Racial Discrimination or Testamentary Freedom?

Rahil Patel

"The soul of the dying Testator beats against the barriers of the law, which appear to him to confine within such narrow limits the power which he thinks ought to be his, over the property which he fondly believes is his"1

Consider the situation of a Jewish testator both with an intention to maintain his property within his family line, and at the same time ensuring that his property is not disposed to a Gentile. Unimaginable that when he passed away his family might subvert his intent, he inserts an express condition requiring his daughter to marry a person "of Jewish race"2 on condition precedent. Yet, even with the strict principles surrounding testamentary freedom, in *Re Tarnpolsk* Danckwerts J held that the words "of Jewish race" were void for uncertainty, being "impossible for a possible candidate to show with reasonable certainty that he satisfies the test which the testator has attempted to lay down."3

It is clear that while the doctrine of uncertainty underpinned this decision, the "unruly horse"4 of public policy played a large part in the fabric of the decision.

On one hand, the private disposition of property by an interest-holder should be free to dispose their property as they see fit;

in contrast, it is an imperative role of the courts to provide not only „equality before the law," but the redress of unequal treatment of one citizen to another. Finding the correct balance between the two is indeed a difficult task.

The introduction of legislation in Australia, most notably the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW), provides for a statutory framework in which to operate, but with explicit exemptions in the areas of charitable benefits5 and a resilient common law, questions of how far racist conditions on private dispositions of property should extend continue to plague the system.

The first point of departure is that racist conditions have their roots in the beliefs and conscience of an individual. Due to the guiding role the judiciary has on the transformation of minds in society, it is argued that a move away from a strict freedom of property disposition will be adopted in the future. Even within the private sphere and acknowledged by the growing number of "widely accepted treaties and statutes"6 since the 1950"s, "nothing could be more calculated to create or deepen divisions between existing religious"7 or racial groups than the sanction of property disposition which would permit racist conditions. The judicial arm – being "an active agent in the promotion of the public weal"8 - has a moral duty to eliminate the tacit enforcement of racist conditions.

Racist Conditions and Uncertainty

While there is an obvious disfavour towards racist conditions within the current judiciary (and no doubt

this has not persuaded the courts to openly resolve the conflict in terms of public policy. Under the veil of 'uncertainty', conditions that impose a distinction on "race," "religion" and "faith" have often required "the greatest precision and in the clearest language the events in which the forfeiture of the interest given to the beneficiary is to take place."9 In *Kay v South Eastern Sydney Area Health Service,10* the words "young White Australia Couple" were determined void for uncertainty.11 Determining whether someone was firstly "white" and secondly, "Australian" is ultimately a matter of degree and since the testator did not indicate as to what degree of "race" was required, the testator did not, "from beginning, precisely and distinctly,"12 provide adequate certainty.

The uncertainty found in *Kay* surrounding the words "White Australian" demonstrates the courts adoption of a "subtle and…artificial"13 distinction between certainty of expression and certainty of operation.14 As used, the words "clearly express a definite requirement that the testator had in mind."15 Yet in operation, the NSW Supreme Court has construed the words to be ambiguous. While „race" has been defined to include, "colour, nationality, descent and ethnic, ethno-religious or national origin,"16 the concept of „race" is arguably very artificial and inevitably a product of social construct. As Young CJ demonstrated, "does it mean Australian by birth or a person who since has obtained Australian nationality?"17 Does it require pure Australian blood or is it based on skin colour alone? Is there in fact a practical means of ascertaining if one is of pure Australian blood at all? These questions attack the heart of racial discrimination, for inevitably racism is a state of conscience plagued with "unadulterated vanity, malice, or spite."18

Racist Conditions and Public Policy

"[A] testator may impose any condition that his whim and caprice may dictate, however unreasonable, unless it be contrary to the law or public policy."19 A useful framework that should be looked at in assessing the extent of racist conditions in private property disposition is that offered by the Canadian judiciary.

In *Pepsi-Cola* the Supreme Court of Canada noted that "the common law does not exist in a vacuum," but "reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future."20 These "sensitivities" have been replicated in "widely accepted treaties and statutes," which for Canadian jurisprudence has "point[ed] the direction in which such conceptions, as applied by the courts, ought to move."21

The *Canadian Charter of Rights and Freedoms* has had a significant impact on the judiciary in respect to testamentary freedoms and conditions. In the pre-*Charter* era, Canadian judges "consistently refused"22 to endorse the doctrine of public policy to void racist conditions. Echoing the views of Windeyer J, public policy was ""a vague and unsatisfactory term and calculated to lead to uncertainty and error when applied to the decision of legal rights."23 However, highlighting the changed legal (and social) environment since the introduction of the *Charter*, the decision of *Fox v Fox Estate24* confirmed within the *private* sphere: "[i]t is now settled that it is against public policy to discriminate on grounds of race or religion."25

