The bound testator – self-restriction of testamentary freedom

A discussion paper

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Overview

Testamentary freedom is one of the universally accepted principles of succession law and allows testators in most legal systems to more or less freely decide on the transfer of their wealth upon death. However, only a few jurisdictions allow testators to restrict their testamentary freedom voluntarily, be it by binding dispositions upon death which cannot be revoked during lifetime (for example, by mutual wills or succession agreements), or be it by contracts to exercise their testamentary freedom in a certain manner (for example, by contracts to make or not to make a will or to revoke or not to revoke a will). At closer inspection, the power of testators to bind themselves is an extension of their freedom to testate. It turns the exercise of testamentary freedom into a marketable good and allows testators to use the future succession as a consideration. On the other hand, basic functions of testamentary freedom in society, economy and family might be endangered if testators cannot freely decide on their succession until death.

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I. Self-restriction of testamentary freedom versus…

The self-restriction of testamentary freedom by the testator is only one issue among many which fall under the headline 'restrictions of the actors in succession law'. However, the bound testator is a very peculiar one compared to the other restrictions.

1. … obligations created by succession law

First, the bound testator has to be delineated from obligations created by succession law: Inheritance law as all areas of private laws is using obligations as an instrument to determine private relationships in order to implement the succession upon death, for example, when regulating the relationship between coheirs or between heirs and legatees (if the law distinguishes between this type of beneficiaries), in order to coordinate the succession between different persons. Furthermore, succession law uses obligations sometimes between the true heirs and third persons pretending to be heirs (*Erbschaftsbesitzer* in German law), in order to protect the estate against encroachment by third persons. Another example for succession-law created obligations can be found in jurisdictions which only know a forced heirship in value (and not in kind): Here obligations are created between the testamentary heirs and the forced heirs in order to implement their mandatory share by creating claims of the forced heirs against the testamentary heirs.

All those obligations of course establish restrictions, however, not restrictions of the testator but rather of the succeeding generation. Furthermore, the nature of those obligations is not different from other classic private-law obligations created, for example, by contracts or torts.

2. … restrictions of third persons by the testator

Secondly, self-restrictions of the testator have to be contrasted with restrictions of third persons by the testator. This refers to scenarios where succession law enables the testator to restrict third persons, especially, the beneficiaries, for example the heirs, in order to control their behaviour, for example, by testamentary conditions, or in order to perpetuate the estate, for example by trusts, substitutions or testamentary executors. Such a restriction of third persons – especially: the succeeding generation – by the testator, such a 'reign from the grave', gives of course rise to many interesting questions, notably, regarding the legitimacy and the limits of such restrictions: How far shall the testator be free to intrude with the private life of the beneficiaries, for example, if a cer-

tain area of private life is even protected by human rights, such as the freedom to marry? In 2004, the German Constitutional Court in the *Hohenzollern* case came to the conclusion that a testamentary clause is void which stipulated that a member of a former reigning house should only inherit if he married within the same class, the (high) nobility, which reduced his choice of potential future spouses to a handful of persons. Yet also other fundamental questions arise when thinking about restrictions of third persons by the testator: Shall the testator by perpetuating the estate be able to avoid that the heirs can repurpose the use of wealth and deploy the resources inherited in novel domains?

In all these scenarios succession law allows restrictions, however only restrictions by the testator, at least in the sense that the testator initiates the restriction of the beneficiaries, for example, the heirs. At closer inspection, however, we are dealing here more with *self-restrictions by the beneficiaries*. Nobody forces them to accept the conditions imposed by the testator which come along with the succession. Such testamentary condition therefore – in a contractual obligation's sense – contain some indication for their justness, a kind of *Richtigkeitsgewähr* (in the sense of Walter Schmidt-Rimpler). The heirs can always reject the inheritance if they do not agree with the restrictions imposed by the testator. Procedurally, they are simply accepting the terms and conditions of an offer similar to the situation when they conclude a contract (as already Immanuel Kant recognised in one of his rare texts on wills and successions[1]). Of course, the beneficiaries, the heirs, are not able to negotiate the restrictions with the testator. Rather the testator puts the heirs in a situation where they can only decide: 'take it or leave it'. But also this is, from a private law or contractual perspective, a common scenario, for example, as far as standardised terms and conditions are concerned where the contractual mechanisms also apply. The offeror – here the testator – has to internalise the interests of the offerees – here the beneficiaries, for example, the heirs – when making the offer in order to avoid that the offerees do not reject the offer. Hence, the general contractual mechanisms to protect the freedom of the beneficiaries and heirs suffices, for example, the doctrine of unconscionability.

