FREEDOM OF TESTATION: A MEMENTO OF CAPITALIST PATRIARCHY

By

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STATEMENT

Student Number: 3373-719-3

I declare that *Freedom of testation: a memento of capitalist patriarchy* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SARAH RUTHERFORD SMITH DATE

“That’s the trouble about the good guys and the bad guys. They’re all guys!”

Terry Pratchett

Monstrous Regiment

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SUMMARY

The South African concept of freedom of testation is one of the most absolute concepts of freedom of testation in westernised legal systems. It is suggested that the South African concept of freedom of testation is a memento of capitalist patriarchy. As the South African legal system practices a nearly absolute concept of freedom of testation, capitalist patriarchy has maintained masculine control of property in South Africa and perpetuated the systems of male dominance prevalent in South Africa. Freedom of testation allows for wealth to pass from one male to another. It also allows entrenched gender roles to continue by excluding women from inheriting. Thus the South African law of testate succession and its central concept of freedom of testation allows for discrimination on the ground of gender.

KEY TERMS

Succession; freedom of testation; Socialist Feminism; capitalism; patriarchy; Roman law; feudalism; Renaissance; Reformation; Enlightenment; Industrial Revolution; ownership; property.

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1 Introduction

1.1 Problem Statement

The principle of freedom of testation is the foundation of the South African law of testate succession.[1] The South African concept of freedom of testation is one of the most absolute concepts of freedom of testation in westernised legal systems.[2] The South African concept of freedom of testation currently allows a testator to dispose of his estate in any way he wishes with few common law and statutory exceptions.[3]

A testator's will may be declared invalid for the following reasons, if the instructions contained therein are illegal; if the instructions are contrary to public policy or if they are vague and uncertain.[4] A testator is also restricted by a few common law and statutory restrictions, such as those concerning the disposal of immovable property, the right of a minor child to claim maintenance from the estate and the Maintenance of Surviving Spouses Act.[5] Despite these limitations the South African concept of freedom of testation is considered to be very broad and unfettered.

It is suggested that the South African concept of freedom of testation is a memento of capitalist patriarchy.[6] The concept of freedom of testation has evolved throughout history to support and perpetuate capitalist patriarchy.

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1 De Waal and Schoeman-Malan *Introduction to Succession* 4.

2 Hahlo HR "The case against freedom of testation" 1959 *SALJ* 436.

3 Corbett MM et al *The Law of Succession in South Africa* 34.

4 Corbett et al *The Law of Succession in South Africa* 40.

5 Maintenance of Surviving Spouses Act 27 of 1990, hereinafter referred to as Maintenance of Surviving Spouses Act. De Waal *Introduction to the Law of Succession* 4. See also Corbett et al *The Law of Succession in South Africa* 40.

6 The use of the term 'capitalist patriarchy' has different connotations to it than, 'capitalism and patriarchy'. This will be discussed later in the study. However it is difficult to differentiate between the two. In general this study uses the term 'capitalist patriarchy'.

Freedom of testation allows for the exclusion of women from the ownership and control of wealth. “Inherited wealth and power can enforce patriarchy”.[7] As the South African legal system practices a nearly absolute concept of freedom of testation, capitalist patriarchy has maintained masculine control of property in South Africa and perpetuated the systems of male dominance prevalent in South Africa.

Despite the preamble of the Constitution[8] promising to, ‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’, and ‘Improve the quality of life of all citizens’, the inequalities perpetuated through free testamentary disposition have been allowed to continue.

South African testate succession has resulted in discrimination against women, as freedom of testation allows for systems of male dominance to continue. It allows for wealth to pass from one male to another. It has also allowed entrenched gender roles to continue by excluding women from inheriting.

Thus the South African law of testate succession and its central concept of freedom of testation allows for discrimination on the ground of gender.[9]

1.2 Purpose of this study

The South African concept of freedom of testation allows for discrimination on the ground of gender to continue despite this being a listed ground of unfair

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7 Steinem *Moving Beyond Words* 175.

8 Constitution of the Republic of South Africa, 1996. Hereinafter referred to as the Constitution.

9 It is submitted that freedom of testation allows for discrimination on the grounds of both sex and gender, however the term gender will be used throughout the study but it is intended to refer to both forms of discrimination.

discrimination in the equality clause of the constitution.[10] In light of the commitment to the new Constitutional dispensation freedom of testation, in its current form, may no longer be an acceptable form of succession. This study will consider how freedom of testation has resulted in discrimination against women and why such discrimination should no longer be allowed to continue.

1.3 Hypotheses

This study has the following hypotheses for consideration in the cause of the argument:

Freedom of testation in South African law is too broad. South African testators have too much freedom to do whatever they want with their property after they die.

Freedom of testation is a memento of capitalist patriarchy. Freedom of testation supports and perpetuates capitalist patriarchy in that it allows for the continued ownership and control of wealth by men and as such for the continual exclusion of women.

Freedom of testation in South African law is too broad and as it is a memento of capitalist patriarchy, it results in discrimination on the ground of gender.

Freedom of testation should either only be allowed to continue under much more regulated conditions or should be done away with entirely. If freedom of testation were done away with it would result in all deceased estates devolving via the Intestate Succession Act.[11]

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10 The Constitution, s 9(3): 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

11 Intestate Succession Act 81 of 1987. Hereinafter referred to as the ISA.

1.4 Assumptions and limitations

It will be assumed that testators do discriminate in their wills and that discrimination is the whole point of testate succession. It has been suggested that testamentary discrimination is fairly common and can be found in many wills.[12] This assumption is difficult to prove. Wills are considered to be private documents and therefore the content of a will is rarely public knowledge. Also the study can only look at the content of those wills which have come under judicial scrutiny. There may be many other wills which do discriminate on the basis of gender but which are never challenged in the courts and therefore are not reported on. Further, it is assumed that the majority of wills which have been drafted since 1993 (since discrimination on the ground of gender became unconstitutional) have not yet become actionable.[13] When such wills do become actionable only a portion of them will be discriminatory and then only a portion of those discriminatory wills will come under judicial scrutiny. The *BOE Trust Ltd No and others* case provides one example of a will which was drafted within the new dispensation and still contained discriminatory terms.[14] So this assumption is not without any validation.

The study will look at the Constitutional Court's view on equality. However this will be limited to the case of *Harksen v Lane*.[15] A discussion of further equality jurisprudence would exceed the scope of this study.

Due to the scope of the study any history before the Roman period, other than brief introductions on pre-Roman women and pre-Roman succession, will not be considered.

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12 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 [26] hereinafter referred to as *Syfrets*.

13 Constitution of the Republic of South Africa Act 200 of 1993 hereinafter referred to as the Interim Constitution.

14 *BOE Trust Ltd No and others* (211/09) [2009] ZAWCHC 88 (27 May 2009) (as yet unreported) hereinafter referred to as *BOE*.

15 *Harksen v Lane* 1997 (11) BCLR 1489 (CC) hereinafter referred to as *Harksen*.

There will be no consideration of the differences in meaning between the terms 'ownership', 'possession', 'control' of property and 'property rights'. For the purpose of this study what is essential is that women have been excluded from the ownership, possession, control of property and property rights. Generally this study will refer to ownership and control of property. However the term 'property rights' will be used in discussions regarding rights. In the chapter on succession the term 'ownership' is used. The study will not consider property in a separate chapter rather the study will deal with property as it arises in the chapters on Capitalism and Patriarchy.

It is assumed that freedom of testation is protected, along with the institution of private succession, as part of the Constitutional right to property.[16] Thus the property guarantee includes the right to dispose of property on death.[17]

The Constitution lists discrimination on the ground of gender as unfair discrimination.[18] Therefore any discrimination on the ground of gender is unfair discrimination. It is assumed that discrimination on the ground of gender in the form of testate succession is unjustifiable. It is assumed that the right to equality cannot be limited by the right to freedom of testation. Conversely, although freedom of testation may be protected by the property clause in the Constitution[19] it is assumed that this protection does not extend to the right to freedom of testation from being limited by the equality clause.

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16 The Constitution, s25 (1).

17 Corbett et all *The Law of Succession in South Africa* 47. *Syfrets* [18]. See also Du Toit "The Constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law" 2001 (2) *Stell* 233 -234. However, there is no decisive commentary on this suggestion. Indeed Van Der Walt in his discussion of section 25 and what the property right guarantees does not include any discussion of succession rights. See Van Der Walt *Constitutional Property Clauses* 320 – 358. See also Van Der Walt *The Constitutional Property Clause*.

18 The Constitution, s9 (3)

19 The Constitution, s25.

This study is not going to address any gender discrimination that occurs in intestate succession or customary succession. It is suggested that such discrimination was dealt with in the case of *Bhe*.[20]

The study will generally refer to testators as opposed to testatrices. It is considered irrelevant whether the testator is male or female, both genders are affected by capitalist patriarchy. What is relevant is that both testators and testatrices discriminate against women in their wills.

1.5 Point of Departure

The purpose of this study is to undertake a historical and philosophical study of the concept of freedom of testation in order to prove that freedom of testation in South African law is a memento of capitalist patriarchy. The study will show that women have been excluded from the ownership, control and possession of wealth. As such, freedom of testation, in its current form, is no longer acceptable in the new South Africa.

The point of departure of this study will be that of socialist feminism.[21] The research will look at how women have been oppressed by patriarchy and capitalism, and how this oppression is embodied in freedom of testation. The research attempts to understand the ways in which freedom of testation has furthered the subordination of women. The study proposes that freedom of testation in South African law supports capitalist and patriarchal ideology.

It will be argued that freedom of testation is a well-established capitalist ideology. Freedom of testation is used to ensure that wealth and the means of production are kept within the power of those who already possess wealth or already control the means of production (capitalists). It allows for the passing

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20 *Bhe Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC).

21 The reasons for this point of departure will be explained below.

on of property from one capitalist to another. Thus the working classes are continually excluded from obtaining wealth or the control of the means of production.

The concept also forms part of patriarchal ideology.[22] The people who have wealth or the control of the means of production are, generally, male. Freedom of testation allows for the continuation of these patriarchal systems of dominance. Wealth or the control of the means of production can be passed from one male to another (usually from father to son).[23] Thus the concept of freedom of testation allows for the continued exclusion of women.

This study will begin with an explanation of the socialist feminist viewpoint. It will be followed by a study of the history of capitalism and the history of patriarchy and a consideration of how capitalism and patriarchy interact to oppress women. The discussion will continue with the history of freedom of testation. It will show that the concept of freedom of testation was created within the environment of capitalist patriarchy and that the concept is used to support capitalist patriarchy.

The research paper will then conclude with a case discussion concerning freedom of testation in South African law. The research will show that the concept of freedom of testation in South African law is too broad and has allowed for, and continues to allow for, discrimination on the ground of gender as it is a product of capitalist patriarchy. The study will then propose a way forward for freedom of testation in South African law which will ensure that discrimination on the ground of gender is no longer possible.

The main theme of the study is the intersection of theories pertaining to patriarchy, capitalism and property.

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22 Steinem *Moving Beyond Words* 192.

23 Bhasin *What is Patriarchy?* 9.

1.6 Conclusion

Freedom of testation is a memento of capitalist patriarchy. It allows for discrimination on the ground of gender to be perpetuated. As such women have been excluded from the ownership, control and possession of wealth. In light of this freedom of testation is no longer an acceptable method of succession in South African law and must either be done away with in its entirety or severely limited in its application.

2 Socialist Feminism

The term Feminism has only been used since the nineteenth century although the intellectual history of feminism goes back to at least the fifteenth century. Feminism is a diverse field of study. Arguments for equality between the sexes can be traced far back in history. Various feminist goals and arguments exist. Some feminists, sameness feminists, argue for equal treatment of the sexes, and some feminists argue for substantive equality between the sexes, others argue for different treatment of the sexes. This chapter will look at the socialist feminist branch of feminism.

2.1 The beginnings of feminism

The feminist debate began with the liberal feminists arguments. Liberal feminist's most basic concern is for equality between the sexes. Put more broadly, liberal feminists are concerned for women's individualism, women's freedom of choice, equal rights and equal opportunities for women.[1] Liberal feminists attempt to emancipate women from their oppressive gender roles.[2]

The arguments of liberal feminism have been around for centuries, however one of the earliest and, arguably, most popular calls for equality came in the form of Mary Wollstonecraft's book, *A Vindication of the Rights of Women*.[3] Wollstonecraft's *Vindication* was published in 1792 and it brought the demand for female emancipation into mainstream political life.[4] Wollstonecraft's book demanded the equal education of the sexes. Her argument was founded on females having the same capacity for rationality as males and therefore that

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1 Gordon *Transforming Capitalism and Patriarchy* 13.

2 Tong *Feminist Thought* 28.

3 Wollstonecraft Mary *A Vindication of the Rights of Women.*

4 Taylor *Eve and the New Jerusalem* 1.

women should receive the same education as males.[5] Her argument was similar to, if not based on, Immanuel Kant's argument that in order to be a fully functioning human being one has to be able to act autonomously.[6] For Wollstonecraft women's dignity was based on their capacity for self determination.[7] This was the same capacity that Kant had argued for on behalf of men earlier in the eighteenth century. Wollstonecraft wanted women to be considered as what Kant termed an, 'end' just as men had come to be treated as 'ends' by Kant's arguments.[8]

Kant's view on the capacity for self determination was the basis of the argument for human rights. It laid the groundwork on which human rights could be built. However these rights were always men's rights and Wollstonecraft made the argument for women's rights. Wollstonecraft argued that as women have the same capacity for rationality as men they should also be treated as persons and therefore should receive the same education as men.

Wollstonecraft's argument was taken further in John Stuart Mill's "The Subjection of Women" and Harriet Taylor Mill's "Enfranchisement of Women".[9] Mill's and Taylor Mill's essays extended the argument for women's equality to civil liberties and economic opportunities. They also suggested that women's inequality arose from society's customs and traditions.[10] Mill and Taylor Mill provided the link between the calls for women's education and women's civil

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5 Tong *Feminist Thought* 15.

6 A discussion of Kant will be conducted later in the study.

7 Tong *Feminist Thought* 16.

8 Kant Groundwork *of the Metaphysic of Morals* 32 – 33.

9 Mill "The Subjection of Women" in Rossi (ed) *Essays on Sex Equality* and Taylor Mill "Enfranchisement of Women" in Rossi (ed) *Essays on Sex Equality*. See also Tong *Feminist Thought* 2.

10 Mill "The Subjection of Women" in Rossi (ed) *Essays on Sex Equality* 184 - 185 and Taylor Mill "Enfranchisement of Women" in Rossi (ed) *Essays on Sex Equality* 95. See also Tong *Feminist Thought* 2.

rights. Just as women had a right to education so they had rights to legal and social equality and the right to the vote.[11]

Thus liberal feminists began the feminist movement by arguing for equality between the sexes based on sameness. However, the view of liberal feminist's is seen, by some, as moderate and consistent with liberal ideology and capitalist democracy.[12] Liberal feminists do not question the patriarchal structures which exist in society to subordinate women. Indeed some liberal feminists have accepted that their concepts of human values are in fact male values,[13] that the concept of an autonomous person is fundamentally a male conception and cannot be applied to a feminist viewpoint.[14]

Socialist feminists criticise the failure of liberal feminist to question the structures that exist in society to support the subordination of women. Liberal feminists do not question whether patriarchy is intrinsic to a capitalist system and vice versa. Thus liberal feminists pose no threat to the system of capitalism. [15] Liberal feminism does not recognise that equality cannot exist in a capitalist system as it ignores the structures of inequality, based on sex, which are intrinsic to capitalism.[16]

2.2 Socialist Feminism

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11 Lerner *The Creation of feminist Consciousness* 217.

12 Gordon *Transforming Capitalism and Patriarchy* 13.

13 Tong *Feminist Thought* 28.

14 Jagger *Feminist Politics and Human Nature* 28. For further discussion of this see West "Jurisprudence and Gender" in Barnett (ed) Sou*rcebook on Feminist Jurisprudence* 227- 244.

15 Gordon *Transforming Capitalism and Patriarchy* 14.

16 Gordon *Transforming Capitalism and Patriarchy* 14. These structures of inequality will be discussed in the section on capitalism.

Modern socialism emerged in nineteenth century Europe in response to the rapid economic and social changes that had occurred with breakdown of the feudal order and the change from a rural economy to an urbanised, industrial economy. The resulting emphasis on individualism, liberalism and progress was interpreted differently by socialists than it was by capitalists. Socialism was a reaction to the lack of community and co-operation, the rise in poverty and inequality that became apparent with the rise of industrial capitalism.[17]

The main concern of socialism is its commitment to creating an egalitarian society. Socialism's goal is to create a society where every person can seek fulfilment and is not held back by structural inequalities.[18]

The most significant theory in the history of socialism, called Marxism, was produced by Karl Marx and Fredriech Engels.[19] Marxism attempts to explain the progress of human society through class divisions and in the process provided a critique of capitalism.[20] It is this critique which is relevant to socialism.

Socialists argue that capitalism creates class divisions. Capitalism provides the upper classes with privileges and opportunities which are inherited from the ownership of capital and wealth. At the same time capitalism deprives those classes that have been historically deprived (the lower classes) of such capital and wealth. [21] Capitalism does not allow for equal access to resources or the means of production. Socialists understand that the majority of the means of production are owned by the minority (the upper classes) and yet

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17 Newman *Socialism: A Very Short Introduction* 6.

18 Newman *Socialism: A Very Short Introduction* 3.

19 Newman *Socialism: A Very Short Introduction* 21.

20 Marx *Capital A Critique of Political Economy*. See also Newman *Socialism: A Very Short Introduction* 22.

21 Newman *Socialism: A Very Short Introduction* 3.

everyone depends on the means of production to live.[22] Thus socialists challenge the property relationships that are fundamental to capitalism. [23]

For women, socialism offered a solution to the oppression and injustices caused by capitalism. Women were (and still are) subordinated by the structures of inequality, based on sex, which are intrinsic to capitalism. Socialism offered women a means of resistance and an alternative to capitalism.

Socialist feminists propose that women are doubly disadvantaged in capitalist society as they suffer from economic and social dependence on men within the family and economic exploitation within the workforce.[24] Socialist feminists believe that most property and the means of production are controlled by men and that they are passed from one man to another, usually from father to son via the system of primogeniture. Even in situations where a woman has been able to inherit property or the means of production, socialist feminists argue that she is limited by customary practices, emotional pressures, social sanctions, violence and gender roles, in her control over such property.[25]

Socialist feminist thinking proposes that women's oppression appears in various ways and in various situations and not merely in the modes of production and the equality of resources. [26] They realise that a change in economic circumstances of women alone will not itself ensure that women are no longer subordinated to men. Socialist feminists propose that change is required in both the system of production and the ideology surrounding the

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22 Ehrenreich "What is Socialist Feminism?" in Hennessy and Ingraham (eds) *Materialist Feminism: A Reader in Class, Difference and Women's Lives* 65.

23 Newman *Socialism: A Very Short Introduction* 3.

24 Hannam *Feminism* 41.

25 Bhasin *What is Patriarchy?* 9.

26 Ehrenreich "What is Socialist Feminism?" in Hennessy and Ingraham (eds) *Materialist Feminism: A Reader in Class, Difference and Women's Lives* 65.

subordination of women.[27] Thus socialist feminists are concerned about the role patriarchy plays in the subordination of women as well as the role of capitalism.[28]

Where socialist feminists differ from Marxists, or even from ordinary socialists, is that they believe that women were subordinated to men prior to capitalism.[29] They suggest that patriarchy existed before capitalism. Socialist feminists suggest that women were subordinated to men before the development of class based societies thus their subordination has to have another cause not only the class division caused by capitalism and that this cause is patriarchy.[30] Socialist feminists consider patriarchy to be a continually changing system and that the system of patriarchy has evolved to support capitalism. Conversely socialist feminists propose that to understand the subordination of women you have to understand the history of capitalism and therefore that capitalism developed to support patriarchy.

