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BORGVERRICHTINGE TOT DIE FOLGENDEN

THE CONSTITUTIONALLY BOUND DEAD HAND? THE IMPACT OF CONSTITUTIONAL RIGHTS AND PRINCIPLES ON FREEDOM OF TESTATION IN SOUTH AFRICAN LAW

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1 Introduction

This contribution constitutes the third in a trilogy of articles on freedom of testation and the limitations imposed by law upon free testamentary disposition. In the first article¹ I established the historical basis of the trilogy through a brief examination of the developmental history of freedom of testation in Roman and Roman-Dutch law, with particular emphasis on the social and economic foundations of such development. This historical overview is accompanied by a classification of various restrictions imposed upon free testamentary disposition in the above two legal systems, again with reference to the social and economic considerations underlying each restriction. In the second article² I undertook a comparative analysis of freedom of testation and its limitation in English and Australian law as two examples of common law legal systems as well as Dutch and German law as two examples of civil law (continental) legal systems. The second article, as a precursor to the third, focused specifically on the limitation of testamentary freedom in terms of public policy in English and Australian law and in terms of good morals (*goede zeden* and *guten Sitten* respectively) in Dutch and German law. I examined this limiting effect with particular reference to prescriptive testamentary provisions whereby a testator attempts to control the conduct of beneficiaries or regulate the exploitation of assets in a manner which relates to the exercise of fundamental rights by (instituted and/or potential) beneficiaries. To this end I considered the approach in each of the above four legal systems to testamentary forfeiture clauses based upon race, nationality and religion as well as the approach in English and Australian law to charitable testamentary bequests which limit benefits on the basis of the above-mentioned three considerations.

I observed in the second article that the South African legal position with regard to the limits imposed upon freedom of testation by the *boni*

¹ Du Toit "The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law" 1999 *Stell LR* 232.

² Du Toit "The Limits Imposed upon Freedom of Testation by the *Boni Mores*: Lessons from Common Law and Civil Law (Continental) Legal Systems" 2000 *Stell LR* 358.

*mores*³ has for quite some time been characterized by comparative juridical inactivity. I contended that this lack of judicial and legislative rejuvenation is not only regrettable in itself, but is rendered even more acute in light of constitutional development in South Africa since 1994. This development has, amongst other things, pertinently focused the attention of legal academics and practitioners alike on the potential impact of constitutional rights and principles on the entire body of South African private law. It is therefore not surprising that much has already been written on both the manner as well as the extent of the impact of the rights contained in the Bill of Rights of the South African Constitution⁴ on the legal relationships between private parties. It is generally accepted that at least some of the rights guaranteed in the Bill of Rights enjoy horizontal application and that the legal effect of such rights will indeed permeate South African private law.⁵ It stands to reason that such constitutionally guaranteed rights will also exert influence on the South African law of succession in general and freedom of testation in particular.

In this, the final article in the trilogy, I attempt to provide a framework for future judicial development of the legal position in South African law with regard to freedom of testation in light of the influence of constitutional rights and principles. In this regard I shall, as in the second article, focus my discussion on testamentary disposition by way of prescriptive provisions, in particular testamentary forfeiture clauses and charitable testamentary bequests based upon race, nationality and religion. I do so by virtue of my belief that these testamentary provisions will be the focal point of any future constitutionally-inspired development of the South African law of succession.

The investigation commences with a brief exposition of the legal position regarding, on the one hand, freedom of testation in South African law and, on the other hand, the limitations imposed by South African law on this freedom. This exposition is followed by a diagnosis: an examination of the traditional approach of South African courts to testamentary forfeiture clauses and charitable testamentary bequests based upon race, nationality and religion. Thereafter the impact of constitutional rights and principles on the traditional legal position is considered, principally from a theoretical perspective. In the final part of the article a prognosis is attempted: a future approach in South African law to the above-mentioned testamentary provisions is suggested, with due regard to relevant constitutional imperatives and reliant on the insights gained from the investigations conducted in the first two articles of the trilogy.

³ The *boni mores* can in the present context be regarded as the South African legal equivalent of the common law public policy criterion and the civil law good morals criterion.

⁴ Act 108 of 1996.

⁵ See 4 1 *infra*.

2 The traditional approach to freedom of testation and its limitation in South African law

2.1 Freedom of testation

Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit.⁶ This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from such testator's will.⁷ Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property. An owner's power of disposition includes disposal upon death by any of the means recognized by the law, including a last will.⁸ The acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.⁹

2.2 The limitation of freedom of testation

Freedom of testamentary disposition in South African law is not, nor has it ever been, completely unfettered. The following restrictions on freedom of testation currently operate in South African law:¹⁰

- (a) The maintenance and education of a parent's children constitute a claim against such parent's deceased estate.¹¹
- (b) The Maintenance of Surviving Spouses Act¹² awards a claim for maintenance to a surviving spouse against the estate of a deceased spouse under certain circumstances.

⁶ Corbett, Hahlo, Hofmeyr & Kahn *The South African Law of Succession* (1980) 34; Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* (1987) 621; De Waal & Schoeman *Law of Succession Students' Handbook* (1996) 87.

⁷ *Havemann's Assignee v Havemann's Executor* 1927 AD 473 475-476; *Ex parte Trustees Estate Loewenthal* 1939 WLD 78 81; *Crookes v Watson* 1956 1 SA 277 (A) 298A-B; *Ex parte Erasmus* 1970 2 SA 176 (T) 178A; *Ex parte Estate Marks* 1970 3 SA 539 (T) 542E; Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* 251.

⁸ De Waal *The Law of Succession and the Bill of Rights* in Rautenbach et al *Bill of Rights Compendium* (1998) 3G8.

⁹ This corresponds with the position in Roman and Roman-Dutch law. See in this regard Du Toit 1999 *Stell LR* 232 234 and 239 as well as De Waal *Law, society and the individual: the limits of testation* in Visser (ed) *Essays on the History of Law* (1989) 304 and 311. See Du Toit 2000 *Stell LR* 358 for the corresponding position in English, Australian, Dutch and German law.

¹⁰ Note that in Du Toit 1999 *Stell LR* 232 (the first article) reference is made to the limitation of freedom of testation in terms of the Subdivision of Agricultural Land Act 70 of 1970. Since the writing of the first article this Act has been repealed in its entirety by the Subdivision of Agricultural Land Repeal Act 64 of 1998. The prohibition on the subdivision of agricultural land contained in the former Act, together with the limitation it imposed on freedom of testation, is therefore no longer in effect.

¹¹ *Glazer v Glazer* 1963 4 SA 694 (A) 706-707.

¹² Act 27 of 1990.

- (c) Effect will not be given to testamentary dispositions which are illegal, *contra bonos mores* or vague.¹³
- (d) The Immovable Property (Removal or Modification of Restrictions) Act¹⁴ limits a testator's capacity to prevent the alienation of land by way of long-term provisions.
- (e) The Trust Property Control Act¹⁵ provides for the variation or early termination of testamentary trusts under certain circumstances.
- (f) The Minerals Act¹⁶ curtails a testator's capacity to subdivide mineral rights.
- (g) The Pension Funds Act¹⁷ excludes certain benefits payable by a pension fund from the estate of a deceased member of such fund.

It is the task of the South African courts to achieve the required balance between the safeguarding of freedom of testation on the one hand and implementing the common law and statutory limitations on this freedom on the other. In *Ex parte Strauss De Beer JP* acknowledges the former consideration when he declares:¹⁸

"But whilst freedom of testation is recognised by the Legislature, it is the duty of the Court to protect and give effect to that freedom."

In *Robertson v Robertson's Executors* Innes CJ formulates the so-called "golden rule" for the interpretation of wills, expressing at the same time the judicial obligation to strike a balance between freedom of testation and its limitation:¹⁹

"The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so."

3 A diagnosis: the traditional approach to prescriptive testamentary provisions based upon race, nationality and religion in South African law

3 1 Testamentary forfeiture clauses

Testamentary forfeiture clauses (often in the form of resolutive or negative potestative conditions) which provide for forfeiture of benefits should a beneficiary forsake a particular faith or conclude a marriage with members of a given race, nationality or religion are well known in South African law. The traditional approach dictates that such provisions are not contestable on the ground that they are *contra bonos*

¹³ Corbett et al *The Law of Succession in South Africa* 81; Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* 187; De Waal & Schoeman *Law of Succession Students' Handbook* 87.

¹⁴ Act 94 of 1965.

¹⁵ Act 57 of 1988.

¹⁶ Act 50 of 1991.

¹⁷ Act 24 of 1956.

¹⁸ 1949 3 SA 929 (O) 936.

¹⁹ 1914 AD 503 507.

mores.²⁰ The traditional approach culminated in the decision by the Appellate Division (as it then was) in *Aronson v Estate Hart*,²¹ still the *locus classicus* on so-called “Jewish faith and race clauses” in South African law. *In casu* the testatrix’s will provided for forfeiture of benefits should a beneficiary “marry a person not born in the Jewish faith or forsake the Jewish faith”. The Appellate Division, true to the traditional approach, decided that such a provision is not to be regarded as *contra bonos mores*. Greenberg AJ’s finding in favour of the validity of the above provision is, as far as public policy is concerned, ostensibly founded on social considerations. He opines, for example, that a marriage between a Jew and non-Jew might readily result in increased tension and irreconcilable differences between the spouses. He also expresses concern that the children born of such a marriage might fall victim to family disputes and societal disapproval. The true *ratio* for Greenberg’s decision is however revealed when he holds that no principle in law renders it contrary to public policy for a testator, in the exercise of his “right” to free testamentary disposition, to safeguard his descendants against the social perils alluded to above.²² Greenberg’s judgement in the *Aronson* case is therefore firmly rooted in the predominant role of freedom of testation in the South African law of testate succession.

Van den Heever AJ relies principally on common law authority in his concurring decision in favour of the validity of the above provision. He refers to Voet²³ who states that a testamentary condition requiring a beneficiary to marry a man of her own religion, is not to be regarded as unlawful.²⁴ Van den Heever AJ rejects the opposing view of Savigny that intimate and personal decisions (such as the choice of a faith) ought not to be influenced by financial loss or gain.²⁵ He then formulates the common law rule as follows, seemingly inspired by Greenberg’s reference to social influences:²⁶

“There is nothing immoral or against public policy in a Jew remaining true to the faith of his fathers and a condition that he shall not marry a person of another religion is conducive to happy and harmonious marriages.”

Unsurprisingly, the *Aronson* decision did not escape criticism. Hahlo²⁷ deplored Van den Heever’s reliance on common law authority in order to address the issue in a modern day and age:

“[I]t is . . . submitted that questions of public policy today cannot be resolved by reliance on writers who flourished several hundred years ago. Times change and conceptions of public policy change with them.”

²⁰ *Ex parte Marks’ Executors* 1921 TPD 284; *Ex parte Administrators Estate Lesser* 1940 TPD 11; *Scott v Estate Scott* 1943 NPD 7; *Fram v Fram* 1943 TPD 362.

²¹ 1950 1 SA 539 (A).

²² 546.

