

CHAPTER 1
INTRODUCTION

CHAPTER 1

INTRODUCTION

I INTRODUCTION: WHY IT IS NECESSARY TO ARGUE FOR CONTRACTUAL JUSTICE IN THE SOUTH AFRICAN LAW OF CONTRACT

In delivering a separate judgment in the now famous South African tenant/landlord case, *Brisley v Drotzky*¹ the late Judge of Appeal, Pierre Olivier, noted that: 'It is clear that our law finds itself situated in a developmental phase where contractual justice is emerging more than ever before as a moral and juristic norm of superlative importance.'² The majority of the Supreme Court of Appeal in this case held that a verbal agreement that had altered the provisions of an earlier written agreement, could not stand.³ This, according to the court, was the position because the written agreement contained a provision that all amendments to the original agreement would only be valid if also reduced to writing – a so-called non-variation or *Shifren* clause.⁴

The effect of the court's decision for Ms Brisley was that she, along with her ailing mother and young son, were evicted from their home. All because Ms Brisley had for a few months paid the rent after the contractually stipulated date and did not reduce to writing the agreement in terms of which Ms Drotzky orally allowed her to pay the rent after this written stipulated date.

¹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

² *Ibid* 29D-E. (Author's translation from the original Afrikaans).

³ *Ibid* 10H-19C.

⁴ *Ibid* 10E and 11F-H. The clause derives its name from the decision in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en 'n Ander* 1964 (4) SA 760 (A) where it was decided that a stipulation or condition in a written contract which provided that 'any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect', rendered the contract incapable of being altered verbally.

The court's decision, as so many before it, illustrates the hegemonic social consequences brought about by the fact that the freedom of contract doctrine and the black letter approach to the law of contract prevail absent of a sensitivity to both social context and the socio-economic outcome of their applications (a notion which may also be referred to as the justifiability (justness) of these approaches). This decision also emphasises the ever-widening gap between the law and justice and yet again shows how judges often prefer to cling to the law (rules) to the detriment of justice (the ethical).

The focus of this study is (the lack of) concern with contractual justice in the South African law of contract. I will argue here that this lack of a concern with contractual justice can be attributed to the lack of emphasis on the ethical element of contract, namely good faith. My argument implies that I believe that injustices are manifest in contract law and that there is a legitimate need for 'justice to be done' in contract.⁵

In support of the above contention, consider the following examples of unfairness / injustices in contract offered by The South African Law Commission in its discussion paper on unjust / unfair contract terms:⁶ In desperate need of a roof over their head, the head of a homeless family signs a lease which allows the landlord to unilaterally raise the rent without prior consultation with the tenant;⁷ an illiterate or uninformed person agrees to the jurisdiction of the High Court in a loan agreement, where the jurisdiction of the Magistrate's Court would have been sufficient;⁸ a purchaser of furniture on hire-purchase discovers well-after the purchase that the standard terms

⁵ As justice and fairness (as I use it here) are inseparable concepts, it may be said that there is a belief that a need for fairness in the law of contract exists and that unfairness is rampant in the operation of the law as it has been and currently still is.

⁶ SA Law Commission Discussion Paper 65 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1996).

⁷ *Ibid* par 1.3

⁸ *Ibid*.

of the hire-purchase agreement contains a waiver of all rights of the purchaser relating to latent defects.⁹ To that we can add the example of the hospital patient who went in for a simple operation and came out of hospital with a heel that would never again be corrected - only to be told by the Supreme Court of Appeal that he was not entitled to contractual damages because he had signed a contract indemnifying the hospital against all loss caused by negligence.¹⁰ These are but a handful of injustices and it is of course not possible to define every instance of contractual injustice.

The above examples indicate, however, that contractual injustices *exist* in the South African law of contract. That being the case, one would be in a position to argue that there is a need for transformation in the law of contract to address these injustices. However, a reading of the majority in *Brisley* reveals the considerable scholarly hesitancy in respect of taking the steps towards transformation and reform in the law of contract. It is certainly not heartily welcomed or even anxiously awaited by the majority of role players in this area of South African private law.

The Supreme Court of Appeal especially, clearly articulates its attempts to preserve the law of contract in an archaic pre-constitutional costume.¹¹ This costume consists almost entirely out of the material of the freedom of contract doctrine. The attempt to preserve it as such is articulated in dicta holding that ‘the *Shifren*-principle is “trite” and the question arises why, after almost forty years, it should be overthrown’¹² as well as the prevailing judicial view that it will be contrary to a

⁹ Ibid.

¹⁰ See the facts in *Strydom v Afrox Healthcare Bpk* (Case no 16946/98 Transvaal Provincial Division) par 10; *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) 26H-27H.

¹¹ See for example the majority decisions in *Brisley v Drotsky* (note 1 above) and *Afrox Healthcare v Strydom* (note 10 above).

¹² *Brisley v Drotsky* (note 1 above) 11E. (Author’s translation from the original Afrikaans).

‘controlled developmental approach’¹³ to suddenly afford judges a discretion to ignore contractual principles such as *pacta servanda sunt* when they regard those principles to be unconscionable or inequitable.

South Africa has undergone a constitutional transformation from a history of inequality, oppression, exclusion and an atrocious disregard for human dignity, to a morally responsible community that is required to be committed to conduct themselves in accordance with the fundamental values and ideals enshrined in the Constitution.¹⁴ The same conduct is required in the context of commercial dealings that occur under the umbrella of the Constitution between the members of such a morally responsible people. In the light of this assertion, a law of contract within a constitutional democracy that remains without a general equitable remedy and which does not reflect an emphasis on good faith as the ethical element of contract, appears untenable. In this regard, I believe that the supremacy of the constitutional values/ideals of, for instance, equality and human dignity in a contractual setting, will increasingly militate against the extremely liberal interpretation of the freedom of contract doctrine.¹⁵ These values also offer the tools for a reinterpretation of freedom of contract which would be more consistent with the value system embodied in the Constitution.

The duty to be concerned with and to live the values of the Constitution in order to contribute to the ongoing process of transformation is vested in the people of South Africa. The *enforcement* of these values is ultimately vested in our courts. In this study I will argue that when deciding cases

¹³ Ibid.

¹⁴ Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

¹⁵ Important contributions in this respect include, but is not limited to, CFC Van der Walt ‘Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?’, (2000) 1 *TSAR* 33-51; L Hawthorne ‘The Principles of Equality in the Law of Contract’ (1995) *THRHR* 58 and GF Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law’ (2004) 121(2) *SALJ* 395.

in the law of contract, our courts still continuously choose to look the other way. It is still held that we should not fix what is not broken, while the Constitution requires that we should realise the brokenness and continuously and untiringly at least attempt the fixing.

II AN ALTERNATIVE STORY OF CONTRACT LAW

In her introduction to an essay on the deconstruction of contract doctrine Clare Dalton wrote that: ‘Law like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority...’.¹⁶

The South African law of contract has been telling for centuries a grand story or narrative in which the central theme is that contracts freely and voluntarily entered into should be enforced and in which the central claim is that it is in the public interest (ie good) that individuals should be held to the contracts they have agreed to as competent legal subjects¹⁷ – even in circumstances when those contracts are deeply unfair and does not contribute to human well-being. The latter appears to be an element of the narrative which is often deliberately left out or ignored.

The freedom of contract grand narrative is justified by all sorts of explanations which continuously rely on a specific interpretation of historical developments of the South African law of contract, for instance whether or not we have or have not and to what extent, received rules into our mixed legal system in furtherance of the freedom of contract principle. Curiously enough, it always seems to be that we ‘historically received’ the rules in furtherance of freedom of

¹⁶ C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94(5) *Yale LJ* 997, 999.

¹⁷ See for instance *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 893I.

contract and never those curtailing it.¹⁸ This is the (political) story judges and jurists alike have elected to tell us, primarily because it fitted and still fits in so well with the grand narratives of other disciplines and served (serves) the status quo which they were (are) a part of equally well. It is this narrative which will be questioned in this study in order to open up the space for an alternative story of the South African law of contract.

Critiques which question the grand narrative are primarily criticised for their frustrating and undermining qualities which fail to provide a sustainable concept of true progression. This critique is founded in the argument that the prevalent perception is that it is difficult, if not impossible, to see a way out of the ‘oewerlose moeras van onsekerheid’ (boundless morass of uncertainty).¹⁹

But according to Dalton:

When we tell one another stories, we use languages and themes that different pieces of the culture make available to us, and that limits the stories we can tell. Since our stories influence how we imagine, as well as how we describe, our relationships, our stories also limit who we can be.²⁰

In its challenge of the grand narrative, this study attempts to (at least in part) offer an alternative story of the law of contract – a re-telling, therefore, to de-limit who we can be, with the focus on

¹⁸ One example is the decision in *Bank of Lisbon v De Ornelas* 1988 (3) SA 580 (A) where it was held that the equity remedy in contract, the *exceptio doli generalis*, was not received into and did not form part of the South African law of contract. The commitment to freedom of contract is also illustrated in *Brisley v Drotzky* (note 1 above) where the Supreme Court of Appeal held that the *Shifren* principle survived forty years of legal development and a constitutional transformation.

¹⁹ JC De Wet & AH Van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 83.

²⁰ Dalton (note 16 above) 999.

other truths of the South African law of contract which are often left untold. As such it is rather an attempt to reveal than to obliterate, rather a call to begin again than a claim that the end has come. This goal can however only be pursued by challenging the grand narrative of the South African law of contract, by criticising and questioning its meanings and by ‘reminding us that our legal categories are contingent and fluid, and that they can be reconstructed if found to rely on untenable and outdated conceptions of human nature, reason and truth.’²¹

This challenge of the grand narrative (telling of a different story) proceeds thus as critique. When choosing critique one is unavoidably drawn into the language of critique. On the other hand, one also engages with the language of the grand narrative in order to critique the grand narrative. CLS critiques share, in my opinion, significant strands of thinking with those who argue outside of its vocabulary in the law of contract for an equitable approach.²² The arguments of these ‘natural law’ scholars are not to be ignored but they appear to believe by and large that we can still know what the open-ended standards of contract mean – that we can determine a fixed meaning for

²¹ D Litow ‘Postmodernism without the Pomobabble’ (2000) 2(1) *Florida Coastal LJ* available at <http://www.fcsl.edu/academics/journal/volumethree/Litow.htm>.

²² Important contributions in this regard include, but is not limited to, L Hawthorne ‘The Principles of Equality in the Law of Contract’ (1995) 58 *THRHR* 157; L Hawthorne ‘Public policy and micro-lending – has the unruly horse died?’ (2003) 66 *THRHR* 116; K Hopkins ‘The influence of the Bill of Rights on the enforcement of contract’ (2003) 425 *De Rebus* 25; C Lewis ‘Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African Law of Contract’ (1991) 108 *SALJ* 249; J Lewis ‘Fairness in South African Contract Law’ (2003) 104 *SALJ* 340; GF Lubbe ‘*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg’ (1990) 1 *Stell LR* 7; GF Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law’ (2004) 121/2 *SALJ* 395; CFC van der Walt ‘Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontrakbedinge’ (1986) 103 *SALJ* 646; CFC van der Walt ‘Kontrakte en Beheer oor kontrakteervryheid in ‘n nuwe Suid-Afrika’ (1991) 54 *THRHR* 367; CFC van der Walt ‘Aangepaste Voorstelle vir ‘n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg’ (1993) 56 *THRHR* 65 and CFC van der Walt ‘Beheer oor onbillike kontrakbedinge – *quo vadis* vanaf 15 Mei 1999?’ (2000) 1 *TSAR* 33.

concepts such as reasonableness, good faith and the boni mores. Here the schools of thought diverge, because CLS does not believe that we can overcome the contradictions in order to arrive at universal meaning. The language of this text will, without doubt, reflect the tension between these schools but it will conclude in support of the critical argument.

This study wants to signify a new beginning – a transformation which always remains an ideal. As such it is an attempt to open up a space where the possibilities of who we can be is broadened by a new imagination influenced, as Dalton indicated, by the new stories we have to tell.