Thus socialist feminists propose that women's oppression is a result of capitalist patriarchy, that the patriarchal privilege that men enjoy is as essential to women's oppression as the economic structure.[31] They attempt to see the connection between the economic class and the sex class[32] and the ways in which the intersection of patriarchy and capitalism help men to maintain power.[33]

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27 Newman *Socialism: A Very Short Introduction* 95.

28 For further discussion of socialist feminism see Eisenstein "Constructing a Theory of Capitalist Patriarchy and Socialist Feminism" in Levine (ed) *Enriching the Sociological Imagination* 225 – 247.

29 Rowbotham *Woman's Consciousness, Man's World* xxiiii.

30 Beasley *What is Feminism? An Introduction to Feminist Theory* 62.

31 Ehrenreich "What is Socialist Feminism?" in Hennessy and Ingraham (eds) *Materialist Feminism: A Reader in Class, Difference and Women's Lives* 65.

32 Bhasin *What is Patriarchy?* 27.

33 Jagger "Socialist Feminism and the standpoint of women" in Rosen and Wolff (eds) *Political Thought* 98.

2.2.1 Capitalism and Patriarchy versus Capitalist Patriarchy

Some socialist feminists see capitalism and patriarchy as one system called capitalist patriarchy. Other socialist feminists see capitalism and patriarchy as independent systems (capitalism and patriarchy) linked by history. These socialist feminists think that capitalism is an expression of male dominance (of patriarchy). [34]

For the purpose of this study the argument that capitalism and patriarchy are linked is preferred or rather that capitalism is inseparable from patriarchy (patriarchy might still exist in a non-capitalist society). What is essential is that socialist feminists believe that capitalism and patriarchy or capitalist patriarchy is responsible for the subordination of women.

The following chapters will look at how patriarchy and capitalism subordinate women and how they interact to support each other. However it is very difficult to separate the two systems and at times it may appear that the study is discussing patriarchy under a capitalist heading or capitalism under the heading of patriarchy. Unfortunately this is the nature of the argument. Either capitalism and patriarchy have become so intertwined that it has become difficult to separate them, or they are in fact one system, capitalist patriarchy, and it is impossible to separate them.

2.3 Conclusion

In order to understand how capitalist patriarchy has negatively affected the status of women it is necessary to look at the position of women throughout history. It is necessary first to understand, “the nature of female subordination,

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34 Gordon *Transforming Capitalism and Patriarchy* 18.

the causes of women's co-operation in the process of their subordination and the conditions for their opposition to it".[35]

It is not possible in this study to consider the entire history of women's subordination as it was a process taking more than two and a half thousand years (and still continues).[36] This study will consider both capitalism and patriarchy during the pre-Roman period with more in-depth studies of the Roman period and the Middle-Ages. This will be followed by a study of the Renaissance, the Enlightenment and the Reformation. The discussion on capitalism will conclude with the Industrial Revolution. The discussion on patriarchy will continue with the Industrial Revolution and into the 20th century.

Whilst the argument has been made that patriarchy existed long before capitalism, the study will begin with a discussion of the history of capitalism. The history of capitalism is definite whereas the history of patriarchy has to be read into the history that has already been recorded by men. The history of capitalism sets the scene in this study for the history of patriarchy.

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35 Lerner *The Creation of Patriarchy* Acknowledgments.

36 Lerner *The Creation of Patriarchy* 8.

3 Capitalism

3.1 Introduction

Discussing the origins of capitalism is a confusing and difficult task. Generally historians discuss what are considered to be the main characteristics to identify and date the origins of capitalism. These characteristics can include the nature of the economic system, ownership of property, methods of organising production, capital accumulation, the spirit of acquisitiveness and the growth of rationality.[1] The culmination of these characteristics can be found in the English Industrial Revolution and the economic growth that resulted there from.

The progress of capitalism towards the Industrial Revolution can be followed through the study of various historical developments. These developments came from the Renaissance and the Reformation; the rise of liberalism, the growth of individualism, political democracy and the growth of the market economy; the erosion of religious moral authority and the weakening of political monarchies.[2]

The changes that occur in the characteristics of capitalism (for example the way ownership of property has been viewed over the centuries) are gradual and vague.[3] This chapter is an attempt to discuss these characteristics through their historical developments. A combination of these characteristics together with the history of patriarchy will show that capitalism is a societal structure which has allowed for, and still allows for, the oppression of women.

This chapter will start with a discussion of Roman law followed by a discussion of the feudal period. The study will consider changes that occurred

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1 Hartwell "The origins of Capitalism: a methodological essay" in Pejovich (ed) *Philosophical and Economic Foundations of Capitalism* 11.

2 Hartwell "The origins of Capitalism: a methodological essay" in Pejovich (ed) *Philosophical and Economic Foundations of Capitalism* 17.

3 Seddon *Modern Economic History* 1.

in the economy and (more importantly) with the way human beings viewed themselves and private property. The chapter will continue with a discussion of the Renaissance, the Enlightenment and the Reformation periods. The chapter will conclude with a discussion of the Industrial Revolution.

3.2 Roman Law

It is generally agreed that in very early history possession was collective.[4] That property was owned by the whole of a community or tribe. There was no understanding of private ownership and therefore there could be no sale or exchange or donation.[5] The trading of goods and trade routes did exist, however this exchange existed merely to provide for the exchange of goods for survival rather than for profit.

By the third century AD Europe was dominated by the Roman Empire. Consequently the Roman view of ownership of property prevailed throughout Europe. However ownership in Roman law is difficult to define. The emphasis of Roman law was on possession of property as opposed to ownership of property.[6] Although the Romans had a concept of a right to property, this right cannot be compared to the modern understanding of a subjective right to property.[7]

In the Roman era ownership of property attached to a societal role as opposed to attaching to a person. A modern subjective right to property attaches to a person rather than to the role a person plays in society. In the Roman era ownership of property (or rather control of property) attached to

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4 Avila *Ownership: early Christian teaching* 4.

5 Avila *Ownership: early Christian teaching* 5.

6 Johnstone *Roman Law in Context* 60.

7 Garnsey *Thinking About Property* 181. For further discussion of the Roman concept of private property and ownership see Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 77 – 81 and 108 – 110.

the role (or position) of the *paterfamilias*.[8] The *paterfamilias* was the male person responsible for property on behalf of his family.

The Roman law was not concerned with the justification of ownership. Roman society did not question the control over property that was exercised by the *paterfamilias*. The *paterfamilas'* control of property was simply accepted as part of the social ordering of Roman society.[9]

The concept of individualism was unknown in the Roman era. The concept of owning property as an individual was also unknown. This meant that Romans did not trade or participate in the market for profit or individual gain, rather they did so on behalf of the family and because that was the role they filled in society. The ideas of liberal capitalism had not yet developed.

After the Roman period there was also no need for the justification of property as it was simply accepted as an established condition of life.[10] However over the centuries as the ideology regarding ownership, or private property, changed it created a need for justification.[11]

3.3 Feudalism

By the fifth century AD the destruction of the Western Roman Empire left the population of Western Europe without military protection or any form of social control. The population that remained consisted of small German kingdoms. The strongest and most resilient of these kingdoms were the Franks.[12] However the various kingdoms were frequently threatened by "barbarian"

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8 Kelly *A Short History of Western Legal Theory* 76.

9 Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 77.

10 Kelly *A Short History of Western Legal Theory* 107.

11 Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 77.

12 Kelly *A Short History of Western Legal Theory* 85.

invaders. In order to protect themselves from the threat of invasion by these "barbarian" invaders the Frankish kings devised a system of military and political relationships called feudalism.[13]

The feudal system of the early Middle Ages was based on the Manorial system of the late Roman Empire.[14] In the late Roman Empire manorialism consisted of large farms, called *latifundia.*[15] These *latifundia* were in the possession of Roman nobles (Roman men who were the families' *paterfamilias*) and they became self-sufficient estates. The servants who maintained the estate became bonded to the land.[16] These estates provided for the subsistence of the households which lived on the land. A certain portion of the estate was reserved for the *paterfamilias* and his family, but was worked by the servants on their behalf. The rest of the land, whilst controlled by the *paterfamilias*, was divided amongst the slaves to support themselves.[17]

Feudalism was a modification of the Roman Manorial system. Feudalism maintained the two class society of free men and slaves that existed in the Roman Empire. However, under feudalism the upper class (or nobility) consisted of those who had military skills and strength and could provide protection for the population from the "barbarian" invaders.[18] Power and land became concentrated in the hands of those strong enough to protect themselves and their dependents.[19]

The lower class, the serfs, were those members of the population who were not fighters but did the work necessary to support the military organization.[20] This class consisted of people who had been servants under the Roman

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13 Cameron *A Concise Economic History of the World* 45.

14 Cameron *A Concise Economic History of the World* 45.

15 Van Wijk (ed) *Western Europe From the Decline of Rome to the Reformation* 149.

16 Cameron *A Concise Economic History of the World* 45.

17 Van Wijk (ed) *Western Europe From the Decline of Rome to the Reformation* 150.

18 Rider *An Introduction to Economic History* 18.

19 Viljoen *Capitalism: A Historical Survey* 11.

20 Rider *An Introduction to Economic History* 18.

Empire and the common people of the Germanic tribes.[21] The lower class worked the lands and provided produce and/or money payments to the noble class in return for their military protection.[22]

Feudalism thus provided a new form of social system and provided military protection for the population of Western Europe. The serf was protected by the noble, who owed loyalty to and was protected by a higher noble who in turn owed loyalty to and was protected by the King.[23] In return for their military service the Frankish Kings granted the nobles vast estates.[24] The nobles granted hereditary rights to use a portion of land (a fief) to their serfs.[25] The serfs sacrificed their liberty and became bonded to the land in return for the security provided by the nobles.[26] Thus a person's standing in feudal society was decided by the amount of land they possessed.[27] The more land under a noble's control, the more serfs he would have working for him and the higher up he was in the feudal hierarchy.

Feudal society was controlled by men and was concerned with the affairs of men.[28] A man's personal status was determined by his occupation, for example a man could be a knight, a baker or a mason. However a woman's personal status was defined by her gender, a woman could only be a virgin, a wife, a mother or a widow.[29] Women were ranked and defined by who their fathers were or by the men to whom they were married and thus women were also part of the class divisions. However, noble or upper class women could not be valued for their military skills as they were not allowed to participate in the military. Women of the lower class could work for their nobles but their

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21 Sherman *How Society Makes Itself* 47.

22 Fulcher *Capitalism: A Very Short Introduction* 23.

23 Hunt *Property and Prophets* 3.

24 Cameron *A Concise Economic History of the World* 45.

25 Hunt *Property and Prophets* 3.

26 Rider *An Introduction to Economic History* 25.

27 Harksen *Women in the Middle Ages* 9.

28 Rider *An Introduction to Economic History* 20.

29 Leyser *Medieval Women: A Social History of Women in England 450 – 1500* 93.

roles depended upon that of their fathers or husbands. Even if women did do labour they were still expected to fulfil their domestic roles within the family. Thus during the feudal period men became valued for the military and labour role they could play in feudal society, whereas women became valued for their domestic roles.

3.3.1 The Role of the Church in feudal society

The feudal system and consequently the property relations of the Middle Ages were justified by the Christian Church's paternalistic ethic.[30] After the fall of the Western Roman Empire the Church became the most powerful authority in Europe. The Church controlled and produced all legal and political theory.[31] However in order to survive the invasions of the early Middle Ages the Church had to form a close relationship with the nobles in order to guarantee the Church's protection.[32] Additionally the feudal lords needed an ideology that would justify the social system of feudalism.[33] In order to justify the social system the Christian Church supported the feudal system through its theology.

The theology of the early Middle Ages compared the society of Western Europe in the Middle Ages to a family. God was depicted as the father and humans as his children. As God cares for and protects his children so humans respect and give loyalty to God. This comparison was continued throughout the hierarchy. The role of the King was also compared to the role of the father, who looked after his subjects, and who was loved and respected by his subjects in return. Men who had wealth and power also had a role comparable to that of a father. The common person was supposed to submit

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30 Hunt *Property and Prophets* 10.

31 Kelly *A Short History of Western Legal Theory* 89.

32 Painter *A History of the Middle Ages* 124.

33 Hunt *Property and Prophets* 5.

to the leadership of such men.[34] The theology also ensured that women were subordinated to men. Women had duties of respect and loyalty to the men in their families and social system.

This theology was emphasized in the New Testament which taught the importance of charity and caring for others as well as the evil of selfishness, greed and desire.[35] Thus the wealthy and powerful had parental obligations towards the needy. In return the needy had duties of respect and loyalty towards those in power. The economic and social relationships of the feudal system came to seen as being ordained by God.[36]

Apart from providing a justification for the new social system the Church was also involved in changing the opinions regarding private property. In the early Middle Ages the Church did not recognise private property as a right. The Church considered ownership of private property to be one of the consequences of the fall into sin.[37] It was an example of corrupt society.[38] However the Church, as the largest possessor of land during the Middle Ages,[39] had to accept the ownership of private property as a contemporary condition of everyday life.[40]

Thus the original justifications for ownership came from theology. God had dominion over the earth and this resulted in man obtaining dominium over the

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34 Hunt *Property and Prophets* 5.

35 Hunt *Property and Prophets* 6.

36 Hunt *Property and Prophets* 8.

37 Kelly *A Short History of Western Legal Theory* 150.

38 Garnsey *Thinking About Property* 174.

39 Hunt *Property and Prophets* 4.

40 Kelly *A Short History of Western Legal Theory* 107.

earth through God.[41] The result was that private property became justified by natural law.[42]

The Church had accepted and justified the existence of private property, and confirmed that common ownership was no longer the only form of ownership. However the justification for private property provided by early theology soon became unacceptable.

As the ownership of property became more acceptable, it also became affected by the feudal hierarchy. Only the Church and the upper classes were able to own property. Serfs and women were certainly not seen to be capable of owning property.

3.3.2 Economic Revival

During the early Middle Ages the economy was one of subsistent agriculture.[43] Families consumed only what they themselves produced.[44] The trade that existed was trade for survival rather than for profit. Whilst there were some merchants who bought and sold goods at a profit, the existence of a merchant class mostly disappeared due to the threat of attack from the barbarian invaders.[45] The cities and towns that had existed in the Roman period were depopulated as people left for the countryside because of their fear of being attacked by the "barbarian" invaders in the cities and towns.[46] The small cities and towns which still existed were included in the feudal

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41 Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 80.

42 Kelly *A Short History of Western Legal Theory* 107.

43 Hilton "Capitalism – What's in a name?" in Sweezy et al *The Transition from Feudalism to Capitalism* 145.

44 Bowles *Understanding Capitalism* 4.

45 Rider *An Introduction to Economic History* 25.

46 Rider *An Introduction to Economic History* 42.

hierarchy and had obligations to their feudal lords.[47] Cities and towns became increasingly insignificant, except as religious centres and military fortresses. With the decline of trade in Western Europe, port cities lost their reasons for existence.[48] Neither the small merchant group nor the agricultural labourers engaged in the production of goods for the market.[49] The production of goods only occurred for personal use and local trade. The nature of the feudal economy and society was small-scale and inward-looking.[50]

Though the ideas of individual liberalism were still coming, feudalism laid the groundwork for capitalism. It allowed for land and power to become concentrated in the hands of upper-class men.

By the ninth and tenth centuries relative peace and stability returned to Western Europe and this laid the foundation for an economic revival.[51] Western Europe started to produce a small agricultural surplus which allowed for exchange to restart.[52] Taxes started to be paid in money (as opposed to in kind) with the income received from the exchange of the agricultural surplus.[53] As the wealth of towns and cities increased due to the increase in trade they were able to purchase charters (from their rulers) which guaranteed the towns and cities freedom from the feudal hierarchy to regulate their own affairs.[54]

The municipal and village authorities became responsible for the planning and regulation of economic life in towns and cities. To maintain social harmony all forms of production were regarded as a form of public service rather than as an act of increasing the wealth, prestige or power of an individual.[55]

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47 Seddon *Modern Economic History* 5.

48 Rider *An Introduction to Economic History* 42.

49 Sherman *How Society Makes Itself* 56.

50 Rider *An Introduction to Economic History* 25.

51 Van Wijk (ed) *Western Europe From the Decline of Rome to the Reformation* 164.

52 Van Wijk (ed) *Western Europe From the Decline of Rome to the Reformation* 165.

53 Rider *An Introduction to Economic History* 33.

54 Seddon *Modern Economic History* 5.

55 Seddon *Modern Economic History* 7.

3.3.3 The further influence of the Church

As commerce slowly started to grow it became necessary for the Church to have better justifications for private property ownership. These justifications for the Church were produced by Thomas Aquinas. Writing in the eleventh century Aquinas argued that even though private property is not ordained by divine law, justification can be found for it in natural law by using human reason.[56] He argued further that private property contributes to the common good, because people take better care of property which they consider to be their own. He also stated that private property allows for the better organization of human affairs and that it creates a more suitable environment for peace.[57] Thus Aquinas provided the first detailed justification for private ownership of property. The ownership of private property became justified by positive human law as an addition to natural law.[58]

A further theological debate arising in the thirteenth century created a new need for a theological justification for private property. The need arose because of a debate between two scholastic orders in the Roman Catholic Church - the Dominicans and the Franciscans.[59] The debate centred on whether the 'ideal state of perfect human life' allowed for the ownership of property or whether it required a doctrine of poverty and thus denounced the ownership of property.[60] Although the debate did not concern property rights

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56 Aquinas *Summa Theologica* II II QQ 1 -148 Q66 Art.2 Pt. 11-11. See also Stark *The Victory of Reason* 79.

57 Aquinas *Summa Theologica* II II QQ 1 -148 Q66 Art.2 Pt. 11-11. See also Stark *The Victory of Reason* 79.

58 Kelly *A Short History of Western Legal Theory* 151.

59 Varkemma "Summenhart's theory of rights" in Mäkinen and Korkman (eds) *Transformations in Medieval and Early Rights Discourse* 120.

60 Varkemma "Summenhart's theory of rights" in Mäkinen and Korkman (eds) *Transformations in Medieval and Early Rights Discourse* 120 - 121.

directly, the Dominican tradition of justifying material property and its ownership led to discussion about property rights.[61]

This debate as well as Aquinas' arguments for private property created a significant change in the ideology surrounding private property. No longer was the justification for control of property based on membership of a group or a person's role in society (as was accepted in Roman times) but rather on man's relationship with God. The worldview was beginning to stress the importance of the individual.[62] People stopped seeing themselves only as members of a group and began to see themselves as individuals.[63] Emphasis began to be placed on the individual and the individuals rights. The justification for private property had changed from one's role in the family to a theological justification.

Thus the control of private property became more socially and economically acceptable. Again the Church and its theology had a major influence on the changing perspectives on private property.

3.3.4 The later Middle Ages

In the fourteenth century AD the population of Europe was decimated by the plague. The population decline created a huge labour shortage and thus the demand for labour grew and the wages that were offered for labour increased. The demand for labour meant that the lower classes no longer needed to be bonded to a certain estate in order to survive. Instead the lower classes had greater choice of whom they wanted to work for and where they wanted to work. Despite paying higher wages the upper classes also had to include other incentives to convince serfs to continue working their land. In order to

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61 Coleman "Are there any individual rights or only duties?' in Mäkinen and Korkman (eds) *Transformations in Medieval and Early Rights Discourse* 4.

62 Mahoney *The Challenge of Human Rights* 5.

63 Burke "Representations of the self from Petrarch to Descartes" in Porter (ed) *Rewriting the Self* 17.

keep their current labour force and to encourage more serfs to work their lands the upper classes had to provide the serfs with better working and living conditions. By far the most important incentives that a noble could provide to encourage the lower classes to continue working their lands were those of freedom and choice.[64] Nobles who offered these incentives kept the labourers for their lands.

