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

by

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**Thesis submitted in partial fulfilment of the requirements for the degree *Doctor Legum***

**in the**

**Department of Legal History, Comparative Law and Jurisprudence**

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**November 2005**

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**ACKNOWLEDGEMENTS**

I wish to acknowledge and thank the following persons who have contributed to the successful realisation of this project:

PPS for a bursary awarded in the early days of this study;

The University of Pretoria (singling out Mrs Terblanche from the bursary division) for financial support throughout my undergraduate and postgraduate studies;

The Law Faculty at the University of Cape Town (singling out Prof Danie Visser) for financial support during the crucial final stages of the study and all my colleagues for their support and assistance;

Members of the Law Faculty at the University of Pretoria;

Members of the Max Planck Institute in Hamburg and Prof Reinhard Zimmermann for the valuable opportunity of a research visit in January 2005;

All my friends, family and loved ones: Carina Swart, Marelize Barnard, Louis Joubert and family, Jurné Le Roux, Anashri Pillay, PJ Schwikkard, Karin Lehmann, Danie Brand, Patricia Lenaghan, Pierre De Vos, Marcus Pillay, Mohamed Paleker, Jane Franco and Graham Bradfield.

My darling and best friend, André, for the gift that is sharing your life with me;

Finally, Karin van Marle, for your insistence on slowness in my time of haste, your mentorship, friendship, support, critique but most of all for helping me to envisage the richly rewarding elsewhere that always finds itself curiously both within and beyond the text.

Cape Town
February 2006

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'-if you nearly see

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

How many lies did it require to make

The portly truth you here present us with?'

- from 'Mr Sludge, "The Medium"' - Robert Browning

'as mense net meer genade het met mekaar

sal die lewe langer duur'

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

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

'Civilization's main concept

Lies within Her you see

Without contracts realized

No city could ever be

Nor enduring peace, 'cept

That of death's eternal rest

Leaving all opposition excised

And a barren world, unblessed'[2]

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

[2] http://labienus.home.texas.net/Patrons.html.

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**ABSTRAK:**

'Apparently the existence of deepgoing antinomies in our system of contracts is an experience too painful to rise to the full level of our consciousness'[1]

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

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

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

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


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

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

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

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

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

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Sleutelterme:

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

**ABSTRACT:**

‘Apparently the existence of deepgoing antinomies in our system of contracts is an experience too painful to rise to the full level of our consciousness’[1]

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

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

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

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

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

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

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

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

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

Keywords:

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

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Notes:

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

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# CHAPTER 1

# INTRODUCTION

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# 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 Drotsky*[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 Drotsky orally allowed her to pay the rent after this written stipulated date.

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[1] *Brisley v Drotsky* 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.

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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.

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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

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[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).

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'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 kontraksbedinge – *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.

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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 subjects[17] – 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.

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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 Drotsky* (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.

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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

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[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 Kontraktereg' (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 kontraksbedinge' (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 kontraksbedinge – *quo vadis* vanaf 15 Mei 1999?' (2000) 1 *TSAR* 33.

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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

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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 lead 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.

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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.

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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

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[25] See, for instance, JC De Wet & AH Van Wyk (eds) *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978); AJ Kerr *The Principles of the Law of Contract* (6ed) (2002); the majority decision in *Brisley v Drotsky* (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 Drotsky* (note 1 above) 29D-E and 33C.

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belief in altruistic values[30] 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 ideologies[31] 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 exclusively[32]) 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]

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[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.

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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.

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freedom of contract and maintaining a seperation 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 anarchy[43] 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

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[40] Cockrell (note 28 above) 40.

[41] Ibid.

[42] Van der Walt (note 15 above) 36.

[43] See *Brisley v Drotsky* (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.

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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 Drotsky* (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 consent[54] 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.

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[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.

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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.

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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 Walt[57] 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]

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[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.

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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 law[60] 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).

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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.

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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.

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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.

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[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.

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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.

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# CHAPTER 2

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

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# CHAPTER 2

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

> '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.

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

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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.

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## 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]

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[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.

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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.

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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 kontraksbedinge' (1986) 103 *SALJ* 646.

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survived the reception[23] 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.

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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]

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[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

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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 folllows: '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 man[33] and that between man and God.' [34] Iustitia is seen as the ultimate or highest value - 'the sovereign mistress and queen of all the

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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.

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virtues.'[35] Cicero described good faith as the foundation of justice[36] 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 oficiis*.[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 oficiis* 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.

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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

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[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.

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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,

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[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.

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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

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[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.

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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.

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> 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

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[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.

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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.

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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]

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[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

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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]

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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.

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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.

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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).

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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.

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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:

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[91] Ibid.

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

[93] Aquilius (note 28 above) 346.

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> [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]

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[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.

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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.

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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.

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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 where 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]

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[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.

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(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 *Pynchon 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* I 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.

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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.

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[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.

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## 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

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[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.

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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 characterisitic 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]

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[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.

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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.

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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 contract[138] - [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]

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[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.

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## 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]

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[141] Horwitz (note 102 above) 937 af.

[142] Ibid 918, 946-947.

[143] Ibid 937.

[144] Ibid 947.

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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

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[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Horwitz (note 102 above)

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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

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[149] Ibid 953.

[150] Horwitz (note 101 above) 110.

[151] Atiyah (note 102 above) 400.

[152] Horwitz (note 102 above) 953.

[153] Ibid 955.

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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 Drotsky* 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.

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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*

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[159] Ibid.

[160] Horwitz (note 101 above) 118-119.

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

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favours freedom of contract'[162] 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).

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# CHAPTER 3

# THE SOUTH AFRICAN LAW OF CONTRACT:

# A CRITICAL EVALUATION

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# THE SOUTH AFRICAN LAW OF CONTRACT:

# A CRITICAL EVALUATION

'our legal categories are contingent and fluid, and...they can be reconstructed if found to rely on untenable and outdated conceptions of human nature, reason, and truth' [1]

## I INTRODUCTION:

In his analysis of form and substance in the South African law of contract, Cockrell (relying heavily on Kennedy's analysis of American private law adjudication[2] and a critique of that analysis by Kelman[3]) shows that critical approaches to contract law occurs predominantly on two levels, namely one of form and one of substance.[4] It is particularly useful to engage with the duality on both the levels of form and substance, since an exploration interrogating an idea of the correct form can never escape the question 'Form of what?'[5]

The critical evaluation on the substance level, deals with the political morality underpinning the law of contract. It involves a juxtaposition of the extreme forms of individualism on the one side and altruism on the other. Kelman indicates that these are the 'two vital competing political

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[1] D Litowitz 'Postmodernism without the Pomobabble' (2000) 2(1) *Florida Coastal LJ* (available at http://www.fcsl.edu/academics/journal/volumethree/Litow.htm.

[2] D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685.

[3] M Kelman *A Guide to Critical Legal Studies* (1987).

[4] A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40.

[5] C Dalton 'An Essay in the Deconstruction of Contract Doctrine' 94 (5) *Yale LJ* 997, 1002.

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paradigms that are at war both among and within us.'[6] The formal analysis points out that doctrine is and will always be expressed in one of two mostly inseparable but distinguishable forms, namely either a rule form or a standard form.

Kennedy's critical analysis further claims that the adherence to individualism and the adherence to rules, on the one hand, and a belief in altruism and a belief in the expression of doctrine in the form of standards, on the other, link up with each other on opposing sides of the duality. Kennedy claims that '[t]he substantive and formal dimensions are related because the same moral, economic and political arguments appear in each.'[7] The opposites are placed as opposing ideological positions and so make up and contain the duality of form and substance.[8] The diagram below attempts to visually set out Kennedy's approach. One has to be mindful of course of the fact that the diagram is overly simplified in the sense that it does not account the plethora of intermediary positions between the extreme poles of the duality.

[6] M Kelman (note 3 above) 54.

[7] Kennedy (note 2 above) 1685.

[8] On the one side we will then find the pole of individualism and rules and on the other, altruism and standards.

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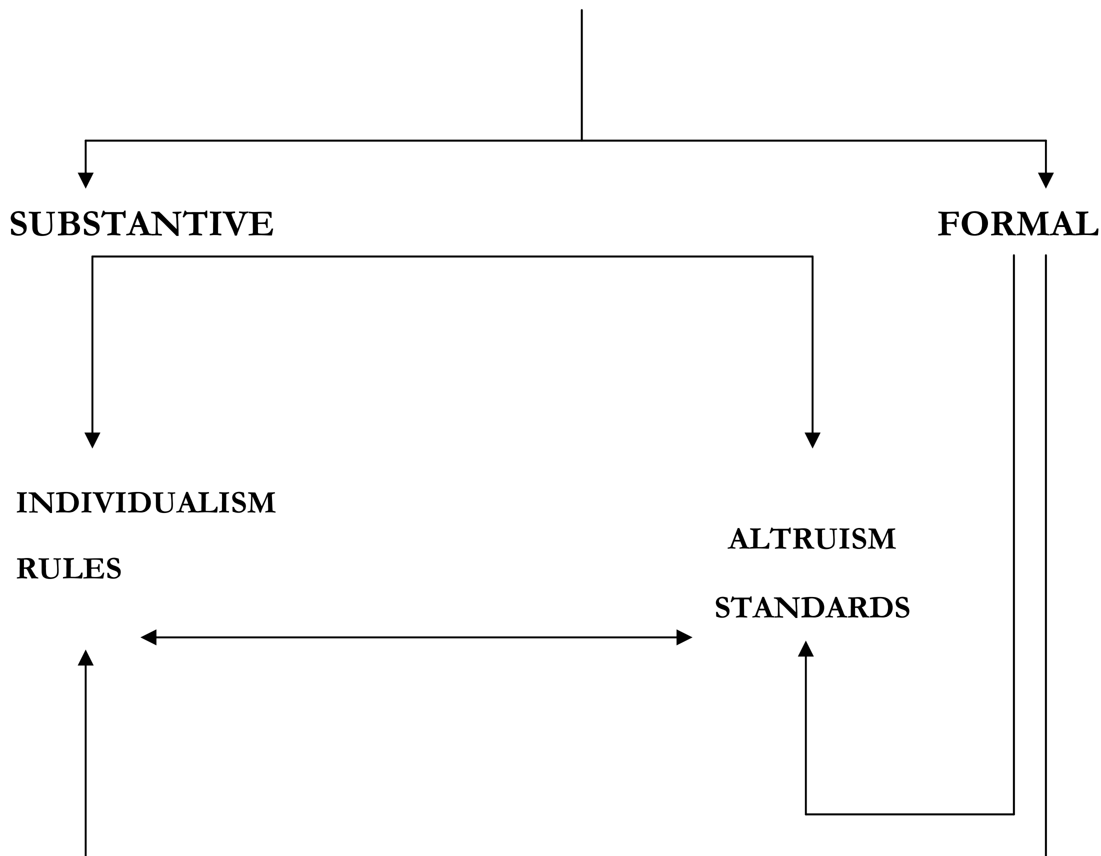


In England, Adams and Brownsword have similarly argued that both (market-)individualism and consumer-welfarism (what Kennedy calls altruism and Cockrell collectivism) underpins the English law of contract.[9] The authors claim that judges in the system are forever 'caught within the ideological tensions'[10] between these positions in the law. Those who follow a formalistic, market-individualist approach will uncritically apply the relevant rules from the rule-book, because they are concerned with following the rule-book and the rulebook itself tends to favour market-individualism.[11] Judges following a realist consumer-welfarist approach will be less concerned with the rule-book than with generating a desired result.[12] There is also the possibility

[9] JN Adams & R Brownsword 'The ideologies of of contract' (1987) 7 *Legal Studies* 205.

[10] Ibid 218.

[11] Ibid 221.

[12] Ibid 210, 222.

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of a formalist consumer welfarist outcome, because realist decisions feed into the rule-book and lead to the generation of new rules.[13] This contention links up with Kennedy's argument that rules (or the rule-book) can have an essentially standard-like appearance, which will lead to an obliteration of the distinction between rules and standards as a form.[14] The indeterminacy and false sense of certainty that the rule-book generates, then lies open for exposure.

The juxtaposition of opposing poles of a duality as a framework for critical analysis is not new. Dalton explains the value of such an interrogation suggesting that each pole of a duality is best understood and defined in relation to its opposite.[15] This understanding requires an (unavailable) prior understanding of the opposite of the pole which is being discussed or argued for. Although such an understanding may be unavailable as Dalton claims, the interrogation of the aspects of the pole which renders it opposite, can guide us in the search for such an understanding – not only of the opposite but also of the total duality in its complexity.

The approach that I will follow in Chapter 3 is based on the approach set out above. Dalton, referring to American contract law, has suggested that contract doctrine consistently favours one pole of each duality: 'Contract law describes itself as more private than public, interpretation as more objective than subjective, consideration as more about form than about substance.'[16] This chapter will attempt to show that South African contract doctrine is no different. The doctrine (positive law) sets up and contain a duality which favours one pole over another, namely, in Kennedy's terms, a pole which accommodates a preference for individualism over altruism and rules over standards. This is but one useful way to express the dualities Dalton refers to above.

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[13] Ibid 220.

[14] Kennedy (note 2 above) 1701.

[15] Dalton (note 5 above) 1000 note 5.

[16] Ibid 1000.

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In the second part of the chapter I wish to explore the 'under-privileged' positions of altruism and the standard form in the South African law of contract. These values became and remain under-privileged precisely because of South African contract law's preference for and commitment to liberal politics cast in formal rules. This exploration will be conducted also in the context of whether at all and to what extent, if any, South African courts truly apply altruist values and fluid standards in their decisions on contract. I conclude the discussion of pre-1994 case law in contract by suggesting that our law of contract reflects a clear commitment to privileging liberal ideology at the cost of altruistic values and the standard form.

## II INDIVIDUALISM, THE SUBJECTIVITY OF VALUE AND THE WILL THEORY OF CONTRACT

The centrality of the project to continue privileging individualist politics in contract law is exposed by a substantive critical analysis of the field. Kennedy goes as far as to claim that individualism provides the law of contract with its justification.[17] This individualist vision of the law of contract developed, as I have indicated in Chapter 2, out of a worldview in the late eighteenth century, which emphasised the relationship between the individual and society.[18] This worldview was profoundly influenced by the escalation in commercial development at the time. People derived their positions of power within a society from their place in the social hierarchy as well as from their own efforts to assume and maintain the specific place within that hierarchy.[19]

[17] Kennedy (note 2 above) 1715.

[18] JM Feinman 'Critical Approaches to Contract Law' (1983) 30 *UCLA LR* 829, 831.

[19] Ibid.

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Individualism accepts as given a world of independent individuals who are encouraged to prefer the perusal of self-interest rigorously. A consideration or sensitivity for the interests of others fall outside of the aims of this way of life, although one should be prepared to obey the rules that make it possible to co-exist with other self-interested individuals.[20] The individual is entirely self-reliant. His conduct conforms to the belief that other individuals in the community are themselves motivated only by pure self-interest.[21] The individualist morality is concerned with a respect for the rights of others but endorses the reluctance not to engage in communal activity. In addition, individualists are opposed to the use of private and public power to achieve social ends.[22] Individualists believe that everyone should determine and achieve their aims without the help of, or in liaison with others.

Concerning the role of law in life, individualists believe that the law cannot impose upon legal subjects as a group the liability of shared profits or loss.[23] The law merely fixes the boundaries of individual freedom by defining and enforcing rights. In the context of the law of contract, the parties create their own law through the agreement. Mensch refers to this phenomenon as a 'magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection of free will itself.'[24] Contractual liability is thus only determined by the agreement (consensus) of the parties. The law of contract in an individualistic world, to borrow from Macaulay, provides the glue that binds individuals to their agreements.[25]

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[20] Ibid 839; Kennedy (note 2 above) 1713.

[21] Kennedy points out that the individualist ethic should be distinguished from the egotistical ethic in the sense that the individualist ethic has a strong positive moral content whereas the egotist believes that it is entirely impossible and undesirable to place any limits on the perusal of self-interest. See Kennedy (note 2 above) 1714 – 1715.

[22] Kennedy (note 2 above) 1715.

[23] Ibid 1713.

[24] E Mensch 'Freedom of Contract as Ideology' (1981) 33 *Stanford LR* 753, 760.

[25] S Macaulay 'An Empirical View of Contract' (1985) *Wisconsin LR* 465, 466.

