

PUBLIC POLICY: THE ORIGIN OF A GENERAL CLAUSE IN THE SOUTH AFRICAN LAW OF CONTRACT

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1 Introduction

Jean-Etienne-Marie Portalis, the father of the Code Civil, described the paradox facing the legislator as having to simplify everything but simultaneously make provision for all eventualities.¹ In his vision the aim of the law is to provide protection for the interests of citizens who are entitled to the rule of law and not to be ruled by discretion. However, it is trite that lawmakers cannot foresee every possibility and provide decisions on every eventuality, and it is within this sphere between law and discretion that general clauses play a role. In contract law general clauses provide protection to contracting parties in the wide variety of circumstances that were not directly foreseen by either parties or the legal system. Thus general clauses contain a rule, the criteria of which are open-ended, vague and numerous;² they enable value

1 Jean Etienne Marie Portalis (French jurist and statesman, 1746-1807) *Discours et rapports sur le Code Civil* (Paris 1844, repr Caen, 1898) at 5ff: “Nous avons été frappés de l’opinion, si généralement répandue, que … le grand art est de tout simplifier en prévoyant tout … Nous n’avons … pas cru devoir simplifier les lois au point de laisser les citoyens sans règles et sans garantie sur leurs plus grands intérêts. Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que ce sont ceux mêmes auxquels un code paraît toujours trop volumineux, qui osent prescrire impérieusement au législateur la terrible tâche de ne rien abandonner à la décision du juge”; S Whittaker “Theory and practice of the ‘general clause’ in English law: General norms and the structuring of judicial discretion” in S Grundmann & D Mazeaud (eds) *General Clauses and Standards in European Contract Law Comparative Law, EC Law and Contract Law Codification* (The Hague, 2006) 57-76.

2 C Willet “General clauses and the competing ethics of European consumer law in the UK” (2012) 71(2) *Cambridge LJ* 412-440.

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judgments.³ A general clause is a legal norm, which is not precisely formulated, and does not have a clear core.⁴ Not defined by the legislature in a way that allows direct application, these rules or norms capture certain situations in vague terms and cabin a wide range of cases.⁵ It is argued that the function of general clauses is to limit party autonomy and to fill gaps.⁶ Examples of recognised general clauses are good faith – *bonne foi, guter Glaube*, abuse of rights or unfairness – *abus de droit, Rechtsmissbrauch*, fairness, duty of loyalty or honesty – *honêteté, Treu- oder Interessenwahrungspflicht* or a duty of care – *Sorgfaltspflicht*.⁷ Grundmann and Mazeaud⁸ distinguish several characteristics of such clauses. First, the task of defining their content falls to the courts; secondly, general clauses are legal rules or norms to be applied.⁹ It must be emphasised that general clauses are rules and not broad underlying principles which may be deduced from a multitude of rules although they may also give rise to underlying principles.¹⁰

In theory common-law jurisdictions characterised by judicial decisions and the precedent system do not recognise a general clause in the form of a written document. Consequently, South Africa does not have a “general clause” as codified legal systems do. However, if one disregards the issue of form, it is possible to recognise parallels to or efficient equivalents of a general clause in common-law systems.¹¹ Moreover, a general clause may make an appearance in legislation and regulations.¹² This article will investigate the origin of the public-policy clause, which has come to the fore as the general clause in the South African law of contract.

2 Equity, the *exceptio doli* and good faith

It is generally held that Roman-Dutch law is inherently equitable, and that the Dutch courts paid due regard to considerations of equity where equity was not inconsistent with

3 S Grundmann “The general clause or standard in EC contract law directives – a survey on some important legal measures and aspects in EC law” in Grundmann & Mazeaud (n 1) 144-161; P Schlechtriem “The functions of general clauses exemplified by regarding Germanic laws and Dutch law” in Grundmann & Mazeaud (n 1) 41-55 at 41-49.

4 In German terminology this is referred to as “Begriffskern”; cf S Grundmann “General standards and principles, *clauses générales*, and *Generalklauseln* in European contract law – a survey” in Grundmann & Mazeaud (n 1) 1-19 at 2-3.

5 Grundmann (n 4) at 3.

6 *Idem* at 8.

7 *Idem* at 1-2.

8 Grundmann & Mazeaud (n 1) *passim*.

9 Grundmann (n 4) at 3.

10 *Idem* at 4.

11 H Collins “Social rights, general clauses and the *acquis communautaire*” in Grundmann & Mazeaud (n 1) 111-140 at 114.

12 This is the case in South Africa in s 48 of the Consumer Protection Act 68 of 2008, which outlaws unfair, unreasonable or unjust contract terms.

the principles of law.¹³ Thus equity could not override a clear rule of law. Moreover, it is believed that in Roman-Dutch law all contracting parties were expected to conduct themselves in a manner consistent with the dictates of good faith.¹⁴ However, since neither the Roman-Dutch principle of good faith nor the English principle of equity ever developed appropriately in the South African law of contract, the equitable defence of the exceptio doli generalis was used to ward off claims tainted by unconscionability. In 1988 the majority of the Appellate Division in *Bank of Lisbon & South Africa Ltd v De Ornelas* decided that because the exceptio doli generalis had never been received into Roman-Dutch law it did not provide a basis for the recognition of a substantive defence based on equity in modern South African law.¹⁵

Zimmermann¹⁶ agrees with the court's argument that the substantive content of the exceptio doli had been absorbed into the requirement of good faith. Consequently, with the demise of the exceptio doli, the focus shifted towards good faith and the question arose whether good faith constituted a "free-floating principle".¹⁷ In other words did good faith constitute a rule that permitted a court to intervene directly in contractual relations, or did it operate only indirectly, through established common-law rules and doctrines, such as those relating to public policy and the legality of contracts?¹⁸ This question was addressed in *Brisley v Drotsky*¹⁹ in which the Supreme Court of Appeal stated:

[G]oeie trou [bied] nie 'n onafhanklike, oftewel 'n 'freefloating', basis vir tersydestelling of die nie-toepassing van kontraktuele bepalings ... nie. Goeie trou is 'n grondbeginsel wat

13 Johannes Voet (Dutch jurist, professor at Herborn, Utrecht and Leiden, 1647-1713) *Commentarius ad pandectas* (The Hague, 1698-1704) 1 1 6; Ulrich Huber (Frisian jurist, professor at Franeker, 1636-1694) *Heedendaegse rechtsgelertheyt* (Leeuwaarden, 1690) 1 1 17, 18 and 21; Dionysius van der Keessel (Dutch jurist, professor at Groningen and Leiden, 1738-1816) *Theses selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii introductionem ad jurisprudentiam Hollandicam* (Leiden, 1800) at 24; *idem Praelectiones iuris hodierni ad Hugonis Grotii introductionem ad jurisprudentiam Hollandicam* (tr HL Gonin & D Pont *Voorlesinge oor die hedendaagse reg...* vol 1, Amsterdam, 1961) *ad 1 2 22*; Johannes van der Linden (Dutch practitioner and prolific author, 1756-1835) *Commentarii ad pandectas J Voet, tomus tertius continens supplementum a libro I usque ad XI "reliquae d v sequentur"* (Utrecht, 1793) *ad 1 1 6*; Cornelis van Bynkershoek (Dutch advocate, judge and Chief Justice of the Hooge Raad, 1673-1743) *Observationes tumultuariae* vol 1 (Haarlem, 1926) at 664; *idem Observationes tumultuariae* vol 2 (Haarlem, 1934) at 1358; Willem Pauw *Observationes tumultuariae novae* (Haarlem, 1968) at 499, 979; *Estate Thomas v Kerr* (1903) 20 SC 354 at 374; *Kent v Transvaalsche Bank* 1907 TS 765 at 774; *Hassan Khan v Immigration Officer* 1915 CPD 655 at 661; *Bothwell v Union Government (Minister of Lands)* 1917 AD 262; *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 295; *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 606A-D. Cf R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town, 1990) at 674.

