

**A CRITICAL LEGAL ARGUMENT  
FOR CONTRACTUAL JUSTICE  
IN THE SOUTH AFRICAN LAW OF CONTRACT**

by

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‘if you nearly see

The real world through the false - what do you see..?

How many lies did it require to make

The portly truth you here present us with?’

- from ‘Mr Sludge, “The Medium”’ - Robert Browning

‘as mense net meer genade het met mekaar

sal die lewe langer duur’

- Vaslav Nijinski (as quoted in H Aucamp *Volmink* (1981))



Fides, the Roman goddess of good faith and faithfulness, depicted here on early Roman coinage. Fides is the goddess of bargains kept, promises unbroken, and faith upheld. She signifies the virtues of integrity and honesty in all dealings between individuals and groups. In the later Roman period, she was called Fides Publica ('Public Faith') and was considered the guardian of treaties and other state documents, which were placed for safekeeping in her temple. The Senate often convened in her temple, signifying her importance to the state.<sup>1</sup>

'Civilization's main concept

Lies within Her you see

Without contracts realized

No city could ever be

Nor enduring peace, 'cept

That of death's eternal rest

Leaving all opposition excised

And a barren world, unblessed<sup>2</sup>

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<sup>1</sup> 'Fides' *Encyclopædia Britannica* from Encyclopædia Britannica Premium Service (available at <<http://www.britannica.com/eb/article-9034191>>)

<sup>2</sup> <http://labienus.home.texas.net/Patrons.html>.

**ABSTRAK:**

‘Apparently the existence of deepgoing antinomies in our system of contracts is an experience too painful to rise to the full level of our consciousness’<sup>1</sup>

In die hedendaagse, transformatiewe regs milieu weerspieël die Suid-Afrikaanse kontraktereg grotendeels steeds pogings om die reg uit te beeld as 'n koherente sisteem bestaande uit duidelike, neutrale reëls. Hierdie pogings vloei voort uit oortuigings dat die reëlboek opsigself in staat is om duidelike antwoorde in alle kontraktuele dispute te verskaf.

Die bemoënis van hierdie studie is 'n oortuiging dat die kontraktereg, sodanig toegewy aan bogenoemde uitbeelding, nie voldoende bemoëid is met transformasie en die ideaal van geregtigheid nie. Kennedy het reeds in die sewentigerjare die ambivalensie van hierdie regsisteem ontbloot en geargumenteer dat die privaatreëls bloot die fundamentele teenstrydigheid reflekteer – die onoplosbare spanning tussen optrede wat geheel en al voortspruit uit eiebelang teenoor optrede wat ingelig, beïnvloed en beperk word deur ander.

Kennedy sien die fundamentele teenstrydigheid as 'n kontinuum met twee ‘ideaal-tipes’ posisies op die vlak van vorm en substansie. Op die substantiewe vlak, plaas Kennedy die teenstrydigheid as individualisme teenoor altruïsme. Op die vorm vlak, bestaan die ideaal-tipes posisies in 'n voorkeur vir reg in die vorm van reëls teenoor reg in die vorm van ‘oop’ standarde.

Kennedy se mees diepgaande argument hou in dat 'n etiek van individualisme die reg verkies in die vorm van reëls teenoor 'n etiek van altruïsme wat die reg in die vorm van oop standarde steun. Hierdie argument reflekteer Kennedy se opvatting dat vorm en substansie inderdaad interafhanklik is omdat dit onmoontlik is om die vraag ‘Vorm van wat?’ te vermy. Dalton het later

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<sup>1</sup> F Kessler ‘Contracts of Adhesion – Some Thoughts About Freedom Of Contract’ (1943) 43 *Colum LR* 629, 633 soos aangehaal in C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ 94 (5) *Yale LJ* 997, 999.

meer eksplisiet bygevoeg dat vorm en substansie polities altyd 'n hiërargie in die regsisteem sal genereer.

In navolging hiervan, poog hierdie studie 'n soortgelyke bespreking van die Suid-Afrikaanse kontraktereg. Die studie argumenteer ons kontraktereg nie net die fundamentele teenstrydigheid duidelik reflekteer nie, maar ook dat dit voorkeur verleen aan en werk om die individualisme/reël posisie te onderhou. Hierdie posisie is nie voldoende bemoeid met die etiese element van die kontraktereg (goeie trou) en met die ideaal van kontraktuele geregtigheid nie.