III APPROACHING THE FUNDAMENTAL CONTRADICTION: THE HISTORY OF FREEDOM OF CONTRACT AND CONTRACTUAL JUSTICE

In the previous section I have indicated that I will attempt in this study to challenge the grand narrative of the law of contract in South Africa. In order to challenge the grand narrative, I believe one first has to investigate the origins of the story by asking how the story became the grand narrative.

Towards the above, I will investigate in Chapter 2 the history of (the marginalisation of) equity in the law of contract. I will conduct this investigation through an evaluation of the legal systems from which South Africa inherited its contract law, namely Roman Law and English or Anglo-American Law. I will attempt to show how Roman law embraced the original ethical values of Greek philosophy in declaring the supremacy of the values of *iustitia* and *aequitas* in Roman contract law. It will be seen here that we have inherited from the Roman law the notion of the incidence of morality on contract law. I will then proceed to the emergence of English and Anglo-American contract law and will indicate here the importance of the equity approach in the English courts until the late eighteenth century. In addition, I will move to a discussion of the

reconceptualisation of contract law in the nineteenth century and aim to show how the law of contract became a tool in the hands of the market system with its concomitant commercial classes who believed that value could only be subjectively determinable.

This ‘functional’ approach to contract caused moral and ethical enquiries into the fairness of bargains to lose relevance. This led to an increased insistence on freedom of contract - the rise of the will theory that parties should be held to the bargains they freely and voluntarily entered into – as well as an insistence on clear and formally realisable rules which were believed to create certainty for market participants in relation to the outcome of their contractual disputes. I will conclude Chapter 2 with an indication of the divide between contract scholars who bought into this new approach as opposed to those who did not, as well as a discussion of the profound paradox that emerged in nineteenth century contract law as a result of the insistence on certainty and objectivity.

IV FORM, SUBSTANCE, THE FUNDAMENTAL CONTRADICTION AND THE LAW OF CONTRACT

In Chapter 3, I will engage with the multiplicity of the dualities of life which contract law reflects. We might refer to these dualities as those of form and substance, individualism and altruism, rules and standards, public and private, objective and subjective. For this reason it is helpful to conduct the critique, as Kennedy has done, on two axes, namely one of form and one of substance.²³

²³ D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard LR* 1685. For examples of dualities in contract law other than the one of form and substance I employ here, see Dalton (note 16 above) 1000.

I will argue (relying on Chapter 2) that the jurisprudence of contract law concerned with the ideological convictions about the influence of morality on contract law has been significantly divided since the mid-eighteenth century and that this discourse in itself vividly reflects what Kennedy has called the fundamental contradiction.

The fundamental contradiction is the irresolvable tension both among and within us between acting purely out of self-interest and having regard for the interests of others in one's actions.

Kennedy noted firstly, that it is:

true that everyone is to some degree ambivalent in his feelings about these substantive conflicts. There are only a few who are confident either that one side is right or that they have a set of meta-categories that allow one to choose the right side for any particular situation. Indeed, most of the ideas that might serve to dissolve the conflict and make rational choice possible are claimed vociferously by both sides.²⁴

Between the two ideological extremes, there has and thus will increasingly be a plethora of intermediary positions, but the different ideologies/paradigms precipitate clearly into two main streams or ideals.

On one side (the privileged side) we find the widely popular program expressed as an ideal to maintain the law of contract as the formalistic system of rigid, 'value-neutral' rules, to be applied in vacuo of social reference. The main concern of scholars who position themselves within this paradigm is to steer the contractual ship of moral 'neutrality' through the stormy and uncharted

²⁴ Kennedy (note 23 above) 1710-1711.

waters of increased insistence on social context.²⁵ In this course the reliance is primarily on a false sense that the ‘neutral’ application of the rules creates, guarantees and perpetuates certainty. Kennedy claims convincingly that there exists a dispositional link between this belief in rules (on the form level) and the belief in and adherence to individualism (on the substance level).²⁶ To put it differently, the commitment to so-called value-neutral rules is in and of itself a political position - one that we have come to term and refer to as typically liberal. Many scholars have pointed out repeatedly that this political position often masks its specific views on law and morality behind a claim of neutrality.²⁷

The conflicting ideal is to sink this contractual rule-Titanic in order to wake its crew up to the social context of contract, simultaneously reminding it that this is not new – that the law was and always will be inherently value-laden and politicised.²⁸ To the minds of those who position themselves within this paradigm, the sinking of the ship can only be achieved by following a standard-orientated approach, as opposed to a rule-based approach, in the adjudication of contractual disputes. In short, it may be termed the quest for contractual justice.²⁹ On a substance level, Kennedy has shown that the belief in a standard-orientated approach corresponds with the

²⁵ See, for instance, JC De Wet & AH Van Wyk (eds) *De Wet en Yeats Die Suid-Afrikaanse Kontrakereg en Handelsreg* (1978); AJ Kerr *The Principles of the Law of Contract* (6ed) (2002); the majority decision in *Brisley v Drotzky* (note 1 above); the decision in *Afrox Healthcare Bpk v Strydom* (note 10 above); the decision in *South African Forestry Co Ltd v York Timbers* 2005 (3) SA 323 (SCA); D Hutchison ‘Non-variation clauses in Contract: Any Escape from the *Shifren* Straightjacket?’ (2001) 118 *SALJ* 720 and for a more ‘masked’ argument DW Jordaan ‘The Constitution’s impact on the law of contract in perspective’ (2004) 1 *De Jure* 58.

²⁶ Kennedy (note 23 above) 1685.

²⁷ K van Marle & D Brand ‘Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha* (2001) 12(3) *Stellenbosch LR* 408, 412.

²⁸ A Cockrell ‘Substance and Form in the South African Law of Contract’ (1992) 109 *SALJ* 40.

²⁹ CFC van der Walt ‘Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg’ (1993) 56 *THRHR* 65, 66 and *Brisley v Drotzky* (note 1 above) 29D-E and 33C.

belief in altruistic values³⁰ and to this extent the quest for contractual justice is often seen as an essentially altruistic project – a project of the left.

The extreme forms of the aforementioned ideologies³¹ form the parameters of the continuum/duality along/in which issues of morality are evaluated in the (South African) law of contract. These extreme political ‘forms’ point out that we are fundamentally faced with a duality on both (and not exclusively³²) the levels of substance and form. Critics have noted that certain common law moral concepts (like, for instance, the *boni mores* and the public interest) have a distinct dualistic character.³³ The identification of this dualism and the exposure of the indeterminacy that it generates, is a common trend in critical discourse.³⁴ Dalton has pointed out that ‘[l]iberalism’s obsession with, and inability to resolve, the tension between self and other suggests that our stories about politics, policy, and law will be organized along dualities reflecting this basic tension’.³⁵

³⁰ Kennedy (note 23 above) 1685.

³¹ Individualism / Collectivism; Rules / Standards.

³² See Dalton (note 16 above) 1000 who points out that contract law is shot-through with dualities, for instance, the dualities of private and public, objective and subjective.

³³ JM Feinman ‘Critical Approaches to Contract Law’ (1983) 30 *UCLA LR* 829, 833.

³⁴ D van der Merwe ‘The Roman-Dutch Law: From virtual reality to constitutional resource’ (1998) 1 *TSAR* 1, 3 n7 and the authority cited there.

³⁵ Dalton (note 16 above) 1007.

In Chapter 3 I will suggest, following Kennedy, that in the South African law of contract ‘individualism [and the commitment to rules] is the structure of the status quo.’³⁶ I have alluded to the fact that the majority of South African contract scholars position themselves on the individualism/rules side of Kennedy’s form/substance continuum and so causes the imbalance in the South African law of contract with regard to moral influence on contractual agreements. The ill-represented nature of the other side of the continuum, in my view, not only creates but also continuously widens the gap between equity (justice) and the law (of contract) and contributes to the false impression that the law of contract is inherently politically neutral and only wears a value orientated mask in the most extreme of circumstances.³⁷ But as Dalton indicates, a duality, such as the ones we encounter in the law of contract, inevitably favours one of its poles politically, hence the hierarchy and its concomitant dominant position emerges.³⁸

A superficial reading of the standard textbooks does not however reveal the crisis in the law of contract.³⁹ The standard texts portray contract law as a closed set of non-controversial rules with their own internal logic which apparently provide clear answers in all given cases. Any policy justifications for these rules are easily ‘brushed aside’ by the employment of a politic in favour of

³⁶ Kennedy (note 23 above) 1775. See also V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis UP 15 who is of the opinion that ‘South African judges prefer rules, not standards; certainty, not fairness; individualism, not altruism. Mostly, these value judgments are made under the guise of inherently true, objective and selfexplanatory rules, the foremost of which is perhaps the sanctity of contract in the sense that consenting adults should be kept to their bargains, whatever they may be.’

³⁷ Cockrell (note 28 above) 40.

³⁸ Dalton (note 16 above) 1000.

³⁹ Cockrell (note 28 above) 40 n1 refers to the following examples: De Wet & Van Wyk (note 19 above) and RH Christie *The Law of Contract in South Africa* (1981). It should be noted that the latter work is now in its fourth edition.

freedom of contract and maintaining a separation between law and morality.⁴⁰ As Cockrell puts it: ‘the hard edges of legal policy have been smoothed away by the sandpaper of legal doctrine’.⁴¹ Or at least, this seems to continuously be the project.

Van der Walt explains that the inherent slowness of the law, accompanied by the familiar cautious approach of lawyers alike, contribute to the fact that, even in this day and age, the majority of scholars is still convinced that considerations of contractual equity have no role whatsoever - or at least no direct role - to play in the terrain of contract law practice.⁴² In pointing this out, Van der Walt confirms the suspicion that most contract lawyers simply don’t like a nagging, sentimental law of contract which speaks in a strange tongue and insists on ‘abstract’ things like justice, fairness and good faith. My suspicion is that the aversion is founded in fear: fear of the anarchy⁴³ its ‘uncertainty’ may announce, fear of how it will ultimately show the falsity of positivistic ‘certainty’, an (unconscious/subconscious) fear of a commitment to justice, and ultimately the fear that it will transpire that contract doctrine can never live up to its promise to bridge ‘the source of our deepest anxiety, the chasm between self and other.’⁴⁴

The possible reasons for the perpetuation of the portrayal (privileging) of the classical image of the law of contract and the disregard for the fundamental ambiguities existent therein, are virtually limitless. The traditionalists are of the opinion that the merit in the perpetuation of the privileging of the traditional program can be explained rather easily with emphasis on the necessity thereof: ‘One can hardly imagine the commercial consequences, the legal uncertainty

⁴⁰ Cockrell (note 28 above) 40.

⁴¹ Ibid.

⁴² Van der Walt (note 15 above) 36.

⁴³ See *Brisley v Drotzky* (note 1 above) 26A where the majority holds that a dilution of the *Shifren* rule will cause immense legal and commercial uncertainty, not to mention the concourse of litigation.

⁴⁴ Dalton (note 16 above) 1002.

and the evidential problems that will emerge.⁴⁵ (That is of course the necessary anarchy that will follow should a value-orientated approach be adopted.)

On the opposite side of the continuum the justification by the critics in favour of the adoption of a value-orientated approach, is expressed in the following words of Olivier, JA: ‘it [legal uncertainty, evidential difficulty etc] is the price that a virile body of law, which values equity just as important as legal certainty, must pay’.⁴⁶

In order to irradiate what has been suppressed, this study necessitates undermining of the foundations of the traditional system as well as illumination of the plethora of inconsistency and falsity inherent therein, for ‘it is only once the belief structures which pervade legal and social consciousness - the ideology which persuades us that prevailing social arrangements are necessary and natural - are removed, that society can be transformed’⁴⁷ and as Dugard remarked: ‘Absence of criticism does not promote infallibility [it] merely encourages belief in infallibility with all its attendant dangers’.⁴⁸

Towards this irradiation, I will emphasise in Chapter 3 the merits of the underprivileged values of the law of contract. Here I will rely on the sociological understanding of human nature and the altruist perspective that is concerned with contractual justice. Sociologists have long rejected the atomistic view of man put forward in the seventeenth and eighteenth centuries.⁴⁹ Selznick argued that we should realise that society is not made up out of ‘preformed, wholly competent

⁴⁵ The majority in *Brisley v Drotzky* (note 1 above) 11F.

