say that a unique South African trust law, based on Roman Dutch legal principles, but also influenced by the English law, was developed by the legislature, the courts and legal practitioners in order to satisfy modern requirements of practice.⁸¹ An important milestone in this development was the introduction of the Trust Property Control Act 57 of 1988. This Act, however, is not a complete codification of the law of trusts, several aspects of trust law is still governed by the common law.⁸²

2 4 The Trust Property Control Act 57 of 1988

The purpose of this Act is to regulate further the control of trust property and to provide for matters connected therewith. Section 13 in particular empowers the court to vary trust provisions that have the consequences which the founder of the trust did not contemplate and which *inter alia*, hamper the achievement of the objects of the founder or are in conflict with “public interest”. This provision has been the subject of many cases that come before the courts challenging a particular provision in a trust deed.⁸³ This usually happens in the case of charitable trusts, whether established by *act inter vivos* or by last will, are created for the benefit of a third party. The recipients of the settlor’s generosity are not normally intended to acquire enforceable rights.⁸⁴ Our courts have treated such a trust, depending on the terms of the deed or will, as a *donation sub modo*, a *bequest sub modo* or a *fideicommissum sub modo*.⁸⁵ Furthermore, our courts when dealing with charitable trusts have been mainly concerned with questions such as whether a trust is void for vagueness and whether there is a case of for the application of the *cy-pres* doctrine. Their approach has been that charitable trusts must be benevolently interpreted and upheld whenever possible.⁸⁶ This is true even today, however courts now have the benefit of a substitution clause where the testator’s initial bequest cannot be executed due to impossibility. For example in *Ex parte BoE Trust*⁸⁷ which will be discussed later

⁸¹ Abrie *et al Estate and Financial Planning* (2003) 80.

⁸² Abrie *et al* (2003) 80.

⁸³ *Minister of Education v Syfrets* 2006 (4) SA 205 (C), *Curators, Emma Smith Educational Fund v University of KwaZulu Natal* 2010 (6) (SCA) 518, *In re BOE Trust* 2013 (3) SA 236 (SCA).

⁸⁴ Hahlo 1961 SALJ 195 205. See also Ch 3 the discussion on exclusionary charitable trusts against public policy.

⁸⁵ *Jewish Colonial Trust v Estate Nathan* 1940 AD 163; *Marks v Estate Gluckman* 1946 AD 289.

⁸⁶ Hahlo 1961 SALJ 195 206.

⁸⁷ 2009 (6) SA 470 (WCC).

below, the court decided to give effect to the substitution clause where the testator made race a condition of eligibility for the bursary he sought to be created.

2 5 Freedom of testation

The principle of freedom of testation traces its foundation in Roman and Roman-Dutch law and has been accepted well into the South African law of testate succession and as such enjoys protection through many guidelines adopted by this freedom in our law.⁸⁸ In short freedom of testation states that a person may dispose of his or her property upon death as he or she sees fit.⁸⁹ The following guidelines reflect to what an extent the principle enjoys protection in our law i.e. the strict formalities required for the valid execution of a will, contractual restriction of one's right to dispose of property, a testator's right not to be under any undue influence when making testamentary dispositions, objection against delegating one's testamentary power, that a testator is free to change his will anytime time until his/her death and all the rules of amending and interpretation aimed at ensuring that the intention of the testator are carried out.⁹⁰

Freedom of testation however, is not without any limitations or restrictions and even long before the advent of the Constitution, in Roman law there were restrictions on freedom of testation.⁹¹ South African law permits the restriction of freedom of testation based on relevant social and economic considerations.⁹² Some of these restrictions are of statutory nature, while others are founded upon common law principles. These restrictions, De Waal⁹³ continues to state that were not only aimed at alleviating abuses to freedom of testation, but also sought to ensure that the deceased's last wishes are carried through in line with prevailing social norms, legislation and the testator's responsibility towards his family. In South African law as in Roman and Roman-Dutch law, an important restriction based upon social considerations dictates, that effect will not be given to testamentary provisions in compliance with such provisions will be *contra bonos mores* or against "public

⁸⁸ De Waal "The Social and Economic Foundations of the Law of Succession" 1997 *Stell LR* 162.

⁸⁹ De Waal & Schoeman-Malan *The Law of Succession* (2015) 4.

⁹⁰ De Waal 1997 *Stell LR* 162.

⁹¹ De Waal 1997 *Stell LR* 162 170.

⁹² Du Toit "The limits imposed upon freedom of testation by the *boni mores*: lessons from common law and civil (continental) legal systems" 2000 *Stell LR* 358.

⁹³ De Waal 1997 *Stell LR* 162 170.

policy”.⁹⁴ This shows that just like any other right a person may have, they are not absolute and in circumstances which warrant limitations, they will be imposed in order to strike a balance between an individual’s wishes and his duty by operation of law towards his fellow men. One cannot be simply left to use his power over others in any manner they see fit, where required, the state and the law as the superior guardian all of citizens must step in to protect the rights of those who cannot speak for themselves simply by being at the mercy of resourceful testator.⁹⁵ The restrictions on freedom of testation based on social consideration may be summarised as follows⁹⁶ a) all the testator’s children including extra marital minor children and major children who cannot provide for themselves have a common law claim for maintenance against the estate of the deceased; b) Surviving spouses also have a claim for maintenance in terms of the Maintenance of Surviving Spouses Act;⁹⁷ and c) Bequests which are contrary to “public policy”, immoral and illegal are rendered invalid and will not be given effect to and as such limit the testator’s freedom to control heirs even from the grave.

2 5 1 Limitations on freedom of testation under Roman Law

Roman legal convictions demanded a testator when disposing off his estate by will, to act in a socially responsible manner and in accordance with his moral duty towards his family.⁹⁸ Economic considerations also played an undeniable role in this regard and as such reservation of a certain portion of a deceased estate in favour of family members and so alleviated the burden on others or the state to support them.⁹⁹ Thus Roman law regarded unlawful testamentary bequests or provisions considered to be *contra bonos mores* as void and hence *pro non scripto*.¹⁰⁰ As a result a testator’s dispositions were therefore subject to society’s estimation as to the legal and moral acceptability of his wishes.¹⁰¹ The restriction on freedom of testation based on economic factors can be seen on the restrictions imposed on perpetual

⁹⁴ Du Toit 2000 *Stell LR* 358 359.

⁹⁵ De Waal 1997 *Stell LR* 162 170. For purposes of this chapter only the social consideration will be discussed, the economic consideration will be discussed in Ch 3 below in so far as they relate to legislation that limits freedom of testation.

⁹⁶ De Waal 1997 *Stell LR* 162 170 – 171.

⁹⁷ The Maintenance of Surviving Spouses Act 27 of 1990.

⁹⁸ Du Toit “The impact of social and economic factors of freedom of testation in Roman and Roman-Dutch law” 1999 *Stell LR* 232 236.

⁹⁹ Du Toit 1999 *Stell LR* 232 236.

¹⁰⁰ Du Toit 1999 *Stell LR* 232 236.

¹⁰¹ Du Toit 1999 *Stell LR* 232 236.

fideicommissum and the various measures imposed on the reservation of a certain share of the deceased's estate in favour of certain people.¹⁰²

2 5 2 Limitations on freedom of testation in Roman-Dutch Law

Roman-Dutch law generally emulated Roman law as far as restriction of freedom of testation is concerned, many of the restrictions from Roman law were received unchanged into Roman-Dutch law, their social and economic foundations still intact.¹⁰³ However, the strict rules pertaining to disinheritance were not received into Roman-Dutch law entirely. For example, a father could disinherit his child by mere omission of such a child from his will, unlike in Roman law where such an act was not socially acceptable.¹⁰⁴ Even so, the social responsibility of a testator to provide for his family, coupled with the economic support provided by the *legitim*, justified in Roman-Dutch law as in Roman law, the restriction of a testator's freedom of testation with regard to disinheritance of close relatives. Roman-Dutch law adhered closely to Roman law in its approach to unlawful testamentary provisions or testamentary provisions considered to be *contra bonos mores*. Society's estimation as to the legal and moral acceptability of a testator's wishes remained the determining factor in this instance.¹⁰⁵ If such wishes were deemed not in accordance with the legal convictions of the community, they were promptly disregarded. When it comes to the Roman rules with regard to perpetual *fideicommissum*, they were relaxed in the sense that it was expressly made subject to the testator's wishes. It was therefore allowed, if expressly provided by the testator.¹⁰⁶

2 5 3 Further limitations on freedom of testation

(a) Common Law

Restrictions on freedom of testation under common law means that the testator's last wishes will not be carried out if a provision in a will or testamentary document is a) in general unlawful; b) against public policy; c) impracticably vague; or d) impossible.¹⁰⁷

¹⁰² Du Toit 1999 *Stell LR* 232 237 – 239.

¹⁰³ Du Toit 1999 *Stell LR* 232 240.

¹⁰⁴ Du Toit 1999 *Stell LR* 232 240.

¹⁰⁵ Du Toit 1999 *Stell LR* 232 240.

¹⁰⁶ Du Toit 1999 *Stell LR* 232 242.

¹⁰⁷ De Waal & Schoeman-Malan (2015) 4.

A person's minor children also have a common law claim for maintenance against his or her estate.¹⁰⁸ Both under common law and the Immovable Property (Removal or Modification of Restrictions) Act¹⁰⁹ the courts have a limited jurisdiction to modify a testator's directions as to the disposal of immovable property and the testator's power to prohibit the alienation of immovable property is, in terms of the Act, limited as to the duration of any such prohibition.¹¹⁰

(b) Legislation

There is also specific legislation that restricts the testator's freedom of testation, for example, a testator's power to subdivide agricultural land is restricted by the Agricultural Holdings (Transvaal) Registration Act¹¹¹ and the Subdivision of Agricultural Land Act.¹¹² The Minerals Act¹¹³ imposes stringent limitations on the registration of deeds giving effect to the division of a mineral right among two or more persons into undivided shares, or to an increase in the number of holders of undivided shares in a mineral right.¹¹⁴ The Act has provisions to ensure that a will or rules of intestate succession will not result in the avoidance of these limitations.¹¹⁵ A further limitation on freedom of testation is created by the Pensions Fund Act¹¹⁶ which states that any benefit payable by a pension fund in respect of a deceased member does not form part of the member's estate, and contains provisions as to how the benefits must be handled.

2 6 Conclusion

The South African trust although it may have traces of English common law, it has developed into a unique institution as settled by the leading case of *Braun v Blann and Botha*.¹¹⁷ Our trust caters and adapts to the changing democratic and constitutionally founded aspect of testate succession. The charitable testamentary trust, as shall be seen in the following chapters, is developing in a manner that takes

¹⁰⁸ De Waal & Schoeman-Malan (2015) 4.

¹⁰⁹ Act 94 of A1965.

¹¹⁰ Corbett *et al The Law of Succession in South Africa* (2001) 40.

¹¹¹ Act 22 of 1919.

¹¹² Act 70 of 1970.

¹¹³ Act 50 of 1991.

¹¹⁴ Section 20(1) of Act 50 of 1991.

¹¹⁵ Section 21 of Act 50 of 1991.

¹¹⁶ Act 24 of 1956 section 37C.

¹¹⁷ 1984 2 SA 850 (A).

into account the influence of the Constitution¹¹⁸ and the changing legal convictions of society. The above discussion shows very common features from Roman, Roman-Dutch and common law regarding limitations on freedom of testation. In all aspects freedom of testation was firmly rooted and recognised as a guiding principle in testate succession matters and as a result was always considered when giving effect to the testator's last wishes. Freedom of testation is, in addition, in certain respects limited by the common law and statute on both economic and social grounds.¹¹⁹ The equality clause in Section 9 of the Constitution¹²⁰ also requires one to take into consideration issues of fairness and fundamental individual rights when exercising their right to freedom of testation.¹²¹ Thus it is always imperative for one to consider the influence of the Constitution when exercising their rights to dispose of property. It is generally accepted that freedom of testation forms part of a person's right to property as stated by section 25 of the Constitution.¹²²

¹¹⁸ The Constitution, 1996.

¹¹⁹ De Waal "The Law of Succession and the Bill of Rights" in *Bill of Rights Compendium* (1998) para 3G12 – 16.

¹²⁰ The Constitution, 1996. See detailed discussion in Ch 3.

¹²¹ De Waal & Schoeman-Malan (2015) 4.

¹²² *Minister of Education v Syfrets Ltd* 2006 4 SA 205 (C).

Chapter 3: The Constitution and legislation restricting freedom of testation

3 1 Introduction

The purpose of this chapter is to highlight some of the most common legislation that limit freedom of testation and the impact of the Constitution on the principle of freedom of testation. It does not aim to provide a conclusive list of all legislation enacted that may limit freedom of testation,¹²³ but discuss how the object of a trust may be unlawful if it is considered illegal or “against public policy” in terms of either common law, legislation or the Constitution. This chapter will therefore attempt to answer questions 5 to 8 of the research questions.

3 2 Legislation restricting freedom of testation

The Acts below are discussed by De Waal¹²⁴ and Du Toit¹²⁵ in what they respectively term as the economic viability of a disposition made by a testator. This is based on the question how far can one be allowed to use their wealth in controlling the manner in which others must live their lives by virtue of accepting a testator’s inheritance. This may negatively affect the growth of wealth for the state and in particular the living who must be restricted in how they can use the property left behind by the deceased.

- a) The Immovable Property (Removal or Modification of Restrictions) Act¹²⁶ section 2(1) and 6(1) give the court the power to amend limitations placed on immovable property in the case of *fideicommissum*. In terms of this Act, the testator cannot prevent the alienation of land by means of long term *fideicommissa* or other long-term provisions in his or her will.¹²⁷
- b) The Trust Property Control Act¹²⁸ section 13 gives the court the power to vary or terminate a testamentary trust if the court is of the opinion that it hampers the objective which it was founded for. This provision is commonly used by

¹²³ Jamneck *et al* *The Law of Succession in South Africa* (2012) 184.

¹²⁴ De Waal 1997 *Stell LR* 162.

¹²⁵ Du Toit “The Constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African Law” 2001 *Stell LR* 222 225.

¹²⁶ The Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

¹²⁷ Jamneck *et al* (2012) 116.

¹²⁸ The Trust Property Control Act 57 of 1988.

trustees who find themselves faced with the difficult task of giving effect to testamentary trusts whose objective is unlawful or contrary to “public policy”.¹²⁹

- c) The Subdivision of Agricultural Land Act¹³⁰ prohibits the subdivision of agricultural land into economic units.
- d) The Minerals Act¹³¹ restricts the testator’s power to subdivide mineral rights.
- e) The Pension Fund Act¹³² disregards some benefits due to a testator to form part of the estate.
- f) The Maintenance of Surviving Spouses Act¹³³ allows a testator’s surviving spouse to claim maintenance from the estate.
- g) The Maintenance Act¹³⁴ also limits the testator’s freedom of testation. The fact that a child has been disinherited does not mean he or she cannot claim for maintenance against the testator’s estate.¹³⁵
- h) The Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁶ which also state that is against public policy to discriminate unfairly on persons based on their race, gender, religion, etc.