The small agricultural labour force now had far more power to enforce their rights.[65] This resulted in the serfs gaining freedom from feudal dues and services[66] and a great number of serfs became free tenants.[67] The tenants would pay fees to the nobles for the right to live and work on the land. The tenants had the right to farm the land in whatever manner they wished and the produce from such land was their own.

The result of the serfs being freed from their feudal dues and services created a market for land rentals.[68] The majority of land still remained under the control of the upper classes. Lords became landlords. The nobles could now charge rent for the use of the land that had been under their military control. Rent in labour had been converted into rent in money.[69] This allowed the upper classes to remain the upper classes because they were the majority land holders.[70] Rent in the form of money allowed for the accumulation of private fortunes.[71]

Competition among the lower classes for land increased the price of land rentals. Farming had to change from subsistence to intensive farming to

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64 Stark *The Victory of Reason* 125.

65 Fulcher *Capitalism: A Very Short Introduction* 25.

66 Sherman *How Society Makes Itself* 57.

67 Stark *The Victory of Reason* 125.

68 Sherman *How Society Makes Itself* 59.

69 Beaud *A History of Capitalism* 17.

70 Fulcher *Capitalism: A Very Short Introduction* 23.

71 Beaud *A History of Capitalism* 22.

produce cash crops and make up for the high rent prices.[72] This created pressure to use the latest technology and started the process of technological innovation.[73] Innovative crops and practices increased the agricultural output.[74] During this period the methods of production started to improve and specialisations started to occur.[75] Advancements were made in the fields of transport, energy, textiles, metal work, agriculture and other consumer goods.[76]

The enclosure movement of the late fifteenth century (continuing into the nineteenth century) also had a significant effect on the ownership and control of property.[77] Most farming in the Middle Ages was based on an open field system. The open field system was co-operative, villagers decided together what crops to sow and the work of ploughing, sowing and harvesting the field was shared.[78] The enclosure movement resulted in large areas of common land being fenced off and becoming the private property of individuals.[79]

Enclosure occurred because there was a growing demand for wool and thus a need for grazing land.[80] During the enclosure negotiations tenants would lose their right to farm because either their lease had run out, they were bought out by the larger landowners or because they simply were not able to prove any legal claim to the land.[81] Land titles were very vague and tenants often ignorant, so enclosure could be easily accomplished by the more powerful

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72 Sherman *How Society Makes Itself* 59.

73 Sherman *How Society Makes Itself* 59.

74 Du Plessis *Transitions to Capitalism in Early Modern Europe* 3.

75 Sherman *How Society Makes Itself* 60.

76 Vaizey *Capitalism and Socialism: A History of Industrial Growth* 25.

77 Fulcher *Capitalism: A Very Short Introduction* 24.

78 Chappell *An Economic History of England* 1.

79 Fulcher *Capitalism: A Very Short Introduction* 24.

80 Seddon *Modern Economic History* 11.

81 Lane *The Industrial Revolution* 41.

and educated landowner.[82] From the 1700's onwards there was a growing tendency for landowners to use private acts of parliament to enforce enclosure.[83] This often occurred without the knowledge of tenants living on the land.[84] By 1830 almost all of England's agricultural land had been enclosed.[85]

The enclosure movement separated the majority of the lower classes from the land on which they had subsisted.[86] This created an agricultural proletariat who either became landless labourers working on the large estates for a wage or who went to seek work in the towns.[87] The proletariat were a class of people who were emancipated from feudal duties but dependent on wage labour for their livelihood.[88]

The dissolution of the feudal system, the change in status from serf to tenant, the enclosure movement and the consequent agricultural surplus resulted in less people being involved in subsistence farming and more people becoming involved in market activity.[89] This growth in market activity led to urbanization and a consequent growth in towns and cities.

However as the incidence of paid work increased so did the separation between paid work and domestic work. This separation between paid work and domestic work ensured that women were excluded from the paid economy.[90] It also gave men a value for being able to earn money that women could not have. As women only performed domestic work the psychological value given to domestic work decreased and the psychological

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82 Seddon *Modern Economic History* 14.

83 Lane *The Industrial Revolution* 42.

84 Seddon *Modern Economic History* 20.

85 Lane *The Industrial Revolution* 41.

86 Seddon *Modern Economic History* 11.

87 Seddon *Modern Economic History* 12.

88 Dobb *Capitalism Yesterday and Today* 18.

89 Rider *An Introduction to Economic History* 79.

90 Radford Ruether *Women and Redemption* 115.

value of paid work increased. Thus men became more valued as they were paid workers and the value of women decreased because they were not paid workers.

The feudal period ensured that society was split into two definite classes, the upper and the lower, and that control (maybe not yet ownership) of property started to be accumulated by the upper class.

3.4 Renaissance and Enlightenment

The fourteenth century was the beginning of the Renaissance period. The Renaissance was a period of transition between the medieval and the modern world.[91] There was a revival of classical learning of the Greeks and Romans, the arts flourished and European society changed dramatically. The Renaissance period saw the conquest of Colonies around the world, the feudal political system turned into centralised monarchies, merchant capitalism grew, resulting in the expansion of manufacturing, and a rapid growth in population.[92] Artists, architects and men of scientific and literary brilliance flourished during the Renaissance period. However the Renaissance was also a period of religious and political turmoil.[93]

The Renaissance was intrinsically linked to the Scientific Revolution. Scientists returned to the study of nature by observation and experimentation and this laid the groundwork for all scientific work that has since been accomplished.[94] In 1543 Copernicus proved that the sun was the centre of the universe and not the Earth as previously believed.[95] This confirmed that the

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91 Tanner *The Renaissance and the Reformation* 22.

92 "Did gender have a renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 343.

93 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 11.

94 Tanner *The Renaissance and the Reformation* 24.

95 Tarnas *The Passion of the Western Mind* 416.

Earth revolved around the sun rather than the other way around. [96] The Earth was not the centre of the universe, merely one among a number of planets.

This revelation had massive consequences for scholars during this period. Knowledge that had long been considered to be true had now been shown not to be. People had believed that human beings were the centre of the universe and this had been proved to be false. The basis of their belief system, their trust in religious theology, had been brought into doubt.[97] This meant that the justification of private property provided by religious theology had also been brought into doubt.

The scientific revolution required scholars to look at the world from a new perspective. European society began to develop a culture based on the ideas of personal liberty and rationalism. Medieval Europe came to be seen as, 'primitive, superstitious, childish, unscientific and oppressive'.[98] New truths had to be found and new proofs for knowledge had to be provided. A new basis for their belief system was required in order to give it authority and in turn a new justification for ownership needed to be provided. Writers such as Rene Descartes, Hugo Grotius, Immanuel Kant, John Locke, and Georg Hegel were all influenced by these ideas and helped to change the way people thought about themselves, society, their place in society and consequently property and the economy.

3.4.1 Rene Descartes

Rene Descartes was profoundly influenced by the scientific revolution. Descartes was disillusioned by the fact that ideas that he had believed to be true had been proved to be false, such as Copernicus proving that the sun, not the earth, was the centre of our universe. Descartes realised that the

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96 Tarnas *The Passion of the Western Mind* 416.

97 Solomon *Continental Philosophy Since 1750* 26.

98 Tarnas *The Passion of the Western Mind* 283.

direct evidence provided by our senses could in fact be false.[99] Thus Descartes questioned whether there was any knowledge, any evidence provided by our senses, that could be proved to be true or could be known for sure. Descartes realised that something more basic, more trustworthy, than the evidence provided by our senses was needed to provide a sufficiently stable and acceptable basis for our knowledge.[100] Descartes attempted to provide an incontestable foundation for science.[101]

However, as it would be impossible to question the entirety of human knowledge Descartes decided to find proofs for the most fundamental questions, so Descartes began by doubting the existence of all reality. [102] He wanted to establish one unquestionable fact on which all other truths could be based.[103] Whatever remains once doubt has been pushed to the limits of possibility must be the permanent basis of certainty.[104]

Descartes found that there was no knowledge that could be proved to be true. The evidence provided to us by our senses might be false. All knowledge, he reasoned, had the possibility (however small it may be) of being false, as our senses may be deceived. However the one thing that Descartes found he could not doubt, the one thing that must be true, the one thing that could not be deceived, was the existence of his own doubting.[105] Because Descartes could not doubt his own ability to doubt, he knew that this at least had to be true. Thus Descartes' famous statement, "*cogito ergo sum* (I think therefore I am)",[106] provided the only knowledge which could absolutely be true.

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99 Magee *Confessions of a Philosopher* 118.

100 Needham *Descartes: An Introduction to the Philosophy of Mind* 9.

101 Kroeze "Matrix Iuris" 2005 (1) *SAPL* 324.

102 Magee *Confessions of a Philosopher* 117.

103 Kim Atkins (ed) *Self and Subjectivity* 8.

104 Mellone *The Dawn of Modern Thought* 27.

105 Kroeze "Matrix Iuris" 2005 (1) *SAPL* 325.

106 Kelly *A Short History of Western Legal Theory* 261.

What Descartes achieved was to give identity to the 'self' that thought.[107] His statement created the idea that the human mind is separate from the human body.[108] It presented the human mind, the self, the ability to think or to reason, as being the only true thing. Descartes presented a human being (or a self) as a totally separate, self-defining entity.[109]

Descartes' theory had major theological consequences. His theory separated man from God. Now the existence of man could be proved without the existence of God. The existence of man could be proved by the human ability to doubt. Although Descartes went on to prove God's existence as a logical necessity for the existence of man (in fact man's existence proved the existence of God),[110] he had essentially removed God from the equation.
This discovery meant that the reliance on God for justification of private property was insufficient. With the rise of science the justification had to be based on scientific reasons as opposed to metaphysical ones.[111]

3.4.2 Hugo Grotius

The Dutch jurist Hugo Grotius, who wrote about the way to wage a just war, ended up providing a new justification for private property. [112] He also redefined the Roman concept of *ius* and thus created the concept of subjective rights.

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107 McCormick "The concept of the self in political thought" *Canadian Journal of Political Science / Revue canadienne de science politique* (12) (4) 701.

108 Reiss "Denying the body? Memory and the dilemmas of history in Descartes": *Journal of the History of Ideas* (1996) (57) (4) 590.

109 Reiss "Denying the body? Memory and the dilemmas of history in Descartes": *Journal of the History of Ideas* (1996) (57) (4) 590.

110 Kroeze "Matrix Iuris" 2005 (1) *SAPL* 325.

111 Van Der Walt "Marginal notes on powerful legends: critical perspectives on property theory" 1995 (58) *JCRDL* 402.

112 Grotius *The Rights of War and Peace* I 133 – 179. See also Mahoney *The Challenge of Human Rights* 9.

Grotius (relying on Descartes) based his arguments on the power of human reason. He argued that society arises from a desire for human association, and from such association the idea of *ius* arises.[113] Human reason tells us that in order for society to exist peacefully you have to respect the rights of others.[114]

In Roman times an *ius* amounted to an action – a method or remedy which a person could use against another person to rectify a situation.[115] *Ius* was a method of judgement.[116] The term *ius*, although translatable to mean right, in practice amounted to an action.[117] It was the power to act in a certain legal situation.[118] *Ius* was not understood as the modern conception of a 'right' is.

Grotius subjectified the term *ius* so that it became something which a person has rather than an action that a person can use.[119] To have an *ius* meant that a person had a moral quality which included power over oneself and power over others.[120] An *Ius* became a power that a person has over other people to prevent them from interfering with one's self interest.[121]

Then in an attempt to turn law into a legal science and provide a basis for a scientific legal methodology Grotius defined and labelled each right.[122] Thus Grotius created the theory of subjective rights. Grotius proposed that

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113 Mahoney *The Challenge of Human Rights* 10.

114 Kelly *A Short History of Western Legal Theory* 228.

115 Haakonssen "Hugo Grotius and the history of political thought" in Haakonssen (ed) *Grotius, Pufendorf and Modern Natural Law* 240.

116 Tuck *Natural Rights Theories: their origin and development* 8.

117 Buckland *A Manual of Roman Law* 33.

118 Kaser *Roman Private Law* 28.

119 Haakonssen "Hugo Grotius and the history of political thought" in Haakonssen (ed) *Grotius, Pufendorf and Modern Natural Law* 240.

120 Mahoney *The Challenge of Human Rights* 9.

121 Haakonssen "Hugo Grotius and the history of political thought" in Haakonssen (ed) *Grotius, Pufendorf and Modern Natural Law* 241.

122 Van Der Walt "Tradition on trial" (11) (1) *SAJHR* 176.

respecting individual rights would lead to less conflict and, in the event of a conflict, respecting individual rights would assist in an easy and swift resolution. This argument allowed for a doctrine of rights to become prominent in European society.[123] Grotius' concept of *ius* eventually became the popular and accepted way of characterizing the way in which human beings behaved towards one another.[124]

Included in Grotius' doctrine of rights was the right to private property, which Grotius justified by acquisition. All that was necessary to make oneself the owner of unowned property was an overt act of appropriation.[125]

3.4.3 John Locke and Immanuel Kant

John Locke continued with Grotius' theory but focussed on the right to property. Locke justified a right to property by arguing that the fruits of one's labour were one's own.[126] He suggested that we obtain a right to property because of the labour we invest in it and that this right allows us the freedom to do with the property what we will.[127]

Locke's theory was satisfactory up to the eighteenth century. However as rights became more personal, and as individualism and liberalism grew, a new justification for private property emerged. The new justification came from the German philosopher Immanuel Kant who argued that private property was an

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123 Grotius *The Jurisprudence of Holland I* 2-3. See also Kelly *A Short History of Western Legal Theory* 228.

124 Mahoney *The Challenge of Human Rights* 7.

125 Grotius *The Jurisprudence of Holland I* 2-3. See also Kelly *A Short History of Western Legal Theory* 229.

126 Locke *Two Treatise of Civil Government* 138. See also Kelly *A Short History of Western Legal Theory* 230.

127 Locke *Two Treatise of Civil Government* 138. See also Magee *The Story of Philosophy* 108.

institution necessitated by practical reason.[128] Kant suggests that the choice to acquire something as one's own and the obligation on others to refrain from using the objects of our possession is a rule of practical reason.[129]

Kant provided a new foundation for knowledge, which had been Descartes original concern. Descartes had proposed that reason provided a foundation for knowledge. Kant however realised that we cannot form any conception of the external world without using experience and thought which are subject dependent. Experience and thought Kant believed could not be trusted. Kant realised that the causal connection between the experiment and the observation could not be validated either empirically or logically. Kant knew that experimentation and logic cannot be the only bases for reliable knowledge.[130] In the process of creating a new theory of knowledge Kant redefined what it meant to be a rational human being.[131]

Kant argued that human beings are not only physical bodies.[132] Although it appears as if our bodies are controlled by the empirical world Kant asserts that there must be some aspect of our actions that is free, some aspect which is not controlled by the natural world.[133] Kant makes this argument because as human beings we have moral concepts and categories. As human beings we are able to make moral decisions such as the choice between right and wrong or ought and ought not.[134] As it is possible for us to choose our actions then there must be some part of us as human beings which is not controlled

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128 Kelly *A Short History of Western Legal Theory* 292. See also Magee *Confessions of a Philosopher* 181.

129 Kant *Groundwork of the Metaphysic of Morals* 62 - 64.

130 Magee *Confessions of a Philosopher* 178 – 181.

131 Solomon *Continental Philosophy Since 1750* 26.

132 Magee *Confessions of a Philosopher* 192.

133 Magee *Confessions of a Philosopher* 193.

134 Magee *Confessions of a Philosopher* 192.

by the natural world or subject to scientific laws.[135] If human being's choices were only subject to scientific laws then they would, in fact, have no choice.

Thus Kant argued that the part of a human being which exercises freedom of choice is not part of the empirical world. This freedom or moral autonomy gives human beings an absolute value; it requires that human beings always be considered as ends and never as a means to an end.[136]

Kant claimed that this moral autonomy meant that human beings have the capacity for rationality and the capacity to generate and obey their own laws.[137] And it is this ability to use their reason to make moral laws and to follow these laws that makes human beings unique.[138] Human beings do not get their moral laws from others but instead find them within themselves.[139] For Kant human beings became the source of natural law. [140]

Kant then suggests that a legal system is created to protect this moral autonomy that human beings have.[141] The legal system ensures that each human being has an external sphere in which their freedom, their autonomy, is protected from interference by others. From this idea rights are conceived as a negative moral space, protected by law, within which a person can realize and develop their individual moral freedom.[142] For Kant the first right is the 'independence from being constrained by another's choice'.[143] This first

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135 Magee *Confessions of a Philosopher* 193.

136 Kant *Groundwork of the Metaphysic of Morals* 98 -99. See also Goodman (ed) *What is a Person?* 1.

137 Cosculleula *The Ethics of Suicide* 36.

138 Mahoney *The Challenge of Human Rights* 34.

139 Lakoff and Johnson *Philosophy in the Flesh* 418.

140 Atkins (ed) *Self and Subjectivity* 47.

141 Fletcher "Law and morality: a Kantian perspective" 1987 (1-4) 535.

142 Van Der Walt "Tradition on trial" (11) (1) *SAJHR* 177-178.

143 Kant *Groundwork of the Metaphysic of Morals* 30.

right allows for the creation of other rights.[144] Kant saw legal rules as a method for prescribing the way in which the free wills of individuals could coexist.[145]

Kant argues further that ownership is acquired by the transcendental directing of an individual will upon a given object. A person needs to have an external sphere in which their moral autonomy, their freedom, can be expressed, and thus to create this external sphere ownership is required. Kant saw ownership as being the most significant way in which the human will can realise and objectify itself.[146] Thus a new justification for ownership is provided by the human will.

Kant's justification was furthered by Georg Hegel who reasoned that private property was an, 'indispensible condition of human personality'.[147] Hegel put forward that property allowed human beings to be independent and free.[148] He suggested that a human being needs to have an external sphere, provided by property, in order to exist.[149] Hegel's idea of a person was as a unit of free will or autonomy which had no concrete existence until there was an external world to enact such will upon.[150] Property provides a social context in which a human being can be himself.[151] Property allowed an individual to define

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144 Buonamano *A Genealogy of Subjective Rights* 223.

145 Kant *Groundwork of the Metaphysic of Morals* 33. See also Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 33.

146 Kroeze *Between Conceptualism and Constitutionalism: Private-Law and Constitutional Perspectives on Property* 34.

147 Hegel *Elements of the Philosophy of Right* 73 -83. See also Kelly *A Short History of Western Legal Theory* 334.

148 Carter *The Philosophical Foundations of Property Rights* 90.

149 Hegel *Elements of the Philosophy of Right* 73.

150 Radin Margaret Jane "Property and personhood" 1982 (34) (5) *Stanford Law Review* 972.

151 Garnsey *Thinking About Property* 150.

himself as separate from others.[152] Thus by the early nineteenth century property had become an essential aspect to personality.[153]

3.4.4 Conclusion

Thus the justification of private property had changed from the social order, to religious theology, to the rationality of man. Private property is now considered to be an expression of the individual and directly linked to the individual's will.

What occurred during the Renaissance and the Enlightenment had massive consequences for how people viewed themselves. No longer did people see themselves as responsible to and for their superiors, rather they considered themselves as important as individuals. People's sense of responsibility to themselves and the property under their control changed.

The general economic trend during the Renaissance and the Enlightenment periods was away from feudalism and towards capitalism. Trade, industry and the means of production started to become privately owned. The accumulation of private wealth, specifically of the upper classes, became more acceptable and more pronounced. The development of property rights assisted capitalism to attain its full potential.[154] The creation of property rights allowed for the 'instruments and appliances, structures and stocks of goods with which production is carried on',[155] to be under the ownership of individuals.

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152 Garnsey *Thinking About Property* 151.