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Unger points out that this political position which experienced its heyday in the nineteenth century was driven by the idea that only a system of clearly delineated rules and rights could define a free political and economic order.[26] This order was maintained by a strict adherence to a system of predetermined rules and attempts to prevent that it is contaminated by policy considerations. In the contractual context, Kelman summarises the situation as follows: '...the rulelike position is privileged..., experienced as the starting-point 'free contract regime position" from which other positions represent *departures*'.[27]

Feinman indicates that the central economic and philosophical principle of the individualist ideology is the belief in the subjectivity of value - the concept of value understood as being entirely dependent on individual perceptions.[28] In the previous chapter I emphasised that the subjectivist theory of value bears close relation with the development of the market economy.[29] It can therefore be said that individualism both serves as the justification for the market economy and that its politics was primarily responsible for its escalation.[30] Kennedy explains the relationship as follows:

> The individualistic ethic is reflected in a perennial strain of economic theorizing that emphasizes the natural and beneficial character of economic conflict and competition. According to this view, social welfare, *over the long run*, will be maximised only if we preserve a powerful set of incentives to individual activity. The argument is that the

[26] R Unger 'Legal analysis as institutional imagination' 1996 *The Modern LR* 1, 1-2.

[27] Kelman (note 3 above) 20.

[28] Feinman (note 18 above) 839.

[29] See the discussion of this topic in Chapter 2.

[30] Kennedy (note 2 above) 1714 n74, however, points out that economic individualism, as he uses the term, is not exclusively synonymous with the nineteenth century laissez-faire approach, but rather that economic individualism 'appeals to the beneficial effects of competition and self-reliance within whatever structure of rights and regulations the state may have set up.'

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> wealth and happiness of a people depend less on natural advantages or the wisdom of rulers than on the moral fibre of the citizenry, that is, on their self-reliance. If they are self-reliant they will generate progress through the continual quest for personal advantage within the existing structure of rights. [31]

In the individualist world, the role of courts in contractual disputes is believed to be merely a non-interventionist one. Individualists believe that courts should enforce the self-created law in contracts and that they should prevent that obligations and duties are imposed on parties which they have not agreed to.[32] The main argument in favour of a non-interventionist and marginalised role of the courts in contract is that such an approach will enhance freedom and security, which is necessary to sustain and guarantee the expansion of the market system. Individualists legitimise their position by claiming that their separate private benefits are transformed into a public benefit by the magic work of an invisible hand. This public benefit is then referred to in economic terms as the maximisation of wealth.[33]

According to the individualist approach the utmost freedom of contract, as a manifestation of the parties' freedom of choice, will generate these ends. The doctrine of freedom of contract entails, amongst other meanings,[34] that parties should be free to choose one another as contractual partners and secondly, they should be free to contract on those terms chosen by

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[31] Ibid.

[32] Feinman (note 18 above) 832; JN Adams & R Brownsword (note 10 above) 208.

[33] This belief in an invisible hand is the neoclassical interpretation of a concept originally employed by Adam Smith in his classic work A Smith, RH Campbell & AS Skinner (eds) *An inquiry into the nature and causes of the wealth of nations* (1976).

[34] For additional interpretations of the freedom of contract concept see L Hawthorne 'The Principles of Equality in the Law of Contract' (1995) *THRHR* 157, 163.

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them.[35] Adams and Brownsword indicate that the latter concept has two limbs to it: Firstly, it entails that the 'free area'[36] in which parties are allowed to set their own terms, should be maximised and secondly, parties should be held to the terms they had agreed upon in the free area.[37]

A doctrine of unconscionability (contractual justice) in the law of contract is not seen as conducive to the maximisation of wealth, because it would mean that the 'free area' is minimised and that parties may potentially escape the terms they had agreed upon in the free area.[38] This would in turn limit term-freedom and because partner-freedom has already undergone substantial restrictions,[39] such an erosion of term-freedom would result in an unacceptable marginilisation of freedom of contract and the sanctity of contract. Furthermore it implies an interventionist role of the courts which, to the individualist, is an unacceptable one.

However, Feinman shows that a marginalised law of contract, based on an individualist way of exercising choice entails at least two problematic issues.[40] Firstly, the individualist image is an

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[35] Adams & Brownsword (note 9 above) 208 refers to these concepts as partner-freedom and term-freedom respectively.

[36] Ibid 209.

[37] Ibid indicating that this concept is none other than the principle of sanctity of contract.

[38] Ibid. The authors show that the principle of sanctity of contract has a double emphasis: Firstly if parties should be held to *their* bargains, courts should not intervene to strike down terms which to them appear unreasonable. Secondly, if parties should be *held* to their bargains, courts should not 'lightly relieve' them from their bargains.

[39] See for instance the anti-discrimination provisions of the Constitution (section 9(3)) and generally the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (as amended), specifically the Schedule to the Act containing an illustrative list of unfair discrimination in certain sectors. These provisions have (commendably) limited partner-freedom substantially in the South African law of contract.

[40] Feinman (note 18 above) 840.

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incomplete one as individualist characterisation of individual and social welfare neither portrays the aspirations of people nor that of the law completely. Secondly, Feinman points out that individualism does not generate a single, consistent set of doctrines for the entire law of contract. Instead, it generates a plethora of rhetorical questions and contradictions. In addition, the individualist definition of value and the ultimate purpose of maximisation of wealth, reveals a preference for values which can easily be reproduced on the open market. He shows that it is improbable that the social values of togetherness, solidarity and love[41] will be realised through exchange in the market. Wealth in the individualistic sense is thus not equal to personal welfare or human well-being, in the wide sense.[42]

If one is to bear in mind the two most important ideals of individualism, namely the enforcement of defined rights on the one hand and the maximisation of wealth, on the other, the following tautology presents itself in the individualistic discourse: a strict enforcement of contracts (rights) limits individual freedom thereby marginalizing, as opposed to furthering, individual welfare. Strict enforcement of agreements in accordance with the principle of freedom of contract is not the only possible way in which human well-being can be achieved.[43] One of the consequences of this assertion is that the legitimacy of the argument in favour of a marginalised law of contract is and remains questionable.

[41] For an account of how (South African) law generally cannot contain love see K van Marle 'Love, law and South African community: Critical reflections on 'suspect intimacies' and 'immanent subjectivity' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 231.

[42] Feinman (note 18 above) 840-841.

[43] Ibid 842.

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## III FORMALISM: THE SHAPE OF INDIVIDUALISM

### *(a) Introduction*

Formalism, understood as a preference to express substantive legal doctrine in the form of rules and to apply these rules mechanically, reveals an intimacy with individualism on the substance level of Kennedy's portrayal of the contract law duality. This relationship exists due to the fact that the proponents of the individualist ethic seem to believe that the law should take the form of abstract and formal rules, which defines the elements of a contractual right. It will be seen that formalists believe in the substance of individualism and accordingly are ready to apply the rule that contracts will be enforced because the parties willed it.[44]

The mechanical application of these rules will, according to the individualists, protect the parties' autonomy from judicial contamination. Because the outcome of the application of the rule is predictable, individuals can anticipate the legal consequences of their conduct, which creates certainty. It also allegedly allows the parties to calculate almost exactly to what extent the conclusion of a specific contract will legally serve their self-interest.[45] This invention and mechanical application of so-called 'value neutral' rules to further the individualist ideal is the project of legal formalism. In the next section I will set out the most important elements of formalism and apply these to a relatively recent South African judgment.

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[44] Kelman (note 3 above) 20.

[45] Feinman (note 18 above) 832.

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(b) General characteristics of formalism

The formalist approach to the law of contract is fundamentally rule-orientated.[46] It advocates faith in a system of value-neutral rules which are applied within a moral vacuum and without reference to policy considerations in circumstances calling for its application. This according to formalist believers will provide clear and predictable answers in all cases, thus enhancing legal certainty.

The formalist agenda in the law of contract has been summarised by Adams and Brownswordin the manner I describe below:[47]

First and foremost, the rule-book rules the law: 'The world may change, but the traditional rules, like 'Ol' Man River', 'jus' keep rollin' along.'[48]

Secondly, the rule-book is (almost mathematically) comprehended of as a closed logical system. Just like one plus one must equal two, the contractual concepts embodied in the rules have a logic of their own.[49]

Thirdly, the 'conceptual purity and integrity'[50] of the rule-book should be maintained. This means that there will inevitably be a commitment to 'clean-up' the law where ill-fitting or non-rulelike doctrines are encountered.

[46] Adams & Brownsword (note 9 above) 214.

[47] Ibid.

[48] Ibid.

[49] Ibid. As a single example Adams and Brownsword refers to the offer/acceptance model according to which it is determined whether a contract has come into being. If acceptance of the offer occurred, a contract *has* to have come into being according to the formalist rule.

[50] Ibid 214.

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Fourthly, formalism reveals a preference for conservatism. Formalists encourages judges to base their decisions on well-established rather than less well-established or dubious doctrine.

Fifthly, sympathy and politics are not regarded as material considerations of formalist judges, unless of course the rule-book elevates these considerations to a status of materiality. If the rule is against a party it is just too bad for him. No time is afforded to interpretation of the rule with reference to considerations of fairness or justice or some other moral or social purpose. Subjective judicial opinions (politics) about the fairness or not of a particular rule should not influence the decision and can never serve as an excuse to deviate from the rule-book. [51]

In the sixth instance, formalists always apply the rule anti-critically and mechanically, precisely because politics are not allowed to play a role. 'Shibboleths such as "freedom of contract" and phrases such as "sanctity of contract" are cited without considering the social context or the social outcomes of their application. The rule-book, like Iustitia, is blind to any and all considerations of merit, purpose of the rule or context of the dispute.' [52]

In the seventh place the formalist belief is that the routine application of rules will only be optimal where the rule itself is clear and certain and does not allow for any measure of judicial discretion. Formalists would, for instance, prefer a rule which unequivocally, prohibit the inclusion of exemption clauses in contracts, than a rule stating that the inclusion of an exemption clause is prohibited where the clause is (clearly) 'unreasonable in the circumstances'.[53]

Finally, Adams and Brownsword point out that an approach to shy away from legal reform as well as a strict interpretation of appeal court jurisdiction, may be classified as by-products of

[51] Ibid 214 - 215.

[52] Ibid 215.

[53] Ibid.

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formalism. The reluctance to effect legal reform accords with the formalist conception that judges should apply rules, not make them.[54] The second by-product refers to the tendency of appeal courts to rather enquire into whether the correct rule was applied than to enquire into whether the correct legal question was asked or whether the decision was correct on substantive legal grounds.

(c) A South African example

A striking illustration of the formalist approach in the South African law of contract can be found by revisiting the majority judgment of the Supreme Court of Appeal in *Brisley v Drotsky*.[55] By endorsing the *Shifren* principle[56] the Court revealed its commitment that first and foremost, the rule-book governs the law. Simultaneously it revealed its belief that the *Shifren* rule has a logic of its own (it is logical not to enforce oral amendments to written contracts).[57] The third characteristic of formalism referred to above, namely the commitment to rid the law of non-rulelike or ill-fitting doctrine, is revealed in the majority's sharp attack on a minority judgment of Olivier, JA[58] where he argued for increased consideration of the *bona fides* in the law of contract[59]– an approach which clearly does not 'fit' into the formalist program.

The formalist commitment to conservatism and well established doctrine, is clearly articulated where the court asks: '[T]he *Shifren* principle is trite and the question is why, after almost forty

[54] This approach could also be termed positivism.

[55] 2002(4) SA 1 (SCA).

[56] *Brisley v Drotsky* 2002(4) SA 1 (SCA) 10H – 12F.

[57] Ibid 11B-E.

[58] Ibid 13B-15D.

[59] See the judgment of Olivier, JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) discussed in Chapter 4.

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years, it should be overthrown?'[60] Sympathy for the effect of the application of the *Shifren* principle on the life of Ms Brisley and her family, did not influence the court's decision on the application of the rule (the court unequivocally held that personal circumstances are not legally relevant circumstances[61]) neither did the court consider the social context or social outcome of its cry that the sanctity of contract prevails. In addition, it is submitted that the clarity of the *Shifren* rule and the fact that it does not allow for any measure of judicial discretion (oral amendments to a written contract are invalid unless also reduced to writing) persuaded the court to endorse it.

Even the 'corollaries' of formalism, namely to shy away from major law-reform and a narrow interpretation of jurisdiction is clear in the majority's decision. It is clear that the court was not prepared to come to the aid of Ms Brisley and thereby affect a major law-reform in contract. It justified its decision not to effect this reform on a clear *narrow* interpretation[62] of its jurisdiction to develop the common law in accordance with 'the spirit, purport and objects of the Bill of Rights'[63] and its inherent jurisdiction in terms of section 173 of the Constitution to develop the common law. I will return to a detailed discussion of this decision in the next chapter.

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[60] *Brisley v Drotsky* (note 56 above) 11F.

[61] Ibid 21B.

[62] Ibid 21B – 22D where the court holds that it has no discretion in terms of section 26(1) of the Constitution to allow or disallow an eviction order where the legally relevant circumstances are present, namely that the defendant is in possession and the plaintiff is owner. The Court did not consider whether the non-variation clause was contrary to the spirit, purport and objects of the Bill of Rights – an omission which in itself reflects a narrow interpretation of its jurisdiction to develop the common law.

[63] Section 39 of the Constitution.

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(d) Why is formalism bad?

Feinman points out that the critique of a rule-based adjudication contains two basic elements:[64] First is the problem of formalism's attempt to create certainty. A rule system may convey an image of certainty, but because of the limitations of language and the complexity of social reality, this image is false.[65] Rules may be overlapping, vague and contradictory and do not necessarily reduce legal uncertainty or increase predictability. Furthermore, as Feinman points out, the decisions regarding application, choice and interpretation of rules inevitably involves judicial discretion which is and remains subjective.[66] There is thus no more inherent objectivity in the set of rules than the subjective (or perceived) objectivity the rule system brings about. Kennedy and Kelman refer to this by pointing out that rules are necessarily both under- and over-inclusive as to their purpose: 'Rules are bad because they enable a person to 'walk the line,' to use the rules to his own advantage, counterpurposively.'[67]

Feinman's second point of critique of formalism is that it blindly assumes that people will respond to the threat of the rules.[68] Macaulay has shown that often the rules of contract law in the text-books take a back seat to business relationships, customs and interests at stake.[69] In addition, people may not know what the rule says or even that there exists a rule governing a particular situation, because, after all, not every person to whom a contract applies is a lawyer or possesses the necessary legal education required to know about the rule - especially in South Africa.

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[64] Feinman (note 18 above) 844.

[65] Ibid.

[66] Ibid.

[67] Kelman (note 3 above) 40 – 41.

[68] Feinman (note 18 above) 844.

[69] S Macauley 'Non-contractual relations in business

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But some of us have one, or two or even a whole team of lawyers, which brings me to Feinman's third point of critique namely the fact that knowledge of the law normally resides with those who also are in the stronger bargaining positions. This greater legal sophistication suggests that those in weaker bargaining positions and their ignorance of the law might be exploited, which makes contract law just another 'vehicle for magnifying patterns of inequality in society.'[70]

## IV INDIVIDUALISM'S AND FORMALISM'S 'NATURAL AFFINITY'[71]

The existence of the relational link between a commitment to rules and a commitment to the individualist ethic, may be explained with reference to the nineteenth century view that consistency, stability and certainty were believed to be the values which will promote and enhance individual freedom and equal opportunity.[72] Kennedy himself is of the opinion that individualism and an advocacy of rules formed part of a larger intellectual entity, namely the *laissez-faire* theory,[73] but he did not attempt to explain why the link exists and expressly avoids an interpretation that the connection is either necessary or logical.[74] Kelman describes the relationship between substance and form as 'aesthetic' in the sense that there is 'little way to prove the connection other than by laying it out and directly assessing its plausibility.'[75]

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[70] Feinman (note 18 above) 845.

[71] Adams & Brownsword (note 9 above) 221.

[72] D van der Merwe 'The Roman-Dutch law: from virtual reality to constitutional resource' 1998 1 *TSAR* 1, 6.

[73] Kennedy (note 2 above) 1746. Also see D Kennedy 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' (1985) 34 *American Univ LR* 939 in which Kennedy discusses the role of law in economic thought of the nineteenth century and elaborates upon the 'kinship' between classical legal thought (formalism) and the economic ideas of the nineteenth century.

[74] Ibid 1738, 1746, 1748-1749.

[75] Kelman (note 3 above) 59.

