

CHAPTER 6:
THE ETHICAL ELEMENT OF CONTRACT
AND CONTRACTUAL JUSTICE

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‘...die rigsnoere van reg, waarheid en skoonheid...

Sonder hulle is denk sowel as goeie daad onmoontlik.

Maar (en dit is die noodlot van ons menswees) ons kan volgens hulle lewe

maar nooit kan ons hulle volledig ken nie’

- NP Van Wyk Louw (1938)

I INTRODUCTION

Up to now, I investigated the history and manifestation of the fundamental contradiction in South African contract law as well as Kennedy’s argument that we will forever oscillate in the irresolvable tension between the two ideal typical poles of morality that is individualism and altruism. We have seen that in the law of contract individualism links up with a preference for the rule form and altruism with a preference for the law in the form of standards. I have tried to show that the individualism/rule pole is strongly privileged in the law of contract but that there exists theoretical support for a relational or altruistic approach to the institution of contract. That approach is currently within the application of the law, unprivileged. We have also seen that, as a result of this individualism/rules bias which is inculcated in the pre-1994 law of contract of South Africa, transformation after the enactment of the Constitution has been minimal. In the previous chapter we have seen that in the rest of the world, however, there is currently a renewed realisation of the indispensability of the ethical element of contract.¹ Scholars concerned with the

¹ See Chapter 5 IV above.

ethical in contractual relations generally agree that good faith constitutes the ethical element of contract law.²

I wish to investigate in this Chapter firstly, what the nature of the ethical element of contract is, that is, where in the duality of substance and form do we locate good faith as the ethical element of contract? I will suggest that the *obligation* (duty) to contract in good faith (ethically) exists as a matter of altruism and the interdependent nature of a society. Secondly, I would like to argue - using the work of critical law and psychology and empirical law and psychology scholars - that the over-emphasis on individualism and rules in the law of contract has created a false consciousness which perpetuates a non-concern with elaborating an understanding of and commitment to the ethical element of contract. Third, I will suggest that an understanding of the ethical element of contract should be informed and shaped by the fundamental values/ideals of the Constitution. I will specifically investigate two fundamental (and I believe inseparable) values of the Constitution, namely freedom and dignity. Finally, I will suggest that although the fundamental contradiction is irresolvable, a concern with and a commitment to the ethical element of contract poses the possibility of increased transformation and a better law of contract.

² See CFC Van der Walt 'Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika' (1991) 54 *THRHR* 367, 387 who is of the opinion that curial control over freedom of contract should proceed in accordance with the legal-ethical good faith measure ('regsetiese goeie trou-maatstaf'). Also see CFC Van der Walt 'Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg' (1993) 56 *THRHR* 65, 76 with regard to why good faith is the ethical element of contract.

II THE NATURE OF THE ETHICAL ELEMENT OF CONTRACT

A contract, we are told, is an agreement between two parties of competent contractual capacity.³ We speak of the circumstances of the existence of a contract between parties as a ‘contractual relationship’.⁴ If a contract is then a human relationship, and the ethical measure in contract is good faith then I understand the ethical in contract to be an altruistic rather than an individualistic endeavour.⁵ I believe that the establishment of an ethical relation in the contractual context presupposes and depends on the presence of and relation(s) with others as well as the altruistic concern that is regard for the interests of another. After all, one can only act in good faith towards or in relation to, another person. The obligation to act in good faith is an obligation that springs from altruistic virtues such as forbearance and generosity as well as the virtue that promises seriously made to another person should be kept.⁶ Grové adds that it entails that contracting parties should show respect for each other’s interests.⁷

The ethical obligation exists both as a contractual and non-contractual (pre-contractual) obligation. As Kelman puts it: ‘[Altruism demands] sensitivity to and awareness of others, even

³ Van der Merwe et al *Contract General Principles* 2ed (2004) 2; AJ Kerr *The Principles of the law of contract*(6ed) (2002) 3-4; RH Christie *The Law of Contract* (4ed) (2001) 23.

⁴ Ibid.

⁵ V Terblanche ‘The Constitution and General Equitable Jurisdiction in South African Contract Law’ (2002) LLD thesis University of Pretoria 152 argues that ‘good faith is said to be the expression of morality and altruism that forms part of the fundamental values of society’.

⁶ See C Fried *Contract as Promise* (1981) 1 who believes that the virtue of promise keeping is ‘the moral basis of contract law’.

⁷ NJ Grové ‘Kontraktuele Gebondenheid, die Vereistes van die Goeie trou, Redelikheid en Billikheid’ (1998) 61 *THRHR* 687, 689.

others one hasn't voluntarily chosen to be sensitive to.⁸ This obligation is, however, at stake as soon as parties encounter each other in the contractual sphere.

Contractual responsibility and ethical action in the form of conduct in good faith thus relies on others and so is located in human relation as opposed to human separation. To quote Colombo: 'Good faith implies a developed sense of community and a high level of awareness of personal responsibilities towards society.'⁹ As such, following Kennedy, the ethical relation in contract is an altruistic relation committed to the law in the form of standards and the idea of justice as 'the organization of society so that the outcomes of interaction are equivalent to those that would occur *if* everyone behaved altruistically.'¹⁰ In other words, in contract it is a contractual relation which proceeds on the basis of commitment to standards of good faith, reasonableness, fairness and the ideal of contractual justice.

III FALSE CONSCIOUSNESS AND THE LACK OF AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT

(a) *Introduction*

The law's story(ies) of contract has relied heavily on the mainstream social discourses in a variety of disciplines in order to claim and maintain its legitimacy. I want to argue here that specifically the mainstream discourse in psychology has propped up and kept alive liberal contract law's story that the relation in contract is an individualistic story of separation – that every person is an island. It has done this through a successful deployment of false consciousness. My engagement

⁸ M Kelman *A Guide to Critical Legal Studies* (1987) 60.

⁹ S Colombo "Fascism, Community and the Paradox of Good Faith" (1994) 11(3) *SALJ* 482.

¹⁰ D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685, 1722.

with psychology in attempting to re-emphasise and explore the ethical element of contract is necessary because I believe with Feinman, that contract law, like all other law is a product of the human mind and that it can be transformed (or thought of differently) once the law's subjects open up their eyes to the domination they believe to be just.¹¹ I will try and show here that if we are prepared to deny the blindfold of false consciousness, there are stories in psychology which resist the narrow concept of an economic man, endowed with an individualist ethos of rational thought and natural self-interest. I will look at false consciousness in the contexts of the relationships between the procedural and the substantive, autonomy and community, law and justice and finally the relationship between justice and wellness.

(b) *False consciousness in the critical law and psychology discourse*

The critical law and psychology discourse focuses on the person who finds herself within a legal system. The discourse does not assume a specific liberal understanding of rationality, but acknowledge irrationality and often argue for a different (anti-liberal) understanding of rationality. Because of its particular concern with the human mind, critical law and psychology scholars share the CLS concern with false consciousness - 'the holding of false or inaccurate beliefs that are contrary to one's own social interest and which thereby contribute to the maintenance of the disadvantaged position of the self or the group.'¹² These arguments seek to expose how the phenomenon of false consciousness draws legal subjects into complacency with a system that may not be just and may be adversely affecting their well-being. Critical law and psychology scholars argue that there is a link between a person's experience of justice and her experience of

¹¹ JM Feinman 'Critical Approaches to Contract Law' (1983) 30 *UCLA LR* 829, 857.

¹² JT Jost 'Negative Illusions: Conceptual clarification and psychological evidence concerning false consciousness' 16 *Political Psychology* 397, 400 as quoted by DR Fox 'A Critical Psychology Approach to Law's Legitimacy' (2001) 25 *Legal Studies Forum* 519,527.

wellness and that legal subjects should be ‘psychopolitically literate’¹³ to enable them to question and challenge the system in order to further their own well-being.