153 Carter *The Philosophical Foundations of Property Rights* 90.

154 Seldon *Capitalism: A Condensed Version* 23.

155 Dobb *Capitalism Yesterday and Today* 5.

3.5 Reformation

Another important aspect in the move towards capitalism was the Reformation. The Reformation began in 1517 when Martin Luther challenged the papacy about the sale of indulgences.[156] The Reformation was a reaction to the Catholic Pope's abuse of power, the corrupt clergy and the deception of the common people by the Catholic Church. [157]

The essential feature of what became known as Protestantism is that the individual is given sole responsibility for their own salvation rather than an individual's salvation only being possible through the Catholic Church. Protestantism proposed that an individual's salvation is justified by their faith alone rather than by their works.[158] Thus whether people were virtuous or evil, whether they were selfless or greedy became irrelevant to a person's salvation. Instead a person's salvation was determined by their belief and faith in God.

The Reformation challenged the early Christian paternalist ethic which condemned greed, acquisition and the desire of wealth.[159] Instead the Protestant belief encouraged a self-disciplined life and encouraged people to practice the occupation which, they claimed, God called people to perform.[160] It also fostered a belief that the salvation of an individual would be visible in an individual's success on earth. This is apparent in the adage, 'God helps those who help themselves'.[161] These new ideas were supported by a dislike of selfish pleasure and frivolous spending, which encouraged people to save and accumulate private wealth. Protestantism encouraged people to practice their chosen (or God given) profession. It also encouraged and allowed

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156 Davis (ed) *The Origins of Modern Freedom in the West* 221.

157 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 35.

158 Ishay *The History of Human Rights* 70.

159 Hunt *Property and Prophets* 31.

160 Fulcher *Capitalism: A Very Short Introduction* 35.

161 Kelly *A Short History of Western Legal Theory* 168.

people to become prosperous from such professions as this was seen as a sign of God's approval. At the same time Protestantism discouraged the enjoyment of such prosperity. Therefore Protestants were encouraged to accumulate wealth but not to spend it. Thus the pursuit of commercial success became acceptable. The accumulation and the ownership of wealth were no longer frowned upon in society.[162]

The emerging capitalists of the sixteenth century needed to be free from the moral opposition coming from the Catholic Church.[163] It was here that Protestantism played a major role. Protestantism freed the emerging capitalists from the condemnation of the Catholic Church and paved the way for the accumulation of wealth and capital. [164] The value that Protestantism placed on performing one's work efficiently and successfully promoted economic labour and expansion.[165]

This change in viewpoint promoted a new interest in individual choices and rights.[166] Luther's doctrine of Christian liberty helped to promote freedom as a vital value of human existence.[167] The ideas of individualism and rights created an economic vitality and promoted the accumulation of wealth.[168] This led to a growth in trade and commerce[169] and created a strong interest in property rights.[170]

The Reformation also had a considerable influence on the doctrine of *laissez-faire*. *Laissez-faire,* which literally means 'let do', became the slogan of economic liberalism. The belief that moral and economic progress could only

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162 Tarnas *The Passion of the Western Mind* 246.

163 Hunt *Property and Prophets* 32.

164 Hunt *Property and Prophets* 32.

165 Hunt *Property and Prophets* 33.

166 Ishay *The History of Human Rights* 70.

167 Davis (ed) *The Origins of Modern Freedom in the West* 222.

168 Fulcher *Capitalism: A Very Short Introduction* 35.

169 Rider *An Introduction to Economic History* 89.

170 Kelly *A Short History of Western Legal Theory* 168.

come from an individual's self sacrifice and self discipline transformed into the concept of *laissez-faire*.[171]

The concept of *laissez-faire* promoted the idea that if every man were allowed to pursue his own self interest, then society would benefit from the increased prosperity.[172] This was also influenced by the individualist ideals of John Locke and David Hume,[173] who proposed that if people are free from government intervention to pursue their own ends they are more likely to be prosperous and that this would prevent discord in society and the economy.[174] Thus, especially in Britain the policy of *laissez-faire* was seen as being a natural expression of liberty and harmony.[175] By the early twentieth century this policy of no state intervention in economic affairs became widely accepted.

The Reformation combined with the ideas of the Renaissance and Enlightenment periods allowed for and promoted the accumulation of wealth under the ownership of the minority. It created an environment in which it was more acceptable and set the stage for the massive changes that occurred in society during the Industrial Revolution.

3.6 Industrial Revolution

By the sixteenth century the population had recovered from the effects of the plague, commerce started to grow dramatically and there was a greater need for manufactured goods. The intellectual development of the sixteenth century also led to new scientific advancements.[176]

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171 Chapman and Chambers *The Beginnings of Industrial Britain* 21.

172 Seddon *Modern Economic History* 3.

173 Hume *A Treatise of Human Nature* 228-229

174 Berend *An Economic History of Twentieth-Century Europe* 13.

175 Berend *An Economic History of Twentieth-Century Europe* 15.

176 Hunt *Property and Prophets* 20.

From the fifteenth and sixteenth centuries onwards there were important advances in transport, energy, the production of textiles and other consumer goods, metalwork and agriculture.[177] The advancements made in navigation, created a greater availability of raw materials and introduced better ways to use the raw materials. There was development in all sectors of the economy which brought about a rise in production.[178] The improvements and changes in technology allowed for the performance of tasks that had taken far more time in the pre-industrial period or that may not have been performed at all.[179] These advancements were very influential in the transition to capitalism.[180]

Due to the technological advances (especially in the area of medical science) there was an increase in the population.[181] The rise in population created a greater demand for manufactured goods and raw materials. This resulted in the 'putting out system' whereby capitalists owned the goods through all the stages of production. The capitalist owned the raw materials and the products manufactured from such raw materials. The craftsman or worker no longer owned the finished product and could no longer sell the finished product to earn a living. Instead of selling a finished product the craftsman sold his talent or abilities in the form of labour to the capitalist.[182] The craftsman now earned his living through wage work.

The fact that the capitalist could own the product throughout all stages of production was as a result of the changing ideologies. The changing ideologies were also as a result of a need for the justification of private property that came from the emerging capitalists. Such justification was provided by the Enlightenment philosophers. It is suggested that the changing ideologies may have been self-serving.

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177 Vaizey *Capitalism and Socialism: A History of Industrial Growth* 25.

178 Pawson *The Early Industrial Revolution* 13.

179 Cameron *A Concise Economic History of the World* 165.

180 Hunt *Property and Prophets* 20.

181 Sherman *How Society Makes Itself* 64.

182 Hunt *Property and Prophets* 16.

As technology improved there was rapid development of factories and equipment.[183] The economy came to be dominated by mass-industry and overseas trade.[184] Production no longer occurred in the home of the craftsman but rather occurred in factories. Production stopped being an individual venture and became a team process. Production no longer occurred by hand but rather became largely produced by tools and machines.[185] This created a greater market and demand for manufactured items.

From the middle of the nineteenth century capitalism grew to become the dominant form of production throughout the world.[186] And today the majority of capital and the means of production are owned by the minority.

However despite these advances in society, the divisions in class became even more apparent during the Industrial Revolution. The differences between landless wage earners and capital owning entrepreneurs became increasingly significant.[187] The methods by which people earned their livelihoods had changed, and the landless became progressively more dependent on employment.[188] The division between landed and landless and the consequent dependence on wage earning created an urban middle working class of people.[189]

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183 Sherman *How Society Makes Itself* 64.

184 Pawson *The Early Industrial Revolution* 13.

185 Dobb *Capitalism Yesterday and Today* 19.

186 Sternberg *Capitalism and Socialism on Trial* 19.

187 Hilton “Capitalism – What’s in a name?” in Sweezy et al *The Transition from Feudalism to Capitalism 145.*

188 Bowles et al (ed) *Understanding Capitalism* 19.

189 Pawson *The Early Industrial Revolution* 14.

3.7 Conclusion

The development of capitalism arose from a change in the structure of society, a change in the way human beings viewed themselves and a change in the views regarding the ownership of private property. The result has been that the majority of wealth and the control of the means of production are now owned by the minority.

4 Patriarchy

4.1 Introduction

Patriarchy generally describes male domination. It concerns the power relationships by which men dominate women and the systems which make women subordinate to men. Patriarchy is founded by the ideology that women are inferior to men.

The subordination of women occurs in different forms in all aspects of life. It occurs within the family, within the work environment and in the social environment. The norms and practices which define men as superior and women as inferior are present in our family lives, social lives, religious lives, laws, schools, books, media and work environments. Throughout history men have been identified with having a higher value as a human being than women have.[1] Patriarchy creates the standard that male is normal and that the male point of view is the human point of view.[2]

Patriarchy creates and supports a system of male control, male dominance and male superiority. Each period of history, each social system is subject to patriarchy.[3] Patriarchy has created the institutionalised subordination and exploitation of women by men.[4] In most circumstances women form part of the system of patriarchy as they have internalised it.[5] Women have become integral to upholding and perpetuating the power of patriarchy. "The systematic disadvantaging of women has affected women's self-perception,

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1 Dodson Gray *Patriarchy as a Conceptual Trap* 22.

2 Dodson Gray *Patriarchy as a Conceptual Trap* 50. For further discussion of this see West "Jurisprudence and Gender" in Barnett (ed) Sou*rcebook on Feminist Jurisprudence* 227- 244.

3 Bhasin *What is Patriarchy?* 3 – 6.

4 Gordon *Transforming Capitalism and Patriarchy* 18.

5 Bhasin *What is Patriarchy?* 15.

their ability to conceptualize their own situation and their ability to conceive of societal solutions to improve it."[6]

Each period of history that is examined should be viewed as being affected by and subject to patriarchy.

As previously stated the enquiry into patriarchy will focus on women during the pre-Roman period, the Roman period and the Middle Ages. Then the study will focus on the Renaissance, the Enlightenment and the Reformation; and the Industrial Revolution.

4.2 Pre-Roman Women

It is suggested that long before the Roman period women were already subject to the control and domination of patriarchy. Friedrich Engels suggests that patriarchy occurred because of the domestication and propagating of animals, which was first serious division of labour between the sexes.[7] Engels suggests that from this division of labour arose the division of society into classes[8] and the inequality between the sexes.[9] When animals became domesticated it created a market for animals. Men, as the people responsible for the animals were able to participate in the market but women were excluded from participating in the market. From this very early stage women were excluded from the control of private property (which at this point in history was animals) and relegated to the domestic sphere.[10]

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6 Lerner *The Creation of Feminist Consciousness* 10.

7 Engels *The Origins of the Family Private Property and The State* 193.

8 Engels *The Origins of the Family Private Property and The State* 195. Engels also uses this argument for the establishment of private property.

9 Engels *The Origins of the Family Private Property and The State* 196.

10 Engels *Origins of the Family, Private Property and the State* 66 -70.

Engels suggests that the domestication of animals excluded women from production and restricted women to their domestic role.[11] Gerda Lerner also suggests that the development of agriculture during the Neolithic period led to the commodification of women's sexual and reproductive capacities. Women came to be seen as a resource for labour and accumulation. Lerner further argues that as a consequence of this women (and their sexual and reproductive capacities) came to be treated as a means of exchange.[12] Women could be bought or sold in marriage for the benefit of their families.[13] Pre-Roman society was structured in a manner whereby women were exchanged in marriage and whereby men had certain rights in women which women did not have in men.[14] Pre-Roman women, as a group, had less autonomy than men.[15] Women, at this early stage of history, were a resource which men could acquire.[16]

Thus even in the pre-Roman period woman became physically and, more importantly, psychologically subordinate to men.

There is another view which proposes that prior to patriarchy (or recorded history) the world was matriarchal. The argument suggests that prior to patriarchy women were respected. Women were the powerful gender in society and held the leading positions in society.[17] Friedrich Engels suggests that women, as the only certain parent of children, received respect, deference and tribute. He suggests that all the nations of antiquity were ruled by maternal law.[18]

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11 Engels *The Origins of the Family Private Property and The State* 196.

12 Lerner *The Creation of Patriarchy* 212.

13 Lerner *The Creation of Patriarchy* 213.

14 Lerner *The Creation of Patriarchy* 77.

15 Lerner *The Creation of Patriarchy* 77.

16 Lerner *The Creation of Patriarchy* 212.

17 Radford Ruether *Goddesses and the Divine Feminine* 3.

18 Engels *The Origins of the Family Private Property and The State* 14.

Whichever model is correct, whether patriarchy has been in existence since human beings have been in existence or whether there was a period of human history when women were considered the more important of the sexes cannot yet be decided. However, it is certain that by the Roman period patriarchy had taken hold.

4.3 Roman Women

As early as the tenth century BC Roman society was patriarchal. Roman domestic life, social life, political life and economic life was male orientated and male dominated.[19]

Under early Roman law a woman's role was restricted to the bearing of children and the management of the family household.[20] It was assumed that women wanted to be married and have children and thus women did not have the option of a career or a profession.[21]

Women in Roman society were valued for their roles as wives and mothers.[22] Women were considered to be at a physical disadvantage because of their lack of strength and because of their ability to bear children.[23] Roman society believed that the female sex was suited to domesticity.[24] Thus Roman women were (and consequently were also considered to be) less educated, less experienced, emotionally vulnerable and dependent on their male

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19 Arjava *Women and Law in Late Antiquity* 231.

20 Shelton *As the Romans Did* 288.

21 Clark *Women in Late Antiquity* 13.

22 Woolf (ed) *Cambridge Illustrated History of the Roman World* 115.

23 Clark *Women in Late Antiquity* 56.

24 Clark *Women in Late Antiquity* 94.

relatives.[25] These perceived weaknesses convinced Roman society into believing that women were intended to stay in the home.[26]

A Roman woman was expected to subject all of her own interests to those of the men in her life.[27] A Roman female was subject to the control of her *paterfamilias*. The *paterfamilias* could be her father, her oldest male relative, her husband or her husband's *paterfamilias.*[28] Roman women were not allowed to assume a public role.[29] Women were excluded from office and were not allowed to vote.[30]

Women in Roman times were also limited in terms of ownership of property. As previously stated ownership in Roman law is difficult to define, but it is generally thought that property was controlled by the *paterfamilias* (the male head of the family). The *paterfamilias* controlled the property on behalf of the family and he had a responsibility to control the property in the best interests of the family and the property. The property continually belonged to the family rather than the *paterfamilias*. When the *paterfamilias* died a new *paterfamilias* would take over his position and inherit the property on behalf of the family. Whilst there is little evidence of primogeniture in Roman law there are records of patrimonial estates remaining within a family line for several generations.[31] Thus the system of succession in Roman law was developed in such a way as to exclude women from the control of property.

The Roman marital regime also ensured that women were excluded from the control of property. When a woman married *cum manu* under Roman law she

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25 Clark *Women in Late Antiquity* 56.

26 Clark *Women in Late Antiquity* 94.

27 Shelton *As the Romans Did* 288.

28 Kaser *Roman Private Law* 75.

29 Arjava *Women and Law in Late Antiquity* 233. There have been exceptions to this rule, see Wethmar-Lemmer "The legal position of Roman woman: a dissenting perspective" in Fundamina 2006 174-184 in this regard.

30 Woolf (ed) *Cambridge Illustrated History of the Roman World* 114.

31 Muirhead *Historical Introduction to the Private Law of Rome* 45.

moved from the *potestas* of her father to the *potestas* of her husband (or her husband's *paterfamilias*). In early Roman law an *uxor in manu* (a wife who was married *in manu*) and the children of a *paterfamilias* were not allowed to own property at all.[32] Any property that a woman held before a marriage i*n manu* became the property of her new *paterfamilias*.[33]

A woman who married *sine manu* remained within the control of her original family and therefore under the *patria potestas* of her *paterfamilias*.[34] Thus any property she may have had remained under the control of her *paterfamilias*. The *cum manu* form of marriage became outdated in the post classical period, instead marriage *sine manu* became the norm.[35] This meant that a woman did not move into the control of her husband's family, instead she stayed within the *patria potestas* of her own *paterfamilias*. Whichever the form of marriage, it is clear that property always remained within the control of men.

It is generally agreed that the life expectancy in Roman times was between twenty to thirty years.[36] Usually females would be married by the age of sixteen or at least by their early twenties.[37] Thus it was highly probable that a woman would pass from the *patria potestas* of her father to the *manus* of her husband.

However, it was possible for a Roman woman to become *sui iuris* (independent).[38] This would happen if her *paterfamilias* died before she

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32 Kaser *Roman Private Law* 75.

33 Muirhead *Historical Introduction to the Private Law of Rome* 27.

34 Wethmar-Lemmer "The legal position of Roman women: a dissenting perspective" 2006 *Fundamina* 177.

35 Wethmar-Lemmer "The legal position of Roman women: a dissenting perspective" 2006 *Fundamina* 174.

36 Saller *Patriarchy, Property and Death in the Roman Family* 12.

37 Saller *Patriarchy, Property and Death in the Roman Family* 36.

38 It appears as if this proposal is very unlikely due to the shortage of women in Roman society, the age of marriage for Roman women and the life expectancy of Roman women. Herlihy "Life Expectancies for Women on the Middle Ages" in Morewedge (ed) *The Role of Women in the Middle Ages* 4 - 5.

married *in manu* or if she were emancipated. However a woman who was no longer under *patria potestas*, nor married *in manu* was still required in early Roman law to have a guardian.[39] This requirement was called *tutela mulierum.* The guardian would generally be her nearest agnatic male relative, unless another person was appointed on her behalf in the will of her deceased *paterfamilias*.[40] This provision ensured that should a woman come into the control of any property, she could be prevented from disposing of such property and that the property was kept intact for future male generations.[41] If a Roman woman came into the control of any property she could not marry, nor could she alienate any of her property, nor could she make a testament to dispose of it after her death without her guardian's consent.[42] Thus the property was hers in name only and the property was really under the control of her male guardian.[43] However by the post classical period this *tutela mulierum* had become ineffectual.[44]

By the mid first century AD the legal restrictions which had prevented women from participating in commercial activities had been removed or had become ineffective.[45] In matters of private law it was considered that women had achieved something near equality.[46]

However it is generally agreed that despite these changes the majority of Roman women were socially conditioned not to participate in commercial

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39 Kaser *Roman Private Law 83.*

40 Arjava *Women and Law in Late Antiquity* 112.

41 Arjava *Women and Law in Late Antiquity* 112.

42 Muirhead *Historical Introduction to the Private Law of Rome* 45.

43 Muirhead *Historical Introduction to the Private Law of Rome* 45.

44 Wethmar-Lemmer "The legal position of Roman woman: a dissenting perspective" 2006 *Fundamina* 174.

45 Van den Bergh "Roman women: sometimes equal and sometimes not" 2006 *Fundamina* 113.

46 Robinson "The status of women in Roman private law" 1987 *The Juridical Review* 143.

enterprises.[47] Women still played no part in government or in public law. Social conventions and economic circumstances meant that women were still subordinate to men.[48] Women were considered to belong to the private sphere of life and were expected to fulfil their natural role of submission and obedience.[49]

By the end of the Roman period patriarchy was already established as property was controlled by the *paterfamilias* and the social restrictions placed on women ensured that they had very little access to or control over property. The emphasis on women's domestic role and their lack of education meant that from the early beginnings of recorded history women were intellectually and economically disadvantaged and prohibited from participating.

Towards the end of the Western Roman Empire the growing belief in Christianity seemed to offer women an escape from patriarchal Roman society.

4.4 Christian Women

Towards the end of the Roman Empire Christianity became the emerging religion of the era. Women were drawn to the new religion because they were able to share in the activities and ideals of the new Christian religion.[50]

The teachings of Jesus focused on removing social discrimination. His teachings challenged the arrangement of the biological family and the arrangement of the patriarchal marriage.[51] Jesus' teachings challenged

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47 Wethmar-Lemmer "The legal position of Roman woman: A dissenting perspective" 2006 *Fundamina* 154.