3 3 The Constitution and freedom of testation

The Constitution of the Republic of South Africa¹³⁷ was adopted as the supreme law which must be adhered to by all organs of state, citizens and decision makers across the board. The question then arise to what an extent does the Constitution affect the validity of trusts and other testamentary provisions which are discriminatory in nature?¹³⁸ The core fundamental rights underlying our Constitution are the right to life,¹³⁹ equality¹⁴⁰ and human dignity.¹⁴¹

¹²⁹ *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C).

¹³⁰ The Subdivision of Agricultural Land 70 of 1970.

¹³¹ The Minerals Act 50 of 1991.

¹³² The Pension Fund 24 of 1956.

¹³³ The Maintenance of Surviving Spouses Act 27 of 1990.

¹³⁴ The Maintenance Act 99 of 1998.

¹³⁵ Jamneck *et al* (2012) 116.

¹³⁶ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³⁷ The Constitution, 1996.

¹³⁸ De Waal 1997 *Stell LR* 162 171.

¹³⁹ Section 11 of the Constitution, 1996.

¹⁴⁰ Section 9 of the Constitution, 1996.

¹⁴¹ Section 10 of the Constitution, 1996.

3 3 1 Freedom of testation under the property clause

Section 25 of the Constitution states that “No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property”. In *Minister of Education v Syfrets*¹⁴² Griesel J accepted the correctness of counsel for both parties in stating that although neither section 25 nor any other provision in the Constitution specifically refers to freedom of testation, or the right of individuals to dispose of their assets upon death. Freedom of testation forms an integral part of a person’s right to property, and must therefore be taken to be protected in terms of section 25. This notion was also reiterated by Mitchell AJ in *Ex parte BOE Trust Ltd*¹⁴³ who stated that “the right to property includes the right to give enforceable directions as to its disposal on the death of the owner”.

3 3 2 The Constitution’s direct horizontal application

Direct horizontal application means that the rights protected in the Bill of Rights bind not only the state in its relation with individuals, but that individuals may where necessary directly exercise their constitutional rights against the state and other individuals.¹⁴⁴ Thus section 8(1) of the Constitution states that the Bill of Rights is applicable to all law and is binding on the legislature, the executive, the judiciary and all organs of state. Section 8(1) read with 8(2) imposes validity on any law or conduct that is inconsistent with the Constitution. Section 8(3) read with s39(2) states that the court must promote the spirit, purport and objects of the Bill of Rights when developing the common law. It is important to note that s8(3) does not give the courts a blanket approach to rewrite our common law but merely states that where our common law does not speak on a certain issue, then the court must develop that area of the law in light of the principles enshrined in the Bill of Rights.¹⁴⁵ Although it has been said that it is unlikely that section 25 which deal with the right to property including the right to dispose property, that any part of section 25 will have a meaningful direct horizontal application.¹⁴⁶ It is important to consider how other constitutional rights may be affected by one’s exercise of their right to dispose their private property in a testamentary document. This chapter will only consider the

¹⁴² 2006 (4) SA 205 (C) par 18.

¹⁴³ 2009(6) SA 470 (WCC) par 9.

¹⁴⁴ Currie & de Waal *The Bill of Rights Handbook* (2013) 553.

¹⁴⁵ Du Toit 2001 *Stell LR* 232; de Waal, Currie and Erasmus *The Bill of Rights Handbook* (1999).

¹⁴⁶ Currie & de Waal (2013) 553.

equality clause and gender in particular as one of the grounds listed under that section. The right to human dignity and the right to religion will also be discussed as the basis of exclusionary provision often exercised in charitable testamentary trust.

(a) The equality clause

The concept of equality is a rather controversial social phenomenon, in simple terms it can be understood to mean that people who are similarly situated in relevant ways should be treated similarly.¹⁴⁷ It is also believed that this understanding of equality means that people who are not similar should therefore not be treated in a similar way.¹⁴⁸ This simple yet controversial understanding of equality comes with a number of challenges when it comes to determining the two issues which are ancillary to the notion of treating similar people in a similar way.¹⁴⁹ The first issue has to do with what counts as relevant when it comes to determining the similarity of people in a situation.¹⁵⁰ The second issue is what constitutes similar treatment of people who are similarly situated.¹⁵¹ As shall be seen in chapter 4 below, issues of equality are not clear cut and in most cases require one to ask the question is it fair and possible to treat everyone equally? Section 9 protects the right to equality and comprises a guarantee that the law will protect and benefit people equally and places a prohibition on unfair discrimination.¹⁵² The equality clause also gives life to fundamental rights that may not be encroached upon when someone exercises their property right and in this instance freedom of testation. Section 9(2) is said to “include the full and enjoyment of rights and freedoms.” Section 9(3) provides that 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. Section 9(4) operates horizontally between all natural and juristic persons, and states that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). Further section 9(5) states that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

¹⁴⁷ Currie & de Waal (2013) 210.

¹⁴⁸ Currie & de Waal (2013) 210.

¹⁴⁹ Currie & de Waal (2013) 210.

¹⁵⁰ Currie & de Waal (2013) 211.

¹⁵¹ Currie & de Waal (2013) 211.

¹⁵² Currie & de Waal (2013) 211.

When determining whether there is a violation of the equality clause, courts often make reference to the principles established in *Harksen v Lane*¹⁵³ in which the constitutional court laid the foundation for this enquiry which is two-fold: (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). (b) Does the discrimination amount to unfair discrimination, which involves a two-stage analysis? Firstly does the differentiation amount to “discrimination”. If it is on specified ground, then discrimination will have been established. If it is not on specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b) The right to human dignity

Human dignity is not only a justiciable and enforceable right that must be respected and protected, given the political history of South Africa, it is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central significance in the limitation of rights enquiry.¹⁵⁴ Thus section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. In *Minster of Education v Syfrets Trust Ltd*¹⁵⁵ Griesel J stated that “it is trite that the principle of freedom of testation has never been absolute and unfettered: various restrictions have been placed on this freedom over the years, both at common law and by statute; both in this country and in other open and democratic societies based on human dignity, equality and freedom.

(c) The right to freedom of religion

Section 15 of the Constitution does not prevent the state from recognising or supporting religion, but does require it to give recognition to religions practiced nation-wide.¹⁵⁶ This right, together with section 31, which talks to the rights to cultural, linguistic and religious communities, also firmly entrenches the right of

¹⁵³ 1998 (1) SA 300 (CC).

¹⁵⁴ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

¹⁵⁵ 2006 (4) SA 205 (C) para 22.

¹⁵⁶ Currie & de Waal (2013) 315.

individuals and communities to free exercise of religion. Read together with the equality clause in section 9(3), section 15 prohibits the state from discriminating against any particular religious group.¹⁵⁷ Despite the right to freedom of religion being expressly stated in the Constitution, there is no clear definition of the term “religion” to help us understand what is meant by religious freedom.¹⁵⁸ The term religion has been interpreted both locally and internationally in a generous manner taking into account other concepts such as faith, belief, conscience, culture and human dignity.¹⁵⁹ The meaning of term religion is found in case law and usually described not in isolation but rather as a subjectively held condition rooted in faith.¹⁶⁰ Thus in *Prince v President, Cape Law Society*¹⁶¹ Ngcobo J held that religion is a matter of faith and belief, and the beliefs held may not necessarily make sense to others, but believers should not be made to prove their faith or beliefs. This definition has been supported to be in line with our constitutional democracy based on human dignity, equality and a society that respects diversity.¹⁶² As a result it is important when defining the right to religious freedom to understand that “religion” is not only limited to faith and belief but also encompasses human dignity.¹⁶³ The protection of the right to religion may further be seen in how individual members from certain denominations have been allowed to exercise this right even when disposing off their properties.¹⁶⁴

(d) Other constitutional rights that must be considered

Section 15(1) also entails another set of fundamental rights that need be considered when dealing with trusts and freedom of testation. This subsection deals with freedom of religion, belief and opinion and state that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Furthermore, section 18

¹⁵⁷ Currie & de Waal (2013) 315.

¹⁵⁸ Henrich “Understanding the concept of “religion” within the constitutional guarantee of religious freedom” 2015 TSAR 784.

¹⁵⁹ Henrico 2015 TSAR 784 785.

¹⁶⁰ *Publication Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665 (A) 672; Henrico 2015 TSAR 784 789.

¹⁶¹ 2002 (2) SA 794 (CC).

¹⁶² Henrico 2015 TSAR 784 792.

¹⁶³ Henrico 2015 TSAR 784 792.

¹⁶⁴ *Ex parte President of the Conference of the Methodist Church of Southern African: in re William Marsh Will Trust* 1993 (2) SA 697 (C); *In re Heydenrych Testamentary Trust* 2012 2012 (4) SA 103 (WCC). See however, the conclusion of Ch 4 of this dissertation which shows that the courts in these cases did not deal with the issue of religion, especially *In re Heydenrych* where two of the three trusts in question mentioned members of the Protestant faith.

and 21 of the Constitution guarantee a person's freedom of association, freedom of movement and freedom of residence.¹⁶⁵ It is therefore submitted that provisions such as those prohibiting a person from marrying a person of a certain race, gender or faith, or requiring a beneficiary to live in certain will be regarded as against "public policy" and the *boni mores*, and may be found invalid.¹⁶⁶

There have been cases prior to the constitutional democracy where a testator provides that a beneficiary must live in a certain place or certain property. The courts were obliged to give effect to such provisions if they were clear and unambiguous.¹⁶⁷ Under common law such provisions were regarded as valid and enforceable.¹⁶⁸ The clause would only fail if it was vague regardless of how unfair it was on the beneficiaries. For example in *Ex parte Higgs: In re Estate Rangasami*¹⁶⁹ the will provided that the testator's four sons should forfeit their inheritance if they chose to move out of the family home. The sons and the testator's widow applied for an order declaring the condition invalid or in the alternative, impossible, not reasonably capable of being obeyed or not binding on the sons. They argued that the family home had become too small for all the sons to and their families to live together and the situation had become a health risk. They wanted to divide the property so as to allow each son the opportunity to build his own house on the property. The court held that the condition of the will was not void as it was not calculated to break up existing marriages nor was it calculated to discourage any possible future marriages. The testator's intention seemed to have been to keep his home and family intact and the court found nothing *contra bonos mores* in that. Furthermore, the Court found that it was not impossible to carry out the terms of the condition – the sons could simply add additional space to the existing house. This case shows you just how unfair such provisions will be to beneficiaries. They amount to abuse of the power of the person which Du Toit¹⁷⁰ mentions when addressing the economic limitation on freedom of testation.

¹⁶⁵ Jamneck *et al* (2012) 123.

¹⁶⁶ Jamneck *et al* (2012) 123.

¹⁶⁷ Jamneck *et al* (2012) 121.

¹⁶⁸ *Ex parte Dodds* 1949 (2) SA 311 (T); *Ex Parte Kock* 1952 (2) SA 502 (C); *Ex parte Higgs: In re Estate Rangasami* 1969 (1) SA 56 (D).

¹⁶⁹ 1969 (1) SA 56 (D).

¹⁷⁰ Du Toit 2001 *Stell LR* 222 232.

3 3 3 The limitation clause

While all the rights in the Bill of Rights and the Constitution as a whole deserve special protection, they are not absolute.¹⁷¹ They may be limited by a law of general application taking into consideration all the right and parties involved, including the surrounding circumstances of each case. This will also include an exercise of balancing competing rights and the nature of the violation experienced. In this regard it will be crucial to consider the provisions of section 36 of the Constitution which sets out the basis for limitation of rights. Section 36 reads as follows:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including-

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.’

(2) Except as provided in in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The existence of a general limitation clause does not mean that the rights in the Bill of Rights can be limited for any reason; the limitation must serve a purpose that most people would regard as necessary.¹⁷² This entails a two-stage approach, the first stage dealing with the interpretation of a right and the second stage considering the justifiability of the limitation of that right.¹⁷³ In this dissertation, the first stage would entail an enquiry of whether one has an inherent right to benefit in a charitable trust where they have been excluded on the basis of their gender or religion. While the second stage enquiry would consider just how important the right to freedom of testation is, and whether it may not be limited as a result of its violation of section 9 and 15 respectively.

¹⁷¹ Currie & de Waal (2012) 150.

¹⁷² Currie & de Waal (2013) 151.

¹⁷³ Currie & de Waal (2013) 154.

3 4 Conclusion

Freedom of testation like any other right in the Constitution is not absolute and may be limited by the legislation and the Constitution itself. This will be done in terms of section 36 which provides the basis for the limitation of rights. Section 9(3) also makes it clear that no one may discriminate unfairly against another person on the grounds listed thereunder. It can therefore be taken that provisions that are discriminatory in nature such as those that provide that the testator wants to benefit a certain religious group will not pass the constitutional muster. However as shall be seen in the recent charitable trust cases which will be discussed in Chapter 4, this is not the blanket approach that our courts will follow. Each case will be determined according to its special state of facts and as shall be discussed further, differentiation does not necessarily mean discrimination. Generally when you benefit one person you are bound to exclude another. The question should be is it done in terms of the law of general application as stated in section 36 of the Constitution and does in amount to fair discrimination.¹⁷⁴

¹⁷⁴ *Harksen v Lane* 1998 (1) SA 300 (CC).

Chapter 4: Gender and religious exclusive charitable trusts

4 1 Introduction

This chapter will discuss charitable trust and how public policy was interpreted when dealing with faith clauses, and discuss how the position has changed since the advent of the Constitution. It will further show a change of approach by the courts in the development of public policy when dealing with gender and religious exclusive provisions in testamentary trusts. It will consider in great detail grounds upon which one may not discriminate unfairly on the basis of section 9 of the Constitution and how section 13 of the Trust property Control Act has been applied by the courts to vary testamentary trust provisions which are unlawful and contrary to “public policy” and the effect of a substitution clause. It will also look at foreign judgement of a public benefit trust that only benefitted girls and consider whether South African courts are most likely to endorse a charitable trust that benefits one gender over another. Religious exclusive trusts will also be discussed in seeking to answer whether a small religious group may create a trust that will only benefit children and members belonging to that group. Chapter 4 therefore will attempt to answer question 9 to 15 of the dissertation.

4 2 Public policy, faith clauses and freedom of testation pre-constitutional dispensation

Generally the courts will not give effect to conditions or testamentary provisions which are seen as *contra bonos mores* or against public policy.¹⁷⁵ Public policy can easily be described as that which the community sees as immoral or legally unacceptable. However, it is important to note that these perceptions by communities change with times and what was considered socially unacceptable 50 years ago will not necessarily hold true nowadays.¹⁷⁶ Hence the law must always serve as a yardstick for drawing the line on what is and or not acceptable legally speaking, otherwise it would be almost impossible to please everyone and give way to whatever wishes are presented by testators and people in general. This is due to the fact that morality is a subjective issue and cannot be imposed on everyone. Thus

¹⁷⁵ Jamneck *et al* (2012) 117.