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In his discussion of Kennedy's *Form and Substance* article, Kelman shows that an explanation for the connection may be found in the fact that the normative case of both the ideologies rests on the assumption that value is subjective and that the two ideologies share 'nearly identical value-sceptical arguments.'[76]

Kennedy shows that there is a connection between the legal arguments lawyers will employ when they defend the strict interpretation of a rule and those employed when they ask a judge to make a substantive, individualistic rule.[77] Individualists believe that people should be prepared to accept the detrimental consequences of their actions, without looking to support from others. Similarly, formalists believe that the ones who are detrimentally affected by application of the rule, have no-one to blame but themselves.[78] Kelman puts it as follows: '...the rule *form* may always tend to appeal to the *substantive* individualist because its formal virtues match up aesthetically with the virtues he is inclined to admire.'[79]

The connection between individualism and rules form what we might refer to as the privileged pole of the duality that is contract doctrine. In the South African law of contract the connection between individualist politics cast in a rule form is particularly evident. It's privileging in adjudication even more so. Gabel & Feinman have suggested that a legal case comes into being where the system breaks down and conflicts arise, which they have equated to 'the "moment" of legal ideology'.[80] This is the moment at which specific beliefs, political commitments and economic interests seek to justify the conflict by looking at it through an idealized lens.[81]

[76] Ibid 61.

[77] Kennedy (note 2 above) 1738.

[78] Ibid 1739.

[79] Kelman (note 3 above) 59.

[80] P Gabel & JM Feinman 'Contract Law as Ideology' in D Kairys (ed) *The Politics of Law* (3ed) (1998) 508

[81] Ibid.

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In the following section I aim to show how the politics of the law of contract in South Africa consistently favour protection of the individualist/rule position. I focus primarily on the protection of the freedom of contract/sanctity of contract slogans by pausing at critical moments of legal ideology in its history and try to point out that these critical decisions contain the politics of individualism in a distinct rule form preference, which in itself can be applied formalistically (mechanically) to effectively mask the political commitment behind a claim of value neutrality.

## V 'FREEDOM OF CONTRACT' AS A POLITICAL SLOGAN IN SOUTH AFRICA

### (a) Early days

One of the most frequently quoted passages justifying the privileging of freedom of contract as the basis of contractual obligation in the South African law of contract, is to be found in a late nineteenth century case from the English law, called *Printing and Numerical Registering Co v Sampson*:[82]

> If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.

[82] 1875 LR 19 Eq 462 per Jessel MR. The mood is also expressed in more general terms by Kotze, CJ in *Brown v Leyds* (1897) 4 OR 17, 31 who 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'.

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South African jurist's protection of individualism in freedom of contract terms can also be traced back to the late nineteenth century.[83] In *Burger v Central South African Railways*[84] Innes, CJ held in no uncertain terms that the South African law of contract does not recognise the right of a court to release a party to a contract from his obligations on considerations of fairness.[85] In passing it should be noted that this decision seems to have ignored the fact that it was not yet at the time an unassailable fact that the exceptio doli generalis was not part of the South African law of contract.[86]

In 1939 the decision in *Jajbhay v Cassim*,[87] purported to challenge the freedom of contract doctrine and made its reign subject to the qualification that 'simple justice between man and man' is something which public policy also requires. This decision was however heavily criticised by the doyennes of contract at the time, De Wet and Van Wyk, who took it upon themselves to appeal for the restoration of freedom of contract to its unqualified position as the central value and primary determinant of public policy in the law of contract:

> This decision of the Appellate Division throws this matter into a boundless morass of uncertainty, and that on the grounds of unconvincing considerations. [...] It is in any event undesirable to make the issue of whether one can reclaim or not dependent on

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[83] See also V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis, UP 153 who refers to the 'privileged position of 19th century contract law theory in South Africa.'

[84] 1903 TS 571.

[85] *Burger v Central South African Railways* 1903 TS 571, 576.

[86] The decision which annihilated the *exceptio doli generalis* only came in 1989 in the *Bank of Lisbon* case discussed later in this chapter.

[87] 1939 AD 537.

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> such an uncertain test such as *simple justice between man and man* and the conviction of the court whether the one or the other should be relieved.[88]

This privileging of freedom of contract echoes in the court rooms of this country like a hollow warning to those who dare to claim that their contract might be unfair. Below follows only a *capita selecta* of examples in support of this contention. These examples represent critical moments in the battle between freedom of contract and equitable considerations in which freedom of contract consistently emerged carrying the victory torch.

(b) The abolishment of the laesio enormis doctrine

In 1949 the tension between freedom of contract and possible intrusions on its terrain presented itself in the law of sale when the validity of the laesio enormis doctrine was considered in the case of *Tjollo Ateljees (Eins) Bpk v Small*.[89] In Roman law the sellers of land were allowed to cancel the contract, on the grounds of laesio enormis, where the price paid for the land was less than half of the market value of the land at the time of conclusion of the contract.[90] The doctrine of laesio enormis was further developed in the Roman-Dutch law and made applicable to contracts for the sale of immovable as well as movable things where one of the parties suffered a disproportional loss due to the operation of the contract.[91] The operation of laesio enormis constituted a drastic relaxation of the freedom of contract doctrine seeing that either seller or buyer could cancel the contract where it proved to be operating unfairly against one of them.[92]

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[88] JC De Wet & AH Van Wyk (eds) *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 83. (Author's translation, emphasis added.)

[89] 1949 (1) SA 856 (A).

[90] Ph J Thomas *Essentialia van die Romeinse Reg* (1980) 119.

[91] *Tjollo Ateljees* (note 89 above) 868.

[92] DD Tladi 'Breathing equality into the law of contract: Freedom of contract and the new constitution' (2002) *De Jure* 306.

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In the above mentioned decision the court found that the laesio enormis doctrine was not applicable to the dispute between the parties, because the respondents were not able to prove that what they received was actually worth less than half of what they paid.[93] In addition, the doctrine was abolished as not being received into the South African law of contract, according to Cockrell clearly on the basis that it constituted an altruist intrusion on the terrain of individualism.[94]

The defensibility of Cockrell's statement above is clearly illustrated in the judgment of Van den Heever, JA who held that the doctrine of laesio enormis placed an unreasonable limitation on the freedom of contract of the parties and caused the law to intervene and transform the contract into something neither of the parties intended it to be.[95] In addition, the court rejects laesio enormis on the basis that it is 'open-ended' and affords a too wide judicial discretion.[96]

In the light of what has been said about the connection between individualism and rules, it is therefore not surprising that Van den Heever, JA goes as far as to admit that the problem with laesio enormis is that it cannot be expressed in the form of a clear rule of law: 'I am satisfied that despite all the learning relating to the rescission of contracts on the ground of laesio enormis nothing has evolved out of it which could be dignified by the name of a rule of positive law.'[97] The court also held that the doctrine had no right of existence in a modern world with a highly complex and sophisticated commercial organisation.[98] Consequently, the burial rites over laesio enormis are again administered in the language of the protection of the freedom of contract:

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[93] *Tjollo Ateljees* (note 89 above) 876.

[94] Cockrell (note 4 above) 44.

[95] *Tjollo Ateljees* (note 89 above) 875.

[96] Ibid 865 and Cockrell (note 4 above) 45.

[97] *Tjollo Ateljees* (note 89 above) 875.

[98] Ibid 860.

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> In my opinion the doctrine that persons of full legal capacity can resile from contracts into which they have solemnly entered in the absence of fraud, duress or excusable mistake, was never part of the law of South Africa and in the few cases in which it was applied, it was done so by mistake[99]....
>
> In laesio enormis a person of full legal capacity, whose free exercise of volition was in no way impaired or restricted, seeks relief not against a wrong, but against his own lack of judgment, ineptitude or folly. Since the alleged rule encourages a party to divest himself of obligations *which he has freely and solemnly undertaken*, I do not consider it in harmony either with immanent reasons or public policy[100]

It took the legislature a mere three years to follow suit. In 1952 laesio enormis suffered a certain death by statute.[101] Consequently, another important common law tool which could have contributed to the furtherance of fairness in the law of contract perished at the feet of freedom of contract.[102]

[99] Ibid 871.

[100] Ibid 873. (Emphasis added.)

[101] Section 25 of the General Law Amendment Act 32 of 1952 provides as follows: 'Doctrine of *laesio enormis* abolished in Republic - No contract shall be void or voidable by reason merely of *laesio enormis* sustained by either of the parties to such contract.'

[102] Tladi (note 92 above) 311.

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(c) The recognition of undue influence as a ground for restitution

In 1956 the recognition of undue influence as a ground on which a contract could be set aside or declared void, came to the fore in the case of *Preller v Jordaan*.[103] Jordaan, a medical doctor, had treated Preller as a patient of his for a number of years. Preller was an elderly, ill, emotionally and physically weakened farmer who was most worried about the fate of his four farms after his death.[104] Because there were no living children left, Preller feared that should he not recover from his sick bed (a possibility of which Dr Jordaan constantly reminded him) his life's work will be lost and his widow left penniless.[105]

Dr Jordaan, despite Preller's initial doubt, constantly advised and attempted to persuade Preller to transfer ownership in his four farms to Jordaan, supposedly, so that Jordaan could see to the farming activities in the interest of Preller's spouse in the event of Preller's death.[106] Transfer was subsequently effected into Jordaan's name.[107] Hereafter Jordaan transferred ownership in three of the farms to his children.[108] Preller 'miraculously' recovered from his sick-bed only to find that he had been swindled out of his four farms.[109] Preller subsequently instituted action to have the agreement, in terms of which he transferred the farms to Jordaan, set aside on the grounds of undue influence and to claim restitution of the four farms.[110]

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[103] 1956 (1) SA 483 (A).

[104] Ibid 488B-C.

[105] Ibid 488D-E.

[106] Ibid 488E-G.

[107] Ibid 488F.

[108] Ibid 488G-H.

[109] Ibid 488H – 489A.

[110] Ibid 489A-C.

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The recognition of this ground for restitution originates from the English concept of 'undue influence'.[111] It is not surprising to find that undue influence developed in England as a concept of equity. The doctrine justified restitution in circumstances where the strict principles of the common law did not allow an attack on the validity of the contract.[112]

The doctrine of undue influence was recognised in *Preller v Jordaan*[113] by the majority of the court - but not on the ground of equitable considerations but on the basis that it could in appropriate circumstances negate *consensus*. The court focused on the Roman-Dutch interpretation of undue influence and concluded that where one party influences the other to such an extent that his *will* becomes weak and pliable and the party exercising the influence then brings his *will* to bear in an unprincipled manner on the other so that the influenced party concludes a transaction with the influencing party which he will not have concluded otherwise of his own free *will*, then the influence is undue and the influenced party has a right of restitution.[114] In addition, the court stated that the test to determine whether the contract was void or voidable in these circumstances is whether the party seeking to have the contract set aside concluded it *willfully* and *knowingly* with the intention to have legal consequences flow from it.[115] The minority judgment of Van den Heever, JA similarly reveals a devotion to the will theory of contract and outwardly rejects the recognition of undue influence as a ground of restitution.[116]

The effect of the court's acceptance of undue influence as a ground on which restitution could be claimed and indeed its finding that Dr Jordaan unduly influenced Mr Preller, did not,

[111] Van der Merwe *et al Kontraktereg Algemene Beginsels* (1994) 92.

[112] Ibid.

[113] *Preller and Others v Jordaan* (note 103 above) 493H.

[114] Ibid 492H.

[115] Ibid 496E.

[116] Ibid 506D.

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however, generate a result which could be called 'equitable'. The Court held that Mr Preller did indeed *knowingly and willingly* intend to transfer ownership in the farms to Dr Jordaan, albeit that his willingness was brought about by undue influence.[117] The court thus held that the ownership in the farms indeed did pass to Dr Jordaan and from him to his family members to whom he transferred three of the farms.[118]

The practical outcome of the court's decision was thus that Mr Preller could only claim back one of his four farms on the ground of undue influence, namely the one still registered in the name of Dr Jordaan. The court held that Mr Preller did not accuse the new owners of the farms of being party to or having had knowledge of the undue influence[119] and therefore their position was different from Dr Jordaan's in that it was not affected by the voidability of the agreement between Preller and Jordaan.

The decision of the majority was showered with individualistic criticism, the strongest of which was again enunciated by De Wet and Van Wyk who are of the opinion that the majority judgment amounts to ''n ondermyning van die onskendbaarheid van afsprake'[120] (an undermining of the sanctity of agreements). According to the authors the minority judgment is the correct one because it outwardly denies the existence of undue influence in our law of contract.[121]

The tyranny which I aim to expose exists in the following: Had the court (as De Wet and Van Wyk recommends) not recognised undue influence at all as a ground for restitution, an elderly and ill person, who had been exploited by his sly and cunning doctor, would not have any

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[117] Ibid 496G.

[118] Ibid.

[119] Ibid 494A.

[120] De Wet & Van Wyk (note 88 above) 49.

[121] Ibid.

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remedy with which to attack the contract and claim back his life's work. De Wet and Van Wyk are of the opinion that the law of contract should not even have given Mr Preller the opportunity to claim back one of his farms, because the 'onskendbaarheid van afsprake' (the idol that is freedom of contract) has to prevail and be protected at all costs. So on the one hand we can say that luckily the court did not opt to protect the idol and at least Mr Preller could claim back one of his farms and that in that respect, the court's decision has to be commended.

But what would the result have been had the court opted for the direct application of fairness by concluding that the remedy existed in equity and not as one of the doctrines affecting the consensus? What if the court held that the contract had not been entered into in good faith by Dr Jordaan? It seems to me that the agreement between Mr Preller and Dr Jordaan would then have been held to be so exploitative in the circumstances, contrary to the bona fides and inequitable so as to be void *ab initio* but at the very least unenforceable. Whatever the case may be, had the contract been declared void *ab initio* or unenforceable on equitable grounds or because it was contrary to good faith, Dr Jordaan would not have acquired ownership and therefore could not transfer ownership. This would mean that Mr Preller would be able to claim back all four of his farms. It appears therefore, that by following the indirect approach and accepting undue influence as a doctrine imposing on the consensus of the parties, the court indeed did worship the idol and soothed its conscience about the impact of this on Mr Preller's life by at least allowing him to get back one of the farms.

Individualists, formalists and positivists (such as the like of De Wet and Van Wyk) will probably remark that Preller had to accept responsibility for the consequences of his wilful and knowing actions. The outcome of this decision clearly illustrates the commitment to the individualist/rule ideals I refer to above and the non-commitment to considerations of how the court's decision impacts on the lives of people in real situations. It also emphasises one of my general points,

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namely that on a substance level, the individualist pole of the contract duality is continuously favoured politically above the altruist pole.

(d) The exceptio doli generalis is dead.[122] Long live the exceptio doli generalis![123]

(i) The exceptio doli generalis is dead

One of the most striking (South African) illustrations of the link between a preference for rules and a preference for individualism as well as of the political preference for these preferences, is to be found in the judgment of Joubert, JA in *Bank of Lisbon and South Africa v De Ornelas & Others*.[124]

This decision is generally regarded as the decision in which the Appellate Division (currently, the Supreme Court of Appeal) did away with the judicial perception that a contract could be declared unenforceable by a court on the basis of considerations of unfairness. The Appellate Division held that the exceptio doli generalis as a technical remedy founded in equity does not form part of the South African law.[125]

The question which the court primarily concerned itself with was whether the exceptio survived the reception of Roman Law into Roman-Dutch Law and of Roman-Dutch Law into the South African law. The court held unqualifiedly that the exceptio doli generalis never formed part of

[122] *Bank of Lisbon and South Africa v De Ornelas & Others* 1988 (3) SA 580 (A).

[123] *Van der Merwe v Meades* 1991 (2) SA 1 (A) read with AJ Kerr 'The *replicatio doli* reaffirmed. The *exceptio doli* available in our law' (1991) 106 *SALJ* 583.

[124] Note 122 above.

[125] Van der Merwe *et al* (note 111 above) 234. The operation of this remedy in Roman Law was discussed in Chapter 2.

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the Roman-Dutch law,[126] could therefore not have been received into the South African law[127] and that its occasional appearances on the scene of the South African law[128] should finally be prohibited by burying it 'as a superfluous, defunct anachronism.'[129]

In this case, certain securities had been provided by the De Ornelas Fishing Company to the Bank of Lisbon as security for obligations under an overdraft facility.[130] The securities consisted of a suretyship and a special mortgage of immovable property.[131] Although the securities had been provided to secure obligations in terms of the overdraft facility, the relevant security agreements provided that the securities also covered obligations from 'whatsoever cause or causes arising'.[132]

The De Ornelas Fishing Company cancelled its overdraft facility after the bank refused to increase it.[133] It discharged its entire debt under the overdraft and accordingly wanted to cancel

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[126] *Bank of Lisbon* (note 122 above) 605H.