48 Robinson "The status of women in Roman private law" 1987 *The Juridical Review* 143.

49 Malone *Women and Christianity Vol I: The First Thousand Years* 65.

50 Elshtain *Public Man, Private Woman* 61.

51 Malone *Women and Christianity Vol I: The First Thousand Years* 65.

women's subordination in society and within the family. This had significance for women as it offered women freedoms which they had not previously enjoyed.[52]

The characteristics most associated with women, such as child bearing, mercy and compassion, were celebrated in the early Christian religion.[53] However Jesus also offered women the option of not getting married.[54] Early Christianity allowed women to become involved in the public sphere.[55] Every person was equal in the eyes of the Christian God.[56] The early Christian religion allowed for the creation of a new society in which men and women were equals.[57]

The writings of Paul however changed these ideas. Paul reconstructed the teachings of Jesus so that the gender and social implications were lost. Paul reverted to the hierarchal order of creation wherein men were supreme and women subordinate.[58]

As Christianity grew larger it became more conservative and the Roman society's domestic role of women was revived.[59] God was the head of Christ, Christ the head of man and man the head of woman.[60] This (conveniently) supported the Church's ideology as God was the head of the Church, the Church the head of men and men the head of the family.

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52 Radford Ruether *Women and Redemption* 21.

53 Elshtain *Public Man, Private Woman* 61.

54 Malone *Women and Christianity Vol I: The First Thousand Years* 66.

55 Boulding *The Underside of History* 340.

56 Elshtain *Public Man, Private Woman* 62.

57 Malone *Women and Christianity Vol I: The First Thousand Years* 67. See also Boulding *The Underside of History* 340.

58 Radford Ruether *Women and Redemption* 36.

59 Boulding *The Underside of History* 340.

60 Radford Ruether *Women and Redemption* 36.

This change in Christianity was continued and extended in the generations after Paul. In the first two centuries AD the ecclesiastical reforms which were implemented ensured that women had little role to play in Christianity.[61] By the first half of the second century women were prohibited from teaching in the Church or holding any authority in the church.[62]

These reforms started to have a social influence on the family hierarchy. Women were again required to submit to their husbands.[63] As in early Roman times, women became defined by their bodies and its utility. Women became bound by a number of constraints and were rarely seen as individuals in a legal, moral or economic sense.[64]

Although essentially Christian teaching was that everyone is equal, regardless of gender, in the eyes of God, the reality was that women were not treated as equals.[65] The Church regarded women as being the descendants of Eve and therefore as being intellectually and emotionally inferior to men. This religious argument allowed for women to be prevented from participating fully in the Military and the Guilds. The argument also had the dreadful consequence that women did not need to be educated to the same level as men.[66]

However the promise of equality between the sexes in the afterlife was still attractive to women and thus the religion was still popular and it continued to grow throughout the Middle Ages.[67]

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61 Malone *Women and Christianity Vol II: From 1000 to the Reformation* 22 – 23.

62 Radford Ruether *Women and Redemption* 40.

63 Radford Ruether *Women and Redemption* 40.

64 Malone *Women and Christianity Vol II: From 1000 to the Reformation* 24-25.

65 Brudage “The paradox of sexual equality in the early Middle Ages” in Mathisen and Sivan (eds) *Shifting Frontiers in Late Antiquity* 256.

66 Erler and Kowalski “Introduction” in Erler and Kowalski (eds) Women *and Power in the Middle Ages* 1.

67 Schulte von Kessel “Virgins and mothers between heaven and earth” in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 147.

4.5 Feudal Women

Pre-feudal society following Roman society was unquestionably biased towards men. Originally in the feudal period a person's standing in society was decided by the amount of land they possessed and land possession was related to military service.[68] However as women could not perform military service they were excluded from the feudal system. The connection between land-holding and military service meant that women were further prevented from landholding.[69]

Feudal estates were usually transferred from one male heir to the next.[70] So women were continuously prevented from possessing and controlling property. If the family had no sons then it was possible that a daughter would succeed to the estate.[71] However women were still subject to the guardianship of men and therefore the succession was in name only. A woman (who was not married) who had succeeded to property was usually under the guardianship of her nearest male relative, or of her lord or king.[72] Thus the control of property still lay in the hands of men.

Marriage in medieval society also upheld patriarchal thinking. Women were encouraged to marry and it was uncommon for a woman to be unmarried.[73] When a woman married she would pass from the control of her father to the control of her husband, just as women had in the Roman period. Feudal women were expected to subordinate themselves to fathers or to their husbands, in all areas of their lives.[74] Should a woman have obtained the control of some property, upon the conclusion of a marriage such property

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68 Harksen *Women in the Middle Ages* 9.

69 Gies *Women in the Middle Ages* 27.

70 Gies *Women in the Middle Ages* 27.

71 Harksen *Women in the Middle Ages* 9.

72 Gies *Women in the Middle Ages* 29.

73 Shanar *The Fourth Estate* 65.

74 Shanar *The Fourth Estate* 14.

would pass from the control of the wife to the control of her husband. This included any land and the income arising from such land. The only restriction placed upon the husband was that he could not dispose of the land without his wife's consent. However, this restriction was easily circumvented.[75] If a woman succeeded to any property from her family, such property was regarded as being jointly shared by the woman and her husband and the husband bore the responsibility of managing the joint assets.[76] Women were also not allowed to dispose of their property via a will and her property would pass automatically to her surviving male heir.[77]

A woman's economic influence in medieval society was restricted to the household. Women were only given control over small sums of money for the running of the household.[78] This limited power was given to women more for convenience sake than because women were allowed to hold authority in feudal society.[79] It was convenient that women were responsible for baking, brewing, caring for the yard animals and the cultivation of the land immediately surrounding the homestead.[80] As women were only given control over small sums of money they were prevented from any involvement in the market. Men were relieved of all the domestic responsibilities. This meant that men were able to perform tasks outside the household.

During the feudal period women still had no participation in government.[81] Women could not represent themselves in court and they had no legal

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75 Morris & Nott *All My Worldly Goods* 22.

76 Shanar *The Fourth Estate* 91. Any assets owned by the husband prior to the marriage were considered to be the husband's property, not joint property.

77 Morris & Nott *All My Worldly Goods* 22 - 23.

78 Harksen *Women in the Middle Ages* 10.

79 Bennett "Public power and authority in the medieval English countryside" in Erler and Kowalski (eds) *Women and Power in the Middle Ages* 28.

80 "Life Expectancies for women in the Middle Ages" in Morewedge (ed) *The Role of Women in the Middle Ages* 10.

81 Shanar *The Fourth Estate* 11.

capacity.[82] This restricted women from forming economic acquaintances and from acquiring political influence.[83] Women could be included within the guilds, but this was more of a preventative measure, ensuring they did not compete in the market.[84] Thus women's participation in the guilds was nominal.

Some writers have argued that women did enjoy a level of social, political and economic equality during the feudal period. Indeed guardianship of women died out towards then end of the Middle Ages. Some women were able to hold land and to represent themselves in court.[85] However this level of equality was conditional to the unwritten assumption that women would not abuse this power.[86]

Women's continued lack of or lesser education, the lack of control of property and their continued limitation to the domestic sphere ensured that women continued to be subordinate to men.

4.6 Women of the Renaissance and the Enlightenment

The Renaissance period saw many drastic changes in Western Europe. Colonies were established around the world, the fragmented political system that characterised feudalism became centralised monarchies, economies saw large scale changes as merchant capitalism grew, manufacturing expanded, populations grew and more people moved into towns and cities.[87] The Renaissance experienced a wealth of artists, architects and men of scientific

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82 Harksen *Women in the Middle Ages* 10.

83 Bennett "Public power and authority in the medieval English countryside" in Erler and Kowalski (eds) *Women and Power in the Middle Ages* 25.

84 Harksen *Women in the Middle Ages* 10

85 Radford Ruether *Women and Redemption* 114.

86 Jordan *Renaissance Feminism* 15.

87 Hardwick "Did gender have a renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 343.

and literary brilliance, however it was also a period of religious and political turbulence.[88]

The codification of procedures regulating commerce, trade and market relations restricted the activities of women in ways which they had not been during the feudal period.[89] It appears that over the course of the Renaissance women had gradually less legal control over property.[90] The revival of Roman law in the Renaissance ensured that women were again understood as being incapable. Women were again subjected to the control of a male guardian, they were prevented from succeeding to land (this had a limiting effect on their already restricted political roles) and women were still excluded from voting or holding political office.[91]

During the Renaissance, scientists and writers produced an energetic intellectual environment.[92] Scientists returned to the scientific methods of observation and experimentation. This laid the groundwork for Copernicus's astronomical discoveries and the scientific revolution.[93] The scientific revolution had dramatic consequences for man's position in society.

The new knowledge that came with the scientific revolution brought about an increase in self-esteem and recognition of the dignity of man. The Renaissance period saw an increased interest in the individuality of human beings.[94] The individual became important as an individual, not because they

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88 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 11.

89 Jordan "Renaissance women defending women: arguments against patriarchy" in Marotti (ed) *Italian Women Writers from the Renaissance to the Present* 56.

90 Jordan *Renaissance Feminism* 16.

91 Radford Ruether *Women and Redemption* 114.

92 Hardwick "Did gender have a renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 343.

93 Tanner *The Renaissance and The Reformation* 24.

94 Tanner *The Renaissance and The Reformation* 23.

were a member of a guild or corporation or because of their status in society.[95] However these changes were limited to the male human being.[96]

The renewed interest in science led to a new understanding of biology and thus a new understanding of the social and political formulations of gender roles.[97] A correlation was drawn between men's and women's different biologies and their, "naturally" different roles and abilities. Increasingly gender became a key determinant of power.[98]

Because of the renewed interest in science and man's position in society philosophers started questioning man's existence, and as a result forming a system of human rights. However their discourse concerned men as opposed to women.[99] Most philosophers assumed that if women had the ability to reason then such ability was more concrete and less abstract than man's ability to reason[100] and thus inferior.[101] Generally though, women's inferiority was justified on the natural ground of their sex.[102] Most writers maintained physical and intellectual distinctions between the sexes.[103] Some writers' theories, such as Descartes', were accessible to men and women. Descartes thought that both men and women had the capacity for reason and the

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95 Tanner *The Renaissance and The Reformation* 25.

96 Boulding *The Underside of History* 526.

97 Hardwick "Did gender have a renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 352.

98 Hardwick "Did gender have a renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 353.

99 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 315.

100 Zemon Davis and Farge (eds) "What are women anyway?" in *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 258.

101 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 329.

102 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 326.

103 Hannam *Feminism* 18.

potential to exercise it. However the reality of the lives of women prevented women from realising this potential.[104]

The Renaissance era did produce some literature in defence of women. A debate was initiated by Christine de Pizan around 1400 AD. Christine de Pizan was France's first professional female author. De Pizan's family circumstances forced her to write in order to support herself and her family. As a female writer in the fifteenth century it was first necessary for de Pizan to prove that women could and should write. This required de Pizan to challenge centuries of philosophical and theological thought regarding women.[105] De Pizan argued that women's faults come from their secondary status and lack of education as opposed to their inherent natures.[106]

However despite de Pizan's argument, women were generally thought to be inferior. Because of this women were excluded from the arguments for human rights and therefore also excluded from the arguments for political rights.[107]

This assumed inferiority justified the continued substandard education of women.[108] It was argued that as women had an inferior ability to reason they should not be burdened with other concerns and therefore their role should be limited to the domestic sphere.[109] Their education should only be carried out

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104 Marshall *Humanity, Freedom and Feminism* 22.

105 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 11.

106 Radford Ruether *Women and Redemption* 127.

107 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 340. It is submitted that there were exceptions to this.

108 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 329.

109 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 332.

to the extent that they are required to fulfil their natural duties[110] of wife and mother.[111]

Thus in Renaissance Europe the education of women was minimal and it was used to reinforce societal and religious restraints on their behaviour. From the sixteenth century onwards much of the focus on gaining equality for women was on ensuring access to education for women.[112] Prior to the seventeenth century women only received above standard education if they were a daughter of wealth or rank, a daughter in a family which had no sons, or if her father had enlightened ideas about female education.[113]

By the seventeenth century, discussion regarding the equality of the sexes had become common among educated Europeans.[114] Seventeenth century feminism questioned the idea of a fixed nature for women and men.[115] The idea that gender differences might be a result of social and cultural conditioning rather than biological reasons allowed for the questioning of the traditional roles of men and women.[116] However these liberal arguments for equality were not intended to change the culture of male domination merely to allow for women to participate in that culture.[117]

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110 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 329.

111 Crampe-Casnabet "A sampling of eighteenth century philosophy" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 337.

112 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 13.

113 Lerner *The Creation of Feminist Consciousness* 28.

114 Stuurman "The deconstruction of gender: Seventeenth century feminism and modern equality" in Knott and Taylor (eds) *Women, Gender and Enlightenment* 371.

115 Stuurman "The deconstruction of gender: Seventeenth century feminism and modern equality" in Knott and Taylor (eds) *Women, Gender and Enlightenment* 384.

116 Rogers "Learning to be good girls and women" in Simonton (ed) *The Routledge History of Women in Europe since 1700* 94.

117 Stuurman "The deconstruction of gender: Seventeenth century feminism and modern equality" in Knott and Taylor (eds) *Women, Gender and Enlightenment* 385.

The Renaissance may not have changed the reality of women living during that period, but the ideas of Enlightenment philosophers about, 'tolerance, reason, progress, natural rights, freedom, education and personal fulfilment, laid the groundwork for the feminist revolution.[118]

Ideas about individuality and human rights led to an analysis of the role of women and the promotion of their equal rights. Importantly education for women started to become more popular.[119]

4.7 Reformation Women

The scientific revolution and the spirit of enquiry which began in the Renaissance allowed more serious questions concerning religious and moral life to be asked.[120] This resulted in the Renaissance leading to the Reformation.

Protestant Reformers originally seemed to offer women more opportunities and status than the medieval Catholic Church had.[121] Protestants emphasized the spiritual equality between men and women. Within the new religion some women found social recognition and personal autonomy. For a brief period some women were able to challenge the stereotypical assumptions about women.[122] However the pressure to conform to the existing norms of society prevented women from gaining too much equality.[123]

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118 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 206.

119 Phillips *The Ascent of Woman* 1.

120 Tanner *The Renaissance and The Reformation* 25.

121 Hardwick "Did gender have a Renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 348.

122 Marshall (ed) *Women in Reformation and Counter-Reformation Europe* 7.

123 Schulte von Kessel "Virgins and mothers between heaven and earth" in Davis and Farge (eds) *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 147.

The protestant faith placed extreme importance on the household and on family life. This confirmed women's subordinate position within the Protestant religion. The only acceptable role for a Protestant woman was that of wife and mother.[124] Women were pressured into getting married. The role of wife came to be seen as a woman's highest calling. Protestants required women to serve God by getting married and fulfilling the role of wife.[125] Thus, whilst Protestants praised women and their virtues they still ensured that women were subordinate to men.[126]

The Protestant revolt against the imposed celibacy of the Catholic Church meant that monasteries and convents were closed down.[127] This meant that some women lost the option of a religious vocation.[128] No longer was the role of Nun available to women. The closing of convents also greatly decreased the educational opportunities for women. However, the protestant emphasis on bible reading created a need for the education of both males and females.[129] Protestants did open schools which allowed for the education of females, however, the education was limited to the reading of the bible, the teaching of the catechism and basic literacy. Protestant education also focused on a female's domestic duties. [130]

At the same time as the Protestant Reformation Catholics also began to emphasize the importance of domestic life. Both Protestant and Catholic

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124 Hardwick "Did gender have a Renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 348.

125 Marshall (ed) *Women in Reformation and Counter-Reformation Europe* 13.

126 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 57.

127 Malone *Women and Christianity Vol III: From Reformation to the 21st Century* 51.

128 Radford Ruether *Women and Redemption* 116.

129 Hardwick "Did gender have a Renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 348.

130 Radford Ruether *Women and Redemption* 116.

religions started to limit the definition of a good wife, so that women were increasingly limited to the domestic arena.[131]

The hierarchal society continued to be dominant. The well-ordered family dominated by the father had become the model for the well-ordered state and in turn the well-ordered state reinforced the hierarchy within the family.[132]

However the Protestant Reformation also initiated a multitude of extremist religions which went even further in the battle for equality of the sexes. These religions sometimes advocated free love and complete freedom for females. Some attacked the patriarchal institution of marriage. Some of the new religions allowed women to take leading roles within their organisations.[133]

The period of Renaissance and Reformation had allowed the role and nature of women to be questioned and many philosophers had given attention to the role of women, marriage and the family. However due to their lack of education few women had been able to participate in these debates. The reformation did create some opportunities for change but they were rare. Nonetheless the Enlightenment had provided women with the means to begin the debate.[134]

4.8 Industrial Revolution Women

At the beginning of the nineteenth century women did not have the right to vote, women could not run for election or hold any public office, they could not be a member of a political organisation or go to political meetings. Women were constrained economically. Women could not participate in trade, open a

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131 Hardwick "Did gender have a Renaissance" in Meade and Wiesner-Hanks (eds) *A Companion to Gender History* 348.

132 Davis and Farge (eds) "What are women anyway?" in *A History of Women in the West III Renaissance and Enlightenment Paradoxes* 258.

133 Evans *The Feminists* 17.

134 Evans *The Feminists* 13.

business, start a profession, open a bank account or obtain credit in their own names. They could not own property, any property they inherited[135] passed to their husbands on marriage. Women remained under the power and control of their father until they married and when they did such power and control passed to their husbands. Women were still seen as minors in terms of the law; they were not considered to be legal persons and could not enter into contracts on their own. Women were still discriminated against in terms of inferior education. The sanctity of the family and the cult of domesticity were regarded as fundamental social values in the nineteenth century. [136]

Under the feudal regime, though a woman was subordinate, her work still had an economic value for the family. This contribution had given women a certain position and a limited power within the family.[137] However with urbanization and industrialisation work started to be performed outside the family home. This meant that women were increasingly excluded from the world of business.[138] When women had children they became even more economically dependent on men as they were further prevented from participating in the economy because of their child rearing duties.[139] Their roles became limited to the raising of children and the performance of domestic work. When women did work their employment was seen as marginal. This was used as a justification for lower wages for women which, in turn, reinforced the belief that a women's place was in the home.[140]

The Industrial Revolution saw a mass urbanisation throughout Europe (and America). This led to massive changes in the social structure of society and

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135 Inheritance is now preferred over succession as subjective rights now exist. Thus the use of the word, 'inherited'.

136 Evans *The Feminists* 22.

137 Nye *Feminist Theory and the Philosophies of Man* 10.

138 Nye *Feminist Theory and the Philosophies of Man* 10.

139 Rowbotham *Women in Movement* 37.

140 Hannam *Feminism* 23.

particularly changes in the structure of the family.[141] Capitalism replaced human labour with machines.[142] Certain family members (specifically the housewife) became robbed of their productive function as certain goods (such as food and clothes) started to be purchased outside of the family. This meant that certain family members were unproductive and had to find new ways to support themselves and their dependent family members.[143]

As a woman was seen as destined to get married and have children, it implied that only young unmarried women could participate in the workplace. This also implied that as these young women had no family responsibilities they only needed to be paid enough to support themselves. This created a difference in the value placed on men and women's work. It also implied that as a woman's working life was limited to the time until she got married, it was unnecessary to train her for a lifetime's work.[144]

By the 1830's the requirements of industrialising societies significantly changed the importance attached to girl's training and learning possibilities.[145] The professionalization of traditionally female jobs also limited women's opportunities in the work place.[146] Women began to want to join the professions, in order to earn an income which was of a standing corresponding to their family's social status.[147]

The separation of work and home meant that women of the ruling classes had free time in which they could become involved in religious, charitable and

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141 Evans *The Feminists* 23.

