

Constitutionalism, Public Policy and Discriminatory Testamentary Bequests—A Good Fit Between Common Law and Civil Law in South Africa’s Mixed Jurisdiction?

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This Article investigates South African courts’ treatment of discriminatory testamentary bequests in the pre- and post-constitutional eras. It shows a change in judicial attitude towards such bequests from an accommodating, tolerant stance, purportedly founded on South Africa’s Roman-Dutch common law, during the pre-constitutional era to a firm normative approach with a focus on equality and non-discrimination during the post-constitutional years. The Article assesses critically this post-constitutional approach against precedent and scholarship from Common Law and Civil Law jurisdictions and asks whether, given the mixed nature of its legal system, the current South African position in regard to such bequests achieves a good fit between the Common Law and Civil Law.

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I. INTRODUCTION

In the post-constitutional era from 1994 onward¹ South African courts were called to adjudicate upon a number of challenges to

* © 2012 François du Toit. Professor of Law, University of the Western Cape, South Africa. I am grateful to Prof. Marius de Waal (University of Stellenbosch) for his valuable comments on an earlier draft of this Article. I thank Profs. Naomi Cahn (George Washington University Law School) and Bill LaPiana (New York Law School) for the instructive discussions on the topic of discriminatory trusts that inspired this Article.

testamentary charitable trusts that contained directives based on race, gender and religion in regard to the bestowal of trust benefits. In deciding these matters, courts had to weigh testators' personal autonomy through the exercise of freedom of testation against constitutional and public policy imperatives on equality and non-discrimination. Where constitutional and public policy prescripts were found to outweigh testamentary freedom, courts cured the violation of the equality rights of those excluded from trust benefits through apposite remedies.

In this Article I assess critically South African courts' treatment of discriminatory testamentary bequests against constitutionally founded public policy prescripts, on the one hand, and the demands occasioned by adherence to testators' freedom of testation, on the other. To this end, I typify as discriminatory all bequests that, in the words of Harding,² "pick out elements of the identity" of testamentary beneficiaries as well as those excluded from testamentary benefit and on which the unfavourable treatment of such beneficiaries or excluded persons are based. South African jurisprudence on the matter reveals that race, gender and religion are the foremost elements of identity utilized by testators to mete out unfavourable treatment.

The inquiry focuses on the mixed nature of South Africa's common law that is Civilian in origin but is infused with elements of the English Common Law. I investigate how South African courts' treatment of discriminatory testamentary bequests, both in the pre-constitutional and post-constitutional eras, adheres to the tenets of Roman-Dutch law (as South Africa's common law to this day) and, moreover, how such treatment is aligned to corresponding tendencies in Common Law jurisdictions. In particular, I distinguish the firm normative approach to discriminatory testamentary bequests advocated by some Common Law scholars, on the one hand, from, on the other, the emphasis that some Civilian scholars place on subjective considerations such as testamentary intent, motive or purpose to provide balance to the objectivity of a strictly normative inquiry. I test the normative stance that South African courts assumed towards discriminatory testamentary bequests in the post-constitutional years against these views propounded in Common Law and Civil Law scholarship, and I argue that the position taken by South African courts regarding the distinction between fair and unfair

1. South Africa's interim Constitution, enacted after the fall of apartheid, came into force on 27 April 1994 and its final Constitution was signed into law on 10 December 1996 and came into force on 4 February 1997.

2. Matthew Harding, *Some Arguments Against Discriminatory Gifts and Trusts*, 31 OJLS 303, 322 (2011).

discrimination is significant for the purpose of adjudicating on the tenability of such bequests.

II. THE COMMON LAW: A NORMATIVE APPROACH

The Common Law traditionally regards discriminatory testamentary bequests, including those devised along racial, gender and religious lines, with considerable tolerance. In the well-known English case of *Blathwayt v. Baron Cawley*³ the House of Lords could not be persuaded to invalidate a forfeiture clause that provided for the relinquishment of estates under a testamentary settlement if the estate holders became Roman Catholics. Similarly, in *University of Victoria v. British Columbia (Ministry of the Attorney General)*⁴ the British Columbia Supreme Court ruled that a testamentary bursary bequest to Roman Catholic students at the petitioner university was valid and administrable in accordance with the will's directives. And in *Trustees of Church Property of the Diocese of Newcastle v. Ebbeck*⁵ the Australian High Court opined that a testator "may . . . provide that his property shall go only to persons of a particular religion" and that "a prospective beneficiary will be disqualified unless he renounce a particular faith."⁶

This tolerant approach notwithstanding, the Common Law permits interference in bequests that may be labelled discriminatory in nature. To this end two tools are utilized; first, the strict requirement regarding certainty of conditions attaching to testamentary dispositions and, secondly, the public policy yardstick.⁷ In regard to the former, the House of Lords determined in the leading English case of *Clavering v. Ellison*⁸ that a condition subsequent must evince a high degree of precision to meet the certainty requirement. In *Clayton v. Ramsden*⁹ the House of Lords, following *Clavering v. Ellison*, struck down for uncertainty a condition subsequent that purported to effect the forfeiture of interests under testamentary trusts if the trust beneficiary married a person not of Jewish parentage and of the Jewish faith.

The second tool, public policy, is used readily in Common Law jurisdictions to adjudicate the tenability of potentially discriminatory testamentary bequests that meet the certainty requirement. However,

3. [1976] AC 397 (HL).
4. (2000) 185 DLR (4th) 182.
5. [1960] 104 CLR 394.
6. *Id.* at 414.
7. Harding, *supra* note 2, at 308, 310.
8. [1859] 7 HL Cas 707.
9. [1943] AC 320 (HL).

courts in these jurisdictions generally refrain from invalidating altogether such bequests; rather they choose to refashion the devolution of benefits under these bequests. This is the case particularly regarding testamentary charitable trusts that restrict trust benefits on racial, gender and religious grounds. To this end courts in Common Law jurisdictions make ample use of the *cy-près* doctrine in instances where the restrictions imposed occasion impracticability or impossibility of charitable purposes. In *Re Lysaght, Hill v. Royal College of Surgeons of England*¹⁰ the Chancery Division, despite not labelling the offending condition in violation of public policy, ordered a *cy-près* scheme that excised from a testatrix's will a restriction that excluded students of the Jewish or Roman Catholic faiths from scholarships at the Royal College of Surgeons.¹¹ On the other hand, the Ontario Court of Appeal, in *Re Canada Trust Co. v. Ontario (Human Rights Commission)*,¹² found that an *inter vivos* educational trust violated public policy insofar as it limited recipients of scholarships to, among others, "a British Subject of the White Race and of the Christian Religion in its Protestant form." The discrimination evident from the indenture creating this trust was of a particularly bigoted variety insofar as it contained a number of recitals that related to, among others, the race, religion, ethnic origin and colour of the class of persons eligible to receive scholarships. It proclaimed, among other things, that "the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines" and that "the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion."¹³ The court, having ruled that the discriminatory restrictions violate public policy, decided on refashioning the trust by relieving it of such restrictions. The court consequently applied the *cy-près* doctrine to strike out all restrictions regarding race, ethnic origin, gender and religion in respect of those entitled to the benefits of the trust.¹⁴ Significantly, the court in *Canada Trust* applied contemporary public policy notions in arriving at its

10. [1966] Ch 191.

11. See also the earlier case of *Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General* [1947] Ch 183 and the more recent judgment in *Re Harding; Gibbs v. Harding* [2007] EWHC 3 (Ch).

12. (1990) 69 DLR (4th) 321.

13. *Id.* at 326.

14. It is noteworthy that the utilization of the *cy-près* doctrine to change the devolution of benefits under (potentially) discriminatory trusts is not without its critics: *cf.*, e.g., John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123 (2010).

decision, not the public policy that prevailed at the time of the trust's creation some seven decades earlier.

Trusts such as those in the *Lysaght* and *Canada Trust* cases exhibit a distinct "public" character because, although privately created, they are directed at educational institutions that receive government funding and draw their student populations from the public at large. Common Law jurisprudence reveals sensitivity for the public-private-divide in regard to such trusts. In *Canada Trust*, for example, Tarnopolsky JA opined that the court's decision *in casu* "does not affect private, family trusts" because "[i]t is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination" and "[o]nly where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void."¹⁵

The public-private-divide in respect of, on the one hand, charitable trusts and gifts and, on the other, private, non-charitable dispositions features pertinently in the United States of America where federal and state constitutional and statutory provisions as well as the state action issues usually associated therewith come into play. For example, *Evans v. Newton*¹⁶ concerned a testamentary bequest of land to a city in Georgia for "a park and pleasure ground" for whites only. The Georgia court of first instance accepted the city's resignation as trustee and appointed three individual trustees.¹⁷ The Supreme Court of Georgia, in its majority judgment, opined that the park's status as a public facility was "not dissipated *ipso facto* by the appointment of 'private' trustees"¹⁸ and, moreover, that, because "mass recreation through the use of parks is plainly in the public domain . . . state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment."¹⁹ The Supreme Court consequently held the bequest to be unconstitutional and reversed the judgment of the trial court.²⁰ The *Evans* judgments, in addition to affirming the division between the public and private spheres, place into

15. (1990) 69 DLR (4th) at 353.

16. 382 U.S. 296 (1966).

17. *Id.* at 297-98.

18. *Id.* at 301.

19. *Id.* at 302.