14 Zimmermann (n 13) at 674.

15 (n 13) at 606D-E.

16 Zimmermann (n 13) at 674.

17 D Hutchison "Good faith in the South African law of contract" in R Brownsword, N Hird & G Howells (eds) *Good Faith in Contract – Concept and Context* (Aldershot, 1998) 213-242 at 213.

18 D Hutchison "The nature and basis of contract" in D Hutchison & C-J Pretorius (eds) *The Law of Contract in South Africa* (Cape Town, 2012) 3-45 at 28.

19 2002 (4) SA 1 (SCA) in par [22].

in die algemeen onderliggend is aan die kontraktereg en wat uiting vind in die besondere reëls en beginsels daarvan.

Within months this decision was confirmed in *Afrox Healthcare Bpk v Strydom*.²⁰

The Supreme Court of Appeal's negation of good faith as a general clause with direct application as a standard to test the enforceability of a contract reopened the search for another general clause, and attention turned to public policy. In an earlier leading case, *Sasfin (Pty) Ltd v Beukes*,²¹ the Appellate Division had recognised the principle of public policy as a benchmark for judging fairness and reasonableness. Smalberger JA held²² that "[n]o court should ... shrink from the duty of declaring a contract contrary to public policy when the occasion so demands".

This case placed the accent squarely on public policy and made no reference to good faith as a point of reference for legality. Public policy was made the touchstone for the enforceability of contracts. Regarding the reach of public policy the court was rather circumspect. As Smalberger JA stated:

The power to declare contracts contrary to public policy should however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.²³

The judge continued by saying, "[p]ublic policy demands in general full freedom of contract; the right of men to freely bind themselves in respect of all legitimate subject-matters".²⁴

The Constitutional Court in the case of *Barkhuizen v Napier*²⁵ reiterated the choice of public policy over good faith. In this seminal judgment the court endorsed the concept of public policy as the benchmark for fairness and reasonableness. Ngcobo J held that "[a]s the law currently stands good faith is not a self-standing rule, but an underlying value

20 2002 (6) SA 31 (SCA) in par [32]; this opinion was reiterated in *Southernport Developments (Pty) Ltd v Transnet Limited* 2005 (2) SA 202 (SCA) in par [16] in which it was emphasised that good faith in itself did not constitute a consideration that would render enforceable an agreement to negotiate.

21 1989 (1) SA 1 (A). Sasfin, the appellant, was a finance company. Beukes, the respondent, was an anaesthetist. The parties had concluded a discounting agreement in terms of which Beukes was obliged to offer for sale to Sasfin all book debts he wished to sell. A discounting agreement governed the purchase of the book debts. Beukes had also concluded an all-encompassing deed of cession in favour of Sasfin and two other companies, in terms of which he ceded to these parties as creditors all present and future claims which he might have, as security for his obligations to them. A dispute arose between Sasfin and Beukes and Sasfin applied for an order enforcing the deed of cession. The court *a quo* dismissed Sasfin's application on the grounds that the deed of cession was contrary to public policy and thus invalid. The appeal against this order was dismissed because the cession was found to be unconscionable and therefore unenforceable because it was contrary to public policy.

22 *Idem* at 9A-B.

23 *Idem* at 9.

24 *Ibid.*

25 2007 (5) SA 323 (CC).

that is given expression through existing rules of law".²⁶ In regard to the question what the approach is concerning constitutional challenges to contractual terms, he pointed out that "[o]rdinarily constitutional challenges to contractual terms will give rise to the question of whether *the disputed provision is contrary to public policy*" (my emphasis). Consequently, the highest court in South Africa has identified public policy as the general clause relating to the validity of contracts.

3 Public policy

This paper will investigate the origin of the concept of public policy within the ambit of the South African common law. The first analysis²⁷ of public policy in South African legal theory²⁸ appears to be in Wessels.²⁹ This author divides illegal contracts³⁰ into contracts prohibited by legislation,³¹ those contrary to the common law,³² contracts the object of which is contrary to public policy,³³ contracts *contra bonos mores*³⁴ and miscellaneous illegal contracts.³⁵ Contracts contrary to public policy he further subdivides into agreements which injure the state in its relations with other states; agreements tending to injure the public service; agreements impeding or obstructing or perverting the administration of justice; contracts in restraint of marriage and for future separation of husband and wife; agreements in restraint of trade; wagering contracts and usurious contracts.³⁶

26 In par [82].

27 R W Lee *An Introduction to Roman-Dutch Law* (Oxford, 1915) refers to public policy at 237: "In certain cases compensation is disallowed on grounds of public policy". G Wille & P Millin *Mercantile Law of South Africa* (Johannesburg, 1934) at 26-31 refer to public policy several times in their casuistic exposition of illegal or immoral agreements.

28 In case law, contracts contrary to public policy were held to be illegal for a long time; see *infra* at 3ff. See, also, M Bisset & PF Smith *The Digest of South African Case Law 1922-1933* (Cape Town & Johannesburg, 1936) sv "contract" and "contrary to public policy" (vol 4), and "legality" (vol 3).

29 JW Wessels *The Law of Contract in South Africa* vol 1 (Johannesburg, 1937) at 155-199.

30 *Idem* at 153. He defines such contracts as impossible by law.

31 *Idem* at 155. He draws a distinction between contracts expressly and impliedly prohibited and those declared unenforceable.

32 *Ibid.* In this category are those contracts that the law prohibits because, eg, their subject matter does not exist in nature; it is *extra commercium*; it involves a future succession; or it is the property of the person who contracts to obtain it.

33 *Ibid.* Wessels gives the following examples of the object of the obligation being contrary to public policy: agreements which injure the state in its relations with other states; agreements which could injure the public service; agreements obstructing the administration of justice; contracts in restraint of marriage and for the future separation of husband and wife; agreements in restraint of trade; wagering contracts and usurious agreements.

34 *Ibid.* Wessels considers libellous works, agreements involving future seduction and contracts involving immoral purposes to be *contra bonos mores*.

35 *Idem* at 202. Wessels considers contracts to defraud the insolvency laws and contracts to defraud creditors to be examples of miscellaneous illegal agreements.

36 *Idem* at 155.

It is obvious that contracts injuring the state's relations with other states and agreements injurious to the public service or obstructing the administration of justice are contrary to public policy, even if not expressly prohibited by legislation or the common law.³⁷ However, within the private domain it is more difficult to give content to this amorphous concept. Wessel defines as contrary to public policy an act which is contrary to the interests of the community, and goes on to say that such acts may also be regarded as contrary to the common law or in some cases to the moral sense of the community. For the first category he relies on Voet³⁸ and for the second on Justinian's Institutes and Savigny.³⁹ It is nevertheless submitted that this explanation eliminates the "contrary to public policy" category, since it is subsumed in the previous and subsequent groups, namely contracts contrary to the common law and contrary to the *boni mores*. Wessels addresses this point by cautioning that there are cases of contracts that are void as being against public policy which cannot readily be placed in any of these classes.⁴⁰ However, Wessels set the matrix and the abovementioned inconsistencies have dogged legal theory.⁴¹

Wille⁴² draws a distinction between public policy and good morals.⁴³ He divides the first into agreements tending to injure the state or the public service or aiming to defeat or obstruct the administration of justice or to interfere with the free exercise by persons of their rights.⁴⁴ In the 1970 edition⁴⁵ this category also included the unconscionable oppression of one of the parties. However, this was not elaborated upon.

