

DEVELOPMENTS IN SA CIVIL PROCEDUREAL LAW 373

THE LIMITS IMPOSED UPON FREEDOM OF TESTATION BY THE *BONI MORES*: LESSONS FROM COMMON LAW AND CIVIL LAW (CONTINENTAL) LEGAL SYSTEMS

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1 Introduction

Freedom of testation is recognised as one of the founding principles of the South African law of testate succession. According to this principle, testators are free to dispose of their assets in a will in any manner they deem fit.² Freedom of testation is not, however, completely unfettered—South African law allows for the restriction of this freedom on the basis of relevant social and economic considerations.³ Some of these restrictions are of a statutory nature, while others are founded upon common law principles.⁴ In South African law as in Roman and Roman-Dutch law, an important restriction based upon social considerations dictates, that effect will not be given to testamentary provisions if compliance with such provisions will be *contra bonos mores* or against public policy.⁵

A disconcerting feature of the South African legal position with regard to the limits imposed upon freedom of testation by the *boni mores* is the comparative juridical inactivity which has characterised this area of the law in recent years—neither our courts nor the legislature has devoted much attention to freedom of testation in general and more particularly to the limiting effect of the *boni mores* on this freedom. Indicative of this lack of judicial and legislative rejuvenation is the fact that authoritative decisions by the appellate division (now the supreme court of appeal) on this issue dates back to the 1950s.⁶ It stands to reason that the role attributed in such decisions to the *boni mores* for the purpose of limiting freedom of testation may no longer hold true in a (more)

¹ I would like to thank the University of the Western Cape for facilitating the research for part of this article through their exchange programme with the Catholic University of Leuven in Belgium.

² Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* (1987) 251; De Waal & Schoeman *Law of Succession* (1996) 87.

³ De Waal "The Social and Economic Foundations of the Law of Succession" 1997 *Stell LR* 162.

⁴ Du Toit "The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law" 1999 *Stell LR* 232 236 240; De Waal 1997 *Stell LR* 162 170.

⁵ Corbett, Hahlo & Hofmeyr *The Law of Succession in South Africa* (1980) 118; De Waal & Schoeman *Law of Succession* 92. For purposes of this discussion the terms "*boni mores*" and "public policy" will be used as synonyms. See *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy* 1988 1 SA 546 (W) 552G in support of this proposition and *Rylands v Edros* 1997 1 BCLR 77 (C) 92A for a contrary view.

⁶ *Aronson v Estate Hart* 1950 1 SA 539 (A) on testamentary faith and race clauses.

modern legal environment.⁷ The paucity of legal development in the above regard becomes even more acute when constitutional development in South Africa since 1994 is considered. This development has raised a pertinent question with regard to the impact of constitutional principles upon the entire body of South African private law. It is, for example, accepted that some of the rights contained in the Bill of Rights of the South African Constitution⁸ has a definite bearing on the relationship between private individuals, be it by way of either direct⁹ or indirect¹⁰ horizontal application of such rights. It is furthermore accepted that the effect of constitutional principles (as embodied in the rights contained in the Bill of Rights) will, with regard to the limitation of freedom of testation, primarily occur through the application of the *boni mores* criterion.¹¹ There is, however, as yet little indication as to the precise manner in which such a constitutionally-founded *boni mores* criterion will operate in order to limit freedom of testation in the South African law.¹²

In view of these considerations, it is suggested that a proper evaluation of the limits imposed upon freedom of testation through the application of a constitutionally-founded *boni mores* criterion is indeed appropriate.¹³ In order to facilitate such an evaluation, this article investigates, by way of comparative research, the role of the *boni mores* for the purpose of limiting freedom of testation in selected common law and civil law (continental) legal systems. The insight gained from such an investigation will undoubtedly provide valuable direction when this issue is considered in a South African context.

As far as common law legal systems are concerned, the limits imposed by public policy upon freedom of testation in English and Australian law will be considered first. Then Dutch and German law will be similarly investigated as two examples of civil law or continental legal systems. In each of the latter two cases, the limits imposed upon freedom of testation by good morals (*goede zeden* in Dutch law and *guten Sitten* in German law) will be considered. The investigation of the issue in each of the above-mentioned legal systems will focus primarily on the approach (in terms of public policy or good morals) to prescriptive testamentary provisions whereby it is attempted to control the conduct of beneficiaries or to regulate the exploitation of assets in a manner which infringes the

⁷ In the famous words of Hahlo "Jewish Faith and Race Clauses in Wills — A Note on *Aronson v Estate Hart* 1950 1 SA 539 (A)" 1950 *South African Law Journal* 231 240: "Times change and conceptions of public policy change with them."

⁸ Act 108 of 1996.

⁹ Woolman in Chaskalson, Kentridge, Klassren, Marcus, Spitz & Woolman *Constitutional Law of South Africa* (1996) 10–57; Woolman & Davis "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions" 1996 *South African Journal on Human Rights* 361 380.

¹⁰ Sprigman & Osborne "Du Plessis is *not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" 1999 *SAJHR* 25.

¹¹ De Waal in Rautenbach et al *Bill of Rights Compendium* (1998) 3G25.

¹² The only substantial consideration of the issue to date is by De Waal in Rautenbach et al *Bill of Rights Compendium* 3G1. De Waal's discussion is, however, confined to the limiting effect of the equality clause of the Bill of Rights upon freedom of testation.

¹³ I shall undertake this task in a forthcoming article.

fundamental rights of (instituted and/or potential) beneficiaries. To this end particular emphasis will be placed on testamentary provisions based on race, nationality and religion.

2 Freedom of testation and its limitation in Common Law legal systems

2 1 English law

2 1 1 Freedom of testation in English law

Testate succession during the Anglo-Saxon period in England was comparatively undeveloped and imperfect.¹⁴ The Norman conquest (1066) did not expedite development in this area of the law as the ecclesiastical courts and the *King's Court* soon gained strict control over deceased estates.¹⁵ As the influence of these courts waned, English testators enjoyed greater freedom (within certain broad limits) to dispose of their assets by way of will. This freedom was later enhanced by various statutory measures such as the Statute of Wills of 1540, the Statute of Tenures of 1660, the Dower Act of 1833, the Married Women's Property Act of 1882 and the Mortmain and Charitable Uses Act of 1891. At the height of political and economic *laissez-faire* during the nineteenth century, the freedom of testamentary disposition was virtually unfettered in English law.¹⁶ This freedom was, however, again substantially restricted in favour of a deceased's dependants by the Inheritance (Family Provision) Act of 1938 and the Inheritance (Provision for Family and Dependants) Act of 1975.¹⁷

Finch *et al* summarise the position in English law with regard to freedom of testation as follows:¹⁸

"[T]he concept of testamentary freedom . . . is of central importance to legislation on wills in the context of English law . . . each testator is free to dispose of his or her property on the basis of individual choice. . . . In its purest form it implies the absolute right of the individual over property, in death as well as in life. In reality the law places some restrictions on that right. . . . However, in essence, under English law the testator has considerable freedom to decide who shall receive bequests, and also what form those bequests shall take."

English law supports freedom of testation by various other means, most importantly through the acknowledgement of private ownership. Miller explains the relationship between private ownership and private succession (which in turn is premised upon freedom of testation) in English law as follows:¹⁹

"The law of succession presupposes the existence of private property, that is property owned and possessed by individuals. . . . Given that the rules of succession are necessary in a society which recognises private property . . . [t]he power of testation is a part of the power of gift."

¹⁴ Potter *A Short Outline of English Legal History* (1933) 252; Pollock & Maitland *The History of English Law* Vol 2 (1968) 320–321; Miller *The Machinery of Succession* (1996) 3.

¹⁵ Potter *English Legal History* 252–253; Pollock & Maitland *History of English Law* 332–333; Miller *The Machinery of Succession* 3.

¹⁶ Holdsworth *A History of English Law* (1938) 22.

¹⁷ Other relevant restrictions on freedom of testation in English law relate to mutual wills, *estoppel*, contractual succession and perpetuities.

¹⁸ *Wills Inheritance and Families* (1996) 21.

¹⁹ *The Machinery of Succession* 2–3.

The power of gift is the power of the owner of property to give away that property to whomsoever he or she chooses not only in his or her lifetime, but also at his or her death. The power of gift can be regarded as being as vital to the concept of property as the power to sell or exchange."

English law does not, in the absence of a written constitution for the United Kingdom, recognise a constitutional guarantee of private ownership and private succession. Such a guarantee is, however, implied by Article 1 of the First Protocol to the European Convention on Human Rights (1950),²⁰ which has been imported into the domestic law of the United Kingdom by the Human Rights Act of 1998. Whether the guarantee of private ownership (and hence private succession and freedom of testation), in terms of the above-mentioned Convention, will be accorded the status of a commensurate fundamental right in English law is as yet still uncertain.