⁴⁶ *Ibid* 31C (Author’s translation).

⁴⁷ Feinman (note 33 above) 856-857.

⁴⁸ J Dugard ‘Judicial Process, Positivism and Civil Liberty’ (1971) 88 *SALJ* 181.

⁴⁹ P Selznick ‘The Idea of a Communitarian Morality’ (1987) 75 *California LR* 445.

individuals endowed by nature with reason and self-consciousness.⁵⁰ We should bear in mind that ‘in the beginning is society, not the individual’.⁵¹

Selznick also points out that sociology recognises that ‘man as a social being depends on others for psychological sustenance, including the formation of personality.’⁵² This is the notion of ‘the implicated self.’⁵³ The morality of the implicated self builds on the understanding that our obligations (including our obligations of a contractual nature) flow from our identity (which is influenced by our experiences in society) and our relatedness with that society, rather than from consent or more importantly for current purposes, from consensus.

In the law of contract (some of) these obligations are founded (only) in the non-contractual element of contract. These non-contractual obligations reach back, beyond consent, to more fundamental and less voluntary commitments such as equity, reasonableness and the requirement to act in good faith. As Selznick put it: ‘[t]he point is ... that some kinds of obligation are not founded on consent⁵⁴ and ... these are the more solid building blocks of a moral order.’⁵⁵

Gordley has pointed out that promises (the basis of consensus) can no longer be taken to be inherently virtuous, that is, equitable, reasonable or made in good faith, for the simple reason that they do not have to be.⁵⁶ When a promise (whether oral or written) however no longer reflects the above-mentioned values it becomes morally empty and only instrumental or functional.

⁵⁰ Ibid 446.

⁵¹ Ibid 447.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See Selznick (note 49 above) 451 where it is indicated that ‘consent suggests agreement, bargaining, reciprocity and specificity.’

⁵⁵ Ibid 452.

⁵⁶ J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 162.

Where the enforcement of such a ‘promise’ results in human suffering, I would argue that it should no longer be enforced.

Throughout the course of Chapter 3, in support of the theoretical argument, I shall focus on critical court decisions in the South African law of contract to support my general argument that an individualism/rule bias is inculcated in the South African law of contract but that that does not mean that we have completely annihilated all of the altruistic, standard-orientated norms in contract law.

V THE CONSTITUTION, TRANSFORMATION AND CONTRACT LAW

In support of my general argument for transformation, I will argue in Chapter 4 that the Constitution attempts to provide us with the ethics of an open and democratic South Africa which we choose to live and deal in. It also marks a significant break with our Apartheid-past and therefore enjoins transformation in all its many facets.

The constitutional system of competing values has as its very origin values very similar to those which have been continuously marginalised and suppressed in the South African law of contract. I will argue here specifically that a transformative reading of the Constitution can facilitate the inevitability of legal reform in the area of moral influence on contracts. This reform is inevitable in the sense that the continued application of a rigid system of rules, devoid of any reference to social context or a true value sensitivity, brings the law of contract in conflict with its broad legal context where the emphasis is increasingly being placed, due to the birth of the constitutional rule of law, on a system of equally competing values as opposed to a ‘value neutral’ system favouring freedom of contract.

I will support, to this extent, a reading of the Constitution which argues for a resistance against different forms of horizontal application because it creates the danger of becoming a politic which in itself can resist transformation. Here, I rely on the work of Johan van der Walt⁵⁷ and Lourens du Plessis.⁵⁸ I will argue that the insistence on the objectivity/subjectivity and the private/public divide in contract law has become senseless. Part of this aim is to show that the system's claim of devotion to objectivity and privity is in any event false.

I believe that a true or real commitment to the values which became marginalised as a result of the exercise of judicial discretion consistently in favour of individualism and rules, can be afforded the opportunity to compete at equal level in the contract continuum with the values that have at all cost been privileged in the past. Having said this, my discussion of post-1994 decisions in the Supreme Court of Appeal will show that this court still does not take its constitutional duty to transform the law and to enforce the values of the Constitution seriously. I will proceed to argue that it is essential for the judiciary to realise that the Constitution requires political decision-making other than the traditional commitment to liberal politics masking as a claim to neutrality but will conclude that our courts will probably never reach the point where they apply fairness (informed by the Constitution) directly to the law of contract.⁵⁹

⁵⁷ J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 341; J van der Walt 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism' (2003) 1 *Law, Social Justice & Global Development Journal* (available at <<http://elj.warwick.ac.uk/global/03-1/vanderwalt.html>>).

⁵⁸ LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12(2) *SAJHR* 214; LM du Plessis 'Lawspeak as text ... and textspeak as law: Reflections on how jurists work with texts - and texts with them' (2001) 118 *SALJ* 794.

⁵⁹ Van Marle & Brand (note 27 above) 415.

The new constitutional ethos is substantially different from the ethos which informed the determination of the legitimacy of contractual behaviour in the past. It is an ethos which requires us to embrace transformation and be sensitive to difference in all its manifestations. This requires a non-reductive commitment to the dynamic nature of concepts such as good faith and contractual justice, for this is, in my opinion, the only way in which the law can begin to contemplate the accommodation of the constitutional ideal of respect for difference.

VI AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT

Finally, I shall argue that once we live up to the possibility of a value-sensitive law of contract, a re-emphasis on the ethical element of contract is required in order to aspire to a(n) (more) equitable law of contract in South Africa, or in other words, to resist an iniquitous one. The ethical element of contract is said to be contained in the good faith requirement.

In Chapter 5 we will see that throughout the world, comparative jurisdictions have, in some or the other form (primarily legislation) re-emphasised and accommodated good faith as the ethical element of contract. Here I shall investigate the South African Law Commission's project on unfairness in contract law⁶⁰ and will support open-ended legislation introducing the ethical enquiry back into the law of contract. I will also problematise the fact that Parliament is currently not dealing with this project and will ask whether this non-concern with the SALC's project constitutes in itself resistance to transformation.

In Chapter 6 I shall argue that good faith as the ethical element of contract is an altruistic rather than an individualistic concept, because good faith relies, inter alia, on the concept of relation and the interdependence of a society. In its emphasis on the ethical element of contract my proposal

⁶⁰ SA Law Commission Project 47 (note 6 above).

draws on the principle of sociological jurisprudence that everything in society is interdependent, the one conditioned by the other and how, in the continuities of life, ‘the primordial sources of obligation and responsibility may be found.’⁶¹ By re-emphasising the ethical element of contract I hope to show that every person is simultaneously (although with varying content) responsible for the welfare and advancement of the self *and* for that of other contracting parties in the community and that this responsibility requires ‘taking into account people’s entire lives, not just their narrow economic roles.’⁶²

I will argue that the phenomenon of false consciousness has played a major role in the non-concern with good faith and contractual justice. Here, I shall focus on the arguments of critical law and psychology and will also investigate critical law and psychology’s argument that there exists a connection between a person’s experience of wellness and her experience of justice. I also attempt to show that the teachings of main stream psychology in itself has assisted in conjuring a false consciousness regarding the legitimacy of law in general. I also refer briefly to the work of empirical contract theorists who teach us that the world of doctrine is not the world we live in.⁶³

The law of contract in South Africa cannot begin to pursue the ideal of contractual justice without a renewed emphasis on the ethical element of contract. For this to happen we will have to resist complacency, open our eyes to injustice and actively strive towards a better future. It is true that contractual justice is never an achieved, fixed position in space and time. But at the very least a re-emphasis of and a commitment to good faith in contract can attempt to strive more rigorously to this ideal through transformation.

⁶¹ Selznick (note 49 above) 448.

⁶² Van der Walt (note 15 above) 33; Feinman (note 33 above) 859.

⁶³ S Macaulay ‘An Empirical View of Contract’ (1985) *Wisconsin LR* 465.

In contract, the ethical process entails the commitment to the creation of relations concerned with the exercise of freedom of contract in good faith and the ideal of justice. My focus is on how contractual behaviour can (should) be ‘shaped’ in order to conform to the value system enshrined in the Constitution and hence be/become responsible or ethical. Good faith and a doctrine of contractual justice should accommodate, and their legitimacy should be consistently tested, against these values/ideals for them to be the vehicles with which the law of contract become infused with the ideals of the Constitution.

In my view, an ethical approach allows for increased flexibility as well as better guidance than sets of rigid rules and directives attempting to afford content to the constitutional values in a contractual setting. The provision of neat and tidy definitions is contrary to the project and inappropriate - for different reasons, but primarily because I believe in the following words of Corbin JA:

the “objective theory” is based upon a great illusion – the illusion that words, either singly or in combination, have a “meaning” that is independent of the persons who use them. It is crudely supposed that words have a “true” or legal meaning (described as “objective”), one that all persons of whatever race, origin or education are bound to know, and in accordance with which the law requires them to perform and to accept performance...⁶⁴

Contract law can never be allowed to lose sight of the ideal of justice. It should always remain self-reflexive and open in order to continue to accommodate this ideal of (contractual) justice. I agree with Du Plessis that the Derridean suggestion that concepts such as good faith and justice are ‘too

⁶⁴ AL Corbin *Corbin on Contracts* (1962) 106 quoted by Jansen JA in *Saambou Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 996D-G.

abysmal to become a text,'⁶⁵ does not mean that we cannot say anything about them; 'on the contrary, we must speak more and more about them.'⁶⁶ Du Plessis warns that to make sense of the project of constitutional interpretation, we will have to free ourselves from the illusion of 'an "only one meaning" syndrome'⁶⁷ which is characteristic of liberalist readings.

The study concludes that it is impossible 'to draw lines at ordained points on axes whose poles exist only in relation to one another'⁶⁸ and say: 'Here, at this very point, exists the acceptable balance of doctrine and reality, here we find contractual justice'. In this sense it is impossible to resolve the fundamental contradiction. Neither pole/image of/in the duality separately, nor both poles/images together provide an adequate basis for the South African law of contract. As Feinman indicates: 'Separately each generates incomplete and inconsistent positions... Together the two are fundamentally in conflict. ...[T]he conflict constitutes a contradiction, an irreconcilable opposition.'⁶⁹

Finally, I will argue that the above is not necessarily bad news and especially, that it does not provide us with an alibi to do nothing to increase our chances of a better law of contract. I will support and emphasise in this regard the transformative value of utopian thinking. Utopian thinking is particularly relevant in contract law, because contract as an element of our daily lives, reminds us constantly that we do not live in Utopia. This again, need not necessarily render us paralysed, but can instead help to inform our immediate actions through imagining a different order.

⁶⁵ LM du Plessis 'Lawspeak as text ... and textspeak as law: Reflections on how jurists work with texts - and texts with them' (2001) 118 *SALJ* 794, 810.

⁶⁶ *Ibid.*

⁶⁷ LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12(2) *SAJHR* 214, 218.

⁶⁸ Dalton (note 16 above) 1002.

⁶⁹ Feinman (note 33 above) 857.

We may not yet know what exactly ethical behaviour in contractual context is, neither may we ever be able to fully describe it. But I believe that the status quo, to the extent that it does not reveal a commitment to the ethical element of contract, to the extent that it legitimises and endorses selfish, amoral behaviour, it is unacceptable. It is only in relation to this opposite (as opposite and unacceptable) that we are able to locate a better law of contract.

CHAPTER 2

THE JURISPRUDENTIAL HISTORY OF

CONTRACTUAL JUSTICE:

A HISTORICAL OVERVIEW OF THE ORIGIN

AND MARGINALISATION OF FAIRNESS IN THE

LAW OF CONTRACT

CHAPTER 2

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

‘For three and a half centuries, one of the most important facts about... legal
history has been that something is missing.’¹

I INTRODUCTION

This chapter investigates the ways in which the concept of equity in contract law was dealt with in the legal systems from which South Africa inherited its general principles of contract law. These legal systems are Roman law and English (or Anglo-American) law.