[127] Ibid 607A.

[128] For a discussion of the various interpretations of the exceptio doli generalis see SWJ Van der Merwe, GF Lubbe & LF Van Huyssteen 'The exceptio doli generalis: Requiescat in pace – vivat aequitas' (1989) 106 *SALJ* 235. From these discussions I deduce that where the court accepted that the exceptio was part of the South African law, it restricted its application ie resisted an interpretation that it is an all-encompassing equity defence in contract, which is another way of saying that it tried to make the exceptio a pliable servant of freedom of contract. See *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 (A) and *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).

[129] *Bank of Lisbon* (note 122 above) 607B. Also see GF Lubbe '*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) 1 *Stell LR* 9.

[130] *Bank of Lisbon* (note 122 above) 607E.

[131] Ibid 607F.

[132] Ibid 609A.

[133] Ibid 607I.

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the security agreements accessory to the overdraft.[134] The bank refused to accept cancellation of the security on the basis that the securities also secured obligations of the De Ornelas Fishing Company due to the bank in terms of a transaction which was entirely independent from the overdraft facility, namely a contract for the forward purchase of dollars.[135] De Ornelas Fishing subsequently raised the exceptio doli generalis during the course of its attempts to escape the security agreements, which of course, were unsuccessful as the court ruled that the *exceptio* was not part of the South African law.[136]

Van der Merwe, Lubbe and Van Huyssteen have characterised the approach of the majority in this case as 'positivist-historical'.[137] The authors point out that the court approached the historical sources in such a formalistic and clinical manner that it got lost in a historical methodology which does not appear to be sensitive to problems of our times and which leaves policy considerations undealt with.[138] Lewis points out that the majority decision appears to be 'fixated' on the exceptio itself rather than to focus on the principle which underlies it.[139]

Typically positivistic, a long lesson in Roman Law follows which concludes that the exceptio is a 'superfluous, defunct anachronism'[140] and that equity cannot override a 'clear rule of law'.[141] To this Van der Merwe, Lubbe and Van Huyssteen replies that it appears then that equity has an 'interstitial (sic) operation' limited to areas where existing rules are unclear or incomplete. The authors also consider the question whether the Appellate Division regards its role as comparable

[134] Ibid 607J-608A.

[135] Ibid 608A-B, E.

[136] Ibid 607B, 608F.

[137] Van der Merwe, Lubbe & Van Huyssteen (note 128 above) 238.

[138] Ibid 239.

[139] J Lewis 'Fairness in South African Contract Law' (2003) 104 *SALJ* 330, 334.

[140] *Bank of Lisbon* (note 122 above) 607B.

[141] Ibid 606A-B.

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to that of the *iudex* in Roman Law who was only a finder of facts and, if this was the case, opine that it would certainly be 'as untenable to our modern law as it seems to have been to Roman law'.[142]

In his discussion of the majority decision, from what we may call a critical legal perspective, Cockrell shows that the decision that the exceptio doli constitutes 'a superfluous, defunct anachronism',[143] is founded upon an extreme form of individualism which denies that the law may 'legitimately superimpose an overriding duty to act in good faith'[144] on the voluntary agreements of legal subjects with full capacity.[145] Again, as Cockrell points out, the judge's problem with accepting the exceptio, like in the *Tjollo Ateljees* case, was that it enjoins a judge to employ a standard which cannot be cast in 'a clear rule of law'.

Cockrell's view accords to that of Van der Merwe, Lubbe and Van Huyssteen who point out that the majority expresses no belief in the responsibility of a court to ensure justice – a responsibility which would necessarily entertain commitments to standards. In accordance with its preference for rules and individualist politics, the majority positivistically quotes *Van der Linden*'s account of *Voet* 1.1.16 with approval: '...[j]udges and jurists ought to look to nothing more carefully than this, that they do not forsake the written law for some headstrong equity...'[146] Joubert, JA's rejection of the exceptio doli is thus clearly linked to his disapproval of the discretion which will be afforded to judges by its acceptance. The majority decision clearly does not take account of the subjectivity/discretion which is at play in considering whether 'a clear rule of law' is

[142] Van der Merwe, Lubbe & Van Huyssteen (note 128 above) 237-238.

[143] *Bank of Lisbon* (note 122 above) 607B.

[144] Cockrell (note 4 above) 44.

[145] Ibid.

[146] *Bank of Lisbon* (note 122 above) 610D-E.

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applicable or not, neither does it account for the subjectivity in the interpretation of that 'clear rule'.

Lewis confirms the above where she opines that the rejection of an equitable jurisdiction in the law of contract by the majority of the Appellate Division calls for an explanation other than one rooted in history and the old authorities and considers 'the inherent conservatism of lawyers' and 'the safety of the authorities of yesteryear'[147] as possible reasons for the insistence upon formalism and the application of clear rules. On a policy level there seems to exist therefore, a clear link between historic positivistic accounts of the law, formalism and individualism.

The minority judgment of Jansen, JA appears to be very different from that of the majority and confirms the above statements about the majority judgment from the perspective of an argument for the *retention* of the exceptio doli. Jansen, JA holds that substantive principles of individualism and the certainty principle of formalism, are not absolute:

> It is said that the recognition of the *exceptio doli* in this sense would be an infraction of the freedom of contract and of the principle that *pacta servanda sunt* – that it would lead to legal uncertainty. Freedom of contract, the principles of *pacta servanda sunt* and certainty are not however absolute values.[148]

Even from the beginning of the judgment it appears that Jansen, JA was at least willing to consider that the exceptio still has a role to fulfil in our modern law.[149] Jansen, JA, like the majority, also investigates Roman Law, but his judgment, as opposed to that of the majority,

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[147] 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, 263.

[148] *Bank of Lisbon* (note 122 above) 613A-C.

[149] Ibid 611H.

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reveals a clear consciousness of the change in values and convictions of equity which is part and parcel of the development of a society over time.[150]

In addition, Jansen, JA shows how the so-called 'absolute' twin principles of pacta servanda sunt and freedom of contract, have come under attack[151] and also how it can be limited in the South African law by standards embodying notions of fairness and reasonableness in the public interest. According to Jansen, JA investigations into the 'prevailing *mores* and the sense of justice of the community as a norm'[152] will determine the limitations on freedom of contract. Concerning the exceptio there is, according to the judge, then no real objection to the determination of a standard of aequitas in a similar way.[153]

After continuing to undermine the authorities on which the majority relied and pointing out that '[i]n our law the requisite of good faith has not as yet absorbed the principles of the exceptio doli nor has the concept of contra bonos mores as yet been specifically applied in this field', Jansen, JA concludes that '[t]o deny the exceptio right of place would leave a vacuum'.[154] The minority judgment concludes as follows: 'In my view it would offend the sense of justice of the community to allow the Bank to use the strict wording of the documents to retain the securities after payment of the overdraft.'[155]

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[150] Ibid 612F-613A.

[151] Ibid 613B-614A.

[152] Ibid 615D.

[153] Ibid.

[154] Ibid 616C.

[155] Ibid 617J-618A.

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(ii) Long live the exceptio doli generalis

Let us pause for a moment at one of the aims of this study which is to show that our stories about the law of contract are and will be organised along dualities reflecting the basic tension between self and other. Pursuant to these terms, we can say that the decision in *Bank of Lisbon* was a decision choosing 'self' and that the exceptio doli generalis involves a decision to involve / be concerned with the other, which the court resisted by abolishing the exceptio.

The above being said, let us consider the facts of another Appellate Division decision reported three years after the Appellate Division had ruled in the *Bank of Lisbon* case, namely the case of *Van der Merwe v Meades*.[156] In this case Van der Merwe sold a house to Meades in terms of a deed of sale containing a voetstootsclause. Some time after transfer had taken place Meades sued Van der Merwe for the cost of the repair of a latent defect of which he alleged he was unaware at the time of the sale. Van der Merwe denied also that he knew about the defect at the time of the sale and relied on the voetstootsclause.[157]

The court summarised the position in Roman law which was basically, that the seller of a merx with a latent defect could rely on a voetstootsclause but that that was not the end of it. The buyer could reply to this by using the replicatio doli which had the effect that he had to prove that the seller knew about the latent defects at the time of the sale and wilfully witheld the fact of their existence to the buyer to mislead him. If the seller succeeds with the replicatio doli the seller could no longer rely on the voetstootsclause.[158]

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[156] 1991 (2) SA 1 (A).

[157] *Van der Merwe v Meades* 1991 (2) SA 1 (A) 2F-3A.

[158] Ibid 4H-5A.

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The court proceeded to consider the Roman-Dutch reception of this position and held that it was indeed the same in Roman Dutch law and furthermore, that the position was received unchanged into the South African law.[159]

The effect of this decision is that the replicatio doli forms part of the South African law of contract.[160] Now, the same court had previously held in *Bank of Lisbon* that the conclusions about the non-reception of the exceptio doli generalis 'equally hold for the replicatio doli generalis'.[161] Kerr submits that the linking was correct.[162] If, as Kerr points out, the replicatio doli, on the *later* decision of the court, survived the reception, and the same court linked the replicatio with the exceptio and has not departed from that position, then the only conclusion that can follow is that the exceptio doli generalis must also have survived the reception.[163] It appears that the court in *Van der Merwe v Meade*s[164] unintentionally resurrected the exceptio doli generalis. (Incidentally, as Kerr points out, the *Van der Merwe* case does not refer to the *Bank of Lisbon* case.[165])

Where, as Kerr points out, a later court with the same status holds contrary to its own prior decision, then the later position should be followed, that is, then the *Van der Merwe* decision should be followed which (unintentionally) reaffirms the existence of the exceptio doli generalis in South African law.[166] This seems to me to be a correct exposition of the consequences of the *stare decisis* principle.

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[159] Ibid 8B-H.

[160] AJ Kerr (note 123 above) 584.

[161] *Bank of Lisbon* (note 122 above) 608F-G.

[162] Kerr (note 123 above) 584.

[163] Ibid 585.

[164] 1991 (2) SA 1 (A).

[165] Kerr (note 123 above) 585.

[166] Ibid 586.

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The question is whether this position was *in fact* followed – that is, did the *Van der Merwe* case in fact resurrect the exceptio doli generalis? It appears not. In the majority judgment in *Brisley v Drotsky*[167] the SCA clearly stated its position: It criticised the judgment of Oliver, JA in the *Saayman* case for attempting to breath new life into the exceptio doli generalis and then concluded that the question whether the exceptio deserves reconsideration does not arise currently.[168] It therefore accepted that the exceptio doli generalis is not part of the South African law. In the separate judgment Olivier, JA seems to affirm that 'this court did not hesitate to pronounce the funeral rites over the exceptio doli generalis'.[169] In the subsequent unanimous decision in *Afrox Healthcare v Strydom*[170] the Supreme Court of Appeal confirmed (quoting *dicta* from the *Brisley* case with approval) that good faith, reasonableness, fairness and justice are abstract considerations subjacent to our law of contract which may shape and transform rules of law, but that they are not independent or 'free-floating' bases for the non-enforcement of contracts. The Court held that it has no discretion and does not act on the basis of abstract ideas, but precisely on the basis of crystallised and established rules of law, when it decides the enforceability of a contractual provision.[171]

This confirms that the Supreme Court of Appeal does not consider the exceptio doli part of the law of contract; although it has itself held that it still is a part of our law. The fact that the defence was never raised again after the exceptio doli's 'burial' in *Bank of Lisbon* confirms that legal practice have accepted that the *Bank of Lisbon* decision is 'the (final) law'.

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[167] 2002 (4) SA 1 (SCA) 29C-D.

[168] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 14A-B.

[169] Ibid 29B (Author's translation from the original Afrikaans).

[170] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

[171] Ibid 40H-41A.

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Returning to my suggestion that the existence of the exceptio doli generalis in contract law is an attempt to ensure and enhance ethical concern with the other in contractual relations, I suggest that the decision in *Van der Merwe v Meades* is a decision to open up a space *for* 'the other' of the law of contract whilst the decision to exclude it closed that space. The fact that the decision in favour of 'the self' is the privileged one, is a matter of politics, which brings me back to my general point that the individualism/rules intimacy (tyranny) of liberal legal ideology is the politically favoured ideal of the law of contract. However, the existence of an underprivileged decision choosing 'the other', by the same court, suggests that there is an other side to this (story of the law of contract). This confirms that Dalton's point, namely that liberalism's inability to resolve the tension between self and other suggests that our stories (about the law of contract) will be organised along dualities which reflect this basic tension, also holds true in the South African law of contract.

## VI DEDUCTIONS

The affinity or intimacy between the substantive ideal of individualism and the form ideal of rules seem to me to form a strong coalition which successfully resists critical moments where the opportunity arises to challenge freedom of contract on equitable grounds. If I describe it as a *strong* coalition the description begs the question why it is strong. The answer is unavoidably an issue of power. An issue of who is where, which is another way of saying that it is an issue of politics.

My story of the law of contract in South Africa attempts to reveal that falsity and contradiction are rampant in the law of contract. In other countries this realisation has resulted in a critical focus on the inescapable presence of politics in the law of contract. In addition, the critics focus on the unrealisability of a formal system of rules and on the significant gap between idealised

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world views and the real operation of the law of contract in a modern society.[172] This approach generally resorts under what is referred to as a value orientated approach.

This approach is a controversial one, at least for those who consistently engage with the program of separation between contract law and contractual morality. It's controversy dangerous, because it poses a threat to and undermines the prevalence of the currently favoured / privileged position.[173]

In what follows I shall attempt to reveal the suppressed supplement of the law of contract, which is not to be understood as my description of *the* other of the South African law of contract. I remain concerned with and am conscious of 'the message that we can neither know nor control the boundary between self and other'.[174]

## VII THE IDEAL OF ALTRUISM

The substantive ideal (or counter-ethic) which opposes the ideal of individualism in the law is referred to as altruism[175] or collectivism.[176] The values of altruism are normally expressed as opposites of individualist values. This normally causes collectivist values to be described as 'less well-defined'[177] and vague.[178] Feinman is of the opinion that altruism contains two elements.

[172] Feinman (note 18 above) 833.

[173] Dalton (note 5 above) 1007.

[174] Ibid 1113.

[175] Kennedy (note 2 above) 1717.

[176] Feinman (note 18 above) 842; Cockrell (note 4 above) 42.

[177] Kelman (note 3 above) 54-55: '..., we believe in the (less well defined) politics of altruism,...'

[178] P Selznick 'The Idea of a Communitarian Morality' (1987) 75 *California LR* 445, 445: 'Yet the communitarian idea is vague; in contemporary writing it is more often alluded to and hinted at than explicated.'

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Firstly, there is within this ideology a pervasive communitarian vision. The second element of the altruist discourse emphasises the interdependence of the modern commercial community rather than the communitarian ideal.[179] What does Feinman mean when he says this? This is the question I shall interrogate in the remainder of this section.

(a) The commitments of the altruist ideal

Individuals with an altruist vision do not see the world as a place where freedom-seeking isolates operate with a will only to promote self-interest.[180] They believe that humans are, to a far greater extent, social creatures, inundated with the responsibilities and benefits which crystallise out of one's existence in a community.[181] Accordingly, they are not and believe they should not be concerned with the realisation of self-interest only. Altruist individuals consider the interests of others and how their actions impact on the well-being of those others. Kennedy summarises it as follows: '[t]he essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interest over those of others.'[182] 'Altruism enjoins us to make sacrifices, to share and to be merciful.'[183]

From the above-mentioned, Kennedy deduces that there are two important concepts at play in the altruist vision, namely sharing and sacrifice. [184] Kennedy describes sharing as a static concept in that it presupposes an existing distribution of wealth, which is redistributed by sharing.[185] Sacrifice on the other hand is dynamic in the sense that people take positive action to influence

[179] Feinman (note 18 above) 842 – 843.

[180] Kennedy (note 2 above) 1717; Feinman (note 18 above) 842.

[181] Ibid.

[182] Kennedy (note 2 above) 1717.

[183] Ibid.

[184] Ibid 1718.

[185] Ibid 1717.