2 1 2 The limits imposed upon freedom of testation by public policy in English law

2 1 2 1 *General observations*

As indicated above, the United Kingdom is unfamiliar with a constitutional guarantee of fundamental rights upon which the limitation of freedom of testation with regard to prescriptive testamentary provisions (which ostensibly infringe the fundamental rights of (instituted and/or potential) beneficiaries) can be founded. Some of the rights contained in the European Convention on Human Rights have, however, acquired full legal force and effect in the United Kingdom on the basis of the Human Rights Act.²¹ Various English commentators maintain that the Convention rights thus embodied in the Human Rights Act enjoy at least indirect horizontal application in the United Kingdom and that it can, therefore, also influence the relationship between private individuals.²² Should horizontal effect indeed be attributed to Convention rights, it is quite possible that such rights will in future shape the English legal position with regard to the limitation of freedom of testation on the basis of public policy, particularly by defining public policy for the purpose of the limitation of free testamentary disposition. At present, however, contentious testamentary provisions, particularly those based on race, nationality and religion, are dealt with in English law, as far as

²⁰ Confirmed by the European Court of Human Rights in *Marckx v Belgium* 13 June 1979 Series A Volume 31.

²¹ Relevant rights include the right to freedom of thought, conscience and religion (a 9 of the Convention); the right to freedom of expression (a 10 of the Convention); the right to freedom of association (a 11 of the Convention) and the right to marry (a 12 of the Convention). The Convention also contains a prohibition on discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (a 14 of the Convention).

²² Hunt "The 'Horizontal Effect' of the Human Rights Act" 1998 *Public Law* 423; Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" 1999 *International and Comparative Law Quarterly* 57; Markesinis "Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill" 1999 *Law Quarterly Review* 47.

public policy is concerned, predominantly in accordance with the courts' view of what is acceptable and what is not. The role of public policy in the latter regard is aptly described (with reference to Australian law but obviously equally applicable to English law) by Atherton and Vines:²³

"[P]ublic policy . . . suggests some overriding qualification of legal rules in the public interest: that at some point the individual's freedom of action is checked in the interest of some higher good. Public policy . . . is . . . an explanation of a group of rules and principles which overrides the freedom of testamentary disposition and the freedom of inheritance."

English courts have in this regard labeled the following testamentary provisions (principally in the form of testamentary conditions) as offending against public policy:

- (a) A condition which encourages a beneficiary to commit a crime or to participate in any other act forbidden by law.²⁴
- (b) A condition which requires of a beneficiary to exert influence with regard to a political matter, for example, the acquisition of a peerage.²⁵
- (c) A condition which effects the separation between parent and child.²⁶
- (d) A condition which interferes with the religious education of a child.²⁷
- (e) A condition which prevents a beneficiary from defending the realm or from occupying a public office.²⁸
- (f) A condition in general restraint of marriage.²⁹
- (g) A condition which prevents a beneficiary from practicing a certain trade.³⁰

2 1 2 2 *Restriction of freedom of testation with regard to prescriptive testamentary provisions*

The manner in which public policy is employed in English law to address the issue of the validity or otherwise of prescriptive testamentary provisions, particularly those based on race, nationality and religion, is somewhat controversial. Such provisions are, on the one hand, often regarded as not offending against public policy and hence completely valid. This approach is, on the other hand, regularly questioned, particularly on the basis that such provisions should indeed be considered as contrary to public policy. The following discussion of the English legal position in this regard proceeds on the basis of a dual

²³ *Australian Succession Law* (1996) 603.

²⁴ *Mitchel v Reynolds* (1711) 1 P Wms 181; *Egerton v Earl of Brownlow* (1853) 4 HL Cas 1; *Shrewsbury v Hope Scott* (1859) 6 Jur NS 452.

²⁵ *Earl of Kingston v Pierepont* (1681) 1 Vern 5; *Egerton v Earl of Brownlow* (1853) 4 HL Cas 1.

²⁶ *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471; *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75; *Re Carborne, Hodge and Nabarro v Smith* [1943] 2 All ER 7; *Re Piper, Dodd v Piper* [1946] 2 All ER 503.

²⁷ *Re Tegg, Public Trustee v Bryant* [1936] 2 All ER 878; *Re Blake, Lynch v Lombard* [1955] IR 89.

²⁸ *Re Beard, Reversionary and General Securities v Hall, Re Beard v Hall* [1908] 1 Ch 383; *Re Edgar, Cohen v Edgar* [1939] 1 All ER 635.

²⁹ *Long v Dennis* (1767) 4 Burr 2052; *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570.

³⁰ *Cooke v Turner* (1846) 15 M&W 727; *Egerton v Earl of Brownlow* (1853) 4 HL Cas 1.

distinction. Firstly, prescriptive testamentary provisions aimed at controlling the conduct of beneficiaries will firstly be discussed with reference to testamentary forfeiture clauses. Prescriptive testamentary provisions aimed at regulating the exploitation of assets will thereafter be discussed with reference to charitable testamentary bequests.

2 1 2 2 1 Testamentary forfeiture clauses

In English law, testamentary forfeiture clauses often take the form of so-called conditions subsequent in terms of which a bequest is terminated upon the occurrence of an uncertain future event.³¹ Prescriptive forfeiture clauses founded on race, nationality or religion which direct beneficiaries' religious convictions or choice of spouse are well-known in English law. These provisions are generally regarded as not in conflict with public policy.³² This position is supported by the fact that the provisions of the Race Relations Act of 1976, which is aimed at combating discrimination on racial grounds, does not apply with regard to testamentary bequests and private trusts.³³

The view in favour of the validity of the testamentary provisions under discussion has, however, been questioned in the past. In *Clayton v Ramsden*, for example, a testator stipulated that his daughter would forfeit her testamentary benefit, should she marry "a person who is not of Jewish parentage and of the Jewish faith."³⁴ Lord Russell correctly describes the effect of this provision as follows:³⁵

"[T]his is a case in which the testator has sought . . . to direct the lives of his children from the grave . . . [and] . . . to control his daughter Edna's choice of husband."

Lord Romer decides, without specific reference to public policy, that such a bequest is completely acceptable.³⁶ A word of warning is, however, offered by Lord Atkin:³⁷

"For my own part I view with disfavour the power of testators to control from their graves the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear."

The court's general reluctance to grant relief on the basis of policy-considerations is somewhat tempered by the majority's decision that the terms "of Jewish parentage" and "of the Jewish faith" are conceptually too uncertain to ensure proper effect and that the condition *in casu* therefore fails as a result of vagueness.

The leading English decision on the present issue is by the House of Lords in *Blathwayt v Lord Cawley*, where a testator provided for forfeiture of trust benefits if, amongst other things, any of the

³¹ Hobbs *Halsbury's Laws of England* Volume 50 (1998) 265.

³² *Perrin v Lyon* (1807) 9 East 170; *Jenner v Turner* (1880) 16 ChD 188; *Hodgson v Holford* (1879) 2 ChD 959; *Re May, Eggar v May* [1932] 1 Ch 99.

³³ Hobbs *Halsbury's Laws of England* Vol 50 274 n 2.

³⁴ [1943] 1 All ER 16.

³⁵ 17. See a similar observation by Lord Romer at 20-21.

³⁶ 21.

³⁷ 17.

beneficiaries should "be or become a Roman Catholic".³⁸ Lord Wilberforce admits to the desirability of a reconsideration of the validity traditionally attributed in English law to provisions of this kind:³⁹

"[I] do not doubt that conceptions of public policy should move with the times and that widely accepted treaties and statutes [*in casu* reference was made to the Race Relations Act as well as the European Convention on Human Rights] may point to the direction in which such conceptions, as applied by the courts, ought to move. It may well be that conditions such as these are, or at least are becoming, inconsistent with standards now widely accepted."

Lord Wilberforce is, however, of the opinion that the present provision should not be regarded as invalid on the basis of policy-considerations. He advances two reasons for his view. Concluding that the provision is contrary to public policy, would firstly detract from the prominence of freedom of testation in English law:⁴⁰

"To do so would bring about a substantial reduction of another freedom, firmly rooted in our law, namely that of testamentary disposition."

Secondly, testamentary benefiting is secondly per definition premised on personal choice and preference, which is not necessarily to be equated with discrimination:⁴¹

"Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy."

Lord Wilberforce is supported in this approach by the rest of the court. Lord Cross comments, for example:⁴²

"[I]t is true that it is widely thought nowadays that it is wrong for a government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and those of another."

Lord Edmund-Davies concurs with this view:⁴³

"[A] not unimportant matter of public policy is involved in limiting a testator's power to dispose of his own property in his own way without clear justification for so curtailing his freedom is first established, and I echo the doubt expressed by . . . Lord Cross . . . that it is self-evidently against public policy for an adherent of one religion to distinguish between people of one faith or another when he is making his testamentary dispositions."

The court decides, therefore, that the conditional forfeiture clause *in casu* does not conflict with public policy. The court also holds that the forfeiture clause cannot be regarded as conceptually too vague or uncertain to ensure proper effect. The testator's wishes are thus maintained.

Several aspects with regard to the *Blathwayt*-decision deserve comment. Firstly, Lord Wilberforce's statement that private selection

³⁸ [1975] 3 All ER 625.

³⁹ 636.

⁴⁰ 636.

⁴¹ 636.

⁴² 639.

⁴³ 649.

by a testator, supported by his freedom of testamentary disposition, is not a matter to be dealt with in terms of public policy can not be accepted without qualification. Freedom of testation as well as its limitation is, as stated earlier, founded upon relevant social and economic considerations. These considerations, either independently or in mutual co-operation, determine the content and operation of public policy. Therefore, private selection, if it exceeds the boundaries imposed by particularly policy-defining social considerations, can indeed offend against public policy in appropriate circumstances. It is submitted that this will principally occur when a testator uses freedom of testation to exert undue influence in the private lives of beneficiaries to such an extent that the fundamental rights of the beneficiaries concerned are (discriminatorily) infringed.