20. *Id.* In *Evans v. Abney*, 396 U.S. 435 (1970), the United States Supreme Court rejected a prayer to strike the aforementioned racial restriction from the testator's will under the *cy-près* doctrine and affirmed the Georgia trial court's and Georgia Supreme Court's ruling that, because the sole purpose of the trust to establish a whites-only park was, according to the judgment in *Evans v. Newton*, unconstitutional, the trust had in fact failed, causing the trust property to revert to the testator's heirs.

sharp focus the role of courts as public authorities through which legal subjects wish to have privately created legal acts enforced.

Is the public-private-divide as outlined above a tenable one and, if not; to what extent ought public policy, manifestly as an objective, non-discrimination norm, to negate testators' freedom to discriminate in purely private bequests? Common Law scholarship yields interesting and wide-ranging views on this intriguing matter.

At the one end of the spectrum the Weinribs,²¹ in their discussion of the *Canada Trust* case, argue against the operation of a non-discrimination norm to quash private autonomy in the law of gifts and trusts. The Weinribs advocate the principle of "transactional equality" which militates against acknowledging the normative position of only one party in an essentially private dispute on parties' rights and obligations.²² The consideration that every disponent is free to choose the terms and conditions of a disposition of property is central to the Weinribs' argument.²³ The opposite end of the spectrum is occupied by those who call for the elimination of all discrimination from gifts and trusts. Harding²⁴ opines that courts, as public institutions, must always be sensitive to applicable public policy and/or constitutional norms, even when adjudicating a purely private matter. He contests the Weinribs' argument that the state impermissibly violates personal autonomy when it refuses to facilitate privately created dispositions, even when such dispositions are not imbued with a public character of any kind. Harding opines that the non-discrimination norm affects all gifts and trusts, even those that discriminate in pursuit of a valuable goal:

In a community characterized by pluralism, the collective good of a public culture of respect for, and pride in, identity is potentially undermined in any case where a person brings about unfavourable treatment of others on grounds that, in one way or another, explicitly pick out elements of the identity of those others. Moreover, the likelihood of this collective good being undermined increases when the state, through law, vindicates such discriminatory treatment on the part of individuals by enabling that treatment to take effect.²⁵

21. Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in HUMAN RIGHTS IN PRIVATE LAW 43 (Daniel Friedman & Daphne Barak-Erez eds., 2001).

22. *Id.* at 48-49, 56.

23. *Id.* at 67-68.

24. Harding, *supra* note 2, at 318.

25. *Id.* at 322-23.

Grattan and Conway²⁶ also support this approach in their criticism of *Canada Trust*. They argue that, in jurisdictions with constitutional dispensations, the public policy doctrine channels constitutional protections into the entire realm of private law; there is not a more exclusive personal sphere within the private law domain that is immune from public policy arguments and associated judicial interference. Grattan and Conway opine, therefore, that public policy can be invoked to override all private dispositions without the need for some public “anchor”—such as the public domain in respect of educational trusts—to be applied.

Between these opposing views a range of standpoints, particularly by American commentators, seek to establish a middle ground. Henry²⁷ discusses the judgments on a so-called “Jewish clause” that required beneficiaries to marry a spouse of the Jewish faith or someone who converted to Judaism within one year of marriage in *In re Estate of Feinberg*²⁸ and welcomes the strong judicial preference for testamentary freedom evident from the Illinois Supreme Court’s judgment *in casu*. Henry notes as significant that the provision in the Feinberg will was not punitive in nature and was clearly an expression of the testators’ deeply held religious beliefs.²⁹ Henry supports judicial interference in testamentary bequests only where a disposition is “punitive in nature or motivated by an interest in furthering a prejudicial, bigoted, or malevolent agenda”³⁰—the educational trust in the *Canada Trust* case clearly falls into this ignominious category. On the other hand, Colliton³¹ argues that particularly race and gender-based trusts, even those with private individuals as trustees, are invalid and should not be enforced under the American common law of trusts because, among other reasons, they offend contemporary public policy prescriptions. In support of this proposition, Colliton places particular reliance on the majority judgment in *Bob Jones University v. United States*,³² a case that addressed the question whether an educational institution that practiced racially discriminatory admission and other policies was exempt from federal

26. Sheena Grattan & Heather Conway, *Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective*, 50 MCGILL L.J. 511, 531 (2005).

27. Orly Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 NW. J. L. & SOC. POL’Y 215 (2011).

28. 919 N.E.2d 888 (Ill. 2009).

29. Henry, *supra* note 27, at 233.

30. *Id.* at 234.

31. James W. Colliton, *Race and Sex Discrimination in Charitable Trusts*, 12 CORNELL J.L. & Pub. Pol’y 275, 292 (2003).

32. 461 U.S. 574 (1983).

income taxation. The Supreme Court reasoned, on the basis of the common law of trusts, that the university was not charitable and, hence, did not qualify for tax exemption and other benefits afforded charitable institutions.³³ The court stated:

We are bound to approach these questions with full awareness that determination of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not “charitable” should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.³⁴

In light of the *Bob Jones University* judgment, Colliton proposes that trusts that discriminate against blacks and other minority racial groups are contrary to public policy and not enforceable as charitable trusts.³⁵ He concedes, however, that trusts discriminating in favour of traditionally disadvantaged groups may be justifiable as attempts to address past discrimination or to correct economic or opportunity imbalances.³⁶ Colliton consequently advises that decisions on whether a particular trust violates public policy must necessarily be taken on a case-by-case basis.³⁷ While such a casuistic approach is, practically speaking, often unavoidable, Elmore³⁸ warns that a case-by-case determination of how public policy might affect an individual situation may yield inconsistency from which it is difficult to distil a principled solution to policy-based challenges to testamentary bequests. He, therefore, advocates that a court must determine public policy by making logical and proper inferences from statute law and legal precedent.³⁹ Correspondingly, Grattan and Conway⁴⁰ note as significant the *Canada Trust* court’s affirmation that public policy is infused by equality directives such as those contained in the Canadian Human Rights Code 1981, the Canadian Charter of Rights and Freedoms included in the Constitution Act 1982 and, for purposes of the United Kingdom, the Human Rights Act 1998. Harding⁴¹ also emphasizes the importance of

33. *Id.* at 595.

34. *Id.* at 592.

35. Colliton, *supra* note 31, at 297.

36. *Id.*

37. *Id.* at 298.

38. Christopher T. Elmore, *Public Policy or Political Correctness: Addressing the Dilemma of Applying Public Policy to Inheritance Issues*, 2 *EST. PLAN. & COMMUNITY PROP. L.J.* 199, 203 (2009).

39. *Id.* at 223.

40. Grattan & Conway, *supra* note 26, at 531.

41. Harding, *supra* note 2, at 311.

the Human Rights Act insofar as it imported provisions of the European Convention on Human Rights into England's domestic law and increased the likelihood that the norms entrenched in the Convention will influence, through some form of horizontal effect, the development of the English common law on the issue of discriminatory testamentary bequests.

The above synopsis shows that discriminatory testamentary bequests elicit wide-ranging and, at times, conflicting reactions from courts and commentators in Common Law jurisdictions. Nevertheless, there is by and large unanimity that public policy can be invoked normatively to limit testators' freedom to have discriminatory dispositive plans effected; the burning issue remains the extent to which the non-discrimination norm limits testamentary freedom, particularly in purely private bequests. Judicial precedent can undoubtedly aid an inquiry into the matter. The concretization of public policy in state and national constitutions and human rights statutes in Common Law jurisdictions lends a definitive objectivity to the normative inquiry.

III. CIVIL LAW: ROOM FOR SOME SUBJECTIVITY—THE DUTCH POSITION

Continental European civil codes generally contain prescripts that invalidate testamentary bequests, particularly conditions, which violate the public order or good morals.⁴² The test in this regard is by and large objective in nature: will the average, reasonable person regard the contested bequest as contravening good morality?⁴³ The new Dutch Civil Code (*Burgerlijk Wetboek*), of which Book 4 on inheritance law commenced on 1 January 2003, permits explicitly a subjective element—that of the motive underlying a testamentary bequest—in the inquiry into the effect of contravention of the public order and/or morality on a bequest's validity. Article 4:44 of the Code determines that a will or testamentary bequest is void if its content is contrary to the public order or good morals; moreover that a will or testamentary bequest is void if the decisive motive for making the will or bequest is contrary to the public order or good morals, provided such motive is evident from the

42. E.g., art. 900 of the French Civil Code (*Code Civil*); par. 138 of the German Civil Code (*Bürgerliches Gesetzbuch*); art. 900 of the Belgian Civil Code (*Burgerlijk Wetboek*). The good morals function by and large as a Civilian equivalent to the Common Law's public policy yardstick.

43. E.g., in German law the evaluation occurs in terms of the "*Anschaung des anständigen Durchschnittsmenschen*" (the opinion of the decent average person): see CARSTEN THOMAS EBENROTH, *ERBRECHT* 199-200 (1992).

will itself. Article 4:45 stipulates in similar vein that where a condition or testamentary obligation imposed by will is contrary to, among others, the public order or good morals, the condition or obligation is deemed not to have been written. Such condition or obligation does not, however, invalidate the entire bequest to which it is attached, unless it constitutes the decisive motive of the testator for making the bequest.