These critics argue that dominant institutions use the process of false consciousness to encourage widespread belief in unjustified assumptions about human nature. Taking capitalism as his example, Fox argues that capitalist theory is steeped in psychological assumptions that human nature is essentially selfish.¹⁴ Capitalist theory ultimately teaches people to expect the worst from others and from themselves. Fox claims that these inaccurate and incomplete assumptions about human nature enhance the public's acceptance of the system's legitimacy.¹⁵

With regard to the difference between procedures and substance, one of the aspects of false consciousness is the false belief that consistently applied procedures can bring about a just decision when the substantive law is itself unjust.¹⁶ Fox believes that it is easier to identify dishonest and biased system players than it is to conceptualise a system that enforces biased legal principles. As Fox indicates, it is a problem when a dishonest judge is bribed to rule in favour of a landlord rather than a tenant, but it is a far more serious problem when a judge rules the same way because the law was written by legislators who are landlords and is interpreted by appellate judges who believe they are merely applying neutral principles about the sanctity of contracts and private property.¹⁷

¹³ I Prilleltensky & DR Fox ‘Psychopolitical Literacy for Wellness and Justice’ (2003) In Press *Journal of Community Psychology*, currently located at <http://www.dennisfox.net/papers/psychopolitical.html>

¹⁴ Fox (note 12 above) 529.

¹⁵ Ibid.

¹⁶ Ibid 527.

¹⁷ Ibid 528. The decision in *Brisley v Drotzky* (2002) (4) SA 1 (SCA) can serve as an example of where the application of the law was in favour of the landlord.

Fox points out that mainstream legal scholars and authorities often prefer to focus not on hard-to-define substantive justice but on procedural justice in order to avoid the conceptual and political problems.¹⁸ In this view, the ‘rule of law’ is the procedurally correct application of general principles, even when it brings about unfair results in particular cases. In the context of good faith in South African contract law, Grové (referring to Lubbe) argues that good faith is at play in the procedural and substantive aspects of contract law - the conclusion of the contract requiring procedural propriety and the result of the parties’ agreement requiring substantive propriety.¹⁹ With regard to procedure, Grové argues that the bona fides require that a party to a contract does not conduct herself improperly during the conclusion of the contract in order to obtain consensus, because this will cause the contract to be void or voidable in accordance with one of the crystallised and accepted forms of negation of the will theory (fraud, duress, undue influence, etc).²⁰

Grové continues to argue, with regard to substantive propriety, that once it has been determined that there is consensus one has to test the result of the parties’ agreement for the substantial fairness of the bargain with reference to public policy.²¹ Here he enquires into the position where the result of the parties’ agreement should reflect the good faith between them. He concludes that it is exactly here where the problem presents itself, because South African contract law does not allow for a substantive equity defence.²²

¹⁸ Ibid. An example from South African case law here would be the decision in *Afrox Healthcare v Strydom* (2002) (6) SA 21 (SCA) 35F where the court avoided the issue of unequal bargaining power by relying on the argument that the respondent did not plead the right form of negligence in his pleadings.

¹⁹ Grové (note 7 above) 691 and the authority cited there.

²⁰ Ibid 693.

²¹ Ibid.

²² Ibid 694.

In my opinion the above is a result of false consciousness: We accept that agreements that were concluded in the presence of procedural impropriety are assailable, but once the consensus has been obtained procedurally proper, South African contract law does not visit the substantive propriety of the bargain. The fact that the law insists on and provides for propriety in obtaining the consensus, draws attention away from the more difficult issue of substantive fairness.

Although correct procedures are extremely important, they are not enough.²³ As pointed out by many who challenge mainstream legal thought, the law would be very different if its basic doctrines had been written by poor people, women and black people.²⁴ By directing attention to procedures rather than to results, Fox claims that legal authorities deflect substantive ‘justice-based’ demands for social change.²⁵ This deflection is an example of false consciousness.²⁶

As emphasized in empirical psychological research, the common belief that authorities use fair procedures promotes system legitimacy.²⁷ The notion that is created and perpetuated is that procedural rules can help resolve conflicts that are inevitable, not just between people with conflicting interests but even among people with similar goals and values:

A legal and political system whose essential principles, procedures, and styles were created by white privileged men with substantial property is justified by the false claim that today everyone is treated equally; because the law is unconcerned with

²³ Ibid 528 quoting C Haney ‘Psychology and legal change: The impact of a decade’ (1993) 17 *Law and Human Behaviour* 371, 381.

²⁴ Ibid 528.

²⁵ Ibid 527.

²⁶ Ibid as well as the authority cited there.

²⁷ Fox (note 12 above) 527.

unjust outcomes so long as approved procedures are followed, substantive justice is displaced by the perception of procedural justice.²⁸

Critical law and psychology further holds that ‘law... is inherently value-laden, a psychological phenomenon ...primarily rooted in the intellectual, emotional, and spiritual life of the people in a community... [and] should be particularly susceptible to reasoned value positions grounded in supportable psychological theory and available data.’²⁹ I support Fox’s view that the central focus of psychological jurisprudence should be the degree to which law both reflects and affects the fundamental contradiction.³⁰ These values subsume values proposed as fundamental, such as dignity, freedom and equality. Fox argues that the emphasis should be on efforts to balance individual autonomy and a psychological sense of community and to show how these attempts are helped or hindered by particular legal and political structures, practices and theories.³¹ Although the goal of achieving a balance between autonomy and the psychological sense of community is not in the abstract a controversial one, Fox points to the irresolvability of the fundamental contradiction – the important point that people in society differ amongst themselves as regards the desirability of each of these positions.

For those who believe that the law should be a space where competing values are always at stake, it makes sense to expect legal conflict to reflect the competition between individualist and altruist values. As we have seen, the South African law of contract (also because of the totalitarian

²⁸ Ibid 520.

²⁹ Ibid HJ Berman *The use of law to guide people to virtue: A comparison of Soviet and U.S. perspectives* in JL Tapp & FJ Levine (eds) *Law, justice, and the individual in society: Psychological and legal issues* (1974) 75 as quoted in Fox (note 12 above).

³⁰ DR Fox ‘The Autonomy-Community Balance and the Equity-Law Distinction: Anarchy’s Task for Psychological Jurisprudence’ (1993) 11 *Behavioral Sciences & the Law* located at <http://www.dennisfox.net/papers/balance.html>.

³¹ Ibid.

political climate in which it developed) favours a strong sense of individualism coupled with extreme emphasis on notions of formalism.³² As a consequence, and although there are undoubtedly exceptions, we can hypothesize that contract law in its current state tends to hinder rather than help individuals in the difficult quest to attain the optimal sense of autonomy/community balance.

Adherents of critical psychological jurisprudence concerned with the subjective experience of law and with social justice take the position that radical social change is needed to help society progress meaningfully in a direction more suited to basic human needs and values. This involves the debureaucratization as well as the individualisation of human relationships.³³

The phenomenon of false consciousness in the context of the individualism / altruism tension in the South African law of contract reveals that this system of law has become so entrenched in a system of rigid, seemingly ‘value-neutral’ rules in service of capitalism and the interests of the commercial classes, that a proper inquiry into and discourse on contractual morality has by and large lost relevance. We come to think that without the rules, we cannot be good. We await the rules to tell us about the Good, rather than to rely on ourselves and our potential to be good. Kelman indicates that people are prone to exhibit a need for rules because the system makes them doubt their inherent ability to do good: ‘...soon we think that the rules make us do good rather than that we sometimes collectively choose to do the good things we do when applying rules or even when we don’t.’³⁴ In so doing, relying on the system in this way, we allow it to have the power it needs to blind us into false consciousness.

³² See the decisions in *Tjollo Ateljees v Small*, *Bank of Lisbon v De Ornelas*, *Brisley v Drotsky*, *Afrox Healthcare v Strydom* and *York Timbers v SA Forestry* as discussed in chapters 3 and 4.

³³ Fox (note 30 above) 4.

³⁴ Kelman (note 8 above) 295.