Secondly, Lord Simon arrives at his decision in a somewhat positivistic manner:⁴⁴

"Courts are concerned with public policy only insofar as it has been manifested by parliamentary sanction or embodied in rules of law having binding judicial force."

It is submitted that particularly the provisions of the Human Rights Act, insofar as they enjoy horizontal application, amply embody public policy in binding legal (and legislative) rules. In the present context, the provisions of this Act therefore facilitate not only Lord Simon's approach to public policy but also satisfy the requirement of a "clear justification for so curtailing his [a testator's] freedom" insisted upon by Lord Edmund-Davies above.

Thirdly, Lord Simon correctly acknowledges that the evaluation of public policy in any given instance can only proceed with due consideration of the particular facts and circumstances of the individual case:⁴⁵

"The actual personal circumstances can differ so greatly in these matters from case to case that it is difficult to apply a general rule of public policy which is not either practically unreal in many cases or open to some logical objection."

Unfortunately, the court provides little indication of the factors to be considered in such a casuistic evaluation. One valuable observation is, however, made in this regard by Lord Wilberforce. He suggests that the personal inclination and responsibility of the individual beneficiary (*in casu* towards the acquisition of a material benefit) should be weighed carefully against the ostensible infringement of a fundamental right of such beneficiary (*in casu* religious freedom):⁴⁶

"[A] choice between considerations of material wealth and spiritual welfare has to be made by many . . . and it would be cynical to assume that these cannot be conscientiously and rightly made."

The public policy standpoint enunciated almost three decades ago in *Blathwayt v Lord Cawley* with regard to prescriptive testamentary forfeiture clauses based on race, nationality and religion, still represents

⁴⁴ 637.

⁴⁵ 637.

⁴⁶ 637. See similar remarks by Lord Cross at 644 and Lord Fraser at 650.

the prevailing legal position in English law. It will be interesting to see whether (and if so, to what extent) the indirect horizontal application of relevant provisions of the Human Rights Act will bring about a metamorphosis in the approach to this contentious issue.

2 1 2 2 2 Charitable testamentary bequests

English law allows testators to confine benefits in terms of charitable bequests (often in the form of charitable trusts) to groupings of their choice.⁴⁷ This approach is supported by English law's traditional classification of charitable trusts as formulated in *Commissioner for Special Purposes of Income Tax v Pemsel*.⁴⁸ Lord MacNaghten decides *in casu* that charitable trusts can be identified under four distinct headings, namely trusts for the relief of poverty, trusts for educational purposes, religious trusts and trusts which cannot be identified under any one of the aforementioned three headings, but which still operate for the benefit of the community.⁴⁹ English law allows testators to regulate the exploitation of assets by means of charitable trusts on the grounds of, *inter alia*, race, nationality and religion, as long as this quadruple classification can accommodate such trusts.⁵⁰

The above legal position is strengthened by the fact that the Race Relations Act of 1976 (aimed at combating discrimination on racial grounds) as well as the Sex Discrimination Act of 1975 (aimed at combating discrimination on the ground of gender) allow for certain concessions in favour of charities.

Section 34 of the Race Relations Act provides, for example, that discrimination will not be unlawful if such discrimination is necessary in order to give effect to the provisions of any instrument directing the operation of a charity and in terms of which benefits are awarded to persons of a particular racial group. This section is, however, not applicable with regard to provisions which limit benefits on the basis of race or colour. Oakley therefore contends that this statutory provision allows a charitable trust to provide validly for the education of, for example, Pakistani's or Spaniards only, but that a similar charitable trust which expressly excludes Pakistani's or Spaniards from its benefits, will conflict with this statutory provision.⁵¹ Section 34 of the Act furthermore provides that, in the case of a provision which defines a group or class of beneficiaries with reference to colour, such reference must be regarded as void and has to be ignored by the trustees of the charity concerned. A trust to educate white children in Coventry will therefore simply become a trust to educate children in Coventry.⁵²

⁴⁷ Oakley *Parker and Mellows The Modern Law of Trusts* (1998) 379.

⁴⁸ [1891] AC 531.

⁴⁹ 583.

⁵⁰ Pettit *Equity and the Law of Trusts* (1993) 309.

⁵¹ *The Modern Law of Trusts* 411 n 62.

⁵² Moffat & Chesterman *Trusts Law* (1998) 648. See also Hayton *Hayton and Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies* (1996) 480; Pettit *Equity and the Law of Trusts* 309-319.

Section 43 of the Sex Discrimination Act provides that conduct will not be unlawful if such conduct occurs pursuant to the provisions of any instrument directing the operation of a charity and in terms of which benefits are bestowed upon the members of one gender only. This section allows for the existence of so-called "single sex charities" such as the YMCA, the YWCA, the Boy Scouts and the Girl Guides.⁵³ Section 78 of the Sex Discrimination Act does, however, provide for certain restrictions with regard to educational charities in the above regard. This section stipulates that the trustees of any such charity can apply to the appropriate minister for the removal or amendment (subject to relevant administrative procedures) of any restriction which pertains to their organisation so as to enable them to award benefits to members of both genders.

It is therefore evident that, despite the general lenient approach to charities in terms of the above-mentioned legislation, certain legislative restrictions are indeed imposed upon charities as far as bestowing benefits on the basis of race, colour and gender is concerned. These restrictive measures are complemented by various non-statutory mechanisms of English law to further escape the contentious results of charitable bequests founded on, *inter alia*, race, nationality and religion.

One such mechanism concerns the requirement that charities have to display an element of public benefit. In *Inland Revenue Commissioners v Baddeley*, Viscount Simonds formulates an important distinction with regard to this requirement when he has to decide upon the validity of a charitable trust:⁵⁴

"[There is a] distinction . . . between a form of relief extended to the whole community, yet by its very nature advantageous to the few and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it."

In the former case, a charitable trust can validly be constituted, while no such trust exists in the latter case, simply because the required element of public benefit is absent. This distinction prompts Viscount Simonds to hold that a trust *inter vivos* created for, amongst other things, "the promotion of the religious and physical well-being of persons resident in the County Boroughs of West Ham and Leyton in the County of Essex . . . who . . . are . . . members or likely to become members of the Methodist Church" does not, due to the absence of the required element of public benefit, constitute a valid charitable trust.⁵⁵ A similar result is achieved in *Davies v Perpetual Trustee Company* with regard to a testamentary trust for "the Presbyterians, the descendants of those settled in the Colony hailing from or born in the North of Ireland . . . for purposes of establishing a college for the education and tuition of their youth".⁵⁶ Lord Morton describes the intended beneficiaries *in casu* as "a fluctuating body of private individuals" and holds that the trust

⁵³ Oakley *The Modern Law of Trusts* 411 n 62. See also Todd *Textbook on Trusts* (1999) 288; Pettit *Equity and the Law of Trusts* 310-311.

⁵⁴ [1955] AC 572 592.

⁵⁵ 592-593.

⁵⁶ [1959] AC 439.

provisions display no element of public benefit. The trust is therefore not to be regarded as a valid charitable trust.⁵⁷

Another mechanism relates to the application of the *cy prés* doctrine. This doctrine allows a court to identify and implement an alternative trust purpose if the original purpose identified by the founder of a charitable trust cannot be achieved because it has been rendered impossible, impractical or unlawful, provided that the purpose identified by the court corresponds closely with that originally identified by the founder. English courts have in the past employed the *cy prés* doctrine to avoid the contentious consequences of charitable bequests founded on race, nationality and religion.

One such case is *In re Lysaght, Hill v The Royal College of Surgeons*.⁵⁸ The testatrix *in casu* bequeathed the residue of her estate to trustees for the purpose of the creation of an endowment fund of £5 000 in favour of The Royal College of Surgeons, to be administered by the college itself. The fund had to be utilised for the payment of bursaries to students, but in this regard the testatrix prescribed that any recipient of a bursary "must be a British born subject and not of the Jewish or Roman Catholic faith". The college declared itself unwilling to administer the fund in respect of which (in their view) discriminatory measures applied. The college therefore approached the court to determine whether the trust created by the testatrix can indeed be labelled a charitable trust and, if so, whether the trustees should pay the £5 000 to the college or, alternatively, utilize it *cy prés*.

Buckley J holds that the will of the testatrix evinces a clear charitable intention and purpose. This purpose is manifested in the bequest of the endowment fund to the college. He is of the opinion, however, that the restriction imposed by the testatrix with regard to religion cannot be regarded as contrary to public policy.⁵⁹

"I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects . . . but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents of a particular faith, is contrary to public policy."

Buckley J, however, still has to address the unwillingness of the college to administer the endowment fund under the restrictions prescribed by the testatrix. In this regard he comes to the conclusion that the restrictions imposed do not constitute an essential portion of the testatrix's general charitable purpose.⁶⁰ He is furthermore of the opinion that these restrictions render the trust purpose impractical and that relief can therefore be granted in terms of the *cy prés* doctrine.⁶¹

⁵⁷ 456. See also *Caffoor (Trustees of the Abdul Gaffoor Trust) v Commissioner of Income Tax, Colombo* [1961] AC 584. In *Verge v Somerville* [1924] AC 496 a testamentary bequest "for the benefit of New South Wales . . . soldiers" returning from the First World War was, however, regarded as a valid charitable trust.