¹⁷⁶ Jamneck *et al* (2012) 117.

in *Aronson v Estate Hart*¹⁷⁷ it was the socially acceptable top restrict one from entering into marriage with a person from another religion. It was not considered against public policy when for a court to enforce such a provision on the affected beneficiaries.

4 2 1 *Aronson v Estate Hart*¹⁷⁸

The testator directed “*that should any of the beneficiaries under his will marry a person not born in the Jewish faith or forsake the Jewish faith, then such beneficiary shall forfeit all the benefits or claims which he or she may have under the will.*”¹⁷⁹

The *quo* court held that this clause was not too uncertain to be enforced. In the Appellate Division counsel for the appellant further argued that the clause was in nature a nude prohibition as there was no named beneficiary to take the property forfeited under the clause, and that the clause was contrary to public policy in that it improperly restricted freedom of testation in the choice of marriage and religion. The court held that the clause was not void for uncertainty, was not against public policy and was not a nude prohibition. Greenberg JA¹⁸⁰ made this following remark:

“... it cannot be said that it is against public policy. Whether the court agrees with the attitude or not, a person who is reasonable, honourable, law-abiding and patriotic citizen may well fear that marriage between what conveniently be described as Jew and no-Jew will tend as far as the spouses are concerned to increase the tensions and stresses, ordinarily to be expected between them, to such an extent as to lead to irreconcilable differences; in the case of children of such a marriage he may equally be apprehensive of the unsettling effect on them of inner conflicts which may leave them rudderless and adrift on the sea of life. He may also fear that they may fall between two stools and be acceptable to neither section. I know of no principle in law which would attempt (according to his rights) to safeguard his descendants against these perils.”

Van den Heever JA¹⁸¹ also stated:

“There is nothing immoral or against public policy in a Jew remaining true to the faith of his fathers and a condition that he shall not marry a person of another religion is conducive to harmonious and happy marriages.”

¹⁷⁷ 1950 (1) SA 539 (A) 546.

¹⁷⁸ 1950 (1) SA 539 (A).

¹⁷⁹ *Aronson v Estate Hart* 1950 (1) SA 539 (A) 551.

¹⁸⁰ *Aronson v Estate Hart* 1950 (1) SA 539 (A) 546.

¹⁸¹ *Aronson v Estate Hart* 1950 (1) SA 539 (A) 567.

The court held further that the concept of nude prohibition of alienation was not a recognized principle of our law; however where a bequest did not mention a substitute heir in the case of a conditional bequest and where the appointed heir failed to fulfil the condition or the inheritance is forfeited by him, the estate would devolve intestate.

This case was strongly criticised by Hahlo¹⁸² and he holds that notions of public policy which were accepted hundreds of years ago cannot continue to bind present legal was of the view that it was against notions of propriety that a testator should be allowed to use the power of the purse to force his descendants for one, two or more generations to profess a faith which they may no longer hold and to refrain from following the dictates of their hearts in the choice of a mate if such a choice happens to conflict with the ideas of their deceased ancestor.¹⁸³ Corbett, Hofmeyer & Kahn¹⁸⁴ also rightfully support Hahlo and submit that no one has a right to put another in making a choice between following their choices and inclinations or forsake them in fear of forfeiting their benefits under a will. Du Toit¹⁸⁵ also points out that the decision of Greenberg AJ was firmly rooted in the predominant role of freedom of testation, stating that what was considered not against public policy at that time is not necessarily true in the new constitutional dispensation. It has also been argued that Aronson was decided on incomplete interpretation of Roman-Dutch law, which would have found that seen the finding going against the principle of freedom of religion.¹⁸⁶ In Roman-Dutch law every individual was entitled to freedom of religion and conscience, and in accordance to their conviction or persuasion or conscience to elect of his own accord whether he wanted to profess a certain religion or no religion at all.¹⁸⁷ It was therefore unlawful to compel a person to continue to profess his faith or not to change his faith in order to adopt another faith, by bequeathing him some benefit in a will subject to such a condition. Roman-Dutch law found such clauses invalid on the fundamental principle of freedom of religion which

¹⁸² Hahlo "Jewish Faith and Race Clauses in Wills: A Note on Aronson v Estate Hart (1950) SALJ 231.

¹⁸³ Hahlo 1950 SALJ 231 240; Corbett *et al* (2001) 131.

¹⁸⁴ Corbett *et al* (2001) 131.

¹⁸⁵ Du Toit 2001 *Stell LR* 222.

¹⁸⁶ Joubert "Jewish Faith and Race Clauses in Roman-Dutch Law" (1968) 85 SALJ 402.

¹⁸⁷ Joubert (1950) SALJ 402 419.

was derived from natural law.¹⁸⁸ Although the Appellate Division, now the SCA is unlikely to overrule the decision of *Aronson v Estate Hart* as being an incorrect reflection of our modern common law, based on the reasoning of the four judges of the court on this matter. It has been observed that submitted that a different approach will altogether be used in light of the Bill of Right in relation to discriminatory testamentary disposition.¹⁸⁹ This shall be reflected in the discussion of *In re Heydenrych*¹⁹⁰ below.

Linking provisions and conditions to bequest in a will is very closely related with freedom of testation.¹⁹¹ This makes it easy for testators to abuse freedom of testation as it allows them to make unfair provisions which will not be favourable to beneficiaries. This gives a testator the right to have extended control over beneficiaries and use the power of the purse to control others even when he is no longer around.¹⁹² Conditions which were unfair on beneficiaries continued to be a norm before the advent of the Constitution. Testators were given lee way and the courts would only consider the impossibility of a condition as opposed to dealing with the issue of the restrictive and controlling nature of the bequest made. For example, in *Ex parte Dessels*¹⁹³ the court upheld a condition in a will that the testator's widow was not live in immorality and that the concept of immorality was not vague as to be incomprehensible. The testator simply intended to prevent the widow from living with a man without marrying him. The other two conditions were disregarded as being uncertain and against public policy to restrict the widow's freedom of movement. Although one may not give a conclusive list of what constitute public policy, it is accepted and shall be seen that public policy is now rooted in the Constitution and testamentary dispositions of property must take into considerations effects of the Bill of Right and the rights contained therein.

¹⁸⁸ Joubert (1950) SALJ 402 419.

¹⁸⁹ Corbett *et al* (2001) 133.

¹⁹⁰ *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC).

¹⁹¹ De Waal & Schoeman-Malan (2015) 136.

¹⁹² Du Toit 2001 *Stell LR* 222.

¹⁹³ 1976 (1) SA 851 (D) 853 (H).

4 3 Charitable trusts, religious and gender discriminatory provisions and the Bill of Rights in the new constitutional era

Charitable trusts trace their origin to Roman times, where initially the Romans only allowed such bequest to be made in relation to religious purposes only, but in the development of time the concept was expanded to embrace all charitable purposes.¹⁹⁴ Charitable trusts are usually created with the object of achieving an impersonal goal, and the founder may not appoint ascertained or ascertainable beneficiaries under the trust.¹⁹⁵ The object for which a charitable trust is created relates in principal, to general public benefit or the benefit of a defined section of the community and not to benefit individual beneficiaries.¹⁹⁶ The requisite element of public benefit is seen in a bequests aimed at the advancement of the interests of a particular group in the community, provided that group or section is sufficiently large or representative.¹⁹⁷ Charitable purposes include religious and educational purposes, as well as giving aid to or providing for the care and comfort pf such groups in the community such as the aged, infirm, incapacitated, underprivileged and the needy.¹⁹⁸ Generally trusts for charitable purposes are treated with a certain degree of leniency or accorded favourable treatment when dealing with them.¹⁹⁹ This favourable approach to trusts seeks, whenever possible, to maintain the trust as opposed to invalidating it.²⁰⁰ This favourable treatment relates to two issues; (a) the validity of the trust, and (b) the application of the *cy pres* doctrine where the trust has failed.²⁰¹

(a) The validity of a trust

The underlying general principle for the favourable treatment accorded to charitable trusts state that they must be upheld as far as legitimately possible in order to accomplish its charitable purpose.²⁰² As a result pf this general rule, a trust for charitable purposes will not be allowed to fail on the ground of uncertainty in regard to its objects or purpose or the beneficiaries under the trust.²⁰³ This is approach is

¹⁹⁴ *Marks v Estate Gluckman* 1946 AD 289.

¹⁹⁵ Du Toit *South African Trust Law: Principles and Practice* (2007) 190.

¹⁹⁶ *Deedat v The Master* 1995 (2) SA 377 (A) 3831.

¹⁹⁷ *Ex Parte Henderson* 1971 (4) SA 549 (D) 554 A-B.

¹⁹⁸ *Marks v Estate Gluckman* 1946 AD 289 302 – 307.

¹⁹⁹ *Corbett at al* (2001) 427.

²⁰⁰ Du Toit (2007) 190.

²⁰¹ *Corbett at al* (2001) 427.

²⁰² *Corbett et al* (2001) 429.

²⁰³ *Corbett et al* (2001) 429.

different with testamentary trusts or bequests which are not charitable, where courts would invalidate a provision not necessarily for lack of adherence to public policy but due to the uncertainty or vagueness of a condition.²⁰⁴ The leniency afforded to charitable trusts also gives the trustees wider powers to appoint beneficiaries than trustees of a non-charitable trust.²⁰⁵

(b) The *cy pres* doctrine

This doctrine originates from English law and is interpreted to mean “as near as possible”.²⁰⁶ It has been accepted that this doctrine forms part of our law and that the English denotation is similar to the application adopted by our courts.²⁰⁷ According to Corbett²⁰⁸ the *cy pres* doctrine when applied to testamentary dispositions (including trusts) may be stated as follows: where (a) a testator has made a disposition of property for a charitable purpose, and (b) the purpose has been accomplished or the disposition fails because the purpose designated by the testator is not capable of being accomplished or because the particular mode of application of the property designated for the accomplishment of the purpose cannot be achieved, and (c) it appears that the testator had a general charitable intention overriding or transcending the designated purpose of the designated mode of application. The court may authorise the application of the *cy pres* doctrine to find a purpose as near as possible to that prescribed by the testator or find a substitution of a mode of application which conforms as near as possible to the testator’s general charitable intent.²⁰⁹ For example in *Ex parte Henderson*²¹⁰ the court held that the vagueness of the trust’s purpose and the general administrative powers afforded the executors in this selection of beneficiaries and charitable causes or institutions to support, should not invalidate the trust. The departure from the initial charitable purpose intended by the testator amounts to an amendment to the trust provisions which may be done by the courts in terms of section 13 of the Trust Property Control Act²¹¹ which gives the courts powers to vary or amend trust provisions.²¹² Most cases would rather use

²⁰⁴ *Ex parte Dessels* 1976 (1) SA 851 (D) 853 H.

²⁰⁵ Corbett et al (2001) 430; Du Toit (2015) 191.

²⁰⁶ Corbett et al (2001) 430.

²⁰⁷ Corbett et al (2001) 431.

²⁰⁸ Corbett et al (2001) 431.

²⁰⁹ Corbett et al (2001) 431.

²¹⁰ 1971 (4) SA 549 (D) 558 A – B.

²¹¹ Act 57 of 1988.

²¹² Du Toit (2015) 192.

section 13 rather than the common law *cy pres* doctrine²¹³ in seeking the court's intervention when dealing with charitable trusts whose provisions are contrary to public policy or the object which the founder intended is no longer accomplishable. This is because generally it appears that section 13 has conferred to the courts wide powers of variation than those afforded by common law.²¹⁴ The following is one such case which sought the court's intervention and brought section 13 under scrutiny prior to the advent of the constitution.

4 3 1 *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust*²¹⁵

The testator had, in his will executed in 1899, bequeathed to his son the residue of his estate "in trust to be applied to the founding and maintaining of a home for destitute white children..." The son then established the William Marsh Memorial Homes which were thereafter administered by the Methodist Church of Southern Africa. Over the passing years, through socio-economic changes in the country, circumstances had changed and there had become a dearth of destitute "white" children with the result that the homes, in the past accommodated 120 children, now only accommodated some 60 children and it was expected that the number of destitute "white" children qualified to enter the home would decline further in the future. There were furthermore a number of destitute children of different skin colour for whom the homes could, but for the provisions that of the will and trust provide a safe haven. The president of the church brought an application stating that it was almost impossible to administer this trust which was not only an embarrassment to the church which was multi-racial in its constitution, convictions and policies. The applicant further pointed out that the real need for the care of destitute children was to be found within the non-white section of society. An application for the deletion of the word "white" from the trust instrument was brought in terms of section 13 of the Trust Property Control Act 57 of 1988. Section 13 as was previously discussed in chapter 2 above gives the courts the power to vary trust provisions which bring about consequences which the founder did not contemplate or foresee. The court in applying the subjective criterion to section 13, opined that this provision of the trust

²¹³ Du Toit (2015) 192.

²¹⁴ Corbett *et al* (2001) 426.

²¹⁵ 1993 (2) SA 697 (C).

had brought about consequences which the late William Marsh neither contemplated nor foresaw, that in a changing world the established homes would become emptier and emptier as the white skinned population became increasingly affluent, and thus the number of destitute children would continually decrease.²¹⁶ Objectively speaking, the court held that the William Marsh Trust cannot continue to operate in a restrictive manner in a country that sees the need to care for children regardless of their skin colour.²¹⁷

This case was strongly criticised on the poor application of section 13. It has been submitted that although the judge rightly pointed out that an application for variation of a trust under section 13 can only be successful if the applicant satisfies the court that a provision in a trust instrument results in consequences which the testator did not foresee, and which hampers the achievements of the objective which it was intended, or is in conflict with public interest. It has been argued that both these tests were wrongly applied in that the judge simply accepted there was a dearth of destitute “white” children without any evidence presented to the court to support this claim.²¹⁸ The decision was also criticised on the objective criterion which deals with the aspect of public interest, and it has been stated that it is the unforeseen results of the trust that must be in conflict with public interest and not the provision in question as held by the judge in *William Marsh*.²¹⁹

4 3 2 Charitable trust cases and public policy in the new constitutional era

As previously discussed in chapter 3 above, the Constitution is the supreme law which requires that all arears of the law must conform to, respect and uphold the rights in the Bill of Rights. Often in practices courts find themselves having to make rulings on charitable trusts provisions which like the one discussed above were created by testamentary provisions whose will were created over century ago, and are discriminatory in nature or do not conform to public policy. The following reported cases dealt with freedom of testation, public policy and the grounds for discrimination contained in section 9(3) of the Constitution.

²¹⁶ At 703 B – C.

²¹⁷ At 703 I – J.

²¹⁸ Van der Spuy “Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Trust 1993 (2) SA 697 (C)” 1993 *De Jure* 447.