Fox speculates that equity's critics, generally in favour of preserving a conservative status quo, understand that '[j]ustice is not a thing to be grasped or fixed. If one pursues genuine justice . . . one never knows where one will end. A law created as a function of justice has something unpredictable in it which embarrasses the jurist'.³⁵ This also seems to be the view of the decision makers in the South African law of contract in that the resistance to an equity jurisdiction is clearly articulated in terms of how it would lead to unpredictable, potentially embarrassing results. To quote just a single example from the *Afrox* case:

When the court is faced with the question of enforcement of the terms of the contract, it has no discretion; it does not act on the basis of abstract ideas, but precisely on the basis of established, crystallised rules.³⁶

There is no (and I believe never can be) consensus on the definition and provision of substantive justice.³⁷ Fox indicates that culturally-derived definitions of justice vary over space, culture, and time as well as by political perspective. In the context of psychology and law in particular, it is not clear which 'independent definitions [of justice] . . . might "make sense" from a psychological perspective'.³⁸ Heyns for instance, indicated that a Western person's notion of reasonableness may be substantially different from that of an African person.³⁹ But surely we can say that oppression, inequality and racism, for example, cannot be part of any system seeking to attain social justice.⁴⁰ Furthermore, we can surely argue that social justice cannot be attained by a body of law that rejects a general fairness criterion in favour of the strict enforcement of contracts (all

³⁵ J Ellul *The technological society* (1964) 292 as quoted in Fox (note 30 above) 6.

³⁶ *Afrox Healthcare Bpk v Strydom* (2002) (6) SA 21 (SCA) 40H-41A.

³⁷ Fox (note 14 above) 528.

³⁸ *Ibid.*

³⁹ C Heyns "'Reasonableness" in a Divided Society' (1990) 107 *SALJ* 279.

⁴⁰ I Prilleltensky & DR Fox (note 13 above).

in the name of the ‘fundamental’ value of freedom at the cost of other fundamental values such as equality and human dignity), as is the case in the South African law of contract.

Critical law and psychology accepts that justice cannot be defined, but it suggests that justice can be experienced. These scholars claim that there exists a link between a human being’s experience of wellness and her experience of justice, but that false consciousness again deflects attention away from this link. According to Fox and Prilleltensky ‘wellness is achieved by the balanced and synergistic satisfaction of personal, relational, and collective needs, which, in turn, are dependent on how much justice people experience in each domain.’⁴¹ The authors claim that in the good society wellness and justice are not separate concepts but are interlinked and ‘constituted by complementary factors’.⁴² The media’s transmission of distortions of wellness and/or justice however strips wellness of its social context and reinterprets justice as tantamount to the status quo.⁴³ To this extent, the authors recognise that psychology is not separated from politics and acknowledge that the claim of interconnectedness between wellness and justice is also a political one. They point out that the traditional individualistic ethos advocated by psychology is equally a political claim.⁴⁴

Fox and Prilleltensky describe wellness as derived from a ‘synergistic interaction’ of personal, collective and relational factors in which each of these three domains reach ‘a basic level of satisfaction.’⁴⁵ The authors point to the existence of significant empirical data showing that subjective well-being is influenced by collective factors as vast as political oppression and corruption, employment and participatory democracy and warns that wellness cannot be reduced

⁴¹ Ibid 1.

⁴² Ibid 2.

⁴³ Ibid.

⁴⁴ Ibid 2.

⁴⁵ Ibid.

to only personal and the relational.⁴⁶ However, the collective factors are often portrayed as something unreachable and difficult to access which causes an imbalance in the interaction of the personal, the relational and the collective.

The authors describe justice as ‘the fair and equitable allocation in society of burdens, resources, and powers’.⁴⁷ They point out that justice is essentially a relational construct in which context is paramount:

An allocation regime that ignores individual circumstance easily degenerates into discourses that blame victims and justify inequality. To prevent one-size-fits-all approaches...we need multiple allocation schemes that respond to variability in context.⁴⁸

The authors employ the argument that societies aspiring to justice should seek equilibrium among needs, deservingness and equality, much the same as the way an individual should seek balance within wellness among personal, relational, and collective needs.⁴⁹ ‘Just as in wellness, to restore lost equilibrium in justice we may have to reposition certain domains from the background to the foreground.’⁵⁰

Fox and Prilleltensky propose a commitment to psychopolitical literacy as a means of resisting the barriers created by the misrepresentation that the two realms of wellness and justice are

⁴⁶ Ibid 3.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

isolated from each other. Towards a holistic understanding of wellness and justice,⁵¹ psychopolitical literacy refers to ‘people’s ability to understand the relationship between political and psychological factors that enhance or diminish wellness and justice.’⁵² The authors note that merging ‘the positive and negative psychological and political dynamics affecting wellness and justice,’ will invariably draw attention to the interface between individual and societal variables.⁵³

In essence, psychopolitical literacy is about educating people about the nature of power. Psychopolitical literacy undermines an either/or scholarship of wellness and justice and proposes a holistic approach to undermine ‘the ignorance that flows from the examination of parts’.⁵⁴ Prilleltensky and Fox claim that:

[i]ndividuals lacking psychopolitical literacy too often endorse myth-like values and assumptions that legitimize injustice. Once people believe in a myth, their sceptical sense vanishes, they accept it as fact, and - most importantly - the invented reality becomes reality itself, the only reality.⁵⁵

To this extent psychopolitical literacy undermines false consciousness and propagates awareness.

⁵¹ Ibid 7.

⁵² Ibid.

⁵³ Ibid 10.

⁵⁴ Ibid.

⁵⁵ Ibid.

For Prilleltensky and Fox the decision to pursue wellness and justice, not just for us but for others as well, is not only cognitive but moral in the sense that the commitment to psychopolitical literacy draws on the realisation that people can change their own lives and improve the collective future.⁵⁶

The above claims of psychopolitical literacy to emphasise and promote the link between wellness and justice should, in my view be carefully considered in the South African law of contract, especially if we view contract as not only relational, but also collective and political. Contract affects our experience of wellness (which is linked with our experience of justice) on a multiplicity of levels. The absence of a commitment to good faith and contractual justice (the ethical) in the law of contract appears to distort the link between wellness and justice in contract and poses the danger of the fatalistic thought in false consciousness. This easily results in the dynamics of complacency which the authors refer to above and ultimately has the potential to make us the perpetrators of our own destruction.

The task of psychopolitical literacy in the South African law of contract is to develop an understanding of the problem of power in contract law and to create awareness that the traditional conceptions of power are not necessarily pursuant to wellness or justice. The challenge of critical law and psychology scholars is to make people recognise that the law as it is is not necessarily the law as it should be and the law as it is can only obliquely contribute to or promote wellness. I support Sloan's suggestion that: '[P]eople need to be invited by psychologists and other social scientists to participate in an ongoing process of reflection on our personal and collective problems in living meaningfully.'⁵⁷ The task is thus not only an eye-opening one but also a mobilising one.

⁵⁶ Ibid.

⁵⁷ T Sloan 'Theories of personality: Ideology and beyond' as quoted in Fox & Prilleltensky (note 13 above).

In eroding false consciousness and its foundations, psychological jurisprudence should emphasise the crucial psychological link between wellness and justice as part of the transformative endeavour. Once people start to note the injustices in the system and how those injustices affect their well-being, they will mobilise efforts to promote justice and consequently, their own wellness.

In order to develop psychopolitical literacy within a contractual context, it is necessary to reinvestigate the understanding of contract in everyday life. Empirical theories dealing with the use and abuse of contract behaviour in the shadow of contract law, provide an indispensable tool towards such a reinvestigation.⁵⁸

(b) Lessons from empirical law and psychology

The writings on empirical psychology in contract law and on how the general themes in critical psychological jurisprudence manifest in the field of contract, are unfortunately limited and far apart. A study by Stolle and Slain represents one of the few recent studies designed to examine the impact of contract law on our daily lives.⁵⁹ By following an empirical psychological approach, Stolle and Slain found that individuals rarely understand the legal significance of these documents.⁶⁰

⁵⁸ DP Stolle & AJ Slain 'Standard form contracts and contractschemas: A preliminary investigation of the effects of exculpatory clauses on consumers' propensity to sue' (1997) 15 *Behavioral Sciences and the Law* 83, 84.