⁵⁸ [1966] Ch 191.

⁵⁹ 204-205.

⁶⁰ 203.

⁶¹ 209.

"[I]nsistence on the provision for religious discrimination would defeat the paramount intention of the testatrix in the present case: indeed it would destroy the trust, for it would result in the college disclaiming the trusteeship, which would occasion the failure of the trust. Accordingly . . . the court can and should enable the college to carry the trust into effect without the element of religious discrimination."

Buckley J decides therefore that the words "and not of the Jewish or Roman Catholic faith" should not be read as part of the trust provisions.⁶²

It is evident that, despite English law's lenient approach to prescriptive charitable testamentary bequests based on race, nationality and religion, English courts readily employ the above mechanisms in order to avoid the contentious consequences of such bequests. However, public policy plays little part in this regard.

2 2 Australian Law

2 2 1 Freedom of testation in Australian law

The English colonised Australia during the 1780's. Existing British legislation and common law applied in the new colonies, and the British parliament also enjoyed legislative power with regard to such colonies.⁶³ Australia gradually obtained increasing independence from Britain, but Australian law remains closely related to that of Britain. In the words of Brennan J in *Mabo v State of Queensland (No 2)*:⁶⁴

"Australian law is not only the historical successor of, but is an organic development from, the law of England."

This is true also with regard to the Australian law of succession, as stated by Atherton and Vines:⁶⁵

"Since inheritance is an area of the law which is regulated by the [Australian] States rather than the Commonwealth, it is clear that English law continued to be able to influence the jurisdictions well into the twentieth century. Most of this influence appeared in the form of common legislation and a view that the English cases were the most persuasive precedents for Australian courts to follow."

Freedom of testation was readily received as one of the fundamentals of the English law of testate succession in Australian law. Hardingham *et al* declares in this regard:⁶⁶

"The law of the various Australian States and Territories . . . like the law of England, confer on a mature citizen the liberty to make an effective declaration as to what is to be done after his death in relation to the inheritable property which he owns immediately before his death."

Private succession and freedom of testation are supported in Australian law, as in English law,⁶⁷ by the acknowledgement of private

⁶² A similar result was achieved in *Re Woodhams, Lloyds Bank v London College of Music* [1981] 1 All ER 202 with regard to a testamentary bequest to the College of Music towards the payment of an annual bursary to "a promising boy . . . of British Nationality and Birth". See also *In re Dominion Students' Hall Trust, Dominion Students' Hall Trust v Attorney General* [1947] Ch 183.

⁶³ Blackshield, Williams & Fitzgerald *Australian Constitutional Law and Theory* (1996) 131-132; Carvan *Understanding the Australian Legal System* (1994) 27-28.

⁶⁴ (1992) 175 CLR 1 18.

⁶⁵ *Australian Succession Law* 47.

⁶⁶ *Wills and Intestacy in Australia and New Zealand* (1983) 1.

⁶⁷ See 2 1 1.

ownership. Atherton and Vines provide an Australian perspective in this regard.⁶⁸

"Succession law is about the transmission of property on death. . . . It is possible to view the ability to pass on property at the time of one's death as a right which is inherent in the nature of the ownership of property."

Australian law does not, in the absence of a bill of rights in the Commonwealth of Australia Constitution Act of 1900, recognise a constitutional guarantee of private ownership and private succession (and hence of freedom of testation).

2 2 2 The limits imposed upon freedom of testation by public policy in Australian law

2 2 2 1 *General observations*

As indicated above, Australia is unfamiliar with a comprehensive constitutional guarantee of fundamental rights upon which the limitation of freedom of testation with regard to prescriptive testamentary provisions (which ostensibly infringe the fundamental rights of (instituted and/or potential) beneficiaries) can be founded. The one or two fundamental rights guaranteed in the Commonwealth of Australia Constitution Act, as well as relevant provisions of Commonwealth legislation aimed at combating discrimination, operate either strictly vertically or are otherwise not available to litigants in private disputes on the contents of wills.⁶⁹ Australian law therefore deals with contentious testamentary provisions, particularly those based on race, nationality and religion, in accordance with public policy as formulated and applied by the courts.

Australian courts have in this regard labeled the following testamentary provisions (principally in the form of testamentary conditions) as offending against public policy:

- (a) A condition which encourages a beneficiary to commit a crime or to participate in any other act forbidden by law.⁷⁰
- (b) A condition which excludes the jurisdiction of a court or which precludes a beneficiary from litigation with regard to the particular will.⁷¹
- (c) A condition which effects the separation between parent and child.⁷²
- (d) A condition which prevents a parent from performing his/her parental duties.⁷³
- (e) A condition in general restraint of marriage.⁷⁴

⁶⁸ *Australian Succession Law* 17–18.

⁶⁹ Blackshield et al *Australian Constitutional Law and Theory* 702; Booker et al *Federal Constitutional Law: An Introduction* (1994) 223–224; Grace & Jones *Law, Liberty and Australian Democracy* (1990) 423.

⁷⁰ *Wallace v Wallace* (1898) 24 VLR 859; *Re Ellis, Perpetual Trustee v Ellis* (1929) 29 SR (NSW) 470.

⁷¹ *Permanent Trustee v Dougall* (1931) 34 SR (NSW) 83; *Re Chester* (1978) 19 SASR 247.

⁷² *Re Thomson* [1966] SASR 278.

⁷³ *Re Ellis, Perpetual Trustee v Ellis* (1929) 29 SR (NSW) 70.

⁷⁴ *Carrodus v Carrodus* [1913] VLR 1; *Re Hartman* [1960] Tas SR 16; *Re Thomson* [1966] SASR 278.

2 2 2 2 *Restriction of freedom of testation with regard to prescriptive testamentary provisions*

The manner in which public policy is employed in Australian law to address the issue of the validity of prescriptive testamentary provisions, particularly those based on race, nationality and religion, is as controversial as in English law. Such provisions are, on the one hand, often regarded as not offending against public policy and hence completely valid. This approach is, on the other hand, regularly questioned, particularly on the basis that such provisions should indeed be considered as contrary to public policy. The discussion hereafter of the Australian legal position in this regard proceeds on a similar basis as the discussion of the English legal position. Firstly, prescriptive testamentary provisions aimed at controlling the conduct of beneficiaries will be discussed with reference to testamentary forfeiture clauses. Prescriptive testamentary provisions aimed at regulating the exploitation of assets will thereafter be discussed with reference to charitable testamentary bequests.

2 2 2 2 1 Testamentary forfeiture clauses

In Australian law, as in English law, testamentary forfeiture clauses often take the form of so-called "conditions subsequent" in terms of which a bequest is terminated on the occurrence of an uncertain future event.⁷⁵ Prescriptive forfeiture clauses founded upon race, nationality or religion are well-known in Australian law. These provisions are generally dealt with on the basis of vagueness or uncertainty, rather than with reference to policy considerations. Such provisions have, however, in a few cases been cursorily regarded as not in conflict with public policy.⁷⁶

In *Trustees of Church Property of the Diocese of Newcastle v Ebbeck*, the court investigates this issue in greater detail.⁷⁷ The testator *in casu* bequeathed the residue of his estate to his wife and directed that, upon her death, it should go to their three sons in equal shares. The bequest to each son was made subject to the condition "that he and his wife shall at the date of death of my wife or at my death should my wife predecease me profess the Protestant faith". The testator provided for forfeiture of benefits should this condition not be fulfilled. The validity of the bequest is contested, *inter alia*, on the ground that it offends against public policy. This view finds favour with the majority of the court. Dixon CJ bases his decision in this regard on the negative consequences brought about by the forfeiture clause, particularly with reference to the dilemma resulting from the choice between preservation of marriage on the one hand and adherence to a chosen faith on the other. He uses a marriage between one of the testator's Protestant sons and a Roman Catholic wife as an example.⁷⁸

⁷⁵ Atherton & Vines *Australian Succession Law* 595-596.

⁷⁶ *In re Harris, National Trustee Company v Sharpe* [1950] ALR 353; *Re Kearney* [1957] VLR 56.

⁷⁷ [1960] 104 CLR 394.

⁷⁸ 403-404.

"In a marriage between a Protestant husband and a Roman Catholic wife it [the conditional bequest *in casu*] makes the continued adherence of the wife to her faith the cause of his forfeiting his very substantial share in his father's estate with the alternative of his disencumbering himself of his wife before his mother dies. Whether designedly or not such a disposition creates an opposition between the wife's religious beliefs and a serious temporal interest of the husband. . . . If she cannot or will not desert her faith it provides an inducement to him of a pecuniary or proprietary nature the operation of which cannot be put in opposition to the policy of the law, its policy to preserve and maintain marriage. . . . Assuming that the donee himself retains his Protestant faith, he and his wife remain conscious that her adherence throughout his mother's life to her own faith stands between him and his inheritance. The husband on his part might be a man of firm mind and of a lofty and generous sentiment, but it would be difficult for many a man in such a situation to prevent his mind on occasions from adverting rather to the advantages of divorce than the blessings of matrimony, that is to say if ever unhappy differences arose or clouds appeared which unless dispelled might develop such a prospect. In an uneasy marriage a more fruitful apple of discord could hardly be placed upon the domestic board."