Ek oorweeg of en hoe die oorgang van 'n totalitêre staatsbestel na 'n konstitusionele demokrasie hierdie hiërargie geaffekteer het. Die gevolgtrekking is teleurstellend maar ook hoopvol in die sin dat hierdie ingeprente vooroordeel in die kontraktereg niks kan wegneem van die feit dat alle reg in Suid-Afrika moet funksioneer in die skadu van 'n oppermagtige Grondwet wat toegewy is aan die ideale van openlikheid, gelykheid, menswaardigheid en vryheid in alle menslike verhoudinge, kontraktueel aldan nie.

Ten einde die tradisionele voorstellings van die kontraktereg teen te staan en ter ondersteuning van bogenoemde, stel hierdie studie 'n (her)beklemtoning van goeie trou as die etiese element van die kontraktereg voor. Goeie trou is 'n dinamiese konsep wat nie vasgevang behoort te word in 'n netjiese regsdefinisie nie. Goeie trou verstaan dat, in die gemeenskap van kontrakterende individue, elkeen verantwoordelik is vir die ander se welstand en dat ons uiteindelik toegewyd behoort te bly aan die fundamentele waardes van die Grondwet waaronder die onontbeerlike kontraktereg voorts moet funksioneer. Die moeisaamheid en kompleksiteit van hierdie aktiwiteit verskaf geen alibi nie.

Sleuteltermes:

kontraktereg, fundamentele teenstrydigheid, Critical legal studies, horisontale toepassing, goeie trou (bona fides), etiese element van die kontraktereg, openbare belang, gemenerereg-transformasie, exceptio doli generalis, utopiese denke

**ABSTRACT:**

‘Apparently the existence of deepgoing antinomies in our system of contracts is an experience too painful to rise to the full level of our consciousness’<sup>1</sup>

In the current transformative milieu, the South African law of contract continues its attempts to convey an image of contract as a coherent system of clear and neutral rules. These attempts stem from the belief that the rule-book, in and of itself, can offer us determinate answers in all contractual disputes.

This study was borne out of a concern that in its commitments to sustain this image, the South African law of contract is not sufficiently concerned with transformation and the ideal of justice. In the seventies, Kennedy exposed the ambivalence of the contract system and argued that private law vividly reflected the fundamental contradiction; the irresolvable tension in and among us between acting purely out of self-interest or allowing our actions to be informed, influenced and curtailed by others.

Kennedy asserted that the fundamental contradiction could be construed as a continuum with two opposing ‘ideal typical’ positions on both the level of form and substance. On the substance level he referred to this warring engagement as individualism and altruism. On the form level, the ideal typical commitments prefer law either in the form of rules or as open-ended standards.

Kennedy’s most provocative claim was that individualism preferred law in the form of rules whereas altruism favoured the open-ended standard form. This claim reflected the understanding that form and substance are interdependent because it is impossible not to ask: ‘Form of what?’

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<sup>1</sup> F Kessler ‘Contracts of Adhesion – Some Thoughts About Freedom Of Contract’ (1943) 43 *Colum LR* 629, 633 as quoted by C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ 94 (5) *Yale LJ* 997, 999.



Dalton later added more explicitly that form and substance would politically always generate a hierarchy within a legal system.

Following Kennedy, this study engages with the South African law of contract in a similar way. It argues that the South African law of contract not only reflects the fundamental contradiction profoundly, but also privileges and works to sustain the individualism/rule position. This position is not sufficiently concerned with the ethical element of contract (good faith) and with the ideal of contractual justice.

I consider whether and how the transition from a totalitarian state to a constitutional democracy affected this hierarchy. I arrive at disappointing but nevertheless hopeful conclusions in the sense that the bias inculcated in the law of contract cannot take anything away from the fact that it operates in the penumbra of a Constitution which is committed to openness, equality, dignity and freedom in all human relationships, including those of a contractual nature.