Article 4:44 was the subject of a recent decision by the Court ‘s-Hertogenbosch.⁴⁴ *In casu* a testatrix instituted one of her sons, with express reference to his gender, as only heir. This bequest was contested on the ground that the exclusion of the testatrix’s other children from their legitimate portions contravened the public order and good morals by reason of the testatrix’s motivation to afford her heir “more elbowroom in life” and, moreover, that she deemed as negligible the other children’s interests in the inheritance. The court opined that the testatrix’s motivation for instituting the son as sole heir does not contravene the public order or good morals;⁴⁵ moreover, that article 4:44 can be invoked only in exceptional circumstances where testamentary direction militate against the fundamental notions of unwritten law. As testamentary encroachment on the legitimate portion has never been regarded as contravening the public order or good morals in the Netherlands, the will’s contestants could not invoke successfully article 4:44 before the Court ‘s-Hertogenbosch.⁴⁶

A comparison between the approach of the court *in casu* and the model proposed by Harding for the elimination of all discrimination from gifts and trusts in Common Law jurisdictions reveals the complicated nature of applying public policy to testamentary bequests. Harding,⁴⁷ building on the premise that identity-based bequests undermine a community’s collective good, argues that a public culture of respect for identity is not endangered where discriminatory treatment is known to be discriminatory by only the person meting it out. So, if a testator has a son, Paul, and a daughter, Jenny, and leaves his property only to Paul because he believes that women are ill-equipped to manage property, Harding advocates that the bequest should stand notwithstanding the fact that it is motivated by a desire on the testator’s part to discriminate against his daughter on the ground of gender.⁴⁸ However,

44. 29 November 2011, LJN BU6438, *available at* www.rechtspraak.nl (last visited 28 Dec. 2011).

45. *Id.* § 4.9.1.

46. *Id.* § 4.9.2.

47. Harding, *supra* note 2, at 323.

48. *Id.*

should the testator leave his inheritance expressly to “my male descendant,” Harding argues that, because the discriminatory nature of the disposition has been made explicit, the disposition should be invalidated.⁴⁹ This is so even where the disposition is not intended as manipulative in that the testator attempts to rule from the grave.⁵⁰

Harding’s model is clearly at odds with the position taken by the Court ‘s-Hertogenbosch in the above judgment insofar as it ruled that the gender-exclusive appointment of an heir did not invalidate the bequest on policy grounds. However, there is (qualified) support for Harding’s view in Civil Law scholarship. For example, the Dutch writer Rutten⁵¹ proposes that, should a testator be moved to make a particular testamentary disposition, and even state such explicitly in the will, by reason of religious convictions, no improper motive is present; should the same testator, however, benefit his son to the exclusion of his daughter without good reason or should he exclude his spouse from an inheritance because she is not a Muslim, an improper motive is present and the bequest will fall foul of article 4:44 of the Dutch Civil Code. Rutten’s view is criticized by Kolkman⁵² who relies on a dissenting opinion in the European Court of Human Rights’ judgment in *Pla & Puncernau v. Andorra*⁵³ that “what is prohibited for the State need not necessarily also be prohibited for individuals,” and argues that Rutten’s distinction between motive based on conviction (which Rutten deems unacceptable), on the one hand, and religious conviction (which Rutten deems acceptable), on the other, is untenable. Kolkman favours, in light of the aforementioned dissenting opinion in the *Pla* case, a dispensation in which individuals enjoy greater freedom to arrange their private affairs in accordance with their personally held convictions, whether religious or otherwise, even if the outcome of such arrangements would amount to impermissible discrimination if perpetrated by a state.

Interestingly, *Pla*, in which the European Court of Human Rights ruled that the Andorran High Court breached the European Convention on Human Rights when it decided to uphold a testamentary settlement that discriminated against adopted children, is regarded by Harding⁵⁴ as

49. *Id.*

50. *Id.* at 324.

51. S.W.E. Rutten, *SHARIA-testamenten*, 6705 W.P.N.R 305, 311 (2007).

52. Wilbert D. Kolkman, *Who, Then, in Law, Is My Son—Over Family Life, Uitleg en de Lange Arm uit Straatsburg*, in MARKANTE ANALYSES: OPSTELLEN AANGEBODEN AAN MARK WISSINK OP 17 DECEMBER 74-75 (Grietje de Jong, Lineke Klap, Bart Krans & Fokko Oldenhuis eds., 2009).

53. (App. No. 69498/01) (2006) 42 EHRR 25.

54. Harding, *supra* note 2, at 314.

instructive to English courts in developing England's common law to eliminate all discrimination from gifts and trusts; Kolkman,⁵⁵ on the other hand, criticizes the majority opinion in *Pla* on the ground that the European Convention on Human Rights is typified by the "black letter approach" so common in Anglo-Saxon jurisdictions—an approach that, according to Kolkman, does not pay due regard to intention, reasonable expectations and other subjective elements that are frequently decisive to testamentary bequests. The view of Luijten and Meijer⁵⁶ corresponds with the latter opinion and also affirms a case-by-case approach to the matter:

It has to be decided in each particular case whether the bequest endangers the personal freedom of choice of the beneficiary. One must have regard to the intention of the testator. The same testamentary condition can often be intended as either immoral or not immoral, for example the condition not to marry or not to remarry. In practice it will often be difficult to discover such intention; in our opinion a benign intention on the testator's part will then have to be assumed.⁵⁷

Finally, it is noteworthy that testamentary dispositions that conflict with the public order or good morals as well as bequests where the testator's decisive motive contravenes the public order or good morals are fairly rare in modern Dutch wills. This low incidence is ascribable to the pivotal role played by the Civil Law notary in the Netherlands.⁵⁸ Article 21(2) of the Dutch Notaries Act (*Wet op het notarisambt*) obliges a Dutch notary to refuse service, among others, when, according to his reasonable conviction, the service which he is required to provide would contravene the law or the public order, or when his assistance is required in respect of an act that apparently will have an unlawful purpose or consequence. Notaries, therefore, will caution testators against including discriminatory or potentially discriminatory provisions in wills; if a testator is nevertheless insistent, the notary will simply withhold service and the will will not be executed.⁵⁹ Of course, estate lawyers in Common Law jurisdictions face a similar challenge. Cundiff and Copans,⁶⁰ in their discussion of the earlier-mentioned *Feinberg* case, caution that the prudent adviser, although not under any statutory obligation to withhold services akin to that of the Dutch notary, should devise devolutionary

55. Kolkman, *supra* note 52, at 70.

56. E.A.A. LUIJTEN & W.R. MEIJER, *HUWELIJKSGOEDEREN- EN ERFRECHT* (12th ed. 2008)

57. *Id.* at 201 (my translation from the original Dutch).

58. Kolkman, *supra* note 52, at 74.

59. *Id.*

60. James H. Cundiff & Andrew D. Copans, *In Re Estate of Feinberg: When Legal Fees Consume an Estate—Restrictive Clauses are Moot*, 35 *ACTEC L.J.* 255, 263 (2009).

schemes that will ensure the implementation of restrictive testamentary provisions in a manner that avoids potential invalidity (or, it should be added, the potential for judicial refashioning of such provisions) based on public policy concerns.

The above synopsis shows that in a Civil Law jurisdiction such as the Netherlands scholarly opinion on the tenability of discriminatory testamentary bequests differs just as in Common Law jurisdictions. Although the approach to such bequests is normative, the Dutch Civil Code's and Dutch scholars' explicit emphasis on the subjective considerations of testamentary intent, motive or purpose is significant insofar as it establishes, potentially at least, some counter-balance to the rigidity that could result from a firm objective, normative approach to public policy issues in inheritance law.

IV. A SOUTH AFRICAN PERSPECTIVE

The South African legal system, like those of, among others, Scotland, Louisiana and Quebec, is mixed or hybrid in nature. Roman-Dutch law, the legal system developed in the Netherlands through the reception, particularly in the fifteenth and sixteenth centuries, of Roman law and its synthesis with Germanic customary law, feudal law and canon law, was introduced at the Cape of Good Hope (present-day Cape Town) by Dutch settlers from the middle of the seventeenth century. Roman-Dutch law remains South Africa's common law to this day; however, by reason of judicial and legislative adaptation and development, no longer in its pure form. Roman-Dutch law coalesced with English law in the aftermath of the second British occupation of the Cape in 1806—the new English rulers retained Roman-Dutch law as the law of the Cape, but English legal influence on the existing Civilian legal system was unavoidable and a number of typically Common Law legal institutions and statutory constructions soon featured in the law of the Cape.⁶¹ The trust, the focus of recent South African judgments on discriminatory testamentary bequests, was one such legal institution introduced at the Cape—notwithstanding Roman-Dutch law's unfamiliarity with the trust, English settlers continued the (to them) familiar usage of the trust in testamentary bequests, deeds of gift, ante-

61. For a concise overview of the development of South Africa's common law and its mixed legal system, see A.B. EDWARDS, *THE HISTORY OF SOUTH AFRICAN LAW—AN OUTLINE* (1996); Reinhard Zimmermann & Daniel Visser, *Introduction: South African Law as a Mixed Legal System*, in *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 2* (R. Zimmermann & D. Visser eds., 1996).

nuptial contracts and land transfers.⁶² As white settlers moved to the central and northern South African interior the mixed legal system of the Cape, with its trust law component, spread throughout what became modern-day South Africa.

A. *Freedom of Testation and Constitutionalism*

Freedom of testation was a highly regarded manifestation of private autonomy in Roman law (where will-making negated the “misfortune” of intestacy)⁶³ and was, as such, received into Roman-Dutch law⁶⁴ from where it established itself, bolstered by the corresponding position in English law,⁶⁵ as one of the fundamental premises upon which the modern South African law of testate succession operates.⁶⁶ The maxim *voluntas testatoris servanda est*—denoting that a testator’s last wishes as minuted in a will must be carried out—forms part of South African law;⁶⁷ consequently South African courts enjoy no general jurisdiction to authorize a variation of the terms of a will—a so-called “non-variation rule” is in effect.⁶⁸

Freedom of testation is, however, not absolute or unfettered. South African law, as indeed most, if not all, jurisdictions that recognise freedom of testamentary disposition, imposes a number of limitations on testators’ freedom to make testamentary bequests as they see fit. Some such limitations are rooted in the common law,⁶⁹ whereas others are contained in statute.⁷⁰ The South African common law limitation on freedom of testation pertinent to this Article prescribes that effect is not given to a testamentary provision that is, in Roman legal phraseology, *contra bonos mores* or, in modern terms, contrary to public policy.⁷¹

62. EDWIN CAMERON, MARIUS J. DE WAAL, BASIL WUNSH, PETER SOLOMON & ELLISON KAHN, *HONORÉ’S SOUTH AFRICAN LAW OF TRUSTS* 21 (5th ed. 2002).