²³ *Commentarius ad Pandectas* 28 7 11. See Du Toit 1999 *Stell LR* 232 241.

²⁴ 558.

²⁵ 563 and 567.

²⁶ 567.

²⁷ “Jewish Faith and Race Clauses in Wills – A Note on *Aronson v Estate Hart* 1950 1 SA 539 (A)” 1950 *SALJ* 231.

Van den Heever's analysis of common law authority is furthermore found wanting. In the eighteenth century the Dutch *Hoge Raad* as well as the *Hof van Holland* found testamentary conditions of the kind under discussion to be invalid, not only as it prevented conversion to the Christian faith, but, more importantly, because it constituted an infringement on the fundamental right to freedom of religion derived from natural law.²⁸

Hahlo further argues that the contemporary fundamental rights to freedom of religion and freedom of choice of marriage partner comes under threat if forfeiture clauses such as the one in the *Aronson* case are upheld. In Hahlo's view the social considerations alluded to by Greenberg and Van den Heever are not in issue – whether a marriage between a Jew and non-Jew is to be regarded as good or bad is therefore not the question at hand. In the words of Hahlo:²⁹

“The question is whether it is contrary to our notions of propriety that a testator should be allowed to use the power of the purse to force his descendants for one, two or more generations to profess a faith which they may no longer hold and refrain from the dictates of their hearts in the choice of a mate if such choice happens to conflict with the ideas of their deceased ancestor.”

Hahlo, as Savigny above, answers this question in the affirmative and suggests that a testator should, as a matter of principle, not be free to direct intimate personal decisions of beneficiaries through material enticement.³⁰ This view is shared by Corbett, Hahlo, Hofmeyr and Kahn³¹ in their discussion of the decision in *Ex parte Dessels*.³² *In casu* a testator provided for an annuity payable to his surviving spouse, but indicated that payment would cease if, amongst other things, she permitted any stranger to live with her, except one regarded as a visitor who stayed for no longer than one week per year and who, if male, was accompanied by his wife. The court invalidated this condition on the ground of vagueness but Corbett, Hahlo, Hofmeyr and Kahn suggest that such condition ought to be considered *contra bonos mores* as it constitutes an undue restriction on freedom of movement (and conceivably freedom of association) – two fundamental rights invariably exercised through personal choice.

The criticism leveled against the Appellate Division's decision in *Aronson v Estate Hart* puts into question the tenability of the traditional approach in South African law to testamentary forfeiture clauses based upon race, nationality and religion. It is suggested that a reappraisal of the traditional approach is long overdue. It is furthermore submitted that a constitutionally-founded *boni mores* criterion is the appropriate tool to be utilised in such a reassessment.

²⁸ Du Toit 1999 *Stell LR* 232 241.

²⁹ 1950 *SALJ* 231 240.

³⁰ 1950 *SALJ* 231 242.

³¹ *The South African Law of Succession* 122.

³² 1976 1 SA 851 (D).

3 2 Charitable testamentary bequests

In order to qualify as a charitable testamentary bequest, South African law requires such bequest (often in the form of charitable trusts) to display an element of public benefit. It is accepted, however, that public benefit in this context need not necessarily denote a benefit to the community at large - a benefit bestowed on a comparatively small yet distinct and identifiable group of people can constitute a charitable bequest, as can the advancement of a small section of the community in a respect which is calculated to serve some public interest.³³ This being the case, South African testators frequently limit their beneficence on the basis of race, nationality and religion when including charitable bequests in their wills. The traditional approach dictates that such bequests are not contestable on the ground that they are *contra bonos mores*.³⁴

The Appellate Division had the opportunity to consider the issue in *Marks v Estate Gluckman*.³⁵ *In casu* the testator established a testamentary trust for the payment of bursaries to students at the University of the Witwatersrand. The testator stipulated that each recipient of a bursary had to be a "Jew or Jewess (not converted)" and that a bursary would lapse "if the grantee prove religiously inclined". This bequest is contested on two grounds, namely that the former qualification is too vague to implement and that the latter is *contra bonos mores*. Tindall AJ holds that the trust *in casu* indeed qualifies as a charitable bequest, not only because the trust provisions reflect a general charitable intent on the part of a testator, but also as the trust serves "educational purposes of a public nature".³⁶ Having established the charitable nature of the bequest, Tindall follows the lenient common law approach to such bequests. This approach dictates that a charitable trust such as the one *in casu* should, if at all possible, be maintained rather than invalidated. Tindall therefore finds that the potential beneficiaries have indeed been identified with sufficient certainty so as to prevent vagueness from rendering the trust invalid. He also holds that the qualification with regard to the religious inclination of a bursar is not *contra bonos mores*, as it is couched in precatory rather than peremptory terms and it is furthermore difficult to determine the precise intention of the testator with regard to this qualification.³⁷ The court unfortunately addresses the latter issue fairly synoptically and Tindall does not really pronounce himself on whether, as a matter of principle, the qualification pertaining to religious inclination should be regarded as *contra bonos mores*.

Following the decision in the *Marks* case, South African courts looked favourably on charitable trusts which limit benefits to members of a particular race, nationality or religion. A close reading of these decisions

³³ *Ex parte Henderson* 1971 4 SA 549 (D) 554A-B.

³⁴ *Ex parte Bosman* 1916 TPD 399.

³⁵ 1946 AD 289.

³⁶ 311-313.

³⁷ 310.

reveals that the predominance of freedom of testation as well as the general lenient approach to charitable bequests alluded to above, directed the courts in their attitude towards these bequests. Hence a trust availing a stand as a "haven of rest for tired European missionaries",³⁸ a trust "for the assistance and encouragement of *bona fide* inventors of British nationality",³⁹ a trust for the training of "Natal European orphaned girls and boys",⁴⁰ a trust for the erection of homes for "destitute children of British parentage"⁴¹ and a trust for the erection of a "home of rest for generally trained non-European nurses"⁴² have all been regarded as valid by South African courts.

A decision representative of an opposite school of thought is that of Berman J in *Ex parte President of the Conference of the Methodist Church of Southern Africa: in re William Marsh Will Trust*.⁴³ In *casu* the testator, William Marsh, executed a will in 1899 in which he created a trust providing for the erection and maintenance of a home for destitute white children, modeled on similar homes established by one Stephenson in London. In consequence of these trust provisions the testator's son caused several Marsh Memorial Homes for destitute white children to be erected. During the 1970's the Methodist Church of Southern Africa took charge of the administration of the homes. In the course of time the number of white children admitted to the homes declined dramatically. During the 1950's, for example, the homes housed more than a hundred and twenty children, but at the time of the present action only sixty children occupied the homes and this number was expected to decrease even further. The President of the Methodist Church therefore applied for an amendment to the trust deed, amongst other things for the removal of the word "white" from the trust provisions in order to avail the care and protection afforded by the homes to children of all racial groups. The President contended in particular that the Methodist Church of Southern Africa is a strong proponent of non-racialism and that the church is therefore reluctant to conduct the administration of the homes in terms of what it viewed as discriminatory trust provisions.

The application is brought in terms of section 13 of the Trust Property Control Act. This section allows a court to order the deletion or amendment of any trust provision on application by a trustee or any person who, in the opinion of such court, has a sufficient interest in the trust property. A court is also empowered to give any order it deems just with regard to such provision, including an order replacing trust property with other property or an order terminating such trust. An above-mentioned order can be granted if the particular trust provision brings about consequences which, in the opinion of the court, were not foreseen

³⁸ *Ex parte Robinson* 1953 2 SA 430 (C).

³⁹ *Standard Bank v Betts Brown* 1958 3 SA 713 (N).

⁴⁰ *Ex parte Marriott* 1960 1 SA 814 (D).

⁴¹ *Ex parte Rattray* 1963 1 SA 556 (D).

⁴² *Ex parte Impey* 1963 1 SA 740 (C).

⁴³ 1993 2 SA 697 (C).

or contemplated by the founder of the trust (the so-called subjective criterion for the application of section 13) and which either hampers the achievement of the objects of the founder or prejudices the interests of the trust beneficiaries or is in conflict with the public interest (the so-called objective criterion for the application of section 13).

Berman J decides firstly that the testator's intention to create homes akin to those established by Stepenson in London is being frustrated by a racial prohibition which do not pertain to the London homes. The subjective criterion of section 13 is therefore satisfied:⁴⁴

"[T]his particular provision of the trust instrument has brought about consequences which the late William Marsh neither contemplated nor foresaw, viz that the home which he wished to establish upon his death in his name, would, in a changing world, the nature of which he could not envisage, become emptier and emptier as the white-skinned section of the population became increasingly affluent and the number of children in destitute circumstances to whom he limited the enjoyment of his beneficence would continually decrease."

Berman addresses the objective criterion of section 13 with reference to the consideration that the trust provision which limit trust benefits to white children only, can be regarded as in conflict with public policy (and hence *contra bonos mores*). He finds the racial limitation to be indeed contrary to public policy:⁴⁵

"It cannot seriously be contended that by continuing to restrict the intake of destitute children to the homes to those whose skins are white will better serve the interests of the public than to open their half-empty premises to children who are destitute but are excluded therefrom solely be reason of the fact that their skin is coloured brown or black or indeed any other colour but white. The contrary is unarguably the case – the interest of the public in this country, the inhabitants of which are mainly non-white, cries out for the need to house and care for destitute children, whatever their ethnological characteristics may be."

The application for the deletion of the word "white" from the trust provisions is therefore granted, this despite the Master of the Supreme Court's insistence that the testator's freedom of testation should prevail and that effect should be given to the clear and unambiguous limitation imposed by the testator upon utilisation of the trust benefits.

The *William Marsh* decision did not escape criticism. Criticism is particularly leveled at the court's interpretation and application of the subjective and objective criteria of section 13. In the latter regard Van der Spuy⁴⁶ points out that Berman erroneously viewed the trust provisions as such as contrary to public policy while section 13 requires the consequences of the provisions to be in conflict with public policy. In similar vein Van der Spuy argues that Berman J incorrectly regarded the proposed amendment as better serving the public benefit than the existing provisions, once again not having due regard for the requirement of section 13 that the consequences of the provisions must conflict with

⁴⁴ 703B-C.

⁴⁵ 703I-J.

⁴⁶ "Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust 1993 3 SA 697 (K)" 1991 De Jure 445 454.

public benefit.⁴⁷ This criticism is generally regarded as valid.⁴⁸ It is instructive, however, that, in consequence of the interpretative error committed by judge Berman, the racially discriminatory trust provisions are themselves regarded as contrary to public policy and the proposed amendment is seen as more favourable to the public benefit than the existing provisions. Berman's judgement in the *William Marsh* case therefore exhibits a heretofore unprecedented willingness to employ public policy or the *boni mores* in order to invalidate a charitable testamentary bequest and, in so doing, limit charitable testamentary disposition along racial lines.

The *William Marsh* decision puts into question the tenability of the traditional approach in South African law to charitable testamentary bequests based upon race, nationality and religion. It is suggested that a reappraisal of the traditional approach deserves urgent attention. It is furthermore submitted that, as with testamentary forfeiture clauses, a constitutionally-founded *boni mores* criterion is the appropriate tool to be utilised in such a reassessment.