142 Allendorf *Women in Socialist Society* 21.

143 Evans *The Feminists* 24 -25.

144 O'Brien and Quinalt (eds) *The Industrial Revolution and British Society* 32.

145 Rogers "Learning to be good girls and women" in Simonton (ed) *The Routledge History of Women in Europe since 1700* 94.

146 Evans *The Feminists* 25.

147 Evans *The Feminists* 24, 30.

social organisations.[148] Some women became involved in the social problems that arose during the industrial revolution. Their inability to help in these areas led them to become dissatisfied with their own powerlessness.[149] In the nineteenth century women started to organise in groups to combat their powerlessness and fight for the emancipation of women.[150]

In 1792 Mary Wollstonecraft published A *Vindication of the Rights of Women*, which argued for equal rights on the basis of reason and natural law.[151] Her argument was that a change in women's character and outlook would result in change in the social order. [152]

In 1851 John Stuart Mill published his book *Enfranchisement of Women*, which argued for women's equality and the right of female suffrage.[153] His book linked female emancipation firmly to the ideas of liberal individualism.

Early feminist groups were largely concerned with economic freedoms for women. Industrialisation had created a wealthy propertied class in society so ownership of property also became a feminist goal.[154]

The 1830's and 40's saw attempts to improve the education of girls and to find new forms of employment for women. In the 1880's British married women obtained the rights to their property and earnings (it no longer fell under the control of their husbands).[155] The Married Women's Property Acts of 1870[156]

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148 Banks *Faces of Feminism* 15.

149 Phillips *The Ascent of Woman* 34.

150 Evans *The Feminists* 13.

151 Banks *Faces of Feminism* 28.

152 Hannam *Feminism* 21.

153 Phillips *The Ascent of Woman* 47.

154 Evans *The Feminists* 34-35.

155 Banks *Faces of Feminism* 33-35.

156 Married Women's Property Act 1870.

and 1882[157] changed the marital property laws in Britain. From 1882 onwards a woman's property no longer passed to her husband at marriage. Married women had obtained the right to acquire and dispose of real and personal property.[158]

The fist half of the nineteenth century also saw the emergence of workers' rights. The working class began to see themselves as separate from their employers and as having separate needs from their employers. Workers also began to form a sense of community.[159] This sense of community combined with socialist ideals led to the development of trade unions. Women of the working class fought side by side with men against an overload of work. [160]

However giving women the right to acquire and dispose of property was an insufficient reform, as women did not enjoy or have access to the same level of wealth as men. Women brought less into a marriage and were not able to acquire as much during their marriage as their husbands. Women's wages were lower, they were restricted from certain forms of employment and their ability to earn wages was restricted by their family responsibilities.[161] Thus women were still dependent on men for their livelihoods.

This continued dependency led to the realisation that the primary feminist issue of the nineteenth century was the issue of suffrage. Women started to realise that if they achieved the vote they would then be able to correct injustices through legislation.[162] The claim for women's emancipation

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157 Married Women's Property Act 1882.

158 Morris and Nott *All My Worldly Goods* 29. This right was only achieved for South African women in1984 with the Matrimonial Property Act 88 of 1984. However this right was only achieved for those South African women married in terms of the civil law.

159 Merriman *A History of Modern Europe: from the Renaissance to the Present* 704.

160 Allendorf *Women in Socialist Society* 22.

161 Morris and Nott *All My Worldly Goods* 30 – 31.

162 Nye *Feminist Theory and the Philosophies of Man* 5 - 6.

developed as part of a much broader campaign, the abolition of slavery, advancing the rights of workers and the achievement of property reforms.[163]

The first country to recognise women's right to vote was New Zealand in 1893. In 1920 the USA congress passed the nineteenth amendment which recognised women's right to vote. In 1928 women in the United Kingdom achieved the same rights to vote as men. In South Africa white women achieved the vote in 1930 whereas women of colour only achieved the right to vote in 1994.

4.9 Conclusion

Having achieved some level of equality (such as the right to vote) was and still is not enough for women. As socialist feminists suggest there is a need to question the patriarchal structures which exist in society to subordinate women. The combined effect of capitalist patriarchy has ensured that women are subordinated in modern society in vast and various ways. In some forms of subordination women are complicit and in other forms of subordination they are not. There may even be forms of subordination of which women are as yet unaware. Achieving formal equality such as the right to vote does not ensure actual equality between men and women. The substantive reasons for women's inequality also have to be addressed.

"In virtually all existing cultures, women's work, though usually invisible to the male eye, sustains the economy and subsidizes the profits, leisure time and higher standard of living enjoyed by men, private corporations, and male-dominated governments. In spite of this, women live almost universally without the corresponding economic, political and social control over their lives that such a crucial role should mean".[164] Whilst it can be argued that women have achieved a degree of equality, the wealth that has been

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163 Hannam *Feminism* 28.

164 Leghorn and Parker *Woman's worth: sexual economics and the world of women* 3.

accumulated by women is not equivalent, or at least they have not gained the equivalent ownership of private property.[165] Therefore there can be no argument against the fact that women have been and still are excluded from the ownership of private property.

It is impossible to fully consider all the ways in which women are subordinated by capitalist patriarchy. As already stated subordination of women occurs in different forms in all aspects of life. It occurs within the family, within the work environment and in the social environment. Even if it were possible to consider all ways in which women are subordinated such a consideration would be beyond the scope of this study.

The rest of this study will focus on one specific area of women's subordination, namely freedom of testation. It is an attempt to rectify one of the structures of capitalist patriarchy. The study will consider the concept of freedom of testation and how freedom of testation allowed for and continues to allow for the accumulation of wealth by men. The study will show how freedom of testation excludes women from the ownership of private property and the consequential accumulation of wealth.

The next chapter of this study will focus on the concept of freedom of testation. The study will show how freedom of testation has allowed for and continues to allow for the continued ownership of private property and the control of the means of production by men. That freedom of testation supports and perpetuates the capitalist patriarchal idea of private property and that this has allowed for wealth to accumulate under the control of men.

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165 This statement is very general and there are good arguments that the degree of equality women have obtained is very small.

5 Private Property and its perpetuation through Freedom of Testation

5.1 Introduction

As earlier stated it is possible that in very early history matriarchy may have existed and had matriarchy persisted women may have had more control over or ownership of private property. However, it is accepted that even before recorded history, patriarchy existed. It is also accepted that women have been excluded from participating in the economy for centuries. The preceding chapters have shown that women have been excluded from the ownership and control of private property since the beginning of recorded history. In whatever ways that patriarchy came to be the standard, what is essential is that since very early history, women have been excluded from the ownership of property and the means of production and that this exclusion continues to be supported by, and in turn supports, the capitalist patriarchal system. It is suggested that private property (and consequently freedom of testation as a method for perpetuating the ownership of private property) forms one of the structures of capitalist patriarchy that supports and reinforces capitalist patriarchy.

As history developed women were consistently educated to a lower level than men and therefore when debates surrounding private property arose women were unprepared and could not participate in the debates and argue for the same rights that men achieved during that period. Women could not argue for their rights until much later in history. Women were not able to see themselves as individuals with rights and duties until long after men had become to be seen as individuals and obtained their rights. By the time women obtained rights, the control of property and the means of production was already largely in the hands of men.

Prior to the nineteenth century women were severely limited in their ownership (or control) of property. Even though women have now gained the right to ownership and control of their own property, it is still insufficient. Women still do not enjoy the same level of wealth as men, their access to wealth is restricted, their ability to accumulate wealth is restricted, their earnings are lower, the forms of employment available to women are restricted and their family responsibilities are greater than men's.[1] Women's ability to acquire ownership of property is limited by the fact that most property is already owned by men and by the fact that women have greater barriers to overcome in order to obtain ownership.

One of the most extreme examples of the structures that support and perpetuate capitalist patriarchy, and therefore one of the methods by which women have been excluded from the ownership of private property, are the methods of succession. Throughout history women have been excluded from the ownership and control of private property through the different historical methods of succession. These methods have resulted in the form of testate succession that is followed in South Africa today.

This chapter will follow the concept of freedom of testation from ancient history to modern-day South Africa. The study will show how freedom of testation has developed and changed to support capitalist patriarchy and how, even in a country which includes the right to equality in the Constitution,[2] freedom of testation still allows for discrimination on the grounds of gender to occur.

Arguably the concept of freedom of testation is the most devious form of the succession models. In an open and democratic South Africa, freedom of testation is recognised and supported by the law, despite the fact that

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1 Morris and Nott *All My Worldly Goods* 30 – 31

2 The Constitution, s9

freedom of testation allows for discrimination on the ground of gender to occur.[3]

The history of the concept of freedom of testation shows that it developed in order to suit the changing conditions of society.[4] It is arguable that freedom of testation developed in line with capitalist patriarchy to support the capitalist patriarchal system. This paper will discuss freedom of testation as one specific example of the structures of capitalist patriarchy that exist in society that support and protect capitalist patriarchy.

In Roman times the concept of freedom of testation was concerned with the continuation of the family unit and its control of the property. Today the focus of freedom of testation has changed from the continuation of property, to the continuation of the individual. The testator's will or rather his intention is now considered to be the primary concern of testate succession. Thus the ideology of testate succession has changed from being a continuation of the intestate succession rules to a continuation of the testator's personality.

This change in ideology was very gradual taking several centuries. The Renaissance, the Enlightenment and the Reformation periods were incredibly influential. Developments concerning the understanding of the individual and individual rights, as well as developments in the ownership of private property, contributed to the change.

In order to understand how the change in freedom of testation occurred it was necessary to look at how private property and the ownership of private property have been viewed over the centuries. This study has already shown how the justifications for the ownership of private property changed drastically over the centuries. Originally private property was justified by the social order,

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3 The concept of freedom of testation in South African law also allows for other forms of discrimination to occur, such as discrimination on the grounds of birth, however this study is purely concerned with discrimination on the ground of gender.

4 McMurray "Modern limitations on liberty of testation" in Wigmore and Kocourek (eds) *Rational Basis of Legal Institutions The Modern Legal Philosophy Series* Vol 14 458.

then by religious theology and finally by the rationality of man. Linking private property to the rationality of man has turned private property into an expression of individualism. Consequently private property has become directly linked to a testator's personality. Thus freedom of testation has changed from a customary practice to a subjective right of the testator.

This chapter will consider the pre-Roman systems of succession, Roman succession, the changes that the system of succession underwent during the Roman-Dutch period and continues with these changes into the South African history of succession.

5.2 Pre-Roman Succession

In ancient systems of law a man's estate devolved according to customary practices.[5] One argument for the development of these modes of succession comes from the religious practice of ancestor worship.[6]

These ancient communities believed that the spirits of deceased members of the family (the ancestors) remained with the household and with their prior possessions.[7] It was also believed that if regular offerings were made to the ancestors, if they were worshipped, that the ancestors would protect and keep watch over their living descendants.[8]

In ancient European communities many generations of the same family lived within one household.[9] The social unit of these communities was the

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5 Hahlo "The case against freedom of testation" 1959 *SALJ* 435.

6 Brune "The origin and history of succession in Roman law" *Law Magazine and Review: a Quarterly Review of Jurisprudence* 432.

7 McDaniel *Roman Private Life and its Survivals* 24.

8 McDaniel *Roman Private Life and its Survivals* 24-25.

9 McDaniel *Roman Private Life and its Survivals* 23.

patriarchal family. The family group was centred on the highest living ascendant[10] or the oldest of the fathers.[11] In Roman law this position became known as the *paterfamilias*.

5.3 Roman law

In the Roman system of succession the *paterfamilias* was responsible for the civil and religious duties of the family.[12]

The *paterfamilias* was the closest living family member to the ancestors. The *paterfamilias* was considered to be the best person to please these domestic gods. Thus it was the responsibility of the *paterfamilias* to worship and pay respect to the gods on behalf of the family.[13] The *paterfamilias* would make regular offerings to these domestic gods and by doing this he would ensure the continued protection of the family group.[14]

In order to guarantee the protection of the household, it was necessary that the *paterfamilias* performed his role continuously. The offerings had to be continuously made and could not be stopped or delayed.

To prevent any break in the duty from occurring, the eldest son of the *paterfamilias* would be appointed as his successor.[15] On the death of the *paterfamilias* the eldest son would take over his position and continue to make the offerings. It was uncommon for people to be childless,[16] but if the

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10 Lee *The Elements of Roman Law with a translation of the Institutes of Justinian* 1.

11 McDaniel *Roman Private Life and its Survivals* 23.

12 Brune "The origin and history of succession in Roman law" *Law Magazine and Review: a Quarterly Review of Jurisprudence* 432.

13 Brune "The origin and history of succession in Roman law" *Law Magazine and Review: a Quarterly Review of Jurisprudence* 432.

14 Kaser *Roman Private Law* 331.

15 Leage *Roman Private Law* 235.

16 McDaniel *Roman Private Life and its Survivals* 25

paterfamilias did not have any sons he would adopt another male into the family to fill his role.[17]

The position of paterfamilias would pass from the deceased paterfamilias to his successor. The family responsibilities and the family possessions would also pass from the deceased *paterfamilias* to his successor. [18] This ensured that there would be a religious successor on the death of the *paterfamilias*[19] and allowed for the continued protection of the family by the ancestor gods.[20]

The *paterfamilias* controlled the family property, but he only did this in the best interests of the family and the property. When the *paterfamilias* died and the new *paterfamilias* stepped into his position he succeeded to the property on behalf of the family. The property continually belonged to the family rather than the *paterfamilias*. Thus the holder of the position of head of the family changed rather than the ownership of property.[21]

Apart from the religious importance, this form of inheritance also made the most economic sense. The eldest son would have grown up with the property and he would have learnt from the *paterfamilias* how to use such property efficiently. A close relationship between the *paterfamilias* and his successor would have existed. From this relationship the successor would have gained an understanding of the obligations and responsibilities of the position of the *paterfamilias*.[22] Generally the eldest son would be the most capable person to take over the family responsibilities on the death of the *paterfamilias*.

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17 Hadley *Introduction to Roman Law* 297.

18 Leage *Roman Private Law* 236.

19 Brune "The origin and history of succession in Roman law" *Law Magazine and Review: A Quarterly Review of Jurisprudence* 433.

20 Maine *Ancient Law* 134.

21 Maine *Ancient Law* 227.

22 Spoor "Freedom of testation and social and economic development" *Responsa Meridiana* 308.

Thus a mode of succession developed from these religious beliefs. The religious responsibilities, family responsibilities and property passed from the deceased to his successor.[23]

This system of succession is apparent in early Roman law. Early Romans also believed in ancestor worship. It was recognised that a person's descendents had the duty of continuing the family and the family's religious responsibilities.[24]

5.3.1 Testate Succession

In early Roman law the paterfamilias could transfer ownership of property to a successor via a will. Because of the existence of rudimentary wills in early Roman law it has been argued that, by this time, the Roman law of succession had developed to provide testators with a limited freedom of testation.[25]

It is submitted that this concept of freedom of testation was not the same concept of freedom of testation that we have today. It was simply another method of ensuring that the family property passed to the best possible caretaker.[26] The concern in Roman times was not the disposal of property rather it was the institution of a successor.

The original concept of a will arose when there were no family members to take over the role of *paterfamilias*. If there were no sons then the customary mode of succession could not apply and another person needed to be

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23 Brune "The origin and history of succession in Roman law" *Law Magazine and Review: A Quarterly Review of Jurisprudence* 434.

24 Muirhead *Historical introduction to the Private Law of Rome* 40.

25 Du Toit "The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law" 1999 *Stell* 233.

26 The early Roman system of succession is only traceable in part and is therefore highly controversial – Max Kaser *Roman Private Law* 331.

appointed successor. Through the drafting of a will the *paterfamilias* could appoint somebody, other than a son, as his successor. [27]

At a later stage even a man who had a son was allowed to draft a will in which he appointed his son as his successor or the testator could draft a will in which provision was made provision for his son not surviving him or attaining majority.[28]

6.3.1.1 The types of wills in Roman law

In early Roman law there were three forms of wills with a fourth developing in the classical period of Roman law. The first, the *testamentum calatis comitiis* was a declaration in front of the *comitia calatis*.[29]

The *comitia* met only twice a year, and women were not included in the *comitia* business. [30] It may have been a requirement that the *comitia* vote to approve the contents of the will.[31] Because of these limitations of the *testamentum calatis comitiis* it is clear that testation in this form was not popular.[32]

The second form, the will *in procinctu*, was available only to soldiers.[33]

The third type of will was the *nuncupative* will. Although this form had few restrictions, other than the requirement of witnesses, it was also not much in use.[34]

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27 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 507.

28 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 551, this passage refers to the situation in ancient Attica, but as Sohm suggests it is likely that the early Roman law developed in the same method.

29 Leage *Roman Private Law* 237.

30 Lee *The Elements of Roman Law with a translation of the Institutes of Justinian 198.*

31 Buckland *Elementary Principles of the Roman Private Law* 133, although this is not certain.

32 Buckland *Elementary Principles of the Roman Private Law* 133.

33 Buckland *Elementary Principles of the Roman Private Law* 133.

Finally the *testamentum per aes et libram* developed to deal with the inadequacies of the *testamentum calatis comitiis*.[35] This will originally took the form of a fictitious sale from the testator to his successor.[36] However, in later law, as writing became more common, the formalities of the sale were done away with.[37]

After the time of the Twelve Tables the *testamentum per aes et libram* (in its developed form) was the most popular method of succession in Roman law.[38] However even though it seems similar in form to the will we use today[39] the substance of the will was different.

There were restrictions placed on the *testamentum per aes et libram* concerning who could make a will, who could succeed under a will and what could form part of the estate. These restrictions prescribed the substance of the will to such an extent that there was in fact no freedom of testation.

5.3.1.2 Who could draft a will

To begin with only adult Roman citizens who were *sui iuris*[40] were able to draft a will.[41] A person only became *sui iuris* upon the death of their *paterfamilias*, thereby releasing him from the *patria potestas*.[42] Therefore anybody whose

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34 Buckland *Elementary Principles of the Roman Private Law* 133.

35 Buckland *A Manual of Roman Private Law* 175.

36 Hadley *Introduction to Roman Law* 299 - 300. Originally the sale was made to the *familiae emptor* who carried out the wishes of the testator, however later this role was nominal with the heir taking the estate.

37 Hadley *Introduction to Roman Law* 300.

38 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 290.

39 Modern wills are also required to be in writing and witnessed in order for it to be valid.

40 A person is *sui iuris* when they have contractual or legal capacity.

41 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 289.

42 Paternal authority.

father was still living and who was still under the *patria potestas*[43] of the *paterfamilias* was unable to draft a will. The age of adulthood in Roman times was twenty five.[44] Therefore nobody under the age of twenty five was able to draft a will.

No *peregrini* (foreigner) could make a will.[45]

Originally women were thought to be incapable of drafting a will.[46] In later law this idea changed and there are some records of women drafting wills. However the majority of women were either under a form of tutelage[47] or under the *manus* of their husband.[48] Therefore most women did not draft wills or certainly did not enjoy freedom of testation in the drafting of their wills.

This meant that only a restricted number of males and a very few liberated females drafted wills.

5.3.1.2 Who could succeed under a will

The people who could succeed under a will were also limited. In early law *peregrini*, widows who remarried within a year of the passing on of their previous husband, and a few other classes or people[49] were unable to succeed. In later law heretics and the children of traitors were prevented from succeeding.[50]

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43 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 486-487. A person could be emancipated by the *paterfamilias* and thereby become *sui iuris* even if the *paterfamilias* still lived.

44 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 73.

45 Tellegen-Couperus *Testamentary Succession in the Constitutions of Diocletian* 9.

46 Kaser *Roman Private Law* 351.

47 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 72.