⁵⁹ *Ibid* 94.

⁶⁰ Earlier, in 1963, Macaulay attempted to address the burning issues in contract by using survey and interview methodologies and, by relying heavily on empirical data collected in the surveys, he found that formal contract doctrine often takes a back seat to extra-legal conceptions of fair dealing and common honesty and decency. See S Macauley 'Non-contractual relations in business: A preliminary study' (1963) 28(1) *American Sociological Review* 55.

Macaulay (a leading empirical theorist) has confirmed Dalton's view that contract doctrine contains major conflicting strands of political philosophy.⁶¹ As Macauley puts it: 'It does not stand apart from the cross currents of political debate over time.'⁶² Macaulay remarks that 'contract law promises to remedy breaches of contract and provide security of expectations but it does this only indirectly and imperfectly.'⁶³ This promise which contract law cannot keep helps to lead us into the false consciousness that a world that is always changing is stable and that the law of that changing world can resolve the conflicts and tensions in society. Macauley also confirmed Kennedy, Kelman and Feinman's views that there exist counter rules for almost every contract rule and that 'most contract rules are qualitative and open-ended.'⁶⁴ He argues that contract law cannot produce what it promises by employing the following analogy of the Wizard of Oz: 'Much of law operates under the Wizard of Oz principle of jurisprudence - you will recall that the Great Oz was a magnificent and wonderful wizard until Dorothy's dog knocked over the screen so all could see that the Wizard was a charlatan.'⁶⁵

Macaulay argues that we need to open our eyes to the charlatan in order to make the world a better place. At minimum, he argues, we need 'a complex model of contract law in operation if we wish to be descriptively accurate.'⁶⁶ We often resist this kind of descriptive accuracy, according to Macauley, because it requires us to confront society's 'dark side'.⁶⁷

Again, these are general observations which ring true for the South African law of contract. We have seen in Chapter 3 that our courts' political concern when determining the boni mores and

⁶¹ S Macauley 'An Empirical View of Contract' (1985) *Wisconsin Law Review* 465, 477.

⁶² *Ibid.*

⁶³ *Ibid* 478.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid* 477.

⁶⁷ *Ibid* 479.

the determinants of the public interest in a specific case, is with freedom of contract; that the public interest favours freedom of contract and the sanctity of contract and that the enquiry into whether an agreement was entered into in good faith⁶⁸ is avoided by deeming all contracts to have been entered into in good faith. Often this comes at the cost of fundamental (constitutional) values such as human dignity and equality as can be seen from a plethora of both pre- and post constitutional decisions in the South African law of contract.⁶⁹ I tend to agree then with Fox where he argues that the few times that equity is victorious in this scenario, is just a perpetuation of the false consciousness that the system actually works, serves us well and that no real transformation is necessary.⁷⁰

Macauley argues that the challenge of the empirical is to ‘avoid cynicism, recognise the values of classic views of law, and rationalise a dispute processing system that does not turn on litigation and doctrine’.⁷¹ He acknowledges that although this may be more difficult ‘than squaring the circle or turning lead into gold,’⁷² it should remain the commitment of an empirical perspective on law.⁷³ This seems to me to be the commitment which opens up the possibility of hope that we can contribute to a better law if we resist being led into false consciousness, open our eyes to the many gaps and start to engage in practices pursuing the ideal.

⁶⁸ Which we can rephrase as the enquiry into the ethical element of contract.

⁶⁹ See note 32 above.

⁷⁰ Fox (note 14 above) 528.

⁷¹ Macauley (note 61 above) 482.

⁷² *Ibid.*

⁷³ *Ibid.*

IV AN EMPHASIS ON THE ETHICAL ELEMENT OF CONTRACT: FREEDOM OF CONTRACT AND HUMAN DIGNITY

As already stated, my understanding of good faith as the ethical element of contract, is informed by the principle 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.’⁷⁴ The ethical relation (based on good faith) in contract is a responsible relationship with others which accepts responsibility for other contracting parties, who may or may not at the moment of conclusion of a contract be excluded by the system, but who always already has the potential to be excluded by the system, whether as a result of unequal bargaining power, the existence of a rule the traditional application of which is not in her favour, or for whatever other conceivable reason.

The fundamental contradiction represents itself vividly in the law of contract in the form of an apparent clash between freedom of contract and good faith. This clash haunts the possibility of an ethical relation in contract because people do not share the same ideas about the extent of freedom of contract and the extent of good faith, primarily because most of the time they do not share the same morality. Can we control the divergence, disparity and clashes in this context?

If freedom of contract is derived from the broad political value of freedom and good faith is derived from the broad value of dignity, I would argue that we can answer the above question and interpret the meaning(s) of the ethical element *of contract* in South Africa, in the penumbra of the supreme values/ideals of our Constitution, namely freedom, equality and human dignity. I believe that all these values must be investigated together in the law of contract, because I agree with Lubbe that ‘the law of contract should secure “a framework within which the ability to

⁷⁴ P Selznick ‘The Idea of a Communitarian Morality’ (1987) 75 *California LR* 445, 448.

contract enhances rather than diminishes our self-respect and dignity.”⁷⁵ The ethical element of contract, to be concerned with and committed to transformation,⁷⁶ should therefore be concerned with all these fundamental values.

But these fundamental values and their often contesting and contested relationships with each other are in themselves difficult to grasp and elusive in their complexity. I will investigate here two views on the relationship between freedom and dignity. The focus is primarily on dignity because I believe that dignity is the fundamental value upon which all other human rights are structured.⁷⁷ The first exposition proves that the fundamental contradiction is also at this level at work. The second exposition is a utopian/idealist position. I will aim to show how the utopian vision can inform our immediate actions towards transformation in the law of contract.

⁷⁵ G Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law’ (2004) 121/2 *SALJ* 395.

⁷⁶ K Van Marle ‘In support of a revival of utopian thinking, the imaginary domain and ethical interpretation’ (2002) 3 *TSAR* 501, 509.

⁷⁷ R Brownsword ‘Freedom of Contract, Human Rights and Human Dignity’ in D Friedmann & D Barak-Erez (eds) *Human Rights in Private Law* (2001) 183, 188.

- (a) Human dignity as ‘the two-edged sword’⁷⁸
- (i) Human dignity as empowerment (read traditional freedom of contract)

In a recent contribution reflecting on the impact of the acceptance of the Human Rights Act of 1998 on English Domestic Law, Roger Brownsword interrogates the relationship(s) between freedom of contract and human dignity.⁷⁹ Firstly, Brownsword indicates that there is a ‘relatively familiar and widely accepted’⁸⁰ discourse that links human dignity with the right to individual autonomy which in the law of contract expresses itself through the exercise of freedom of contract.⁸¹ Brownsword remarks that this idea of dignity can be traced back to nineteenth century America and the ‘free labour ideology’ which held the view that ‘respect for human dignity and freedom of contract forms a virtuous circle’.⁸² On this view, according to Brownsword, we lack dignity without the right at least to make our own contracts and we recover it with such a right.

Brownsword is furthermore of the opinion that if we are at all going to take this right of freedom of contract as a human right seriously, it must have at least the exclusionary force to take priority over the preferences and opinions of others about the question whether the right is exercised immorally. This view on dignity harks back to the traditional articulation that freedom of contract is paramount, that parties should not be released from the contracts they entered into and that a

⁷⁸ D Feldman ‘Human Dignity as a Legal Value: Part I’ (1999) *PL* 682, 685 quoted in Brownsword (note 77 above) 189.

⁷⁹ Brownsword (note 77 above). For an interrogation following the same approach to South African contract law see Lubbe (note 75 above) 420-421.

⁸⁰ Brownsword (note 77 above).

⁸¹ *Ibid* 189.

⁸² *Ibid*.

court should only enforce contracts.⁸³ This view of dignity in support of liberal-individualist politics is generally referred to as ‘dignity as empowerment’ (thus, dignity manifested as freedom of contract).