4 The impact of constitutional rights and principles on freedom of testation in South African law

4.1 The relevant operational provisions of the South African Bill of Rights

In the introductory part of this article, I stated that some of the rights contained in the Bill of Rights of the South African Constitution have a definite bearing on the legal relationships between private parties. This submission is premised upon the horizontal application attributed to at least some of the rights guaranteed in the Bill of Rights.⁴⁹ This view is readily founded on textual authority from the Constitution itself, in particular some of the operational provisions of the Bill of Rights. In this regard section 8(1) renders the Bill of Rights applicable to all law, binding the legislature, the executive, the judiciary and all organs of the state. Section 8(1) is supplemented by section 2 which imposes invalidity on any law or conduct inconsistent with the Constitution. Section 8(2) of the Constitution further renders a provision of the Bill of Rights binding on a natural or juristic person "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty

⁴⁷ 1991 *De Jure* 445 454-455.

⁴⁸ See, for example, Cronjé and Roos *Casebook on the Law of Succession* (1997) 372.

⁴⁹ Views in favour of direct horizontality have been expressed by, amongst others, Woolman in Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman *Constitutional Law of South Africa* (1996) 10-57; Woolman and 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 *SAJHR* 361 380; Cheadle & Davis "The Application of the 1996 Constitution in the Private Sphere" 1997 *SAJHR* 44 55; Govender "The Operational Provisions of the Bill of Rights" 1997 *Obiter* 159 171 and in favour of indirect horizontality 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 31-37 and 42-46.

imposed by the right". Section 8(2) undeniably focuses the inquiry with regard to the applicability of a given right to the relationship between private parties, on the circumstances of each case. In the words of Cockrell:⁵⁰

"[S]ection 8(2) proceeds from the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person."

Section 8(3) directs the application of a provision of the Bill of Rights in terms of section 8(2). The Court is hereby empowered to (a) apply and even develop the common law in order to *give* effect to a right contained in The Bill of Rights and (b) to develop the rules of the common law to limit such right. Section 8(3) is supplemented by section 39(2), the latter instructing a court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. It is vital to note that section 8(3) does not bestow *carte blanche* on South African courts to rewrite the common law at will. The primary task of the courts remains the *application of existing common law rules*. Only if the common law is silent on a particular issue, or if the application of an existing common law rule yields results incompatible with the principles and directions of the Bill of Rights, may a court develop (and in the latter instance change) the common law.⁵¹ The limitation of a right contained in the Bill of Rights in terms of section 8(3) can only occur in conformity with the provisions of section 36(1) – the general limitation clause. Section 36(1) provides for such limitation in terms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom. Section 36(1), as section 8(2) above, expressly directs the inquiry to the circumstances of each case, listing the following principal factors to be taken into account in the limitation exercise: the nature of the right to be limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and any less restrictive means to achieve the purpose.

It is submitted that the developmental task with regard to the common law imposed on the courts by the above provisions will result in a move away from the previous formal style of adjudication in the area of private law towards a more substantive view of the law with due cognisance of prevailing moral, social, economic, political and institutional influences.⁵² That this development has already commenced, is evident from a

⁵⁰ Rautenbach et al *Bill of Rights Compendium* 3A8. See also Woolman in Chaskalson et al *Constitutional Law of South Africa* 10-62; Wallis "The Evolution of Private Law under the Constitution" 1997 *Obiter* 210 210-211.

⁵¹ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (1999) 57; Govender "The Operational Provisions of the Bill of Rights" 1997 *Obiter* 159 172; Wallis 1997 *Obiter* 210 213.

⁵² See Cockrell "Adjudication Styles in South African Private Law" 1993 *THRHR* 590 592; Cockrell "Rainbow Jurisprudence" 1996 *SAJHR* 1 7 and 35; Van Reenen "The Relevance of the Roman (-Dutch) Law for Legal Integration in South Africa" 1995 *SALJ* 276 280 and 283.

remark by Farlam J in *Rylands v Edros*⁵³ where he decides that the Bill of Rights of South Africa's Interim Constitution⁵⁴ has rendered the decision in *Ismail v Ismail*⁵⁵ untenable. In the *Ismail* decision potentially polygamous marriages concluded under the Muslim faith were found to be contrary to public policy and hence invalid. Farlam decides that the *Ismail* judgement is not to be reconciled with constitutional values such as equality and tolerance. It is evident that substantive constitutional policy considerations moved him to this conclusion when he states:⁵⁶

"[I] prefer to base my decision on the fundamental alteration to the basic values on which our civil polity is based which has been brought about by the enactment and coming into operation of the new Constitution."

In view of the above considerations, it is submitted that the Bill of Rights of the South African Constitution indeed paves the way for a more substantive view of the law. The fact that the Bill of Rights also regulates private law matters, allows South African judges to depart from the previously favoured formal style of adjudication in the area of private law and to develop, where necessary and appropriate, the common law through constitutionally-inspired policy-orientated decisions.⁵⁷ It therefore stands to reason that the common law position with regard to freedom of testation and its limitation will not (and cannot) escape constitutional scrutiny. In this regard two issues are deserving of consideration. Firstly, whether freedom of testation enjoys constitutional protection and, secondly, the extent to which the limitation of free testamentary disposition can be constitutionally founded.

4.2 A constitutional guarantee of freedom of testation

The South African Constitution, unlike its German counterpart,⁵⁸ contains no express guarantee of private succession and hence freedom of testation. The constitutional guarantee of the right to property in section 25 – the property clause – however negates this shortcoming. Section 25(1) provides:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

At first glance this provision, having been phrased in the negative, does not guarantee private succession and freedom of testation. It is accepted, however, that, for purposes of this provision, the term "property" has to be accorded its traditional common law meaning. De Waal, Currie and Erasmus⁵⁹ submit in this regard that "property" in the context of the

⁵³ 1997 1 BCLR 77 (C).

⁵⁴ Act 200 of 1993.

⁵⁵ 1983 1 SA 1006 (A).

⁵⁶ 87E.

⁵⁷ *Rivett-Carnac v Wiggins* 1997 4 BCLR 562 (C) 569E-F.

⁵⁸ See Du Toit 2000 *Stell LR* 358 380.

⁵⁹ *The Bill of Rights Handbook* 403-405. See also Chaskalson and Lewis in Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman *Constitutional Law of South Africa* 31-3 and 31-6; Badenhorst in Rautenbach et al *Bill of Rights Compendium* 3FB3.

property clause refers to the set of legal rules traditionally regarded as an embodiment of the claims of individuals to their patrimony. It not only comprises ownership as such, but also the rights which traditionally form part of the "bundle of rights" constitutive of ownership, *inter alia* the right to dispose of an asset, the right to the use and exploitation of an asset and the right to prevent the use and exploitation of an asset by others.

The fact that the constitutional guarantee of the right to property is premised upon the traditional meaning attributed to the property concept, leads to the inescapable conclusion that both private ownership as well as the resultant *ius disponendi* indeed enjoys constitutional protection in South African law. Such protection invariably results in a concomitant (although unexpressed) guarantee of private succession and freedom of testation, the latter essential to the exercise of the *ius disponendi* by way of testamentary bequest.⁶⁰ In similar vein, the limitation of free testamentary disposition is also envisaged when section 25(1) is read with section 36 of the Bill of Rights. In this regard it is important to note that the existing limitations on freedom of testation operating in South African law indeed complies with the requirements of the general limitation clause. The existing limitations are either cast in legislation or founded upon sound common law principles, thus complying with the requirement in section 36(1) that a right contained in the Bill of Rights (in this case freedom of testation as an element of the right to property) may be limited only in terms of law of general application. The existing limitations on freedom of testation furthermore comply with the requirement that a right contained in the Bill of Rights may be limited only to the extent that such limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom. De Waal's exposition⁶¹ of the existing limitations on testamentary freedom in South African law indicates that these limitations are all founded upon sound social and economic considerations, thus rendering them fully compliant with this requirement. The socio-economic foundations of the existing limitations also place them well within the ambit of the factors listed in section 36(1) for special consideration in the limitation exercise.⁶²

4 3 A constitutional basis for the limitation of freedom of testation

As indicated above, it is accepted that apposite rights included in the South African Bill of Rights enjoy horizontal operation. The bulk of prevailing authority supports the view that at least some of these rights operate directly horizontally.⁶³ A litigant can therefore invoke one or

⁶⁰ See also 2 1.

⁶¹ "The Social and Economic Foundations of the Law of Succession" 1997 *Stell LR* 162.

⁶² See also De Waal in Rautenbach et al *Bill of Rights Compendium* 3G13.

⁶³ See 4 1.

more of these rights when contesting the validity of a testamentary bequest. Such litigant will in all probability argue that the contentious provision constitutes an infringement on a particular constitutionally protected right and that the bequest should therefore be invalidated. An opposing party is likely to counter with reliance on the testator's freedom of testation. The court is now obliged to conduct the balancing exercise in terms of section 36 as envisaged by section 8(3)(b) of the Constitution: the court must weigh freedom of testation against the competing constitutional right. If the court finds that the particular constitutional right should prevail over the testator's freedom of testamentary disposition, the court must, pursuant to section 8(3)(a) of the Constitution, apply the common law in order to resolve the situation. The common law indeed awards a remedy in this regard, namely that a bequest which is *contra bonos mores* or against public policy can be invalidated.⁶⁴ If a bequest such as the one before the court was found to be in conflict with the *boni mores* in the past, the court will undoubtedly extend due protection to the infringed constitutional right by also invalidating the contested testamentary bequest. As indicated earlier, some contentious bequests are, however, not traditionally regarded as *contra bonos mores* despite the fact that they encroach on or even negate rights that currently enjoy constitutional protection. If the bequest before the court falls into this category, but the court is of the opinion that such bequest should indeed be invalidated in consequence of the *boni mores* as reformulated by constitutional rights and principles, such court is empowered by section 8(3)(a) and (b) to develop the common law to limit freedom of testation on the one hand and, on the other hand, to give due effect to the countervailing constitutional right. In so doing the court will invariably extend the limitation imposed on freedom of testation by the *boni mores* to testamentary bequests not traditionally invalidated in consequence of policy considerations.⁶⁵

It is furthermore submitted that the judicial utilization of a constitutionally-founded *boni mores* criterion will represent an unequivocal departure from the traditional formal style of adjudication with regard to the limitation of testamentary freedom and constitute a firm step towards a more substantive approach to this area of the law of testate succession. This point of view does not, however, imply a complete and utter disregard for freedom of testation, nor does it advocate the devaluation of testamentary freedom in the face of competing constitutional rights. It simply obliges South African courts to fine tune its application of the *boni mores* criterion when limiting freedom of testamentary disposition and to do so in order to strike an appropriate and workable balance between freedom of testation and

⁶⁴ See 2.2.