63. W.W. BUCKLAND, *A MANUAL OF ROMAN PRIVATE LAW* 173 (1928); F. SCHULZ, *CLASSICAL ROMAN LAW* 205 (1951).

64. R.W. LEE, *AN INTRODUCTION TO ROMAN-DUTCH LAW* 352 (4th ed. 1946).

65. GARETH MILLER, *THE MACHINERY OF SUCCESSION* 3-5 (2d ed. 1996).

66. M.M. CORBETT, GYS HOFMEYR & ELLISON KAHN, *THE LAW OF SUCCESSION IN SOUTH AFRICA* 39 (2d ed. 2001).

67. *Robertson v. Robertson’s Executors* 1914 AD 503; N.J. VAN DER MERWE & C.J. ROWLAND, *DIE SUID-AFRIKAANSE ERFREG* 482 (6th ed. 1990).

68. *Ex parte Jewish Colonial Trust Ltd.: In re Estate Nathan* 1967 (4) SA 397 (N).

69. E.g., a dependent minor child’s maintenance claim against a deceased parent’s estate.

70. E.g., an indigent surviving spouse’s maintenance claim against a deceased spouse’s estate under the Maintenance of Surviving Spouses Act 27 of 1990.

71. Note that South African courts tend to use “*boni mores*” and “public policy” synonymously—an approach that is followed in this Article: see *Minister of Educ. v. Syfrets Trust Ltd.* 2006 (4) SA 205 (C).

It is noteworthy that South African courts were traditionally open to inquiries into testamentary intent, motive or purpose when determining whether bequests contravene public policy—precisely the approach advocated by Civil lawyers such as Kolkman as well as Luijten and Meijer.⁷² For example, it is settled law, Roman, Roman-Dutch and South African, that a testamentary condition is void for violation of public policy if it encroaches on the sanctity of marriage through the imposition of a general restraint on marriage.⁷³ Nevertheless, should a testator provide for periodical payments to his unmarried daughter on condition that the payments shall cease if the daughter should marry, it is not the testator's intention to prevent the daughter from entering into marriage but only to provide for her financial well-being until she marries. Some South African commentators opine, therefore, that such a condition, given the underlying testamentary intent, is valid even though it may discourage the daughter from entering into marriage.⁷⁴ Similarly, South African courts have held that a condition or provision in a will which was not inserted with the intention or purpose to cause interference in a beneficiary's marital relationship but for some other legal purpose, is valid and not in contravention of public policy even though it may have the tendency to disrupt the marital relationship.⁷⁵ These views illustrate South African law's (and courts') traditional stance to balance, when apposite, objective, normative policy demands with subjective considerations pertinent to the particular testator in inquiries into the limitation of testamentary freedom in terms of public policy.

Some of the South African judgments discussed later in this Article dealt with a statutory limitation on freedom of testation in terms of article 13 of the Trust Property Control Act 57 of 1988. Neither this provision nor its treatment by South African courts will be analysed comprehensively in this Article, but it deserves mention that it empowers a court to vary any trust provision where such provision occasions consequences which, in the opinion of the court, the trust founder failed to contemplate or foresee (the jurisdictional fact upon which the article's operation depends⁷⁶), and such provision is, *inter alia*, in conflict with the public interest. Article 13 of the Trust Property Control Act will be

72. See Part III above.

73. D 28.7.14; D 35.1.22; JOHANNES VOET, COMMENTARIUS AD PANDECTAS 28.7.12 (1698-1704); SIMON VAN LEEUWEN, CENSURA FORENSIS 1.3.5.29-30 (1662); Aronson v. Estate Hart 1950 (1) SA 539 (A); De Weyer v. SPCA Johannesburg 1963 (1) SA 71 (T).

74. D.S.P. CRONJÉ & ANNELIESE ROOS, CASEBOOK ON THE LAW OF SUCCESSION 129 (4th ed. 2001).

75. Barclays Bank DC&O v. Anderson 1959 (2) SA 478 (T).

76. *Ex parte* BOE Trust Ltd. 2009 (6) SA 470 (WCC) § 20.

contextualized briefly later with particular reference to its “public interest” criterion.

The Constitution of the Republic of South Africa 1996 contains, in its Bill of Rights,⁷⁷ a property clause—article 25—that is said to guarantee private ownership and, consequently, an owner’s right to dispose freely of property held in private ownership.⁷⁸ As such disposition can occur also by testamentary bequest, South African commentators mooted that freedom of testation is implicitly guaranteed under the South African Constitution.⁷⁹ In *Ex parte BOE Trust Ltd.* the court declared:

Insofar as it may be necessary to seek confirmation that the right to freedom of testation remains protected under the Constitution, reference may be made to s 25(1) of the 1996 Constitution. In my opinion, it is clear that the right to property includes the right to give enforceable directions as to its disposal on the death of the owner.⁸⁰

This unambiguous judicial pronouncement supports the standpoint that freedom of testation is indeed constitutionally protected in South African law. Juxtaposed to such autonomy in regard to the exercise of private ownership rights, stands the equality and non-discrimination directives contained in the Constitution’s Bill of Rights. The Bill of Rights is the cornerstone of democracy in South Africa and enshrines a number of rights that affirm the democratic values of human dignity, equality and freedom.⁸¹ For the purpose of this Article, reference to the Bill of Rights’ equality clause⁸² suffices. The equality clause dictates that everyone is equal before the law, but also authorizes measures designed to advance persons or groups of persons that suffered from unfair discrimination in the past. It lists, in article 9(2), the grounds upon which the state may not discriminate unfairly against anyone, which grounds include race, gender, sex, ethnic or social origin, colour, religion and birth. The equality clause operates directly horizontally between individuals, because its prohibition against unfair discriminatory action

77. CONST. ch. 2.

78. IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 538-539 (5th ed. 2005).

79. CORBETT, HOFMEYR & KAHN, *supra* note 66, at 47; François du Toit, *The Constitutionally Bound Dead Hand? The Impact of Constitutional Rights and Principles on Freedom of Testation in South African Law*, 2 *STELL. L. REV.* 222, 233-34 (2001).

80. *Ex parte BOE Trust Ltd.* 2009 (6) SA 470 (WCC), § 9. American law espouses a different view—United States courts have held that no one stands possessed of an inherent, fundamental, constitutionally guaranteed right to make a will; rather such right is conferred and regulated by statute: *see Fullam v. Brock* 155 S.E.2d 737, 739 (Sup. Ct. N.C. 1967).

81. CONST. art. 7.

82. *Id.* art. 9.

extends also to persons *inter se*. To this end, article 9(3) of the Constitution dictates that no person may discriminate unfairly, either directly or indirectly, against anyone on any one or more of the aforementioned grounds. Finally, the equality clause directs that discrimination on any one or more of the aforementioned grounds is unfair unless it is established that the discrimination is in fact fair. Evidently, therefore, the minority view in the European Court of Human Rights' judgment in *Pla & Puncernau v. Andorra*⁸³ that "what is prohibited for the State need not necessarily also be prohibited for individuals" does not ring true in the South African context—neither the South African state nor persons within its borders may practice unfair discrimination in their dealings with (other) persons.

It is noteworthy, however, that the Bill of Rights' limitation clause⁸⁴ permits the limitation of rights contained therein by law of general application to the extent that such limitation is reasonable and justified in an open and democratic society. Finally, attention must be drawn to article 8 of the Constitution that regulates the application of the Bill of Rights. Article 8(1) provides that the Bill of Rights applies to all law, and binds the legislator, the executive, the judiciary and all organs of state. Article 8(2) directs that the Bill of Rights is binding on natural and juristic persons. Article 8(3) stipulates that when a court applies a provision in the Bill of Rights to a natural or juristic person, such court may, in order to give effect to a right contained in the Bill of Rights, develop the common law to the extent that legislation does not give effect to that right; moreover, such court may develop rules of the common law to limit the right, provided that such limitation occurs in accordance with the Constitution's limitation clause. It is noteworthy, therefore, that South African courts are given the express power to develop common law rules to give effect to a right enshrined in the Bill of Rights or to limit such right when apposite.

Commentators acknowledged from the inception of South Africa's democratic constitutional dispensation that some testamentary provisions that are discriminatory in nature, yet have been accepted as valid in the past, may no longer pass muster in light of the South African Constitution's equality and non-discrimination imperatives.⁸⁵ One court stated emphatically that the only question is which particular bequests

83. (App. No. 69498/01) (2006) 42 EHRR 25.

84. CONST. art. 36.

85. CORBETT, HOFMEYR & KAHN, *supra* note 66, at 134; CAMERON, DE WAAL, WUNSH, SOLOMON & KAHN, *supra* note 62, at 172.

will survive judicial scrutiny and which will not.⁸⁶ Before I attend to this important question, I outline, in the section that follows, South African courts' traditional approach to discriminatory testamentary bequests in the pre-constitutional era and also the initial move away from the traditional approach in the run-up to democratic constitutionalization.