²¹⁹ Van de Spy 1993 *De Jure* 447.

(a) *Minister of Education v Syfrets Trust Ltd*²²⁰

This case dealt with a will and codicil which was executed in 1920, whose charitable trust came into operation in 1965 and provided that the benefit for foreign study must be limited to students of the University of Cape Town who are of “European descent”. Further the trust provided that persons of “Jewish descent” and “females of all nationalities” were also excluded from benefitting. In terms of the deceased’s will the Council of the university was charged with selecting the students who were to receive the bursaries. The Council later advised the trustees that it was unable to accept this duty in view of the discriminatory provisions contained in the will and as such the duty was undertaken by the trustees.²²¹ The Minister of Education brought an application for an order deleting the discriminatory provisions. The Minister brought the application on 3 grounds (a) based on section 13 of the Trust Property Control Act, (b) in terms of the common law which prohibits bequests that are illegal or immoral or contrary to public policy, and (c) by direct application of the Bill of Rights, in particular the equality and anti-discriminatory provisions of section 9. Griesel J found that although a compelling case had been established on each of the grounds raised by the applicant, he chose to base his judgement on the ground which spoke to the existing principles of common law informed by the spirit, purport and objects of the Bill of Rights.²²² The key issue in the decision was to what an extent can freedom of testation yield to the freedom from discrimination based on race, gender, religion and ethnicity stated by the equality clause in section 9 of the Constitution.²²³ The court found that the principle of freedom of testation is not absolute and unfettered and that the fact that the court was willing to vary the provisions of the trust and recognise certain groups as worthy to benefit from the trust, this did not amount to arbitrary deprivation of property as mention under section 25 of the Constitution.²²⁴ Therefore the limitation of the contested provision would amount to limitation of freedom of testation and not a deprivation of property. when it came to the issue of public policy, the court held that “public policy is not a static concept: it changes over time, and in particular it must now be informed by the value system enshrined in the Constitution, in this case the value of human dignity,

²²⁰ 2006 (4) SA 205 (C).

²²¹ At para 1 read with para 5.

²²² At para 16; Wood-Boodley “Freedom of testation and the Bill of Rights: Minister of Education v Syfrets Trust Ltd” 2007 SALJ 687 688.

²²³ At para 12.

²²⁴ At para 20 – 22.

the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism.²²⁵ The provisions of the will must, therefore, be evaluated against the public policy of the time when the court is asked to enforce or give effect to the will and not when the will was executed.²²⁶ Thus the court found that the limitation of bursaries to persons of “European descent” constituted indirect discrimination based on race or colour. Further the exclusion of Jews and women constituted direct discrimination based on religion and gender respectively.²²⁷ These were all specified grounds of discrimination based on section 9(3) of the Constitution, thus the court held that the onus was on the curator ad litem to establish that the discrimination was fair.

Criticism on this case comes from the fact that the learned judge fails to mention that the term “arbitrary” has a variable content depending upon the context, such that in other circumstances where there is a connection between the means and ends, it would be required to justify legislative deprivation, while in other situations it would be compelling to prevent the deprivation from being arbitrary.²²⁸ Wood-Boodley continues to state that Griesel J held that the contested provisions amounted to unfair discrimination in terms of the Constitution, then it should follow that they are also contrary to public policy.²²⁹ The problem with this notion is that it does not understand that once a court in a finds that there has been a direct violation of the Bill of Rights, then there must be an enquiry into the limitation clause of section 36(1) regardless of whether that violation is found to be contrary to public policy or not.²³⁰ There other circumstances in which a trust may fall under the prescripts of affirmative action under the Bills of Rights which warrant “legislative and other measures designed to protect or advance person, or categories of persons, disadvantaged by unfair discrimination.”²³¹ Hence it is important to discuss the following case, which has been criticised for not taking into consideration the plight of previously disadvantaged and marginalised groups in the society.²³²

²²⁵ At para 24.

²²⁶ At para 26.

²²⁷ At para 33.

²²⁸ Wood-Boodley 2007 SALJ 687 690.

²²⁹ At para 32.

²³⁰ Wood-Boodley 2007 SALJ 687 691.

²³¹ Wood-Boodley 2007 SALJ 687 691.

²³² Modiri “Race As/And The Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to be Racist in BOE Trust Limited” 2013 (16) 5 PER 582.

(b) *Ex parte BOE Trust Ltd*²³³

The trustees in this case brought an application to amend the terms of the testamentary trust that provided that trust funds were to be applied “for the provision of small bursaries to assist 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. The will further stipulated that the only proviso to the selection of suitable candidates is that they must return to South Africa for a period to be stipulated by the Professors listed. The trustees applied for the deletion of racially exclusionary conditions on the grounds that it was contrary to public policy and *inter alia*, in terms of the principles set out in the *Syfreets*,²³⁴ consideration of equality were set to overrule freedom of testation. Mitchell J in obiter,²³⁵ after careful consideration of what constitutes unfair discrimination in terms of section 9(3) of the Constitution, held that discrimination used to achieve a legitimate purpose is not unfair. Such legitimate objectives, he stated, are for example, the need to redress past injustices based on gender and race. Therefore, the racially-exclusive nature of the bursary trust in this case served a legitimate purpose in that it sought to ensure that beneficiaries who receive assistance to study a doctorate overseas come back to South Africa and thus ameliorate skills loss and further promote importation of skill obtained overseas. As a result any discrimination that resulted from it could not be described as unfair.²³⁶ The court found that in order to succeed with an order of variation of the trust provision in terms of section 13 of the Trust Property Control Act, the Act requires that court must be satisfied that the provision has brought about consequences which the of the trust did not contemplate or foresee. Mitchel J²³⁷ further stated that although the court in *Syfreets* did not rely on the application of section 13 to make its finding, it was justified to find that Dr Scarbrow did not foresee when he wrote his will two decades of the 20th century that, that the constitutional dispensation 70 years later would render his bursary contrary to public policy. The same however, could not be said with the will in issue which was executed in July 2002, eight years into the new constitutional dispensation. It cannot be said that the testator was not aware of the changes that

²³³ 2009 (6) SA 470 (WCC).

²³⁴ *Minister of Education v Syfreets* 2006 (4) SA 205 (C).

²³⁵ At para 14 & 15.

²³⁶ *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) par 15.

²³⁷ At para 20 – 22.

came as a result of the democratic era and thus warrant the interference with the trust sought by section 13 of the Trust Property Control Act. The SCA also dismissed the appeal against Mitchell AJ's judgement and emphasised the testator's freedom of testation. Erasmus AJA stated that undermining a testator's freedom of testation also offends one's constitutional right to human dignity.²³⁸ He contended that "the right to dignity allows the living, and the dying the, the peace of mind of knowing that their last wishes would be respected after they have passed away."²³⁹

This decision has been criticised by Modiri²⁴⁰ for lack of a decisive rejection of racism and horizontal application of the Bill of Rights, which does not tolerate (racial) discrimination by private non-state actors.²⁴¹ Modiri further highlights the proviso in the testator's will was specifically only added after the testator was warned by family members that the trust objective limiting beneficiaries of bursaries to white students would possibly not be given effect based on its discriminatory nature. It is also important to note that when Modiri criticised *BOE*, there was already a decision from the SCA dealing also with discriminatory provisions in a charitable trust. The case of *Emma Smith* gave Modiri an opportunity to compare the two decisions now from the same court. However different the facts were as pointed out by Erasmus AJA, the appellants in *BOE* brought their appeal based on the reasoning in *Emma Smith*.²⁴² This dissertation will show the difference between the two cases in the full discussion of *Emma Smith* below. The judge in *BOE* chose instead to deal with the right to property enshrined in section 25(1) and the right to human dignity stipulated in section (10) of the Constitution. Dignity is said to come into contact because failure to recognise freedom of testation would trump constitutional principles of human dignity. The court continued to state that the right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away".²⁴³ Although the judge rightfully pointed out that freedom of

²³⁸ Section 10 of the Constitution, 1996.

²³⁹ *In re BOE Trust Ltd* 2013 SA 236 (SCA) para 26 & 27.

²⁴⁰ Modiri "Race as/ and the trace of the of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in *BOE Trust Limited*" *PER* 2013 581.

²⁴¹ Modiri 2013 *PER* 581 583. It is important to note that Modiri's criticism is two-fold focusing on the politics of law and race. For purpose of this dissertation focus will only be based on the legal aspects of the case and not consider the political race issue that the second part of Modiri's article discusses.

²⁴² *BOE Trust Ltd* 2013 (3) SA 236 (SCA) para 16.

²⁴³ *BOE Trust Ltd* 2013 (3) SA 236 (SCA) para 27.

testation is not absolute, the court chose to reject objective impossibility when considering whether the testator's condition in *BOE* had become impossible to carry out as required by section 13 of the Trust Property Control Act. Thus he failed to consider the issue of unlawfulness given the fact that the testator had foreseen impossibility and made alternative arrangements in light of it.²⁴⁴ As a result the substitution clause made it easier for the judge to escape the principles set out in *Emma Smith and Syfrets* and the provisions of the Trust Property Control Act, the Equality Act and the Constitution.²⁴⁵ Further the court simply remained within the bounds of common law and refers to the Constitution to only point out that freedom of testation is part and parcel of the right to property.²⁴⁶ His decision fails to confront the general question of how the Constitution has affected fundamental legal concepts of the law of succession, especially freedom of testation as was the case in *Emma Smith and Syfrets*.²⁴⁷

(c) *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal and Others*²⁴⁸

The facts of this case concerned a will which was drafted in 1938, which amongst other things created a charitable trust. The trust which was called the Emma Smith Educational Fund was to be administered by the Council for the University of Kwa-Zulu Natal and provided for bursaries towards the “the higher education of European girls born of British South African or Dutch South African parents, who have been in Durban for a period of at least three years prior to the grant”. The University applied in trial court for an order varying the provisions of the will and deletion of the word “European, British and Dutch South African”. The University stated that it caused them considerable embarrassment to administer the Fund because of the racially exclusive basis upon which bursaries had to be awarded.²⁴⁹ It also feared being challenged in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act.²⁵⁰ The trial court granted an order for variation, the curators ad litem for the potential beneficiaries of the Fund then took the matter on

²⁴⁴ Modir 2013 *PER* 581 589.

²⁴⁵ Modiri 2013 *PER* 581 590.

²⁴⁶ Modiri 2013 *PER* 581 591 – 592.

²⁴⁷ Modiri 2013 *PER* 581 592.

²⁴⁸ 2010 (6) SA 518 (SCA).

²⁴⁹ At para 13.

²⁵⁰ Act 4 of 2000.

appeal. In both the trial court and the Supreme Court of Appeal the university relied on section 13 of the Trust Property Control Act. The court held that the court below was correct in granting an order for variation and removing the racially discriminatory conditions which were against public policy as stated in *Syfrets* decision. The court stated that the constitutional imperative to remove racially restrictive clauses that conflict with public policy from an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution, must take precedence over freedom of testation, particularly given the fundamental value of our Constitution.²⁵¹

When analysing the decision, De Waal²⁵² contends that the SCA did not address the first requirement for the application of section 13, and that is the subjective requirement, namely whether the trust provisions in question brought about consequences which in the court's opinion the founder of the trust did not contemplate or foresee. Failure to address this point and elaborate on why it hampers the objects of the founder makes the court's decision weak. The court was solely concerned with explaining why it thought the trust provisions were in conflict with public interest.²⁵³ As a result the court's decision was based on the provisions of section 9 of the Constitution which are brought into practical application by the Promotion of Equality and the Prevention of Unfair Discrimination Act. It has also been submitted that this case like the next one which will be discussed below, were decided on the basis of section 13 of the Trust Property Control Act and not on the basis of common law as was the case in *Syfrets*.²⁵⁴ However, in all three cases, namely *Syfrets*, *Emma Smith* and *Ex parte BOE Trust* the court emphasised that the findings did not mean that freedom of testation is not negated or ignored but must be exercised in line with the prescripts of the Constitution.²⁵⁵ As a result it seems differentiation in testamentary provisions would be lawful in other instances in order to achieve a "legitimate objective" such as the "need to redress past injustices based

²⁵¹ At para 42.

²⁵² De Waal "The Law of Succession (including Administration of Estates) and Trusts" *Annual Survey of South African Law*, 2010 1195.

²⁵³ De Waal 2010 *Annual Survey* 1195.

²⁵⁴ De Waal & Schoeman-Malan (2015) 138.

²⁵⁵ De Waal & Schoeman-Malan (2015) 138.

on gender and race.²⁵⁶ In *Emma Smith*, the court also stated *obiter* that it would be permissible for a religious group to set up a trust for the benefit of other members of that faith, or if a member of a club set up a trust for the children of fellow club members.²⁵⁷

(d) *In re Heydenrych Testamentary Trust*²⁵⁸

The applicant in this case was an administrator of three charitable testamentary trust instruments which had discriminatory provisions regarding potential beneficiaries. The Heydenrych Trust executed in 1943 provided that an educational trust must be created for “European boys of good character of the Protestant faith”. The Houghton Trust was executed in 1989 and provided that “two or more boys of the white population group must be educated abroad”. The third and last George King Trust was executed in 1987 and provided that “financial assistance should be provided to promising music students of the members of the white group of Protestant faith”. The applicant sought an order deleting certain provisions of the provisions of the trusts which discriminate directly on the grounds of race and gender. Although two of the trusts directly discriminated on the grounds of sex and/or gender, the applicant did not advance an order on these aspects but contended that the court should be lenient in dealing with these grounds and prevail in light of freedom of testation.²⁵⁹

The court made a careful consideration of previous cases that dealt with discriminatory provisions²⁶⁰ and the application of section 13 of the Trust Property Control Act. The court found that the condition stipulated in the Heydenrych trust constitute direct discrimination on the grounds of ethnic origin, culture and birth, and indirect discrimination on the grounds of race and colour, more specifically because it has the effect of excluding most black South Africans.²⁶¹ Accordingly the inclusion

²⁵⁶ *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) para 14. De Waal and Schoeman-Malan (2015) 138 suggest that these *obiter* remarks leave room that fair discrimination will be tolerated just as long as it can be reasonably justifiable.

²⁵⁷ *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal* 2010 (6) 518 SCA para 41.

²⁵⁸ 2012 (4) SA 103 (WCC).

²⁵⁹ At para 2.

²⁶⁰ *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust* 1993 (2) SA 697 (C); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Curators, Emma Smith Educational Fund v University of Kwa-Zulu Natal* 2010 (6) SA 518 (SCA).