Dixon CJ therefore, pursuant to the social considerations referred to in the above *dictum*, regards the condition embodied in the forfeiture clause as contrary to public policy and hence invalid. He is supported, with a slight shift in emphasis, by Windeyer J:⁷⁹

"The vice of the situation that this condition creates does not, I think, arise from the possibility of cupidity on the part of the husband overmastering affection and considerate loyalty. It arises from the conflict of emotions, loyalties and duties that it creates for the wife. She must decide before a given date whether to adhere to her faith and thus cause her husband to lose his patrimony, or in the interests of the husband and their children to renounce her faith. It is not, I think, fanciful to regard such a situation as containing the seeds of unhappy differences and not the less so if the spouses be good and conscientious people."

It is evident that the majority of the court finds the attempt by the testator to control, by means of the power of the purse, the religious convictions and marital harmony of the beneficiaries and others concerned, as well as the resultant dilemma of choice with regard to the acquisition of a testamentary benefit, the preservation of marriage and the adherence to a chosen faith, as the determining factors in judging the present condition untenable in view of public policy. The minority of the court is, however, not persuaded by this point of view. Kitto J, much like Lord Wilberforce in *Blathwayt v Lord Cawley*,⁸⁰ is of the opinion that the last-mentioned dilemma does not in itself justify the conclusion reached by the majority—the personal inclination and responsibility of the individual beneficiary must be factored into the equation, with particular reference to the facts and circumstances of each individual case:⁸¹

"[I]t is not difficult to believe that in some cases the offer of a legacy to one spouse on condition that the other will renounce an existing religious adherence may lead to discord between them. But whether it will, and to what extent it will, must depend [on the particular circumstances of] every case. . . . I find myself unable to accept, as a general proposition, that in most cases or even in a considerable number of cases, the pecuniary advantage thus bestowed upon dissolution of the marriage would appeal to the husband so strongly that, notwithstanding all considerations of opposite tendency, he would be likely to feel a real temptation to seek an end to his marriage, and to yield to it for the sake of the lucre."

⁷⁹ 417.

⁸⁰ See 2 1 2 2 1.

⁸¹ 409–411.

Kitto J does therefore not regard the present condition as contrary to public policy. The *Ebbeck*-decision provides a good example of what Mackie describes as the "real tension between testamentary conditions and the principle of freedom of testation" in Australian law — tension which has as yet not been satisfactorily defused by the Australian courts.⁸²

2 2 2 2 2 Charitable testamentary bequests

The Australian common law position with regard to prescriptive charitable testamentary bequests corresponds to a large extent with that of English law. Australian law allows testators to confine benefits in terms of charitable bequests (often in the form of charitable trusts) to groupings of their choice. This approach is supported by the acceptance in Australian law of English law's traditional classification of charitable trusts as formulated in *Commissioner for Special Purposes of Income Tax v Pemsel*.⁸³ Australian law allows testators to regulate the exploitation of assets by means of charitable trusts on the grounds of, *inter alia*, race, nationality and religion, as long as this quadruple classification can accommodate such trusts.⁸⁴ In this light a charitable trust "for a training farm for orphan lads being Australians,"⁸⁵ a bequest of trust income "for such purposes relating to the work of St John the Baptist Church of England,"⁸⁶ a trust "for the benefit of [Armenian] orphans whose fathers fought with the Russian Army against Germany and Japan in the World War,"⁸⁷ a bequest of trust income "to the Adelaide Hebrew Congregation"⁸⁸ and a trust "to provide accommodation for transient aborigenes"⁸⁹ have all been regarded as valid by Australian courts.

Australian law, emulating the English legal position, acknowledges certain mechanisms to escape the contentious results of charitable bequests founded *inter alia*, race, nationality and religion. In accordance with the English decision in *Inland Revenue Commissioners v Baddeley*,⁹⁰ Australian law requires charities to display an element of public benefit. In the absence of this requirement, an (attempted) charitable bequest cannot be labelled as such. In *Roman Catholic Archbishop of Melbourne v Lawlor* a trust "to establish a Roman Catholic daily newspaper" was, not regarded as a valid charitable trust.⁹¹ The court opines that the promotion of the Roman Catholic faith was not the sole purpose of the newspaper, but that other non-religious purposes were also intended. These non-religious purposes did not satisfy the requirement of public

⁸² "Testamentary Conditions" 1998 *University of Queensland Law Journal* 38 55.

⁸³ See 2 1 2 2 2.

⁸⁴ Meagher & Gummow *Jacob's Law of Trusts in Australia* (1997) 185.

⁸⁵ *Attorney-General for New South Wales v Perpetual Trustee Company* (1940) 63 CLR 209.

⁸⁶ *Union Trustee Company of Australia v Church of England Property Trusts* (1946) 46 SR (NSW) 298.

⁸⁷ *Armenian General Benevolent Union v Union Trustee Company of Australia* (1952) 87 CLR 597.

⁸⁸ *In re De Vedas (Deceased)* [1971] SASR 169.

⁸⁹ *Aboriginal Hostels v Darwin City Council* (1985) LGRA 414.

⁹⁰ See 2 1 2 2 2.

⁹¹ (1934) 51 CLR 1. See also *Re Davies* (1932) 48 TLR 539.

benefit and rendered the entire bequest ineffective as a charitable trust.⁹² It is furthermore accepted, in principle, that the *cy prés* doctrine can, in accordance with the English decision in *In re Lysaght, Hill v The Royal College of Surgeons*,⁹³ be employed in Australian law to give effect to the provisions of a charitable trust, while at the same time negating the contentious consequences of such provisions founded on, for example, race, nationality and religion. Australian courts have, however, as yet not had the opportunity to employ the *cy prés* doctrine in this regard.

It is evident that Australian law, while adopting a lenient approach towards prescriptive charitable testamentary bequests, recognises certain mechanisms to avoid the contentious consequences of such bequests based on race, nationality and religion. Public policy plays, as in English law, little part in this regard.

3 Freedom of testation and its limitation in Civil law (Continental) legal systems

3 1 Dutch law

3 1 1 Freedom of testation in Dutch law

The *Koninkrijk der Nederlanden* (Dutch Kingdom) was established in 1813. The Dutch adapted the provisions of the French civil code, the *Code Napoléon*, (already in force in the Netherlands at that time) as the codification of their civil law and produced the *Burgerlijk Wetboek*, which came into force in 1838. The *Burgerlijk Wetboek* remained in force as the Dutch civil code for more than a century until a new code was commissioned in 1947. This commission resulted in the compilation of the *Nieuw Burgerlijk Wetboek*. Dutch law of succession, which comprises a mixture of successory rules from the *Code Napoléon* and principles from Roman and Germanic law of succession, was originally contained under the main heading of "Ownership" in Titles 11–17 of Book 3 of the *Burgerlijk Wetboek*. It has now been moved as an independent subject to Titles 1–5 of Book 4 of the *Nieuw Burgerlijk Wetboek*. Book 4 will, however, only be implemented in full by 2001.⁹⁴

Freedom of testation (*testeervrijheid*) constitutes one of the founding principles of the Dutch law of succession. Kasdorp *et al* declares in this regard:⁹⁵

"In een testament kunnen worden opgenomen alle niet met de openbare orde en goede zeden strijdende bepalingen, bestemd om na dode te werken en rakende privaatrechtelijke belangen waarover de testateur de vrije beschikking heeft."⁹⁶

⁹² Meagher & Gummow *Law of Trusts in Australia* 192–193 and 206–207.

⁹³ See 2 1 2 2 2.

⁹⁴ Gerver, Sorgdrager, Stutterheim & Hidma *Het Stelsel van het Nederlandse Privaatrecht* (1995) 47–54; 375–376; Kasdorp, Kleyn, Wedekind & Zwemmer *Erfrecht Compendium* (1998) 2; Perrick *Erfrecht* (1996) 2.

⁹⁵ *Erfrecht Compendium* 43.

⁹⁶ "A will can contain any interest in terms of private law which is not contrary to public policy or the public order and which is destined to devolve upon death in terms of the testator's power of free disposition." (My translation.)

Dutch law lends support to freedom of testation through the recognition of private ownership and private succession. Perrick states this proposition as follows:⁹⁷

"Zolang men een eigenaar de vrije beschikking over zijn goederen tijdens zijn leven zal laten, zolang zal men hem ook de bevoegdheid moeten toekennen, om bij uiterste wilsbeschikking over zijn goederen te beschikken. En in zoverre het recht deze bevoegdheid tot het maken van uiterste wilsbeschikkingen erkent, in zover zal het erfrecht een uitvloeisel zijn van die individuele eigendom."⁹⁸

Dutch law does not recognise a constitutional guarantee of private ownership and private succession. Article 14 of the Dutch *Grondwet* (Constitution) grants protection against expropriation, destruction and disuse of property, but this provision is not regarded as a comprehensive guarantee of private ownership in Dutch law.⁹⁹ The Netherlands is a co-signatory to the European Convention on Human Rights, but the guarantee of private ownership embodied in Article 1 of the First Protocol to this Convention is similarly not regarded as a guarantee to the same effect in Dutch law.