The seminal case of *Canada Trust Co v Ontario Human Rights Commission26* established and weighed the competing dispositional interests and laid the foundations for *Fox*. Here, a *public* trust was designed to provide educational funds for needy, white, British, Protestant students, with repeated references to both the superiority of the white and Protestant classes. Justice Robins specifically acknowledged that the "freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest."27 Whether *inter vivos* or within a will, the free-movement of interests by an interest-holder is a vital element of common law. However, the Judge continued:

„The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality [of] rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced.28

With an emphasis on the principles enunciated in the *Charter, Human Rights Code* and a democratic pluralistic society, and in light of both *Canada Trust* and *Fox,* the Canadian judiciary has developed the doctrine of public policy extensively. No longer is it adequate for a racist condition to hide behind the banner of „testamentary or depositional freedom." As per Justice Galligan"s judgement, it is no longer an option for will-makers to insert discriminatory clauses, even within the private sphere.29 Racist conditions and testamentary freedom must yield to public policy.

Pausing here for a moment, it is interesting to consider the converse arguments that can be placed in favour of strict testamentary freedom – and consequentially, a tacit approval of racist conditions: firstly, testamentary freedoms is derived from an era of "rugged individualism"30 and has been labelled the "corner-stone"31 of the common law, precisely because it is "the freedom to choose [the] beneficiary and to set the conditions for the benefaction."32 While the disposing interest-holder may "proceed more often from spite than from benevolence,"33 the intended recipient is under no legal compulsion to convert, practice or accept the racist condition. The donee always has a *choice* as to either accepting the gift with the conditions or to disclaim and maintain complete freedom of restrictions. It has also been argued that it is a logical extension of an owners freedom to deal with his or her property while alive, and any restriction on that right would blunt the advantages of dispositional freedom: namely, the promotion of the accumulation of wealth, and self-reliance in their children who are not guaranteed an inheritance.34

Notwithstanding these arguments, the influence of public policy within the private disposition of property can be argued as the primary "channel through which constitutional values flow into private law."35 The "private/public divide is already an illusory concept; for example, one has to only look at private contractual arrangements that are capable of being void on public policy grounds if its terms are deemed detrimental to society or '*contra bonos mores*' – a doctrine which already extends to contracts involving racial discrimination.36 Further, judicial enforcement of racist conditions, as an agency of the state, is in fact a public act of constitutionally prohibited discrimination.37 As Judge Edgerton stated in relation to racist covenants in America, "since the injunctions are based on covenants alone and the covenants are based on colour alone, ultimately the injunctions are based on colour alone."38 The court must consider that enforcement of one racist condition will often mean the enforcement of all like conditions. Inevitably this "will have a tendency to produce injury to the public interest or good of the common weal."39 It is time to resolve this conflict by openly acknowledging that the doctrine of public policy should, and indeed, must be used to override racial discrimination in testamentary dispositions.

Australia's Future Direction

In a legal environment where there is a distinct sparsity of cases related to racist conditions within the private disposition of property, Australian jurisprudence is in a state of formative development. While the substantive equality provisions provided for within the *Racial Discrimination Act 1975* and the *Anti-Discrimination Act 1977,* specifically ss 9(1A)(b), (2) & 12 (1)(b), (2) and ss 7 & 20 respectively, provide for an operational framework, it is clear that large gaps still exist in which racist conditions can operate. For example, both s 8(2) *RDA* and s 55 *A-DA* specifically exempts charitable gifts. In *Kay,* for example, where the deceased bequeathed $10, 000 to a children's hospital "for the treatment of *White* babies" the Supreme Court upheld the condition on the basis it was not affected by either act.40 Further, to „bribe" one who receives a gift is also within the prerogative accorded to testators, with the common law recognising both the condition precedent and condition subsequent. While little regard has been given in the past to the unreasonable, absurd or spiteful motivations of the testator generally, there is a strong argument that alongside the repeated references to "persons"41 within the *RDA,* the private-sphere is now no longer exempt from public policy considerations.

The inherently discriminatory nature of racist conditions abuses not only racial harmony, but more importantly the core value of equality, which brings it firmly within the realm of public policy. Racist conditions are grounded in the belief that a class of people should be treated inferior because of their race, and while it can be seen as irrelevant whether the disposition of property occurs because of a propagation of their belief or simply a perpetuation of individual prejudices, the outcome is equivalent in each case: that is, the beneficiary is required to act in accordance with the conscience of another.