²⁶¹ At para 13.

of the terms “white, European and British” had the effect of disqualifying black South Africans from benefitting from scholarships, and constituted unfair discrimination, and against public policy.²⁶² The Houghton trust on the other hand had been established to benefit boy to study in Oundle School which was initially an only boy school but later became a co-educational institution. These circumstances, the court held according to the jurisdictional (subjective) fact, were unforeseen by the testator at the time of executing the will. Therefore the aims and objective of Oundle had changed and transformed into a gender-inclusive school, as a result limiting bursaries to boys in circumstances where the institution in question is co-educational constitutes unfair discrimination in terms of the principle laid down in *Harksen v Lane*.²⁶³ The court held that the impugned conditions in the Houghton Trust and Heydenrych Trust constituted unfair discrimination on the grounds of gender and race, and were in conflict with section 9(4) of the Constitution and public interest.

It is important to note that the court rejected applicant’s arguments that the testators were not sexist but merely motivated by the fact that at the time when the wills were drafted the industries concerned were most occupied by men and the testators did not consider including girls under the bursary bequests.²⁶⁴ Goliath J held that the testator’s exclusion of girls from the bursary bequests was motivated by his belief that women were incapable of or unable to qualify in the civil service or as chemists. The learned judge further stated that the testator neither contemplated subsequent changes in the gender composition of the civil service, nor the recent advancement of women in the field of chemistry.²⁶⁵ Thus Goliath J concluded by stating...

“I am further satisfied that the unfairly discriminatory provisions of the trusts brought about consequences which the founders did not contemplate and foresee. All the wills in question were executed before the advent of our democracy and the introduction of the Constitution. The testators would not have foreseen that the allocation of scholarships by the trusts on a discriminatory basis would be rendered unconstitutional and unlawful. Furthermore, they did not foresee that the charitable purpose of the trusts would be hampered by the discriminatory conditions imposed”.

²⁶² At para 14.

²⁶³ 1998 (1) SA 300 (CC). *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC) para 18.

²⁶⁴ *In re Heydenrych Testamentary Trust* para 15 & 18.

²⁶⁵ *In re Heydenrych Testamentary Trust* para 19.

Although this it submitted that this decision is correct in so far as its findings are based on section 13 of the Trust Property Control Act and not on the basis of common law, as was the case in *Syfrets*.²⁶⁶ The question of whether a member of the Protestant faith can establish a trust for the benefit of children or other member of that faith to the exclusion of other members of the public was not answered. The judgement is silent on this point, the two trusts of Heydenrych and King George had conditions that also limited beneficiaries to members of the protestant faith.

4 4 Conclusion

The discussion above shows just how far notions of public policy have come, influenced by social, political and democratic changes in the law of succession. It is well accepted that common law and public policy are embedded in the Constitution and must be interpreted in line with the prescripts of the Bill of Rights.²⁶⁷ The equality clause lays the foundation under which all citizens may be treated by both the state and in relation to one another. Section 13 of the Trust Property Control Act on the other hand does not give the court the general power of variation of trusts, but requires that certain requirements must be met in order for the application to be successful.²⁶⁸ Although the courts differed in the application of section 13 and in some instances did not address all the requirements of the Act, as was the case in *Emma Smith*,²⁶⁹ the courts arrived at the same conclusion with regards to the deletion of the discriminatory provisions of the trusts concerned. For example the court in *Syfrets* case approached the problem from a law of succession perspective, and applied the common law principle that testamentary provisions which are *contra bonos mores* and invalid and unenforceable.²⁷⁰ In *Emma Smith* on the other hand, the court approached the problem of an angle of the law of trusts, and applied section 13 by dealing with the words used answer the question whether they are in conflict with public interests.²⁷¹ Both these approaches, led the respective courts to the same conclusion and it was due to the fact that public policy and public interests were informed by constitutional considerations, especially the fundamental right to equality.

²⁶⁶ De Waal & Schoeman-Malan (2015) 138.

²⁶⁷ *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).

²⁶⁸ *Curators, Emma Smith Educational Fund v University of Cape Town* 2010 (6) SA 518 (SCA).

²⁶⁹ De Waal 2010 *Annual Survey* 1195.

²⁷⁰ De Waal 2010 *Annual Survey* 1197.

²⁷¹ De Waal 2010 *Annual Survey* 1197.

The courts also dealt strongly with the issue of race as opposed to other discriminatory conditions mentioned by the trusts. For example in *Emma Smith* the racial clause was dealt deleted, but the gender restriction (namely women only should qualify) was not deleted.²⁷² Does this mean that our courts will consider gender as fair discrimination if it seeks to benefit women instead of men? What if both men and women are in the same club but only women in that club are benefitted. Could this be seen as unfair discrimination as was the case *In re Heydenrych*?²⁷³ These unresolved questions suggest that our courts are most likely to uphold testamentary trust provisions which strive to benefit women given the oppressive history that women had to undergo with lack of opportunities granted for their personal and professional development.²⁷⁴ It is rather unfortunate that *In re Heydenrych* the court failed to deal with the issue of religion that was presented by the two trusts which made mention to Protestant faith. This condition would have given the court an opportunity to clarify if the obiter in *Emma Smith* can be exercised and a testator given the freedom to benefit only members of his faith and not the general public. This would be in contrast to the *William Marsh* trust where the testator sought to benefit only white children but did not limit the homes to only those who are members of the Methodist church. Finally it is important to note in all the cases the courts continued to support and emphasise that freedom of testation is not necessarily negated or ignored but limited only in so far as it establishes or seeks to uphold unfair discriminatory provisions.

²⁷² Although the focus of this dissertation is not on race, but gender and religion as grounds for restricting beneficiaries, this notion seems to support Modiri's argument when he says that the court escaped dealing with the issue of race and justified itself by upholding the substitution clause as opposed to dealing with the root that has caused a rift in the political and social landscape of South Africa.

²⁷³ *In re Heydenrych* the court held that to continue to benefit boys only in a co-educational institution would amount to unfair discrimination, para 18.

²⁷⁴ *In re Heydenrych* 2012 (4) SA 103 (WCC). See also Ch 5 full discussion of *Re The Esther G. Castanera Scholarship Fund* 2015 MBQB 28 where a Canadian court upheld a gender-exclusive testamentary trust.

Chapter 5: Gender and religious exclusive charitable trusts and freedom of testation in other jurisdictions – a comparative analysis

5 1 Introduction

This chapter will examine how other jurisdictions have dealt with the principle of freedom of testation in so far as it relates to testamentary bequests which had conditions that are restrictive in nature. Furthermore it will examine whether in these jurisdictions, freedom of testation is given a constitutional guarantee and to what an extent do charitable testamentary bequests enjoy protection and survive criticism despite having restrictive conditions attached to them. Foreign case law in relation to a charitable trust seeking to benefit women only and being gender exclusive will be discussed in great detail. Comparison will be made with recent South African court cases dealing with gender exclusive testamentary provisions encompassing instruments other than the charitable trust deed, and whether private trusts may be excluded from interference by the courts. Religious exclusive charitable trusts cases will also be discussed and compared against the South African context and lessons that may be adopted for future application of freedom of testation in a constitutional state. This chapter will then answer research questions 16 to 19 of the dissertation.

5 2 Freedom of testation in English law- a common law legal system

English law gave recognition to testate succession by the enactment of pieces of legislation that recognized and respected testators who wanted to dispose their assets by way of a will and thus the adoption of the *Statute of Wills* of 1940.²⁷⁵ Freedom of testation in English law is supported by various means and most importantly through the acknowledgement of private ownership. However, unlike South Africa, it does not, in the absence of a written constitution for the United Kingdom, recognise a constitutional guarantee of private ownership and private succession.²⁷⁶ This guarantee is implied by Article 1 of the First Protocol to the *European Convention on Human Rights* (1950), which has been imported into the

²⁷⁵ Du Toit "The limits imposed upon freedom of testation by the Boni Mores: Lessons from Common Law and Civil (Continental) Legal Systems" 2000 *Stell LR* 358 360.

²⁷⁶ Du Toit 2000 *Stell LR* 358 361.

domestic law of the United Kingdom by the *Human Rights Act* of 1998. In English law limitations on freedom of testation particularly contentious testamentary provisions, are dealt with, in so far as public policy is concerned, predominantly in accordance with the court's view of what is acceptable and what is not.²⁷⁷ As a result prescriptive forfeiture clauses founded on race, nationality or religion which direct beneficiaries' religious convictions or choice of spouse are generally not regarded in conflict with public policy.²⁷⁸ An example of the English courts' predominant support for freedom of testation and reluctance to move away from historic notions of public policy is deduced from the leading case of *Blathwayt v Lord Cowley*.²⁷⁹ In this case the testator provided that his beneficiaries will forfeit "should they be or become Roman Catholic". The House of Lords held that to find that this forfeiture clause is invalid based on public policy considerations, will constitute a substantial reduction of freedom of testation which is firmly rooted in the law of testamentary disposition.²⁸⁰ The court further held that benefitting others is a matter of personal choice and preference, and therefore it should not be equated to discrimination. Although the court acknowledged that it would be unlawful for the state to uphold one religion over another, it cannot be said that it is against public policy for an individual to benefit members of his faith over others.²⁸¹

This decision like the old South African position of Jewish faith clauses²⁸² placed so much emphasis on freedom of testation and the needs to protect the testator's preconceived notions about unsavoury consequences that may arise as a result of one changing their belief or religious system. In *Aronson* the court opined that it can never be said that preventing one from marrying a person not of Jewish faith is against public policy when a testator must have contemplated that it would put undue strain on the marriage itself and set the children to find themselves being caught in between two competing interests. Du Toit²⁸³ criticises *Blathwayt* decision by stating that public policy should serve as the overriding rule regardless of whether a testator chooses to exercise discrimination in a private sphere. However, this

²⁷⁷ Du Toit 2000 *Stell LR* 358 362.

²⁷⁸ Du Toit 2000 *Stell LR* 358 363.

²⁷⁹ (1975) 3 All ER 625.

²⁸⁰ *Blathwayt v Lord Cawley* 637.

²⁸¹ *Blathwayt v Lord Cawley* at 639.

²⁸² See the *Aronson* decision which is discussed in great detail in Ch 4 of this dissertation.

²⁸³ Du Toit 2000 *Stell LR* 358 365.

dissertation supports this decision and submits that given the South African constitutional guarantee of freedom of testation and the limitation of rights, differentiation in the private sphere should be allowed so long as it is done through constitutional considerations of public policy. However, it is important to note what Du Toit highlights in the judgment of Lord Wiberforce in *Blathwayt* in relation to religion, that the personal inclination and responsibility of the beneficiary concerned must be weighed against the infringement of the fundamental rights of that beneficiary, and that is religious freedom.²⁸⁴ The English court seems to agree with the South African position in this regard, where it has been held that it would be unfair for a testator to continue to expect his beneficiaries to hold on to a faith which no longer service their opinions or conscience.²⁸⁵

5 2 1 Charitable trusts in English law

English law allows testators to regulate the distribution of their assets by means of charitable trusts on the ground of *inter alia*, race, nationality and religion so long as this quadruple classification can accommodate these kinds of trusts.²⁸⁶ However, certain qualifications in favour of charities are made, for example section 34 of the *Race Relation Act* of 1976 states that discrimination will not be unlawful if such discrimination is necessary in order to give effect to the provisions of any instrument directing the operation of a charity and in terms of which benefits are awarded to persons of a particular racial group.²⁸⁷ This section, however does not apply to provisions which limit benefits on the basis of race or colour. Where a provision defines a group or class of beneficiaries with reference to colour, such reference must be regarded as void and has to be ignored by the trustees.²⁸⁸ Section 43 of the *Sex Discrimination Act* of 1975 provides that conduct will not be unlawful if such conduct occurs in relation to the provision on any instrument directing the operation of a charity and in terms of which benefits are bestowed upon members of one gender only. Thus this section allows for the existence of so-called "single sex charities" such as the YMCA, the YWCA, the Boys Scouts and the Girl Guides.²⁸⁹ Section 78 of the *Sex Discrimination Act*, however, provides for certain restrictions

²⁸⁴ Du Toit 2000 *Stell LR* 358 365. *Blathwayt v Lord Cawley* at 640.

²⁸⁵ See Ch 4 criticism on Aronson by Hahlo 1950 *SALJ* 231 240; Corbett *et al* (2001) 131.

²⁸⁶ Du Toit 2000 *Stell LR* 358 366.

²⁸⁷ Du Toit 2000 *Stell LR* 358 366.

²⁸⁸ Du Toit 2000 *Stell LR* 358 366.

²⁸⁹ Du Toit 2000 *Stell LR* 358 367.

with regard to educational charities and states that the trustees of such charities can apply to the relevant minister for the removal or amendment (subject to necessary administrative procedures) of any restriction which pertains to their organisation so as to enable them to award benefits to members of both genders. As a result of these provisos, Du Toit points out that despite the general lenient approach to charities, certain legislative restrictions are imposed upon charities as far as bestowing benefits on the basis of race, colour and gender is concerned.²⁹⁰

English law, like the South African position, requires that charities have to display an element of public benefit, and in this regard a distinction has to be made between a benefit for the community, where only a few will qualify and a benefit for a particular group out of a large community with people who are willing to take advantage of the benefit, but such is not available to them.²⁹¹ As a result in *Davies v Perpetual Trustee Company*²⁹² the court rejected a charitable trust created to benefit members of the “Presbyterians” for establishing a college for the education and tuition of their youth. Another way of regulating the English trust is through the *cy pres* doctrine, which allows a court to identify and implement an alternative trust purpose if the original purpose identified by the founder of a charitable trust cannot be achieved because it has become impossible, impractical or unlawful, provided that the purpose identified by the courts corresponds closely with that originally identified by the founder.²⁹³ Thus the *cy pres* doctrine has been employed by English courts to avoid the contentious consequences of charitable trusts founded on race, nationality and religion.²⁹⁴ For example, in *In re Lysaght, Hill v The Royal College of Surgeons*²⁹⁵ the court was called to answer whether a fund which was established to award bursaries to surgeons with a restriction “must be British born subject and not of the Jewish or Roman Catholic faith” can be labelled a charitable trust and award the 5 000 pounds to the college or, alternatively utilize it *cy pres*. The court held that although it cannot be accepted that excluding others by virtue of their faith is against public policy, these restrictions render the trust purpose impractical and therefore the college must administer the fund without the element of religious discrimination.

²⁹⁰ Du Toit 2000 *Stell LR* 358 367.

²⁹¹ *Inland Revenue Commissioners v Bladdeley* 1955 AC 572 at 592.

²⁹² [1959] AC 439.

²⁹³ Du Toit 2000 *Stell LR* 358 368.

²⁹⁴ Du Toit 2000 *Stell LR* 358 368.

²⁹⁵ [1966] Ch 191.

Despite English law's lenient approach to prescriptive charitable trust bequest based on race, nationality and religion, English courts readily employ the above mechanisms in order to avoid contentious consequences of such bequests. However, public policy plays a little part in this regard.²⁹⁶ It can be seen from this decision that unlike South Africa where discrimination of another based on religion is not only against public policy but religion is a constitutional guarantee which is listed as one of the grounds which one may not unfairly discriminate against. It would seem that English law does not employ an objective approach when applying public policy towards discriminatory trust provisions. Their courts are concerned with giving effect to the charitable objective of the trust instead of dealing deep with the discriminatory nature of the benefit bestowed.