3 1 2 The limits imposed upon freedom of testation by good morals (goede zeden) in Dutch law

3 1 2 1 General observations

Chapter 1 of the Dutch *Grondwet* guarantees a number of fundamental rights (*grondrechten*). Chapter 1 contains, *inter alia*, an equality clause (article 1) which prohibits discrimination on the grounds of religion, belief, political opinion, race, gender or any other consideration. Other relevant rights guaranteed in this Chapter include the right to freedom of religion and belief (article 6), the right to freedom of association (article 8) and the right to privacy (article 10). It is accepted that these rights enjoy at least indirect horizontal application in appropriate circumstances. They are therefore instrumental in the determination of Dutch juridical concepts such as good faith and good morals.¹⁰⁰ There has, however, been little judicial reference to these rights as far as the limits imposed upon freedom of testation by good morals in Dutch law are concerned. It is nevertheless argued by many Dutch writers that fundamental rights can in principle affect the general approach to prescriptive testamentary provisions, particularly by guiding a court in its

⁹⁷ Erfrecht 7. See also Gerver et al *Het Systeem van het Nederlandse Privaatrecht* 105; Verheugt, Knottenbelt & Toringa *Inleiding in het Nederlandse Recht* (1992) 157; Van der Burght *Pitlo Het Nederlandse Burgerlijk Wetboek Deel 5 Erfrecht* (1997) 7.

⁹⁸ "If an owner is allowed to freely dispose of his property during his lifetime, he must also be allowed to dispose of it by will. As long as the law recognizes such testamentary disposition, the law of succession will remain a consequence of individual ownership." (My translation)

⁹⁹ Bellekom, Heringa, Koopmans & De Winter *Compendium van het Staatsrecht* (1994) 310; Kortmann *Constitutioneel Recht* (1997) 414.

¹⁰⁰ Kortmann *Constitutioneel Recht* 354; Kortmann & Bovend'Eert *The Kingdom of the Netherlands An Introduction to Dutch Constitutional Law* (1993) 131; Chorus, Gerver, Hondius & Koekkoek *Introduction to Dutch Law for Foreign Lawyers* (1993) 246; Prakke, De Reede & Van Winsen *Handboek van Het Nederlandse Staatsrecht* (1995) 222-223.

interpretation and application of the good morals criterion. The necessity of such a role for fundamental rights is explained as follows by Coene:¹⁰¹

“Het komt mij voor dat ook tussen testator en legataris geen werkelijke verhouding van gelijkheid bestaat en dat het recht dat een eigenaar van goederen heeft om vrij over die goederen te beschikken hem een zekere machtspositie t.a.v. de (kandidaat) begunstigde zou kunnen geven die hij kan aanwenden om invloed uit te oefenen op diens intieme levensfeer.”¹⁰²

In view of these considerations, the discussion hereafter of the relevant Dutch legal position will commence with a theoretical perspective on the influence of fundamental rights on prescriptive testamentary provisions, whereupon the limiting role of good morals with regard to freedom of testation in Dutch law will be examined.

3 1 2 2 *Restriction of freedom of testation with regard to prescriptive testamentary provisions*

3 1 2 2 1 A theoretical perspective: the influence of fundamental rights on prescriptive testamentary provisions

Various approaches typify Dutch law as far as this issue is concerned. The first question to be considered is whether a prescriptive testamentary provision can indeed infringe the fundamental rights of a beneficiary. One approach attributes no such effect to prescriptive provisions as a beneficiary is always free to repudiate a bequest and in so doing maintains the fundamental right concerned.¹⁰³ The bequest in terms of, for example, a forfeiture clause which obliges a beneficiary not to wed a Roman Catholic, can therefore simply be repudiated, ensuring that the beneficiary's freedom of choice of spouse remains unscathed. A second approach (which is ostensibly favoured by most Dutch writers on the topic) dictates that a prescriptive testamentary provision of the kind under discussion presents the beneficiary with a dilemma: she must weigh the fundamental right concerned against material gain. In the above example the beneficiary will necessarily be obliged to decide whether his choice of spouse (even a Roman Catholic) is going to be limited by material gain. The second approach prescribes that the mere presence of this dilemma renders the beneficiary's decision or choice involuntary and the fundamental right concerned is consequently infringed.¹⁰⁴

Acceptance in terms of the latter approach, that the fundamental rights of a beneficiary might indeed be infringed by prescriptive testamentary provisions, raises a second matter, namely an evaluation of the subjective and objective approaches advanced in Dutch law in order to resolve this

¹⁰¹ In Rimanque (ed) *Die Toepasselijkheid van de Grondrechten in Private Verhoudingen* (1982) 315. Coene writes with regard to Belgian law which, as far as the issue under discussion is concerned, corresponds greatly with Dutch law.

¹⁰² “It appears that an unequal relationship exists between testator and legatee and that the testator's right to dispose of his assets freely can provide him with a position of authority with regard to the beneficiary, which position he could exploit in order to interfere in the intimate private life of the beneficiary.” (My translation)

¹⁰³ Kamphuisen “Godsdienst en Vermogensrecht” 1955 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 357.

¹⁰⁴ Kamphuisen 1955 *WPNR* 358.

problematic issue. The subjective approach dictates that the relevant testamentary provision will be invalidated only if the testator intended to exert influence through material enticement in the private life of the beneficiary concerned. The objective approach dictates that the provision will be invalidated only if it indeed caused undue interference in the private life of the beneficiary, irrespective of the *intention* of the testator to this effect. If such interference is present on the facts of the particular case, judged objectively, the prescriptive provision infringes the fundamental right concerned and will be invalidated.

Kamphuisen¹⁰⁵ suggests that neither of these two approaches resolve the issue satisfactorily, as a rigorous application of each can, in a given instance, produce a result which does not accord with the legal convictions of the community. Kamphuisen opines that a compromise between the two approaches can be found in the careful judicial consideration of the facts and circumstances of each case. The intention of the testator and the interest of the beneficiary concerned should be weighed properly — the prescriptive provision should, in the absence of any ascertainable concern on the part of the testator with regard to the restriction imposed in his will, be invalidated in favour of the fundamental right(s) of the beneficiary.¹⁰⁶ Coene adds that a will is essentially an instrument for the distribution of assets upon death, not an instrument to effect influence in the private lives of beneficiaries. She qualifies this view, however, with reference to the fact that testamentary benefiting occurs, per definition, on the basis of preference — in some cases a proper evaluation of all relevant facts and circumstances will inevitably result in the testator's freedom of testamentary disposition prevailing despite the presence of what a beneficiary perceives to be (discriminatory) unequal treatment.¹⁰⁷ Kamphuisen admits to the difficult nature of the issue under discussion in a final word of warning:¹⁰⁸

“De probleme, de ik aan de orde heb gesteld, zijn uitermate netelig, vooral, omdat ook de opvattingen omtrent moraal en godsdienst een rol spelen. Verschil van mening kan dan ook niet uitblijven en men kan zelf vaak aarzelen omtrent het juiste standpunt. En de rechter krijgt naast zijn moeilijke ambt van praetor de nog subtieler functie van censor morum te vervullen.”¹⁰⁹

3 1 2 2 2 The limiting role of good morals (goede zeden) with regard to freedom of testation

The limitation of freedom of testation occurs in Dutch law on the basis of, *inter alia*, the nature of the particular bequest. This means that a

¹⁰⁵ Kamphuisen 1955 *WPNR* 358–359.

¹⁰⁶ 1955 *WPNR* 358–359.

¹⁰⁷ In Rimanque (ed) *Grondrechten in Private Verhoudingen* 326. This view accords with that of Lord Wilberforce in *Blathwayt v Lord Cawley* discussed in 2 1 2 2 1 *supra*.

¹⁰⁸ 1955 *WPNR* 359.

¹⁰⁹ “The difficulties I have alluded to, are extremely problematic, particularly since conceptions with regard to morality and religion play a part. Difference of opinion can, therefore, not be precluded and one might hesitate as to the correct point of view. The judge furthermore acquires the difficult role of moral censor in addition to his task as judiciary.” (My translation)

testamentary bequest will be invalidated if its implementation cannot be justified in terms of the good morals or the public order (a set of rules maintaining the social order for the benefit of the state).¹¹⁰ The general approach to this issue is founded upon article 3: 40 of the *Burgerlijk Wetboek* which provides:

“Een rechtshandeling die door inhoud of strekking in strijd is met de goede zeden of de openbare orde, is nietig.”¹¹¹

This general provision provides the basis for various other provisions of the *Burgerlijk Wetboek* which operate to restrict freedom of testation. Article 4: 935 provides, for example:

“In alle uiterste wilsbeschikkingen worden de voorwaarden, die onverstaaanbaar of onmogelijk zijn, of met de wetten en de goede zeden strijden, voor niet geschreven gehouden.”¹¹²

Article 4: 938 provides in similar vein:

“De vermelding van eene, het zij ware, het zij valsche beweegreden, die echter met de wetten of de goede zeden strijd, maakt de erfstelling of het legaat nietig.”¹¹³

The following testamentary provisions have in the past, in the light of the above statutory provisions, been regarded by Dutch courts as conflicting with the good morals:

- (a) A provision in general restraint of marriage.¹¹⁴
- (b) A provision which negates the operation of the *legitieme portie* (award of maintenance) in favour of dependants.¹¹⁵
- (c) A provision which prohibits the alienation of bequeathed assets.¹¹⁶
- (d) A provision which establishes a prohibited *fideicommissum* (*making over de hand*).¹¹⁷

Van der Burght indicates that the good morals are readily employed to limit freedom of testation in Dutch law with regard to prescriptive

¹¹⁰ Perrick *Erfrecht* 144.