3. … restrictions of the testator by third persons

There is also a third kind of restrictions in succession law which should be contrasted with the bound testator and the self-restriction of testamentary freedom: restrictions of testators (and their testamentary freedom) by third per-

[1] *I. Kant*, Metaphysische Anfangsgründe der Rechtslehre (1797) 134 (§ 34): 'Die Beerbung ist die Uebertragung […] der Habe und des Guts eines Sterbenden auf den Ueberlebenden durch Zusammenstimmung des Willens beyder'.

sons. This category of restrictions does not refer to the limits of testamentary freedom by forced heirship or other mandatory succession rights – although Gottfried von Schmitt, one of the drafters of the succession law part of the German Bürgerliche Gesetzbuch, the fifth book of the Civil Code, argued in 1879 that forced heirship was an intentional and unilateral self-restriction by the testator when marrying or procreating[2]. To assume such a self-restriction would of course be a pure fiction. The idea that persons when constituting a status relation (marriage, parentage) think of their succession sounds rather far-fetched.

The law only very rarely provides for mechanisms allowing third persons to unilaterally restrict testators in exercising their freedom to testate. Contracts on the succession upon death of a third person are prohibited in most jurisdiction – although some systems allow such contracts under some circumstances, German, Swiss and English law for instance ('*Erbschaftsverträge*' or 'contracts of expectant heirs' are the pertinent keywords here). However, such contracts on the succession of a third person are anyhow no restriction of the testator. Rather such contracts are an immanent limit of the freedom to testate. The testator can never avoid that third persons – heirs or not – speculate and agree on a certain distribution of the estate inherited by them, especially, after the testator has died. Hence, the only mechanism to restrict a testator's freedom to testate are substitutions established by a third testator with the current testator as a beneficiary, however, only in respect of property which the testator already inherited from a third person establishing the substitution.

II. Mechanisms to self-restrict one's testamentary freedom – an exception from a comparative perspective

Yet are there any mechanisms for testators to self-restrict their testamentary freedom? The answer is: only a few, at least from a comparative perspective. Only a few jurisdictions allow testators to bind themselves.

1. Rarely: freedom of contract

First, most private lawyers will think of the freedom of contract as a possible mechanism for testators to bind themselves in their exercise of testamentary freedom towards another party. However, in most systems, this freedom cannot be used for self-restrictions of testators. On first sight, of course, the testator

[2] *von Schmitt*, Entwurf eines Rechtes der Erbfolge für das Deutsche Reich (1879) 54.

could make a certain exercise of testamentary freedom to the object of a contract, based on general rules. For example, the testator and a third person could agree in a contract that the testator shall set up a will under which the third person will be the testator's sole heir. If the testator then violates these contractual duties (by not setting up such a will), the other party could claim damages. Only a specific performance of such contracts – in systems which allow such a performance – would not be possible once the testator has died (and the breach of contract is manifest), as testamentary freedom can mostly only be exercised in person.

However, the majority of legal systems does not allow such contracts of testators to testate in a certain way. The German Civil Code, for example, contains even an explicit provision prohibiting such contracts: Section 2302 of the Bürgerliche Gesetzbuch. Similar statutory prohibitions can be found in France, Greece, Italy, Poland, Portugal, Sweden, Slovenia and Spain – to mention only a few jurisdictions. It appears that it is only England and Wales and Norway which allow contracts to make (or not to make) a will or to revoke (or not to revoke) a will. Also Scottish law might uphold such agreements.

Interestingly, however, even systems which prohibit contracts obliging a party to testate in a certain form do not go as far as declaring wills or other testamentary dispositions void which the testator makes in order to fulfil the prohibited contract. Of course, the testator can revoke such a will during lifetime if possible under the general succession rules without violating any contractual duty (because the contract obliging the testator to a certain exercise of testamentary freedom is illegal and void). Additionally, potential heirs might be able to avoid or rescind the will based on a mistake of the testator who thought that he was bound by the prohibited and void contract. However, if that does not happen (the testator does not revoke the will and it is not avoided by the potential heirs), the testamentary dispositions of the testator will be valid. Furthermore, it will not be possible to 'reclaim' such a will based on restitution or unjust enrichment; wills and other testamentary dispositions always bear their *causa* in themselves.