48 Buckland *A Manual of Roman Private Law* 61.

49 Such as *dediticii* and *intestabiles.*

50 Buckland *A Manual of Roman Private Law* 179.

There were three classes of people who were able to succeed: *sui et necessarri* heirs, *necessarri* heirs or *extranei* heirs.[51]

5.3.1.2.1 Sui et necessarri heirs

Sui et necessarri heirs were descendants of the deceased who fell under his *patria potestas* and became *sui iuris* at his death. If these successors were included in the will they had no choice but to succeed, hence they were called necessary heirs.[52]

Both sons and daughters were considered to be *sui et necessarri* heirs. However the inclusion of daughters is nominal. Daughters of the *paterfamilias,* who married in *manu*, passed into the power of their husbands and could not succeed from their fathers. Daughters who were *in potestate* (no longer under the control of a *paterfamilias*) could be a successor. However, the risk of a daughter carrying the inheritance into the control of another family by her marriage meant that it was highly unlikely that a testator would include a daughter in the succession.[53] Instead a father would provide for his daughter by giving her a *dos* - a dowry.[54] However, even this property would be controlled by her husband.[55]

Women were not allowed to be the head of the family and could not exercise the *patria potestas* of the *paterfamilias*.[56] It was considered unnecessary for women to have control of property as they had no family responsibilities. So it was unusual for a daughter to be a successor to her father. If a daughter was included in the succession, it was in name only. The real control would be in

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51 Buckland *Elementary Principles of Roman Private Law* 140.

52 Hadley *Introduction to Roman Law* 270.

53 Muirhead *Historical introduction to the Private Law of Rome* 41.

54 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 101, however even this property would be controlled by her husband.

55 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 101.

56 Leage *Roman Private Law* 97.

the hands of the daughter's guardians.[57] A daughter who was no longer under *patria potestas* or the *manus* of a husband would be placed under the tutelage of her older relatives. This ensured that any property she may have acquired from her deceased *paterfamilias* would be protected and could not be alienated. Upon her death, the property would return to the estate of her family.[58]

This meant that *sui et necessarri* heirs were generally male descendants of the testator. This is simply another form of the practice which originated from ancestor worship.

5.3.1.2.2 Necessarri heirs

Necessarri heirs were slaves who inherited under their masters will. These were also necessary heirs in that they had no choice but to succeed to the estate if they were included in their masters will.[59] A testator would appoint his slave as his successor and upon his death the slave would become a freeman.[60]

A testator would appoint his slave as his successor if the testator was insolvent and did not want the indignity of insolvency to lie on his name or his family.[61] The testator would not have burdened his descendants with the shame of insolvency and so would have chosen a slave to bear that burden. Having an insolvent estate in Roman times was considered to be such a disgrace[62] that the testator had practically no choice but to institute his slave.

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57 Muirhead *Historical introduction to the Private Law of Rome* 41.

58 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 149.

59 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 285.

60 Buckland *A Manual of Roman Private Law* 186.

61 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 285.

62 Leage *Roman Private Law* 255.

Presumably the descendants of the deceased would now fall under the *patria potestas* of their uncle or eldest male relative. Wives would pass back into the *patria potestas* of their fathers.

By appointing his slave as successor the testator provides for his family as they will not have to settle the testator's liabilities. Thus this is again an example of the testator providing for and protecting his family.

5.3.1.2.3 Extranei Heirs

Extranei heirs were people who were not members of the testator's family.[63] These successors had a choice whether to accept or reject the succession. They were not considered to be necessary heirs. A testator would appoint an *extranei* heir to replace non-existent sons or the testator may have been choosing someone who was better suited than his sons to provide for the family and protect the family property.

Hadley submits that a testator was not required to be acquainted with the *extranei* heir; he only had to have a firm idea of who the intended successor was.[64] However it is unlikely that a testator would appoint a successor who would not have accepted the succession. Nor would a testator have appointed a successor who would not care for his descendants, or not have dealt with the estate in an efficient and respectful manner. It is most likely that the *extranei* heir would have been aware that he had been appointed as successor to the testator and had agreed to fulfil the role of *paterfamilias*.

It is submitted that as the popular *testamentum per aes et libram* originated from an imaginary sale of the estate from the testator to the successor, it is likely that the *extranei* heir (the purchaser) would be aware that the testator had chosen him as his successor. The *extranei* heir would have had to have been present at the imaginary sale and would be aware that he was succeeding to the testator's estate.

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63 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 286.

64 Hadley *Introduction to Roman Law* 307.

By Roman law separating the heirs into these three classes it is possible to see that the classes of heirs merely allowed for the continuation of the customary practices.

5.3.1.3 Other limitations on who could be appointed as successor

Other limitations on who could be appointed as a successor developed in Roman law to ensure that the person who was appointed successor was the person most capable of fulfilling the role of *paterfamilias*.

During the later Republic the *Vocanian* Law ensured that a woman could not be appointed as successor by a person who had an estate worth more that one thousand asses.[65] This further limited the number of women who could succeed to an estate. During the reign of Augustus the *Lex Julia* prevented a person who was not married at the death of the testator (or did not marry within 100 days after the death of the testator) from succeeding under the will.[66]

The *Lex Pappia Popea*, which was also passed during the reign of Augustus, prevented people who were married but childless from succeeding under the will of a testator.[67]

It was a matter of public concern that the relatives who depended upon the *paterfamilias* would not be deprived of their succession upon his death.[68] It became accepted that certain relations had to be provided for and could not be excluded in the will of the testator.[69] It was so usual for the son of a testator to succeed to the estate that in order to exclude a son from the succession a testator had to follow a specific form If the testator did not follow

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65 Hadley *Introduction to Roman Law* 308.

66 Hadley *Introduction to Roman Law* 310.

67 Hadley *Introduction to Roman Law* 310.

68 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 502.

69 Lee *The Elements of Roman Law with a translation of the Institutes of Justinian* 207.

the specific form the will would be invalid and the successors would inherit intestate.[70]

The *querela inofficiosa testamenti* was an action designed to contest a will which went contrary to this natural duty.[71] If near and dependant relatives of the testator had not been included in the will they could use the *querela inofficiosa testamenti* to contest the will for a legitimate portion of the inheritance.[72]

5.3.1.4 The estate

Apart from the limitations on who could make a will and who could succeed under a will, there were also other factors which indicate that the concept of freedom of testation in Roman times was not the same concept as we understand it today.

It is a widely recognised concept in Roman law that succession on death was the universal succession to all the rights and liabilities of a deceased person.[73] The successors succeeded to the property as a universal succession.[74]

The concept of universal succession meant that the property of the deceased was not split up into the different pieces, it remained as one unit. [75] A successor could not succeed to a portion or a specific part of the deceased's estate. This was known as *succedere in locum defuncti* – stepping into the place of the deceased.[76] The appointed successor would succeed to all the rights and liabilities of the deceased. This suggests that the Roman concept of

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70 Buckland *A Manual of Roman Private Law* 193.

71 Buckland *A Manual of Roman Private Law* 199.

72 Hahlo "The case against freedom of testation" 1959 *SALJ* 435.

73 Kaser *Roman Private Law* 330.

74 Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* 284.

75 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 503.

76 Kaser *Roman Private Law* 330.

universal succession was succession to the status of the deceased rather than to the deceased's property.[77]

The paterfamilias had the ability to institute one of the potential successors as successor to an undivided estate whilst depriving any other potential successors.[78]

This is opposed to singular succession as we understand it today.[79] Under singular succession the different heirs can inherit different and separate portions of an estate. However, the Roman concept was more of a continuation than an inheritance[80] as the successor is treated as though he were the deceased.[81] There is only mention of material possessions in terms of an accessory to the family.[82]

Even if more than one successor was appointed in a will, the co-successors still inherited as a universal succession. The co-successors did not inherit specific assets or even a specific percentage of the estate. They each succeeded to all of the rights and all of the obligations.[83] Not only did they form a community of property but it also symbolised the relationship in the family.[84] The family would remain together as a community. All the successors became responsible for all the rights and obligations.

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77 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 504.

78 Du toit "The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law"1999 (2) Stell 234.

79 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 504.

80 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 505.

81 Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* 504.

82 Maine *Ancient Law* 203.

83 Hadley *Introduction to Roman Law* 272.

84 Kaser *Roman Private Law* 344.

5.3.1.5 Conclusion

Considering the accumulation of these limitations – who could draft a will, who could succeed under a will and what could form part of the estate – it is apparent that the term freedom of testation has been incorrectly applied to the Roman law of succession. The risk that a testator would deprive his family of his estate seems to have been of no consequence in the Roman period.[85]Freedom of testation, as we currently understand it, is a recent development in the progress of society.[86] The Roman law of succession was merely a continuation of the ancient inheritance practices associated with ancestor worship.

5.4 Freedom of Testation in the Middle Ages

As has already been stated freedom of testation has changed from a method for the continuation of property to the continuation of the individual. This change occurred during the Renaissance, Reformation and Enlightenment periods.

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Having legal rules surrounding succession presupposes the existence of private property. Thus until human beings had a concept of private property the legal rules surrounding succession were no more than a codification of the customary practices. Only when human beings had an understanding of a testator as an individual, holding individual rights, and of private property rights and such rights attaching to an individual could there be an expression of the testators' will and thus freedom of testation.

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85 Weimar "Inheritance contracts and public policy" 1994 (1) *Journal of South African Law* 796.

86 Sidgwick "Freedom of bequest, from the individualistic point of view" in Wigmore and

Kocourek (eds) *Rational Basis of Legal Institutions The Modern Legal Philosophy Series* Vol 14 445.

Thus, only once Grotius had created rights and codified them, could there be a right to private property and only with the ideas of individualism that were developed by Locke, and Hegel (and others) could those rights become subjective rights, i.e. rights that belonged to individuals.

Around the nineteenth century freedom of testation came to be seen as an expression of an individual's will. Freedom of testation was no longer a misinterpreted codification of the customary succession practices. Rather freedom of testation had morphed into an individual right. Property, which changed ownership upon death, no longer belonged to a role, such as that of the *paterfamilias*, rather an individual had a right in such property and could direct his will over such property. Thus the ability to direct what happens to your property after your death was seen as an expression of the individuals will or a continuation of that individual's personality. From the nineteenth century onwards it becomes more correct to speak of inheritance of property as opposed to succession to property.

Up to the nineteenth century what has been misleadingly referred to as freedom of testation was curbed in various methods to ensure that the testators' will benefited his family.[87] It was not until the fourteenth century that a general rule emerged that gave every man the ability to dispose of his personal property via a will.[88] During the thirteenth century it was decided that land could not be disposed of via a will and that the land automatically passed to the heir. Usually the heir was decided by following the rules of primogeniture, so the eldest male son or nearest male relative would inherit.[89] It may be argued that during the Middle Ages freedom of testation developed to provide that a portion of personal property could be disposed of at the testator's discretion (once the surviving spouse and children had been provided for). However, this portion was often intended to be given to the

87 Miller *The Machinery of Succession* 5.

88 Miller *The Machinery of Succession* 2.

89 Miller *The Machinery of Succession* 4.

Church for the good of the testator's soul.[90] The Church supported freedom of testation provided that the testator made pious bequests.[91] Thus the power of testation was more conditioned than a real, actual choice made by the testator. Society expected that the choice would be made in favour of the Church.[92]

Thus freedom of testation did not exist in the Middle Ages. However in the nineteenth century due to the changing ideas concerning the individual and private property the absolute concept of freedom of testation comes to the forefront of succession law.[93] Indeed freedom of testation, "exalts the volition of the property holder it is consistent with free market economics".[94] Thus freedom of testation had become linked to the economic system. It upholds and perpetuates capitalism.

This change in ideology can be seen quite clearly in the South African law of succession. This change will be discussed in the following section. Many European countries, although they express the concept of freedom of testation, have kept limitations on the freedom and thus, in part, continue to be an expression of the customary succession practices. Thus testate succession in most other westernised countries ensures that the surviving spouse and the family are provided for from the deceased estate.[95] The patriarchal practices which ensured that men benefited from this succession have largely been done away with. Although it is suggested that patriarchal inheritance may continue in the small portion of the estate that is subject to free testation.

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90 Sheehan "The bequest of land in England in the high Middle Ages", in Banfield (ed) *Marriage, Property and Succession* 332.

91 Weimar "Inheritance contracts and public policy" 1994 (1) *Journal of South African Law* 796.

92 Miller *The Machinery of Succession* 4.

93 Mellows *The Law of Succession* 175.

94 Friedman "The law of the living, the law of the dead: property, succession and society" 1996 *Wisconsin LR* 353. See also De Waal "The social and economic foundations of the law of Succession" 1997 92) *Stell* 166 – 168.

95 Hahlo "The case against freedom of testation" 1959 *SALJ* 435.

The South African system of testate succession, however, has the most absolute concept of freedom of testation and there is a marked difference in South African law between testate and intestate succession practices.[96]

5.4 Introduction to South African Law

By the time that freedom of testation changed from a customary practice to a subjective right the customary practice of succession had already been introduced to South African law.

In 1652 the Dutch East India Company[97] created a refreshment station at the Cape of Good Hope for their ships travelling to the Far East.[98] The Dutch East India Company had been delegated power by the States-General of the United Netherlands to maintain law and order in their overseas possessions. Under such authority the VOC enforced law and order in the Cape of Good Hope.[99]

Initially law was enforced by VOC representatives in the Cape, in the form of a ship's council. Later a type of court, the *Raad van Justisie*, took over this role. This court was originally constituted of laymen and the later Dutch lawyers who settled in the cape.[100]

Any *placaeten* that were issued by the States-General of the United Netherlands were also included into the law at the Cape.[101] The common law

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96 Cobett et al *The law of Succession in South Africa* 33.

97 Vereenigde Geoctroyeerde Oost-Indische Compagnie (VOC)

98 Thomas et al *Historical Foundations of South African Private Law* 95.

99 Edwards *The History of South African Law* 66.

100 Edwards *The History of South African* Law 67.

101 Wessels *History of the Roman-Dutch Law* 357.

of the province of Holland was accepted as the common law of the Cape colony.[102] And with the introduction of Dutch settlers to the Cape, their ideas and customs had a strong influence on the *mores* of the Cape.[103]

Thus by the time of the British occupation of the cape, in 1795, the Roman-Dutch law formed the basis of law in the Cape. Later the Roman-Dutch law was introduced to Natal in 1845 and it was included as the common law of the Transvaal and the Orange River Colony.[104]

The Roman-Dutch law of testate succession had strict requirements for the drafting of wills and severely limited how the testator could dispose of his property.[105] It was accepted that the general principles of Roman law applied in the province of Holland and consequently they accepted the principles of the Roman law of succession.[106] It was this form of testate succession which was introduced into the Cape colony.

At the time of introduction the Roman-Dutch law of testate succession included the *Lex hac edictali*. This rule prevented a testator from giving a larger portion of his estate to any children by a second wife than the portion given to any children by his first wife.[107] The rules concerning *Falcidian* and *Trebellian* Fourths (which provided that an heir could claim one fourth of the estate)[108] as well as the legitimate portion rule (this entitled descendants to one third of their intestate share[109]) were also included.[110] This meant that a descendant of the deceased, who had been disinherited, could claim their legitimate portion (one third of their intestate share) from the deceased estate.

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102 Wessels *History of the Roman-Dutch Law* 356.

103 Edwards *The History of South African Law* 69.

104 Wessels *History of the Roman-Dutch Law* 367 -369.

105 Hosten et al *Introduction to South African Law and Legal Theory* 687.

106 Lee *Introduction to Roman-Dutch Law* 330.

107 De Villiers “The Law of South Africa” (1901) Vol. 3, No. 1 *Journal of the Society of Comparative Legislation*, *New Series* 11.

108 Lee *Introduction to Roman-Dutch Law* 332.

109 This was provided that the testator had left four or less children.

110 Wessels *History of Roman-Dutch Law* 396.

The *Falcidian* and *Trebellian* rules provided grounds for a child to challenge the will of their ascendant if they felt they had been unjustly disinherited.[111]

Thus at the introduction of the Roman-Dutch law of testate succession to the Cape (and subsequently Natal, the Transvaal and the Orange river Colony) freedom of testation was subject to these limitations.

In 1795 the English took possession of the Cape to protect it from the aggressive intentions of Napoleon Bonaparte.[112] At that time the British government followed a practice whereby they did not change the existing laws of their colonies except where such laws conflicted with British occupation.[113] Thus, regardless of British occupation, the Roman-Dutch law remained as the law of the Cape colony.[114]

Despite the British commitment to preserving the Roman-Dutch law it became increasingly difficult to do so. The courts became staffed by English trained judges and lawyers,[115] who had to apply Roman-Dutch principles.[116] The Roman-Dutch law also started to stagnate as it was no longer subject to the developments made in the legal system in Holland. [117] Shortly thereafter the Roman-Dutch law in Holland was replaced by the Code Napoleon and thus ceased to be a living system of law.[118] The only recourse to the law which lawyers in the Cape colony had was to the writings of the Dutch jurists, such as Hugo Grotius.[119]

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111 Lee *Introduction to Roman-Dutch Law* 330.

112 Maisel and Greenbaum *Foundations of South African Law* 58.

113 Wessels *History of Roman-Dutch Law* 362.

114 Maisel and Greenbaum *Foundations of South African Law* 58.

115 Du Plessis and Kok *An Elementary Introduction to the Study of South African Law* 18.

116 Maisel and Greenbaum *Foundations of South African Law* 59.

117 Du Plessis and Kok *An Elementary Introduction to the Study of South African Law* 18.

118 Maisel and Greenbaum *Foundations of South African Law* 59.

119 Du Plessis and Kok *An Elementary Introduction to the Study of South African Law* 18.

In 1820, due to the large number of English settlers to the Cape and the difficulties of applying the Roman-Dutch law, a decision was taken to anglicise the law.[120]

As trade with England grew, the English maritime and commercial customs were adopted by the Cape colony.[121] English legal practices and rules began to be introduced, such as the principle of *stare decisis* and the English criminal law.[122] English ideas and *mores* were introduced to the colony with the English settlers. For example English settlers in the Cape, who had been married in England, were allowed to administer their property in terms of English law.[123] English law particularly influenced the South African law of testate succession.

The English law of testate succession had experienced profound changes over the centuries. Originally the family members enjoyed fixed rights in the estate of the testator. By the nineteenth century all restrictions had been removed leaving a concept of absolute freedom of testation.[124] Eventually the English law has reverted to family members having discretionary rights in the testator's estate.[125] However at the time when the issue of freedom of testation arose in South Africa the English law was far more *laissez-faire* than the Roman-Dutch law in its approach towards private property and consequently the succession laws.[126]

Under the English influence the Roman-Dutch Falcidian and Trebellian rules were removed from the South African law of succession by the Law of

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120 Maisel and Greenbaum *Foundations of South African Law* 7 & 59.

121 Maisel and Greenbaum *Foundations of South African* Law 59.

122 Maisel and Greenbaum *Foundations of South African Law* 60.

123 Edwards *The History of South African Law* 78.

124 Hahlo "The case against freedom of testation" 1959 *SALJ* 436.

125 Margrave-Jones *Mellows: The Law of Succession* 204.

126 Hosten et al *Introduction to South African Law and Legal Theory* 687.

Inheritance Amendment Act.[127] A year later the legitimate portion rule was abolished by the Succession Act.[128] This Act provided that no legitimate portion will be claimable by anybody from the deceased testator's estate. The Act further provides that a testator will have the full power to disinherit any child, parent, relative or descendant without assigning any reason for such disinheritance.[129]

The promulgation of these Acts meant that the South African concept of freedom of testation was now absolute. A testator was free to choose to dispose of his property via his will in any way they wished. And unlike other countries (including English law) which have amended their testamentary institutions to suit the prevailing legal trends, the South African concept has remained relatively absolute.[130]

The South African law now recognises very few limitations on freedom of testation. Courts can refuse to give effect to a testator's will should the instructions be illegal, against public policy or vague and uncertain. There are also some common law and statutory restrictions, such as the Maintenance of Surviving Spouses Act and those concerning the disposal of immovable property. The interests of creditors in the estate must be satisfied before the instructions of the testator can be fulfilled.[131] However despite these limitations the South African concept of freedom of testation is considered to be very broad and unfettered.