37 For the historical background, see Wessels (n 29) at 162-177. RH Christie & GB Bradfield *Christie's The Law of Contract in South Africa* (Cape Town, 2011) at 363ff. However, trading with the enemy has been common practice. Contracts injurious to the public service include promises to public officers which will induce them to use their power and influence for an improper purpose; in both English law and Roman-Dutch law such contracts are void as being contrary to public policy. Contracts impeding, obstructing or perverting the administration of justice include all contracts which promote crime, hinder or frustrate the administration of justice or are illegal and void because they are contrary to public policy. This group may be divided into different categories: contracts to commit an offence and contracts in terms of which criminals benefit; contracts which multiply public offences and contracts concluded to exploit and abuse the legal process.

38 Voet *Commentarius* 2 14 6.

39 Inst 3 19 24; FC von Savigny *System des heutigen römischen Rechts* vol 3 (Berlin, 1940) at 122.

40 Wessels (n 29) at 162.

41 RW Lee & AM Honoré *The South African Law of Obligations* (Durban, 1950) at 177 n 1 mention that the suggested distinction between immoral and illegal transactions (Aquilus (Justice van den Heever) "Immorality and illegality in contract" (1941) 58 *SALJ* 337-353 and (1942) 59 *SALJ* 16-26) has not found favour. At 178 they mention public policy twice in the context of the *condictio ob injustam* or *ob turpem causam*.

42 F du Bois (ed) *Wille's Principles of South African Law* (Claremont, 2007) at 763ff.

43 *Idem* at 768. Agreements are defined to be *contra bonos mores* if they offend our conscience, or sense of what is right, or modesty.

44 *Idem* at 765ff. The rights to work, trade, make a will and marry are discussed.

45 In the 1970 ed of *Wille's Principles of South African Law* at 320-324.

Joubert⁴⁶ argues that the difference between public policy and good morals is difficult to establish since both are based on public interest.⁴⁷

Christie's places contracts against public policy in the category of contracts illegal by common law⁴⁸ and holds that it serves no purpose to classify contracts into those contrary to the common law, those against public policy and those *contra bonos mores*, since the three expressions are interchangeable.⁴⁹ In view of this large-minded approach he omits to describe public policy,⁵⁰ but instead relies on *Sasfin, Botha (now Griesel) v Finanscredit (Pty) Ltd*⁵¹ and *Jajbhay v Cassim*⁵² describing it as that which is “inimical to the interests of the community”, “contrary to law or morality”, or which “run[s] counter to social or economic expedience”⁵³ and takes into account “simple justice between man and man”.⁵⁴ Christie makes an addition namely where a term or contract is plainly improper and unconscionable, or unduly harsh or oppressive it may be declared contrary to public policy.⁵⁵ He equates public policy with the general sense of justice of the community manifested in public opinion, but draws a distinction between superficial and seriously considered public opinion.⁵⁶

Floyd discusses public policy and public interest within the ambit of illegal contracts.⁵⁸ He distinguishes between public policy and public interest. The first is reflected in legislation, the common law, good morals and the public interest and has since 1994 been anchored in constitutional values.⁵⁹ Public interest is described as the overarching consideration in determining illegality,⁶⁰ but at first glance the status *ante quo*, that is

46 DJ Joubert *General Principles and the Law of Contract* (Cape Town, 1987) at 132ff.

47 *Ibid.* Joubert states: “Very often good morals are associated with matters affecting sexual morals, but good morals can deal with a wider spectrum of topics than sex. Underlying every prohibition based on the protection of good morals and public policy is some public interest. The law can protect the public interest by prohibiting certain acts and it may decree that a contravention is a crime and/or that contracts in conflict with the norm are invalid or unenforceable. The basis of the prohibition is the public interest, whether it be good morals or something else, and the reason for the invalidity of the contract is that public interest demands it.”

48 Christie & Bradfield (n 37) at 358ff.

49 *Ibid.*

50 *Idem* at 358-359.

51 (n 21) at 8C-D

52 1989 (3) SA 773 (A) 782I-783C per Hoexter JA.

53 1939 AD 537 at 544.

54 Christie & Bradfield (n 37) at 359.

55 Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544.

56 At 359.

57 *Idem* at 359-360. He refers to Cameron JA in *Brisley v Drotsky* (n 19) in par [93]: “[The] legal convictions of the community ... a concept open to misinterpretation and misapplication – is better replaced ... by the ‘appropriate norms’ of the objective value system embodied in the Constitution.”

58 TB Floyd “Legality” in Hutchison & Pretorius (n 18) 175-205 at 175-176. At 176-191 and 192-195 a distinction is drawn between illegal contracts that are void and illegal contracts that are valid but unenforceable.

59 *Idem* at 175.

60 *Idem* at 176.

Sasfin, remains the touchstone. Thus the distinction between good morals and public policy is held to be of little value because the underlying principles very often overlap.⁶¹ His list of recognised public interest concerns contains no additions of note,⁶² except the reference to the changing content of public policy as being related to public opinion.⁶³

This summary reflects the variety of opinion, phraseology and hesitancy that prevails in respect of public policy and accordingly several aspects of this concept will be analysed in order to determine its origin.⁶⁴

4 Contracts in restraint of marriage

Wessels finds that the earliest application of public policy in the Roman-law rule related to the restraint of freedom of marriage. His argument links the legislation introduced by Augustus, aimed at stemming the continuous decrease in the number of Roman citizens, to the Roman-law texts declaring contracts restraining marriage to be void.⁶⁵ These texts— are to be found in the *Lex Julia de maritandis ordinibus*⁶⁶ and the *Lex Papia Poppaea*.⁶⁷

61 *Ibid.*

62 *Idem* at 176-177. Floyd lists the following public interests: voluntarily concluded contracts should be complied with and enforced (sanctity of contract); simple justice between individuals should be taken into account; as far as possible, the parties to a contract should have equal bargaining power; the administration of justice should not be defeated, obstructed or perverted; the safety of the State should be preserved; the public service should function properly; and people's full exercise of their legal rights should not be interfered with; *cf.* also, Du Bois (n 42) at 764ff.

63 *Cf* Floyd (n 58) at 177 n 9: Here public opinion relates to the validity and enforceability of a contract as a whole or some of its terms. It is not clear whether the well considered or the fickle public opinion is meant.

64 The point that contracts injurious to the state, the public service or the administration of justice are contrary to public policy is not contested.

65 Wessels (n 29) at 177. This legislation was interpreted in the spirit of Augustus' aim in enacting the two relevant laws, and it was thus held that promises linked to conditions of remaining unmarried or arranging a divorce or interfering with the freedom of marriage were void and unenforceable. This argument relies on Savigny (n 39) at 123. The pandectist, Savigny, systematised the law on restraint of marriage and listed four types of conditions that were void and unenforceable: Firstly, any condition perpetuating celibacy; secondly, a condition subjecting a person to the will of a third party regarding the choice of husband (marriage partner); thirdly, a condition limiting the freedom of choice in marriage to such an extent that the person in question would never marry, and fourthly, conditions encouraging divorce for financial benefit. Savigny and Wessels both relied on the following texts: D 7 8 8 1 (*usus* of a house left to a woman on condition she left her husband); D 35 1 22 (legacy left to a woman on condition she did not marry); D 35 1 28pr (legacy left to a daughter if she married as directed by Lucius Titius); D 35 1 63 1 (legacy if she married Titius); D 35 1 72 4 (legacy if Seia married to Titius' satisfaction) and D 35 1 72 5 (legacy to Maevia, if she had not married); D 35 1 74 (usufruct left to a woman on condition that she did not marry); D 35 1 77 2 (legacy to Titius if a certain woman did not marry); D 35 1 100 (legacy to Titia if she did not marry); D 45 1 134pr (*stipulatio contra bonos mores*, degrading to secure marriage bond by penalty).