B. Discriminatory Testamentary Bequests in the Pre-Constitutional Era

It has been said that South African law "takes the principle of freedom of testation further than any other Western legal system."⁸⁷ This is certainly true of the pre-constitutional era when South African testators enjoyed almost unlimited testamentary freedom and courts were generally loath to interfere with testamentary bequests that were capable of being carried out. The two tools used in Common Law jurisdictions to interfere in discriminatory bequests, although available to South African courts, were traditionally utilized very sparingly. First, the certainty requirement in respect of conditions attaching to testamentary dispositions is considerably less strict in South African law than in English law. In *Aronson v. Estate Hart*⁸⁸ the Appellate Division held that a court, when seeking testamentary intent from a will's wording, should not insist on "the greatest precision" or "the clearest language" but should be satisfied if, from the words used, it is "reasonably clear" what the testator intended. Consequently, the court *in casu*, unlike its English counterpart in *Clayton v. Ramsden*,⁸⁹ refused to invalidate for uncertainty a testamentary condition subsequent that directed the forfeiture of testamentary benefits if a beneficiary "should marry a person not born in the Jewish faith or forsake the Jewish faith."

Secondly, insofar as South African courts' traditional use of the public policy yardstick is concerned, testators were afforded considerable leeway to include discriminatory bequests in wills. Courts were particularly mindful of the subjectivities, manifestly as motive, personal inclination, preference, conviction or belief, that often determine the content of testamentary dispositions. In *Aronson* the Appellate Division therefore declined to invalidate the aforementioned forfeiture clause on the ground that it contravened public policy. Greenberg JA⁹⁰ opined that a marriage between "Jew and non-Jew" may well increase the tensions

86. Minister of Educ. v. Syfrets Trust Ltd. 2006 (4) SA 205 (C), § 12.

87. CORBETT, HOFMEYER & KAHN, *supra* note 66, at 40.

88. *Aronson v. Estate Hart* 1950 (1) SA 539 (A), at 544.

89. *See* Part II above.

90. *Aronson v. Estate Hart* 1950 (1) SA 539 (A), at 546.

and stresses ordinarily associated with married life and even lead to irreconcilable differences between the spouses; moreover, that the children born from such a marriage may be unsettled by such inner conflicts “which may leave them rudderless and adrift on the sea of life.” The judge remarked that he knows of no principle in law that would make it contrary to public policy for a testator-parent to safeguard, according to his lights, descendants against such perils.⁹¹

South African testators traditionally also enjoyed considerable freedom in regard to testamentary charitable trusts to limit trust benefits on, *inter alia*, racial, gender and religious grounds. In South Africa it is settled law that a trust established under charitable bequest must evince some element of public benefit in order to qualify as a charitable trust. The concept “public benefit” was explained in *Ex parte Henderson*⁹² to not necessarily constitute the conferment of a benefit on the community at large; the requisite element of public benefit is present in a bequest which is aimed at the advancement of the interests of only a section or group in the community, provided the section or group is sufficiently large or representative. In this regard charitable purposes typically include religious and educational purposes as well as the purpose of giving aid to or providing for the care and comfort of groups in the community such as the aged, infirm, incapacitated and underprivileged or the needy. The providing of assistance to comparatively small but distinct groups of people in need thereof may be a charitable purpose, as may be the advancement of a small section of the community to a degree which is calculated to serve some public interest.⁹³ In this light, the advancement of sectional interests under charitable trusts was traditionally tolerated under South African law. So, for example, were a trust providing bursaries to students of the University of the Witwatersrand, provided that each recipient of a bursary be “a Jew or Jewess (not converted)”;⁹⁴ a trust providing a plot as a “haven of rest for tired European missionaries”;⁹⁵ a trust for the training of “European orphaned girls and boys”;⁹⁶ and a trust for the establishment of a “home of rest for generally trained non-European nurses”⁹⁷ all accepted by South African courts as valid and not contravening public policy. These findings undoubtedly resulted from South African law’s (and courts’)

91. *Id.*

92. 1971 (4) SA 549 (D) 554A-B.

93. *See also* Marks v. Estate Gluckman 1946 AD 289, 302-307, 311.

94. *Id.*

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

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

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

high regard for freedom of testation and the subjective considerations, even caprices, that frequently underpin testamentary dispositions.⁹⁸

Significant, though, is the emergence of a more objective, normative approach to discriminatory testamentary bequests in the period immediately preceding full democratic constitutionalization in South Africa. The leading judgment in this regard is *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust*⁹⁹ in which article 13 of the Trust Property Control Act was used to delete the word “white” from testamentary charitable trust provisions that instructed the establishment of a home for destitute white children only. The court ruled regarding the article’s public interest criterion that it would be in the public interest not to confine entry to the homes, several of which were created in consequence of the trust bequest, to white children only, but to open the homes to destitute children regardless of their ethnological characteristics.¹⁰⁰ The *William Marsh* judgment was typified at the time as illustrative of the new direction taken by South African courts as it relates to human rights and the courts’ contribution to the then-emerging human rights culture in South Africa.¹⁰¹

Clearly, in a case such as *William Marsh*, the emergence of constitutionalism and the consequent rise in prominence of the non-discrimination norm in South Africa during the early 1990s made some inroads into testamentary freedom and the subjectivities associated with the traditional approach to freedom of testation that centred on the recognition and protection, through law, of the personal autonomy and individualism of testators. What would be the position once the constitutionalization process and the establishment of a human rights culture came to fruition; where would South African courts’ treatment of discriminatory testamentary bequests fit into the spectrum of Common Law opinion on the tenability of discrimination in gifts and trusts; and to what extent would South African courts adhere, in their treatment of the matter, to the Civilian-Roman-Dutch tradition of the South African common law?

98. FRANÇOIS DU TOIT, *SOUTH AFRICAN TRUST LAW: PRINCIPLES AND PRACTICE* 33 (2d ed. 2007).

99. 1993 (2) SA 697 (C).

100. *Id.* at 703H-J.

101. S. Nadasen & S. Pather, *The South African Reality and the Creation of a Human Rights Culture*, 6 *STELL. L. REV.* 256 (1995).

C. Discriminatory Testamentary Bequests in the Post-Constitutional Era

South African courts acknowledge readily that, since the advent of the constitutional era, public policy is rooted in the South African Constitution and the fundamental values it enshrines, thus establishing an objective, normative value system against which public policy matters must be resolved.¹⁰² The Constitutional Court stated emphatically that “the normative influence of the Constitution must be felt throughout the common law;”¹⁰³ therefore, courts applying and developing the common law must do so through the infusion of the common law with constitutional values such as human dignity, equality and freedom. In this light and given the dynamic nature of public policy, South African courts held that present-day public policy notions, informed by constitutional imperatives, must be applied even when dealing with wills executed decades earlier at times when different policy considerations held sway.¹⁰⁴ This is not a novel approach in South African law and corresponds with the position taken in the pre-constitutional era by the Appellate Division in respect of contracts when it ruled that questions of public policy must be determined with reference to the time a court is requested to enforce or implement a contract’s provisions, not the time of the contract’s conclusion.¹⁰⁵ Of course, this approach is aligned to that taken in the *Canada Trust* case and supported by Harding¹⁰⁶ who argues that “contemporary values may be applied to old instruments to impugn dispositions on grounds of public policy.”

The normative stance taken by South African courts to public policy questions in wills in the post-constitutional era notwithstanding, the High Court recognized in its very first judgment on the matter¹⁰⁷ that a balance must be struck between the non-discrimination norm, on the one hand, and freedom of testation, on the other; particularly in light of the implicit guarantee of testamentary freedom in the Bill of Rights’ property clause.¹⁰⁸ To this end, the court in *Syffrets Trust*¹⁰⁹ held that not all clauses in wills or trust deeds that differentiate between different groups of

102. Minister of Educ. v. Syffrets Trust Ltd. 2006 (4) SA 205 (C), § 24; *Ex parte* BOE Trust Ltd. 2009 (6) SA 470 (WCC), § 12.

103. NK v. Minister of Safety & Sec. 2005 (6) SA 419 (CC) § 17.

104. Minister of Educ. v. Syffrets Trust Ltd. 2006 (4) SA 205 (C), § 26; *Ex parte* BOE Trust Ltd. 2009 (6) SA 470 (WCC), § 12.

105. Magna Alloys & Research SA (Pty.) Ltd. v. Ellis 1984 (4) SA 874 (A).

106. Harding, *supra* note 2, at 314.

107. Minister of Educ. v. Syffrets Trust Ltd. 2006 (4) SA 205 (C).

108. See Part IV.A above.

109. Minister of Educ. v. Syffrets Trust Ltd. 2006 (4) SA 205 (C), § 48.

people are invalid; only those that effect *unfair* discrimination on grounds such as race, gender and religion will fall foul of the non-discrimination imperative. How is the fairness or unfairness of discrimination established for this purpose? As indicated earlier,¹¹⁰ the South African Constitution's equality clause directs that discrimination on any one or more of the grounds stated in article 9(2) of the Bill of Rights is unfair unless it is established that the discrimination is in fact fair. In *Harksen v Lane*¹¹¹ the Constitutional Court distilled three criteria to guide the inquiry into fairness:

- i. Does the contested conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, the conduct violates the Bill of Rights' non-discrimination directive. However, even if the conduct bears a rational connection, it may nevertheless amount to unfair discrimination.
- ii. Does the differentiation amount to unfair discrimination? This question demands a two-stage analysis:

First, does the differentiation amount to discrimination? If differentiation occurred on one of the grounds specified in the equality clause, then discrimination will have been established. If it did not occur on one of the specified grounds, then whether or not there is discrimination will depend on whether, objectively, the ground is based upon attributes and characteristics that have the potential to impair the fundamental human dignity of persons or to affect them adversely in a comparably serious manner.