⁶⁵ See also De Waal in Rautenbach et al *Bill of Rights Compendium* 3G25 with regard to the right to equality.

countervailing constitutional rights. Some thoughts on the manner in which such a balance will be best achieved are advanced below.⁶⁶

It is submitted that the following rights included in the South African Bill of Rights will in all likelihood constitute the principal counterweight to freedom of testation:

- (a) The right to equality in section 9.⁶⁷ The equality clause expressly prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The validity formerly accorded to prescriptive testamentary bequests based upon race, nationality and religion will have to be reassessed in view of the constitutional guarantee of equality. Testamentary forfeiture clauses such as Jewish faith and race clauses which require adherence to a particular faith or insist upon the conclusion of a marriage with a member of a particular race or faith might well fall foul of the constitutional guarantee of equality. The validity traditionally attributed to charitable testamentary bequests which limit benefits on the basis of race, nationality and religion will have to be similarly re-examined. The legal position with regard to out and out disinheritance in consequence of one or more of the grounds listed in the equality clause also deserve consideration in this regard.
- (b) The right to human dignity in section 10. The interrelation between the right to equality and the right to human dignity justifies the inference that an infringement of the former also constitutes an infringement of the latter.⁶⁸ The testamentary bequests referred to under (a) above are therefore deserving of scrutiny also in light of the right to dignity.
- (c) The right to privacy in section 14. According to McQuid-Mason⁶⁹ the constitutional guarantee of privacy *inter alia* protects the right of the individual to be left alone; in other words, the right not to have personal and intimate decisions influenced by others. It furthermore protects the development of human personality or, stated differently, the right of the individual to personal growth, be it individually or

⁶⁶ See 5 2 - 5 4.

⁶⁷ The Constitutional Court pronounced itself on the operation of the equality clause in *Harksen v Lane* 1997 11 BCLR (CC). This exposition was favourably considered in, *inter alia*, *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

⁶⁸ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) par 31; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) par 41; *Port Elizabeth Municipality v Rudman* 1999 1 SA 665 (E) 675G; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 62E, 65C and 66F-G; Rautenbach in Rautenbach et al *Bill of Rights Compendium* 1A58. For a different view see Leibowitz & Spitz in Chaskalson, et al *Constitutional Law of South Africa* 17-6 and 17-7 and generally Fagan "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" 1998 *SAJHR* 220.

⁶⁹ In Chaskalson et al *Constitutional Law of South Africa* 18-8 and 18-9.

within the confines of a particular group.⁷⁰ The tolerant approach to testamentary bequests directing personal and intimate choices of a beneficiary (such as the forfeiture clauses listed in (a) above) is deserving of reassessment in view of the constitutional guarantee of privacy. Testamentary provisions designed to interfere with a beneficiary's choice of *inter alia* lifestyle, friends, vocation and political affiliation conceivably also conflict with the right to privacy.⁷¹ Out and out disinheritance with regard to factors pertaining to a beneficiary's right to privacy will also have to be addressed.

- (d) The right to freedom of religion, belief and opinion in section 15. This right (in vernacular language often simply referred to as freedom of religion) guarantees the freedom to entertain such religious beliefs as a person may choose, to declare religious beliefs openly and to express religious beliefs through worship, practice, teaching and dissemination. It furthermore implies the absence of coercion or constraint as far as the manifestation of belief is concerned as well as the absence of force in order to move a person to act or refrain from acting in a manner contrary to his religious beliefs.⁷² Testamentary bequests aimed at regulating the religious conviction, belief or opinion of a beneficiary could easily frustrate the constitutional guarantee of freedom of religion. Testamentary forfeiture clauses such as Jewish faith and race clauses should therefore be contestable with reliance on this right. The question with regard to the disputability of out and out disinheritance based on the religious beliefs of the disinherited party also has to be evaluated.
- (e) The right to freedom of expression in section 16. Freedom of expression in this context refers to more than merely freedom of speech. Any activity, even non-verbal in nature, expressive of an emotion, belief or grievance constitutes expression deserving of constitutional protection.⁷³ Testamentary bequests directed at the curtailment of a beneficiary's freedom of expression might well

⁷⁰ See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 30B and 60D-E; De Waal et al *The Bill of Rights Handbook* 257; Rautenbach in Rautenbach et al *Bill of Rights Compendium* 1A62.

⁷¹ Such bequests are not unknown to South African law. In *Ex parte Dessels* 1976 1 SA 851 (D), for example, a testator employed a testamentary forfeiture clause in an attempt to regulate his beneficiaries' choice of lifestyle by directing that his surviving spouse and daughter "sal onder geen omstandighede 'n leefwyse volg wat beskou kan word as 'n lewe in ontug nie". The testator was furthermore prescriptive with regard to the company his surviving spouse would be allowed to keep by directing that she may not permit any stranger to live with her, except one regarded as a visitor who stayed for no longer than one week per year and who, if male, was accompanied by his wife.

⁷² *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 10 BCLR 1348 (CC) par 92 with reference to the oft-quoted decision by the Supreme Court of Canada in *R v Big M Drug Mart* (1985) 13 CRR 64. See also *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C) 981D and in general Farlam "The Ambit of the Right to Freedom of Religion: A Comment on *S v Solberg*" 1998 *SAJHR* 298; Malherbe "Die Grondwetlike Beskerming van Godsdiensvryheid" 1998 *TSAR* 673.

⁷³ De Waal et al *The Bill of Rights Handbook* 298; Marcus and Spitz in Chaskalson, et al *Constitutional Law of South Africa* 20-17.

- constitute an infringement of this right.⁷⁴ Charitable testamentary bequests designed to influence the policy-making of, for example, media companies, artistic establishments or academic institutions will also have to be scrutinized in view of the right to freedom of expression.
- (f) The right to freedom of association in section 18. This right protects the freedom of each individual to form an association, to join an existing association or to take part in the activities of a particular association. The right not to form an association, not to join an existing association, to dissolve an existing association or to resign from an existing association is likewise guaranteed.⁷⁵ The right to exclude others from an association as well as the right to enforce the rules of an association with regard to those who join such association also enjoy protection.⁷⁶ Testamentary bequests which either impose a particular association upon a beneficiary or preclude a beneficiary from a particular association can hardly be reconciled with the constitutional protection afforded to freedom of association.⁷⁷ Attention also has to be paid to the tenability of out and out disinheritance in consequence of associations formed by the disinherited party.
- (g) Political rights in section 19. This section affords constitutional protection to participation in the political process as well as the freedom of political association. Testamentary bequests designed to frustrate such participation or the formation of such associations by a beneficiary conflict with this section and could hence be invalidated. Also deserving of attention is out and out disinheritance on account of the political affiliation of the disinherited party.
- (h) The right to freedom of movement and residence in section 21. Testamentary bequests obliging a beneficiary to reside with a particular person or at a particular location are well-known in South African law. Such provisions are generally regarded as valid.⁷⁸ The view has, however, been expressed that such provisions can indeed be viewed as *contra bonos mores*.⁷⁹ It is submitted that the latter view is deserving of further consideration in light of the constitutional guarantee of freedom of movement and residence. As indicated earlier, Corbett, Hahlo, Hofmeyr and Kahn⁸⁰ are of the opinion that

⁷⁴ See, for example, *Ex Parte Dessels* 1976 1 SA 851 (D) where a testator provided for forfeiture of benefits upon the fulfillment of certain conditions. One such condition stipulated: "My eggenote en dogter sal geensins na my afsterwe neerhalende opmerkings aangaande my uiter of skryf nie."

⁷⁵ De Waal et al *The Bill Rights Handbook* 334; Rautenbach in Rautenbach et al *Bill of Rights Compendium* 1A66.

⁷⁶ *Wittmann v Deutscher Schulverein Pretoria* 1999 1 BCLR 92 (T) 117H.

⁷⁷ See once again the reference to *Ex parte Dessels* 1976 1 SA 851 (D) *supra*.

⁷⁸ See *Grusd v Grusd* 1946 AD 465; *Ex parte De Kock* 1952 2 SA 502 (C); *Barclays Bank v Anderson* 1959 2 SA 478 (T).

⁷⁹ *Ritchken's Executor v Ritchken* 1924 WPD 17.

⁸⁰ *The South African Law of Succession* 122 with reference to the decision in *Ex parte Dessels* 1976 1 SA 851 (D). See 3 1 *supra*.

testamentary provisions in terms of which a beneficiary is precluded from entering into certain social relationships or associating with certain people might also fall foul of the present right. A further pertinent issue in this regard pertains to out and out disinheritance by virtue of the disinherited party's exercise of the present right.

- (i) The right to freedom of trade, occupation and profession in section 22. This right affords constitutional protection to the individual's freedom to choose a trade, occupation or profession.⁸¹ Dispositions aimed at the regulation of a beneficiary's choice of occupation or designed to compel a beneficiary to a particular economic activity were in the past regarded as contrary to public policy in South African law.⁸² The constitutional guarantee of freedom of trade, occupation or profession lends added impetus to such an approach. Out and out disinheritance on account of the disinherited party's exercise of the present right also deserve consideration.
- (j) The right to language and culture in sections 30 and 31. Section 31 guarantees the right of members of a particular cultural, religious or language community to conduct activities freely in order to realize their cultural, religious and language identity. Section 30 protects the individual's decision to identify with a particular cultural or language community.⁸³ Testamentary bequests designed to curtail a beneficiary's participation in the activities of, or affiliation with, a particular cultural, religious or language community are likely to conflict with the above rights. Particularly prescriptive testamentary forfeiture clauses directed at the cultural identity, faith or language preference of a beneficiary might violate the present rights. As before, out and out disinheritance on account of the cultural, religious or language affiliation of the disinherited party needs to be considered as well.

5 A prognosis: the future of freedom of testation and its limitation in terms of a constitutionally-founded *boni mores* criterion in South African law

5.1 Three fundamental propositions as a basis for the prognosis

The prognosis is founded upon the following three fundamental propositions:

- (a) Freedom of testation is worthy of protection and needs to be preserved as a basic principle of the South African law of testate succession. This point of view is firstly founded upon the important

⁸¹ Rautenbach in Rautenbach et al *Bill of Rights Compendium* 1A70. See in general *Janse van Rensburg v Minister van Handel en Nywerheid* 1999 2 BCLR 204 (T) 2111-212B.

⁸² See, for example, *Ex parte Wallace* 1970 1 SA 103 (NC) with regard to a *fideicommissum inter vivos*.

⁸³ De Waal et al *The Bill of Rights Handbook* 443-446 and in general Devenish "Minority Rights and Cultural Pluralism – The Protection of Language and Cultural Identity in the 1996 Constitution" 1999 *THRHR* 201.

function of private succession as a juridical, social and economic institution, which function is firmly supported by the socio-economic foundations of the law of succession.⁸⁴ Freedom of testation is secondly an historical reality. The developmental history of free testamentary disposition in Roman and Roman-Dutch law shows emphatically that the interplay between social and economic factors established freedom of testation as a founding principle of the South African common law of testate succession.⁸⁵ Comparative research thirdly indicates that testamentary freedom is acknowledged as a fundamental principle of the law of testate succession of many comparable common law and civil law legal systems.⁸⁶ The acknowledgement of private succession as well as freedom of testation is further enhanced in South African law,⁸⁷ as indeed in several modern common law and civil law legal systems,⁸⁸ through the recognition of private ownership in terms of its law of property. This protection in terms of private law is supplemented in South African law⁸⁹ (as in German law) by a constitutional guarantee of private ownership and hence private succession as well as freedom of testation.