66 AD 18. WW Buckland *A Textbook of Roman Law from Augustus to Justinian* (Cambridge, 1963) at 113ff, 292-293, 319, 345, 379; M Kaser *Das römische Privatrecht* vol 1 (München, 1971) at 318ff, 724-725; P van Warmelo *n Inleiding tot die Studie van die Romeinse Reg* (Pretoria, 1971) at 71-72, 83, 209, 242.

67 AD 9.

However, Kaser does not support this link. In his description, Roman marriage was ruled by customary law, *mos maiorum*; an off-shoot of the customary law, the *boni mores*, the religious and moral rules of Roman society, were supervised by the censor.⁶⁸ These *boni mores* developed as an open norm in Roman law and contracts restraining marriage were deemed to be *contra bonos mores*.⁶⁹ Young men preferring to remain unmarried and rash divorcees were penalised, while solid married citizens were rewarded by the Augustan statutes,⁷⁰ but contracts restraining marriage were void as being *contra bonos mores*.⁷¹ Justinian disapproved of second marriages and in Novel 22⁷² amended this law, allowing agreements in restraint of marriage.

However, Wessels' argument contained a paradox in that conditions requiring marriage were also held to be void.⁷³ Furthermore, he undermined his argument by concluding that Roman law regarded contracts which prevented freedom of marriage as *contra bonos mores*,⁷⁴ thus indicating that often what was contrary to public policy and what was *contra bonos mores* were not clearly distinguished. Although it may be argued that the censor's supervision of good morals indicates that this was a concern of the state, this essay supports the view that public policy, while closely related to the *boni mores*, is not identical to or interchangeable with it.

Roman-Dutch law did not follow Justinian's Novel,⁷⁵ and agreements penalising marriage or rewarding celibacy were invalid.⁷⁶ Contracts in restraint of marriage were void only if they prohibited parties from entering into marriage altogether, but if the restraint concerned marriage to a particular person the contract's validity was not questioned, since there were others whom the party might marry.⁷⁷ A contract in which one party undertook to pay the other an amount of money if she/he did marry was not considered an interference in freedom of choice of marriage.⁷⁸ According to Voet such an agreement was regarded as fostering marriage rather than preventing it.⁷⁹ However, a contract to marry a particular person or forfeit an amount of money was regarded as interference in freedom of choice of marriage and was thus void and unenforceable.⁸⁰ The Dutch *Consultatien*⁸¹ refer to the case where it was asked whether a contract was

68 Kaser (n 66) at 25, 27, 29, 38, 62, 71-72, 74-75, 125, 185, 195, 250-251, 254, 597, 598.

69 *Idem* at 250.

70 *Idem* at 318ff. Wessels (n 29) at 177.

71 D 45 1 134pr.

72 Nov 22 43 and 44pr.

73 D 35 1 28pr; 35 1 63 1; 35 1 72 4; 45 1 134pr.

74 Voet *Commentarius* 2 14 21 (tr A Lybrechts *Redeneerend vertoog over t notaris ampt* Amsterdam, 1734) 2 438; Wessels (n 29) at 178.

75 Voet *Commentarius* 2 14 21.

76 Wessels (n 29) at 178-179; Joubert (n 46) at 135.

77 Joubert (n 46) at 135; Voet *Commentarius* 2 14 21; Wessels (n 29) at 178; D 35 1 63pr and 64pr.

78 Wessels (n 29) at 178; D 35 1 71 1.

79 Wessels (n 29) at 178; Voet *Commentarius* 2 14 21.

80 D 45 1 134pr; C 5 1 5 2.

81 *Hollandse consultatien* (Rotterdam, 1645-1666) 5 23. See, also, Wessels (n 29) at 178.

valid if a widow and a spinster agreed that whoever was the first to marry would pay the other a large amount of money. The response was that such a contract was contrary to the law of God, the Canon law and the common law and was also *contra bonos mores*.⁸² Groenewegen was of the opinion that a legacy left to a widow until she remarried did not constitute a restraint on marriage and was valid.⁸³

Winfield⁸⁴ traced the introduction of public policy in English common law and cited a passage from Sheppard's *Touchstone*⁸⁵ mentioning the term "against public good"; he also mentioned that the expression was used as early as the reign of Elizabeth, but did not link it to restraint and marriage. Wessels⁸⁶ referred to *Lowe v Peers*⁸⁷ in which it was held in 1768 that the restraint of a first marriage is contrary to the general policy of the law, the public good, and the interests of society.⁸⁸ This was reiterated in 1808.⁸⁹

Agreements between spouses that they will separate are valid.⁹⁰ However, such agreements must be distinguished from those making provision for a possible future divorce. Wessels traced the nullity of agreements concerning future divorce to Roman law,⁹¹ but relied on Groenewegen for the view that such agreements were not received in Roman-Dutch law.⁹² However, in English law, precedent held such contracts to be contrary to public policy.⁹³

In South African law this question arose in 1899 in *Braude v Braude*,⁹⁴ one of the earliest reported cases in which the concept of public policy was applied to void a contract. In this case an undertaking that a married couple would voluntarily separate in the future was declared void. No Roman-Dutch authority was relied upon and the Chief

82 *Ibid.*

83 Simon van Groenewegen (Simon Groenewegen van der Made, Dutch jurist, 1613-1652) *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (Leiden, 1649) *ad C 6 40 lex ult.*

84 PH Winfield "Public policy in the English common law" 1928 (42) *Harvard LR* 76-102.

85 Sheppard *Touchstone* (1641) at 132 in which it was stated that conditions in deeds or limitations which are against the liberty of law or against public good are void: Winfield (n 84) at 83 and seen 43.

86 (n 29) at 178, but he did not mention on what ground such restraints were void.

87 (1768) 4 Burr 2225; 1770 SC Wilmot 36, 498 ER 160. The court held contracts in restraint of marriage to be void.

88 *Ibid.*

89 *Hartley v Rice* (1808) 10 East 22, 103 ER 683. At 22, 683 Le Blanc J held that a contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law.

90 *Ziedeman v Ziedeman* (1838) 1 Menzies 238; *Barker v Barker* (1897) 14 SC 113; *Pugh v Pugh* 1910 TPD 792.

91 D 45 1 19; C 8 38 (39) 2; Wessels (n 29) at 181. The Digest text declares the stipulation void, because statutory penalties already apply and one has to be satisfied with these; however, if the stipulation contains the same penalties it is valid.

92 Groenewegen *ad D* 45 1 19, C 8 39 2 and C 5 17.

93 *Hindley v The Marquis of Westmeath* (1827) 5 LJKB 115; *Jones v Waite* (1842) 9 Cl & F 88, 8 ER 353 at 104, 355; *Cartwright v Cartwright* (1853) 22 LJCh 841 at 845 in which it was held that the proviso was contrary to public policy and therefore void.

94 (1899) 16 SC 565.

Justice held that “an agreement for a future voluntary separation ought not to be enforced by the Court”, the reason given was that such a contract is opposed to public policy.⁹⁵

5 Marriage brokerage contracts

In 1907 it was held in *King v Gray*⁹⁶ that the so-called marriage brokerage contracts should also be held to be illegal as being prejudicial to public welfare. Such contracts, in which one party, for a consideration, undertook to introduce prospective marriage partners might be regarded as interference in the freedom of marriage. Chief Justice De Villiers thoroughly investigated Roman law⁹⁷ and Roman-Dutch law⁹⁸ and even though the old authorities had agreed nearly unanimously⁹⁹ that such contracts were valid and enforceable,¹⁰⁰ dismissed the appeal against the decision of the magistrate who on the authority of *Hermann v Charlesworth*¹⁰¹ had held that such contracts were illegal, being against public policy.