(ii) Human dignity as constraint (read good faith in contract)

Brownsword (following David Feldman) indicates another conception of dignity - as constraint on autonomy – and is of the opinion that this has profound implications for freedom of contract.⁸⁴ Dignity as constraint ‘may subvert, rather than enhance choice’⁸⁵ in situations where freedom is restricted by the State, because it is believed to interfere with the dignity of the individual, a social group or the human race as a whole. In contract, we might then refer to this dignity as constraint as dignity as good faith, because good faith is said to operate as constraint (or corrective) on the utmost freedom of contract.⁸⁶ Lubbe has recently also supported a reading of dignity as constraint in the context of the South African law of contract.⁸⁷ He argues that dignity as a constraint on human choice ‘might render an agreement contrary to public policy.’⁸⁸

⁸³ See the reference to *Printing and Numerical Registering Co v Sampson* (1879) LR 19 Eq 462, 465 in Chapter 3.

⁸⁴ Feldman ‘Human Dignity as a Legal Value: Part I’ (1999) *PL* 682 685 quoted in Brownsword (note 77 above) 189.

⁸⁵ *Ibid* 191.

⁸⁶ *Ibid* 198.

⁸⁷ Lubbe (note 75 above) 420-422.

⁸⁸ *Ibid*.

These interpretations of dignity are from the writings of Kant.⁸⁹ Brownsword points out that in Kant we find both the idea that human beings have intrinsic dignity (which he seems to view as dignity as empowerment) and that dignity has no price, that humans owe themselves a duty of self-esteem (which for Brownsword suggests the conception of human dignity as constraint).⁹⁰ Brownsword then quotes from *The Metaphysics of Morals*⁹¹ to show how Kant ‘collects the strands of his thinking’ about the two concepts of dignity. The quote, inter alia, includes the following words:

Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being...but must always be used at the same time as an end...he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being.⁹²

I believe that Feldman’s exposition of two opposing notions of dignity can be related back to the fundamental contradiction. The individualist committed to the strict enforcement of contracts will generally favour a reading of dignity as dignity as empowerment. An altruist on the other hand, will be more inclined to understand dignity as a constraint on human choice. But because

⁸⁹ I Kant & M Gregor (trans) (ed) *The Metaphysics of Morals* (1996) as quoted in Brownsword (note 77 above) 191.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid 209.

the fundamental contradiction is irresolvable we will inevitably continue to experience the tensions and contradictions between these understandings of dignity.

Although the notion of dignity as constraint is extremely valuable in contract law to control what Cameron, JA called ‘the obscene excesses of freedom of contract,’⁹³ Brownsword and Feldman’s dualistic exposition of dignity as empowerment and dignity as constraint do not entirely support my vision of the ethical element of contract. I say that this is a vision of the ethical element of contract because I realise immediately that the understanding of dignity as a two-edged sword is probably far closer to present reality than the utopian vision I will explore below.

(b) Human dignity and freedom reconciled?

According to Cornell:

Dignity ... comes from Immanuel Kant’s distinction between who and how we are as sensible beings in the world, subjected to determination by the causal laws of nature in our lives as sensual creatures and yet, who in our lives as creatures capable of making ourselves subject to the law of the categorical imperative, can also make ourselves legislators of the moral law and moral right. We are free and as free we are of infinite worth. The categorical imperative is a demand put on us that could be succinctly summarized; who ‘I am’ only has a claim to dignity because I comply my life with who I should be. A categorical imperative is a practical imperative that commands the ‘should be’ but since it is only in the realm of morality that we find our freedom, there

⁹³ *Brisley v Drotsky* (note 32 above) 35F.

is no contradiction in Kant between subjecting ourselves to that command and our freedom.⁹⁴

I interpret Cornell's words above as a vision where dignity as empowerment and dignity as constraint are reconciled. Cornell argues that if we give dignity its broadest meaning, it is 'not associated with our *actual* freedom but with the postulation of ourselves as beings who not only can, but must confront moral and ethical decisions, and it is in making those decisions, that we give value to our world.'⁹⁵ Cornell argues that dignity is part of our practical reason and as such is part of the ideal of humanity: 'it is human beings in their practical activity who give value to the world.'⁹⁶ Cornell notes that '[d]ignity lies in our struggle to remain true to our moral vision, and even in our wavering from it'.⁹⁷

Brownsword conceives of dignity as empowerment as something opposed to or different from dignity as constraint. Cornell believes that Kant pointed out that we find freedom only in the realm of morality, that we can only claim freedom because we have dignity, that freedom is no longer freedom where it violates another's sense of dignity.⁹⁸

In arguing for an emphasis on the ethical element of contract I believe that it is essential that we understand that we can only exercise freedom of contract in the face of respect for the dignity of others. Lubbe argues that our understanding of dignity in contract should be informed by Kant's

⁹⁴ D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation' (2004) 19 *SAPR/PL* 666.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid* 667.

⁹⁸ This approach was followed in the *Coetzee v Comitis* 2001 (1) SA 1254 (C) par 34 where Traverso J held that the restraint of trade procedure of the relevant football association 'strips the player of his human dignity as enshrined in the Constitution.'

precept that people should not ‘act contrary to the equally necessary self-esteem of others, as human beings, that is, [they are] under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being’.⁹⁹

Concerning freedom, Van Marle has pointed out (with reference to the work of Douzinas) that freedom is an open concept, ‘one not yet determined all the way to the end’¹⁰⁰ but it is precisely the open-endedness of freedom that has allowed it to be ‘co-opted by ideologies and movements that are inherently opposed to the essence of freedom’.¹⁰¹ Van Marle uses the example of freedom in deregulated market capitalism or neo-liberal law and economics. The law of contract operating as a tool of these ideologies is as equally opposed to the openness of freedom as its underlying ideologies but nevertheless co-opted freedom and declared it to be the foundation of contract. The justification of this freedom lies in an understanding of dignity as empowerment. This is the freedom of individualism. As Kennedy puts it: “The “freedom” of individualism is negative, alienated and arbitrary. It consists in the absence of restraint on the individual's choice of ends, and has no moral content whatever.”¹⁰²

It is on such a neo-liberalist view of freedom that Brownsword base his views that dignity as constraint (in contract language we can say good faith) is/can be the enemy of dignity as empowerment (freedom of contract). Cornell would want us to understand that there is not and cannot be a contradiction between our freedom and subjecting ourselves to the command that is the categorical imperative. The categorical imperative as Cornell uses it in the above quotation demands of us to further the ends of ourselves as well as that of others.

⁹⁹ Lubbe (note 75 above)

¹⁰⁰ C Douzinas ‘Human rights and postmodern utopia’ (2000) *Law and Critique* 200, 223 as quoted in Van Marle (note 76 above) 503.

¹⁰¹ Ibid.

¹⁰² D Kennedy (note 10 above) 1774.

To bring all of this back to the ethical element of contract in a constitutional South Africa, I would argue that human dignity in the law of contract demands the exercise of *freedom of contract in good faith*. Perhaps this demand was best summarised in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*¹⁰³ by Davis J where he held as follows:

This concept of good faith is congruent with the underlying vision of our Constitution ... to the extent that our Constitution seeks to transform our society from its past, it is self-evident that apartheid represented the very opposite of good faith ... Our Constitution seeks to develop a community where each will have respect for the other... Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.¹⁰⁴

It seems to me that if we are going to declare that we are free to contract, we should realise that we find that freedom of contract only in the realm of morality. Our freedom of contract is therefore a freedom with responsibility - an ethical freedom. I regard it as absolutely crucial in South Africa that we realise, as Kennedy reminds us, that '[w]e can achieve real freedom only collectively, through *group* self-determination. We are simply too weak to realize ourselves in isolation.'¹⁰⁵ This collective achievement of freedom cannot be attained where a claim to freedom violates another's claim to dignity.

¹⁰³ 2002 (6) SA 202 (C).

¹⁰⁴ Ibid 215G-216A. This of course is again a lower court decision which stands in stark contrast with the decisions in the Supreme Court of Appeal discussed in Chapter 4.

¹⁰⁵ Ibid.