- (b) Freedom of testation can never be absolute or unfettered in nature and is therefore limited in appropriate circumstances. This point of view is similarly founded upon the role of private succession as an institution – the social and economic function of the law of succession necessitates the limitation of free testamentary disposition.⁹⁰ The developmental history of freedom of testation in Roman and Roman-Dutch law illustrates that freedom of testation was from the earliest times restricted by virtue of prevailing socio-economic considerations.⁹¹ The limitation of freedom of testation was assimilated as a common law principle into South African law. The modern South African law,⁹² in line with the approach in comparable common law and civil law legal systems,⁹³ dictates that free testamentary disposition can be curtailed in consequence of social and economic influences. The limitations imposed by modern South African law on freedom of testation of course result in the concomitant limitation of constitutionally guaranteed private ownership. It is therefore essential that the existing limitations comply with the provisions of the general limitation clause of the South African Constitution. It is argued above that such is indeed the case

⁸⁴ De Waal 1997 *Stell LR* 162.

⁸⁵ Du Toit 1999 *Stell LR* 232.

⁸⁶ Du Toit 2000 *Stell LR* 358.

⁸⁷ See 2 1.

⁸⁸ Du Toit 2000 *Stell LR* 358.

⁸⁹ See 4 2.

⁹⁰ De Waal in Rautenbach et al *Bill of Rights Compendium* 3G13 – 3G16; De Waal 1997 *Stell LR* 162.

⁹¹ Du Toit 1999 *Stell LR* 232.

⁹² See 2 2.

⁹³ Du Toit 2000 *Stell LR* 358.

and that the existing limitations on testamentary freedom should be allowed continued operation in future.⁹⁴

(c) Some of the rights included in the Bill of Rights of the South African Constitution can constitute a limitation on freedom of testation. This point of view is founded upon the horizontal application accorded to certain constitutionally guaranteed rights. The bulk of authority favours the view that appropriate rights indeed operate directly horizontally.⁹⁵ A litigant can therefore invoke such rights directly in order to contest a testamentary disposition. Reliance on a constitutional right for the purpose of an attack on a testamentary provision will invariably result in the balancing of freedom of testation against the right invoked. Should a court afford more weight to the countervailing right than to freedom of testation, such court must apply or, in the alternative, develop the common law in order to give effect to a right in the Bill of Rights and to promote the spirit, purport and objects of the Bill of Rights.⁹⁶ With regard to contentious testamentary provisions based on race, nationality and religion (but also with regard to the considerations encapsulated in the other rights discussed under 4.3 above), judicial reliance on a constitutionally-founded *boni mores* criterion is likely to affirm existing instances of the limitation of freedom of testation in this regard, on the one hand, and might well, on the other hand, result in the inclusion of instances traditionally regarded as valid under a broader category of testamentary bequests henceforth to be considered *contra bonos mores*.

The above three propositions provide the basis for the construction of a framework for a future approach to freedom of testation in South African law. In this regard three testamentary provisions deserve particular consideration, namely (i) out and out disinheritance on account of personal decisions made by a potential beneficiary, which decisions are also a manifestation of the exercise of constitutionally guaranteed fundamental rights, (ii) prescriptive testamentary forfeiture clauses aimed at directing personal decisions of a beneficiary, which decisions are once again a manifestation of the exercise of such fundamental rights and (iii) prescriptive charitable testamentary bequests aimed at regulating the exploitation of estate assets in a manner which conflict with fundamental rights.

5.2 A constitutionally-founded *boni mores* criterion and out and out disinheritance

The civil codes of some continental legal systems contain a provision

⁹⁴ See 4.2.

⁹⁵ See 4.1. It is accepted that, even if only indirect horizontal application is accorded to such rights, the effect, as far as the limitation of freedom of testation is concerned, will be more or less the same as in the case of direct horizontality. The *modus operandi* will of course differ slightly in each of the two instances. See De Waal in Rautenbach et al *Bill of Rights Compendium* 3G21 and 3G22.

⁹⁶ See 4.1.

which renders a testamentary bequest void if a testator was moved to such bequest by a motive which conflict with the law or the *boni mores*.⁹⁷ It has been suggested that such a provision in a civil code might render an out and out disherison invalid if such disherison occurred in consequence of a repugnant motive on the part of the testator – often in the case of disherison imposed as a form of punishment on a potential beneficiary who has made a personal decision which, although a manifestation of the exercise of a fundamental right, meets with the testator's disapproval.⁹⁸ Comparative research, however, reveals that such provisions in civil codes are hardly ever relied on in order to contest out and out disherison in civil law legal systems. The scant authority gained from continental legal systems in this regard cannot justify the importation of a corresponding measure into South African law. Writers on the issue in civil law legal systems furthermore admit to the fact that it is, as a matter of practicality, often difficult (if not impossible) to ascertain the motive underlying a disherison, particularly if the will itself is silent on the issue.⁹⁹

De Waal¹⁰⁰ submits that cogent reasons exist why out and out disherison should not be contestable, even in terms of a constitutionally-founded *boni mores* criterion. He argues firstly that, should such a contest be possible, it will not only reduce freedom of testation to a mere fiction, but will also nullify the constitutional guarantee of this freedom in the property clause of the South African Constitution. This point of view finds support in the first fundamental notion with regard to the predominance of freedom of testation expressed above.¹⁰¹

De Waal secondly submits that no potential beneficiary enjoys a fundamental right to inherit under South African law. Before an estate falls open (*delatio*) a potential beneficiary at most enjoys a hope or expectation to inherit (*spes hereditatis*).¹⁰² A beneficiary only acquires a vested right to the transfer of estate assets, exercisable against the executor of the deceased estate, at *dies cedit*, the earliest possible time for which (bar one or two exceptions) is set at the time of death of the testator.¹⁰³ The hope or expectation to inherit does not constitute a legal claim to the estate assets of the estate owner (testator) nor does it form an asset in the estate of the potential beneficiary himself. The exclusion of a beneficiary from a will therefore results in the mere frustration of such hope or expectation and does not bring about the encroachment upon or the termination of an existing right of a potential beneficiary.

⁹⁷ See the reference to article 4:938 of the Dutch *Burgerlijk Wetboek* in Du Toit 2000 *Stell LR* 358-378.

⁹⁸ See, for example, Coene in Rimanque (ed) *De Toepasselijkheid van de Grondrechten in Private Verhoudingen* (1982) 327 with regard to the relevant article in the Belgian Civil Code.

⁹⁹ Coene in Rimanque (ed) *De Toepasselijkheid van de Grondrechten in Private Verhoudingen* 327-328.

¹⁰⁰ In Rautenbach et al *Bill of Rights Compendium* 3G22-3G23.

¹⁰¹ See point (a) under 5.1.

¹⁰² Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* 12; De Waal & Schoeman *Law of Succession Students' Handbook* 4.

¹⁰³ *Greenberg and Others v Estate Greenberg* 1955 3 SA 361 (A) 365B-C and 365G-H.

De Waal thirdly contends that the social and economic foundations of the law of succession render the freedom to appoint and disinherit beneficiaries justifiable both as a matter of principle as well as common sense. This point of view is supported by the developmental history of freedom of testation. In Roman law the need for a mechanism to legally appoint an heir, while at the same time disinheriting other potential heirs (the *sui heredes*), was occasioned by the socio-economic position of the Roman *familia*. The establishment of *heredis institutio* and *exheredatio* as legal institutions in Roman law therefore proceeded on sound socio-economic grounds.¹⁰⁴ Roman law furthermore developed various institutions to protect the patrimonial position of disinherited parties, again with due regard to apposite socio-economic considerations. This development resulted in protective measures by way of succession *iure civili* in the case of *praeteritio* of *sui heredes*, *bonorum possessio contra tabulas* and the *querela inofficiosi testamenti*.¹⁰⁵ Roman-Dutch law accepted, as Roman law before it, that a testator should be free to institute and disinherit testamentary beneficiaries. Close relations of a testator could however, if disinherited, avail themselves of the patrimonial protection afforded by Roman-Dutch law in terms of the *portio legitima*.¹⁰⁶ The socio-economic considerations which rendered the freedom to institute and disinherit beneficiaries an integral part of freedom of testation, facilitated the acceptance of the principle in South African law. The patrimonial protection afforded to disinherited parties in terms of Roman and Roman-Dutch law of course no longer operate in modern South African law. Appropriate patrimonial protection is, however, presently effected by way of a common law claim for maintenance awarded to a deceased's dependent children as well as a statutory claim for maintenance awarded to surviving spouses.¹⁰⁷ Comparable modern legal systems are also familiar with similar protective measures, for example, the family provision of English law,¹⁰⁸ the Australian testator's family maintenance provisions,¹⁰⁹ the Dutch *legitieme portie*¹¹⁰ and the German *Pflichtteil*.¹¹¹

De Waal fourthly points to the virtually insurmountable practical difficulties which a successful attack on disinheritance would occasion. The first question which arises in this regard pertains to the nature of an appropriate remedy, should a disinheritance be successfully contested. One

¹⁰⁴ Du Toit 1999 *Stell LR* 232 233-234.

¹⁰⁵ Du Toit 1999 *Stell LR* 232 235-236.

¹⁰⁶ Du Toit 1999 *Stell LR* 232 239-240.

¹⁰⁷ See 2.2.

¹⁰⁸ In terms of the Inheritance (Provision for Family and Dependents) Act of 1975 and the Law Reform (Succession) Act of 1995.

¹⁰⁹ See Atherton and Vines *Australian Succession Law* (1996) 656-735 for a general discussion in this regard.

¹¹⁰ See Kasdorp, Kleyn, Wedekind and Zwemmer *Erfrecht Compendium* (1998) 44-66 and Perrick *Erfrecht* (1996) 162-226 for a general discussion in this regard.

¹¹¹ See Leipold *Erbrecht* (1998) 269-286; Ebenroth *Erbrecht* (1992) 621-662 and Brox *Erbrecht* (1998) 326-346 for a general discussion in this regard.

possibility is of course that the particular will be rewritten to include the disinherited party as a beneficiary. South African courts are, however, in consequence of the predominant role of freedom of testation in the law of testate succession, willing to effect *post mortem* amendments to the wills of testators only in exceptional circumstances.¹¹² The judicial rewriting of a will in order to include disinherited parties would therefore violate this settled rule of practice. But even if a court is empowered to rewrite a will in order to institute a disinherited party as a beneficiary, such court will face the difficult task of deciding on the extent of the benefit to be awarded to such a "new" beneficiary. Should such beneficiary, for example, receive a fixed portion of the deceased estate or must he share equally with the other beneficiaries in the proceeds of a liquidation of estate assets? If the rewriting of a will is not deemed the appropriate remedy, then an alternative might be to declare the particular will invalid in its entirety and then to divide the estate in accordance with the law of intestate succession. A principled objection to such a *modus operandi* is to be found in the consideration that South African law, as indeed Roman and Roman-Dutch law, favours testate succession over intestate succession. Such a remedy would therefore conflict with this fundamental notion of the South African law of succession. A further practical objection to be raised against a remedy which entails intestate succession lies in the fact that it might well result in benefits being bestowed upon individuals (as intestate heirs) who were not contemplated by the testator as beneficiaries from his estate.