2. In some jurisdictions: binding dispositions upon death

The ban of contracts to oblige a testator to testate in a certain manner is, however only one half of the truth, at least in some jurisdictions which allow the testator to set up binding dispositions upon death. In such systems – for example in Austria, Germany and Switzerland – the prohibition of contracts to oblige a testator to testate in a certain manner shall only secure that the testator uses for self-restriction exclusively the mechanisms of succession law and pro-

tects a *numerus clausus* of succession law mechanisms (it prevents, hence, that contracts to oblige a testator to testate in a certain manner are used as a kind of will substitute). German law, for example, allows two forms of binding dispositions: contractual dispositions in succession agreements (*Erbverträge*) and mutual dispositions in joint wills of spouses (*gemeinschaftliches Ehegattentestament*).

Both types of binding dispositions have quasi *in-rem* effects and operate even stronger than contracts obliging a testator to testate in a certain manner: The revocation of binding dispositions by simple unilateral will of the testator is not possible: Contractual dispositions in succession agreements or mutual dispositions in joint wills of spouses invalidate every later will or testamentary disposition which derogates from the binding disposition, in case of joint wills by spouses, however, only after one of the spouses has died and the disposition becomes binding for the surviving spouse (before the death of either spouse, the revocation has to be effected in a certain form, in order that the other spouse gets notice of the revocation – but this applies to mutual dispositions in wills only, not to contractual dispositions in succession agreements). Only certain kinds of dispositions can be binding: the designation of an heir, a *legatum* (*Vermächtnis*), a condition or a choice of law, however, not other dispositions, for example, the designation of a testamentary executor. The binding dispositions do not restrict the power of the testator to dispose during lifetime, only gifts frustrating the binding disposition are void.

Germany is among a small number of jurisdictions which allow such binding dispositions with quasi *in-rem* effects: Binding dispositions – of course with modifications in detail – are accepted, for example, in Catalonia, the Czech Republic, Hungary, Latvia, Lithuania, Norway and Switzerland. Most other jurisdictions allow in their *numerus clausus* of testamentary dispositions only wills which are revocable. In some countries even the revocability of a disposition is part of the statutory definition of a will, for example in the French Code civil, the Italian Codice civile or the Portuguese Código civil. Sometimes the law even goes further: Joint wills or mutual dispositions are prohibited in general, in order to avoid even a factual restriction of testators who might think that there are in any form bound by such wills or dispositions.

III. Reasons for allowing a self-restriction by testators

Against this background, the question begs to be asked whether those few jurisdictions which accept self-restrictions by testators are actually on the wrong track, from a policy perspective.

1. Limiting or enhancing testamentary freedom?

Little problems with self-restrictions by testators will those have who think that the freedom of testation is *a priori* something desirable, as an essential part of private autonomy and as a corner-stone of most private laws. Often testamentary freedom has even been regarded as an expression of natural justice, for example, by Hugo Grotius[3].

Why are self-restrictions by testators (described a minute ago) not problematic from a testamentary-freedom point of view? On first sight, one could have the opposite impression: A self-restriction limits the freedom of testation considerably and could be seen (among forced heirship, illegality, the rule against perpetuities and inheritance tax) as another boundary of testamentary freedom. However, at closer inspection, a self-limitation by the testator is rather an enhancement of the freedom to testate. It allows the testator to grant positions in succession law which give the beneficiary, for example, the heir, more than an ordinary testamentary disposition which can be revoked at any time during lifetime of the testator. From this 'testamentary freedom plus', not only the beneficiary but also the testator profits, who can by those mechanisms of self-restriction, for example, by contractual dispositions in succession agreements or mutual dispositions in joint wills, turn the future estate into a marketable good. Nobody would be prepared to accept a future interest in the estate as a consideration if the testator could revoke the position at any time. Hence, allowing a self-restriction of testators enlarges their freedom to testate considerably. It is therefore a consistent element of succession law in any jurisdiction which stresses the freedom to testate. Therefore, the possibility to self-restrict the freedom to testate should be regarded primarily as an exercise of testamentary freedom and not as an element of the freedom of contract between the testator and the other person, for example, the other testator, the spouse in case of a joint will or the other party in case of a succession agreement.

It is therefore rather peculiar that most mechanisms – if they exist at all – require testators to self-restrict their testamentary freedom towards this other person. This consent of the other person is not necessary to protect that person (the other testator in the joint will or the other party to the succession agreement), even if that person – what is not necessarily the case – is the beneficiary of the binding disposition, for example, the heir. As already mentioned, the heir can always unilaterally reject the offer of the testator (see supra I. 2.). The reason for the necessary participation of the other person is rather to detect a person which has the power to release bound testators from their self-restriction and to reinstall their freedom of testation. Otherwise the self-

[3] *Grotius*, De jure belli ac pacis (1625) Book II chapter 6 § XIV.

restriction would be absolute which probably goes too far. There is no reason why the other person (the other testator in a joint will or the other party to the succession agreement) who accepts the binding disposition as a consideration shall not be able to waive this consideration.