Secondly, if the differentiation amounts to discrimination in the aforementioned sense, does it amount to unfair discrimination? If the discrimination occurred on a specified ground, unfairness is presumed. If on an unspecified ground, the complainant must establish unfairness. The test in this regard focuses primarily on the impact of the discrimination on the complainant and others similarly situated.

- iii. If discrimination is found to be unfair, a determination must be made as to whether justification can be found under the Bill of Rights' limitation clause.

Based on the aforementioned analysis, the court in *Syffrets Trust* held that a bursary bequest, made under a charitable trust established in terms of a will executed in 1920, amounted to direct and indirect unfair discrimination insofar as it limited bursary recipients to students "of European descent only" and excluded expressly "persons of Jewish

110. See Part IV.A above.

111. 1998 (1) SA 300 (CC) § 53.

decent [sic], and females of all nationalities.”¹¹² To this end, the court noted the following important considerations: those excluded from bursaries form part of so-called “previously disadvantaged groups” (under the apartheid dispensation) and the bursary bequest perpetuated the marginalisation of these groups;¹¹³ the bequest ran contrary to national legislation and international conventions against unfair discrimination;¹¹⁴ a finding in favour of amendment of the testamentary trust provisions *in casu* would be in line with the outcome in the earlier judgment in *William Marsh*;¹¹⁵ the university whose students were to benefit from the bursary bequest refused to administer the bursary scheme under discriminatory testamentary direction;¹¹⁶ and, finally, the equality rights of those excluded from eligibility for the bursaries outweigh, in a constitutional balancing exercise, the testator’s right to private property and the free testamentary disposition thereof.¹¹⁷ The court added to the foregoing that an “element of State action” is present in the scenario at hand insofar as a university is “a public agency or quasi-public body” and, moreover, that “a trust, though usually created by a private individual or group, is an institution of public concern.”¹¹⁸

In *BOE Trust*¹¹⁹ the court, although following the same reasoning, arrived at a different conclusion, albeit *obiter dictum*. *In casu* the trustee of a testamentary charitable trust applied for the deletion of the word “White” from a bursary bequest, made under a charitable trust established in terms of a will executed in 2002, that provided bursaries to “White South African students” in possession of “an MSc degree in Organic Chemistry at a South African University” towards doctoral studies at a European or British university; the selection of the bursary recipients had to be effected by “the four Organic Chemistry Professors” at four stipulated South African universities. Noteworthy is the proviso to the bursary bequest that bursary recipients had to “return to South Africa for a period to be stipulated by the Professors listed.”¹²⁰ The applicant, having obtained confirmation from the four universities mentioned that they will decline participation in the selection of bursary candidates unless the bursaries were open to students of all races, argued

112. Minister of Educ. v. Syfrets Trust Ltd. 2006 (4) SA 205 (C), § 1.

113. *Id.* § 34.

114. *Id.*

115. *Id.* See Part IVB above for a brief discussion of *William Marsh*.

116. *Syfrets Trust*, § 34.

117. *Id.* §§ 39-44.

118. *Id.* §§ 45-46.

119. *Ex parte BOE Trust Ltd.* 2009 (6) SA 470 (WCC).

120. *Id.* § 2.

that the bursary bequest, bearing reference to race or colour as a criterion for the selection of bursary recipients, was “directly or indirectly discriminatory against potential beneficiaries of the bursaries.”¹²¹

The court decided the matter in terms of article 13 of the Trust Property Control Act and denied the application by reason of the absence of the jurisdictional fact required for the article’s operation on the facts at hand—no circumstances unforeseen by the trust founder at the time of the will’s execution prevented implementation of the bursary bequest.¹²² The court, nevertheless, touched briefly upon the public policy and constitutional considerations at play *in casu*. The court acknowledged that modern-day public policy notions in South Africa are shaped by the South African Constitution.¹²³ It next opined that the bursary bequest did not run contrary to public policy because, although it excluded non-white students as possible bursary recipients on the basis of race, the discrimination thus occasioned was not unfair insofar as the testatrix sought to achieve, through the bursary bequest’s proviso that bursary recipients must return to South Africa after the period spent at a university abroad, the legitimate purpose of retaining white scholarly expertise for South Africa and, in so doing, of countering the “brain drain” occasioned by the exodus of white South African graduates. The court opined that, to this end, the testatrix was entitled fully, in the exercise of freedom of testation, to benefit a particular class of persons to the exclusion of others.¹²⁴ What bolstered the court’s view on the matter was the fact that, given that public policy is prone to change over time, the will at hand was executed in 2002—well into South Africa’s democratic constitutional dispensation. The changes in public policy that affected the will in *Syffrets Trust*, which will was executed some seventy years prior to the constitutional democratization in South Africa, did, therefore, not affect commensurately the will in *BOE Trust*.¹²⁵

Two further judgments—both on bursary bequests—followed. In both these judgments the courts utilized article 13 of the Trust Property Control Act, rather than the common law public policy yardstick, to effect amendments to testamentary charitable trusts, but the courts’ opinions on article 13’s public interest criterion are nevertheless insightful. In *Curators, Emma Smith Educational Fund v. University of*

121. *Id.* § 3.

122. *Id.* §§ 21–22.

123. *Id.* § 12.

124. *Id.* §§ 15–16.

125. *Id.* § 22.

*KwaZulu-Natal*¹²⁶ the Supreme Court of Appeal had to adjudicate on a testamentary charitable trust, the Emma Smith Educational Fund, created under a will executed in 1938, that instructed the University to “apply the income thereof in and towards the higher education of European girls born of British South African or Dutch South African parents.”¹²⁷ Moreover, the University was enjoined with the discretion to use the trust income, *inter alia*, “in the maintenance of Exhibitions for the benefit of poor girls who but for such assistance would be unable to pursue their studies.”¹²⁸ The applicant in the court *a quo*¹²⁹ prayed the variation of the provisions of the trust through, *inter alia*, the deletion of the words “European,” “British” and “or Dutch South African.”¹³⁰

The court *a quo* allowed the variation sought by the applicants under the Trust Property Control Act. Having established article 13’s jurisdictional fact, the court reasoned, given the centrality of race in the matter at hand, that the present case was indistinguishable from those in *William Marsh* and *Syffrets Trust*; it reasoned, therefore, that, because it could not be persuaded that the aforementioned two decisions were wrongly decided, it was bound by them and, consequently, that “it is in the public interest that the relief sought in the notice of motion be granted.”¹³¹

The curators ad litem for potential beneficiaries under the trust took the matter on appeal before the Supreme Court of Appeal (formerly the Appellate Division).¹³² The appeal court, in addressing the issue of the will’s racially exclusive restriction in terms of article 13 of the Trust Property Control Act, proceeded directly—without, in my opinion, having explicit and comprehensive regard to the section’s jurisdictional fact—to an inquiry on whether such restriction contravened public policy imperatives and, therefore, was in conflict with the public interest (and, hence, variable) in accordance with the article. To this end, the court placed due reliance on *Syffrets Trust* in that testamentary trust provisions that occasion unfair discrimination run contrary to public policy (curiously, the court did not refer to BOE Trust at all). It reasoned that in the public sphere racially discriminatory testamentary dispositions would

126. 2010 (6) SA 518 (SCA).

127. *Id.* § 4.

128. *Id.*

129. The court *a quo*’s judgment was unreported at the time of writing but is available as *University of KwaZulu-Natal v. Makgoba* [2009] ZAKZDHC 28, 17 July 2009, available at <http://www.saflii.org/za/cases/ZAKZDHC/2009/28.html> (last visited 8 Jan. 2012).

130. 2010 (6) SA 518 (SCA), § 1.

131. [2009] ZAKZDHC 28, 17 July 2009, § 81.

132. 2010 (6) SA 518 (SCA).

not pass constitutional muster;¹³³ public policy is rooted in the Constitution and the fundamental values it enshrines;¹³⁴ the University of KwaZulu-Natal is a higher education institution and is obliged to apply public policy;¹³⁵ and the racially restrictive nature of the Emma Smith Educational Fund prevented realization of the testator's intentions and was, moreover, in conflict with the public interest.¹³⁶

In light of the foregoing, the appeal court found that the court *a quo* correctly decided to remove the racially restrictive prescripts from the testator's will.¹³⁷ In reaching this conclusion, the court echoed the view espoused in *Canada Trust*¹³⁸ that its ruling *in casu*, being confined to public charitable trusts, will not impact negatively on future private educational bequests,¹³⁹ nor does it undermine the fundamental principle of testamentary freedom.¹⁴⁰ Consequently, the court dismissed the appeal against the court *a quo*'s deletion of the words "European," "British" and "or Dutch South African" from the testator's will.¹⁴¹

The *Syffrets Trust* and *Emma Smith* judgments indicate that South African testators venture onto precarious ground should they base restrictive testamentary bequests on race, colour or ethnic origin. Given South Africa's racially divided past, the position taken by South African courts on race-based clauses, is, arguably, understandable. But what about restrictive clauses based on other grounds specified in the South African Constitution's equality clause? In *Syffrets Trust* the court excised a gender-based restriction from the trust at hand. More recently, in *Board of Executors v. Benjamin Godlieb Heydenrych Testamentary Trust, George King Testamentary Trust, Cyril Houghton Bursary Trust, Women's Legal Centre (Amicus Curiae)*,¹⁴² the High Court had the opportunity to adjudicate on restrictive clauses where educational trust benefits were limited explicitly on the grounds of race and gender. The trusts' trustee sought the removal of the racial restrictions but advocated a more lenient approach to the gender limitations, whereupon the *amicus curiae* petitioned for the removal of the gender-based restrictions from the two affected trusts. The bequests to which the applicants objected

133. *Id.* § 38.