Even if a remedy of some sort is constructed to aid a disinherited party in his quest to secure a testamentary benefit, practical concerns with regard to the availability of such remedy abound. Should such a remedy, for example, be available to close relatives of a testator only? If so, who in particular would qualify as potential claimants – only relatives in the first *parentela*, only relatives related to the deceased in the first degree or only relatives who can actually prove a close emotional bond with the deceased? If the remedy is not limited to close relatives, then what "cut-off point" is to operate in order to combat the danger of a multitude of potential claimants coming to the fore. These difficulties with regard to the availability of a remedy is compounded by numerous other concerns. Should the remedy, for example, be available only if a potential beneficiary has been expressly disinherited, or can a potential beneficiary also avail himself of the remedy if he has been tacitly omitted from a will? Should the remedy be awarded only in instances where the reason for disinheritance is mentioned expressly in the will? If so, how are instances to be resolved where, despite the silence of the will, the motive for disinheritance can still be proved by *aliunde* evidence? If express mention of the reason for disinheritance is not required, the danger of a multitude of potential

¹¹² *Ex parte Jewish Colonial Trust: in re estate Nathan* 1967 4 SA 397 (N); *Ex parte Sidelsky* 1983 4 SA 598 (C).

claimants rears its head once again. Will only a potential beneficiary who has been completely disinherited be able to avail himself of such a remedy? If not, what should the extent of a benefit be before a challenge on the ground of "quasi-disherison" is precluded?

The considerations of legal policy discussed above, together with the practical concerns raised in the two preceding paragraphs, provide considerable force to the submission that out and out disherison should never be open to contest at the hands of excluded potential beneficiaries. It is therefore submitted that the present position which accords unfettered freedom to South African testators to institute and disinherit beneficiaries should be maintained. It is furthermore submitted that the use of a constitutionally-founded *boni mores* criterion in order to launch a constitutional attack on out and out disherison is absolutely precluded, even if such disherison occurred as a consequence of the exercise of fundamental rights by the disinherited party.

5 3 A constitutionally-founded *boni mores* criterion and testamentary forfeiture clauses

Historical as well as comparative legal research reveals a consistent standpoint in favour of the limitation of freedom of testation with regard to prescriptive testamentary forfeiture clauses. This point of view is founded upon the consideration that prescriptive forfeiture clauses invariably cause intimate and personal decisions of a beneficiary to be influenced by financial loss or gain. This consequence is incompatible with the demands of the *boni mores*, which prescribe that individual choice, particularly if such choice is the manifestation of the exercise of a fundamental right, should not be constrained by material considerations.

This view is detectable even in Roman-Dutch law. Savigny, for example, questioned the fact that testators should be awarded the power to influence the intimate and personal concerns of an individual through material loss or gain.¹¹³ Joubert¹¹⁴ shows in his discussion of decisions of the Dutch *Hoge Raad* from the eighteenth century that testamentary forfeiture clauses which required strict adherence to, for example, the Jewish faith, were invalidated because it conflicted with the principle of freedom of religion in that "[i]t was found to be scandalous and therefore unlawful to compel a person to continue to profess his faith or not to change his faith in order to adopt another faith, by bequeathing him some benefit in a will subject to such condition".¹¹⁵

A similar approach is encountered in modern common law legal systems. In the English decision in *Clayton v Ramsden*,¹¹⁶ also on the tenability of a Jewish faith and race clause, Lord Atkin expresses his

¹¹³ See 3 1.

¹¹⁴ "Jewish Faith and Race Clauses in Roman-Dutch Law" 1968 *SALJ* 402 418.

¹¹⁵ See also Du Toit 1999 *Stell LR* 232 241.

¹¹⁶ [1943] 1 All ER 16 21.

disapproval with "the power of testators to control from the grave the choice in marriage of their beneficiaries." Lord Atkin also declares that he would "not be dismayed if [this] power were to disappear".¹¹⁷ The point of view under discussion is also found in Australian law. In *Trustees of Church Property of the Diocese of Newcastle v Ebbeck*¹¹⁸ Dixon CJ decides that a testamentary bequest which provides for forfeiture of benefits should, for example, a Roman Catholic wife fail to convert to the faith of her Protestant husband, "creates an opposition between the wife's religious beliefs and a serious temporal interest of the husband". Windeyer J¹¹⁹ expresses similar concerns when he opines that the vice of a forfeiture clause of this kind lies in the fact that the wife is compelled to decide "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". He expresses the concern that such a situation indubitably "contains the seeds of unhappy differences and not less so if the spouses be good and conscientious people".¹²⁰

Continental legal systems are also familiar with this point of view. In Dutch law, for example, it is accepted, at least in principle, that a testamentary provision can indeed constitute an infringement on the fundamental rights of a beneficiary. This approach is premised on the ostensible dilemma which the beneficiary encounters in consequence of a prescriptive testamentary provision: such beneficiary is obliged to decide between, on the one hand, the preservation of the particular fundamental right by forfeiture of the testamentary benefit or, on the other hand, abandonment of the fundamental right by abidance by the testamentary provision. The mere fact that a beneficiary is faced with this dilemma renders the ultimate decision (whatever choice is made) involuntary.¹²¹ This approach is evident in the decision of the Dutch *Hoge Raad* in the *Elisabeth Tisper* case.¹²² *In casu* the court, relying on the *goede zeden* in terms of article 4: 935 of the Dutch *Burgerlijk Wetboek*, invalidated a testamentary forfeiture clause which obliged a beneficiary to baptize her children in a particular denomination on the ground that "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 Meijers¹²⁴ expresses his support for this conclusion and opines that it 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 het recht

¹¹⁷ See also *Du Toit* 2000 *Stell LR* 358 363.

¹¹⁸ [1960] 106 CLR 394 403-404.

¹¹⁹ 417.

¹²⁰ See also *Du Toit* 2000 *Stell LR* 358 371-372.

¹²¹ *Du Toit* 2000 *Stell LR* 358 376-377.

¹²² *HR* 21 June 1929 *NJ* 1325 1327-1328.

¹²³ See also *Du Toit* 2000 *Stell LR* 358 379.

¹²⁴ *HR* 21 June 1929 *NJ* 1325 1328.

zich tegen deze heerzucht verzet".¹²⁵ A similar approach is advocated by German writers on the topic. Brox,¹²⁶ for example, opines that "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".¹²⁷

Similar views have been expressed in modern South African law. In *Ex parte Wallace*¹²⁸ Judge President De Vos Hugo observes, applying the public benefit-criterion in terms of section 3(1)(d) of the Immovable Property (Removal or Modification of Restrictions) Act to a prescriptive *fideicommissum inter vivos*, that the public benefit is not served if people's lives are directed by a dead hand and forced into a direction they themselves are unwilling to take. Hahlo¹²⁹ raises similar concerns in his critique of the decision in *Aronson v Estate Hart* when he declares that "it is contrary to our notions of propriety that a testator should be allowed to use the power of the purse to force his descendants for one, two or more generations to profess a faith which they may no longer hold and to refrain from following the dictates of their hearts in the choice of a mate if such choice happens to conflict with the ideas of their deceased ancestor".¹³⁰ Corbett, Hahlo, Hofmeyr and Kahn¹³¹ observes in similar vein that a forfeiture clause which subjects a testamentary benefit to the limitation of the rights to freedom of movement and freedom of association, should indeed be regarded as *contra bonos mores*.¹³²

The authority considered above is indicative of a principled approach which renders prescriptive testamentary bequests in general and testamentary forfeiture clauses in particular untenable, often with reliance on the *boni mores* or by invoking public policy considerations. Coene¹³³ aptly observes in this regard that a will is a document primarily designed to regulate the distribution of estate assets upon death, not to serve as a mechanism to exert undue influence in the lives of testamentary beneficiaries. An attempt by a testator to, through material enticement, bring his influence to bear on the personal and intimate decisions of his beneficiaries might therefore well be regarded as *contra bonos mores*, even more so if the particular decision happens to be a manifestation of the exercise of a constitutionally guaranteed fundamental right by the beneficiary.¹³⁴

The principled approach outlined above is supplemented by an

¹²⁵ See also Du Toit 2000 *Stell LR* 358 379.

¹²⁶ *Erbrecht* 172.

¹²⁷ See also Du Toit 2000 *Stell LR* 358 382-383.

¹²⁸ 1970 1 SA 103 (NC) 106E-F.

¹²⁹ 1950 *SALJ* 231 240-242.

¹³⁰ See 3 1.

¹³¹ *The South African Law of Succession* 122.

¹³² See 3 1 and 4 3.

¹³³ In Rimanque *De Toepasselikhijd van de Grondrechten in Private Verhoudingen* 329.

¹³⁴ See also De Waal's exposition on the equality clause in this regard in Rautenbach et al *Bill of Rights Compendium* 3G24-3G27.

important issue of legal practicality. A testamentary beneficiary acquires a benefit in terms of a forfeiture clause framed as a resolute or negative potestative condition, subject to forfeiture of such benefit upon fulfillment of the condition. *Dies cedit* therefore occurs for such a beneficiary and he can claim transfer of the bequeathed asset from the executor of the deceased estate, which asset will then form part of his (the beneficiary's) patrimony and be subject to the exercise of ownership rights by the beneficiary. Forfeiture of such a benefit in terms of a testamentary forfeiture clause therefore negatively affects both the general patrimonial position of the beneficiary as well as more specifically his constitutionally guaranteed right to property.¹³⁵

There are, however, some countervailing considerations to be weighed against the principled approach outlined above. A "blanket approach", condemning all prescriptive forfeiture clauses as *contra bonos mores* and hence invalid, will firstly bring into question the integrity of the individual beneficiary. It is argued by many that a beneficiary who, guided by personal conviction, values the exercise of a fundamental right above all else, will not bow to the pressure of material enticement and will therefore simply repudiate a testamentary benefit in order to preserve the particular fundamental right. Even if personal conviction plays a lesser role, it is argued that a beneficiary will still be able to decide rationally on adiation or repudiation of the benefit at hand. This point of view is particularly prevalent in common law legal systems. In the English case of *Blathwayt v Lord Cawley*¹³⁶ Lord Wilberforce states with regard to a testamentary forfeiture clause directing the religious education of children that 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".¹³⁷ A similar view is expressed by Lord Fraser¹³⁸ in the same case when he decides that a parent with "strong convictions ... may well regard the religious upbringing of his child of overriding importance not to be set against purely material considerations; if, on the other hand, his religious convictions are weak or non-existent, he can weigh a testamentary benefit with a religious condition attached as one among many factors affecting the welfare of his child". Lord Fraser is therefore of the opinion that "[i]n neither case does the existence of the religious condition seem to me to offend against public policy merely because it might affect the parent's action". Australian law is equally familiar with this approach. In the minority decision in *Trustees of Church Property of the Diocese of Newcastle v Ebbeck*¹³⁹ Kitto J finds it difficult to accept, as a general proposition, that a testamentary forfeiture clause which bestows a benefit

¹³⁵ This fact of course distinguishes the position of a beneficiary under a forfeiture clause from that of the out and out disherison of a potential beneficiary.