Old English law had taken another view than that of Roman and Roman-Dutch law. Winfield’s first concrete case referring to marriage contracts dated from 1750 when in *Chesterfield v Janssen*¹⁰² the Lord Chancellor, Lord Hardwicke, mentioned in an obiter that “in the marriage brocage bonds the court relieve for the sake of the public, as a general mischief”, and that “political arguments … as they concern the government of a nation, must, and have always been of great weight in the consideration of this court, and … if the rest of mankind are concerned as well as the parties, it may properly be said, that it regards the publick utility”.¹⁰³ Wessels traces a line of precedent from 1695¹⁰⁴ until 1905¹⁰⁵ in which marriage brokerage contracts were considered void as being contrary to public policy. When the question of the validity of marriage brokerage contracts

95 *Idem* at 571.

96 (1907) 24 SC 554. Wessels (n 29) at 179-180.

97 D 50 14 3 if *proxeneta conditionis* means “marriage broker”, “brokerage may be charged” was the interpretation by Cornelis Van Bynkershoek *Quaestionum juris privati libri quattuor* (Leiden, 1744) 2 6; C 5 1 6 also allows brokerage.

98 WGH “Marriage brokerage” (1919) 36 *SALJ* 352-357. Van Bynkershoek *Quaestionum* gives the most detailed survey. Moreover, he refers to a decision of the Hooge Raad of 1723 in which it was held that the reward for arranging the marriage must be paid.

99 Only Groenewegen *ad C 3 28 19* and 5 1 6 considered the rule of Roman law abrogated by disuse.

100 Van der Keessel *Theses selectae* at 482; CR ab Oosterga *Censura Belgica* (Utrecht, 1665) at 189-190; Voet *Commentarius* 23 1 1; Lybrechts (n 74) 2 72; CW Decker *ad Simon van Leeuwen Het Rooms-Hollands recht* (Amsterdam, 1781) 4 26 11; Van Bynkershoek *Quaestionum* 2 6; Wessels (n 29) at 179.

101 (1905) 2 KB 123 in which the Court of Appeal stressed the importance of *Cole v Gibson* (1750) 1 Ves Sen 504, 27 ER 1169 in which it was found that this class of contract is against public policy.

102 *Chesterfield (Earl of) v Janssen* (1750) 1 Atk 301, 28 ER 531 at 301, 531.

103 *Idem* at 302, 532.

104 *Hall and Keene v Potter* (1695) 3 Lev 411; 83 ER 756; *Cole v Gibson* (n 101) at 504, 1170 the Lord Chancellor set it aside, not for the sake of the particular instance or the persons, but for the sake of the public; *King v Burr* (1810) 3 Mer 693; 36 ER 266.

105 See *Hermann v Charlesworth* (n 101).

came before the Cape Supreme Court in 1907 in *King v Gray*¹⁰⁶ it was the principles laid down in *Hermann v Charlesworth*¹⁰⁷ that were applied. De Villiers CJ held that the principle was well established in our law that agreements contrary to public policy were not enforceable and that recognition of marriage brokerage contracts was prejudicial to public welfare.¹⁰⁸

In 1926 the comparative approach was introduced when Von Pittius J held in the leading decision of *Hurwitz v Taylor*:

In deciding what is public policy on such a question as marriage, I think the Court is also entitled to take cognisance of the views held in other countries ... and when we find that this class of contract is not recognised by the foremost countries in the world, and have been reprobated by the courts in England, United States of America, and France, and that the new German Code (1900) provides that no obligation is created by such contracts, then I think this Court is entitled to come to the conclusion that such contracts are against public policy.¹⁰⁹

Consequently, public policy played a pivotal role in determining the validity of contracts relating to the conclusion and dissolution of marriage. It was, however, by way of English common law rather than Roman or Roman-Dutch law that the concept of public policy found its application in South African common law.

Joubert has drawn attention to the fact that the difference between public policy and good morals is difficult to explain, but that very often good morals are associated with sex, but can comprise more than sexual matters.¹¹⁰ However, it appears that in Roman law and Roman-Dutch law certain agreements were declared void on account of their content on the ground that they were *contra bonos mores* and dealt mainly with family moral values. The concept of public policy appears to originate in the juridical space defined by family moral values in English law.

The question which now becomes relevant is how this concept was propelled into the sphere of economic morality in order to find both recognition and application as a general clause. It is submitted that public policy entered the economic space by way of usurious contracts and contracts in restraint of trade.

6 Usurious contracts

It is generally accepted that as early as the Twelve Tables (450 BC) Roman law placed a limit on interest and that interest rates in Roman law were subsequently determined

106 (n 96).

107 (n 101).

108 *King v Gray* (n 96) at 557-558.

109 1926 TPD 81 at 93.

110 Joubert (n 46) at 132-133.

by legislation.¹¹¹ Charging of higher interest rates was penalised, but the contract *per se* was not invalid.¹¹² Debtors were obliged to pay only the legal maximum interest rate.¹¹³

During the Middle Ages the Church attempted to abolish interest altogether and relied on the laws of Moses for this purpose.¹¹⁴ Zimmermann¹¹⁵ argues that this ban was based on economic considerations, since charging interest involves the exploitation of need and leads to further impoverishment of the debtor. The Church's attempt to impose her ethics on secular law was only partially successful, although the penalties against usury were strict.¹¹⁶ At that time, the usurious contract was invalid, whatever amount the usurer had taken in excess of the loan was regarded as stolen goods and the usurer was liable to be punished.¹¹⁷ After the reformation and the Dutch War of Independence the protestant Dutch republic did not follow the canon law rule prohibiting interest.¹¹⁸ However, the courts refused to enforce an agreement if they were of the opinion that the interest was excessive.¹¹⁹ This depended upon time, place and the person involved.¹²⁰

In English law the statutes of the thirteenth to the mid-sixteenth centuries adopted canon-law principles and banned the charging of interest.¹²¹ In 1487 an Act prohibiting usury and unlawful bargains¹²² declared all bargains based on usury to be void, and imposed a fine of one hundred pounds and punishment to be imposed by ecclesiastical courts.¹²³ This Act was repealed in 1495 by an Act¹²⁴ which attempted to define the scope of the prohibition. A new leaf was turned in 1545 when an Act agaynst Usurie¹²⁵ allowed interest of ten per cent per annum to be charged on money loaned. Transgressors risked

111 Kaser (n 66) at 167-168, 496ff; Zimmermann (n 13) at 168; PJ Thomas "A stratagem to avoid the limit on interest" (2012) 75 *THRHR* 96-107 at 96-97 mentions that the Twelve Tables placed a limit on interest; there are varying opinions regarding the amount. Justinian reduced the limits: *cf* C 4 32 26 2.

112 Zimmermann (n 13) at 169.

113 *Ibid.*

114 Wessels (n 29) at 197; Zimmermann (n 13) at 170.

115 Zimmermann (n 13) at 170.

116 *Idem* at 170ff.

117 *Idem* at 171 where he refers to Molina *De iustitia et iure* 2 334.

118 During the Middle Ages the Church tried to outlaw all interest but during the fifteenth century this attitude was dropped in favour of a modest interest rate. *Cf* KAD Unterholzner *Quellenmässige Zusammenstellung der Lehre des römischen Schuldverhältnisse mit Berücksicht der heutigen Anwendung* vol 1 (Leipzig, 1840) at 309ff; P MacChombaich de Colquhoun *A Summary of Roman Civil Law* vol 2 (London, 1849, repr 1988) at 473ff; Wessels (n 29) at 197.

119 Wessels (n 29) at 197. The law of Holland during the seventeenth and eighteenth centuries did not stipulate any interest rate.

120 J Loenius (Dutch judge d 1641) *Decisien en observationen* (Amsterdam, 1712) at 21.

121 J Oldham *English Common Law in the Age of Mansfield* (Chapel Hill, NC, 2004) at 166.

122 3 Hen VII c 6.