In respect of Roman law, I aim to show firstly the Aristotelian influence on the formulation of Roman law. I will also indicate that the Roman law of contract accommodated the concept of equity in contract as it developed into a sophisticated legal system. This was achieved through the incorporation of, on the one hand, the *exceptio doli generalis* (applicable to contracts from the strict law) and, on the other hand, the *negotia bona fide* in civil law. In both these instances the *bona fides* that had to be interrogated when these contracts were at issue, was accepted to operate as an open concept, with only contingent (and thus uncertain) meaning.

¹ J Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 9.

In respect of English law, I will describe the early eighteenth century accommodation of equity in English and American law. The accommodation of equity in the law of contract in these legal systems was made possible through the theory and general modernist belief that value was objectively determinable. The meaning of contractual equity in these systems was largely dependant on the general convictions of the community. These convictions directly informed the law to a significant extent through the jury system. The general convictions of the community, in turn, were greatly influenced by the morality imposed by the power of the church on the Renaissance human of the late seventeenth and eighteenth century.

In the nineteenth century, equity was excluded from contractual disputes due to the change in general beliefs about the determination of value and the development of a market economy. The value of contractual consideration was now believed to be only subjectively determinable and as a result the law of contract became an instrument to enforce contractual bargains without visiting the fairness of the bargain. The adjudication of contractual disputes became highly formalistic and positivistic and without reference to general social context. The general belief was held that it would be contrary to the market system and its need for commercial certainty, to make contracts subject to equitable considerations.

The paradox this chapter aims to expose is that the nineteenth century claims of certainty found in a subjectivist theory of contract, were false, precisely for the reason that the aspiration to an objective will theory of contract made each and every contract unique. It allowed parties to make their own law in a contractual agreement and thus the law of contract as a body of law was pervasively uncertain and treacherous. I conclude by arguing that contract law has always been uncertain. The popular historic reasons for the non-accommodation of a doctrine of contractual justice in South African law then emerge as the result only of a political privileging of these reasons, above reasons in support of such an equitable approach to contract.

II ARISTOTLE AND EARLY ROMAN CONTRACT LAW

It has become fairly generally accepted that Greek philosophy and specifically the work of Aristotle, had a substantial impact on the formulation and development of Roman law and legal concepts.² I believe it is meaningful to start a discussion on the philosophical history of contractual equity by briefly analysing the Aristotelian concepts relevant to the formulation of early contract law by the Romans, much of which was later received into the South African law of contract. This is necessary because ‘our modern legal doctrines were founded originally on philosophical ideas discarded long ago’³ and if we are at all to understand what is wrong with or missing from the law of contract of the twenty first century, we should at least try to remember what it was like before.⁴

Gordley indicates that contract doctrines developed around three virtues originally described by Aristotle.⁵ These virtues were promise-keeping, commutative justice, and liberality. Thomas’ reading of Aristotle observed that by making a promise (the foundation of a contract), a person could exhibit either an act of liberality or an act of commutative justice.⁶ Thomas recognised that a contract could violate the equality required by commutative justice which is a notion that bears close resemblance to what we refer to today as unequal bargaining power. He also indicated that certain contracts could be defined in relation to how they constitute either acts of liberality or

² See D Van der Merwe ‘A rhetorical-dialectical conception of the common law – Aristotelian influence on the genesis of Roman legal science’ (2002) 1 *JSAL* 77, 98. In this article Van der Merwe takes issue with Aristotle’s work *Topica* and its influence on Roman law traditions. The author concludes that it is rather Aristotle’s dialectics than the dialectics of Cicero’s *Topica* which is reflected in the ways the Roman jurists studied and practiced law.

³ J Gordley (note 1 above) 9.

⁴ *Ibid.*

⁵ *Ibid* 10.

⁶ *Ibid.*

acts of commutative justice.⁷ What is interesting and essential to note at this point is that Aristotle linked the virtue of telling the truth with the characteristic of being equitable. In his discussion of the truthful man Aristotle indicates the connection as follows: ‘But such a man would seem to be as a matter of fact equitable. For the man who loves the truth, and is truthful where nothing is at stake, will still more be truthful where something is at stake.’⁸

Gordley shows that Aristotle makes it quite clear that the person who breaks his word, does not only lack the virtue of telling the truth but, where he breaks his word in matters regarding justice and injustice, he also lacks the virtue of commutative justice.⁹ For Aristotle it seems then that the virtue of telling the truth and keeping one’s promises are inevitably linked with the virtue of commutative justice – for Aristotle promises (contractual undertakings) are inherently virtuous. Thomas was of the opinion that promises were to be kept because of the moral law or natural law governing them. He however added certain qualifications in order for a promise to be binding by natural law.¹⁰

Thomas described promises as ‘permitting a certain order to be established in which one person’s actions are directed to the benefit of another’.¹¹ He also added that for a promise to be binding it must be communicated by words or clear signs. A promisor could also only be bound to his promise under circumstances in which he intended to be bound by it.¹²

⁷ Ibid.

⁸ *Nicomachean Ethics* iv. Vii. 1127^a - 1127^b as quoted in Gordley (note 1 above) 10–11.

⁹ Gordley (note 1 above) 11.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 12.

As already indicated, Thomas showed that a party could exercise one of two Aristotelian virtues when she makes a promise: commutative justice or liberality. Once determined it is the categorisation of the transaction which determined the obligations of the parties.¹³ Commutative justice was served in voluntary transactions where the amount necessary to restore equality between the parties was taken from the party who had ‘too much’ and was given to the party who had ‘too little.’¹⁴ Commutative justice in contract therefore requires a commitment to equality.¹⁵ Thomas explained that to sell a thing at an unjust price or to lend at usury, violates the equality between the parties and so trumps commutative justice.¹⁶ These contracts were considered invalid, because they did not conform to the moral law which a person observes when exercising virtue.¹⁷

The philosophy of Aristotle influenced the development of Roman contract law in a variety of ways, but as Gordley indicates, the Romans were not interested in building theories from ultimate principles but rather in analysing particular legal problems.¹⁸ Therefore, although the Romans referred to promises, consent and agreement they did not use these principles to determine when a contract was binding.¹⁹ The example offered by Gordley to emphasise the point, is that of *laesio enormis*. This was a remedy available in Roman Law to a contractual party who had been prejudiced by an unequal exchange and allowed the party who had sold land at less than half the just price of the land, to demand from the buyer that he either rescind the sale or pay the rest of the price. Gordley indicates that the Romans did not attempt to explain the remedy in terms of a

¹³ Ibid.

¹⁴ Ibid 13.

¹⁵ Ibid 14.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid 30 and 32.

¹⁹ Ibid 32.

virtue of commutative justice or a principle of equality in exchange.²⁰ Nevertheless, the Aristotelian virtue of commutative justice was served by the Roman remedy of *laesio enormis*, which, interestingly, has been long-expelled from the South African law of contract.²¹

III THE (ARISTOTELIAN) VALUES UNDERLYING ROMAN CONTRACT LAW

(a) *Introduction*

It is equally important to investigate how the Romans (under the influence of Greek philosophy) treated morality in contract law. Here the significance of the enquiry lies in the (expression of) values that have determined the *bona fides*, *boni mores* and the public interest in the law of contract through the ages. It will be seen that the contemporary tensions between standards (like fairness) and rules (like *pacta servanda sunt*) present themselves in the South African law of contract still in the context of these elements as the determinants of the lawfulness validity requirement of our law of contract.²²

The values underlying the Roman law (of contract) is of primary importance in this investigation, for these values (not in terms of their content, but rather in terms of their existence within the law) remain to figure in the South African law of contract as a result of the process of reception. Although there is no clarity as to exactly which values of the Roman law of contract have

²⁰ Ibid 33.

²¹ See the discussion of the decision in *Tjollo Ateljees (Eins) Bpk v Small* 1949(1) SA 856 (A) in Chapter 3.

²² CFC Van der Walt 'Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontrakbedinge' (1986) 103 *SALJ* 646.

survived the reception²³ there is a measure of unanimity that at least the fundamental values of Roman law, did in fact survive the reception.²⁴ The South African law of contract has however been influenced extensively also by Anglo-American law and it is still dominated by the nineteenth century English interpretation of contract referred to as the will theory of contract. The extent to which this domination has caused a suppression of Roman values in the South African law of contract, remains significant and cannot be underestimated.

In what follows I investigate the fundamental values of Roman law, namely *aequitas* and *iustitia* and ways in which they influenced the formulation of Roman contract law.

(b) *Iustitia* (justice) in Roman contract law

In the days of ancient Rome, when it still existed as a small and intimate community of peasants, contracts were enforced strictly in accordance with their terms according to the ideological convictions underlying the maxim *pacta servanda sunt*.²⁵ A promise was a promise and once a person has entered into a contract in accordance with the prescribed formalities, he was unconditionally bound to perform in accordance with its terms. Even contemporary defences

²³ See for instance the controversy relating to the question whether or not the *exceptio doli generalis* was received into the South African law of contract. In *Weinerlich v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation* 1947 1 SA 514 (A) and *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) it appeared that the judiciary accepted that the *exceptio doli generalis* was received from Roman law into the South African law, but in *Bank of Lisbon & South Africa v De Ornelas* 1988 3 SA 580 (A) the Appellate Division found that the *exceptio* was ‘a defunct anachronism’ which never formed part of the South African legal system. For a more detailed account of the annihilation of the *exceptio doli generalis* from the South African law see further Chapter 3.

²⁴ For the sake of clarity, I have to point out once more that I mean to refer here to the existence/accommodation of these concepts in the law and not to their Roman law content or meaning.

²⁵ HR Hahlo ‘Unfair contract terms in civil-law systems’ (1981) 98 *SALJ* 70.

such as duress and fraud, were not seen as excuses to escape a contract.²⁶ As Hahlo puts it: ‘The Roman Shylock was entitled to his pound of flesh’.²⁷ Aquilius similarly sets out the initial position:

...Roman law originally laboured under the tyranny of the word and the rule of formalism. It attached legal consequences to perceptible forms and the spoken word and ignored motives and other inner processes such as volition.²⁸

As Rome however started to develop into a sophisticated people, this position gradually started to change.²⁹ The introduction of the office of the praetor reflected the increasingly transforming Roman thought concerning law. Through the office of the praetor an equity based approach started to develop and this was gradually incorporated into the law. Equitable remedies such as *dolus*, *metus* and *error* followed and in the classical and post-classical Roman law the principles of good faith carried increased weight in the interpretation of the enforceability of contract.³⁰

²⁶ Ibid 71.

²⁷ Ibid.

²⁸ Aquilius ‘Immorality and Illegality in Contract’ 1941 *SALJ* 337 at 339.

²⁹ For a detailed account of the development see MJ Schermaier ‘*Bona fides* in Roman contract law’ in R Zimmermann & S Whittaker S (eds) *Good faith in European contract law* (2000) 65.

³⁰ Hahlo (note 25 above) 71. It is worthwhile to point out that Hahlo describes these defences as *equitable* defences whereas today they commonly resort under defences based on the negation of the will theory of contract. *Dolus*, *metus* and *error* are seen as factors influencing the consensus of the parties and as such are not equitable defences, even though they clearly have their origin in Roman conceptions of fairness in the law of contract. Van der Walt in CFC Van der Walt (note 22 above) 658 shows that the problem of contractual lawfulness (or fairness) is handled indirectly, via the detour of legal constructs imposing on the will theory of contract. In my opinion, there is once again a politic here: If we were to keep terming these defences ‘equitable remedies’, they would clearly not be legitimate in liberal politics with its emphasis on individual autonomy or then the ‘will’ of the parties. But the problem is more complex: the naming of these defences as defences negating the will of one of the parties serves the liberal ideology in that they allowed liberal judges to hold simultaneously that these defences already are ‘equitable’ in themselves. This is clearly employed as rhetoric to

The principles of *iustitia* and *aequitas* formed part and parcel of this element of good faith in contract and the three concepts began to function as dominant standards in the law of contract.