134. *Id.*

135. *Id.* § 39.

136. *Id.* § 40.

137. *Id.*

138. *See* Part II above.

139. 2010 (6) SA 518 (SCA), § 41.

140. *Id.* § 42.

141. *Id.* § 46.

142. *In re* Heydenrych Testamentary Trust 2012 (4) SA 103 (WCC).

were, in regard to the Heydenrych Trust (created in terms of a will executed in 1943), that only European boys, at least one half of which shall be of British descent, will be educated through awards from the trust; in regard to the Houghton Trust (created in terms of a will executed in 1989), that only boys who are members of the white population group may receive educational bursaries under the trust; and, in regard to the George King Trust (created in terms of a will executed in 1987), that only members of the white population group qualify as bursary recipients under the trust.

The court disposed quickly with the racial limitations—for the reasons advanced in the *Syffrets Trust* and *Emma Smith* cases the race-based restrictions were found to contravene public policy and fell to be deleted in terms of article 13 of the Trust Property Control Act.¹⁴³ In regard to the gender-based restrictions of the Heydenrych and Houghton Trusts, the trustee, in an argument that could equally have been made before a Dutch court in a contest of a discriminatory bequest under article 4:44 of the Dutch Civil Code, proposed that the testators concerned were not motivated by sexism when they limited bursary eligibility to males, but by other, unknown reasons. The trustee argued, therefore, that the testators' decisions to impose gender restrictions on bursary recipients were of a subjective, personal nature and that their discriminatory treatment of females should be treated more circumspectly.¹⁴⁴ The court, with reliance on *Harksen v. Lane*, ruled, however, that limiting educational bursaries to boys, particularly in circumstances where the educational institution in question is co-educational, meets the constitutional unfair discrimination test¹⁴⁵ and, moreover, falls foul of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 insofar as the Act enumerates as an unfair practice “[u]nfairly withholding scholarships, bursaries, or any form of assistance from learners of particular groups identified by the prohibited groups.”¹⁴⁶ Furthermore, the South African Constitutional Court affirmed that proof of an intention to discriminate is not required in order to show unfair discrimination.¹⁴⁷ In light of the foregoing, the court ordered the variation of the wills that contained gender-based limitations by including also females as eligible bursary recipients.¹⁴⁸

143. *Id.* § 14.

144. *Id.* § 15.

145. *Id.* § 18.

146. *Id.* § 16.

147. *City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC).

148. 2012 (4) SA 103 (WCC) § 23.

D. Evaluation

South African courts opted for a distinct normative approach to discriminatory testamentary charitable bequests in the post-constitutional era. The South African Constitution, and particularly the equality and non-discrimination imperatives of its Bill of Rights, provides the lens through which courts now view public policy questions in regard to such bequests. This approach is typified by the general objectivity with which the public policy yardstick is applied and a consequent move away from inquiries into testators' intention, motive or purpose that, when apposite, traditionally formed part of the inquiry when the limitation of freedom of testation in terms of public policy was at issue. This approach is, arguably, understandable in light of the constitutional paradigm in which South African courts function since the mid-1990s, coupled with the Bill of Rights' explicit directive in regard to judicial harmonization of the common law with the constitutional imperatives of human dignity, equality and freedom.

But has South African courts moved so firmly into the normative, non-discrimination fold, advocated by Common Law lawyers such as Harding as well as Grattan and Conway, that they have forsaken altogether the subjective considerations, noted by Civil lawyers such as Kolkman as well as Luijten and Meijer, pertinent to testators' dispositive plans? A careful reading of the South African judgments discussed above reveals that testamentary intent, motive or purpose still have a role to play to temper the rigidity that could result from an objective, normative, strictly policy-based approach to the limitation of freedom of testation in regard to discriminatory gifts and trusts.

Noteworthy is the *Syffrets Trust* court's observation regarding its finding *in casu*:

This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored; it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions—which discriminate *unfairly* on the grounds of race, gender and religion—are invalid.¹⁴⁹

The first sentence of the above *dictum* places the matter squarely within the legal-historical context of South Africa's Romanist-Civilian common law. I submit, in other words, that it permits the consideration of an evolved public policy yardstick, rooted not only in

149. Minister of Educ. v. Syffrets Trust Ltd. 2006 (4) SA 205 (C), § 48.

constitutionalism and human rights, but also in, particularly, the tenets of Roman-Dutch law's limitation of testamentary freedom by the good morals. The passage's second sentence makes it explicit that South African testators still enjoy the freedom to accommodate differentiation in their dispositive plans, as long as it does not occasion unfair discrimination in constitutional terms. Unsurprisingly, therefore, the court in *BOE Trust* affirmed:

[N]ot all clauses in wills or trust instruments which differentiate between different classes of beneficiary are invalid. Given that no one has a right to receive a benefit under a will or trust, it seems to me that, in principle, the freedom of testation must include the right to benefit a particular class of persons, and not others. Only where that conduct can be categorised as unfair discrimination should it be held contrary to public policy.¹⁵⁰

Sceptics may view such statements as nothing more than empty pro-freedom-of-testation rhetoric to appease those who fear large-scale judicial intervention in testamentary dispositions. They'll no doubt argue that the true value of freedom of testation comes to the fore when the testamentary dispositions of those who hold non-conforming views are safeguarded on par with those whose dispositions conform to prevailing societal norms. For example, Leslie¹⁵¹ cautions against a scenario where freedom of testation exists for the majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes, but not for those testators who ascribe to non-conforming values. In similar vein, Spivack¹⁵² argues that the principle of testamentary freedom is not necessary to protect conventional bequests; rather it exists to carry out devices that fail to conform to social norms yet reflect a testator's will. In this light, the judgment in *BOE Trust* is significant insofar as it is a post-constitutional case in which a South African court found, albeit *obiter*, that a race-based restriction in a testamentary charitable trust did not contravene public policy. The court reasoned:

During the post-constitutional years much has been said and written about the increasing trend amongst white graduates of our universities to emigrate, upon completion of their education, thereby depriving the country of [the] benefit of their skills obtained at the expense of the South African tertiary-education system The testatrix has thought fit to

150. *Ex parte BOE Trust Ltd.* 2009 (6) SA 470 (WCC), § 16.

151. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 237 (1996).

152. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 249 (2009-2010).

require beneficiaries of the bursary trust to return to South Africa for a period determined by the universities concerned, after obtaining their doctorates. It seems at least possible that, in so doing, she was seeking to ameliorate this skills loss and, indeed, to promote importation of skills obtained overseas. Certainly, it seems to me that the implementation of the bequest in accordance with its terms would have that effect.¹⁵³

This passage focuses pertinently on the testatrix's motive or purpose with the racial limitation and, although the court's deductions in this regard appear somewhat flimsy (based by and large on anecdotal evidence), it nevertheless confirms that testamentary intent, motive or purpose, even of the seemingly non-conforming variety, can swing the balance of the unfair discrimination inquiry in favour of testamentary freedom and away from its limitation on the ground of public policy.

The cases discussed above paved the way for future South African courts to be steadfastly normative, with a pertinent focus on the non-discrimination norm, in their application of public policy to inheritance issues, but to contextualize the distinction between fair and unfair discrimination with due regard to subjective considerations pertinent to the dispositive plan on the merits of each case. That not all discrimination in gifts and trusts is unconstitutional and unlawful, and that a casuistic approach to the adjudication of these matters, akin to that advocated by Colliton in the American context,¹⁵⁴ is advised, appears also from the South African Supreme Court of Appeal's judgment in *Emma Smith*:

The curators argued that the judicial amendment of a public charitable trust's provisions would have a chilling effect upon future private educational bequests. I cannot agree. We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for members of his or her faith or a club member intending to benefit the children of fellow members.¹⁵⁵

This passage permits of the interpretation that adjudication of "private bequests" of the kind to which the court referred—regardless of the tenability of the public-private-divide—may well introduce additional or different, typically subjective, testator-centred considerations to the unfair discrimination discourse; factors that may tip the balance of the unfair discrimination inquiry in favour of testamentary freedom and away from its limitation on the ground of public policy.

153. *Ex parte BOE Trust Ltd.* 2009 (6) SA 470 (WCC), § 15.

154. *See* Part II above.

155. 2010 (6) SA 518 (SCA), § 41.

This is not to say that testamentary motive or purpose will necessarily trump non-discrimination imperatives, even if such motive or purpose is entirely laudable and rationally connected to a legitimate purpose.¹⁵⁶ This assertion is illustrated by the Roman-Dutch approach to religion-based testamentary forfeiture clauses. In *Aronson*¹⁵⁷ Van den Heever JA purported to analyse the matter comprehensively in addressing the challenge to the “Jewish faith and race clause” included in the testator’s will. The judge referred to Savigny¹⁵⁸ who questioned whether the most intimate concern of a human being, to alter one’s religion or to adhere to it, should be influenced by loss or gain. Savigny argued that, in accordance with the principles of Roman law, such a condition should be treated as immoral; moreover, that it renders unconditional the testamentary disposition to which it is attached.¹⁵⁹ Van den Heever JA was unconvinced by this argument and found the reasoning “demonstrably fallacious.”¹⁶⁰ The judge conceded, however, that, whenever a testamentary condition was remitted in Roman and Roman-Dutch law, it was on the ground that to uphold the condition would be “to abet immorality or to induce that which is contrary to public policy.”¹⁶¹ He stated:

If I bequeath an annuity to a person suffering from tuberculosis on condition that he resides in a certain place where the climate is known to be gentle to such sufferers, my motives may be most laudable and enforcement of the condition may be in the best interests of the annuitant. Yet the condition was remitted (*D.* 35.1.71.2). It is clear, therefore, that the jurist must have applied an objective standard: it is contrary to public policy that a free man should by a condition in a legacy be reduced in status to that of a *colonus glebae adscriptus* To seem to reduce his status is an infringement of his *dignitas*.¹⁶²

This notwithstanding, Van den Heever JA concluded that Roman-Dutch law did not evince a consistent standpoint against Jewish clauses on normative grounds and, like his brother Greenberg JA,¹⁶³ opined that “[t]here is nothing immoral or against public policy against a Jew

156. See Part IV.C above in regard to the role of a legitimate purpose in the *Harksen v. Lane* inquiry into the fairness or unfairness of discrimination.