I believe that this conception of freedom and dignity can help us to realise that it is senseless to exploit the perceived inequality (in gender, bargaining power, level of education, market experience etc) or difference of the other contracting party because, as we are all interdependent, we are by behaving in such a manner, only guaranteeing a future exploitation of our own inequality or difference, an undermining of our claim to dignity. Hawthorne has argued that the constitutional right to equality obliges the law of contract to develop a doctrine of inequality.¹⁰⁶ She argues that the development of this doctrine of inequality will force a court to visit, in each and every case, the fairness of the market.¹⁰⁷ She argues, in accordance with the transformative approach, that this development will demand of a court ‘to make a moral decision about the desirability of enforcing contracts and a concern to ensure fair conditions.’¹⁰⁸ Because I am sceptical that this development will take place in a court I would rather argue that the constitutional right of equality obliges each of us to heed and be concerned with the difference of other contracting parties, rather to wait upon a court to tell us to be so concerned.

Finally, the ethical element of contract on this interpretation of freedom, dignity and equality seems to me to be nothing else than the requirement to act reasonable and in good faith when one contracts. It is nothing other than the realisation that freedom of contract cannot prevail in the face of substantially inequitable outcomes of its application. It is the realisation that the political and moral consequences of a court’s decision are inevitably going to affect people in real situations.¹⁰⁹ It is also the claim that the ‘formalistic and clinical conclusions of the majority in the *Bank of Lisbon v De Ornelas* case’¹¹⁰ does not mean that the Roman-Dutch law have lost the very

¹⁰⁶ L Hawthorne ‘The principle of equality in the law of contract’ (1995) 58 *THRHR* 157, 175.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ K van Marle & D Brand ‘Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*’ 12(3) (2003) *Stellenbosch LR* 408, 413.

¹¹⁰ SA Law Commission Report *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1998) 36.

feature which enabled it to survive in the modern world - its openness to policy considerations. It is a realisation, to paraphrase Zimmermann that the concern for substantive justice is not adequately reflected in the (sometimes) deficient will theories which have replaced equitable doctrines.¹¹¹

In submissions to the Law Commission it was pointed out that '[W]e are perhaps now back where we started in Roman days, a few months or weeks away from the Praetor issuing legislation to secure simple justice between man and man.'¹¹² Only time will tell how far from or how close to that moment we are in South Africa.

We can, however, not await the coming into being of a rule of law, once and for all forcing us to act equitable and in good faith when contracting. The very Rule of Law already requires that we do. Although concepts such as good faith and justice cannot be given content without the law,¹¹³ we often forget that we are at least sometimes capable of collectively choosing justice even in the absence of law telling us to choose justice, for even in the presence of law telling us to choose justice we may still not choose justice.

The ethical element of contract, good faith and contractual equity, like justice, simply lacks a single true and fixed meaning. As Emily Houh indicates, Black or female consumers may believe that a particular contracting process is infected with bad faith conduct, while their White and male counterparts may disagree.¹¹⁴ But does the lack of consensus about how to define good faith and contractual justice mean we cannot attack injustice? Not at all. Bell remarks that

¹¹¹ Ibid.

¹¹² Ibid 35.

¹¹³ Malan & Cilliers 'Deconstruction and the Difference between Law and Justice' (2001) 3 *Stell LR* 439.

¹¹⁴ E Houh 'Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law' (2003) 88 *Cornell LR* 1025, 1051-1052.

‘[e]thical work often involves gleaning in the vineyards of injustice while trying to make things better.’¹¹⁵

As Du Plessis indicates, the suggestion that (concepts such as good faith and) justice are ‘too abysmal to become a text,’¹¹⁶ does not mean that we cannot say anything about it; ‘on the contrary, we must speak more and more about it.’¹¹⁷ As Botha, (writing about the Constitution), remarks: ‘it requires us to institutionalise a debate about the meaning of those norms and values which, to paraphrase Arendt, simultaneously separate us and keep us together.’¹¹⁸ It is however impossible to institutionalise this debate if we remain in a state of false consciousness in which we unquestioningly accept and believe uncritically that the law in its current state and application is the best it can possibly be.

Houh indicates that the production of specifically, legal meaning is relational by nature, subject to constantly shifting interpretations.¹¹⁹ This would mean for the law of contract that each time a court is faced with the question whether a contract should be enforced or not, it should be guided in its interpretation and decision by the relational, the collective and the transformative as opposed to a mechanical application of precedent. What is needed is real value judgments in stead of claims of neutrality.

¹¹⁵ D Bell *Ethical Ambition* (2002) 13.

¹¹⁶ 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.

¹¹⁷ *Ibid.*

¹¹⁸ H Botha ‘Democracy and rights: Constitutional interpretation in a postrealist world’ (2000) 63 *THRHR* 561 at 576 as quoted and emphasised by D Hanekom ‘Beware the silence: a cautionary approach to civic republicanism’ (2003) 18 *SAPR/PL* 139, 140.

¹¹⁹ Houh (note 114 above) 1051.

It is because of this concern with particularity that I believe that legislation in this context should be as open-ended as possible to allow a court to interpret the meaning of contractual good faith in each case with reference to how the constitutional values of dignity, freedom and equality are best served in that particular case. The legislation I would propose would look very similar to the Law Commission's first bill in Discussion Paper 65 (the Working Committee's Bill) which I append hereto as Appendix A. Adjudication in the context of this approach requires a court to make a reasoned value-judgment in each case as opposed to mechanically apply the traditional rules while hiding behind a claim of neutrality. This approach to the adjudication of contract is no doubt complex and difficult. But complexity and difficulty does not provide an alibi for not assuming responsibility for this difficult task. What should be borne in mind while we contemplate this approach is that courts are not empowered only to enforce contracts, but should also be empowered to ensure that fairness is furthered.¹²⁰

V REFLECTIONS ON CONTRACTUAL JUSTICE (UTOPIA)

I have proposed above a renewed realisation of the ethical element of contract law in South Africa – an approach which is committed to good faith, and the ideal of contractual justice. But this is an argument for contractual justice which demands of me also my vision of contractual justice. What would contractual justice be to me?

Firstly, I have already indicated that I believe that it is impossible to provide a neat and tidy definition of contractual justice, 'to draw lines at ordained points on axes whose poles exist only in relation to one another'¹²¹ and say: 'Here, at this very point, exists the acceptable balance of

¹²⁰ SN Thal 'The Inequality of Bargaining Power Doctrine: the Problem of Defining Contractual Unfairness' (1988) 8(1) *Oxford Journal of Legal Studies* 17, 21.

¹²¹ C Dalton 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 (5) *The Yale LJ* 997 1002.

doctrine and reality, of individualism and altruism, of rules and standards; here we find contractual justice'. As Kennedy puts it: 'the acknowledgment of contradiction means that we cannot "balance" individualist and altruist values or rules against equitable standards.'¹²²

The reality is that neither pole/image of/in the form/substance 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'¹²³ Dalton believes that the very terms of these polarities are empty.¹²⁴ As she indicates, contract doctrine talks as if we know what is private and what is public, what is subjective and what objective, what is form and what is substance.¹²⁵ '[T]he only way we can define form,...is by reference to substance, even as substance can be defined only by its compliance with form.'¹²⁶

Cohen remarked that: 'Justice is done when those who should have, do have; when each gets his or her due; when what people do have is appropriate to what they should have.'¹²⁷ But conceding the irresolvability of the fundamental contradiction is for me not the same as saying that contractual justice as an ideal should not be pursued. On the contrary, this is precisely why it *should always* be pursued.

¹²² Kennedy (note 10 above) 1775.

¹²³ Feinman (note 11 above)

¹²⁴ Dalton (note 121 above)1002.

¹²⁵ Ibid.

¹²⁶ Ibid. This, I believe is what Kennedy attempted to expose in his analysis.

¹²⁷ RL Cohen 'Membership, intergroup relations, and justice' in Vermunt R & Steensma H (eds.) *Social justice in human relations* (Vol. 1) (1991) 240.