5 3 Freedom of testation in German law's Civil (Continental) legal system

The German law of succession which is derived from Roman and Germanic succession law is codified in Book 5 of the *Bürgerliches Gesetzbuch*. Private ownership as well as private succession enjoy constitutional protection in terms of German *Grundgesetz* (Basic law).²⁹⁷ Article 14(i) of the *Grundgesetz* guarantees private succession as an institution – the so called *Erbrechtgarantie*, and is so doing protects the interests of the deceased as well as his or her beneficiaries. Private succession enjoys comprehensive protection in German law despite the fact that Article 14(i) does not expressly refer to freedom of testation, the guarantee of private ownership and private success is readily interpreted in German law as a commensurate guarantee of freedom of testation.²⁹⁸ German law imposes limits on freedom of testation in terms of good morals (*guten Sitten*).²⁹⁹ Article 3 of the German *Grundgesetz* prohibits discrimination on the basis of gender, parental extraction, race, language, place of birth or extraction, religion as well as religious and political opinion. Some relevant rights found in Chapter 1 include the rights to freedom of religion, belief and confession (Article 4), the right to freedom of marriage and protection of the family (Article 6), the right to freedom of association (Article 9) and the right to privacy (Articles 10 and 13). It is generally acknowledged that the rights contained in Chapter 1 enjoy indirect horizontal operation (*mittelbare*

²⁹⁶ Du Toit 2000 *Stell LR* 358 369.

²⁹⁷ Du Toit 2000 *Stell LR* 358 380.

²⁹⁸ Du Toit 2000 *Stell LR* 358 381.

²⁹⁹ Du Toit 2000 *Stell LR* 358 381.

Dritwirkung) and that it can therefore shape private law, more so when it is applied in a private dispute between parties.³⁰⁰ The constitutional guarantee of freedom of testation in Article 14 of the *Grundgesetz*, coupled with the fact that the *Grundrechte* operates only indirectly horizontally, imply that fundamental rights do not constitute a direct limitation on freedom of testation in German law.³⁰¹ These rights, however, do guide the courts in their interpretation and application of the good morals criterion.

In German law freedom of testation is limited on the basis of *inter alia*, the nature of the particular bequest. This means that unlike English law, testamentary bequests will be found invalid if its implementation cannot be justified in terms of good morals.³⁰² A testamentary provision is regarded in German law as being contrary to good morals (*Sittenwidrig*) if it is against the “*Anstandsgefühl aller billig und gerecht Denkenden*” (the legal convictions with regards to what is proper and acceptable of all reasonable and right minded people).³⁰³ This is equivalent to the South African standard of a reasonable man test. Thus the German test applied in this regard is objective in nature: it determines whether the provision in question, viewed objectively in terms of the “*Anschaung des anständigen Durchschnittsmenschen*” (the consideration of a decent average person”), offends good morals.³⁰⁴ This test is applied with particular reference to the facts and circumstances of each case, and in some cases beneficiaries will simply have to accept that testamentary bequests are by the very nature a matter of the testator’s personal preference, which often results in unequal or discriminatory treatment over others.³⁰⁵ Some German scholars evaluate the role of good morals by stating that a distinction must be made when limiting freedom of testation, between the outright disinheritance of potential beneficiaries and provisions where the testator wants to exert influence in the private lives of beneficiaries.³⁰⁶ This difference is also found in the South African constitutional dispensation where writers have also given possible scenarios where the Constitution can limit a testator’s freedom of testation. For

³⁰⁰ Du Toit 2000 *Stell LR* 358 381.

³⁰¹ Du Toit 2000 *Stell LR* 358 381.

³⁰² Du Toit 2000 *Stell LR* 358 382.

³⁰³ Du Toit 2000 *Stell LR* 358 382.

³⁰⁴ Du Toit 2000 *Stell LR* 358 382.

³⁰⁵ Du Toit 2000 *Stell LR* 358 382.

³⁰⁶ Du Toit 2000 *Stell LR* 358 382.

example in the case of out and out disherison and where the testator discriminates against a beneficiary based on the rights enshrined in the Bill of Rights.³⁰⁷

5 4 Discriminatory charitable trusts in mixed jurisdictions: Canada

In Canada, like many other jurisdictions which uphold testamentary freedom, initially their courts were also reluctant to invalidate discriminatory charitable trusts and treated them with a certain degree of tolerance.³⁰⁸ However in *Canada Trust v Ontario (Human Rights Commission)*³⁰⁹ the court moved away from this traditional approach. In this instance a trust which was created in 1920 to fund educational scholarships provided that scholarships were limited to white Protestants of British nationality or parentage. The trust deed also stated that certain funds should be paid out to female candidates on a yearly basis. The Ontario Court of Appeal applied the *cy pres* doctrine to do away with the terms of the trust deed that discriminated on the grounds of race, sex, nationality and religion. The court held that the trust offended public policy and was varied on that basis. The majority judgment of Robins JA found that equality may outweigh freedom of testation not only in the case of a discriminatory charitable trust, but also in the case of a discriminatory private trust.³¹⁰ The concurring judgement of Tarnopolsky J also recognizing the importance of freedom of testation, found that there was a need to balance freedom of testation and equality using the public policy doctrine.³¹¹ This judgement, however, did not agree with majority on the right to balance freedom of testation and equality in cases of discriminatory private trust.³¹² The majority judgement in *Canada Trust* must be understood as a radical move from traditional judicial reluctance to invoke public policy against private trusts.³¹³ This decision also further affirms the equality provision in section 15 of the *Canadian Charter of Rights and Freedoms*³¹⁴ and

³⁰⁷ De Waal & Schoeman-Malan (2015) 190.

³⁰⁸ Harding "Charitable Trusts and Discrimination: Two Themes" 2016 *CJLL* 227 232.

³⁰⁹ (1990), 69 DLR (4th) 321 (Ont CA).

³¹⁰ *Canada Trust* at 334 – 335.

³¹¹ *Canada Trust* at 348 – 352.

³¹² *Canada Trust* at 353.

³¹³ Harding 2016 *CJLL* 227 234.

³¹⁴ *Canadian Charter of Rights and Freedoms*, 1982.

*Human Rights Code*³¹⁵ that uphold public policy, and suggest that the motive behind the exclusionary provision is also crucial.³¹⁶

5 4 1 Re The Esther G. Castanera Scholarship Fund³¹⁷

This case recently upheld a gender-exclusive testamentary bursary trust, and found that the trust bequest's gender exclusivity did not violate the Manitoba's *Human Rights Code*³¹⁸ and the country's public policy.³¹⁹ The testator had executed a will in 1991 in which she left 50% of the residue of her estate to establish "scholarships at the University of Manitoba for needy and qualified women graduates of the Steinbach Collegiate Institute who will study for a Bachelor of Science degree with a major in one of the basic sciences..." The university raised its concerns regarding the gender exclusive nature of the bequest and argued that it was in contravention of the university policies on the non-acceptance of discriminatory scholarships, bursaries and fellowship. The university approached the court in 2013 with a request for the variation of the Scholarship Fund, inter alia to also include male graduates within its eligibility criteria. The court was called to determine whether the "qualification in the will that the Fund be used for women graduates offend or violate *The Human Rights Code* or public policy."³²⁰ The university contended that although female students were traditionally underrepresented in the sciences, their numbers in the University's relevant undergraduate programs had risen recently. The court when handing down its judgment distinguished this case from the leading judgment of *Canada Trust* and found that:

The restrictions contained in the Castanera Scholarship Fund are not motivated by superiority. If anything, they are motivated by a desire to promote women in the field which historically was a male dominated field. There is no suggestion that women will make better scientists than men. There is only a suggestion that women should be encouraged to enter a discipline which Dr Castanera appeared to have enjoyed, and which historically was not populated by women. The notion that these conditions can be construed as unreasonably discriminatory is simply not sustainable.³²¹

³¹⁵ *Human Rights Code*, R.S.O. 1990, c. H-19.

³¹⁶ Grattan & Conway "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) *McGill L.J.* 511 531.

³¹⁷ 2015 *MBQB* 28.

³¹⁸ C.C.S.M. c. H175.

³¹⁹ *Castanera* para 26.

³²⁰ *Castanera* para 14.

³²¹ *Castanera* para 37.

Dewar J relied on a number of factors when giving his judgement and found that the testator's desire to benefit women was a bona fide and reasonable cause to benefit only female students. The fact that male students were excluded from this Scholarship fund did not mean they were now excluded from pursuing their studies in this field.³²² They can still find opportunities elsewhere outside this fund and continue advancing their interest in the science field. The court further found that there was no offensive motive on the testator when weighing up her freedom of testation against potential discrimination that might be displayed by the Fund, thus the fund had no signs of intentional discrimination.³²³ The court held that even though the number of women in the field had changed since the time the will was executed, to look at this factor alone to the exclusion of other factors such as the testator's background as well as the origin of the gift, would undermine the testator's last wishes.³²⁴

This decision makes it clear that although the testator's freedom of testation was upheld, it was not the only driving force behind the court's judgment. Other factors came into play in light of human rights considerations of what is fair and just in an open democratic society. The historical background of women not being presented with a lot of opportunities played a major role and the fact that there was nothing sinister that indicated a negative attitude toward male students, showed the court that the testator simply wanted to encourage women to enter into this field and not be bottled into thinking they are not good enough. This part of Dewar J's judgement, Du Toit points out, stands firmly in the tradition of achieving substantive equality.³²⁵ The pursuit of substantive equality is important when addressing the question whether discrimination has any place in charity law and, therefore some forms of discrimination should be excused from judicial interference.³²⁶ Unfortunately this question does not have a simple answer, as some scholars argue that all discriminatory bequest, gifts and trusts, regardless of any equality-promoting objectives they might have will fall to be invalidated based on public policy

³²² *Castanera* para 40.

³²³ *Castanera* para 39 & 40.

³²⁴ *Castanera* para 42.

³²⁵ Du Toit "Gender-exclusive charitable trusts: Re The Esther G. Castanera Scholarship Fund and recent South African judgements on discriminatory bursary trusts" 2017 *Manitoba Law Journal* 141 151.

³²⁶ Du Toit 2017 *Manitoba Law Journal* 141 151.

grounds.³²⁷ It is also important to note that section 8 of the Promotion of Equality and Prevention of Unfair discrimination Act 4 of 2000 only addresses discrimination in the context of succession on the basis of gender, and then only in respect of discrimination by a system, there is no reference to private wills or trusts.³²⁸

5 4 2 The South African context compared with *Castanera: King v De Jager*³²⁹

In this case the court was faced with amending the wording of a will which established a *fideicommissum* containing a condition discriminating against female descendants.³³⁰ The case brought an issue between two competing rights, namely freedom of testation on the one hand and the right to equality, specifically the right not to be unfairly discriminated against.³³¹ The will in question was executed in 1902 and a *fideicommissa* was established whose terms were interpreted and applied as appointing only the sons of the testators. Thus the first and second substitution limited the *fideicommissary* beneficiaries to descendants of the male gender. The applicants argued that the terms of the *fideicommissum* which discriminate against the female descendants of the testators are *contra bonos mores*, unconstitutional and subject to amendment. The applicants sought an order removing the discriminatory provision of the *fideicommissum* and cause the deceased's daughters to be declared the fiduciary heiresses to the *fideicommissary* property.³³²

The court when handing down its judgement started by accepting that it is trite law that the principle of freedom of testation is recognised and upheld in South African law, but it was not without limitations. Further, courts will not give effect to testamentary provisions which offend against public policy, as the impact of the new constitutional dispensation and the importance it gives to the concept of equality has

³²⁷ Du Toit 2017 *Manitoba Law Journal* 141 151.

³²⁸ *Harper v Crawford* case no: 9581/2015, unreported, handed down on 30 June 2017.

³²⁹ 21972/2015 (WCC) 10 August 2017.

³³⁰ It is important to note that although this case was not concerned with a charitable trust, but a private will which established a *fideicommissum*, it is nevertheless discussed in this dissertation by virtue of the fact that it dealt with an exclusionary provision discriminating against female gender in particular, thus benefitting male descendants only, and thereby reflecting on the two rights involved, namely equality and freedom of testation. Private trusts are further dealt with in this very Chapter below when dealing with religious exclusions.

³³¹ *King v De Jager* 21972/2015 (WCC) para 1. This case is discussed here although it does not have any element of a charitable trust but to reflect the competing nature of the rights concerned and how the courts will not tolerate unfair gender discrimination.

³³² At para 27.

mandated courts to review the supremacy once afforded freedom of testation.³³³ In light of this statement, the court also made mention of the four South African cases dealing with testamentary trusts which came before the Courts under the new constitutional era and also thoroughly discussed in this dissertation, particularly in Chapter 4.³³⁴ Bozalek J after careful consideration and distinction of the cases which dealt with charitable trusts, such as *Syfrets*, examined the discrimination brought forward on the ground of sex and gender and how there are protected by the right to equality, a guarantee reflected in section 9 of the Constitution. Gender is further protected by section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act³³⁵ particularly section 8(c) of the Equality Act addresses gender discrimination in the context of succession, but only in respect of discrimination by means of a system and not private wills.³³⁶ Thus enquiry before the court was whether the challenged provisions of the will are contrary to public policy or open to a direct challenge in terms of the equality provision of the Constitution.³³⁷ The court found that in terms of section 9(4) read with section 9(5) and its presumption of fairness where a listed ground is involved i.e. gender, the *fideicommissum* did unfairly discriminate against the female descendants of the testators.³³⁸ The court, however, had to decide, in the absence of a legal right to inherit, that the discriminatory effect was legally relevant.³³⁹ Thus Bozalek J made a thorough enquiry on the constitutional justifiability of freedom of testation and looked at whether granting the relief sought would not amount to an exercise similar to rewriting the testator's will.³⁴⁰ To this end he found that the testator's freedom of testation will be subjected to an overriding far-reaching inroad on the part of the courts upon the right to freedom of testation which was also a constitutional right protected by section 25.³⁴¹ Thus the following remark is noted:

"It would give rise to situations where a testator's last wishes are second-guessed by a court which might have little inkling as to why the testator or testatrix provided as he or

³³³ At para 28.

³³⁴ At para 29 – 37; *Minster of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Ex parte BOE Trust Ltd* 2009 (6) SA 470 (WCC); *Curators, Emma Smith Educational Fund v University of KwaZulu Natal* 2010 (6) SA 518 (SCA) and *In re: Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC).

³³⁵ 4 of 2000 ("the Equality Act"); *King v De Jager* 21972/2015 (WCC) 10 August 2017 para 47 – 50.

³³⁶ *King v De Jager* 21972/2015 (WCC) 10 August 2017 para 52 – 53.

³³⁷ At para 57.

³³⁸ At para 58.