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the causal chain of events in order to limit another's loss or to assist that other in the maximising of benefits. No prior distribution of wealth is therefore assumed.[186] Kennedy places sharing and sacrifice as the 'polar opposite' of the liberal notion of exchange.[187]

Lubbe and Murray are of the view that it is the good faith principle in our law of contract which forms the theoretical basis for the judicial activism that is required to further the altruist ideal.[188] The authors argue that it is only by recognising this role of the judiciary that South African contract doctrine can move away from 'a rigidly individualistic stance to one which takes account of the structural inequalities within society'.[189]

A further important theme in altruist discourse is that obligations are from a public interest (as opposed to an individual character) perspective not regarded to be in direct correlation with rights, which shows that obligations carry heavier weight in an altruist world.[190] Thus, although altruists do not concern themselves with the denial of rights, they do not value individual rights above communal norms and responsibilities in the normative hierarchy when they are faced with problematic questions of morality and justice.[191]

Altruism believes that the liberal focus on rights contributes to the individual's alienation from the community in which she finds herself. Altruists also question and deny the neutral stance of

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[186] Ibid.

[187] Ibid 1718.

[188] GF Lubbe & CM Murray *Farlam and Hathaway Contract: Cases Materials and Commentary*(3ed) (1988) 469

[189] Ibid.

[190] Selznick (note 178 above) 454 shows that the importance of obligations lies in that it defines roles. Selznick uses the example of a person who starts a new job and generally wants to know firstly what her obligations / duties are and not what her rights are.

[191] CA Ball 'Communitarianism and Gay Rights' (2000) 85 *Cornell LR* 443, 443-444.

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liberalism and the view that the State is a neutral moral arbitrator which does not endorse any specific form of 'the good life'.[192] Altruists argue that this state neutrality is problematic, because it masks the fact that a liberal state itself endorses a specific moral hierarchy in which freedom and autonomy have the highest ranking.[193] It is obvious that this emphasis on individual freedom and autonomy will be filtered down to the regulation mechanisms of private relationships between individuals, of which the law of contract is the most important. In accordance with this political agenda the mere blind enforcement of a contract in accordance with the principle of freedom of contract, will be regarded as a manifestation of the autonomy principle in the private law context.

In *Form and Substance* Kennedy addresses the liberal objection that it is nonsense to force someone to behave altruistically. To this objection he responds as follows:

> True, the notion requires the *experience* of solidarity and the voluntary undertaking of vulnerability in consequence. It therefore implies duties that transcend those imposed by the legal order. It is precisely the refusal to take all the advantage to which one is legally, but not morally entitled that is most often offered as an example of altruism. It follows that when the law "enforces" such conduct, it can do no more than make people behave "as if" they had really experienced altruistic motives.[194]

Courts following an altruist approach therefore acknowledge that blind enforcement of contracts is an ineffective method of achieving social ends. This approach flows from the notion of the

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[192] Ibid.

[193] Ibid 445.

[194] Kennedy (note 2 above) 1722.

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'implicated self'.[195] The morality of the implicated self expands on the idea that one's most important obligations do not flow from consent or consensus, but rather from identity and relatedness. Consent implies agreement, negotiation, reciprocity and determinacy. Altruism acknowledge the non-contractual element of contract and believe that contractual obligation refers to something far more fundamental and less voluntary than consensus. Accordingly, the blind enforcement of contract is seen as an unsatisfying method to achieve social ends.[196]

Courts committed to an altruist ethic in contractual adjudication investigate aspects such as the procedures followed when the contract was concluded as well as the terms of the contract. Above all, the approach engages with the socio-economic and social context of the agreement so as to ensure that its enforcement or not is in accordance with the furthering of social values.[197] Selznick justifies the necessity of this approach as follows: 'As we move in a more complex direction we enter a world of open-ended obligations that depend less on specific agreements and more on understanding the nature of the relationship and the values at stake'.[198] Van der Merwe (referring to Unger) offers the following as a reason for the importance of a value orientated, altruist discourse: 'The conceptual unity, doctrinal fixity and policy neutrality this idea [the liberal idea] implied could not,..., be sustained against the diversity of social conflict and the intractability of ideological differences'.[199]

Where individualists postulate an ideal world of freedom and equality, altruist vision sees the gap between this world and the real world of limitation and inequality which we live in.[200] This gap is,

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[195] Selznick (note 178 above) 451.

[196] Ibid 452.

[197] Feinman (note 18 above) 843.

[198] Selznick (note 178 above) 452.

[199] D Van der Merwe 'The Roman-Dutch law: from virtual reality to constitutional resource' (1998) 1 *TSAR* 1, 10.

[200] Feinman (note 18 above) 842

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as communitarians point out, responsible for the fact that the market does not manage to maximise social welfare.[201] Selznick points out that Rawls in describing his 'difference principle' pointed out that social and economic inequalities are sometimes desirable and necessary, but that their moral worth should be judged by reference to the contribution they make to the maximisation of wealth of the individual who is least privileged.[202]

Doctrinal manifestations of altruism in the law of contract include the doctrine of unenforceability of agreements on the grounds of public policy.[203] Feinman appears to interpret considerations of public interest and fairness as altruistic ideals in the law of contract. In the South African law of contract this public intrusion on the law of contract is often successfully blocked by the political slogan that generally, the utmost freedom of contract is in the public interest.

(b) The interdependent nature of modern commercial society

Feinman explains that the second element of the altruist (what he calls collectivist) discourse focuses on an economic perspective.[204] The perspective in this focus is that the system of exchange in a developed capitalist economy functions at its best, not when it relies entirely on the accumulation of individual choices, but rather when it understands exchange as a relation and regulates individual choices through intervention of the law.

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[201] Ibid.

[202] J Rawls *A Theory of Justice* (1971) 13-15 as discussed in Selznick (note 178 above) 446.

[203] Feinman (note 18 above) 842 n54.

[204] Ibid 843.

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MacNeil's work on relational contract theory is probably the most important in this regard.[205] His theory shifts the focus in contract from the things contracted for, to the relationship between the parties.[206] Threedy expresses the hope that once we come to conceive contract in this way, we could see contract doctrine becoming more responsive to different kinds of contracts and the differences between the parties to a contract.[207] Similarly, Mulcahy argues that relational contract theory can help us to develop a more sophisticated understanding of underprivileged contractual concepts such as good faith and unconscionability.[208]

MacNeil's relational contract theory is grounded in a pluralistic, context-sensitive model of contractual relations, which emphasises that in the real world, many contracts are based on medium to long term relationships.[209] Throughout these relationships parties rely on good faith, forbearance and sharing. MacNeil places crucial importance on a broad conception of exchange as opposed to its narrow utilitarian conception. This broad concept of exchange MacNeil calls 'relational exchange.'[210] Relational exchange understands that exchange is the inevitable product of specialisation of labour, wherever such labour occurs, 'between discrete entities in markets, or within a family.'[211] In addition, relational exchange understands that discrete exchange can never be the only economic function to accomplish the actual tasks of physical production, distribution and final consumption. Instead, relational exchange theory argues that discrete exchange occurs

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[205] IR MacNeil *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); IR MacNeil 'Relational Contract Theory: What We Do and Do Not Know' (1985) *Wis LR* 483.

[206] DL Threedy 'Feminists in Contract Doctrine' (1999) 32 *Indiana LR* 1247, 1264.

[207] Ibid.

[208] L Mulcahy 'The limitations of Love and Altruism – Feminist Perspectives on Contract Law' in L Mulcahy & S Wheeler (eds) *Feminist Perspectives on Contract Law* (2005) 5.

[209] Threedy (note 206 above).

[210] IR MacNeil 'Relational Contract Theory: What We Do and Do Not Know' (note 205 above) 485 – 486.

[211] Ibid 485.

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only in the interstices between 'quasi-independent entities'[212] and is thus 'not in itself physically productive.'[213] Only relational exchange – a collective working together to produce a good or service with exchange value – can be physically productive.[214]

Based on this theory of relational exchange, relational contract theory conceives of a contract as a relationship, 'an on-going, complex, multifaceted and constantly renegotiated relationship.'[215] The relational theorists are concerned with addressing the gap between theory and practice by showing that 'the world of traditional contract doctrine is already no longer the world we live in'.[216] Generally, relational contract theorists advocate an equitable approach to contracts which exposes and emphasises the tyranny which often results from situations where rules are imposed on the parties which have little, if anything to do with what they actually intended.[217] As Hillman points out, relational contract pursues fairness at the cost of certainty[218] in offering a conception of 'open contracts' where the exact terms are negotiated beyond the moment that the responsibility arises.

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[212] Ibid 487.

[213] Ibid.

[214] Ibid.

[215] Threedy (note 206 above) 1258.

[216] Dalton (note 5 above).

[217] MJ Frug 'Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law' (1992) 140 *U Pa L Rev* 1029, 1037.

[218] Ibid 1036.

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Because the theory understands contract as a relationship, it is able to associate values with contract which have traditionally not formed part of contract theory, such as mutuality and solidarity.[219]

This is not to say that relational contract theory defies the idea of power. But it does offer a wholly different understanding of the idea of power. Birden reminds us that Sharon Welch's work points us to the power of relational living.[220] Welch maintains that ethical living can only reside in what she calls 'the beloved community' where members find healing and resilience in the power of relatedness. 'The beloved community is based not on shared moral grounds, but on a celebration of difference and a resistance against all that destroys the dignity and complexity of life.'[221] Welch's theory, read with relational contract theory, contributes significantly to an understanding of contract that does not translate into reductive tendencies and insistence on sameness.

According to this approach, courts are entitled to add to or amend parties' contracts in order to facilitate proper functioning of the integrated social economy.[222] The individual benefit is the feeling of co-operation and interdependence which provides for proper participation in the economic sphere. The social benefit exists in the furtherance of social interaction and economic exchange. Judicial intervention becomes a safety-net with which a court can correct market failures (of which unequal bargaining power due to social or socio-economic inequality is just one example).

[219] MacNeil has added to these role integrity, reciprocity, planning, consent, flexibility, procedural justice, creation and restrain of power, propriety of means and harmonisation with the social matrix. (See Mulcahy (note 206 above) 9 n 24.)

[220] S Birden 'Re-thinking resistance: On Welch and Foucault' (2002) *Philosophy of Education* 110, 112 and the authority cited there.

[221] Ibid.

[222] Feinman (note 18 above) 843.

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The two elements of the altruist ideal emphasize the importance of cooperative contract which is believed to guarantee the highest individual and social benefits from the altruist perspective.[223] The general perceptions that altruist values are vague and can be defined only in relation to their opposite should not obscure the fact that these values do exist in the (South African) law of contract. The perception that the values are vague and undefined exist only because of the belief that the values of individualism are clear and can be defined coupled with an almost intentional avoidance of attempts to expand, articulate and deliberate the development of the altruist argument.

## VIII THE NATURAL AFFINITY OF ALTRUISM FOR STANDARDS

The arguments opposing a rule based approach on the form side of the form/substance duality advocate a standard orientated approach.[224] Standards are said to simply be open-ended restatements of purpose or 'the substantive objectives of a legal order'.[225] Kelman warns however, that they may be applied in a way that does not meet the purpose.[226] The connection between altruism and a preference for standards exists in the argument that reciprocal ties of social obligations existent between individuals in a relational world, give rise to the definition of standards of acceptable behaviour.[227] These standards entail the expression of normative considerations at a high level of abstraction and with reference to vague criteria such as fairness. Kelman expresses the connection as follows: 'It seems to be the case that most of the formally

[223] Ibid.

[224] Cockrell (note 4 above) 43.

[225] Kennedy (note 2 above) 1688.

[226] Kelman (note 3 above) 41.

[227] Feinman (note 18 above) 831.

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vaguer positions are associated with exacting greater degrees of solicitude from one contracting party for the other than the stricter rules demand'.[228]

The altruist approach to the law of contract peaks at the point where jurists come to the conclusion that the theoretical rule-based approach to contract neither takes proper account of nor reflect the complexities of social reality; especially concerning the unequal distribution of economic benefit in the community and the uninvolved, can't-be-bothered stance of private individuals in relation to the law of contract.[229]

The realisation of the inability of language (as expressive medium of the law) to convey meaning, caused the possibility of defining a system of rules, to become impossible. Critics showed that rules cannot be precise and comprehensive and by implication it indicated that judges and not rules were judging cases. In accordance with this realisation, the altruist approach is in favour of purposive adjudication of contractual disputes so as to give judges the opportunity to consider how to best give effect to the underlying principles and policies in every case.[230] The commitment is to find the best decision on the grounds of the facts of each case, even if that should mean that a measure of (what is perceived to be) legal uncertainty, creeps into the system.[231] The standard orientated approach insists that it should be the role of the judge to decide every case in an essentially prognostic way, which will serve the interests of the community best.

The purposive adjudication advocated within the altruist approach, entails that law should be individualised on a case by case basis by having a committed appreciation for the unique facts of

[228] Kelman (note 3 above) 55.

[229] Feinman (note 18 above) 836.

[230] Ibid.

[231] Ibid 842–843.

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every incidence.[232] Supplemental to this, actual commercial behaviour is investigated in order to identify quasi-objective standards on which judges can base their decisions.[233] Feinman states that this 'experience of commercial reality is supposed to embody norms of behaviour with a moral as well as an empirical character that can be restated as legal principles to direct the courts in the resolution of disputes.'[234] Accordingly the role of the judiciary in contractual disputes is no longer a mere dogmatic enforcement of contracts as it is viewed in the individualist image. To a far greater extent, the altruist argument holds that the courts' role is interventionist and pragmatic. In South Africa authors on contract are of the opinion that the interventionist role of the courts in contract can be based on the principle/standard of good faith.[235]

Kennedy claims that the substantive values of altruism reveal a strong affinity for their expression in a standard orientated form.[236] Kelman shows that Kennedy deduced this 'close connection' from a well thought through analysis of contract. A few examples are identified from contract law which indicates this connection:

1) The standard that a party cannot enforce an *unfair* contract, places an obligation on each of us not to exploit the position of an underprivileged counter-party, which is of course a altruist obligation;[237]

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[232] Ibid 845.

[233] Ibid 836.

[234] Ibid 837.

[235] Lubbe & Murray (note 189 above) 469.

[236] Kennedy (note 2 above).

[237] I have to re-emphasise here that the South African law does not recognise this standard expressly.

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2) The standard that a party should contract *in good faith* requires that parties should take into account each others interests to ensure that one of them does not cause himself damage to conclude the agreement;[238]

Collins refers to the 'harm-to-interests' theory which is employed to justify the *enforcement* of contracts in an altruist world.[239] In the South African law of contract this theory is referred to as the reliance theory.[240] Liability in terms of the reliance theory is founded in standards which fall outside of subjective will and which are in essence altruist. Cockrell shows further that contractual liability on the grounds of relational principles is cast in a distinctively standard based form:

> A promise which the promisor should *reasonably* expect to induce action or forbearance on the part of the promisee or a third party and which does induce such action or *forbearance* is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[241]

This shift of emphasis opens the door for the consideration of community standards of reasonableness in the contractual set-up. The fusion between altruism and standards has the

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[238] Kelman (note 3 above) 55.

[239] H Collins 'Contract and Legal Theory' in W Twining (ed) *Legal Theory and Common Law* (1986) 136 as quoted in Cockrell (note 4 above) 48 n33.

[240] In *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) the court held in favour of the will theory, but conceded that where there is no consensus, the reliance theory will give rise to an enforceable contract. Also see *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) where the defendant was held liable in terms of the contract even though its administrative error had caused subjective consensus to be nullified.

[241] Article 90 of the *Restatement of the Law Second Contracts* (1981). (Emphasis added.)

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potential to trump the uncontrolled enforcement of contract in accordance with the autonomy principle. Lubbe strikingly summarises this position:

> The claim of the autonomy principle that liability depends in principle on the voluntary decision of a contracting party, is qualified in cases of contractual *dissensus* by the corrective operation of estoppel or some other manifestation of the *reliance theory*.[242]

## IX THE PICTURE EMERGING

Feinman summarises the image as it appears up to this point, as follows:

> The individualist pattern is consistent with a formal system that rewards those who conform their behaviour to legal rules and penalizes those who do not. Both collectivist principles and purposive adjudication contemplate particularized adjustments by judges to take care of gaps or inconsistencies. Individualism and formal adjudication both adopt an indirect strategy of legal non-intervention relying on private actions to achieve social goals, while both collectivism and purposive adjudication are result-orientated, favouring direct use of state authority to further the policies underlying the legal system.[243]

But Kennedy points out that the situation in respect of form as I have set it out above, is far more complex than first meets the eye. Kennedy claims that the linkage between individualism /

[242] GF Lubbe 'Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg.' 1991 *TSAR* 1, 15 as quoted in Cockrell (note 4 above) 50. (Translated from the original Afrikaans).

[243] Feinman (note 18 above) 847.