123 Oldham (n 121) at 167.

124 11 Hen VII c 8.

125 37 Hen VII c 9.

a penalty of three times the value of the bargain as well as a fine and imprisonment.¹²⁶ However, in 1551 a Byll Against Usurie¹²⁷ repealed all preceding Acts and revived the absolute prohibition on interest being charged. Contravention of this Act would be proceeded before the King's Courts.¹²⁸ In 1571 the 1545 Act was revived¹²⁹ and in 1623 new legislation against the abuse of usury was introduced allowing eight per cent interest to be charged.¹³⁰ Contracts in breach of this Act were considered void, and the creditor was fined three times the amount of the loan.¹³¹ In 1660 the permitted interest rate was reduced to six per cent¹³² and in 1713 to five per cent.¹³³

It is clear that in both Roman and English law legislation addressed socio-economic problems, namely exploitation and ensuing poverty, and that the continuous stream of legislation in this field may have been the first expression of public policy.¹³⁴ However, these prohibitions, the first such statutory ones, introduced (partial) unenforceability, which evolved into common-law illegality, as circumvention of the usury statutes became commonplace.¹³⁵

In 1841 Menzies J held that Dutch law against usury was applicable.¹³⁶ In 1860 the Supreme Court in *Dyason v Ruthven*¹³⁷ considered the matter of the usurious contract. The court, faced with the problem that there was no legal rate of interest, did not condone usury, but held that a twenty-four per cent interest rate could be reduced to six per cent, on proof of extortion or of actual or constructive fraud.¹³⁸ The assumption seems justified that this decision was motivated by public policy.

7 Contracts in restraint of trade

Wessels acknowledges the lack of Roman-law or Roman-Dutch sources on the topic of restraint of trade,¹³⁹ and that the law on this point has been taken from English law.¹⁴⁰

126 Oldham (n 121) at 168.

127 5 & 6 Edw VI c 20; *cf* F Makower *Constitutional History and Constitution of the Church of England* (London, 1895) at 454.

128 Makower (n 127) at 454.

129 13 Eliz I c 8.

130 Section 2 An Act agaynst Usurie (1623) 21 Ja I c 17.

131 Section 2: "(i)n pain to forfeit the treble value of the money due": *cf* Makower (n 127) at 454.

132 12 Cha II c 13.

133 The Act to Reduce Rate of Interest, 1713 (13 Ann c 15).

134 It is noteworthy that W Blackstone *Commentaries on the Laws of England* bk 4 (Oxford, 1769) included usury in ch 12 under "Of Offences Against Public Trade".

135 *Cf Chesterfield (Earl of) v Janssen* (n 102) at 301, 531.

136 *Sutherland v Elliot Bros* (1841) 1 Menz 99.

137 (1860) 3 Searle 282.

138 Watermeyer J at 284.

139 Wessels (n 29) at 182. He attempts to find analogies in the restraints on marriage and D 35 I 71 2, in which text a legacy was bequeathed subject to a condition restraining a person's choice of domicile. Papinian held that an undertaking infringing the right to liberty is void.

140 Wessels (n 29) at 183.

In 1843 the Cape Supreme Court held that an agreement restraining a person from doing any business in a particular place was not an improper restraint on his natural liberty,¹⁴¹ and in 1877 the principle that a contract enforcing a complete restraint of trade was void was implicitly recognised.¹⁴² Zimmermann points out that as early as the second half of the nineteenth century agreements in restraint of trade could be declared void as being *contra bonos mores*.¹⁴³ In 1898 a contract was declared void as being in restraint of trade.¹⁴⁴ In 1902 it was found that in Roman-Dutch law contracts in restraint of trade were known and enforced.¹⁴⁵ In *Edcombe v Hodgson*¹⁴⁶ De Villiers CJ analysed the legality of contracts in restraint of trade in Roman-Dutch law. The learned judge took Voet¹⁴⁷ to hold that such agreements were void. Nevertheless his conclusion was that regardless of what the Roman-Dutch law may have been, “in our time it can hardly be doubted that any general restraint of trade must necessarily be detrimental to the community and that encouragement of trade is a matter of public policy in our time”.¹⁴⁸ In 1908 the caveat was added in *Federal Insurance v Almelo*¹⁴⁹ that although a contract in general restraint of trade is invalid, where there is a limitation of time or space the agreement may nevertheless be valid in law if it is reasonable.¹⁵⁰

Thus South African law borrowed from English law. Joubert states that already during the reign of Elizabeth I all restraints of trade were held to be unlawful as contrary to the public interest,¹⁵¹ which rule was relaxed in 1711 when it was held that general

141 *Willet v Blake* (1843) 3 Menz 343.

142 *Stephan Bros v Loubscher* 1877 Buch 137: contracts in restraint of trade must be construed strictly. In *Brinkman v Lindt* 1877 Buch 60 the condition that a shop might not be opened within six hours' distance on horseback was held not to be unreasonable.

143 Zimmermann (n 13) at 715.

144 *Hendricks v Doorasammy* (1898) 13 EDC 25.

145 Van Bynkershoek *Observationes Tumultuariae* vol 2 at 1359; Pauw (n 13) at 2876; Joubert (n 46) at 144; E Kahn “Rules relating to contracts in restraint of trade – Whence and whither” (1968) 85 *SALJ* 391-399; C Nathan “The rule relating to contracts in restraint of trade – Whence and whither! A decade later” (1979) 96 *SALJ* 35-43; B du Plessis & DM Davis “Restraint of trade and public policy” (1984) 101 *SALJ* 86-102; C Visser “The principle *pacta sunt servanda* in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade” (1984) 101 *SALJ* 641-655.

146 (1902) 19 SC 224 at 226.

147 Voet *Commentarius* 2 14 16.

148 (1902) 19 SC 224. At 226 he continued: “If, therefore, in the present case the covenant had been that the respondents should be prohibited from carrying on their lawful occupation of photographers in any part of South Africa or even this Colony, I should have refused to enforce a covenant which would be detrimental to the public without any corresponding advantage to the person in whose favour it has been made.” Cf, also, *Federal Insurance Co v Van Almelo* (1908) 25 SC 940.

149 (n 148).

150 Derived from *Mallan v May* (1843) 11 M & W 653, 152 ER 967. In this case it was held at 665, 972 that “the test for reasonableness appears to be whether it (the restraint) be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided”.

151 *Colgate v Bachelor* 1602 Cro Eliz 872, 78 ER 1097: to restrain was held to be against the benefit of the commonwealth; Joubert (n 46) at 145.

restraints were void, but partial restraints might be lawful.¹⁵² In 1894 the House of Lords reconsidered the principle that general restraints were of necessity void. In *Nordenfelt v Maxim-Nordenfelt Guns and Ammunition Co*¹⁵³ the Lord Chancellor, Lord Herschell, held that changing circumstances had to be taken into consideration. The question to be addressed was whether the restraint was not so severe as to interfere with the interest of the public. In particular circumstances the covenant might nevertheless be held void on the basis that it was injurious to the public interest.¹⁵⁴ Lord MacNaghten ruled that all interferences with individual liberty of action in trading were contrary to public policy and therefore void, but that there were exceptions, namely if the restriction was reasonable both with reference to the parties and to the interests of the public.¹⁵⁵ This clearly consolidated public interest as the benchmark in deciding the validity of restraint cases, and restraint of trade clearly projected the concept of public policy into the economic sphere.

Apart from its pivotal role as a benchmark in contracts in restraint of trade, public policy can also be detected in the approach of the various legal systems to agreements of wagering, gambling or betting¹⁵⁶ where protection of the family as well as economic morality have been combined motives.