The famous jurist Cicero, described the Roman concept of *iustitia* as follows: ‘This disposition (*animi affectio*) which urges that each should be granted his own, and which munificently and fairly protects the community of the human alliance is called *iustitia*.’³¹

Cicero’s conception of *iustitia* reveals strong connections with the conceptions of the natural law. According to Cicero *iustitia* is located in nature, it is a description of morally correct and virtuous conduct in accordance with the natural law and arise out of a practical application of the *ius naturale*.³² Van Zyl’s interpretation in this regard is as follows: ‘Cicero hence sees justice as a virtue and attribute which is as far-reaching as nature and natural law itself and which provides a foundation for the relationship between man and man³³ and that between man and God.’³⁴ *Iustitia* is seen as the ultimate or highest value - ‘the sovereign mistress and queen of all the

resist additional intrusions of equity. See the South African Law Commission Report Project 47as discussed in Chapter 5.

³¹ Cicero *De finibus bonorum et malorum* 5.23.64 as quoted by Wethmar in MM Wethmar *Die waardes onderliggend aan die Romeinse regstelsel* (2002) Unpublished MA dissertation University of Pretoria (Original on file with author) 3. This description of *iustitia* by Cicero is similar to its formulation by Plato and Aristotle.

³² Wethmar (note 31 above) 4.

³³ This part of Van Zyl’s commentary on Cicero strongly reminds of the now famous passage from the judgment of Stratford CJ in *Jajbhay v Cassim* 1939 AD 537, 544: ‘...and public policy should properly take into account the doing of simple justice between man and man.’

³⁴ DH Van Zyl *Justice and equity in Greek and Roman legal thought* (1991) 78.

virtues.³⁵ Cicero described good faith as the foundation of justice³⁶ and for him the one could not be achieved without the other.³⁷

The practical application of iustitia is elaborated upon in Cicero's *De officiis*.³⁸ Here he mentions that the function of iustitia is inter alia to prevent that people do harm to each other. Cicero emphasises that iustitia entails that private transactions are respected and contractual obligations honoured and that the principles of good faith (bona fides), the foundation of iustitia, be adhered to in this context. It is insightful to point out that for Cicero it was only a promise made in good faith in furtherance of iustitia that could and would lead to the enforcement of a contractual undertaking. What was different was that the promise founding the contract had to be virtuous to be enforced. It was no longer a case of Shylock entitled to his pound of flesh no matter what. Cicero even went so far as to show that 'any provision derived from the bona fides itself becomes inflexible and unjust if it is not continually tested against the standard of bona fides'.³⁹

Wethmar makes the point that Cicero claims in the *De officiis* that iustitia has a universal application in the sense that it does not only apply in respect of the rich and the privileged, but also in respect of have-nots and the slaves.⁴⁰ Iustitia functions, as a matter of fact, in maintaining peace and stability in the relationships between individuals and the community which they find themselves part of at a given point in time. Schermaier points out that the inspiration for the bona fidei iudicia was the 'fiduciary relationships in which a specific standard of behaviour could be expected which was based on the ethical values of society.'⁴¹

³⁵ Cicero *De Officiis* 3.6.28 (available at http://www.stoics.com/cicero_book.html#BOOK3).

³⁶ Ibid 1.7.23.

³⁷ Gordley (note 3 above) 74.

³⁸ Cicero (note 35 above) 2.5.18.

³⁹ Schermaier (note 29 above) 68-69.

⁴⁰ Wethmar (note 31 above) 6.

⁴¹ Schermaier (note 29 above) 82.

It is thus clear that Roman society in the times of Cicero was committed to a universal belief in the principles of iustitia which was linked to the bona fides. The content of contractual legality as determined by the public interest in this society was clearly determined with reference to the principles underlying iustitia. Freedom of contract was not yet on the citadel and very much subject to limitations placed on its application in favour of the interests of society and only where it gave effect to the principle of basic justice between individuals. Although in classic Roman law the use of the term iustitia features infrequently in legal sources of the time, Kaser was of the view that iustitia is embodied in the strong inherent sense of morality of the classic Romans.⁴² Celsus' definition of the law as 'the art of all that is good and fair' implies that iustitia bore close relation with aequitas during these times.⁴³

(c) Aequitas (fairness) in Roman contract law

The commitment to aequitas in practically all areas of law is evident in Roman law of the classical period. It is especially in the areas of the law of obligations (contract and delict) where aequitas is not only at the fore, but also amalgamates with the bona fides. In the law of contract aequitas and the bona fides were main considerations and in almost all cases deciding factors.⁴⁴

In the post-classical period moral and ethical considerations often lead to the creation of new law. Because iustitia and aequitas featured as the most important factors that presiding officers had to take into account when they pronounced the law during this time, it was also during this

⁴² Wethmar (note 31 above) 6.

⁴³ Wethmar (note 31 above) 6.

⁴⁴ Van der Merwe *et al* (1994) *Kontraktereg Algemene Beginsels* 11-12 points out that the Romans did not elevate consensus to the general basis of all contracts. It appears in the light of the above that *pacta servanda sunt* was not unconstrained in Roman times.

time that the two concepts united substantially.⁴⁵ The application of *aequitas* meant the furtherance of *iustitia*. Therefore it was not of any major consequence which one of the concepts were referred to or utilised in a specific case.⁴⁶

In the Republican period the introduction of the office of the praetor led to the development and expansion of the law in accordance with the principles of *aequitas*. Many of the remedies introduced by the praetor (including those I have referred to above), were, as Hahlo has pointed out ‘equitable remedies’ and therefore closely connected with the underlying principle of *aequitas*.⁴⁷ Van Zyl similarly points out that Cicero’s version of *iustitia* and *aequitas*, was in any event never distinguishable as two different concepts, precisely because for Cicero it was essential that ‘...justice should be equitable, otherwise it will injustice, rather than justice.’⁴⁸

This comprehension of Cicero’s *aequitas* reflects his views in respect of the positive law. Cicero believed that where the positive law does not provide justice, an application of *aequitas* was inevitable. In matters of interpretation of contracts *aequitas* was thus of primary importance, because for Cicero ‘[e]quity is justice that goes beyond the written law.’⁴⁹

The Roman commitment to *aequitas* and *iustitia* in post-classical Rome is reflected by the issue of the famous *constitutio* by Constantine, which provided specifically that in all matters of law and above and beyond the strict law preference should be given to the principles of *aequitas* and *iustitia*.⁵⁰ The *aequitas* concept in its developed form is associated with ideals such as fairness,

⁴⁵ Wethmar (note 31 above) 8.

⁴⁶ Van Zyl (note 34 above) 109.

⁴⁷ See note 30 above.

⁴⁸ Van Zyl (note 34 above) 109.

⁴⁹ Cicero *Rhetoric* 1.13.11 as quoted in Wethmar (note 31 above) 11.

⁵⁰ *Codex Corpus Ius Civilis* 3.1.8 as cited in Wethmar (note 31) 13.

honesty, concern for the fellow-human and the principle that people should deal with each other in good faith.⁵¹

It should be mentioned here that from a political point of view, contemporary South African contract law is immediately different from Roman contract law. The *boni mores* and the public interest requirement as part of the lawfulness criterion of South African contracts deplorably does not, in my opinion, reveal a commitment to the above mentioned values. On the contrary, it reveals a committed devotion to the freedom of contract principle as part of individualist ideology. It will be seen that the ideal of contractual equity and the contractual norm of *bona fides* have been consistently marginalised in the normative development of the law of contract.⁵² This marginalisation occurred in order to suppress alternative views and to perpetuate the liberalist politics devoted to freedom of contract and rules favouring it. Today still, liberals recklessly refer to *iustitia* and *aequitas* as collectivist values, to be avoided and steered clear from.

Although the Romans developed a multiplicity of rules and doctrines based on their conception of *aequitas* and *iustitia* in order to discourage immoral or unlawful contracts, two examples remain significant and relevant in our law of contract. These are the *ex turpi causa*- and the *par*

⁵¹ See A Cockrell ‘Substance and Form in the South African Law of Contract’ (1992) 109 *SALJ* 40, 55 where the author claims that today it is ‘generally accepted’ that all contracts are entered into *bona fide*. It is however evident that the *bona fides* in the South African law of contract is subordinated to *pacta servanda sunt* and rules furthering its entrenchment such as the *Shifren* principle. It follows that it cannot, without more, be accepted that all contracts are today entered into *bona fide*. Many simply are not entered into *bona fide* and, in the light of recent decisions in the Supreme Court of Appeal it is likely that a court will find that the contract or the writing prevails without even an investigation into the *bona fides* of the parties. Also see V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis, UP 15 ‘There appears to be a hollow ring to the often-quoted pronouncements that “all South African contracts are *bonae fidei*”’ See, in addition, Chapter 4.

⁵² See Chapter 3.

delictum-maxims as they are found in the *Digest* of the *Corpus Juris Civilis*. Both these maxims were designed as equitable ways to deal with immoral or illegal contracts in the interest of the public. In the interpretation of public policy these rules were often applied and it is thus essential to look at their comprehension in South African contract law in order to bolster my argument that contractual morality was diluted and obscured by the proliferation of the individualistic approach and the commitment to formalism.

IV MORALITY IN THE ROMAN LAW OF CONTRACT

(a) The ex turpi causa- and the par delictum-maxims

The decision in *Jajbhay v Cassim*⁵³ contains a detailed historical analysis of both the above mentioned rules and their relationship with the contractual public policy concept. This decision contains a complete historic account in the judgment of Watermeyer JA, of the development and interpretation of these rules in the Roman, Roman-Dutch and English law.

Important for current purposes is the normative considerations that underlied the above mentioned maxims when they were formulated in Roman law. These are enunciated in the judgment of Stratford, JA in *Jajbhay v Cassim*.⁵⁴

⁵³ 1939 AD 537.

⁵⁴ *Ibid.*

The moral principle which inspired the enunciation of those two maxims is obvious and has often been expounded. It is to discourage illegality and advance public policy. So much is trite and certain and our pronouncement of the law on the matter before us must be in conformity with that principle.⁵⁵

The basic content of the *ex turpi causa non oritur actio* maxim is that no contractual consequences can flow from an illegal or immoral cause.⁵⁶ According to Gluck the phrase *turpis causa* as it appears in the Digest, refers to an illegal or immoral purpose or end which has not yet been executed or brought about.⁵⁷ In addition, there are also references in the *Corpus Juris Civilis* indicating that a plaintiff could only approach a court for relief with the *condictio ob turpem causam* in circumstances where the plaintiff himself had ‘clean hands’.⁵⁸ This principle from the Roman law was received into the Roman-Dutch law and it appears that the interpretation of this rule in the South African law of contract is similar. The operation of the rule blocks a claim for performance of what had been promised in terms of the unlawful agreement.⁵⁹ Clearly, this militates against *pacta servanda sunt* for no contract will be enforced where its *causa* is regarded as immoral or illegal. The rule also serves as an example of how convictions based on *aequitas* and *iustitia* constrain *pacta servanda sunt*.

The other maxim in this context, also finding its origin in the *iustitia/aequitas*-fusion of later Roman contract law is *in pari delicto est conditio defendentis* (*possidentis*). The consequence of the application of this rule would be that a party to an unlawful agreement, who acted unlawfully by concluding the agreement *and* performing in terms thereof, is precluded from claiming his

⁵⁵ *Jajbhay v Cassim* (note 53 above) 542.

⁵⁶ Van der Merwe *et al Contract General Principles* (2 ed) (2004) 183 and the authorities quoted there.

⁵⁷ *Jajbhay v Cassim* (note 53 above) 548.

⁵⁸ *Ibid.*

⁵⁹ Van der Merwe *et al* (note 44 above) 146.

performance back. The result is that the defendant is left in possession of the performance. Again it is clear that this maxim reflects a Roman comprehension of equity, namely that it is equitable not to have the courts assist those who approach it with ‘tainted hands’.⁶⁰ The determination as to when a plaintiff’s hands were indeed tainted depended in itself on underlying values of the time within Roman society.