¹³⁶ [1975] 3 All ER 625 637.

¹³⁷ See also Du Toit 2000 *Stell LR* 358 365.

¹³⁸ 650.

¹³⁹ [1960] 104 CLR 394 411.

on a husband but furthermore requires of a wife to change her faith, will move the husband to obtain a divorce if the wife appears unwilling to forsake her faith. Kitto argues that, to his mind, it is unlikely 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".¹⁴⁰

A second consideration, which relates to the first, pertains to the waiver of rights. It is founded upon, on the one hand, the important choice between adiation and repudiation which every testamentary beneficiary encounters and, on the other hand, the notion that this choice is made with full knowledge of its legal consequences. According to this point of view, a beneficiary under a prescriptive testamentary forfeiture clause which attempts to regulate personal life decisions and so to restrict the exercise of a fundamental right by such beneficiary, is inevitably put to an absolute choice: the beneficiary can either accept the benefit along with its restrictive effect on the particular fundamental right or, alternatively, reject the benefit and in so doing leave the particular fundamental right unscathed. If the beneficiary prefers to preserve the exercise of the fundamental right, repudiation of the testamentary benefit is the obvious choice. Should the beneficiary however decide, with full knowledge of the legal consequences of such decision, to rather accept the testamentary benefit, the inference seems inescapable that he has waived the particular fundamental right and has consequently acquiesced to the influence of the testator in his private life. This approach is readily encountered in continental legal systems. In Belgian law, for example, absolute operation is not accorded to fundamental rights and it is acknowledged that such rights can indeed be negated by consent or waiver.¹⁴¹ Belgian law dictates that a beneficiary who has adiated a testamentary benefit under a prescriptive forfeiture clause and who has, in so doing, waived the fundamental right curtailed by such bequest, is not permitted to remedy this loss by invoking the *boni mores*.¹⁴²

A third countervailing consideration dictates that the coupling of a testamentary benefit with a prescriptive condition (even one which relates to the exercise of a fundamental right by a beneficiary) is not an attempt by a testator to exert undue influence in the private life of such beneficiary, but rather an endeavour to safeguard the best interests of the beneficiary. This standpoint is particularly evident in South African case law, principally in *Aronson v Estate Hart*.¹⁴³ As pointed out earlier,

¹⁴⁰ See also Du Toit 2000 *Stell LR* 358 372.

¹⁴¹ Rimanque in Rimanque *De Toepasselikhijd van de Grondrechten in Private Verhoudingen* 26-27.

¹⁴² It should however be noted in this regard that, from a South African legal perspective, the right to human dignity and the right to equality (with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion and language) are regarded as non-derogable in terms of the South African Constitution. Waiver of these rights through adiation under a prescriptive forfeiture clause is therefore precluded.

¹⁴³ 1950 1 SA 539 (A).

Greenberg AJ expressed concern *in casu* that a marriage between a Jew and non-Jew might readily result in increased tension and irreconcilable differences between the spouses. He also opined that the children born of such a marriage might fall victim to family disputes and societal disapproval. In his view, therefore, a testator is entitled, in the exercise of his freedom of testation and by employing a forfeiture clause requiring adherence to the Jewish faith, to safeguard his descendants against these social perils.¹⁴⁴ Van den Heever AJ concurs when he finds that “a condition that he shall not marry a person of another religion is conducive to harmonious and happy marriages”.¹⁴⁵ This view is ostensibly premised on the consideration that a testator’s laudable concern for the interests of a beneficiary, embodied in a prescriptive conditional bequest (such as a Jewish faith and race clause in the *Aronson* case), should not be frustrated by leaving such bequest open to an attack in terms of the *boni mores*.

A final opposing consideration rests on the notion that testamentary benefit is per definition a manifestation of individual preference by a testator - a prescriptive testamentary forfeiture clause in a will is therefore not necessarily designed to constrain a beneficiary in the exercise of fundamental rights, but is rather an attempt to differentiate or distinguish between various beneficiaries. This position was favoured by the English court in *Blathwayt v Lord Cawley*¹⁴⁶ as regards a forfeiture clause directed at the religious education of children. Lord Wilberforce opines, for example, that “discrimination is not the same thing as choice”, that “private selection [has not] yet become a matter of public policy” and that he is “unpersuaded that . . . public policy requires that a testator may not prefer one branch of the family to another on religious grounds.”¹⁴⁷ Lord Cross shares this view when he decides that “it is [not] 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.”¹⁴⁸ The Dutch commentator Sneep¹⁴⁹ responds in similar vein to the observations of Meijers regarding the above-mentioned decision of the *Hoge Raad* in the *Elisabeth Tisper* case. Sneep observes that a forfeiture clause such as the one *in casu* is not necessarily to be ascribed to emperiousness on the part of a testator but that it could also be “een gevolg . . . van de stem van het geweten van de erflater, die hem zegt zijn vermogen niet te vermaken aan andersdenkenden”.¹⁵⁰

The above exposition indicates that principled arguments can be advanced both for and against the limitation of prescriptive testamentary

¹⁴⁴ 546.

¹⁴⁵ 567. See 3 1.

¹⁴⁶ [1975] 3 All ER 625.

¹⁴⁷ 636-637.

¹⁴⁸ 639. See similar remarks by Lord Edmund-Davies at 649. See also Du Toit 2000 *Stell LR* 358 364.

¹⁴⁹ “Geoorloofde en Ongeoorloofde Beperkingen der Gewetensvrijheid” 1949 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 343 344.

¹⁵⁰ See also Du Toit 2000 *Stell LR* 358 380.

forfeiture clauses in terms of a constitutionally-founded *boni mores* criterion. In view of the limiting effect on freedom of testation of certain rights contained in the South African Bill of Rights stated in the third fundamental notion to the prognosis above,¹⁵¹ it is imperative to formulate a workable guideline in order to resolve the conflict between the above-mentioned opposing considerations. It is submitted that such a guideline is to be found in a proper judicial evaluation of the facts and circumstances of each individual case. The necessity of such a guideline was alluded to by Lord Simon in *Blathwayt v Lord Cawley*¹⁵² when he states that “[t]he 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 either practically unreal in many cases or open to logical objection”.¹⁵³ In the Australian case of *Trustees of Church Property of the Diocese of Newcastle v Ebbeck*¹⁵⁴ Kitto J rightly observes that the invalidation of a prescriptive testamentary forfeiture clause on the grounds of public policy “must depend [on the particular circumstances] of every case”.¹⁵⁵

Support for such a guideline has also been expressed in continental legal systems. The Dutch commentator Kamphuisen advocates a similar approach, with due regard to the intention of the testator and the interests of both the testator as well as the beneficiary.¹⁵⁶ Another Dutch author, Van der Burght,¹⁵⁷ shares this view when he declares that “[m]en moet steeds nagaan of in het concrete geval de strekking van de voorwaarde de uitoefening van ongeoorloofde dwang is: de bedoeling van de testateur vormt één van de in de beoordeling te betrekken factoren”.¹⁵⁸ Sneep, in his critique of Meijers’ evaluation of the decision of the *Hoge Raad* in the *Elisabeth Tisper* case, also recommends that the issue under discussion “geval voor geval beslist moeten worden”.¹⁵⁹ German law also accedes to this guideline. The good morals-test operates in German law with express reference to the “Anstandsgefühl aller billig und gerecht Denkenden” and the particular criterion employed in this regard concerns the question whether a testamentary provision, judged objectively in terms of the “Anschauung des anständigen Durchschnittsmensches”, conflicts with the good morals in the particular case at hand.¹⁶⁰

A similar guideline has been proposed for South African law. De Waal, in his exposition of the possible limiting effect of the equality clause of the South African Constitution on testamentary freedom with regard to

¹⁵¹ See 5 1.

¹⁵² [1975] 3 All ER 625 637.

¹⁵³ See also Du Toit 2000 *Stell LR* 358 365.

¹⁵⁴ [1960] 104 CLR 394 409.

¹⁵⁵ See also Du Toit 2000 *Stell LR* 358 372.

¹⁵⁶ “Godsdiens en Vermogensrecht” 1955 *WPNR* 357 358. See also Du Toit 2000 *Stell LR* 358 377.

¹⁵⁷ *Pitlo Het Nederlands Burgerlijk Wetboek Deel 5* (1997) 78.

¹⁵⁸ See also Du Toit 2000 *Stell LR* 358 379.

¹⁵⁹ 1949 *WPNR* 343 344. See also Du Toit 2000 *Stell LR* 358 380.

¹⁶⁰ Ebenroth *Erbrecht* 199-200; Brox *Erbrecht* 171-173. See also Du Toit 2000 *Stell LR* 358 382.

prescriptive testamentary forfeiture clauses, declares that "[e]ach controversial condition will have to be interpreted in the context of the specific will and prevailing circumstances".¹⁶¹ The South African Constitution itself provides for the application of such a guideline. Section 8(2) of the Constitution stipulates that "a provision of the Bill of Rights binds a natural person . . . if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". According to Cockrell¹⁶² this provision recognises that "constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person".¹⁶³

The general limitation clause of the Constitution also supports such a guideline. Section 36(1) *inter alia* provides that a right included in the Bill of Rights (for present purposes freedom of testation as an element of the right to property) may be limited only by taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and any less restrictive means to achieve the purpose. These factors indubitably focus the inquiry as to whether the relevant limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", on the particular facts and circumstances of the case at hand.

It is submitted that a constitutionally-founded *boni mores* criterion is the appropriate mechanism to limit the freedom of South African testators to testamentary bequests by way of prescriptive testamentary forfeiture clauses. It is further submitted that such limitation might well be imposed in instances not traditionally regarded as *contra bonos mores*, in particular with regard to prescriptive testamentary bequests based upon race, nationality and religion. Such limitation should, however, be imposed only after a proper evaluation of the facts and circumstances of each case. It is suggested that judicial cognisance should be taken of the following factors when deciding the issue (in addition to the factors listed in section 36(1) of the Constitution):

- (a) The intention of the testator and the general purport of his will: does the will, read in its entirety, suggest the particular prescriptive forfeiture clause to be an attempt to (discriminatorily) interfere in the private life of an instituted beneficiary, or is it merely an attempt to distinguish, on the basis of individual preference, between beneficiaries?
- (b) The testator's interest in the attempted influence in the private life of the beneficiary: does the prescriptive forfeiture clause merely

¹⁶¹ In Rautenbach et al *Bill of Rights Compendium* 3G25.

¹⁶² In Rautenbach et al *Bill of Rights Compendium* 3A8.

¹⁶³ See 4 1.

constitute an attempt by the testator to meddle in the private affairs of the beneficiary or was it the aim of the testator to achieve a laudable, even socially responsible, objective by way of the particular provision?