8 Wagering contracts

A wagering contract¹⁵⁷ is an agreement in which two parties promise each other some performance, usually an amount of money; performance is dependent on the outcome of an uncertain future event beyond their control. As a rule one party will lose, while

152 *Mitchel v Reynolds* (1711) 1 P Wms 181, 24 ER 347 at 190, 350 mentions “the mischief which may arise from them to the publick, by depriving it of an useful member”.

153 (1894) 63 LJCh 908.

154 *Idem* at 914-915. Lord Watson (at 917-918) remarked that public policy changes and that it is beyond the jurisdiction of courts to mould public policy. The court must ascertain what the policy rule is at a particular time.

155 *Nordenfelt v Maxim-Nordenfelt Guns and Ammunition Co* (n 153) at 923-924: “[T]he public have an interest in every person's carrying on his trade freely; so has the individual. All interference with the individual's liberty of action in trading and all restraints of trade in themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by special circumstances of the particular case. It is sufficient justification, and indeed the only justification, if the restraint is reasonable – reasonable, that is, in reference to the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed while at the same time it is in no way injurious to the public.”

156 The terminology is interchangeable.

157 Christie & Bradfield (n 37) at 392ff; Floyd (n 58) at 193ff; Wessels (n 29) at 190ff.

the other wins.¹⁵⁸ Some wagering contracts, such as insurance contracts, are valid and enforceable;¹⁵⁹ others are legal but not enforceable.¹⁶⁰ It is in the latter category that public policy plays a role.

The Digest devotes a title to gamblers¹⁶¹ and shows an ambivalent attitude which continues today. A senatusconsultum proscribed playing for money except in certain sporting events, on the ground that they were contests of strength.¹⁶² Justinian as a Christian emperor expressed the desire to look after the interests of his subjects,¹⁶³ outlawed the game of dice, and decreed that the losers could claim their losses in court.¹⁶⁴ He allowed betting on five games,¹⁶⁵ but placed a limit of one gold piece on each bet. He subsequently prohibited a game with wooden horses and decreed confiscation of the premises where such games were played.¹⁶⁶

The well known gambling fever of the Germans¹⁶⁷ was perpetuated in the Netherlands where according to Grotius it was uncertain whether wagers were valid or not.¹⁶⁸ Grotius went on to say that in Holland wagers were held to be void in the public interest¹⁶⁹ and that what was paid or given could be claimed back.¹⁷⁰ Groenewegen's notes on the *Inleidinge*¹⁷¹ list municipal legislation and literature on the subject. Grotius explained elsewhere in the *Inleidinge* that although in terms of natural law everybody is the master of his own property and actions, the civil law did not want people to use these to their

158 Wessels (n 29) at 190; Joubert (n 46) at 139-140; Floyd (n 55) at 193ff; Christie & Bradfield (n 37) at 393; *R v Jones* 1925 AD 117; *R v Cunard* 1925 CPD 175; *R v Bernstein* 1927 TPD 487; *R v Theodosiou* 1935 TPD 72; *R v Cunningham* 1946 TPD 241; *Rademeyer v Evenwell* 1971 (3) SA 339 (T) at 348; *R v Zock* 1979 (4) SA 1056 (T); *Hampden v Walsh* (1876) 45 LJQB 238 at 240 defined a wager according to the common law "as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening".

159 Cf Hugo de Groot *Inleidinge tot de Hollandsche rechtsgeleerheid* (Amsterdam, 1706) 3 3 48; E van Zurck *Codex Batavus* (Rotterdam, 1758) who discusses wagering sv "assurantie".

160 Wessels (n 29) at 190.

161 D 11 5 *De aleatoribus*: Gamblers.

162 D 11 5 2 1: Spear or javelin throwing, running, jumping, wrestling, and boxing; Wessels (n 29) at 191.

163 C 3 43 1: "Commodis igitur subiectorum providere cupientes" (Desiring, therefore, to look after the interests of our subjects) (tr FH Blume <http://uwacadweb.uwyo.edu/blume&justinian/> (accessed 16 Mar 2013)).

164 C 3 43 1. This claim had a prescription period of fifty years and could be instituted by the losers, their heirs or the municipal authorities; Wessels (n 29) at 191: by a *conductio sine causa*.

165 Leaping, pole vaulting, throwing javelins or pikes, wrestling and show fighting.

166 C 3 43 2pr.

167 Tacitus *Germania* c 24 mentions the Germans' infatuation with wagering; Wessels (n 29) at 191.

168 *Inleidinge* 3 3 48.

169 *Ibid* 3 3 48: "soo is by ons om den gemeenen oorboir". Groenewegen explains in n 114: "Daer inne bestaende dat 't gemeene beste daer een ghelegen is dat de luiden hare goederen door soodanige onnodige ende malle weddingen niet onnuttelijc en verquisten."

170 Grotius *Inleidinge* 3 3 48 "t gunt gegeven ofte betaelt is wederom ge-eyscbt mogen worden".

171 In 1644 the *Inleidinge* was published with notes by Groenewegen referring to the sources used by Grotius and case law.

own detriment, without any benefit for the public interest.¹⁷² Gambling with dice and other games of chance were prohibited in Holland in terms of a statute of 1394,¹⁷³ unless the count had permitted this in a particular city.¹⁷⁴ Finally Grotius held that in terms of Roman law nobody could lose more than he had brought to the table¹⁷⁵ and that in many cities a limit had been placed on the stakes,¹⁷⁶ and what was lost could be reclaimed by the loser, his wife, friends or other members of his family. Thus prohibitions against betting varied in the different towns.¹⁷⁷ It is generally held that wagers on sport were excluded on condition that the wager was moderate. Thus a bet on an archery contest, a ball game or on shooting a bird was allowed.¹⁷⁸ It is understood that the count's discretion to grant a concession to establish a gaming house was passed on to the courts and that games of chance except at casinos were strictly forbidden.¹⁷⁹

Later institutional authors were divided on the subject. According to Voet¹⁸⁰ gambling debts could not be recovered by legal process, nor did the loser have an action to recover his losses.¹⁸¹ During the eighteenth century there was no *communis opinio* on the enforceability of wagering contracts.¹⁸²

Wessels¹⁸³ states that the Dutch courts adopted the same rule as the English courts¹⁸⁴ and postponed cases involving idle wagers until the court had nothing else requiring attention.

172 *Inleidinge* 3 30 13: "Want hoewel een ider nae 't aenghebooren recht meester is van sijn goed ende daden, nochtans heeft de burgher-wet niet ghewilddat de luiden zulcks zouden ghebruicken tot ghelyck hier vooren doo het voorbeeld van wedding is verblaerd."

173 *Inleidinge* 3 3 49: Groenewegen n f: "Hant-vesten by Hertogh Aelbregt van Beyeren aan Anstellant ende Goylant gegeven op den 21 January, 1394."

174 Groenewegen mentions Delft and Monnikendam.

175 *Inleidinge* 3 3 49. Groenewegen has a reference to D 11 5 4.

176 Groenewegen in n 118: Amsterdam and Leiden.

177 Wessels (n 29) at 191.

178 SJ Fockema Andreea *Oud Nederlands Burgerlijk Recht* vol 2 (Haarlem, 1906) at 77.

179 Wessels (n 29) at 192.

180 Voet *Commentarius* 11 5 4: "Nec id quod in alea amissum et solutum est repititur nisi dolus in ludo sit adhibitus. Si quid tamen in alea amissum ac nondum solutum sit, peti nequit, nec is, qui sciens alteri ad habendum credidit, id potest repetere, nec de sponzionibus (bets or wagers) (exceptis assecurationibus) jus dici solet, si qui super sponsione litigare velint"; cf, also, 11 5-8.

181 *Idem* 11 5 6.