The distinction between the rules as well as the particular immorality it attempted to address is best illustrated, inter alia, by an example the court takes from the *Digest*.⁶¹ The example relates to the situation where a man is caught red-handed, while committing theft or adultery and then pays money to the person who discovered him to keep the matter quiet. According to Ulpianus and Paulus a praetorian edict provided that the man could claim back the money.⁶² The *par delictum* rule therefore did not apply in these circumstances. According to Paulus, the conduct of the one who accepted the money was immoral, but although there was dishonesty on both sides, the parties were not in *pari delicto* and therefore the *turpi causa* (immoral cause) was sufficient to claim back the performance.⁶³ The praetor was also not interested at all, for the purposes of invoking the rule, in the question whether the plaintiff was in fact guilty of the theft or adultery.⁶⁴

Before the decision in *Jajbhay v Cassim*⁶⁵ the *par delictum* rule was regarded as a strict rule that did not leave room for exceptions. This impression of the rule is mainly attributed to its comprehension in English Law.⁶⁶ From the decision in *Jajbhay v Cassim* however, it becomes clear

⁶⁰ According to Wilmot LCJ in *Collins v Blantern* 2 Wilson 347: ‘All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.’ (Decided in 1767).

⁶¹ D 4.2.7 & 8.

⁶² *Jajbhay v Cassim*(note 53 above) 549

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 547.

that the Romans themselves knew many exceptions to the rule and thus the conviction with regard to strict application of the rule is not to be located in Roman law. English law's formulation of the rule was that it was in all circumstances in the public interest not to assist a party who has already performed in terms of an illegal or immoral agreement. In *Jajbhay v Cassim* the court held that the rule could be relaxed where public policy and 'simple justice between man and man' so requires.⁶⁷ Aquilius points out that this decision finally did away with attempts to force the artificial rules in respect of restitution in case of an unlawful contract, onto the South African legal system.⁶⁸ Although the rule is based on public policy the very application or relaxation of the rule itself is a question of public policy.⁶⁹

The *par delictum* rule is therefore subordinated to an investigation into public policy as it changes over time. Stratford, CJ held as follows: '...the rule expressed in the maxim *in pari delicto potior conditio defendentis* is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy'⁷⁰ and '[b]ut such a rule, though affording us some guidance, must be subordinated to the overriding consideration of public policy (which I repeat does not disregard the claims of justice between man and man.)'⁷¹ Later in this study it will be seen that this, as a broad approach to the law of contract, is neither privileged nor accepted.⁷²

⁶⁷ Ibid 544.

⁶⁸ Aquilius (note 28 above) 338.

⁶⁹ Van der Merwe *et al* (note 44 above) 153.

⁷⁰ *Jajbhay v Cassim* (note 53 above) 544.

⁷¹ Ibid (where the judge considers whether it is necessary to express all possible exceptions to the rule in the form of a general rule). The court also held that in the case of delictual contracts regard should be had to the moral turpitude of the parties. This part of the decision is heavily criticised by Aquilius in Aquilius (note 28 above) 340 where the author asks '[b]y what standard is one to arrange moral faults into their order of wickedness?' Although, in my view, such a standard would be theoretically capable of formulation, a detailed

Rather, the general approach to contract in South Africa is reflected in the criticism against relaxation of the *par delictum* rule. These criticisms hold that it is too vague and creates too much uncertainty to subject the rule to an evaluation regarding public policy. An additional objection is that the application of the rule becomes discretionary and capricious. The criticism stands and falls by the claim that public policy is a relative concept which is not capable of definition.⁷³ Van der Merwe *et al* opines that these objections are not convincing. The test for relaxation of the rule does not amount to a free, unrestrained judicial discretion in the form of an unconstrained choice. The authors show that public policy requires that justice be done between the parties to an agreement.⁷⁴ Sometimes the refusal of a claim in accordance with a strict application of the *par delictum* rule will serve the public interest and further justice between the parties. Often it will be necessary to relax the rule and allow restitution in order to promote fairness between the parties, which is something that public policy equally requires. Van der Merwe *et al* remark that even in a situation where both parties were in *delicto*, a strict application of the rule may still not be in the public interest if the general interests of society (which forms part of public policy) are preferred.⁷⁵

The requirements of public policy are no more uncertain than the value judgments which are required for applying legal concepts such as reasonableness, wrongfulness or criminal unlawfulness... The relationship between public policy and individual justice would be part of this decision...⁷⁶

critique of this debate falls outside the scope of this study. See however Van der Merwe *et al* (2004) (note 56 above) 191-192 and the authorities cited there.

⁷² See Chapter 3.

⁷³ Van der Merwe *et al* (note 44 above) 152.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* 153.

⁷⁶ *Ibid.*

The general interests of society and individual justice often do not prevail in the face of a successful reliance by a party on freedom of contract. The vast majority of the South African positive law, however, has been holding for decades, in cases where the public interest is concerned, in accordance with an interpretation that prefers to favour a reprivatisation of the public enquiry into contract by holding that generally the utmost freedom of contract is in the public interest. This is a matter to which I will return in Chapter 3.

(b) The bona fides and the exceptio doli generalis in Roman Law

Roman law also distinguished between the so-called *negotia stricti iuris* and the *negotia bonae fidei*.⁷⁷ The contracts from the *ius stricti* bound the debtor to perform strictly in accordance with what he promised in the formula and not in accordance with what the *bona fides* could expect of him, unless the formula itself referred to the *bona fides*.⁷⁸ In the case of the *negotia bonae fidei* the *bona fides* were conclusive and the absence thereof, whether during negotiations, conclusion or institution of the action, gave rise to a defence.⁷⁹ The *bona fides* thus operated as an evaluative yardstick to determine the enforceability of the *negotia bonae fidei*.

To curb possible injustices or unconscionable conduct as a result of the enforcement of the *negotia stricti iuris*, the praetor introduced the *exceptio doli generalis*.⁸⁰ Here the defendant was allowed to submit facts that he would otherwise not have been able to submit because of the

⁷⁷ See CFC van der Walt (note 22 above) 648 and NJ Grové 'Kontraktuele gebondenheid, die vereistes van die goeie trou, redelikheid en billikheid' (1998) 61(4) *THRHR* 687, 688 who shows that the distinction was closely related to the Roman procedural law and the specific defences it allowed for in different cases.

⁷⁸ Van der Walt (note 22 above) 648.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

operation of the strict ius civile.⁸¹ Where there was, for instance wilful misrepresentaion on the part of one of the parties, the exceptio allowed the debtor to resist the action on equitable grounds. The exceptio therefore functioned to curb the abuse of rights in appropriate circumstances and became the instrument with which more equitable principles were introduced in the law of contract by the praetorian law.⁸² Van der Merwe, Lubbe and Van Huyssteen explain that the implication of this defence was that it necessitated of the praetor to decide whether the facts were indicative of the presence of dolus.⁸³ In contrast with this, the iudex did not have such a normative discretion and his ratio decidendi were based only on facts he believed the defendant to have proved.

Although the exceptio doli referred to dolus, Van der Walt (referring to Botha) shows that the meaning attributed to dolus were so wide that the exceptio could be raised as a defence in any action that was ‘contra aequitatem naturalem’.⁸⁴ Again, equity and policy considerations are seen to have played a dominant role in decisions given by the praetor where the exceptio doli was raised. In *Bank of Lisbon and South Africa Ltd v De Ornelas & Another*⁸⁵ our Appellate Division however, held that the Roman-Dutch law never received the exceptio, that therefore the South African law could not have received it and consequently that there was no place for it in our law of contract. This decision will later be discussed and criticised in detail.

Concerning the negotia bonae fidei the presiding officer had a discretion to take regard of the bona fides. Because the bona fides concept formed part of the broader concept of aequitas and

⁸¹ Ibid.

⁸² G Lubbe ‘*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg’ (1990) 1 *Stellenbosch LR* 9.

⁸³ SWJ Van der Merwe, GF Lubbe, LF Van Huyssteen ‘The *exceptio doli generalis: Requiescat in pace – Vivat aequitas*’ 106 *SALJ* 235 237.

⁸⁴ CFC Van der Walt (note 22 above) 649 n10.

⁸⁵ 1988 (3) SA 580 (A).

consisted of both moral and legal facets, it became the concept with which the parties' contractual rights and obligation were aligned with the community's legal convictions as regards equity, justice and conscionability.⁸⁶ Concerning the role of the *bona fides* in Roman law the dicta of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika v Saayman*⁸⁷ suffices: 'Die funksie van die *bona fide*-begrip (ook genoem die goeie trou) was eenvoudig om gemeenskapsopvattinge ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik.'⁸⁸ Van der Walt is however of the view that the *bona fides* could only be evaluated via the detour of the necessary words in the formula, the *exceptio doli* and an expanded version of *dolus*.⁸⁹

Van der Walt is of the view that the inherited approach to equity in contract is one of indirect application. This being said, the Romans did have a defence founded in equity, which is something that the post-constitutional South African law of contract remains to be without.

From the above it should be clear that although Roman morality differed vastly from modern day morality with regard to what was moral and what was immoral, the law of contract revealed a clear commitment to the values of equity, justice and the *bona fides*. The rules of course purported to realise these values practically, but it appears that the rules themselves were always open to moral evaluation and could therefore be relaxed when circumstances so required. Van der Merwe points out that these sentiments of openness are reflected in passages in the *Digest*⁹⁰ where Javolenus Priscus warns that all definitions in the civil law are dangerous because they can always be distorted. Van der Merwe points out that Celsus's comment that many mistakes are

⁸⁶ P Du Plessis 'Good faith and equity in the law of contract in the civilian tradition' (2002) 65 *THRHR* 397 399.

⁸⁷ 1997 (4) SA 302 (A) 319B.

⁸⁸ 'The function of the *bona fide* principle (also known as the good faith principle) was simply to realise community convictions of propriety, reasonableness and fairness in the law of contract.'

⁸⁹ CFC Van der Walt (note 22 above) 649.

⁹⁰ *D* 50.17.202 as quoted in D Van der Merwe (note 2 above) 101.

made in questions of what is right and equitable when the ‘pernicious authority’ of legal science is invoked, reflects a commitment to and consciousness of openness.⁹¹ Interestingly, it has been shown that the *bona fides* or the acknowledgment of contractual liability *ex fide bona* did not destabilise Roman contract law or result in uncertainty and arbitrary decisions, as those resisting this approach in the South African law of contract claim so often will happen.⁹² Viewed in this light, the modern day subordination of equity to strict rules of contract is even more unacceptable, not only in light of the fact that the constitutional endeavour is essentially a moral or value sensitive one, but also, and more alarmingly, because the fact of moral influence on contract, for the law to reflect the legal convictions of the community, is a competency derived from the received Roman law.

What is also important to note for current purposes is that the content of morality (and by necessary implication also the content of the public interest) changes over time, not only within a given civilisation, but also amongst different civilisations. It is precisely for this reason that inherently dynamic concepts such as contractual justice, the *bona fides* and the public interest are not capable of definition. All attempts to define it will necessarily be reductive and limiting. But this does not justify its exclusion from the law, instead, it necessitates it. The fact of moral influence on contractual relationships has been visible since the earliest conceptions of law manifested. As Aquilius points out: ‘We received the Roman law rule in regard to the *incidence of morals* on contract, not Roman or Byzantine ethics.’⁹³ This approach to the reception of Roman Dutch law and its role in modern times, was summarised by Lord Tomlin in the case of *Pearl Assurance Co v Union Government* as follows:

⁹¹ Ibid.

⁹² P Du Plessis (note 86 above) 398-399 and the authority in note 7.

⁹³ Aquilius (note 28 above) 346.

[t]hat law [ie the Roman Dutch law] is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexity of modern organised society.⁹⁴

The Roman equity approach was continued and developed until as late as the eighteenth century in the contract law of England and America. In the Roman Dutch law the distinction between contracts from the *ius civile* (strict law) and contracts *bona fide* disappeared and all contracts were suddenly regarded as *bona fide*. Van der Walt shows that the *bona fides* refer here rather to the modern basis of contractual liability, namely consensus as it has been strengthened by the eighteenth and nineteenth century approach to freedom of the individual according to his own destiny.⁹⁵ This suggests that Roman Dutch law already suffered from some of the defects evident in the South African law of contract as a result of the hegemony of the will theory.