Unlike other western countries the South African law of testate succession is open to abuse, and patriarchal values are allowed to influence inheritance and through such inheritance patriarchal values are perpetuated.

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127 Law of Inheritance Amendment Act 26 of 1873.

128 Succession Act 23 of 1874.

129 Succession Act 23 of 1874 at III

130 Corbett et al *The Law of Succession in South Africa* 33.

131 Corbett et al *The Law of Succession in South Africa* 40.

The next chapter will look at a case study where patriarchal values affected testate inheritance and were thus perpetuated by the concept of freedom of testation.

6 Syfrets

6.1 Introduction

Since 1993 it has become unconstitutional to discriminate inter alia on the ground of gender.[1] However, as stated in the introduction, it is very difficult to determine whether discrimination is occurring in testamentary dispositions. Testaments are considered to be private documents and therefore the dispositions contained therein only become known upon the death of the testator. The majority of testaments which are being drafted under the new constitutional dispensation will only become actionable when the testator dies (which hopefully for the majority of testators will only be in the future). Also the legal system only becomes aware of testaments which are challenged in the courts. Therefore there may be several testaments which do discriminate on the ground of gender without a justifiable reason, but which are not challenged in the courts and are thus never rectified. These factors make it very difficult to ascertain whether discrimination actually does occur in testaments, and if it does occur how frequently it occurs and what forms it occurs in. [2]

In light of this there has only been one case in which testamentary discrimination on the ground of gender has been challenged.[3] This is the *Syfrets* case. This testament was drafted in 1920. The testament was drafted under conditions which no longer exist in modern day South Africa.

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1 The Interim Constitution, S8 (2).

2 The *BOE* case does provide at least an example of a testament which was drafted within the Constitutional dispensation that contains discriminatory clauses.

3 The *BOE* case also considers testamentary discrimination (although not on the ground of gender), however it places reliance on *Syfrets* and therefore a detailed discussion of the case is unnecessary.

The *Syfrets* case revolved around the following circumstances. In March 2002, the former Minister of Education, Mr. Kadar Asmal, found a newspaper advertisement for the Scarbrow Bursary Fund. The advertisement invited deserving students studying at the University of Cape Town to apply for a bursary from the Scarbrow Bursary Fund. Applicants for the bursary were limited to people "of European descent, male, gentile".[4] Thus only white, non-Jewish males could apply.

The Minister felt that these criteria were contrary to the equality clause in section 9 of the Constitution.[5] He thought that the conditions discriminated on the grounds of race, gender and religion. The Minister, therefore, requested Syfrets Trust Limited (the Trustees of the fund) to remove the exclusionary criteria.[6]

The Trustees were unwilling to remove the contested criteria. They stated that they were bound, by the concept of freedom of testation, to uphold the wishes of the Testator. The Trustees would only amend the conditions of the trust if ordered to do so by a Court.[7] The Minister then approached the Court for such an order.

The case came before Griesel J in the Cape High Court. The Minister, as well as the University of Cape Town, requested that the discriminatory conditions be removed from the will. They based their request on section 13 of the Trust Property Control Act 57 of 1988, the common law and a direct application of the Constitution. [8]

Syfrets Trust Limited, as the first respondent, and the Master of the Court, as the nominal second respondent, represented the interests of the Scarbrow

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4 *Syfrets* [4].

5 The Constitution S9.

6 *Syfrets* [6].

7 *Syfrets* [6].

8 *Syfrets* [9].

Bursary Fund.[9] A *curator ad litem* was appointed to represent the interests of the potential beneficiaries.[10]

Both the respondents and the *curator ad litem* argued for upholding the principle of freedom of testation.[11] Their reasoning was that the South African law of succession is founded on the concept of freedom of testation.[12] Freedom of testation is a cornerstone of the law of succession and amending it in this way would reduce the principle to a nullity. No reasons were provided as to why freedom of testation is, or should be, a cornerstone of the South African law of succession.

The respondents also argued that the concept was guaranteed constitutional protection under the property clause, section 25(1).[13] Further, the *curator ad litem* relied on the rights to dignity (section 10), privacy (section 14) and freedom (section 12) to support the concept of freedom of testation. [14]

It was shown that the testator, Dr Edmund William Scarbrow, established the Scarbrow Bursary Fund in the terms of his will. Such will was drafted in 1920.[15] In 1920 unfair discrimination against women, persons of colour, or people from different religious backgrounds was acceptable.[16] It was not contrary to public policy to discriminate in these ways. The testator died in 1921 and the Trust became active in 1965 after the death of his last son.[17]

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9 *Syfrets* [2].

10 Syfrets [2].

11 *Syfrets* [17].

12 *Syfrets* [17].

13 *Syfrets* [17]. See discussion under 1.4 Assumptions and Limitations.

14 *Syfrets* [40].

15 *Syfrets* [2].

16 *S v Makwanyane* 1995 (3) SA 391 (CC) 262.

17 *Syfrets* [5].

With the Constitution, the principle of public policy has come to be guided by the constitutional values.[18] The social and political environment in which we live is very different from that of the 1920's. Human dignity, equality, non-racialism, non-sexism and the advancement of human rights and freedoms are now important values for South Africans.

The three arguments on which the application was based, namely, section 13 of the Trust Property Control Act 57 of 1988, the common law and a direct application of the Constitution are all based on the equality clause.[19] However Griesel J decided to settle the case on the public policy issue.[20] Hence his job was to decide whether the conditions of the Scarbrow Bursary Fund, which discriminate against race, gender and religion, were contrary to public policy.[21] Looking at it from a different angle Griesel J had to decide whether the right to property[22] and its corollaries of private succession and freedom of testation are limited by the principles of public policy.[23]

Griesel J essentially makes his decision on the basis of public policy, "In my view, the answer is self evident: it can never be in the public interest of a society founded on 'the achievement of equality' to deny access to funding, to continue their education, to previously disadvantaged and marginalised groups of people on the basis of their race, gender or religion."[24]

Griesel J does briefly look at the Constitutional challenge of the equality right to determine whether there has been discrimination and whether such

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18 *Napier v Barkhuizen* [2005] JOL 16182 (SCA) [7].

19 *Syfrets* [15].

20 *Syfrets* [16]

21 *Syfrets* [24].

22 The Constitution. S25

23 *Syfrets* [39].

24 *Syfrets* [34].

discrimination is unfair.[25] However his discussion of the equality right is limited to the *Harksen* case.

The case of *Harksen* sets out the test for actions which amount to unfair discrimination.[26] The test begins by asking whether the action differentiates between people or categories of people and if so whether this differentiation is connected to a legitimate government purpose. The test asks whether the action concerned amounts to discrimination – if it is on one of the listed grounds in section 9 then discrimination is established.[27] It then enquires into whether such discrimination is unfair. Again if the discrimination is on one of the listed grounds it is presumed to be unfair discrimination.[28] Finally, if the action amounts to unfair discrimination, it must be decided whether such discriminatory action can be justified in terms of the limitations clause, section 36 of the Constitution.[29]

In terms of the *Harksen* test, the conditions of *Syfrets* discriminate on the listed grounds of race, gender and religion and are therefore presumed to be unfair discrimination. According to the *Harksen* test Griesel J should then have performed a section 36 limitation enquiry, to decide whether the unfair discrimination caused by freedom of testation is a justifiable limitation of the equality right. However as Griesel J decides the case on the basis of public policy he simply assumes that unfair discrimination is contrary to public policy and is therefore unjustifiable. [30] He substantiates his assumption by referring to section 29 of the Equality Act, the National Education Policy Act 27 of 1996 and the Convention on the Elimination of All Forms of Discrimination against Women (1979).[31]

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25 *Syfrets* [33]

26 *Harksen* [53].

27 *Harksen* [53].

28 *Harksen* [53].

29 *Harksen* [53].

30 *Syfrets* [32].

31 *Syfrets* [34].

However, unfair discrimination is not automatically contrary to public policy and it was incorrect for Griesel J to assume that it was. To determine whether it is contrary to public policy Griesel J should have performed a section 36 limitation enquiry. It is possible, in some situations, for unfair discrimination to be acceptable public policy. Griesel J admits that his judgement "does not mean that all clauses in wills that differentiate between different groups of people are invalid".[32] He limits his finding of invalidity to the current circumstances. There have been instances where the Constitutional Court has found unfair discrimination to be a justifiable limitation in terms of a section 36 enquiry. In the case of *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality*, it was decided that the implementation of an across the board rates increase, despite resulting in discrimination on racial grounds, was, upon performing a section 36 limitation enquiry, found to be justifiable because the respondents had used the least restrictive means possible and the implementation of the rates increase was only a temporary measure and thus the discrimination would only be temporary. *33*

The question has to be asked as to what might be considered to be fair discrimination and may therefore amount to a limitation of the equality right.[34] De Waal correctly suggests that a section 36 limitation enquiry should be performed to consider whether the equality right can be limited by the concept of freedom of testation.[35]. However De Waal's enquiry is incorrectly concerned with the limitation of the property right than with the limitation of the

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32 *Syfrets* [48].

33 *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (4) BCLR 440 (C). *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) [45] is also an example of unfair discrimination that is justifiable, although in this case the discrimination is against freedom of religion. See also Du Toit "The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law" 2001 (2) *Stell* 234 – 239. for what might constitute constitutional limitations of freedom of testation.

35 De Waal "The law of Succession and the Bill of Rights" in Bill of Rights Compendium 3G11.

equality right. De Waal finds that the property right and its corollaries, the right of succession and freedom of testation, cannot justifiably be limited by the equality right and therefore he finds that testamentary clauses which might institute one gender as opposed to the other gender as heir are valid despite the blatant discrimination.[36]

It is submitted that the question should have been whether the equality right can justifiably be limited by freedom of testation and not whether the property right can be justifiably limited by equality. Had Griesel J performed a limitation enquiry he may still have arrived at the same decision. However the decision would be more persuasive had he followed the prescribed format. It would also have been beneficial for South Africa's equality jurisprudence had he performed the limitations enquiry.

As Griesel J found that the unfair discrimination was contrary to public policy he was able to limit the scope of freedom of testation.[37]The applicants were successful and the Scarbrow Bursary Fund is now available to deserving students of the University of Cape Town, despite their race, religion or gender.

6.3 Conclusion

The *Syfrets* case is now precedent for the amendment of discriminatory wills. However as Griesel J failed to perform a limitation enquiry it is difficult to know what other forms of discrimination will limit freedom of testation and what will not, whether some forms of discrimination would be considered justifiable or not. Obviously conditions that are similar to the Syfrets case would be considered unconstitutional.

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36 De Waal "The law of Succession and the Bill of Rights" in Bill of Rights Compendium 3G11.

37 *Syfrets* [47].

Discrimination on listed grounds,[38] other than gender, race and religion, also occurs in testamentary dispositions and as of yet no decision has been made as to whether such discrimination is justifiable or not. Before the Constitution was enacted, some forms of what became listed discrimination were considered to be acceptable. Clauses which restrain remarriage have been upheld. It is arguable that these restraint of marriage clauses would now amount to discrimination on the ground of marital status.[39] 'Jewish faith and race' clauses have also been upheld.[40] If these clauses received constitutional scrutiny they might now also be considered to be unconstitutional.[41]

In the past these discriminatory clauses have been considered to be acceptable in terms of public policy. It has been acceptable to discriminate in a will on the listed grounds of marital status, religion and race. Would these forms of discrimination survive an application of the Constitution? As this case only concerns the specific conditions of the Syfrets trust and no limitation enquiry was performed it is difficult to decide this.

Perhaps freedom of testation, as a concept, needs to be reconsidered with respect to the new Constitution and not simply the terms of Dr Scarbrow's will. A consideration of the role of freedom of testation under the new dispensation would have been preferable instead of a consideration of discriminatory clauses on a case by case basis. This would provide a precedent for the concept of freedom of testation in future testamentary drafting rather than dealing with discriminatory clauses on a case by case basis.

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38 The Constitution, S9 (3), such as race, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

39 *Ex Parte Dessels* [1976] 2 All SA 67 (D). See also Corbett et al *The law of Succession in South Africa* 130 and 136.

40 *Aronson v Estate Hart and Others* 2 [1950] 2 All SA 13 (A). See also Corbett et al *The law of Succession in South Africa* 130 – 134.

41 Such a finding would raise a debate about inclusive discriminatory terms (or indirect discrimination) and exclusive discriminatory terms however such a debate is beyond the scope of this study.

7 Conclusion

As has already been discussed, the South African law of testate succession is a combination of the Roman law (brought to South Africa through Roman Dutch law) and English law. The current South African concept of freedom of testation is relatively absolute. A South African testator is relatively free to dispose of his property via a will in any way he wishes.[1]

As previously discussed, the Roman-Dutch law of testate succession originally included rules which ensured that testators provided for their dependent family members. However, at the time when the issue of freedom of testation arose in South Africa, the English law was far more *laissez-faire* than the Roman-Dutch law in its approach towards private property and consequently in its approach to the succession laws.[2] Under the influence of the English law the Roman-Dutch protections were removed from the South African law of succession.[3]

South African law now recognises very few limitations on freedom of testation.[4] Courts can refuse to give effect to a testator's will should the instructions be illegal, against public policy or vague and uncertain.[5] There are also some common law and statutory restrictions, such as those concerning the disposal of immovable property or that the interests of creditors in the estate must be satisfied before the instructions of the testator can be fulfilled.[6] A minor child has a common law right to claim maintenance from the estate

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1 Du Toit "The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law" 2001 2 *Stell LR* 222 224.

2 Hosten et al *Introduction to South African Law and Legal Theory* 687.

3 This was achieved by the Law of Inheritance Amendment Act 26 of 1873 and the Succession Act 23 of 1874.

4 Eventually the English law reverted to family members having discretionary rights in the testator's estate. See Margrave-Jones *Mellows: The Law of Succession* (1993) 204.

5 Corbett et al *The Law of Succession in South Africa* 40.

6 Corbett et al *The Law of Succession in South Africa* 40.

and surviving spouses who require maintenance, and were not provided for in a will, can claim in respect of the Maintenance of Surviving Spouses Act.[7]

However, despite these limitations the South African concept of freedom of testation is considered to be very broad and unfettered.[8] And once all these claims against the estate have been met there is still a portion of the estate with which the testator can do what he wishes. It is with this remaining portion or with those estates which do not have to meet these claims (for example where there is no surviving spouse or dependant minor child) that the South African law of testate succession allows for discrimination on the ground of gender. Women may still be excluded from inheritance, simply because they are female, because it is the testator's will.

De Waal suggests that when testamentary discrimination results in a complete disinheritance, for example when a testator disinherits a daughter because of her gender, that the testator's right to freedom of testation should be given preference over the disinherited's right to equal treatment.[9]

De Waal raises three motivations for his argument. Namely, that it would reduce the concept of freedom of testation to a nullity, that the disinherited has no fundamental right to inherit and the practical difficulties of not recognising the testator's wishes.[10]

De Waal then states that where the discrimination attaches to a condition on the bequest as opposed to the bequest itself, it is possible that such condition could be declared constitutionally invalid.[11] Thus the condition could be

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7 De Waal *Introduction to the Law of Succession* 4.

8 Du Toit "The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law" 2001 2 *Stell LR* 224.

9 De Waal *Introduction to Succession* 5.

10 De Waal *Introduction to Succession* 6.

11 De Waal *Introduction to Succession* 6.

regarded as *pro non scripto* and the bequest could be fulfilled without the condition.

It is submitted that De Waal's argument is contradictory as declaring conditional bequests invalid also reduces freedom of testation to a nullity and as these testaments have to be dealt with on a case by case basis (rather than there being one rule which applies to all testaments) the practical difficulties are just as prominent.

The Preamble of the Constitution creates a duty to, "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[12] Considering that historically women have been excluded from wealth, from the ownership and control of private property, from the ownership and control of the means of production, it is easy to see that they have been historically discriminated against. Despite this the South African law of testate succession still allows for such discrimination to be perpetuated through freedom of testation. It is no longer acceptable.

The precedent of *Syfrets* ensures that on a case by case basis discrimination, via testamentary disposition, does not occur. However, this can only happen in those cases which receive judicial scrutiny and in which the discrimination is evident. In the *Syfrets* case the discrimination was evident from the text, however this may not be true in all testaments. Any testator who wants to discriminate (or intends to discriminate without realising that it is discrimination) can, with a simply worded will, ensure that his estate devolves in a discriminatory manner. Or in other words, a testator who wants to maintain patriarchal hierarchy can do so with a simply worded will. Indeed lawyers who have clients who wish to discriminate in their testaments, advise them to discriminate in their testaments but not to state the reasons as to why they are discriminating.[13]

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12 The Constitution, Preamble.

13 Jacobs "Not Over my Dead Body" http://www.walkers.co.za/features/deadbody.html accessed on 3/02/2007.

Provided that the clause in a will is worded in such a way that the discrimination is not evident from the text it is unlikely that these types of clauses will be challenged. Thus, for example, a testator may leave his estate to, 'my son' and exclude his daughter because she is female. Provided that the testator does not state why his daughter is excluded i.e. because she is female, this clause cannot be challenged because it is protected by the right to free testamentary disposition. Thus freedom of testation upholds capitalist patriarchy. Provided that the discrimination is not evident from the text of a will, freedom of testation allows a testator to pass his wealth from himself to another male. Thus the system of male dominance is perpetuated. In a country in which historical forms of dominance are so inherent in society this should not be allowed to continue.

Thus freedom of testation should no longer be allowed to continue in its current form, if at all.

7.1 Suggestions for the amendment of testate succession

South African testate succession, despite attempts to ensure the constitutionality of wills,[14] still allows for discrimination. Perhaps it is time the legislature amended the South African concept of freedom of testation to ensure that these forms of discrimination do not occur through testate succession.

It is suggested that either freedom of testation be done away with in its entirety and that all estates should devolve according to the ISA or that more restrictions be implemented to further limit freedom of testation. An alternative to these suggestions would be to create a registry for South African

14 Such as *Syfrets*.

testaments. Such a registry could ensure that all testaments drafted in South Africa have to meet certain requirements and that the dispositions contained therein are not contrary to the Constitution. This suggestion would alleviate the court's duty as they would no longer have to hear cases concerning the validity of wills or the validity of clauses in such wills. However this suggestion has huge administrative implications for government as well as for the public. Wills would have to be checked for discrimination before they could be authorised. This requirement would restrict the number of people able to make a will due to time and geographical constraints, which in turn would mean that more estates would devolve intestate. This suggests that the best way forward may be to do away with freedom of testation in its entirety and resort to intestate succession in all cases.

The ISA ensures that a deceased estate devolves upon a spouse or if there is no spouse upon a descendant.[15] Alternatively if there is both a spouse and a descendant then the ISA ensures that the spouse would inherit a child's share of the estate i.e. equal with the descendant.[16] If no spouse or no descendants exist then the ISA prescribes a hierarchy of family members who may inherit from the deceased estate.[17] Intestate succession would ensure that no discrimination can occur, on any grounds, upon the devolution of a deceased estate.

This would increase the work load of the High Court as they would have many more deceased estates to deal with. However when compared to the benefit that could be obtained for women this argument hardly seems relevant. Women would no longer be discriminated against in this form. This would ensure that women have greater access to the ownership and control of wealth. It would also give women the ability to create more wealth and give them a stronger footing in the capitalist world in which they live.

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15 ISA 1 (1) (a) and (b).

16 ISA 1 (c).

17 ISA 1 (d) – (f).

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