182 Wessels (n 29) at 193-194. According to Scheltinga there were instances when wagering contracts were enforced; Van Hasselt believed that in Holland wagering contracts that were *super re honesta* were valid; and Zypaeus and Carpzovius asserted that wagers free of fraud and entered into honestly would be allowed – an opinion supported by Sande and Schorer. Van der Keessel was doubtful whether all wagers were prohibited by the common law of Holland: *ibid*.

183 Wessels (n 29) at 193.

184 *Gilbert v Sykes* (1812) 16 East 162, 104 ER 1033 at 162, 1050. Van Alphen *Nieuw verbeterde en vermeerderde Papegay ofte Formulier-Boeck* vol 1 (s' Graven-Hage, 1658) 1 302; Wessels (n 29) at 193.

Consequently the South African courts held that Roman-Dutch law did not regard a wagering agreement as *per se* illegal or immoral.¹⁸⁵ Nevertheless in *Dodd v Hadley*¹⁸⁶ Innes CJ held that for reasons of public policy our courts of law will not enforce wagers. This decision was followed in *Fischer v Straiton*¹⁸⁷ and stands until today. The view on which it was based, that betting is wasteful and has negative consequences for the individual, the family and society in general, supports the submission that public policy entered the economic space by way of wagering agreements.

Today wagering debts not lawfully incurred in terms of the National Gambling Act¹⁸⁸ and the Lotteries Act¹⁸⁹ remain subject to the common law and are not illegal or immoral but are contrary to public interest and unenforceable.¹⁹⁰ Within the ambit of wagering, the concept of public policy protects both family and economic morality.

9 Analysis

South African textbooks have traditionally traced the rule of public policy, as a guide to the content of contracts, to Roman law and Roman-Dutch law with support from English law. However, to validate this conclusion it has been necessary to equate public policy with *boni mores*, good morals. Thus Wessels and many authors after him treated the concepts of *boni mores* and public policy as interchangeable. This is not the place to enter into a debate about law and morality, but traditionally *boni mores* have represented current ideas on morality, which concentrated on family, marriage and sexual matters. The association of *boni mores* with public policy continues today and is justified by the argument that the maintenance of family life and the dignity of the individual are matters of societal and state interest. However, combining the norms of *boni mores* and public policy is historically as well as dogmatically incorrect. It either stretches sound morals beyond recognition or risks turning public policy into moralising paternalism.¹⁹¹ It should furthermore be kept in mind that pre-industrial states had little inclination or means to address issues other than immediate ones such as defence, law, order and taxation. Thus many public interests such as health, education and social welfare were left to private and or church initiatives. Moreover, public policy needs a constitutional and legal foundation; the old subject has to become the modern citizen. This places the

185 *Dodd v Hadley* 1905 TS 439 at 442; *Ward v Levin* 1908 EDC 168; *SA Tattersalls v Myers Bros* 1905 TS 772; *Est Wege v Strauss* 1932 AD 76; M Carnelley “The legal response to cardsharks and other gambling cheats” (2011) 17(2) *Fundamina* 14-32 at 18; J Disney *A View of Ancient Laws against Immorality and Profaneness* (Cambridge, 1729) at 274-275, 279. Disney refers to Alciatus *Parergon iuris libri tres* (Paris, 1539) 8 16 and *In pandectarum seu digestorum iuris civilis septimae partes titulos aliquot commentaria continens* in *Operum* tom 2 (Basel, 1582) col 401.

186 (n 185) at 442.

187 1920 WLD 53; Wessels (n 29) at 194.

188 Act 33 of 1996.

189 Act 57 of 1997. The legislature wished to regulate gambling rather than to prohibit it.

190 *Gibson v Van der Walt* 1952 (1) SA 262 (A) at 270. A gambling debt can be validly discharged as well as being ceded but cannot be enforced by way of an action. Cf Floyd (n 58) at 194.

191 See “Glossary” in Hutchison & Pretorius (n 18) sv “boni mores” at 492, sv “contra bonos mores” at 493 and sv “public policy” at 501.

search for its origin in England where constitutional democracy dates back to Magna Charta. The Industrial Revolution spawned political thinkers such as Hobbes and Locke who sowed the seeds of public policy. Winfield has shown the origins of public policy, the unruly horse reservation¹⁹² and the battle for its survival in *Egerton v Brownlow*.¹⁹³

On a more practical note it should be mentioned that the Roman-law texts used to support the public policy argument have a tenuous link with the subject. The Institutes of Justinian contain a title on ineffective stipulations¹⁹⁴ and the only text relied on reads: “[A] promise in respect of a base cause, as if a man promised to commit homicide or sacrilege, has no efficacy.”¹⁹⁵ The Codex title of the same name contains eight texts¹⁹⁶ and in the casuistry of Digest 45 1, dealing with the *stipulatio* contract, no mention of public policy can be found. As a result the net is thrown wider and texts from the law of succession are relied upon for analogous interpretation, which explains the citations from Book 35 of the Digest.¹⁹⁷ The only passage which possibly gives some support to the origin of public policy in Roman law is Justinian’s regulation of gambling and betting. The same analysis applies to the much cited passages of Voet¹⁹⁸ and Grotius,¹⁹⁹ which are equally reticent on public policy, with exception of Grotius’ text on betting.

10 Conclusion

From this historical discourse it is clear that the concept of public policy rooted in modern South African law has its origins in the Roman and Roman-Dutch norm of *boni mores* – standards of good morals and the English law rule of public policy.

Wille may have been the first author to construct the category “agreements interfering with the full exercise by persons of their legal rights”.²⁰⁰ Although his reference to Voet as the relevant authority is spurious²⁰¹ this conceptual categorisation may reflect one side of the coin of public policy in the Western tradition, namely the protection of individual freedom. Thus agreements affecting freedom to marry, freedom of testation, freedom to exploit a desperate borrower, freedom of trade and freedom to work are void. The other aspect of public policy is that the state protects herself and her organs. It is, however, the first facet of public policy that had the potential to develop into the general clause. As the

192 Burroughs J in *Richardson v Mellish* (1824) Ry & Mood 65, 171 ER 945 at 68, 972.

193 (1853) 4 HL Cas 1, 10 ER 359 at 31, 373. Winfield (n 84) at 85-90.

194 Inst 3 19 *De inutilibus stipulationibus*.

195 Inst 3 19 24: “Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.”

196 C 8 38 (39) *De inutilibus stipulationibus*.

197 D 35 1 deals with conditions in wills.

198 *Commentarius* 2 14 6, 2 14 15, 2 14 21.

199 *Inleidinge* 3 1 42: “daer by iet belooft werd dat nae burgerwet ende zeden oneerlick werd ghehouden”; also 3 1 43: “nietig zijn de verbintenissen die spruiten uit een oneerlijcke oorzaeck ofte inzicht”.

200 Cf the 1970 edition by Gibson (n 45) at 321.

201 Voet *Commentarius* 2 14 6 deals with the question whether *pacta in continentis* with contracts based on good faith were actionable.

nineteenth century *laissez-faire* state developed into a democracy and made place for the twentieth century welfare state, the latter started taking human rights seriously. Evidently such a change of direction would be reflected in public policy and eventually in case law.

Abstract

The article relates how the Constitutional Court has chosen public policy as the general clause with which to combat unfairness in contracting. Consequently the historical development of public policy is investigated in the footsteps of Wessels, who was the first South African author to address the role of public policy in the law of contract in a wider sense. The historical sources on contracts in restraint of marriage, marriage brokerage contracts, usurious contracts, contracts in restraint of trade and wagering contracts are analysed with regard to public policy. Although some Roman-law and Roman-Dutch authority can be found in certain instances, the main observation is that public policy and *boni mores* have not been clearly distinguished by modern writers dealing with these jurisdictions. The conclusion of the paper is that public policy as an open norm is an English transplant.