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rules and altruism / standards is not a delineated one that holds true in all occasions.[244] The fact of the matter is that what often looks like a rule is a masked standard: '[t]he legal order, in this view, was shot through with discretion masquerading as the rule of law.'[245] Again, this interchangeability operates not as a matter of logic but as an empirical reality. Kennedy is of the view that one of the reasons for the obliteration of the rule/standards distinction exists partly in the fact that judges were simply not all willing to subscribe entirely, or wholly buy into, a formal rule system.[246]

This leads to an inevitable conclusion that the law of contract is simply not black and white; instead, it is shot-through with discretion and indeterminacy. The obliteration of the line between rule and standard again emphasises two points I have made in the beginning, namely that the law of contract is not value-neutral, but rather predominantly liberal ideology masking in the form of rules *claiming* to be neutral. Secondly, this 'sameness' of rule and standard illustrates that the claim of certainty can be no more than a claim of subjective certainty generated by a particular application of or belief about rules. There simply is no such thing as the objective certainty of rules.

But the situation becomes even more complex, because Kennedy claims that rules are almost all representative of some sort of altruism if viewed from the perspective that even a minimalist legal regime is more altruistic than a complete state of nature.[247] In this sense the division between altruism and rules is not a fixed one either.

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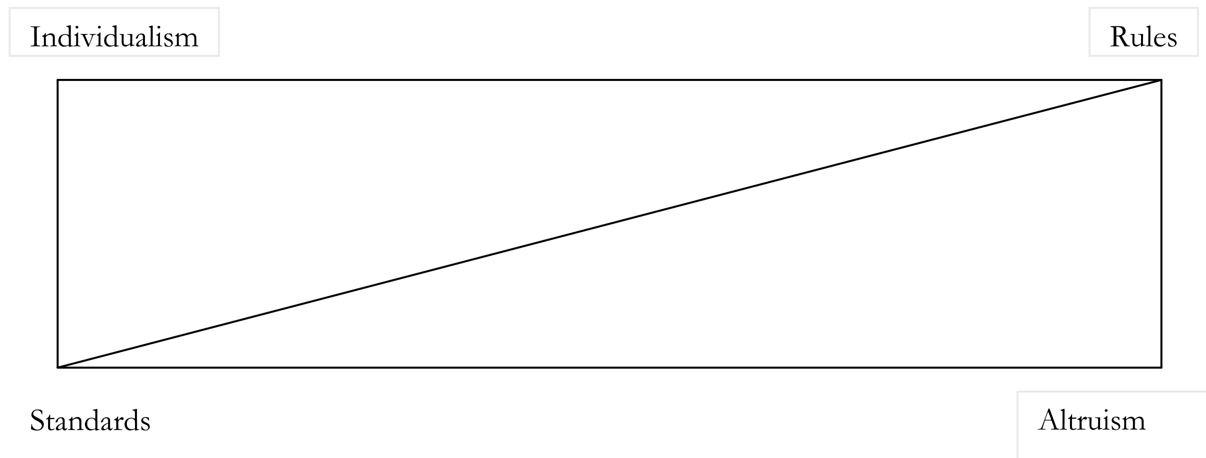
[244] Kennedy (note 2 above) 1701.

[245] Ibid 1701.

[246] Ibid.

[247] Ibid 1721.

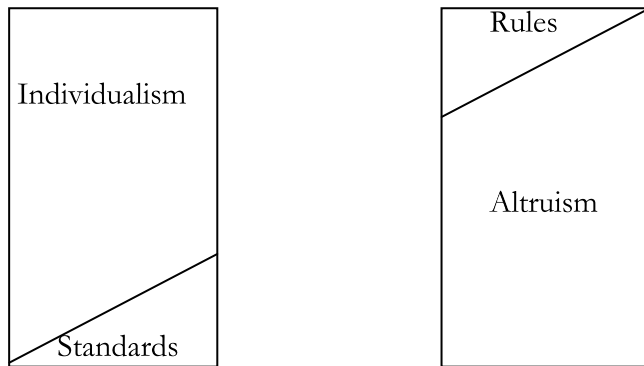
It is important to note that Kennedy never suggested that the division between altruism and rules is a fixed one. He continuously refers to these positions as positions on a continuum[248] and that the lines may be blurred and the divisions contradicted as we move away from the extremes of the continuum. My view of what Kennedy has in mind appears in the diagram below:




The above diagram can be viewed as a scale/continuum mirror. The outer lines that create the form can be viewed as an indication of the limits of a legal system. The dividing line in the middle should be seen as a line on which standards and rules 'slide' within the system from an extreme distinguishable between the two into the standard-like rule or the rule-like standard which Kennedy refers to and which will be situated closer towards the middle of the dividing line. The vertical lines to the left and right may be viewed as uncalibrated value scales. So viewed, the more individualistic the substance, the fewer the standards in the form of the law and the clearer the rules. The reverse holds true for the line between collectivism and rules. The model can also be viewed upside-down or the positions on each vertical line switched to reveal the links.

[248] Ibid 1720.

Below follows two examples which are just 'snapshots' of the above and serve to visually illustrate the argument further. In the first image below, it will be seen that where a system is individualistically biased, the standard form will be underprivileged. The same is true for the relation between rules and altruism.




As I have pointed out in the beginning, this study attempts to show that the individualism/rules side of the continuum was and still is politically favoured in South African contract law. With the above picture in mind, I would like to explore yet some more moments of ideology in the South African law of contract. However, as opposed to the moments discussed before, these moments represent instances where the freedom of contract doctrine *appears* to have given way to considerations of equity in contract. However, towards the end of this chapter I will argue that although this seems to have been the case, these moments in my view operated to further the false consciousness in the legitimacy of the existing liberal status quo.

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## X JUDICIAL CHALLENGES OF THE STRICT ENFORCEMENT OF CONTRACTS IN SOUTH AFRICAN CASE LAW

### (a) BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk[249]

Lewis points out that the aforementioned decision is one of the few Appellate Division judgments of Jansen JA, which have been followed without reservation by the courts.[250] What makes the decision even more important is that it is one of few decisions by the Appellate Division in which equitable considerations carried the victory torch and a strict enforcement of the black-letter law had to bow to equity.

The decision deals with the legal principles pertaining to the exceptio non adimpleti contractus – a contractual defence theoretically available to a party from whom performance is sought to be obtained by a party who has herself not yet (fully) performed in terms of the contract. Where the defence succeeds, it amounts to a relaxation of the principle of reciprocity.

In this decision Jansen, JA adopted a formulation of the principle as enunciated by Innes, JA in *Hauman v Nortjé*[251] namely that the court, where the exceptio is raised as a defence against a claim for performance in terms of a contract, has a discretion to relax the principle of reciprocity.[252] The exercise of the court's discretion is dependent upon the utilisation of the plaintiff's

[249] 1979 (1) SA 391 (A).

[250] Lewis (note 147 above) 258.

[251] 1914 AD 293.

[252] Lewis (note 147 above) 257.

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performance by the defendant and the extent of the performance is a factor to be considered as one of the circumstances affecting the equities involved in the exercise of the discretion.[253]

Where the court then, in accordance with this principle, exercises its discretion, it will award to the plaintiff a reduced contract price, unless the malperformance is of such a serious nature that it justifies rescission of the contract, in which circumstances any claim of the defendant would be based on unjustified enrichment.[254] To persuade the court therefore to exercise the discretion in her favour, the plaintiff has to prove that the defendant is utilising the incomplete performance, that there are circumstances which make it equitable for the court to exercise the discretion, and what the reduced contract price should be.[255]

Lewis indicates that authors have generally approved of this decision. Lubbe and Murray however, warn that the discretion should remain 'unfettered by rigid rules'.[256] The decision in this case represents one of very few examples where considerations of contractual equity have been utilised successfully to thwart the judiciary's preference for formalism. The decision illustrates practically, the need for judicial activism which has been described by altruist theorists. The altruist notions in the decision exist in the fact that the court, in considering the exercise of its discretion, will consider the position of both parties in an attempt to balance the interests at stake and does not rely solely on the question whether substantial performance have been rendered by the plaintiff which entitles him to counter performance according to the freedom of contract doctrine. Whereas this decision reflects a clear preference for an equitable approach, the decision in *Magna Alloys*[257] on the other hand, proves to be no more than the wolf in sheep's clothing.

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[253] Ibid 258.

[254] Ibid. *BK Tooling* (note 249 above) 436 A-437G.

[255] Ibid.

[256] Lubbe & Murray (note 189 above) 571.

[257] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

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(b) Magna Alloys and Research (SA) (Pty) Ltd v Ellis[258]: The 'new position'

The tension between the strict enforcement of contracts and the consideration of equitable principles in contract is most evident in the law relating to restraint of trade clauses.[259] In the above mentioned decision the South African law is said to have been purified from the impure influence of the English law in this area, where the position is that restraint of trade clauses are generally unenforceable.[260]

In this case the plaintiff undertook, in terms of clause 6(b) and 6(c) of the contract between him and the defendant not to offer for sale, for a period of two years after termination of the contract, within a 10 kilometre geographical area which was described in an annexure to the contract, stock similar to that of the appellant.[261]

The court held that the legal position in our law is that restraint of trade clauses will be enforced unless their enforcement is contrary to public policy.[262] This means that restraint of trade clauses are generally enforceable in South African law and will only be declared unenforceable if it can be shown that they are contrary to public policy.[263]

The court held that there can be no numerus clausus of agreements contrary to public policy, because public policy is a dynamic concept, the content of which changes over time.[264] According to Rabie, HR such a clause will be contrary to public policy where the circumstances of the

[258] Ibid.

[259] Cockrell (note 4 above) 61.

[260] Ibid.

[261] *Magna Alloys* (note 257 above) 883D-E.

[262] Ibid 891.

[263] Van der Merwe *et al* (note 111 above) 197.

[264] Ibid 891H.

particular matter are such that the Court is convinced that the enforcement of the restraint of trade will do public policy an injustice.[265] According to the court it would depend on the circumstances of every case whether it could be said that a restraint was contrary to public policy.[266]

The court held that two considerations will apply in deciding the question whether a particular restraint of a person's freedom to trade should be enforced or not. The first of these is the principle that in our law an agreement which is believed by one of the parties to be unfair, is generally not assailable on that ground.[267] In other words (and the court states this explicitly) it is in the public interest that people should be kept to agreements they have concluded even if they are unfair.[268]

This brings us back to the traditional individualistic interpretation of the public interest in contract. Cockrell describes the decision as a 'doctrinal U-turn' which has the effect of casting certain rules of English law into the 'open-ended form of an overriding standard of public policy.'[269] It is precisely for this reason that the *Magna Alloys* decision can be regarded as not only empirical proof of the obliteration of the rules/standards split but also as an attempt to legitimise freedom of contract in the restraint of trade area. In my view, the decision is a clear example of an individualistic attempt to sneak rules masked as standards into the altruistic areas of contract.

The court's moral / political decision is clear: Sanctity of contract should be protected. The only problem is how to legitimise it in the area of restraints of trade. This problem was skilfully solved

[265] Ibid 891H-I.

[266] Ibid 892A.

[267] Ibid 893H.

[268] Ibid 893I.

[269] Cockrell (note 4 above) 61.

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by *simultaneously* declaring that freedom of contract is in the public interest and that (in accordance with that same principle) restraint of trade agreements should stand. This clearly limited the possibility of potential attacks on restraint of trade clauses on the grounds of public policy, to a vast extent. The court effectively blocks an argument that the restraint of trade is contrary to public policy by holding that public policy favours freedom of contract.

The second consideration according to the court which will influence this 'public policy' decision is a focus on another meaning of freedom of contract, namely the freedom *to contract* meaning of freedom of contract. According to the court it is in the interest of the community that everyone should be allowed as far as possible to follow a trade, occupation or profession freely.[270] This right has subsequently been embodied in the South African Constitution as a fundamental human right.[271] The court affirms that attention should be afforded to each of the principles in answering the question concerning the enforceability of the clause and that each case will be viewed in the light of its own particular set of circumstances.[272] These circumstances are held to be the circumstances existing at the moment the court is asked to enforce the restraint.[273]

The suspicion that the court's political decision or inclination was preconceived is confirmed by the way in which great emphasis is placed on this 'new position' so as to draw attention away from the fact that the court still concluded that there was nothing in the contract, the evidence or the facts that indicated that the restraint of trade of the respondent was contrary to the public interest or unreasonable inter partes.[274] This is not surprising in light of the fact that the court

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[270] *Magna Alloys* (note 257 above) 894B.

[271] See section 22 of the Constitution.

[272] *Magna Alloys* (note 257 above) 894C.

[273] Ibid 894F.

[274] Ibid 904C-D.

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had held only a few pages before that freedom of contract (in the sanctity of contract sense) is favoured by public policy.

What the court seems not to have taken account of, again not only confirms its political view in this case, but also its views on the role of the law in general. When asked in cross examination why he did not keep to the restraint of trade the respondent replied 'wie sal dan vir my vrou en kinders sorg'[275] ('who will then take care of my wife and children'). Also, the respondent testified that he had left the employment of *Magna Alloys* because it had experienced a shortage in stock which made it impossible for him to deliver to his clients and to sell the products,[276] which in turn caused him to suffer a substantial loss of income.

These aspects of the matter could not persuade the Court in its decision to enforce the agreement and this in itself confirms a particular vision of law and morality of the Court (ie it is not immoral / illegal / against the public interest for an employer to enforce a restraint of trade against an employee in circumstances where the employer himself cannot provide the employee with sufficient means to conduct a sustainable operation). The only reason offered by the Court as to why this is not contrary to public policy is the familiar technical point that there was nothing in the evidence or the pleadings that suggested that the shortage of products was merely temporary.

[275] Ibid 901D.

[276] Ibid 901B.

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The court does not regard itself inclined to allow an 'ethic of care'[277] to take account of the practical impact of its decision on Mr Ellis' and his family's life, but rather sees itself bound to enforce the agreement in accordance with its political view that contracts should be enforced. This is typical of a liberal approach. Although I also have my doubts as to whether the Court should have released Mr Ellis from the restraint of trade on the basis alone that he had a view of himself as provider, this, coupled with the fact that the appellant indeed did experience a shortage in stock which precluded Mr Ellis from doing proper business, should have been properly weighed against the public interest in enforcement of contracts.

From this I conclude that there was no apparent ideological difference or shift in this case from the formalistic and positivistic approach in the *Bank of Lisbon* case – the decision appears to have brought nothing new to what the courts understood to be in the public interest when it comes to contract.

(c) Sasfin v Beukes[278]: The altruist trump card?

In the above decision the court found that certain aspects of a complex factoring agreement was contrary to public policy. Primarily, the case centred around the validity or not of a deed of cession in which a customer of a bank (a doctor) ceded all his future debtors to the bank regardless of whether he owed the bank money or not.[279] The cession effectively rendered the doctor the slave of the bank. The majority of the Court was of the opinion that these aspects of

[277] K van Marle & D Brand 'Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha* (2001) 12(3) *Stell LR* 408, 412 and the authority quoted there. Also see the decision in *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 (4) SA 507 (O) 513 where the judge held that the respondent's 'emotional' grounds that she was a divorced mother with a child to feed, could not release her from the restraint of trade in question.

[278] 1989 (1) SA 1 (A).

[279] *Sasfin v Beukes* (note 278 above) 6A-D.

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the cession could not be severed from the rest of the agreement and held that the entire transaction was unenforceable.[280]

In this case the Appellate Division was willing to evaluate the substantive fairness of a disputed deed of cession to come to a conclusion that the cession was clearly unreasonable and irreconcilable with the public interest. Smalberger, JA held that unlawfulness comes into play where the public interest in the strict enforcement of contracts in accordance with the principle of freedom of contract, is trumped by other relevant factors.[281] These relevant factors are expressed by the Court to ensure that 'public policy … properly take into account the doing of simple justice between man and man.'[282]

Cockrell indicates that it is interesting to note that this judgment takes a completely different approach from the individualistic credo in *Bank of Lisbon* only six months before.[283] Lubbe notes that the court brands the clauses of the agreement as unenforceable by reference only to considerations of equity.[284] Lewis describes the decision as 'the one decision which yields a ray of light in the field of contractual policy, where the court was both bold and innovative in escaping the shackles of formalism'.[285]

Although I do not disagree that the decision reflects a very different approach from that followed in *Bank of Lisbon,* the following famous *dicta* remain problematic:

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[280] Ibid 17-19.

[281] Ibid 9D-G.

[282] Ibid 13J.

[283] Cockrell (note 4 above) 61.

[284] Lubbe (note 129 above) 9.

[285] Lewis (note 147 above) 264 n76.