In resisting the traditional representations of contract and in support of the above, I propose a re-emphasis on good faith as the ethical element of contract. Good faith cannot be contained in a neat and tidy legal definition. It realises that we are, in the community of contracting persons, each responsible for the other's well-being and that we should ultimately remain concerned with the constitutive values of the supreme law under which the subordinated but indispensable law of contract must continue to operate. The difficulty and complexity of this exercise provides no alibi.

Keywords:

Contract law, fundamental contradiction, Critical legal studies, horizontal application, good faith (bona fides), ethical element of contract, public policy, transformation, exceptio doli generalis, utopian thinking

**TABLE OF CONTENTS****CHAPTER 1:  
INTRODUCTION**

I	INTRODUCTION: WHY IT IS NECESSARY TO ARGUE FOR CONTRACTUAL JUSTICE IN THE SOUTH AFRICAN LAW OF CONTRACT	2
II	AN ALTERNATIVE STORY OF CONTRACT LAW	6
III	APPROACHING THE FUNDAMENTAL CONTRADICTION: THE HISTORY OF FREEDOM OF CONTRACT AND CONTRACTUAL JUSTICE	9
IV	FORM, SUBSTANCE, THE FUNDAMENTAL CONTRADICTION AND THE LAW OF CONTRACT	10
V	THE CONSTITUTION, TRANSFORMATION AND CONTRACT LAW	18
VI	CONCLUSION: AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT	20

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**CHAPTER 2:  
THE JURISPRUDENTIAL HISTORY OF CONTRACTUAL JUSTICE: A  
HISTORICAL OVERVIEW OF THE ORIGIN AND MARGINALISATION OF  
FAIRNESS IN THE LAW OF CONTRACT**

I	INTRODUCTION	26
II	ARISTOTLE AND EARLY ROMAN CONTRACT LAW	28
III	THE (ARISTOTELIAN) VALUES UNDERLYING ROMAN CONTRACT LAW	32
	(a) <i>Introduction</i>	32
	(b) <i>Iustitia (justice) in Roman contract law</i>	33
	(c) <i>Aequitas (fairness) in Roman contract law</i>	38
IV	MORALITY IN THE ROMAN LAW OF CONTRACT	41
	(a) <i>The ex turpi causa- and the par delictum-maxims</i>	41
	(b) <i>The bona fides and the exceptio doli generalis in Roman Law</i>	47
V	CONTRACTUAL EQUITY IN EARLY ENGLISH AND ANGLO AMERICAN CONTRACT LAW	53
	(a) <i>The eighteenth century equity approach</i>	53
	(b) <i>The role of the jury system in the equitable approach to eighteenth century contract</i>	55
VI	THE DEVELOPMENT OF MODERN CONTRACT LAW IN THE NINETEENTH CENTURY	58

VII	THE SUBJECTIVITY OF VALUE AND THE OBJECTIVE THEORY OF CONTRACT	62
VIII	CONCLUSION	64

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**CHAPTER 3:**  
**THE SOUTH AFRICAN LAW OF CONTRACT: A CRITICAL EVALUATION**

I	INTRODUCTION	70
II	INDIVIDUALISM, THE SUBJECTIVITY OF VALUE AND THE WILL THEORY OF CONTRACT	74
III	FORMALISM: THE SHAPE OF INDIVIDUALISM	80
		80
	(a) <i>Introduction</i>	81
	(b) <i>General characteristics of formalism</i>	83
	(c) <i>A South African example</i>	85
	(d) <i>Why is formalism bad?</i>	
IV	INDIVIDUALISM'S AND FORMALISM'S 'NATURAL AFFINITY'	86
V	'FREEDOM OF CONTRACT' AS A POLITICAL SLOGAN IN SOUTH AFRICA	88
		88
	(a) Early days	90
	(b) <i>The abolishment of the laesio enormis doctrine</i>	93
	(c) <i>The recognition of undue influence as a ground for restitution</i>	97
	(d) <i>The exceptio doli generalis is dead. Long live the exceptio doli generalis</i>	97
	(i) The exceptio doli generalis is dead	103
	(ii) Long live the exceptio doli generalis	
VI	DEDUCTIONS	106
VII	THE IDEAL OF ALTRUISM	108
		108
	(a) <i>The commitments of the altruist ideal</i>	108
	(b) <i>The interdependent nature of modern commercial society</i>	113
VIII	THE NATURAL AFFINITY OF ALTRUISM FOR STANDARDS	116
IX	THE PICTURE EMERGING	120
X	JUDICIAL CHALLENGES OF THE STRICT ENFORCEMENT OF CONTRACTS IN SOUTH AFRICAN CASE LAW	124
		124
	(a) <i>BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk</i>	124
	(b) <i>Magna Alloys and Research (SA) (Pty) Ltd v Ellis: The 'new position'</i>	126
	(c) <i>Sasfin v Beukes: The altruist trump card?</i>	130
	(d) <i>Donnelly v Barclays International Bank: Sasfin interpreted</i>	134