- (c) The manner in which, as well as the degree to which, the interest of the beneficiary, judged objectively, is compromised by the prescriptive forfeiture clause: what is therefore the extent of the limitation imposed by the testamentary provision on the exercise of fundamental rights by the beneficiary?
- (d) The individual beneficiary's willingness to abide by the limitation imposed on the exercise of fundamental rights by the prescriptive forfeiture clause: is the beneficiary confronted with a real dilemma as a result of the election between material benefit and the preservation of a fundamental right, or is the beneficiary prepared to forfeit the latter in favour of the former?

5.4 A constitutionally-founded *boni mores* criterion and charitable testamentary bequests

It was pointed out earlier that the traditional reluctance of South African courts to apply the *boni mores* in order to limit freedom of testation with regard to contentious charitable testamentary bequests, particularly those based upon race, nationality and religion, is principally ascribed to, on the one hand, the predominant role of freedom of testation in the South African law of testate succession and, on the other hand, the lenient approach to such bequests which prescribes that bequests *ad pias causas* should be maintained rather than invalidated.¹⁶⁴ The decision of Berman J in *Ex parte President of the Conference of the Methodist Church of Southern Africa: in re William Marsh Will Trust*¹⁶⁵ however displays, despite the criticism leveled at it, a willingness to apply public policy considerations in order to limit testamentary freedom in this regard. Nadasen and Pather¹⁶⁶ view the *William Marsh* decision as indicative of the "direction currently being taken by our courts as it may relate to human rights and its contribution towards the human rights culture" in South Africa. The *William Marsh* case therefore represent an ostensible break with the traditional approach to the validity of particularly racially-orientated charitable testamentary bequests in South African law.

It is interesting to compare the approach to the above issue in terms of South African law with that in English law. The latter is also familiar with a similar lenient approach to charitable bequests, both in terms of the traditional classification of charitable trusts as well as in terms of applicable legislation such as the Race Relations Act of 1976 and the Sex

¹⁶⁴ See 3.2.

¹⁶⁵ 1993 2 SA 697 (C). See 3.2.

¹⁶⁶ "The South African Reality and the Creation of a Human Rights Culture" 1995 *Stell LR* 256 256.

Discrimination Act of 1975.¹⁶⁷ Of particular note is the fact that the traditional classification of charitable trusts and the above-mentioned statutes both facilitate the distribution of benefits by charities on the basis of, *inter alia*, race, nationality, religion and gender. This lenient approach is, however, tempered, particularly in terms of the above-mentioned two statutes, by various restrictive measures to limit the allocation of benefits along racial and gender lines. A pertinent limitation in this regard is imposed by section 34 of the Race Relations Act which prohibits the allocation of benefits by a charity if such benefits are limited on the basis of race or colour – a charitable trust may therefore expressly benefit, for example, Turks or Italians only, but may not expressly exclude Turks or Italians from the benefits of the trust. Section 34 provides further that the reference to colour for the purpose of defining a group or class of beneficiaries of a charity will be regarded as void and must be ignored by the trustees of the charity concerned. A trust to educate white children in Leicester will therefore simply be regarded as a trust to educate children in Leicester. It is therefore evident that English law follows a fairly lenient approach to the maintenance of charitable bequests, ostensibly in adherence to the dictates of public policy, while at the same time acknowledging the necessity to limit certain contentious charitable dispositions, once again with reliance on policy considerations.

The view has, however, been expressed in English law that, stated as a general principle, public policy ought not to be invoked in order to curtail a testator's freedom to limit his beneficence in terms of a charitable bequest to, for example, members of a particular religious group. In *In re Lysaght, Hill v The Royal College of Surgeons*¹⁶⁸ Buckley J remarks with regard to a charitable bequest to the Royal College of Surgeons which excluded members of the Jewish and Roman Catholic faiths 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".¹⁶⁹ The problem which faced the English court in the *Lysaght* case, as indeed the South African court in the *William Marsh* case, was that the institution designated to administer the charitable bequest (the Royal College of Surgeons in the *Lysaght* case and the Methodist Church of Southern Africa in the *William Marsh* case) declared itself unwilling to undertake such administration in terms of directives which it regarded as discriminatory. It could of course be argued that the reluctance of both the above-mentioned parties to administer the charitable bequests concerned is in itself reflective of the general disapproval of such bequests in terms of the *boni mores*. More insightful is the fact that in both cases the respective courts came to the assistance of these parties; in the *Lysaght* case by way of a somewhat suspect application of the *cy prés*

¹⁶⁷ See Du Toit 2000 *Stell LR* 358 366-367.

¹⁶⁸ [1966] Ch 191 206.

¹⁶⁹ See also Du Toit 2000 *Stell LR* 358 368.

doctrine¹⁷⁰ and in the *William Marsh* case by expressly invoking public policy considerations.¹⁷¹ It is submitted that the relief so granted is indicative of a judicial willingness to curb testamentary freedom with regard to charitable bequests, particularly when such bequests are based upon race, nationality and religion.

A countervailing argument draws on the notion that the exclusion of potential beneficiaries from the benefits of a charitable bequest in essence amounts to the out and out disherison of such beneficiaries. If out and out disherison as such cannot be contested with reliance on a constitutionally-founded *boni mores* criterion (as is indeed contended above)¹⁷² then it stands to reason that a beneficiary-exclusive charitable bequest is similarly beyond contest on the ground of public policy. There is, however, one differentiating feature of a charitable bequest that should be born in mind here, namely that it has to evince an element of public benefit, a requirement not set for any other testamentary bequest. Out and out disherison of beneficiaries in terms of a non-charitable bequest can therefore occur without a direct effect on the broader community and the "injustice" done to the disinherited parties will have no negative impact on the broader community. The exclusion of beneficiaries in terms of a charitable testamentary bequest might in appropriate circumstances, the element of public benefit taken into consideration, prejudice the interest of the broader community to such an extent that the bequest operates to the detriment of the public interest and, in so doing, opens itself to scrutiny in terms of public policy considerations. This will notably be the case where, as in the *William Marsh* case, the excluded parties are in need of the testator's beneficence, while the instituted beneficiaries no longer experience a similar want. This argument is particularly potent in the instance where an element of state action is detectable in the institution appointed to distribute the rewards of the testator's beneficence (such as, for example, a university which has to utilize trust income towards the payment of bursaries to students). State action renders the distribution practice of such an institution with regard to the proceeds of a charitable bequest open to a constitutional challenge simply on the ground that the Constitution prohibits the state from conducting discriminatory practices.¹⁷³

The above analysis shows that well-founded principled arguments can be raised both for and against the limitation of free testamentary disposition in terms of a constitutionally-founded *boni mores* criterion with regard to charitable testamentary bequests. It is submitted, again in light of the limiting effect on freedom of testation of certain rights contained in the South African Bill of Rights stated in the third

¹⁷⁰ See Du Toit 2000 *Stell LR* 358 368-369.

¹⁷¹ See 3 2.

¹⁷² See 5 2.

¹⁷³ Section 9(3) of the Constitution. See also De Waal in Rautenbach et al *Bill of Rights Compendium* 3G27.

fundamental notion to the prognosis above,¹⁷⁴ that these conflicting points of view can be reconciled through a proper judicial evaluation of the facts and circumstances of each individual case. Such evaluation might well move a court to, in appropriate circumstances, employ a constitutionally-founded *boni mores* criterion in order to restrict testamentary freedom with regard to charitable testamentary bequests and to do so in instances which were not previously regarded as *contra bonos mores*, in particular with regard to charitable testamentary bequests based upon race, nationality and religion. Such limitation should however be imposed only after a proper evaluation of the facts and circumstances of each case. It is suggested that judicial cognisance should be taken of the following factors when deciding the issue (once again in addition to the factors listed in section 36(1) of the Constitution):

- (a) The intention of the testator and the general purport of his/her will: is the exclusion with regard to the fundamental rights of potential beneficiaries basic to the wishes of the testator, or can it, as in the *Lysaght* case, be regarded as a non-essential and therefore an omissible part of the testator's charitable purpose?
- (b) The period as well as any change in circumstances between the execution of the testator's will and the request for judicial intervention with regard to the particular charitable bequest: have circumstances changed in the course of time (possibly in a manner not foreseen or contemplated by the testator) that public policy, as in the *William Marsh* case, requires that the exclusion imposed by the testator should be abolished?
- (c) The manner in and extent to which the interests of both the instituted as well as the excluded potential beneficiaries are, judged objectively, affected by the particular testamentary bequest: would the extension of the testator's beneficence to excluded beneficiaries have an overwhelmingly negative impact on the interests of the instituted beneficiaries or can an equitable balance be struck between the prevailing interests of the instituted beneficiaries and the supplementary interests of the new beneficiaries to be included?
- (d) The willingness of the person or institution charged with the administration of the testator's charitable bequest (such as the trustee of a charitable trust) to indeed conduct such administration and bestow benefits along, for example, racial or religious lines: any well-founded unwillingness on the part of such functionary might move a court, as in the *William Marsh* and *Lysaght* cases, to award an appropriate remedy.

6 Conclusion

The development of the law of testate succession occurs under the

¹⁷⁴ See 5 1.

influence of a multitude of socio-economic factors. These factors not only sustain freedom of testation but also effect its limitation. South Africa's new constitutional dispensation provides a new perspective on the socially-founded limitation of testamentary freedom in terms of the *boni mores*. In this regard the task to strike the balance between, on the one hand, constitutionally guaranteed private ownership, private succession and freedom of testation and, on the other hand, the limitation of the latter freedom brought about by the application of a constitutionally-founded *boni mores* criterion is, for the moment, in the hands of the South African courts. This task is indeed an unenviable one but it is submitted that a casuistic though principled approach to this issue (as advocated in this contribution) will establish an authoritative body of law which, in turn, will guide the courts in achieving the required balance between freedom of testation and its limitation in terms of the *boni mores*.

OPSOMMING

Hierdie bydrae vorm die derde in 'n trilogie van artikels oor testeervryheid en die beperking van dié vryheid. In die eerste artikel is 'n regshistoriese perspektief op die aangeleentheid verkry, terwyl die tweede artikel 'n regsvergelijkende ondersoek behels het. In hierdie artikel word die insigte uit die eerste twee artikels gebruik ten einde 'n raamwerk vir 'n toekomstige benadering tot die beperking van testeervryheid ingevolge 'n grondwetlik-gefundeerde *boni mores*-maatstaf in die Suid-Afrikaanse reg daar te stel. Die fokus val eerstens op die tradisionele benadering tot testeervryheid en die beperking daarvan, met besondere verwysing na testamentêre verbeuringsbepalings en testamentêre bepalings met 'n liefdadigheidsdoelmerk. Daarna word die invloed van grondwetlik-gewaarborgde regte op testeervryheid en die beperking van dié vryheid ondersoek. Die bydrae word afgesluit met 'n beskouing van die invloed van die *boni mores* op uit-en-uit-ontertwing, testamentêre verbeuringsbepalings en testamentêre bepalings met 'n liefdadigheidsdoelmerk binne Suid-Afrika se nuwe grondwetlike bedeling.