³³⁹ At para 58.

³⁴⁰ At para 60.

³⁴¹ At para 60.

she did. Another possible consequence of the courts assuming a power to intervene in a situation such as the present would be that testator/testatrices might then seek to justify, in their wills, certain dispositions with the courts then being asked to analyse or go behind these explanations. The spectre of a Pandora's Box of litigation regarding private testamentary dispositions thereby being opened is by no means far-fetched. I see no basis in legal principle for a court to purport to exercise on a surrogate basis any person's *uis disponendi*. In the context of testation to do so would impute obligations to the testator that had not subsisted when he was alive, again far-reaching proposition. Such a notion contemplates the exercise of a power that is wholly distinguishable from that of amending the terms of a charitable trust even if such trust were established in terms of a will. The latter case involves determining altered terms of how property that has been bequeathed should be administered, something quite different from determining whether the property should have been bequeathed to a particular person".³⁴²

The court also looked at De Waal's³⁴³ notion that nobody has an inherent "*right to inherit*" and stated that this concept carried considerable weight in as much as the right to equality and the hope or expectation of inheriting should not be conflated.³⁴⁴ In contrast to beneficiaries of a charitable trust, also not having the right to inherit, as stated by the applicants, the court held that these beneficiaries do not stand on the same footing as an heir or heiress.³⁴⁵ They ought to apply to benefit from the provisions of a trust of a public nature established by a will, something totally different from the present case.³⁴⁶ On the facts of the current case, granting the relief sought in an effort to give effect to the right to equality and not to unfairly discriminated against would, arbitrarily favour a small group of female descendants at the expense of many other prior descendants, both male and female.³⁴⁷ Bozalek J opined that:

This matter could be seen as involving 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

³⁴² At para 61.

³⁴³ De Waal "The Law of Succession and the Bill of Rights in *Bill of Right Compendium* (2012 Issue) 3G1 – G15.

³⁴⁴ At para 63.

³⁴⁵ At para 64.

³⁴⁶ At para 64.

³⁴⁷ At para 68.

represent a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.³⁴⁸

When applying the limitation clause of section 36 of the Constitution and the principles of *Harksen v Lane*³⁴⁹ on whether the discriminatory provision can be justified, the court held weight had to be given to the fact that the discriminatory provisions of the will occurred in the private and limited sphere of the testators and their direct descendants.³⁵⁰ Thus it affected only a limited number of persons, and is of limited duration and not manifestly directed at infringing the complainants' dignity.³⁵¹ The court found that the discriminatory provision of the *fideicommissum* was reasonable and justifiable given the importance accorded to the right to freedom of testation, and accordingly the application was dismissed.³⁵²

This case is supported on the basis of its continual recognition of freedom of testation and affording it the same constitutional weight as any other right enshrined in the Constitution, as opposed to dealing with freedom of testation as just a concept or notion of testate succession. Of particular importance to the judgement of Bozalek J is how these two competing rights were dealt with, i.e. finding that there is discrimination on one of the grounds listed in section 9(3) of the Constitution and 8(c) of the Equality Act, and further establishing whether the discrimination is fair and justifiable in terms of the limitation clause and the *Harksen v Lane* test. However, in as much as the court stated that it could not be made the final arbiter in matter involving private bequests and relied strongly on the argument that no one has an inherent right to inherit. The court should have addressed the length of this long perpetuated *fideicommissum* which was established some hundred years ago and maybe on that basis include all the descendants of the testators as beneficiaries, whether male or female. This would not amount to rewriting the testator's will but simply bringing it line with current public policy prescripts and do away with old perceptions that women cannot be property owners. Yes the *fideicommissum* in question is not a system, as it was distinguished from *Bhe v Magistrate*,

³⁴⁸ At para 69.

³⁴⁹ 1998 (1) SA 300 (CC) para 53; see also the discussion in Ch 3 on the limitation clause.

³⁵⁰ At para 75.

³⁵¹ At para 75.

³⁵² At para 80.

*Khayelitsha*³⁵³ but it continues to favour male descendants in contrast to the Canadian case of *Castanera* above, this bequest was motivated by primitive male superiority notions of power to own property, females and children alike.

In most of the cases discussed above, courts either in common law, civil law or mixed jurisdictions alike, have been somewhat inconsistent in invoking public policy as a ground for invalidating discriminatory provisions. However, they all seem to agree on equality as the basis for dismissing trusts bequests which are discriminatory in nature.³⁵⁴ Sonnekus also points out that it is rather unfair for later generations to judge the mores of past generation using changed standards and norms altogether different from their thinking back then.³⁵⁵ This could be the same reason why courts would rather use the *cy pres* doctrine as opposed to public policy to invalidate discriminatory trust provisions. Some writers, however state that the use of the *cy pres* doctrine gives the donor the leeway to hold on to old views of public policy and thus continues to withhold progress in the manner in which his beneficiaries may utilise the gift.³⁵⁶ Others state that it depends on whether the discriminatory provisions that are struck off were incidental to the intention of the donor or an integral part of the gift.³⁵⁷ It is also important to note as discussed earlier in Chapter 4 that although the *cy pres* doctrine forms part of the South African law of trusts, it has not been utilised in the cases seeking remedy for discriminatory provisions.³⁵⁸ Instead applicants rely on section 13 of the Trust Property Control Act which gives the courts power to vary provisions which bring about consequences which the founder did not foresee or contemplate.

³⁵³ 2005 (1) SA 580 (CC); at para 53.

³⁵⁴ Du Toit "Not-for-profit organisations and equality law" 1 (still in draft form to be published in 2017).

³⁵⁵ Sonnekus "Testeerbevoegheid an Testeervryheid as Grondwetlik Beskermdde Bates"2012
Contempt Roman-Dutch Law 171 175.

³⁵⁶ Du Toit "Not-for-profit organisations and equality law" 1 6 – 7 (still in draft form to be published in 2017).

³⁵⁷ Du Toit "Not-for-profit organisations and equality law" 1 7 (still in draft form to be published in 2017).

³⁵⁸ Du Toit "Not-for-profit organisations and equality law" 1 8 (still in draft form to be published in 2017).

5 5 Religious-exclusive charitable bequests in both Civil and Common law jurisdiction

In some instances courts are not only faced with the challenge of solving bequests along racial lines but those bequests often have an element of religion or faith attached to them.³⁵⁹ Traditionally common law states dealt with these bequests using a very lenient approach and would not necessarily invalidate them on public policy considerations. They were given effect to unless it may be proven that the bequest was impossible, impractical and incapable of giving effect to the original intention of the testator.³⁶⁰ For example in *University of Victoria v British Columbia (Ministry of the Attorney General)*³⁶¹ the British Columbia Supreme Court held that a testamentary bursary bequest to Roman Catholic students only, was valid and administrable in accordance with the will's directive. In *Trustees of Church Property of the Diocese of Newcastle v Ebbeck*³⁶² the Australian High Court stated that there are cases where a testator may provide that his property shall go only to persons of a particular religion and that a prospective beneficiary will be disqualified unless he renounces a particular faith. Courts would rather use other means rather than public policy in order to invalidate such discriminatory provisions. In *Clayton v Ramsden*³⁶³ the court relied strongly on the certainty requirement as a condition that may render a religious exclusive testamentary bequest invalid. In this case the House of Lords rejected a condition in a testamentary trust that sought to effect forfeiture of benefits to a beneficiary that married a person not of Jewish parentage and of the Jewish faith, based on lack of certainty of the condition. Neither of the Lords was prepared to invoke public policy as a ground to void the bequest.³⁶⁴ It is evident that courts in common law jurisdictions generally refrain from invalidating altogether such bequests, rather they choose to refashion the manner in which benefits will be allocated under these bequests.³⁶⁵ These courts as was shown earlier make great

³⁵⁹ It is not the purpose of this dissertation to discuss racially exclusive bequests but will only be mentioned in so far as the case had to deal with religious or faith clause that also had race as a prescriptive criterion.

³⁶⁰ *Clavering v Ellison* [1859] 7 HL Cas 707.

³⁶¹ (2000) 185 DLR (4th) 182.

³⁶² [1960] 104 CLR 394.

³⁶³ [1943] AC 320 (HL).

³⁶⁴ Grattan & Conway (2005) *McGill L.J.* 511 520.

³⁶⁵ Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A good fit between Common Law and Civil Law in South Africa's mixed jurisdiction?" 2012 *Tul Eur & Civ* 97 100.

use of the *cy pres* doctrine which is not foreign to South African Law, but has been overtaken by section 13 of the Trust Property Control Act.³⁶⁶

5 5 1 Is there an exception to private trusts?

A question also arises as to whether private trusts may be excused from the realm of public policy scrutiny as some judges argue that it is the public nature of charitable trusts which attracts the requirement that they conform to public policy.³⁶⁷ Du Toit argues that Common Law jurisprudence is sensitive to the public-private-divide with regards, to charitable trusts.³⁶⁸ Hence it was said in *Canada Trust* that it was the public nature of charitable trusts that demanded that they conform to public policy notions against discrimination, but the same demand could not be said in relation to private trusts.³⁶⁹ Hence the courts in the *Lysaght* and *Canada Trust* cases when faced with charitable trusts which, although they were privately created, they were directed at educational institutions that receive government funding and draw their student population from the public at large, and thus had to be varied on that basis.³⁷⁰ Traditionally judges refuse to interfere with discriminatory charitable trusts on public policy grounds because they also refuse to invoke the same public policy against discriminatory private trusts.³⁷¹ When it comes to the public-private-divide of trusts, it is said that the equality norm applies to not-for-profit organisations because they operate in the public and not in the private domain.³⁷² This argument states that courts as public institutions must always be sensitive to prevailing public policy and/or constitutional norms, even when called to resolve purely private matters. This argument is the same formulation captured in the *Syffrets* case that holds that public policy is now rooted in our constitution and must be applied and developed in line with prevailing norms and standards of the time it is put to the test. The public-private divide remains a contentious issue that is debated across the legal spectrum, with many scholars arguing that discriminatory private trusts should be invalidated based

³⁶⁶ See Chapter 4 3 1 and *Ex parte Henderson* 1971 (4) SA 549 (D) 558 A – B discussed thereunder.

³⁶⁷ *Re Canada Trust Co. v Ontario (Human Rights Commission)* (1990) 69 DLR (4th) 321 at 353; *King v De Jager* 21972/2015 (WCC) 10 August 2017.

³⁶⁸ Du Toit 2012 *Tul Eur & Civ* 97 101.

³⁶⁹ *Canada Trust* at 353.

³⁷⁰ Du Toit 2012 *Tul Eur & Civ* 97 101. See also the discussion on *Emma Smith* in Ch 4 above.

³⁷¹ Harding 2016 *CJLL* 227 231.

³⁷² Du Toit “Not-for-profit organisations and equality law” 1 2 (still in draft form to be published in 2017).

on policy grounds.³⁷³ For this reason it is important to note the following recent South African case which dealt with a testamentary disposition having no public benefit character.

5 5 2 Harper v Crawford³⁷⁴

The court had to decide whether it could amend the wording in a testamentary trust so that it would also make the adopted children beneficiaries of the trust in a case where it appeared that the donor did not intend to do so. The applicants relied on section 9 of the Constitution and on post constitutional formulated public policy notions. Dlodlo J differentiated the present case from *Syfrets* and subsequent cases in that they dealt with trusts having a public benefit character as opposed to the current instrument which was purely a private trust deed.³⁷⁵ As a result the judge found that the relief sought was far-reaching in so far as it required the Court to intervene with the right of an to dispose of his property in a manner that he saw fit.³⁷⁶ Thus it was not in the court's powers to interfere with choices made by individuals in the private areas of their lives. The court relied on *Brisley v Drotsky*³⁷⁷ where the court, when faced with whether a contract may be found contrary to public policy, made reference to the following passage:

"Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build".³⁷⁸

The court found that it would be unscrupulous of the Constitution whose primary purpose was to protect the freedom of individuals from undue state interference, to be used to curtail one's freedom and in this instance their freedom to dispose of their property as they so wish to choose.³⁷⁹ Although the court applied the

³⁷³ Du Toit "Not-for-profit organisations and equality law" 1 6 (still in draft form to be published in 2017).

³⁷⁴ Unreported decision (Case No: 9581/2015), handed down on 30 June 2017. It is not the intention of this dissertation to discuss private trusts but to highlight the issue of how discrimination may be tolerated in the private sphere.

³⁷⁵ At para 30.

³⁷⁶ At para 22.

³⁷⁷ 2002 (4) SA 1 (SCA) para 94.

³⁷⁸ Hart *The Concept of Law* (1961) 40 – 41.

³⁷⁹ *Harper v Crawford* para 32.

limitation of rights test envisaged in section 36 of the Constitution, the court concluded that, on the facts of this case, it had no competency to vary the relevant provisions of the trust deed, the same way it had no power or authority to rewrite a testator's will.³⁸⁰

Therefore it is accepted that 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 cases or under statutory authority.³⁸¹ This does not mean that the equality right is negated at the expense of freedom of testation³⁸² but an acknowledgement of the inherent challenges it would pose to the courts in seeking a remedy that would be best under the circumstances.³⁸³ This would entail rewriting the will or trust deed and being caught in between deserving and undeserving would-be beneficiaries. Although our Constitution as shown in Chapter 3 above, has direct horizontal application which prevents one from violating it even amongst individuals in a private sphere. It does not follow that it will automatically interfere with decisions made by private individuals when conducting their private business.

However, this notion is rejected by other international writers, for example, Grattan and Conway³⁸⁴ argue that in countries with constitutional dispensations, public policy notions lead constitutional protection throughout the entire private law space, and there is no aspect of private sphere that is not affected, why then should private dispositions be an exception to the general rule? Thus public policy can be invoked to override all private bequests without any additional support even when it comes to educational trusts. The American writers on the other hand in seeking to find a solution on so-called Jewish clauses, strive to establish common ground when it comes to these conflicting ideas stated above on whether on or public policy should play a role race, gender and religious clauses.³⁸⁵ One such case is *In re*

³⁸⁰ At para 34.

³⁸¹ *King v De Jager* (Case No: 21972/2015) judgement delivered 10 August 2017 para 43.

³⁸² De Waal "The Law of Succession and the Bill of Rights" in *Bill of Rights Compendium* (2012) 3G1 – 3G15.

³⁸³ Corbett *et al* (2001) 134.

³⁸⁴ Grattan & Conway (2005) *McGill L.J.* 511 531

³⁸⁵ Du Toit 2012 *Tul Eur & Civ* 97 103.