Du Plessis indicates that in medieval law contractual equity remained a static principle and that jurists experienced great difficulty in finding a definition of good faith that would fit with the medieval tradition of rule advocacy.⁹⁶ In addition the role of good faith in canon law was never fully explained and there too the concept remained amorphous.⁹⁷ When the works of Aristotle was rediscovered and adapted by Thomas Aquinas, Aristotelian ethics again became part of legal discourse and in terms of Aquinas' interpretation of these ethics, the basis of a contract became the virtue of fulfilling a promise.⁹⁸ This however, was, as I have indicated, accompanied by a doctrine of equality in exchange, based on Aristotle's notion of equality in quantities.⁹⁹

⁹⁴ 1934 AD 560, 563.

⁹⁵ CFC Van der Walt (note 22 above) 649 and the authority cited in note 16.

⁹⁶ P Du Plessis (note 86 above) 400-402.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* 402-403.

⁹⁹ *Ibid* 403.

The entire development of the Roman Dutch law through the Middle Ages into the Renaissance and beyond, escapes the limits of this study. Suffice it to say that the influence of the Church and authors who persisted in the virtue of promise-keeping (because they regarded a promise as inherently virtuous) played a significant role in the conception of the will theory of contract.¹⁰⁰

The problem is (and this will be shown in the next section) that the emphasis shifted from the inherent morality/virtue of the (contractual) promise, to a promise as a functional tool of exchange. Capitalism, the free market economy and the attempts to adapt the law of contract for this economy drastically changed the position of a commitment to justice in contract law and so contributed to a continuing legitimacy crisis in the law of contract of the modern world.

V CONTRACTUAL EQUITY IN EARLY ENGLISH AND ANGLO AMERICAN CONTRACT LAW

(a) The eighteenth century equity approach

Horwitz has indicated that, contrary to the orthodox legal history that the development of contract as a set of promises was complete in the sixteenth century, eighteenth century contract was dominated by a so-called ‘title theory of exchange’ and equitable doctrines governing the award of damages.¹⁰¹

Horwitz shows that the early eighteenth century conception of contract in England and America revealed that the function of contract was still merely to facilitate the transfer of title from one

¹⁰⁰ Regarding this development see RH Christie *The Law of Contract* (4ed) (2001) 8-9.

¹⁰¹ JM Horwitz ‘The Triumph of Contract’ in AC Hutchinson *Critical Legal Studies* (1989) 104.

party to another.¹⁰² Contracts were based on a theory of exchange in the ownership of the performance, hence the parties' rights were founded in the property/performance and not in the contract. In this 'title theory of exchange' contract was not significant and indeed subordinate to the law of property.¹⁰³ Horwitz illustrates this point by indicating that Blackstone's *Commentaries* refers to contract as one of many ways in which transfer of property could be carried out and this is why only forty pages were devoted to contract in Blackstone's four volume work. This 'title theory of exchange' was fit for a typical eighteenth century society where goods were not seen as fungible because no extended markets existed.

The most important aspect of this eighteenth century conception was that contractual liability, akin to the situation in Roman law, was subject to equitable limitations.¹⁰⁴ Contractual obligations as well as performance in terms of a contract were sometimes even disallowed on the basis of the equity (or lack thereof) in the underlying exchange.¹⁰⁵ As Atiyah puts it: "The Courts were, at that time, still more interested in seeing that parties to a contract made a fair exchange, than they were in enforcing bare promises."¹⁰⁶ The English 'equity courts' upheld the doctrine that no contract of which it was determined that the counter performance was inadequate, would be enforced.¹⁰⁷ A clear commitment to protection of unequal bargaining agents is also evident in the decisions of

¹⁰² JM Horwitz 'The Historical Foundations of Modern Contract Law' (1974) 87(5) *Harvard LR* 920; Horwitz (note 101 above). The remainder of this chapter relies heavily on these two readings and to a lesser extent on similar work outside of the critical legal studies tradition done by Patrick Atiyah in England. See PS Atiyah *The Rise and Fall of Freedom of Contract* (1979).

¹⁰³ Horwitz (note 102 above) 920.

¹⁰⁴ *Ibid.*

¹⁰⁵ Horwitz (note 102 above) 923.

¹⁰⁶ Atiyah (note 102 above) 438.

¹⁰⁷ See *Carberry v Tannehill* 1 Har & J 224 (md 1801) as quoted in Horwitz (note 102 above) 923 n32.

this time. In *Evans v Llewellyn*¹⁰⁸ the English court of equity held that it will protect a party where he finds himself in a bargaining situation in which he is not a ‘free agent and is not equal to protecting himself’. Horwitz indicates that even as late as 1810 in his judgment in *Clitherall v Ogilvie*¹⁰⁹ Chancellor Desaussure in South Carolina stated the equitable approach to contract as follows:

[I]t would be a great mischief to the community, and a reproach to the justice of the country, if contracts of very great inequality, obtained by fraud, or surprise, or the skilful management of intelligent men, from weakness, or inexperience, or necessity could not be examined into, and set aside.¹¹⁰

A century after the decision in *Evans v Llewellyn* the English court held in the case of *Frey v Lane*¹¹¹ that a Court of Equity will make an enquiry as to whether the parties were in actual fact on equal footing and where it is found that they were not and the one party took advantage of that inequality, the court will void the contract.¹¹²

¹⁰⁸ (1787) 29 ER 1191 as quoted in SA Law Commission Discussion Paper 65 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (September 1996) par 1.32.

¹⁰⁹ I Des 250 as quoted in Horwitz (note 102 above) 923.

¹¹⁰ *Ibid* 259.

¹¹¹ (1888) 40 Chancery Division 312 as quoted in SA Law Commission Discussion Paper 65 (note 108 above) par 1.33.

¹¹² *Ibid*.

(b) The role of the jury system in the equitable approach to eighteenth century contract

It was not only the equity courts which ensured a proper investigation into the fairness of contractual obligations, but also the existence of a jury system. The juries had the capacity to enquire into the adequacy of the counter-performance with reference to fairness before a claim in terms of a contract would become enforceable. McKean, CJ held that courts were obligated to, in the absence of the ‘equity courts’, turn to a jury to ensure a fair and conscientious interpretation of the agreement between the parties.¹¹³

Horwitz indicates that in Pennsylvania, for instance, lawyers often argued that a plaintiff’s claim had to be both lawful and fair before a jury could be asked to enforce it. A clear example is to be found in the case of *Pyncheon v Brewster*¹¹⁴ where the judge’s instruction to the jury was that they could reduce the amount the plaintiff was claiming, should they consider it reasonable to do so. It appears that American courts of the eighteenth century did not subject its juries to strict rules regarding the award of damages. Furthermore, it was unheard of that a court would set aside a jury’s decision in respect of the amount of damages awarded.¹¹⁵

Because juries consisted of members of different members of the community, the result of this was, as Horwitz indicates, that the community’s concept of what was fair and what was not directly influenced the adjudication of contractual disputes.¹¹⁶ Clearly, the public interest was located in considerations of fairness and justice. The jury system provided for a public interest enquiry into contract, which was even then considered a private affair. Representatives from the community themselves (as opposed to elitist judges) determined what was in the public interest

¹¹³ See *Wharton v Morris* 1 Dall 257, 260 (Pa 1788) as quoted in Horwitz (note 102 above) 924.

¹¹⁴ *Quincy* 224 (Mass 1766) as quoted in Horwitz (note 102 above) 925 note 44.

¹¹⁵ Horwitz (note 102 above) 925.

¹¹⁶ See D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard LR* 1685, 1729.

or not. In this regard Swift remarks: '[t]he jury were the proper judges, not only of the fact but of the law that was necessarily involved in the issue...'¹¹⁷ It appears that the juries also enjoyed a considerable measure of authority as their decisions were often final and were seldom set aside.

The eighteenth century approach to the law of contract was such that principles of morality, fairness and conscience provided an adequate and sufficient 'rule' for the adjudication of contracts. This approach, however, did not concern itself with the interests of the commercial classes and it is precisely for this reason that it came under attack.¹¹⁸ As Horwitz indicates, the law did not guarantee to the businessman the express value of the agreed performance as per the contract.¹¹⁹ Contracts were not enforced meticulously. Instead, they were meticulously subjected to enquiries into the substantive equality of the exchange. Consequently, the law of contract as such, was entirely unsuited for the purposes of the emerging market economy and the commercial classes.¹²⁰ Contract was seen as insulated from the purposes of commercial transactions and often businessman reverted to settling of disputes informally or, where that could not be done, to a formal process of arbitration. But these mechanisms were inadequate and it was clear that the time had come for the law of contract to change.

¹¹⁷ IZ Swift *A system of the Laws of the State of Connecticut* (1796) 380-81 as quoted in Horwitz (note 102 above) 921 note 17.

¹¹⁸ Horwitz (note 101 above) 106.

¹¹⁹ Horwitz (note 102 above) 927.

¹²⁰ Horwitz (note 101 above) 106.

VI THE DEVELOPMENT OF MODERN CONTRACT LAW IN THE NINETEENTH CENTURY

The modern law of contract 'is fundamentally a creature of the nineteenth century'¹²¹ and developed in England and America as an attack on and reaction against the medieval tradition of substantive justice as it was embodied in the equitable conception of contract in the eighteenth century.¹²² Judges and jurists rejected the longstanding natural law approach that the justification of contractual obligations could be derived from the equity in the exchange. Instead of this the source of contractual obligation was seen as the consensus between the parties, a certain meeting of the minds.¹²³ Jurists of the nineteenth century no longer attempted to show that legal outcomes flowed out of broader philosophical principles. Instead, jurists alleged that they were only describing the law of their system.¹²⁴ Where the early jurists not only described will, but also the virtues of communal life, these jurists rejected any such belief.

Gordley indicates that 'the nineteenth century jurists eliminated the concept of virtue from their discussions and were left with the concept of the will alone.'¹²⁵ In England this radical

¹²¹ Ibid 917. For an account of the similarities between nineteenth and twentieth century contract law, see P Gabel & JM Feinman 'Contract Law as Ideology' in D Kairys *The Politics of Law* (3ed) (1998) 507 where the authors show that despite the re-introduction of equitable doctrines to control freedom of contract 'unfairness is rampant in the marketplace' and 508 where the authors remark that contract law in its legitimating aspect represents that equity has already been achieved.

¹²² Horwitz (note 102 above) 917.

¹²³ Ibid. Also see Gordley (note 3 above) 161 who points out that consensus was applied almost exclusively to explain the basis of contractual obligations.

¹²⁴ Gordley (note 3 above) 161.

¹²⁵ Ibid 162.

jurisprudential shift ultimately led to the enactment of the English Judicature Act of 1873, which did away entirely with the long tradition of separate courts for common law and equity.¹²⁶

A clear illustration of this new jurisprudence is to be found in the writings of an English jurist by the name of Powell, who already in 1790 argued for the rejection of considerations of equity in contract in favour of a system of fixed principles and strict rules.¹²⁷ In his first dissertation on contracts, Powell writes that it has become a significant characteristic of contract law discourse that it rejects considerations of fairness based on substantive justice, because these considerations (according to Powell) undermined the ‘rule of law’.¹²⁸ Powell continues in this manner and makes the following remark which reveals the characteristics of eighteenth century contract jurisprudence:

[I]t is absolutely necessary for the advantage of the public at large that the rights of the subject should ... depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied ..., must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the judge.¹²⁹

¹²⁶ See Atiyah (note 102 above) 672 and D Van der Merwe ‘The Roman-Dutch law: from virtual reality to constitutional resource’ (1998) 1 *JSAL* 1, 20 n6.

¹²⁷ IJ Powell ‘Essay upon the Law of Contracts and Agreements’ (1790) as quoted in Horwitz (note 102 above) 917. See also Atiyah (note 102 above) 398-399 who indicates that Powell’s essay was only the first in a long line consisting of Chitty (1826), Addison (1847), Leake (1867), Pollock (1875) and Anson (1879).