Nevertheless, the fact that the self-restriction of the testator is primarily an exercise of testamentary freedom is often not fully regarded by the law as far as it allows such a restriction. In German law, for example, in case of (rather common) mutual dispositions in joint wills of spouses (which can be set up easily in holographic form) the Civil Code assumes a self-restriction of both testators who often do not know that they bind themselves (often this is discovered after the death of one of the spouses). Here, one could think to tighten the formal requirements and to allow such binding dispositions (as contractual dispositions in a succession agreement) only in notarial form – and hence to safeguard that the testators get advise on the legal consequences of a mutual disposition and are able to provide, if applicable, that they shall not be binding.

2. Endangering the purposes of testamentary freedom?

If one, however, does not presuppose that testamentary freedom is something *a priori* desirable, but rather an element of succession law which the lawmaker has to justify positively, the finding that a self restriction of the testator is sensible, is not clear-cut anymore. Enhancing testamentary freedom by allowing a self-restriction of the testator could endanger the overall policy considerations, the basic functions of testamentary freedom in society, economy and family if testators cannot freely decide on their succession until death.

What are those basic functions of testamentary freedom and can they be endangered by allowing self-restrictions of testators? For example, the law could deploy the freedom of testation in order to use the better knowledge of the testator regarding his or her succession. If the law uses succession, for example, to allow solidarity in the family or for the intergenerational protection of certain assets, for example, family enterprises, it might be sensible to leave the decision who should be the heir to the testator who knows the potential candidates best. This 'father knows best'[4] (or better: 'parent knows best') idea speaks of course against allowing self-restrictions of testators. The better knowledge of testators can only be used if they remain free until death to change the succession according to their perceptions and their knowledge. Things might change between self-restriction and death. However, the 'testator knows best' assumption is rather weak because most testators will follow other

[4] *Hirsch/Wang*, A qualitative theory of the dead hand, Ind. L. J. 68 (1992) 1 (12).

guidelines than those the law might have in mind. If lawmakers aim to regulate succession for certain purposes, freedom of testation is the smallest cog in the machine and the lawmaker cannot rely on testators and their 'correct' exercise of testamentary freedom.

Testamentary freedom can, however, be used by the law to meet certain goals *indirectly*. In particular, testamentary freedom can put incentives for a certain behaviour in economy, society and family which the lawmaker aims to stimulate. Testators, for example, can be motivated to productivity by granting testamentary freedom because then they know that they can decide on their succession and the fate of everything they earn and keep. Also potential heirs, on the other hand, can have an incentive to productivity if they know that – due to testamentary freedom – they cannot be sure to inherit. Also they can be motivated to solidarity within the family or qualification to be the best successor if they know that the testator can react at anytime to their behaviour. All those ideas are mainly discussed in family economics where the freedom to testate is regarded as a precious tool to enforce altruism within the family. Already Jeremy Bentham stressed, that freedom of testation 'may also be considered as an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families'[5]. It is, of course, decisive for any incentive function of testamentary freedom that the testator always saves the last word – and this can only be safeguarded if the lawmaker guarantees that wills and other testamentary dispositions can always be revoked. A lawmaker which allows self-restrictions of testators abandons partly the incentive function of testamentary freedom – and this might be the true reason why many jurisdictions are sceptical regarding binding dispositions upon death.

IV. Conclusion

Allowing a self-restriction of testamentary freedom by binding dispositions upon death enhances the individual freedom of testation considerably but might endanger the functions and goals of this institution if the lawmaker aims to use this freedom as an incentive. Of course, the fact that only a few legal systems allow such a self-restriction of testators gives rise to many interesting questions in private international law, especially within the European Union under the European Succession Regulation which harmonises the conflict rules for succession matters within the Member States and even provides for an autonomous definition of succession agreements (referring, inter alia, to their

[5] *J. Bentham*, Principles of the Civil Code [1786], in: The works of Jeremy Bentham I, ed. by Bowring (1843) 337 (Part II chapter 4).

binding nature): Can the testator evade the self-restriction by changing the applicable law, for example, the habitual residence or a unilateral choice of law? Are prohibitions of certain types of testamentary dispositions subject to the conflict rules for formalities or substantive succession law? Can French courts, for example, reject the enforcement of a binding disposition under German law as part of the French public policy? These are interesting questions, however, not for this but for another paper.