*Estate Feinberg*³⁸⁶ where beneficiaries were required to marry a spouse of the Jewish faith or someone who converted to Judaism within one year of marriage. The Supreme Court of Illinois strongly defendant testamentary freedom and as a result was supported by other commentators like Henry³⁸⁷ who holds that judicial interference should only be allowed if the disposition is punitive in nature or motivated by the testator's interest in furthering a prejudicial, intolerant or malicious agenda. Thus in this case it could not be said that the will was punitive in nature save to say that it was an expression of the testator's strong religious belief.³⁸⁸ Hence it is argued that the trust in the *Canada Trust* case falls into the malicious motive category which cannot be upheld.³⁸⁹ However, Colliton³⁹⁰ states charitable trusts that discriminate on the basis of race or sex are invalid and should not be enforced. Although Colliton makes a distinction between two racially discriminatory trusts, i.e. those that have public administrators working on them and those that do not have³⁹¹ he states that even those managed by private trustees, are invalid and should not be enforced under the American common law of trusts because, *inter alia*, they offend modern public policy notions.³⁹²

5 6 Conclusion

The above discussion shows that although in many jurisdictions, both common and civil and even mixed jurisdictions, testamentary freedom is recognised and upheld in one way or another. There is a general consensus that public policy must play a role in influencing the decision made whether or not to uphold a gender or religious exclusive testamentary trust. The difference lies in the application and which public policy will be held at the time when the court is called to make a determination on the discriminatory nature of the bequests. Most English courts still follow common law prescripts, when faced with race, gender and religious clauses and although they mention policy consideration play a significant role, they seem to shy away from making a positive stance against the racial, gender or religious exclusion.

³⁸⁶ 919 N.E.2d 888 (Ill. 2009)

³⁸⁷ Henry "If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom" *Nw.J.L. & Soc. POL'Y* 215 233 (2011).

³⁸⁸ Henry *Nw.J.L & Soc. POL'Y* 215 233 (2011).

³⁸⁹ Du Toit 2012 *Tul Eur & Cil* 97 103.

³⁹⁰ Colliton "Race and Sex Discrimination in Charitable Trusts" *Cornell Journal of Law & Public Policy* 2003 275.

³⁹¹ Colliton *Cornell Journal of Law & Public Policy* 2003 275 277.

³⁹² Colliton *Cornell Journal of Law & Public Policy* 2003 275 292.

Instead they would rather apply the *cy pres*' doctrine in arriving at their conclusion and making a determination in favour of the beneficiaries. Civil jurisdictions such as the German law of trusts moves in the same direction as South African law with a constitutional guarantee to private succession and therefore limiting it in so far as it violates other fundamental rights. The Canadian approach on the recent case of *Castanera* reflects the direction that modern public policy favours fair discrimination based on gender in case of public charitable trusts, where the discrimination is made to remedy past injustices. This is the same reasoning that a South African may apply when called to make a determination on whether or not to uphold a gender exclusive trust in the future.³⁹³

³⁹³ Du Toit 2017 *Manitoba Law Journal* 141 142.

Chapter 6: Evaluation and lessons that can be adopted to redress past injustices

6 1 Introduction

This chapter summarises the whole discussion on trusts with discriminatory provisions and considers possible scenarios where it will be justifiable to have to a trust that discriminates on one or more of the grounds listed in section 9 of the Constitution. It looks at some of the lessons and recommendations that may be adopted from international cases and writers in line with two questions, namely is there room for fair discrimination in a gender exclusive charitable trust and can religious groups benefits members of their faith only?

6 2 A summary of the South African trust

The traditional approach to the trust institution has always been based and found in jurisdictions that follow English common law.³⁹⁴ However as shown above in Chapter 2³⁹⁵ South Africa eventually adopted a completely unique trust institution which develops according to the law of testate succession and the Constitution as supreme law. It does not follow, however, that we cannot learn from English law and other jurisdictions alike, as it is widely accepted that there is a close relationship between English law and the development of common law.³⁹⁶ However it is important to note that the concept of a divided or dual ownership which talks to equity is not entirely accepted in civil law and mixed jurisdictions which have the trust as an independent institution.³⁹⁷ This means it is possible to have a trust without a divided title if all the core elements of developing a trust are present.³⁹⁸ Thus in South Africa, the rights of the beneficiaries in both the *inter vivos* and testamentary trust are personal in nature, because in both cases the trust is created by the founder and/or trustee for the benefit of a third party.³⁹⁹

³⁹⁴ De Waal "In Search Of A Model For Introduction Of The Trust Into A Civilian Context" 2001 *Stell LR* 63.

³⁹⁵ See Ch 1 discussion on *Braun v Blaun Botha*.

³⁹⁶ De Waal 2001 *Stell LR* 63 64.

³⁹⁷ De Waal 2001 *Stell LR* 63 65.

³⁹⁸ De Waal 2001 *Stell* 63 66 – 67. These core elements were discussed in Ch 2 above.

³⁹⁹ De Waal 2001 *Stell LR* 63 76 – 77.

When it comes to charitable trusts that are discriminatory in nature, it has been said that because generally a beneficiary does not have a right to inherit⁴⁰⁰ their wish is entirely depended on the testator and whom he wishes to benefit.

6 3 Is there room for fair discrimination in relation to gender exclusive charitable trusts?

Often when South African courts are faced with testamentary bequests which are discriminatory in nature, judges will first enquire as per the applicants' arguments, whether the provisions in question violate the Constitution and are they against public policy. As a result of the Constitution's direct horizontal application, equality clause and the presumption created in terms of section 9(5) thereof, discrimination on any ground listed in the equality clause is unfair unless it is established that the discrimination is indeed fair.⁴⁰¹ When one analysing the judgment of Griesel J in the *Syfreets* case which dealt with discrimination based on one or more of the grounds listed in section 9(3), gender and race in particular, it is explicit that the rejection of the purported charitable trust was solely on the basis that the benefit was only limited to a minority of the university's student population. The trust continued to marginalise previously disadvantage groups in South Africa who were mostly blacks and women. This could not be accepted because it continued to perpetuate previously entrenched patterns of advantage and privilege among White males.⁴⁰² This judgement according to Du Toit shows that the prospect of a future South African court upholding a bursary trust that seeks to exclude women are highly unlikely.⁴⁰³ However, on the contrary, looking at the judgment in *Emma Smith* it seems possible that a bursary that restricts eligibility to women only may not be rejected.⁴⁰⁴ The fact that *Emma Smith* did not challenge the gender restriction, shows that women of all races have generally been regarded as persons subjected to previous disadvantage in South Africa.⁴⁰⁵ Therefore it is arguable that *Emma Smith* indirectly created a precedent that in favour of gender-exclusive bursary trust under which only women benefit.⁴⁰⁶

⁴⁰⁰ See Ch 5 discussion on *King v De Jager*.

⁴⁰¹ *Minister of Education v Syfreets Trust* para 27 – 28.

⁴⁰² *Minister of Education v Syfreets Trust* para 43; Du Toit 2017 *Manitoba Law Journal* 141 150.

⁴⁰³ Du Toit 2017 *Manitoba Law Journal* 141 151.

⁴⁰⁴ Du Toit 2017 *Manitoba Law Journal* 141 151.

⁴⁰⁵ Du Toit 2017 *Manitoba Law Journal* 141 151.

⁴⁰⁶ Du Toit 2017 *Manitoba Law Journal* 141 151.

This suggests that there instances where, looking at the political landscape of the country, it will be acceptable to benefit one group over another when one makes a donation of a public nature. Can the same be said with regards to a charitable trust that seeks to benefit men only? This question was considered in *In re Heydenrych Testamentary Trust*⁴⁰⁷ where the court varied the gender restriction to include girls on the basis that trust provision brought about consequences which the founder did not contemplate or foresee in terms of section 13 of the Trust Property Control Act. Further, the school which the testator sought to benefit subsequently became gender inclusive and to favour boys over girls would constitute unfair discrimination and violate the Constitution and against public policy. It would seem that limiting benefits to males only may be supported in a private bequest in line with the recent judgment of *King v De Jager*⁴⁰⁸ where the court upheld a *fideicommissum* that sought benefitted male descendants only. It is important to note that although the courts in these above mentioned cases went on to consider past injustices in arriving at their judgements, they were also motivated legislation, common law, public policy and directed by the Constitution as the supreme law. Thus is always important to consider the provisions of section 36 of the limitation clause when dealing with two competing rights listed in the Constitution. Du Toit also points out that Dewar J's judgment in *Castanera* relied on societal values to redress past inequalities, stands firmly in the tradition of achieving substantive equality.⁴⁰⁹ It is said that substantive equality is very important when crucial when addressing the question whether discrimination has any place in charity law and whether some forms of discrimination should be left free from judicial interference.⁴¹⁰ Some writers argue that all discriminatory bequests, gifts and trusts regardless of any equality promoting objective, they must be tested and invalidated on public policy grounds.⁴¹¹

However others like Harding state that limiting testators or donors' liberty to discriminate will limit their options on who they wish to benefit and the goals they so intend to achieve.⁴¹² Du Toit on the other hand points out that South African courts have, instead of following the strictly normative public policy values of the post

²³³ See Ch 4.

²³⁴ See Ch 5.

²³⁵ Du Toit 2017 *Manitoba Law Journal* 141 156. See also Ch 5 full discussion of *Castanera* case.

²³⁶ Du Toit 2017 *Manitoba Law Journal* 141 156; Harding "Some Arguments against Discriminatory Gifts and Trusts" 2011 *Oxford Journal of Legal Studies* 303 322.

²³⁷ Du Toit 2017 *Manitoba Law Journal* 141 156.

²³⁸ Harding 2011 *Oxford Journal of Legal Studies* 303 324.

constitutional era, dealt with these discriminatory testamentary provisions on the basis of what is and is not acceptable.⁴¹³

6 4 Can religious groups benefit members of their faith only?

It is rather unfortunate that the South African court looking at one of the charitable trusts which had faith as a ground for exclusion, missed the opportunity to make a pronouncement on this matter and instead dealt with the issue of race and gender.⁴¹⁴

When one considers the question whether it will be permissible for one to benefit members of their faith by establishing a charitable trust exclusively for them, it seems rhetorical why such a good gesture should not be allowed. However, the question is not as easy as it sounds given the constitutional imperative not to discriminate unfairly on others and the fact that every individual has the right to pursue any belief, conscience or faith.⁴¹⁵ In most jurisdictions religion is accorded a special status in the sense that it is intended to be exclusively and perpetually private and free from government interference.⁴¹⁶ The advancement of religion has always been considered a proper charitable purpose⁴¹⁷ but has not been met with a lack of controversy. For example in the landmark case of *Prince v President, Cape Law Society*⁴¹⁸ the court was called to answer the issue whether the use of marijuana by people who practiced Rastafarianism was legal and acceptable in an open and democratic society. The Court was of the opinion that that it recognised the freedom to practice and exercise Rastafarianism, it cannot be acceptable that one needs to use marijuana for recreational purposes in a country that seeks to address the scourge of drugs and the negative effects it has on society in general. It was further noted in this case that the use of marijuana was permitted for medicinal purposes in health institutions and this restriction did not amount to a violation on the applicant's freedom of religion. Here it can be seen that the court applied the limitation clause in section 36 of the Constitution and the test laid in *Harksen v Lane* to make a finding that was justifiable in relation to the prohibition of the use of harmful substances by legislation. Scholars have criticised conditions which are aimed at controlling one's

⁴¹³ Du Toit 2012 *Tul Eur & Civ LF* 97 124 – 126.

⁴¹⁴ *In re Heydenrych* discussed in Ch 4 above.

⁴¹⁵ See Ch 3 discussion and definition on the right to freedom of religion.

⁴¹⁶ Adams "Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions" 1976 *Clev St. L. Rev.* 1 19.

⁴¹⁷ Adams 1976 *Clev St. L. Rev.* 1 19.

⁴¹⁸ See Ch 3 discussion on freedom of religion.

choice of religion for the sake of benefiting under a particular trust, and it has been argued that it is unfair for a testator to expect his descendants to continue to hold on to a religion that no longer meets their consciousness.⁴¹⁹ It has been submitted that although the SCA has not to date been called to overrule *Aronson v Hart*, the decision would not stand the Bill of Rights test and would be found in violation of the Constitution to put a premium on another to choose between a benefit and their choice of religion.⁴²⁰ This view is strongly supported as a true reflection of the current constitutional recognition of freedom of religion enshrined in section 15 of the Constitution. The question whether one may benefit members of his faith only in a charitable trust remains an unanswered one and it is submitted that the same way as a gender exclusive trust will be tested to determine whether it is intended to redress past injustices, then the same should apply to religious exclusive trusts.

6 5 Evaluation and lessons that may be adopted

This dissertation has reflected some of the controversial issues with regard to gender and religious exclusive charitable trusts, and considered how other jurisdictions have dealt with this issue both in private and public charitable trusts. Although it may not provide conclusive answers to the questions posed in Chapter 1, the following recommendations adopted from Swanson⁴²¹ who argues that a charitable trust is a public trust because it is intended to benefit society as a whole:

- (a) A charitable trust provision that provides benefits to persons or group of persons defined by race or gender (and religion in this instance) shall be effected as though no such conferment was pronounced;
- (b) This notion shall apply to all charitable trusts, whenever they are created; and
- (c) This notion does not apply to charitable trusts aimed at remedying past racial and gender discrimination (including religious exclusions), as long as the effects of that discrimination continues to exist.⁴²²

⁴¹⁹ Hahlo 1950 *SALJ* 231 240; Joubert 1968 *SALJ* 402 418; See also Ch 4 criticism on *Aronson v Hart*.

⁴²⁰ Corbett *et al* (2001) 131 – 133.

⁴²¹ Swanson "Discriminatory Charitable Trusts: Time for a Legislative Solution" 1986 *U Pitt L Rev* 153 156 & 188.

⁴²² Swanson 1986 *U Pitt L Rev* 153 191.

These recommendations are supported and it is further advanced that where a testator has made provision for an alternative bequest or substitution clause as was the case in *BOE*, that substitution clause should be given effect to not because it continues to perpetuate racial discrimination⁴²³ but because it is important to uphold freedom of testation which like many other concepts in private law, enjoys constitutional protection. This will continue to motivate testators to draft wills and other testamentary documents, knowing that their last wishes will be respected and implemented.

6 6 Conclusion

This dissertation has discussed and reflected on the development of the South African law of trusts, with particular reference to gender and religious exclusive charitable trusts. It reflected on how public policy has involved since the decision in *Aronson v Hart* and the impact of the Constitution on the law of testate succession in general. It highlighted the protection afforded to freedom of testation and how it has not been negated by the Constitution but simply reengineered to be in line with current notions of public policy which is now firmly rooted in the Constitution. The discussion further dealt with discriminatory charitable trusts and how they may be effected looking at lessons from other international jurisdictions. Thus the question whether discrimination on any ground listed in section 9(3) of the Constitution was dealt with in line with the Limitation clause and the test set out in *Harksen v Lane*. It is submitted and concluded that any form of discrimination will only be allowed in a public charitable trust on a case by case basis in line with the Constitution and looking at the purpose for which the trust is intended to achieve.

⁴²³ Modiri 2013 *PER* 581 591 – 592; see full discussion of *BOE* in Ch 4.

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