XI	CONCLUSION	137
<b><u>CHAPTER 4:</u></b>		
<b><u>TRANSFORMATION, THE CONSTITUTION AND CONTRACT LAW</u></b>		
I	INTRODUCTION: THE BREAK WITH THINGS PAST, A TRANSFORMING SOCIETY AND THE CONSTITUTIONAL RULE OF LAW	141
	(a) <i>Background</i>	141
	(b) <i>Horizontal application of the Constitution and the Bill of Rights to contract law</i>	145
	(i) Direct and indirect horizontal application provisions	145
	(ii) The role of section 36	148
II	A TRANSFORMATIVE APPROACH TO THE CONSTITUTION AND ITS INFLUENCE ON THE LAW OF CONTRACT	149
III	DECISIONS IN THE LAW OF CONTRACT AFTER 1994	156
	(a) <i>Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO</i>	156
	(b) <i>De Beer v Keyser: 'In with the old out with the new'</i>	161
	(c) <i>Brisley v Drotzky: 'A milestone for the South African law of contract'</i>	164
	(i) The majority decision	164
	(ii) Olivier, JA in the minority (again)	173
	(iii) Cameron, JA's 'constitutional' reading of freedom of contract	177
	(d) <i>Afrox Healthcare Beperk v Strydom</i>	179
	(i) The facts	179
	(ii) The respondent's case	181
	(iii) The respondent's public interest argument and the Court's decision	182
	(iv) Critique	189
IV	CONCLUSION	195
.....		
<b><u>CHAPTER 5:</u></b>		
<b><u>THE SOUTH AFRICAN LAW COMMISSION'S PROJECT ON UNFAIR CONTRACTS</u></b>		
I	INTRODUCTION: THE CHALLENGE OF REFORM: THE SALC'S PROJECT 47 ON UNFAIR CONTRACTS	201
II	THE 'NO' ANSWER	203
III	RESPONSE TO THE 'NO' ARGUMENTS	204
IV	THE UNQUALIFIED 'YES' ANSWER	206
V	THE QUALIFIED 'YES' ANSWER	209
VI	THE 'OFFICIAL' STORY	211
VII	CONCLUSION	214

<b><u>CHAPTER 6:</u></b>	
<b><u>THE ETHICAL ELEMENT OF CONTRACT AND CONTRACTUAL JUSTICE</u></b>	
I	INTRODUCTION 217
II	THE NATURE OF THE ETHICAL ELEMENT OF CONTRACT 219
III	FALSE CONSCIOUSNESS AND THE LACK OF AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT 220
	(a) <i>Introduction</i> 220
	(b) <i>False consciousness in the critical law and psychology discourse</i> 221
	(c) <i>Lessons from empirical law and psychology</i> 232
IV	AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT: FREEDOM OF CONTRACT AND HUMAN DIGNITY 235
	(a) <i>Human dignity as the 'two-edged sword'</i> 237
	(i) Human dignity as empowerment (read traditional freedom of contract) 237
	(ii) Human dignity as constraint (read good faith in contract) 238
	(b) <i>Human dignity and freedom reconciled?</i> 240
V	REFLECTIONS ON CONTRACTUAL JUSTICE (UTOPIA) 247
VI	CONCLUSION 253
.....	
	ANNEXURE A 259
	BIBLIOGRAPHY 262
.....	

Notes:

- The thesis follows the style of the *South African Journal on Human Rights*.
- The thesis reflects the law as at 18 November 2005.