¹¹¹ “A juristic act which is, as a result of either its contents or its purport, contrary to the good morals or offensive to the public order, is void.” (My translation). Article 4.3.1.4.1 of the *Nieuw Burgerlijk Wetboek* stipulates in this regard: “Een uiterste wilsbeschikking, waarvan de inhoud in strijd is met de goede zeden of de openbare orde, is nietig.” [“A testamentary disposition is void if its contents are contrary to the good morals or offend public order.” (My translation)]

¹¹² “In all testamentary dispositions conditions, which are incomprehensible or impossible or which are contrary to law or the good morals, will be regarded as though they were not written.” (My translation). Article 4.3.1.6.1 of the *Nieuw Burgerlijk Wetboek* stipulates in this regard: “Een voorwaarde of een last die onmogelijk te vervullen is, of die in strijd met de goede zeden, de openbare orde of een dwingende wetsbepaling, wordt voor niet geschreven gehouden.” [“A condition or obligation which is impossible to fulfil or which is contrary to the good morals, the public order or a compulsory statutory provision, is regarded as though it was not written.” (My translation)]

¹¹³ “The mention of either a true or false motive which is contrary to the law or the good morals, renders the inheritance or legacy void.” (My translation). Article 4.3.1.4.2 of the *Nieuw Burgerlijk Wetboek* stipulates in this regard: “Eeneens is een uiterste wilsbeschikking nietig, wanneer voor deze een in uiterste wil vermelde beweegreden die in strijd is met de goede zeden of de openbare orde, beslissend is geweest.” [“A testamentary disposition will be void if it is determined by a motive which is contrary to the good morals or public order.” (My translation)]

¹¹⁴ Perrick *Erfrecht* 144.

¹¹⁵ *HR* 25 October 1986, *NJ* 1986 308.

¹¹⁶ Perrick *Erfrecht* 145.

¹¹⁷ Perrick *Erfrecht* 145.

testamentary conditions, particularly those which oblige a beneficiary to wed or not to wed, to adhere to a particular faith or not to convert to a particular faith or to adopt a particular nationality.¹¹⁸ He emphasises, however, that no hard and fast rules apply in this regard—each individual case has to be considered in the light of its own particular facts and circumstances.¹¹⁹

“Men kan nooit van een van deze voorwaarden in abstracto zeggen, dat zij zedelijk of onzedelijk zijn. Alles hangt hier af van omstandigheden. . . . Men moet steeds nagaan of in het concrete geval de strekking van de voorwaarde de uitoefeningen van ongeoorloofde dwang is: de bedoeling van de testateur vormt één van de in de beoordeling te betrekken factoren.”¹²⁰

The best example from Dutch case law with regard to such a prescriptive testamentary provision (in the form of a conditional forfeiture clause) is to be found in the decision by the *Hoge Raad* in the Elisabeth Tisper case.¹²¹ The testatrix *in casu* appointed her stepdaughter, Elisabeth Tisper, as her only heir, but provided for forfeiture of benefits, should Tisper fail to baptise any of her future children in the Dutch Reformed Church before such children's second birthday. It appeared that Tisper herself was a Roman Catholic. She had six children, none of whom were baptised in the Dutch Reformed Church. The question as to the validity of the forfeiture clause is consequently raised before the *Hoge Raad*.

The court regards the forfeiture clause as offending against the good morals, and orders it to be disregarded in terms of article 4: 935 of the *Burgerlijk Wetboek*. In reaching its conclusion, the court emphasises the unacceptability of material considerations playing a determining part in an important personal decision such as the baptism of children.¹²²

“[D]at het Hof eene dergelijke belemmering in de persoonlijke vrijheid van de erfgenaam in strijd acht met de goede zeden . . . dat toch voor de ouders de doop hunner kinderen eene zaak is, die zij vrijelijk overeenkomstig hunne godsdienstige overtuiging behoorden te beslissen, zonder dat overwegingen van geldelijke aard daarbij invloed mogen oefenen.”¹²³

Meijers opines in a note to this decision:¹²⁴

“Deze beslissing en ook haar principiële motiveering vallen zeer toe te juichen. Het is een begrijpelijk verlangen van erflaters om door middel van hun vermogen nog na hun dood invloed op de daden van hun naasbestaanden uit te oefenen, maar even begrijpelijk is het dat hat recht zich tegen deze heerschzucht verzet.”¹²⁵

¹¹⁸ *Het Nederlandse Burgerlijk Wetboek* 77–78.

¹¹⁹ 77–78.

¹²⁰ “We cannot judge these conditions in the abstract as being moral or immoral. Everything depends upon the circumstances. . . . We must ascertain in each concrete case whether the condition implies undue influence: the intention of the testator is but one of the factors to be taken into account in this regard.” (My translation)

¹²¹ *HR* 21 June 1929, *NJ* 1325.

¹²² 1327–1328.

¹²³ “The court regards such impediment of the personal freedom of the heir as contrary to the good morals . . . the baptism of children is an issue to be decided by parents based upon their own religious views and monetary considerations should play no part in this regard.” (My translation)

¹²⁴ 1328.

¹²⁵ “This decision and its motivation should, in principle, be applauded. It is an understandable desire of testators to control the conduct of beneficiaries from the grave by way of their patrimony, but it is equally understandable that the law should resist any such attempt at imperiousness.” (My translation). Meijers seems to view this decision in terms of the subjective approach described

Sneep, however, warns against the generality of Meijers's view and emphasises that the present issue can only be resolved by a proper evaluation of the facts of each case — such an evaluation might reveal a laudable purpose on the part of the testator which, in turn, might serve to maintain his testamentary disposition:¹²⁶

“Ik meen te mogen betwijfelen of wel zo in het algemeen gesteld kan worden, dat d.g. voorwaarden zijn toe te schrijven aan heerszucht van de erflaters. Kunnen deze niet evenzeer een gevolg zijn van de stem van het geweten van de erflater, die hem zegt zijn vermogen niet te vermaken aan andersdenkenden? Dit zal geval voor geval beslist moeten worden. In geen geval lijkt het mij juist, om a priori steeds poging tot beperking van de gewetensvrijheid van de bevoordeelde te veronderstellen.”¹²⁷

3 2 German Law

3 2 1 Freedom of testation in German law

Germany was constituted in its modern form when the North German Federation unified with the South German States to establish the *Deutsches Reich* (the second German Empire) in 1871. Political unification prompted legal consolidation, particularly with regard to German civil law. This was achieved in 1900 with the coming into force of the German civil code, the *Bürgerliches Gesetzbuch*.¹²⁸ German law of succession, which is derived from Roman and Germanic succession law, is codified in Book 5 of the *Bürgerliches Gesetzbuch*.

Private ownership as well as private succession enjoy constitutional protection in terms of the German *Grundgesetz* (Basic Law). Article 14(I) of the *Grundgesetz* provides:

“Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.”¹²⁹

This provision guarantees private succession as an institution — the so-called *Erbrechtgarantie*, and in so doing protects the interests of the deceased as well as his/her beneficiaries. This provision also guarantees the entire objective complex of norms which regulate the transfer of rights and interests upon death.¹³⁰ It is evident, therefore, that private succession enjoys comprehensive protection in German law. Despite the

above — in his opinion it was the intention of the testatrix to exert influence in the private life of the beneficiary, hence the invalidation of the condition. Coene, on the other hand, views this decision as representative of the objective approach — the condition, judged objectively, resulted in undue influence being exerted in the private life of the beneficiary, hence its invalidation. See Coene in Rimanque (ed) *Grondrechten in Private Verhoudingen* 325.

¹²⁶ “Geoorloofde en Ongeoorloofde Beperkingen der Gewetensvrijheid” 1949 *WPNR* 343 244.

¹²⁷ “I doubt whether it can be stated as a general proposition that these conditions are to be ascribed to the imperiousness of testators. Could they not be the result of the conscience of a testator imploring him not to leave his patrimony to those of different opinion? This will have to be determined casuistically. It does not appear correct to a priori presume an attempt to limit the beneficiary's freedom of conscience.” (My translation)

¹²⁸ Zimmermann in Ebke & Finkin (eds) *Introduction to German Law* (1996) 6; Foster *German Legal System and Laws* (1996) 22–23.

