Freedom of Testation and Fundamental Values

A comparative study of objectionable testamentary dispositions
in Germany, England and South Africa

Summary

Everywhere in the Western world, freedom of testation features prominently as a basic principle of the law of succession. It is, however, subject to various restrictions. The present thesis sets out to study the limits placed on freedom of testation by fundamental values or morality in a comparative perspective. It centres around three factual scenarios that are taken from the discussion surrounding section 138 (1) of the German Civil Code (*Sittenwidrigkeit*, transactions *contra bonos mores*): first, a testator disinheriting his close family members in favour of non-family-members or an extra-marital partner; second, testamentary conditions by means of which a testator makes the receipt of the bequest subject to certain behaviour on the part of the beneficiary; and third, cases in which the testator chooses his beneficiaries in a discriminatory manner. In all these cases, freedom of testation comes into conflict with fundamental values – solidarity vis-à-vis the family and ideas of sexual morality in the first, the right freely to determine one's conduct in the second, and the right not to be discriminated against in the third scenario.

These cases are studied in comparative perspective, namely by looking at Germany, England and South Africa. The selection of these countries is driven by the idea that an interesting picture might emerge from the comparison between Germany being part of the civilian tradition and having its private law codified, England with its common law tradition based on precedents, and South Africa as a mixed jurisdiction encompassing continental, British and African elements. The lively debate on how the comparatively young South African Constitution affects the principle of freedom of testation, as well as the interaction between the South African common law (being of European origin) and South African customary law, make South Africa even more interesting for comparative purposes.

The comparative part of the thesis is aimed at answering the question whether the differences in dealing with the respective cases in the three countries can be attributed to divergent understandings of fundamental values; or whether they are rather caused by factors that are not closely related to substantive values. The study demonstrates that the differences identified are not based on significantly divergent values, but can rather be linked to manifold factors stemming from the greater legal context and that have little to do with the perceived offensiveness of the respective testamentary disposition. These factors include historical (at times accidental) developments and ensuing path dependencies; different understandings of concepts such as *Sittenwidrigkeit*, public policy, and *boni mores*; as well as different constitutional dispensations or general characteristics of the respective legal tradition, such as the English doctrine of precedent. Appreciating the impact the greater legal context has on these cases might foster the understanding that "translating" general social or legal values into specific legal remedies involves a multitude of influences.

By drawing on the insights gained from the comparative analysis, the thesis critically assesses the views and positions in German case law and scholarship with regard to the above mentioned cases in the realm of section 138 (1) of the German Civil Code. In the case of a testator disinheriting his family

members and benefiting an extra-marital partner or other persons outside the family, *Sittenwidrigkeit* can be established neither by reference to a reprehensible motivation on the part of the testator nor by reference to the pecuniary or emotional effects the disposition has on the disinherited family members. Some assumptions that are to be found in the case law of the German Regional Appeal Courts (*Oberlandesgerichte*) – relics of the former morally-laden jurisprudence of the Federal Supreme Court (*Bundesgerichtshof*) – are in conflict with the statutory framework of the German Civil Code. This is because the interplay between freedom of testation and the idea of family succession is ultimately and exhaustively determined by the provisions of the *Pflichtteilsrecht* – the right to a compulsory portion.

By subjecting a bequest to a testamentary condition, the testator ventures beyond the mere distribution of his estate and attempts to exert influence on personal and intimate choices of the beneficiary. This is why the *Sittenwidrigkeit* of such a disposition falls to be assessed by a detailed balancing between freedom of testation and freedom of choice on the part of the beneficiary. The concept of unreasonable pressure or influence (*unzumutbarer Druck*), which is widely used in German case law and scholarship, is suitable for dealing with this conflict in terms of private law. The legal remedy in such cases is to be aligned with the idea underlying the invalidity. This leads to the condition being struck out while the rest of the disposition remains intact (so called teleological reduction of the invalidity, as envisaged by section 138 (1) of the German Civil Code).

Considering cases of discriminatory testamentary bequests, the question arises as to the horizontal application of article 3 (3) of the German Basic Law (*Grundgesetz*). Especially in succession law cases, the horizontal application of article 3 is to be assumed in particular instances only – namely if the testamentary disposition can be located, at least to some extent, in the public sphere. In the purely private sphere, however, the horizontal effect should be treated with particular circumspection. Entering into a balancing exercise between freedom of testation and the prohibition of unfair discrimination in the private sphere appears to be appropriate only once the testamentary disposition is likely to infringe the beneficiary's dignity. With regard to the legal remedy, if the testator differentiates on the basis of prohibited characteristics only, the objectionable criterion can be struck out; in all other cases the testamentary disposition is void in its entirety according to section 138 (1) of the German Civil Code.

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