¹²⁸ Horwitz (note 102 above) 917.

¹²⁹ *Ibid* and Atiyah (note 102 above) 398. What Powell thus suggests here is that it is in the public interest that the rights of individuals in contractual settings should not depend on considerations of equity, but rather on fixed rules and certain principles of law. In other words, it appears that Powell advocates the disconnection of all rights from equity considerations, because, according to the author, equity itself is too uncertain and vague.

According to Powell a court should not be allowed to declare a contract unenforceable merely because the contract price was excessive, because only the consent of the parties fixes the price of anything without reference to the intrinsic value of the performance. Powell formulates the principle of freedom of contract as follows: ‘a man is obliged in conscience to perform a contract which he has entered into, although it be a hard one...’¹³⁰

Powell alleges that an equitable approach is necessarily arbitrary and uncertain and should be resisted because no certain principles of substantive justice are to be found in such an approach.¹³¹ His strongest criticism against considerations of substantive justice is that its content depends on the subjective discretion of judges.¹³² One can however not lose sight of the fact that the equity courts were bound to render legitimate judgments based on the community’s convictions of substantive justice. In this sense the law of contract was not open to a free and capricious exercise of the subjective thought of a judge in the form of a free choice. The proponents of the new tendency however, did not see it that way. Judges in the new democracies were of the opinion that the democratic ideal of a free society was best served where the existing law was applied consistently and coherently.¹³³

Atiyah indicates that the translation of Pothier’s work was much more influential in English contract law than that of Powell.¹³⁴ According to Atiyah, it was Pothier, far more than Powell who was the first person (albeit in France) to express contract as primarily an agreement based

¹³⁰ Powell (note 127 above).

¹³¹ Ibid 918.

¹³² Ibid.

¹³³ Van der Merwe (note 126 above) 6. In accordance with this Kotze, CJ in *Brown v Leyds* (1897) 4 OR 17, 31 held that ‘no Court of Justice is competent to inquire into the internal value, in the sense of the policy, of the law, but only in the sense of the meaning or matter of the law’.

¹³⁴ Atiyah (note 102 above) 399.

on the intention of the parties.¹³⁵ Atiyah also indicates that the Courts accepted Pothier's approach because it provided them with a set of *general* principles which could be stated at a high level of abstraction, capable of indifferent application to all kinds of contracts.¹³⁶ Jurists justified this generalising tendency by recourse to the Enlightenment belief in a universal law deduced from natural reason.¹³⁷

A problematic aspect of nineteenth century contract jurisprudence was that it did not explain *why* contracts were binding and enforceable. Contracts were defined only with reference to the will of the parties, but no reasons were offered as to why the will of the parties had to be respected. The view seems to have been that the contract was binding simply because it was a contract¹³⁸ - [t]hese jurists no longer discussed virtues and supposedly were interested only in what the parties willed, not in whether the purposes they sought to achieve were good.¹³⁹ The whole of the conceptual apparatus of the modern law of contract was subsequently moulded to conform to, accommodate and legitimise this will theory of contract.¹⁴⁰

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 400.

¹³⁸ Gordley (note 1 above) 163 and the authority quoted there.

¹³⁹ Ibid 164.

¹⁴⁰ As Kennedy indicates '...all the doctrines were recast as implications of the fundamental idea that private law rules protect individual free will.' In Kennedy (note 116 above) 1730.

VII THE SUBJECTIVITY OF VALUE AND THE OBJECTIVE THEORY OF CONTRACT

Powell's convictions, set out above, reveal the large scale and all-encompassing transformations in economic thinking associated with the emergence of free trade and the market economy of the nineteenth century.

In this market economy contract no longer only facilitated transfer of title, instead it performed the new function of warranting the counter performance.¹⁴¹ Because of the existence of national market, prices were no longer determined locally, but rather regionally.¹⁴² Such a price determination presupposed the general use of money and extensive marketability of goods.

The concept of value became perceived as entirely subjective and the general perception was that contracts had to guarantee that parties received adequate counter performance (exchange). An implied function of contract was therefore to protect the parties from unfavourable fluctuations in supply and price in the market economy.¹⁴³ The protection was apparently contained in the fact that parties were contractually bound to the price they had agreed upon, even where circumstances had changed so dramatically since conclusion of the contract that payment of the agreed price was no longer equitable. Money was regarded as the single standard in the conclusion of contracts.¹⁴⁴

¹⁴¹ Horwitz (note 102 above) 937 af.

¹⁴² Ibid 918, 946-947.

¹⁴³ Ibid 937.

¹⁴⁴ Ibid 947.

The role and function of contract was no longer one of guaranteeing the justice of the exchange but to enforce willed transactions *inter partes*.¹⁴⁵ In a society where the only basis for ascribing value was concurrent, individual will, principles of substantive justice came to be viewed as a necessarily arbitrary and uncertain standard of value.¹⁴⁶ Before, the view was that substantive justice existed to prevent and ensure that legal subjects do not abuse the legal system to exploit each other. At the point where intrinsic value could no longer be ascribed to anything, no substantive measure could exist by reference to which it could be determined whether one party was exploiting the other.¹⁴⁷ The consequence of this was that the parties were deemed to be in an equal bargaining position.

The artificiality of this formulation is obvious. Not only is it entirely devoid of reality to suggest that the parties to the contract are in equal bargaining positions because of the absence of standards or measures of substantive justice, but such a view also ignores the influence of a plethora of equally important variables at play in the equation. To name the obvious, the above formulation ignores the possibility of one party not being as commercially skilled and experienced as the other and exploited as a result of the other party's knowledge of this.

Notwithstanding the obvious flaws in the nineteenth century formulation the modern law of contract comes to the fore proclaiming that all people are equal, because all measures of inequality are based on an illusion.¹⁴⁸

VIII CONCLUSION

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Horwitz (note 102 above)

The acceptance of the will theory of contract was part of a general attempt of the positive law both to reflect commercial transformation and also to protect the interests that arose as a result of this transformation.¹⁴⁹ It was primarily an attempt to fit the law of contract with the emergence of a market economy. As Horwitz indicates, ‘the change from the eighteenth to the nineteenth century involved a pervasive shift in the sympathies of the courts.’¹⁵⁰ The interests to be protected were no longer those of ‘the small town, of the farmer, and of the small trader’. Courts came to reflect commercial interests - the commercial classes needed a political slogan and so came about the idolisation of freedom of contract. As Atiyah shows: ‘...all this generality, this attempt to state the law in terms of abstract principle, fitted well with the new political economy. It was a law suited to the free market,...’¹⁵¹

What is however also clear, is the fact that the courts did not and could not abandon outright the old underlying moral conceptions on which the law of contract was previously founded.¹⁵² The courts still naively wanted to believe that parties to the contract were reaching consensus on its terms as honest, just, fair and non-exploitative persons. To this extent the courts still acknowledged external standards of justice. But the critical legal issue had shifted from whether the contract was fair to whether there was a ‘meeting of the minds’ between the contracting parties.¹⁵³

Horwitz points out that although nineteenth century courts could not succeed in negating the ancient relation between natural law and contract law, they did succeed in setting up a system in

¹⁴⁹ Ibid 953.

¹⁵⁰ Horwitz (note 101 above) 110.

¹⁵¹ Atiyah (note 102 above) 400.

¹⁵² Horwitz (note 102 above) 953.

¹⁵³ Ibid 955.

which the courts could effectively ‘pick and choose’ which groups within the broad society they wanted to benefit in a given case.¹⁵⁴ Above all, the discourse managed to set-up an intellectual divide between the system of formal rules (associated with the ‘rule of law’) and the ancient perceptions of morality and equity (which was seen as necessarily undermining the rule of law).¹⁵⁵ This intellectual divide created the imbalance between ‘continuity of the legal system and the actuality of social reality’¹⁵⁶ in the South African law of contract.

Why is it that when Roman civilisation expanded, developed and became sophisticated, they moved *away* from the strict enforcement of agreements, but when eighteenth century civilisation developed, expanded and became (more) sophisticated, *they* moved *away* from the equitable approach *towards* the strict enforcement of contracts, back towards the Roman Shylock? Is it perhaps because the development occurred so rapidly that it was a regression?

The problem appears to be more acute and is brilliantly illuminated by Horwitz.¹⁵⁷ The *subjectivist* or will theory of contract attempted to provide the law of contract with an *objective* set of rules to provide the law of contract with the *certainty* complained of to be so lacking in eighteenth century equitable contract. It attempted to meet the requirements of market economy, namely uniformity and standardization. However, the will theory holds that, because of the *subjectivity* of value, there has to be a meeting of the minds between two contracting parties for a contract to be valid. Parties were able to remake law because their contractual obligations were founded entirely upon what Elizabeth Mensch has called a ‘magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection of free will itself’,¹⁵⁸ an arbitrary

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ *Brisley v Drotosky* 2002 (4) SA 1 (SCA) 31C (Author’s translation).

¹⁵⁷ Horwitz (note 101 above) 118.

¹⁵⁸ E Mensch ‘Freedom of Contract as Ideology’ (1981) 33 *Stanford LR* 753 760.

meeting of the minds. To this extent every contract was allowed to be unique, ‘depending entirely on the momentary intention of the parties’.¹⁵⁹ This made legal certainty and predictability (the very reasons for which this will theory was developed and strived towards) quite impossible. Thus, the line between objective and subjective contract law appears hazy and blurred - if at all visible and the distinction between certainty and uncertainty entirely invisible.

Horwitz claims that once this ‘objective’ theory destroyed ‘most substantive grounds for evaluating the justice of exchange’ it could proceed with the formulation of a system of ‘objective’ rules and an ideology of their ‘neutral’ application (formalism).¹⁶⁰ This system was able to disguise prolific inequalities in bargaining power and substantial unconscionability in performance.

The development of this modern, ‘objective’ contract law which went hand in hand with the development of the market economy on the continents carried itself to the colonies and so became visible in the law of contract in South Africa. Kötz noted in his submissions to the South African Law Commission on unfair contract terms: ‘Both the idea of private autonomy and the reliance on free contractual exchange are rooted in a political and economic philosophy that reached its apogee in the nineteenth century.’¹⁶¹

Indeed, the South African law of contract is infested with formulations and rules in furtherance of the inequality, sameness and non-concern with substantive equity required by liberal ideology for its very survival. We can find them without much of an enquiry (that is to say, they are there to see for anyone who would open the eyes to see). Formulations such as ‘public policy *generally*

¹⁵⁹ Ibid.

¹⁶⁰ Horwitz (note 101 above) 118-119.

¹⁶¹ SA Law Commission Discussion Paper 65 (note 108 above) par 1.31.

favours freedom of contract¹⁶² and only in *exceptional* circumstances of *extreme* inequity where the enforcement of the contract is ‘*clearly inimical*’¹⁶³ to the interests of the community a court will intervene in the parties agreement on the basis of public policy to set the contract aside, are the most evident. The abolition of equitable Roman law doctrines (*laesio enormis*¹⁶⁴ and the *exceptio doli generalis*¹⁶⁵) because they do not fit the system and the re-enforcement of the non-variation (*Shifren*) principle because it does,¹⁶⁶ comprise what we might call a few more textually less blatant examples.

The judicial terrain of the South African law of contract has become the (un)contested territory of liberal ideology, the will theory, freedom of contract, individualist politics, rules as law and law as rules. But not everyone has bought into this approach and it is precisely because not everyone bought into it, that we find the law of contract to reflect the fundamental contradiction so vividly. This is a matter which I will turn to in the following chapter.

¹⁶² See, for a recent example see *Price Waterhouse Coopers Inc And Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 73E-F and the cases referred to there.

¹⁶³ *Sasfin v Beukes* 1989(1) SA 1 (A) 8C-D.

¹⁶⁴ *Tjollo Ateljees* (note 21 above) and see further Chapter 3.

¹⁶⁵ *Bank of Lisbon and South Africa v De Ornelas & Others* (note 23 above).

¹⁶⁶ *Brisley v Drotsky* 2002(4) SA 1 (SCA).