Second, I believe that '[a]s a virtue [contractual] justice cannot stand opposed to personal need, feeling and desire.'¹²⁸ To this extent contractual justice resists the doctrinal claim that contract law is more objective than it is subjective, more private than it is public. My vision of contractual justice, like that of Van der Walt, holds 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.'¹²⁹ It also means that this 'responsibility is not a choice'¹³⁰ but an unpardonable necessity.

Third, I believe that contractual justice is something other than an emphasis on freedom of contract and the sanctity of contract in the absence of a consideration for the substantive implications of its application. A commitment to contractual justice realises that 'there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit. Real people are involved, even if there are not very many whose lives the decision can affect.'¹³¹

Contractual justice is something other than the unqualified claim that the Constitution does not empower a court to strike down contractual clauses by reference to good faith: It is the realisation that if such a power is to contribute to the well-being of our society, we must at least investigate whether or how we can read the Constitution to allow for such a power, rather than

¹²⁸ IM Young *Justice and the Politics of Difference* (1990) 121 as quoted in Van Marle & Brand (note 109 above) 413.

¹²⁹ CFC Van der Walt 'Beheer oor Onbillike Kontraksbedinge – *Quo vadis* vanaf 15 Mei 1999?' (2000) 1 *TSAR* 33 34; JM Feinman 'Critical Approaches to Contract Law' 30 *UCLA LR* 829 859.

¹³⁰ D Cornell *The Philosophy of the Limit* (1992) 100.

¹³¹ Kennedy (note 10 above) 1777.

to shy away from the constitutional enquiry into contract or read the Constitution exclusively in a classical-liberal way when it comes to the Constitution and contract.

Contractual justice is then also the realisation that it is precisely the open-endedness of the text of the Constitution that allows us to be continuously engaged with the chasm between self and other. It is also precisely for this reason that uncertainty should be embraced, rather than feared, because '[w]e can only cope with certainty once we have accepted the inevitability of uncertainty'.¹³² In other words, contractual justice is also the realisation that even in the law of contract, nothing is certain.

This is not to say that my vision of contractual justice holds that all doctrine is meaningless and should be discarded as unconstitutional. This study has shown that doctrine is redolent with meaning(s). We would not have had a multiplicity of dualities in contract if doctrine simply had no meaning. The problem with doctrinal talk, like Dalton indicates, is not that it has no meaning, but that it pretends that doctrine alone can resolve the issues that come before a court, rather than to acknowledge that 'doctrine can only represent these issues in a way that allows a decisionmaker to make a considered choice in the case before her'.¹³³

Cornell has criticised the attempts in CLS to show that the fundamental contradiction cannot be resolved, that something like 'institutionalised meaning' is impossible.¹³⁴ Cornell believes that the 'proposition' should instead be 'that law cannot be reduced to a set of technical rules, a self-sufficient mechanism that pulls us down the track through each new fact situation. Interpretation always takes us beyond a mere appeal to the status quo'.¹³⁵ Cornell believes that CLS does not

¹³² Du Plessis (note 116 above) 812.

¹³³ Dalton (note 121 above) 1009.

¹³⁴ Cornell (note 130above) 101-102.

¹³⁵ Ibid 102.

reject ethical commitments simply because they are subjective. She argues that CLS' 'insistence on the "irrationality" of personal ethical commitments can itself be understood to have an ethical dimension.'¹³⁶ I believe that it is precisely because the law cannot resolve (only reflect) the fundamental contradiction that creates the appeal for a renewed commitment to the ethical element of contract. We simply cannot rely only on the law for 'the Good' to 'leave its mark', in order for 'the Good [to] constitute the subject as responsible to the Other.'¹³⁷

My vision of contractual justice is, like all visions, utopian – how we imagine it to be. But I do not believe that utopian visions cannot, in a very practical way, contribute to real transformation.¹³⁸ Feinman has pointed out that the role of critical theory in contract law is to resist/remove the barriers to understanding contract and to expose society's true nature by denying the 'limiting belief structures'¹³⁹ and the 'alienating and subordinating institutions that they conceal.'¹⁴⁰ We can do this, Feinman says, because contract law is, like all other law, 'a product of the human will.'¹⁴¹ Because contract law is a product of the human will, Feinman

¹³⁶ Ibid. See also J Derrida 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo LR* 921, 967. The moment of a just decision is a madness, says Derrida, 'acting in the night of non-knowledge and non-rule. Not of the absence of rules and knowledge but of a reinstitution of rules which by definition is not preceded by any knowledge or by any guarantee as such.'

¹³⁷ Ibid also quoted in LM du Plessis (note 117 above) 809.

¹³⁸ On the transformative value of utopian thinking see in general C Douzinas 'Human rights and postmodern utopia' (2000) *Law and Critique* 219 where Douzinas argues for an understanding of human rights as 'the utopian hope for a society in which people are no longer degraded and despised' and C Douzinas *The End of Human Rights* (2000) vii where Douzinas argues, as a matter of transformation, for an increased emphasis on ethics in the legal field and contends that 'law without justice is a body without soul'. Also see Derrida (note 136 above) 969 where Derrida explains the difference between the 'à-venir' and 'the future which can always reproduce the present.'

¹³⁹ Feinman (note 11 above).

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

believes we can ‘deny the power of the present law over our minds’¹⁴² and we can imagine ‘the possibility of a better law.’¹⁴³ He suggests certain practical instances in which he argues that the court’s decision was influenced by utopian thinking.¹⁴⁴

Feinman suggests that thinking about a utopian contract law should include imagining societies and forms ‘in which the fundamental contradiction is either overcome or openly confronted’.¹⁴⁵ I agree with Feinman’s assertion that imagining utopias has important practical consequences, because it makes vivid the inadequacies of the existing law and ‘promotes less distant revolutionary activity by helping generate creative solutions to more immediate problems. By keeping in mind both the defects of existing law and at least some hazy vision of a utopian law, lawyers can transform ordinary situation into extraordinary occasions.’¹⁴⁶ Feinman emphasises that it is not the fact that this struggle will succeed that is important, but rather ‘that it is possible and worthwhile.’¹⁴⁷

I believe thus that utopian thinking forms part of an ethical approach to contract as I have described it above. Feinman’s utopian vision of freedom of contract corresponds with Cornell’s vision of the reconciled version of freedom and dignity: ‘Freedom of contract in the utopian vision requires a social order in which people possess the practical ability to connect with each other to find meaning in their lives through common endeavour...Contractual obligation represents the free assumption by social beings of the responsibility for others with whom they interact.’¹⁴⁸

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 858.

¹⁴⁷ Ibid 860.

¹⁴⁸ Ibid.

Feinman notes however that utopian thinking on its own will not bring about the transformation we imagine because ‘imagining the solution does not by itself bring the solution about’.¹⁴⁹ This means that the problem is primarily one of praxis – the struggle between theory and practical experience. He emphasises the importance of the continuing struggle in realising a better world. This is a ‘struggle which is attentive both to vision and to reality.’¹⁵⁰

It is this immediate action informed by utopian thinking about contractual justice which to my mind can contribute to ethical contractual behaviour, the realisation of transformation and moments of contractual justice.

VI CONCLUSION

Everyday, we tell ourselves and each other stories about the law of contract which are organised along dualities reflecting ‘the chasm between self and other’.¹⁵¹ We might refer to these dualities as form and substance, individualism and altruism, rules and standards, public and private, objective and subjective, or the utmost freedom of contract and the concern for good faith and contractual justice. While we may simultaneously and in varying degrees experience both sides of a duality in our lives at any given point, the relationship between the poles of these dualities is within a (legal) system always hierarchical in that one polarity or ideal typical position is politically privileged above the other.

In my choice to engage with the duality of substance and form, I attempted to indicate in the first part of this study how ethical concepts such as good faith, fairness and justice initially played an

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Dalton (note 121 above) 1002.

important part in the legal systems from which South Africa inherited the South African law of contract. In Chapter 2 we saw that considerations of justice, fairness and good faith were paramount in Roman contract law and later in the 18th century English and Anglo-American Law. We also saw from the historical exploration that the approach to equity in contract law changed drastically during the nineteenth century. The law of contract became an instrument in the hands of the commercial classes in the market with which parties could make and enforce their own law. The problem of power and its abuse became acute during this time because many parties often had to agree to the unilateral contract law of the more powerful contractual party. The general belief was that the market requires an individualistic rule based ethic to function properly.

