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.[1]

'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'[2]

[1] 'Fides' *Encyclopædia Britannica* from Encyclopædia Britannica Premium Service (available at <http://www.britannica.com/eb/article-9034191>)
[2] 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'[1]

In die hedendaagse, transformatiewe regsmilieu 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 bemoeienis van hierdie studie is 'n oortuiging dat die kontraktereg, sodanig toegewy aan bogenoemde uitbeelding, nie voldoende bemoeid 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 privaatreg 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-tipiese' posisies op die vlak van vorm en substansie. Op die substantiewe vlak, plaas Kennedy die teenstrydigheid as individualisme teenoor altruisme. Op die vorm vlak, bestaan die ideaal-tipiese posisies in 'n voorkeur vir reg in die vorm van reëls teenoor reg in die vorm van 'oop' standaarde.

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

[1] 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.

Sleutelterme:

kontraktereg, fundamentele teenstrydigheid, Critical legal studies, horisontale toepassing, goeie trou (bona fides), etiese element van die kontraktereg, openbare belang, gemenereg-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'[1]

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?'

[1] 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

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Notes:

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