> No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should however be exercised *sparingly* and only in the *clearest* of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.[286]

The above dicta indicate the uneasiness with which the Appellate Division approaches the issue of unfair contracts as well as the difficulty it seems to experience with the reconciliation of individualism and altruism within contract doctrine. Hawthorne has remarked that the *dicta* above marginalise the so-called 'new' approach because it merely emphasises the South African judiciary's narrow interpretation of the relevance of equity considerations in the public interest.[287] By holding that it is only in the *'clearest of cases'* that a court may use its power to refuse to enforce an unfair term, and that the power to do this must be used '*sparingly',* the court suggests that unconscionability in and of itself cannot (as was held in the *Bank of Lisbon* case) invalidate a contract.[288] The promise that we can correct for *clear* cases only, simply suggests, to paraphrase Dalton, that the worst features of the system can be held in check, without tinkering with its regular operation.[289]

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[286] *Sasfin v Beukes* 1989 (1) SA (1) (A) 9A-B. (My emphasis).

[287] L Hawthorne 'Public policy and micro lending – has the unruly horse died?' (2003) *SALJ* 66

[288] These sentiments are also reflected in cases decided by the lower courts in the aftermath of *Sasfin*. See in this regard *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C), 825C-827A and *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W), 210G-214F. Also see the discussion of the *Donelley* case hereafter.

[289] Dalton (note 5 above) 1037.

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In 1990, Lubbe suggested that the *Sasfin* decision could rip apart the entire structure of the South African law of contract, if not handled carefully.[290] Christie on the other hand has suggested that the courts are likely to find that the *Sasfin* principle (namely that a court will not enforce a contract if its enforcement would be contrary to public policy), is the most serviceable instrument for developing the common law of contract to give effect to a provision of the Bill of Rights.[291] If the latter is what we hope for in the South African law of contract, one can only hope that the Supreme Court of Appeal will in the future not feel itself confined by the heavy qualifications in exercising the *Sasfin* principle. It will be seen that it was precisely this consideration which the court used to justify its conservative (non-constitutional or constitution-avoiding approach both in *Brisley* and *Afrox* as well as decisions thereafter).

Although '[t]he principle of *pacta servanda sunt* is glossed by a caveat that a contract will not be enforced if this would be contrary to public policy'[292] we should not be so naïve to think that *Sasfin v Beukes* has solved all our problems with regard to the accommodation of equity in contract, for 'the utmost freedom of contract still remains in the public interest' and it is still the Court which will decide if and indeed when the *Sasfin* principle will be invoked in the manner Christie suggests. For the rest, the coercive machinery of the State can still be employed to enforce those unfair contracts which do not meet the Court's no doubt scrupulous eye for the 'clearest of cases'.

One of the first cases in which the Court interpreted the *Sasfin* principle and indeed the limited nature of its power in terms thereof to refuse enforcement of a contract on the ground of public policy was that of *Donelly v Barclays International Bank*.[293] A discussion of this case attempts to

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[290] Lubbe (note 129 above) 24.

[291] RH Christie *The Law of Contract* (4ed) (2001) 403.

[292] Ibid.

[293] 1990 (1) SA 375 (W).

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illuminate the Courts' understanding that their power in terms of the *Sasfin* principle is a very constrained one. As Jonathan Lewis notes: 'it was not long before the force of the public interest argument was [or is it had to be?] diminished'[294]

(d) Donelly v Barclays International Bank:[295] Sasfin interpreted

In this case the bank obtained judgment against the appellant on a deed of surety which secured the overdraft facility of a company. The appellant was a director and shareholder of the company, who, during the course of the appeal, approached the court for leave to submit additional grounds on which it purported to attack the decision of the court a quo.[296] One of these grounds was the submission that the certificate of indebtedness clause in the deed of surety was unlawful and unenforceable as it was suggested that the clause was contrary to public policy on a reading of *Sasfin v Beukes* which was at the time not yet reported but had already been raised thrice in the Witwatersrand Local Division in 3 weeks.[297]

The wording of the clause was almost identical to that of one of the clauses held to be invalid in the *Sasfin* case. However, Kriegler, J ruled that the clause in this case was not invalid.[298]

This outcome appears to be problematic and on closer inspection reveals that the judgment rests upon an interpretation of *Sasfin* which is acutely (self)conscious of the possibility of unfettered judicial discretion which the *Sasfin* decision opens the door for. Kriegler, J holds that the decision of the Appellate Division in *Sasfin* is based on principle but that the principle should in every

[294] J Lewis 'Fairness in South African Contract Law' (note 139 above) 334.

[295] *Donnelly v Barclays International Bank* 1990 (1) SA 375 (W).

[296] Ibid 379H.

[297] Ibid 380A.

[298] Ibid 384I-J.

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case be applied to the specific contract before the court for adjudication.[299] The court also places a great deal of emphasis on the fact that the *Sasfin* judgment should not be regarded 'as a free pardon to recalcitrant and otherwise defenceless debtors'[300]because it is 'decidedly not that'.[301]

Kriegler, J also does not let the opportunity pass him by to emphasise that 'pacta servanda sunt is still a cornerstone of our law of contract'[302] and that 'nothing said or implied'[303] in the *Sasfin* principle can be said to derogate from this important fact.[304] The implication is that the whole of the contractual context should be taken into account against the backdrop of this cornerstone when it comes to the determination of the enforceability of the agreement on the grounds of public policy. Kriegler, J holds that the court was similarly influenced by the surrounding circumstances in the *Sasfin* case.

The court proceeds to distinguish the facts of the *Donelly* case from the facts in *Sasfin*, by pointing out that the case before him was not the case of a lender of money who was effectively placed in control of the debts payable to a professional person (as was the case in *Sasfin*), but rather a case of a distinguished and respected bank in dispute with one of its clients who had received frequent and clear bank statements in a standard form and who was enabled to exercise appropriate control over the principal debt.[305] Also the court holds that it was clear from the trial proceedings that there was never any substantial challenge to the validity of the certificate clause.[306]

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[299] Ibid 381I.

[300] Ibid 381F.

[301] Ibid.

[302] Ibid 381H.

[303] Ibid 381H.

[304] Ibid.

[305] Ibid 384E-F.

[306] Ibid 384 H-I.

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Although there is something to be said for the fact that this decision attempts to individualise the law on a case by case basis by heeding the facts of every case, it is nevertheless not in furtherance of a more balanced approach to freedom of contract and principles of fairness. Although appearing to be rather convinced early in the judgment that its power in terms of *Sasfin* is a very narrow one, the court itself seems to doubt the narrow scope of the *Sasfin* principle later in the judgment,[307] but, having justified a conservative approach, proceeds to follow on it.

Kriegler, J holds that in the circumstances the clause with basically the same wording as the one in the *Sasfin* case is not against public policy and therefore enforceable. This approach seem to be very similar to the approach in *Magna Alloys* where the court also held that it depends on the circumstances of each case whether the restraint of trade will be enforced in accordance with the requirements of public policy but then held that in the circumstances freedom of contract remained in tact.

There is a series of decisions in which the courts have declined to exercise its *Sasfin* power to declare unfair contracts unenforceable on the grounds of public policy.[308] The general approach is similar to that in *Donely*. In *Botha (now Griessel) v Finanscredit (Pty) Ltd*[309] the court refused to declare a deed of suretyship void on the grounds of public policy, holding that, although 'somewhat rigorous', the surety was not left 'helpless in the clutches of the plaintiff'. This prompts one to ask: must a defendant necessarily be helpless in the clutches of a plaintiff for the court to exercise its *Sasfin* power? And when will a defendant be regarded as sufficiently helpless in the clutches of a plaintiff for the court to exercise its power? This interpretation of the *Sasfin*

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[307] Ibid 385A.

[308] *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *De Klerk v Old Mutual Insurance Co Ltd* 1990 3 SA 34 (E); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA); *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004(5) SA 248.

[309] 1989 (3) SA 773 (A).

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principle seems to be counter-intuitive and cannot provide an adequate basis for the infusement of the law of contract with considerations of equity.

Although there exist a handful of cases where the court elected to use the *Sasfin* principle to release the defendant from the clutches of the plaintiff it appears that these cases are indeed, as the court held in *Sasfin* it should be, the few exceptions to the rule.[310]

## XI CONCLUSION

'Once upon a time we had a bad, old, classical law of contract which spoke in abstractions such as 'freedom of contract,' but now we have a good, new, modern law which combines principle and policy and has none of the fundamental defects of classical contract law. That assumption is false.'[311]

Feinman's words above are not truer about the law he described (American contract law) than they are true of the South African law of contract. From the above it is clear that collectivist attempts to resolve the problems of liberal ideology in the law of contract are indeed trumped by liberal ideology itself. The interpretation of the *Sasfin* principle as a narrow power serves as a striking example of that. Although the court which formulated the principle did not hesitate to apply it to the circumstances under their consideration and experienced no predicament of conscience to strike down the clauses under attack on the grounds of equity alone, a similar bold

[310] See for instance the decision in *Baart v Malan* 1990 (2) SA 862 (E) where the court considered itself empowered to release a woman from a divorce settlement obligation to pay her gross anual salary for 20 years as a contribution to maintenance for her children. It appears it is this sort of extreme situation which the court looks for, before it will consider exercising its *Sasfin* power.

[311] Feinman (note 18 above) 830.

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approach has not transpired out of the courts. Instead, the focus has been far more on the fact that it is a power which has to be exercised sparingly and only in the clearest of cases, rather than on the fact that it *is* a power to strike down unfair contracts.

The partial abandonment of the classical law by 'enlightened' jurists seems to have produced a body of law that is inconsistent and whose underlying theories are inadequate. It appears that, once South African jurists, no doubt under the influence of decisions in comparative jurisdictions, found that there are fundamental contradictions apparent in classical contract thought, it attempted to mend this rift by introducing policy considerations and principle, whilst at the same time attempting to still hold on to the foundation of classical contract law, namely utmost freedom of contract.[312]

It is clear that tension between individualist and altruist notions concerning the public interest is evident as a result of this ameliorating attempt. Feinman shows that the undermining of the assumptions of classical contract law did place a question mark over the integrity of the classical approach, but it did not manage to mend the rift, according to Feinman, because the altruistic critique is haphazard and not systematic.[313] It is for this reason that the law of contract finds herself on a continuum of tension between the polar opposites, with a definitive privilege for the individualism/rules pole of the duality. There exists firstly, no attempt to abandon the one approach wholly in favour of the other[314] and secondly, there is also no real attempt in the courts to move towards a more nuanced approach.

[312] Ibid 833.

[313] Ibid.

[314] Klare in Klare 'Contracts Jurisprudence and the First-Year Casebook' 54 *NYU LR* 876 at 880-881 refers to this situation as an aspect of social conceptualism. Social conceptualism primarily entails attempts to harmonise contradictive lines of thought as well as attempts to assimilate formalism and judicial instrumentalism, quoted in Feinman (note 18 above) 834 n17.

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According to Feinman the reasons for this 'schizophrenic' or dualistic approach are threefold:[315] Firstly, critics find the power of freedom of contract to be so pervasive of our traditions and our customs that it is almost inescapable and at least in part, individualism is a description of human belief and behaviour. Secondly, were we to abandon the formality of and the belief in rights, the basis for contract law adjudication would fall away and everything in the law of contract will be engulfed by that 'boundless morass of uncertainty' against which De Wet and Van Wyk warned so often in the past. For the individualists, this is something which will happen of necessity once we do away with these rules. Thirdly, the 'great leap' from the common law to things unknown is just too foreign and daunting for the adherents of classical law to contemplate.[316]

In South Africa the above reasons are closely related to the broad political situation prevalent at these crucial moments of ideology of contract law. A political approach of parliamentary sovereignty, an emphasis on the separation thesis as a result thereof, arbitrary decision making, positivism, strict adherence to rules and a suppression of difference. In short, all which it is not supposed to be today.

The question I would like to address in the next Chapter is whether the advent of a sovereign Constitution (as a product of South Africa's collective human will) and the introduction of a new value system or ethos for the South African community, based on the values of freedom, equality and dignity is, or at least can be, what we need to challenge the individualism/rule bias of our law of contract in order to leave behind the limiting, reductive, alienating and, in my view, ultimately oppressive contract law that is our history.

[315] Feinman (note 18 above) 833.

[316] Ibid.

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# CHAPTER 4:

# TRANSFORMATION, THE CONSTITUTION AND CONTRACT LAW

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# CHAPTER 4:

# TRANSFORMATION, THE CONSTITUTION AND CONTRACT LAW

'I believe a significant part of the failure of the judicial development of the law to address the ills of modern societies can be traced to conservative political attitudes bent on the preservation of an existing status quo … Such political attitudes are bound to turn open-ended legal principles such as reasonableness, good faith and the boni mores of society into rule-like maxims that entrench rather than challenge existing power relations'[1]

## I INTRODUCTION: THE BREAK WITH THINGS PAST, A TRANSFORMING SOCIETY AND THE CONSTITUTIONAL RULE OF LAW

### (a) Background

On 27 April 1994 the Interim Constitution introduced a new dispensation of constitutional sovereignty for South Africa.[2] This new dispensation is founded in the constitutional (formative) values of freedom, equality and human dignity and envisages the eradication of the injustices and discriminations which forms a central theme of South Africa's divided past. The Interim Constitution provided for the first democratic election in South Africa and for an interim

[1] 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, 361.

[2] Constitution of the Republic of South Africa 200 of 1995 (the 'Interim Constitution').

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parliament who, in its capacity as a constitutional assembly, was responsible for drafting the final Constitution which had to be concluded within two years.[3]

The Constitution[4] represents one of the most egalitarian constitutions of the modern world.[5] Hanekom points out that it is a product of 'significant political negotiation and compromise'[6] which 'serves as tangible evidence of our break with the past'.[7] The values contained in the Constitution stand in high contrast to those that were favoured under the Apartheid order. It is a text which envisages a dynamic system of competing values within the framework of the three core values of freedom, equality and human dignity. The spirit, purport and objects of the Bill of Rights are contained in section 7(1) of the Constitution:

> This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

The Bill of Rights embodied in the Constitution ensures the protection and enforcement of human rights by the rule of law. The Bill not only protects the individual against arbitrary exercise of public power, but also places positive obligations on the State and other individuals to respect and contribute to the realisation of, these rights.[8]

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[3] Chaskalson *et al Constitutional Law of South Africa* (5 ed) (1999) 2-15.

[4] Constitution of the Republic of South Africa Act 108 of 1996 (the 'Constitution').

[5] D Tladi 'Breathing constitutional values into the law of contract: Freedom of contract and the Constitution' 2002 35(2) *De Jure* 306.

[6] D Hanekom 'Beware the silence: a cautionary approach to civic republicanism' (2003) 18 *SAPR/PL* 139

[7] Ibid.

[8] B Bekink *Basic Principles of the South African Constitutional Law (A Student Handbook)* (2001) 115.

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The enactment of the Constitution has brought with it much debate as to the preferred approach to its interpretation, the most evident dispute existing between those arguing for a classical liberal interpretation and those arguing for a transformative approach. Henk Botha's thought is located in the school that argues for a transformative approach. He notes three reasons why the Constitution requires more than a classical liberal interpretation.[9] Firstly, he points out that the Constitution contains a commitment to an open, value-orientated, participatory democracy.[10] This is a commitment that cannot be reconciled with the reduced concept of democracy which pervades liberal theory. Secondly, Botha opines that the Constitution does not support a liberal conception of rights as boundaries between the individual and the collective; the rights in the Bill of Rights have a contingent and non-absolute meaning and to that extent they do not operate as a shield against government intervention or as trumps over collective interests.[11] Thirdly, the Constitution is structured in a way which requires far more of an activist stance by the judiciary than what would be acceptable under a liberal interpretation.[12] In accordance with the transformative approach, Van Marle and Brand argues that the new constitutional dispensation requires judges to shape law in accordance with the constitutional values and to make openly political choices in adjudication processes.[13]

Botha's call for a transformative reading of the Constitution resonates with Du Plessis's earlier arguments that academics belong to the 'open community of interpreters.'[14] This open community is characterised by openness as inclusivity, publicness and the open community as a

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[9] H Botha 'Democracy and rights: Constitutional interpretation in a postrealist world' 2000 (63) *THRHR* 561.

[10] Ibid 574.

[11] Ibid 575.

[12] Ibid 575-576.

[13] K van Marle & D Brand 'Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*' (2001) 12(3) *Stell LR* 408, 415.

[14] LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12(2) *SAJHR* 214, 215.