In Chapter 3 I have attempted to show that in South Africa, contract law and its adjudication consistently favours the individualism/rules pole of the substance/form duality. This is evident in decisions where the courts either enforce a contract on the grounds that public policy favours the utmost freedom of contract or where they decline to enforce the contract on the basis that the contract itself is not a manifestation of the free will (freedom of contract) of either of the parties. We have seen that equitable remedies such as *laesio enormis* and the *exceptio doli generalis* have been abolished in favour of the will theories and a preference to deal with unfair contracts in an indirect way via the detours of the constructions affecting consensus – a way to deal with unfairness which has often proved to be deficient.¹⁵²

Dalton makes the point that dealing with unfairness via those constructs which affect the will of the parties (duress, misrepresentation, undue influence etc) effectively constitutes a reprivitisation of the public enquiry into contract when ‘the undoing of a defective deal [is] presented as depending upon the absence of will or intent rather than on mere inequivalence of exchange.’¹⁵³

¹⁵² See the discussion of *Tjollo Ateljees v Small* and *Bank of Lisbon v De Ornelas* in Chapter 3.

¹⁵³ Dalton (note 121 above) 1001.

This privatisation immediately partakes of the public in the sense that the concept of equivalence of exchange relies on subjective states of mind for its determination.¹⁵⁴

In this context we have seen that the public enquiry into the legitimacy of private freedom of contract has been ‘privatised’ in the sense that it has been consistently held that freedom of contract (the strict enforcement of agreements privately concluded) *is* in the public interest.¹⁵⁵ Finally, we have seen that the enactment of a sovereign Constitution did not achieve much to change this one-sided privileging of liberal values in the law of contract. Our courts have again found a way to ‘privatise the political’¹⁵⁶ and to insist on an artificial distinction between private and public; to legitimise the idol that is freedom of contract, insisting that freedom of contract is part of the constitutional ideal of freedom and informs the principle of dignity. In addition, our courts have declared that the Constitution provides no grounds for a general equitable jurisdiction based on good faith (the ethical) in contract. These assumptions are of course based themselves on an extremely unilateral (liberal) reading of the Constitution – a reading which there is arguably, very little room for in South African jurisprudence.

I have attempted to show in this study that there is another side to this story - that there are strong theoretical arguments in favour of a move away from an insistence on the utmost freedom of contract. In Chapter 3 I have tried to indicate that despite the privileging of the individualism/rule pole of the duality, a relational or altruist ethic can indeed be found in the law of contract and also in other disciplines, for instance sociology’s concept of the morality of an

¹⁵⁴ Ibid.

¹⁵⁵ Hopkins remarks that ‘sanctity of contract became the epitome of public policy in contract’. K Hopkins ‘The influence of the Bill of Rights on the enforcement of contracts’ (2003) *De Rebus* 25 (available at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>).

¹⁵⁶ See the discussion of 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* <<http://elj.warwick.ac.uk/global/03-1/vanderwalt.html>> in Chapter 4.

implicated self which focuses on (pre-contractual) obligations rather than rights. We have seen that there are infinite instances of severe contractual injustices which occur every day. I have argued that our Constitution can facilitate a transformation to a better law through which the traditional law of contract can become more infused with the ideal of justice. Up to now the development has been unsatisfactory, primarily because of the Supreme Court of Appeal's obsession with the idol that is *pacta servanda sunt*. I have expressed doubt that the court will reach the point where they apply fairness directly to the South African law of contract through the concept of good faith informed by the values of the Constitution. In this regard, I have suggested open-ended legislation such as that appearing in Appendix A.

From the Law Commission's work on unfair contracts we have seen that in recent times public policy (on a global level) has again become as sensitive to justice, fairness and equity as it has been before the nineteenth century. This sensitivity is reflected in recent developments both in the English common law and the Western law. In 1975 the Unfair Contract Terms Act was introduced in the United Kingdom as the first clear signification of a movement towards the recognition of a doctrine of unconscionability in contract.¹⁵⁷ Decisions by the House of Lords around the same time, like those in *Schroder v Macaulay*,¹⁵⁸ *Davis v WEA Records*¹⁵⁹ and *Llyods Bank v Bundy*¹⁶⁰ also clearly indicated that the judicial paradigm was moving towards an equitable English law of contract. The movement away from or disillusion with formalism and individualism seems to have become an international judicial trend. The rise of the consumer protection movement in the seventies hugely contributed to the accommodation of general equitable jurisdiction in the

¹⁵⁷ SA Law Commission Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Discussion Paper 65 (July 1996) par 1.40.

¹⁵⁸ *Ibid* par 1.41.

¹⁵⁹ *Ibid* par 1.42.

¹⁶⁰ *Ibid* par 1.43.

law of contract of comparative jurisdictions.¹⁶¹ Today, most countries sharing its legal origins with South Africa, embrace in some or the other directly articulated form good faith as the ethical element of contract.¹⁶²

In this chapter I have argued that because a contract is a relation, the ethical element of contract is altruistic. It is the requirement to act in good faith towards *another* contracting party. It is said that contract, like the tango, takes two. So configured, the ethical element of contract is concerned with transformation of the existing law (which does not emphasise or protect adequately the importance of good faith) which is coupled with a denial of and resistance against false consciousness. An ethical approach also resists any particular final meaning of the open ended concepts of contract such as good faith, the *boni mores*, public policy and contractual justice. This is not a new assertion. In Chapter 2 we have seen that the Romans believed that justice goes beyond the written law.

An ethical approach views freedom of contract as a freedom with responsibilities and not a freedom which allows us to exploit others and violate their dignity. The ethical element of contract demands a consciousness that we are all in this together while at the same time realising and being conscious that the fundamental contradiction cannot be resolved. This does not mean that we can do nothing about exploitative self-interest or that, each and every time a poor or illiterate person is coerced into a unilateral contract, we cannot speak out against it.

In this study I have stated, through my numerous discussions of case law, many stories about the lives of South Africans and how the law of contract impact on these lives. My account of the narratives in itself constitutes my narrative. I agree with Dalton where she says that the telling of

¹⁶¹ Ibid.

¹⁶² CFC Van der Walt 'Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg' (note 2 above) 65, 68.

any story is in a sense impoverishing, because it strips reality of its infinitely rich potential, of its detail, ‘of all but a few of its aspects.’¹⁶³ It is unfortunately ‘only through this restriction of content that any story has a meaning.’¹⁶⁴ My own narrative may too be subject to my own criticism of the grand narrative in that it may too ‘misrepresent as much as it reveals’.¹⁶⁵

My only response to this charge can be that this project did not aim to re-emphasise, but to challenge and discredit what I understand to be the grand narrative of the South African law of contract. By adding my story, I hope only to show that transformation in the law of contract is as important a project as transformation in every other area of law. It is not ‘the law’ which is responsible for this transformation - it is us who create the law with our human will in the face of our humanity who is inexcusably responsible for transforming it.

Ultimately, the argument of my study has been that the task is one of ‘*imagining* an altruistic order’¹⁶⁶ and of being committed, in a practical way, to realising that imagination in our daily contractual relations. Contract law is ‘an ideal context for this labor’¹⁶⁷ because it reminds us that we do not live in Utopia. Contract law presents the immediate and very real problems of everyday life, inescapable and ‘yet deeply resistant to political understanding.’¹⁶⁸ With Kelman I feel that this creates the obligation ‘to retrace, hoping to see where we first got lost.’¹⁶⁹ With Kennedy I agree that ‘we should be grateful for this much, and wish the enterprise what success is possible short of the overcoming of its contradictions.’¹⁷⁰

¹⁶³ Dalton (note 121 above) 1113.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Kennedy (note 10 above) 1778. (Emphasis added).

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Kelman (note 8 above) 295.

¹⁷⁰ Kennedy (note 10 above) 1778.