¹²⁹ “Property and the right of inheritance are guaranteed. Their content and limitation shall be determined by the laws.” (My translation)

¹³⁰ Ebenroth & Auer & Finkin (eds) *Introduction to German Law*; Leipold *Erbrecht* (1998) 25; Ebenroth *Erbrecht* (1992) 31; Brox *Erbrecht* (1998) 16.

fact that article 14(1) does not expressly refer to freedom of testation, the guarantee of private ownership and private succession is readily interpreted in German law as a commensurate guarantee of freedom of testation (*Testierfreiheit*). In the words of Leipold:¹³¹

“Daß die Vermögensrechte an Gegenständen aller Art beim Tode eines Menschen von privater Hand in private Hand übergehen, ist die Konsequenz der privatrechtlichen Eigentumsordnung. Auch die Testierfreiheit ist letztlich nur ein Teilaspekt der Verfügbarkeit und damit der Privatheit des Eigentums. Der Zusammenhang wird in der *verfassungsgerechlichen Garantie* des Art. 14 Abs. 1 Satz 1 GG verdeutlicht, die sich auf das Eigentum und das Erbrecht erstreckt.”¹³²

3 2 2 The limits imposed upon freedom of testation by good morals (guten Sitten) in German law

3 2 2 1 General observations

Chapter 1 of the German *Grundgesetz* contains a number of guaranteed fundamental rights (*Grundrechte*). An equality clause (article 3) prohibits discrimination on the basis of gender, parental extraction, race, language, place of birth or extraction, religion as well as religious and political opinion. Other relevant rights guaranteed include the rights to freedom of religion, belief and confession (article 4), the right to freedom of marriage and protection of the family (article 6), the right to freedom of association (article 9) and the right to privacy (articles 10 and 13). It is generally acknowledged that the rights contained in Chapter 1 enjoy indirect horizontal operation (*mittelbare Drittwirkung*) and that it can therefore shape private law, particularly when it is applied in a private dispute between parties.¹³³ The European Convention on Human Rights plays, due to certain legislative and procedural considerations, a limited role as far as the general operation of fundamental rights in German law is concerned.¹³⁴

The constitutional guarantee of freedom of testation in article 14 of the *Grundgesetz*, coupled with the fact that the *Grundrechte* operate only indirectly horizontally, imply that fundamental rights do not constitute a direct limitation on freedom of testation in German law.¹³⁵ These rights do, however, guide the courts in its interpretation and application of the good morals criterion. In this light the German legal position with regard to the limits imposed by good morals on freedom of testation, particularly with reference to prescriptive testamentary provisions, will be examined next.

¹³¹ *Erbrecht* 24. See also Ebenroth *Erbrecht* 25; Brox *Erbrecht* 12.

¹³² “The transfer of proprietary rights from one person to another upon death is the consequence of the property system in terms of private law. Freedom of testation plays an important part with regard to this power of disposition and functions as an essential element of private ownership. The relationship between freedom of testation and private ownership is established by the guarantee of private ownership in a 14(1) of the Basic Law.” (My translation)

¹³³ Hailbronner & Hummel in Ebke & Finkin (eds) *Introduction to German Law* 67.

¹³⁴ Foster *German Legal System and Laws* 78.

¹³⁵ Lange & Kuchinke *Lehrbuch des Erbrechts* (1989) 599.

3 2 2 2 *Restriction of freedom of testation with regard to prescriptive testamentary provisions*

3 2 2 2 1 The limiting role of good morals (guten Sitten) with regard to freedom of testation

The limitation of freedom of testation occurs in German law, as in Dutch law,¹³⁶ on the basis of, *inter alia*, the nature of the particular bequest. This means that a testamentary bequest will be invalidated if its implementation cannot be justified in terms of the good morals. This approach is founded on, *inter alia*, paragraph 138(1) of the *Bürgerliches Gesetzbuch* which provides:

“Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.”¹³⁷

A testamentary provision is regarded in German law as contrary to the good morals (*Sittenwidrig*) if it offends the “Anstandsgefühl aller billig und gerecht Denkenden” (the “legal convictions (pertaining to what is proper and decent) of all reasonable and right minded people”). The test applied in this regard is objective in nature — it is determined whether the relevant provision, judged objectively in terms of the “Anschauung des anständigen Durchschnittsmenschen” (the “consideration of the decent average person”), offends the good morals.¹³⁸ This test is applied with particular reference to the facts and circumstances of each case, since, as Lange and Kuchinke point out, testamentary benefiting is, per definition, premised upon preference and hence unequal treatment — in some cases beneficiaries will simply have to accept what they perceive as unequal or even discriminatory treatment at the hands of a testator.¹³⁹

Brox evaluates the role of good morals in limiting freedom of testation on the basis of a dual distinction. He contends that testamentary provisions which effect the out and out disinheritance of (potential) beneficiaries must be distinguished from provisions in terms of which a testator attempts to exert influence in the private lives of beneficiaries. As far as the former is concerned, Brox opines that disinheritance which occur with reference to the fundamental rights of disinherited (potential) beneficiaries, should not be regarded as contrary to the good morals, particularly because, as stated above, no testator is under the obligation to treat his/her beneficiaries on an equal footing. Testators therefore retain the absolute right to institute certain beneficiaries and to disinherit other (potential) beneficiaries.¹⁴⁰ Brox contends, however, that prescriptive testamentary provisions can indeed be regarded as contrary to the good morals, particularly if such provisions infringe the fundamental rights of the beneficiaries concerned. A bequest which provides for forfeiture of benefits, should the beneficiary marry a person of a

¹³⁶ See 3 1 2 2 2.

¹³⁷ “A juristic act which is contrary to the good morals, is void.” (My translation)

¹³⁸ Ebenroth *Erbrecht* 199–200; Brox *Erbrecht* 171–172.

¹³⁹ *Lehrbuch des Erbrechts* 599. See 3 1 2 2 1 for a similar view with regard to the Dutch and Belgian law.

¹⁴⁰ *Erbrecht* 171. Cf also Lange & Kuchinke *Lehrbuch des Erbrechts* 600.

particular race, nationality or religion, can consequently be regarded as an undue restriction of such beneficiary's right to freedom of marriage (*Entschließungsfreiheit*) and hence invalid. The determining consideration in this and other related cases is the dilemma with which the beneficiary is presented: he must weigh the fundamental right concerned against material gain. The imposition of such a dilemma can, in appropriate circumstances, render the relevant provision contrary to the good morals:¹⁴¹

"Der Erblasser darf nicht materielle Vorteile für solche Entschlüsse versprechen, die nach allgemeiner Anschauung frei von Zwang und Beeinflussung Dritter zu treffen sind und bei denen man sich nicht von materiellen Erwägungen leiten lassen soll."¹⁴²

4 Conclusion

The survey in this article of two common law and two civil law legal systems revealed that freedom of testation is regarded as the founding principle of the law of testate succession in all four systems. This freedom is supported by the recognition of private ownership and private succession in all four legal systems. The legal systems surveyed all allow for the restriction of freedom of testation, *inter alia* on the basis of policy-considerations. Fundamental rights (often constitutionally guaranteed) readily direct the application of public policy or good morals to this effect, particularly with regard to the limitation of free testamentary disposition through prescriptive testamentary provisions based on, *inter alia*, race, nationality and religion.

The limits imposed on freedom of testation in the latter regard are determined by the judicial weight attributed to various relevant considerations. In the case of testamentary provisions aimed at controlling the conduct of beneficiaries, the principal considerations appear to be, on the one hand, the testator's freedom of testation, per definition exercised on the basis of preference, weighed against, on the other hand, material gain directing important personal decisions and choices of beneficiaries. In the case of testamentary provisions aimed at regulating the exploitation of assets, the determining considerations appear to be, as before, the testator's freedom of testation. This is weighed against the possible detrimental effect of the restriction imposed by the testator with regard to the use of assets on the position of instituted and excluded beneficiaries as well as the position of the functionaries responsible for the administration of the assets concerned. These issues can be resolved only by a proper evaluation of the particular facts and circumstances of each case.

It is submitted that the manner in which comparable foreign legal systems strive to achieve a properly weighted balance in the above regard, provides valuable direction when a similar exercise is conducted by South African courts.

¹⁴¹ *Erbrecht* 172.

¹⁴² A testator may not award material benefit to a decision which should, according to the general view, be reached free from the compulsion and influence of others and with regard to which financial considerations should play no part." (My translation)

OPSOMMING

Die Suid-Afrikaanse regsposisie ten opsigte van sowel testeervryheid as die beperking van dié vryheid aan die hand van die *boni mores* het in onlangse tye onder wetgewende en regsprekende traagheid gebuk gegaan. Die behoefte aan vernuwing op die gebied word in die hand gewerk deur 'n algemene erkenning van die invloed van grondwetlik-gewaarborgde regte op die geheel van die Suid-Afrikaanse privaatreë. In hierdie lig ondersoek die huidige artikel, aan die hand van regsvergelijkende navorsing, enkele tersaaklike aangeleenthede ten opsigte van die beperking van testeervryheid ingevolge beleidsoorwegings in "common law" en "civil law" (kontinentale) regstelsels. Die ondersoek is in die besonder gerig op die benadering tot voorskriftelike testamentêre bepalings aan die hand waarvan gepoog word om die gedrag van begunstigdes of die benutting van bates op sodanige wyse te beheer, dat die fundamentele regte van ingestelde en/of potensieële begunstigdes in gedrang kom. Die wyse waarop die Engelse en Australiese reg (as twee voorbeelde van "common law"-regstelsels) asook die Nederlandse en Duitse reg (as twee voorbeelde van "civil law"-regstelsels) hierdie aangeleentheid aanspreek, vorm die besondere fokus van hierdie artikel.