157. *Aronson v. Estate Hart* 1950 (1) SA 539 (A).

158. 3 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 184 (1840-1849).

159. *Aronson v. Estate Hart* 1950 (1) SA 539 (A), at 563.

160. *Id.*

161. *Id.* at 566.

162. *Id.*

163. See Part IV.B above.

remaining true to the faith of his fathers and a condition that he shall not marry a person of another religion is conducive to harmonious and happy marriages.”¹⁶⁴

Joubert,¹⁶⁵ in a comprehensive scholarly critique of Van den Heever JA’s judgment published almost two decades later, notes the references by two writers to judgments handed down by Dutch courts during the time of the Dutch Republic (1581-1795) when Roman-Dutch law was established. First, Van der Linden¹⁶⁶ commented on a decision in which the Court of Holland, on 20 September 1775, ruled against the validity of a testamentary condition that contained a Jewish faith and race clause. Van der Linden notes that a principal reason, among others, for the decision is to be found in the rule of natural law assimilated into the Dutch common law that “*niemand tot het omhelzen of verlaten eener Religie moet gedwongen worden*” (no-one must be coerced to embrace or to forsake a religion).¹⁶⁷ Secondly, Pauw¹⁶⁸ notes a judgment by the *Hoge Raad* (the Supreme Court of the Netherlands or High Council) handed down on 13 December 1747 in which a testamentary condition that contained a Jewish faith clause was held *pro non scripto*. According to Joubert, the *Hoge Raad*’s decision was founded on the principle of freedom of religion—it was found to be scandalous and, therefore, unlawful, to compel a person to continue to profess a faith, or not to convert to another faith (or, for that matter, to deprive such person of the right to hold no faith at all) by making a testamentary bequest to such person subject to such a condition.¹⁶⁹ Joubert concludes, therefore, that, in light of this Roman-Dutch authority, South African courts can invalidate faith and race clauses in wills insofar as they seek to compel beneficiaries to profess a given religion, and to do so on the ground that such clauses conflict with the fundamental (now constitutionally guaranteed¹⁷⁰) principle of freedom of religion.¹⁷¹

To Joubert’s exposition can be added Van Oosten’s¹⁷² mention of an account by the Roman-Dutch writer Cornelis van Bijkershoek (1673-

164. *Aronson v. Estate Hart* 1950 (1) SA 539 (A), at 567.

165. C.P. Joubert, *Jewish Faith and Race Clauses in Roman-Dutch Wills*, 85 SALJ 402 (1968).

166. JOHANNES VAN DER LINDEN, VERZAMELING VAN MERKWAARDIGE GEWIJSDEN DER GERECHTSHOVEN IN HOLLAND *Casus* 17 (1803).

167. Joubert, *supra* note 165, at 416.

168. WILLEM PAUW, OBSERVATIONES TUMULTUARIAE NOVAE I *Obs.* 246 (1964-1967).

169. Joubert, *supra* note 165, at 418.

170. CONST. art. 15.

171. Joubert, *supra* note 165, at 420.

172. M.S. VAN OOSTEN, SYSTEMATISCH COMPENDIUM DER OBSERVATIONES TUMULTUARIAE VAN CORNELIS VAN BIJKERSHOEK 147-48 (1962).

1743) of a Frenchman who bequeathed to his daughter, who adhered to the Reformed religion and who fled to England, a certain monetary sum on condition that the daughter returns to France and converts to Catholicism. The question arose whether or not this condition must be held *pro non scripto*, to which the courts of first and second instance answered in the affirmative, but the *Hoge Raad* was not called upon to decide.

In light of the above authority, Van den Heever JA's view, purportedly expressing the Roman-Dutch position, on the tenability of a Jewish faith and race clause is puzzling and certainly contestable. However, *Aronson v. Estate Hart* is a decision by the South African Appellate Division and the system of precedent that binds South African courts to existing judgments may well prevent courts to depart from *Aronson* on the ground that it stated the common law incorrectly. However, a South African court in the post-constitutional era can invoke the Bill of Rights' equality and non-discrimination directives to overturn the *Aronson* court's finding on normative grounds by following the reasoning in *Syffrets Trust*, *Emma Smith* and *Benjamin Godlieb Heydenrych Testamentary Trust*—such an outcome would certainly be aligned to the normative stance taken in the Roman-Dutch jurisprudence referenced by Joubert and Van Oosten.¹⁷³

At this juncture, however, a caution: a robustly normative approach to discriminatory bequests holds a particular danger to which the *Syffrets Trust* court fell prey. The court set its view so firmly on realizing the non-discrimination norm that it applied incorrectly an important common law inheritance rule. *In casu* the limitation of trust benefits to students of European descent appeared in clause 4(d) of the will and the exclusion of students of Jewish descent and female students was contained in a codicil added to the will some eight months later. As indicated earlier,¹⁷⁴ the court ruled that these provisions occasioned unfair discrimination and, as such, were, in terms of the common law, contrary to public policy. The appropriate common law remedy, derived from Roman-Dutch law, in such a case is to strike out the offending provision, if it is severable from the rest of the disposition, failing which the whole of the disposition must be set aside. Given South African law's non-variation rule in regard to testamentary provisions,¹⁷⁵ a finding that a

173. CORBETT, HOFMEYR & KAHN, *supra* note 66, at 133.

174. See Part IV.C above.

175. See Part IV.A above.

testamentary provision is contrary to public policy does not *per se* give a court the power to vary the provision as it thinks appropriate.¹⁷⁶

What order did the court give in *Syfreys Trust*? It ordered the deletion of the words “but of European descent only” from clause 4(d) of the will and the striking-out of the entire codicil bearing reference to Jewish descent and females.¹⁷⁷ The court, therefore, struck out the codicil as a provision severable from the remainder of the bursary bequest because it offended public policy and, on the same ground, removed certain words from clause 4(d) of the will. I submit that the former constitutes a competent exercise of a South African court’s common law power of variation of testamentary provisions, but that the latter is impermissible in terms of the non-variation rule because, rather than a striking-out of a severable provision, it amounts to a re-writing of the testator’s will through a selective excision of words from a testamentary provision—doing so exceeds the parameters of a South African court’s common law interventionist power regarding a testamentary provision that conflicts with public policy.

Admittedly, this standpoint begs the question whether the *Syfreys Trust* court could have made a different order—striking-out the severable codicil but leaving clause 4(d) of the will unaltered would have occasioned an absurd result because the racially discriminatory restriction on the bursaries would be retained. The solution to this problem lies in South African courts’ mandate under article 8 of the Constitution, particularly the directive in article 8(3) to develop rules of the common law to limit a constitutionally protected right such as freedom of testation. I submit that it would have been competent, indeed necessary, for the *Syfreys Trust* court to invoke explicitly article 8(3) to escape the strictures of the common law non-variation rule by broadening its power of variation of testamentary provisions to include the selective excising of words from a testamentary bequest when such is required to eliminate unfair discrimination and to leave the bequest operationally free from discriminatory restrictions. This the *Syfreys* court failed to do and, as it stands, exceeded, without providing a proper legal basis for doing so, its common law power of variation in respect of the order it made regarding clause 4(d) of the testator’s will. The *Syfreys*

176. *Ex parte* BOE Trust Ltd. 2009 (6) SA 470 (WCC) § 20, § 19; *see also Ex parte* Jewish Colonial Trust Ltd.: *In re* Estate Nathan 1967 (4) SA 397 (N), at 408E-F (confirming that a court cannot make or re-make a testator’s will; it cannot vary the will the testator made, nor can it change the devolution of the estate as the testator directed it, or add to or subtract from the benefit the testator conferred upon each of the beneficiaries).

177. *Minister of Educ. v. Syfreys Trust Ltd.* 2006 (4) SA 205 (C), § 49.

court's error sounds a warning to particularly the proponents of elimination of all discrimination from gifts and trusts that the normative demands of constitutionalism and/or public policy in regard to testamentary dispositions should not be met at the expense of adherence to basic inheritance law principles.

V. CONCLUSION

South African courts' treatment of discriminatory testamentary bequests in the post-constitutional era appears to be a good fit between the predominantly normative paradigm of the Common Law and the slightly more testator-centred approach evident in a Civilian jurisdiction such as the Netherlands. In a sense, South African courts have been fortunate insofar as all the post-constitutional cases on discriminatory bequests concerned educational trusts and the courts, rightly or wrongly, cottoned on to the public side of the public-private divide in regard to these bequests evident from comparable Common Law jurisprudence. Nevertheless, there seems room for a normative stance through the use of an evolved, though historically contextualized, public policy yardstick in regard to purely private bequests—and Roman-Dutch law provides vital authority on this point—that will enable South African courts to also hold private bequests to the non-discrimination norm, but to permit some subjectivity into the inquiry through the test for unfairness of discrimination and consideration of whether the testator intended the dispositive plan to serve a legitimate purpose.

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