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catalyst for the constitutional reality to take effect in civil society.[15] Openness connotes 'a free and rational society receptive to pluralist interplay of forces and ideas shaping its destiny.'[16] The open community of interpreters presupposes that language allows for more than one (equally) valid reading of the Constitution.[17] Du Plessis warns that to make sense of the project of constitutional interpretation, we will have to free ourselves from the restrictive illusion of 'an "only one meaning" syndrome'[18] which is characteristic of liberalist readings.

The process of transformation operationalised by the Interim Constitution is a long and ongoing process which is still in its early phases. This is equally true about the transformative approach to (constitutional) interpretation. The role of the courts in this process is critical. The Constitution tasks the judiciary with the responsibility to interpret and protect the values of the Constitution.[19] Primarily, it is also the task of the courts to strike down law inconsistent with the Constitution, to develop the common law in accordance with the spirit, purport and object of the Bill of Rights and to declare conduct inconsistent with the Constitution invalid.[20] I believe that it is only once the courts become committed to a transformative interpretation of the Constitution and to a transformative approach to the common law in general that we will be able to begin to realise its full impact on the legal system and indeed our lives.

Although the Constitution regulates the public relationship (namely that between state and private person) to a vast extent, the effect of the Constitution on the private relationships between individuals, is for obvious reasons of primary importance in this study. Seeing that (a)

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[15] Ibid.

[16] Ibid.

[17] Ibid 220.

[18] Ibid 218.

[19] See section 39(1) and (2) of the Constitution.

[20] Tladi (note 5 above) 306.

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truly democratic community/(ies) can only exist where individuals are actively involved in and represented by the different communities they find themselves in, it is important that the constitutional value system also finds application horizontally (that is between private persons or groups of private persons amongst themselves). Accordingly, it is important to investigate the horizontal application of the Constitution, specifically in the law of contract in order to see whether it provides us with the means to escape the many straitjackets of the common law of contract.

### (b) Horizontal application of the Constitution and the Bill of Rights to contract law

#### *(i) Direct and indirect horizontal application provisions*

The Constitution and specifically the Bill of Rights, can be applied to the law of contract in a variety of ways and through an application of a variety of its provisions. The general view in this regard is that horizontal application of the Constitution to contract can and should occur either directly or indirectly.[21]

Van der Walt summarises the horizontal application of the Constitution in pointing out that it rests on four provisions, namely section 8(1), section 8(2), section 8(3) and section 39(2).[22] In

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[21] G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law' (2004) 121(2) *SALJ* 395.

[22] Van der Walt (note 1 above) 341,342, 346. I do not wish to take issue here with the position on horizontal application of the Bill of Rights as set out in *Du Plessis v De Klerk* 1996(3) SA 850 (CC) because I think that to a large extent that exposition has become rudimentary. (For a lucid exposition of *Du Plessis* see V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis, UP 96-99.) What I do wish to point out is Van der Walt's contention that the difference between that interpretation and the current stance has contributed to a rivalry between the Constitutional Court and the Supreme Court of Appeal on the issue of horizontal application.

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addition, section 39(1)(a) provides that a court, tribunal or forum, when interpreting the Bill of Rights itself, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In terms of this provision a court is bound to the values of freedom, equality and human dignity when it comes to interpreting the Bill of Rights itself.

Furthermore, section 173 provides that the Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. Two other jurisdiction provisions, namely section 168 and 169 provide that the Supreme Court of Appeal and the High Courts may decide constitutional matters not in the sole jurisdiction of the Constitutional Court in terns of section 167(4).

In addition, section 9(4) enjoins horizontal application in the sense that it provides that *no person* (whether a natural or juristic person) may unfairly discriminate directly or indirectly against *anyone* on one or more grounds in terms of subsection (3). Tladi suggests that section 9(1), (the equality clause) is also relevant in the horizontal application of the Constitution insofar as it (read with section 9(4)) prohibits unfair discrimination in an *unqualified* manner.[23] This is a very important consideration for the law of contract as the inequality of bargaining power problem may be addressed by this reading, especially in the light of Hawthorne's view that 'equality seldom exists [in contract] and most contracts are concluded out of necessity'.[24]

Lubbe argues that although section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, not all fundamental rights have horizontal application. This, according to Lubbe is because section 8(2) provides for a

[23] Tladi (note 5 above) 307.

[24] L Hawthorne 'The Principles of Equality in the Law of Contract' (1995) *THRHR* 157, 163.

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'restricted'[25] direct horizontal application of the Bill of Rights by providing that a provision of the Bill of Rights binds a natural or juristic person 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'[26] Although it can be said that this provision creates the possibility or opens up the space for invoking (one of) the rights in the Bill of Rights as a cause of action or ground of defence in disputes between private legal subjects, Christie has warned that section 8(2) suggests that the court should proceed with caution and investigate the nature of the right and the nature of the duty imposed by the right, to determine whether the Constitution finds direct horizontal application on the private relationships between natural and juristic persons. [27] Similarly, Lubbe and Cockrell seem to be of the opinion that 'the direct horizontal application of constitutional rights against private agencies must be mediated by the operation of the common law.'[28]

Indirect horizontal application is understood to imply that the values and principles of the Bill of Rights have a radiating effect on the common law reflected in open-ended principles of law such as the boni mores.[29] Most importantly in this respect, section 39(2) of the Bill of Rights provides that every court, tribunal or forum, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights.[30]

The issue of direct, as opposed to indirect horizontal application of the Constitution has attracted a lively, ongoing debate, generating sharp-criticisms and profound apologies. I do not wish to take issue with the question whether the Constitution really provides for direct horizontal

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[25] Lubbe (note 21 above) 395.

[26] See section 8(2) of the Constitution.

[27] RH Christie *The Law of Contract in South Africa* (4ed) (2001) 403.

[28] A Cockrell 'Private Law and the Bill of Rights: A threshold issue of "horizontality"' *Bill of Rights Compendium* (looseleaf 1998-) paras 3A8 and 3A7 as quoted in Lubbe (note 21 above) 395.

[29] J van der Walt (note 1 above) 352.

[30] My emphasis.

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application or whether it only provides for indirect horizontal application. Suffice it to say that I side myself with Van der Walt who is of the opinion that 'the future impact of the Bill of Rights on private law in general…will predominantly take place through what has come to be understood as the indirect horizontal application of the Bill of Rights.'[31]

However, from the above it appears that the Constitution provides ample space for its horizontal application to private law and specifically the law of contract. Because the Bill of Rights does not make provision for any specific hierarchy of human rights, the courts are tasked with weighing the competing rights and values in specific instances to determine which right outweighs another in a given set of circumstances. In the area of private law, this process has to take place within the context of the clash of rights and/or values and with reference to the good faith, boni mores and public interest criteria as developed by the values in the Bill of Rights itself.

(ii) The role of section 36

In the light of what has been said above, the role of section 36 in this balancing process should then be considered. Section 36 of the Constitution is the general limitation provision which provides the conditions under which a right in the Bill of Rights may be limited. As Van der Walt points out, section 36 does not have a bearing on the application of the Bill of Rights to private relationships between legal subjects as such, but can be understood to govern the resolution of the conflict between fundamental rights when horizontal application takes place.[32]

Lubbe argues that limitations on the direct application of fundamental rights may, in accordance with section 36(1), be fashioned 'by means of the development of common-law rules.' [33] Here,

[31] J van der Walt (note 1 above) 351.

[32] Ibid.

[33] Lubbe (note 21 above) 395.

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Van der Walt suggests that the proportionality principle is not the only principle in terms of which we can understand the limitation of rights and that it could be equally workable to employ a principle, as is the case in German law, that the right that can be said to best serve the public interest under the circumstances should enjoy precedence, as public interest is in any event the criterion that underlies the various balancing procedures of which the proportionality principle is only one.[34]

In the context of contract law the principle of 'balancing' is particularly important where freedom of contract and good faith are allegedly at odds. In its enquiry into the public interest in contract courts will in the future have to be more seriously concerned, within the broad constitutional context, with a real balancing exercise between freedom of contract and good faith rather than to blindly depart from the freedom of contract starting point position.

## II A TRANSFORMATIVE APPROACH TO THE CONSTITUTION AND ITS INFLUENCE ON THE LAW OF CONTRACT

In light of the fact that the Constitution creates the possibility of horizontal application, coupled with what has been said above, a call for an acknowledgement that it is the constitutional responsibility of the courts to weigh competing rights and interests also in contractual disputes and to decide on the basis of such an exercise which of the parties' position outweighs the other's, does not seem to me to be an unjustified one. This of course implies that a mere blind reliance on freedom of contract as the basis of contractual relationships will not do, neither will an interpretation of contract which attempts to (re)legitimise liberal ideology. The other side of this is that a consideration for the values of freedom, equality and human dignity will have to be properly considered in contractual cases and a real value judgment exercised in each case.

[34] J van der Walt (note 1 above) 351.

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What is in my opinion of cardinal importance to emphasise is that it is not only constitutional rights which are to facilitate common law development but also and more importantly perhaps, the values underlying the Bill of Rights and the Constitution as a whole.[35] In the law of contract this means that a review, adaptation, reinterpretation and expansion of the traditional boni mores, public interest and good faith criteria is inevitable in order to align these open-ended contractual norms from the realms of the common law with the new boni mores of the constitutional community through the radiating effect of indirect horizontal application.

Van der Merwe points out that judges in the former constitutional dispensation, where ideas concerning parliamentary sovereignity were paramount, were compelled to guarantee a consistent and coherent application of the law.[36] Currently, they are compelled to guarantee the law as such – even against and in relation to Parliament – against any intrusion on the democratic values of freedom, equality and human dignity.[37]

In my opinion this statement illustrates what has been going on in the law of contract before and how it is expected to change in the future. In the past, judges in contract felt themselves compelled to guarantee a consistent and coherent application of the freedom of contract doctrine without regard to the injustices that might have ensued from its application. Currently, they are enjoined by the Constitution to ask in each case whether the application of freedom of contract will be in furtherance of the values of freedom, equality and human dignity. The values of the

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[35] J Goldblatt 'The Effect of the Constitutional Norm of Accountability on the Development of the Delictual Liability of the State' Paper presented at the Young Researchers Programme, Faculty of Law, University of Cape Town on 30 April 2004, 1.

[36] D Van der Merwe 'The Roman-Dutch law: from virtual reality to constitutional resource' (1998) 1 *JSAL* 1 13.

[37] Ibid.

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Constitution and the moral ethos of the Constitution itself, has to be guaranteed not only in the law of contract but indeed in all other law subordinate to the Constitution.[38]

It is true that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law and I would not want to be read as denying that freedom of contract is indeed such a value.[39] But the Constitution also explicitly holds that these freedoms are only recognised 'to the extent that they are consistent with the Bill' of Rights.[40] I am thus not suggesting that the vested common law right to freedom of contract, should not be protected. Following Van der Walt, I am merely suggesting that the right to freedom of contract should not be seen to be legally unassailable.[41] It should in all cases be balanced against the other contractual party's right to good faith in the conclusion, operation and termination of the contract. 'Horizontal application requires that vested rights always be subjected to a balancing process when the fundamental rights of others are also at stake.'[42] Lubbe also notes that it is important to recognise 'that the injunction to develop the common law might very well require the reconceptualisation of traditional rules, concepts and doctrines in order to give optimal effect to constitutional rights in the domain of private law.'[43]

The continued protection of traditional values of contract (ie freedom, certainty, sameness, coherence, consistency, predictability) is an outdated remnant of the consequences of

[38] Section 2 of the Constitution provides specifically that the Constitution is the supreme law of the country and that all other law and conduct in conflict with the Constitution is invalid.

[39] Section 39(3) of the Constitution.

[40] Ibid.

[41] Van der Walt (note 1 above) 361, note 63.

[42] Ibid.

[43] Lubbe (note 21 above) 407.

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parliamentary sovereignty and its influence on private law adjudication.[44] In the context of the new dispensation this approach cannot be endorsed where it does not reflect a commitment to the values of the Constitution. Van der Merwe has offered the helpful insight that it is only once judges become prepared and willing to employ the sources of the Roman-Dutch law to protect and defend freedom, equality and dignity, that it can fulfil a constructive role in the adjudication practices of South African courts.[45] In the context of contract this implies a renewed focus on and reinterpretation of those values of the Roman-Dutch law which have become underprivileged in contract law as a result of the overemphasis on freedom of contract (ie bona fides, fairness, reasonableness).

My vision of this transformative approach to contract law is perhaps best described in the words of Langa, DJP in what may be referred to for ease of reference as the *Hyundai*-case:

> The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and include all in the process of governance ... This spirit of transition and transformation characterises the constitutional enterprise as a whole. [46]

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[44] See A van Aswegen 'The Implications of a Bill of Rights for the law of Contract and Delict' (1995) 11 *SAJHR* 50, 67 who indicates that the system of apartheid contributed greatly to social and economic equalities experienced specifically in the context of contract law.

[45] D van der Merwe (note 36 above) 13.

[46] *Investigative Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) par 21.

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Section 39 compels (as opposed to authorise) a court to develop the common law when it does not reflect the values of the Constitution precisely. In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*[47] the Constitutional Court held that the common law has to be developed within the matrix of the constitutional value system. Even though this case deals with horizontal application of the Constitution to the law of delict, it is the *common law* (which necessarily includes the law of contract) which has to be developed in accordance with the value system enshrined in the Constitution.

Van der Walt has argued elsewhere for an understanding of horizontal application of fundamental rights as resistance against the privitisation of the political or the public.[48] He argues that all abuses of fundamental rights 'constitute feudal or colonial privitisation of the political, be they perpetrated by a private or public legal subject'.[49] Van der Walt asserts that the political exists in non-hierarchical or horizontal relations and speaks of a 'verticalisation'[50] of the political which I understand to mean attempts to create hierarchy. He argues that horizontal application is not so much concerned with the category of legal subjectivity to which it applies than it is with the question whether a legal subject (be it private or public) is involved in a privitisation of the political or the public.[51] Constitutional review then entails the (re)horizontalising of the political, the removal of the hierarchy, to which both private and public legal subjects can be dedicated to or responsible for.[52] Van der Walt's ultimate argument is that it is no longer feasible to maintain a stable distinction between the private and the public and points out that '[d]emocracy requires

[47] 2001(4) SA 938 (CC).

[48] 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> 4.

[49] Ibid.

[50] Ibid 3.

[51] Ibid 4.

[52] Ibid 4.

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government by some and by none' and argues that *one* can never 'safeguard absolutely, the some from becoming one, or a few, a privitising and depriving few'.[53]

Van der Walt argues that 'it is the acceptance that the law never simply is what it is, that it is constantly subject to adaptation and supplementation, that renders the distinction between direct and indirect horizontal application devoid of substantive significance.'[54] It is in this interpretation of the Constitution that I believe lies its transformative value.

I believe that a continued debate about transformation through the direct or indirect horizontal application of the Constitution poses the danger that it may become a politic which again threatens actual transformation. Essentially the debate is a debate about the private (in this case contract law) and the public (the Constitution). But the reality is that these spheres are no longer so rigidly separated – the Constitution subordinates all law to it. To that extent the traditional private law of contract should now be transformed or infused by the Constitution ('the public') for it to become a body of law that is constitutional.

It makes no difference then whether we allow for an approach which directly invokes constitutional principles within the context of the common law or whether we elect an approach which prefers to let the common-law principles themselves perform 'the required mediation between the existing law and constitutional challenges to such law.'[55] As long as we can invoke the Constitution, whether by direct or indirect horizontal application, to resist the limiting, reductive and often oppressive tendencies of the common law of contract, it does not really make

[53] Ibid 4-5.

[54] J van der Walt (note 1 above) 355.

[55] Ibid.

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much of a difference how that resistance occurs.[56] What is critical is that we remain committed to transformation *and* that the courts allow us the opportunity to resist 'the privitisation of the political' with the tools of horizontal application.

The remainder of this chapter will consider whether the Courts regard the Constitution to be capable of such a transformative reading or whether it is still up to its old tricks of protecting liberal ideology behind claims of neutrality. I will attempt to show that unfortunately the latter is true. It will be seen that ample opportunities presented themselves to the Supreme Court of Appeal to invoke a transformative reading, but the court declined the opportunity in *Brisley v Drotsky,*[57] *Afrox Healthcare v Strydom,*[58] and *South African Forestry Co Ltd v York Timbers.*[59]

At the end of this chapter I arrive at the conclusion that, but for a few exceptions, contract law adjudication in a post-constitutional, value orientated social context is still primarily concerned with an approach subscribing to indirect and marginalised application of fairness to contracts and furthermore, that there is a practice manifest on the pages of the law reports which threatens transformation, namely a (selective/exclusionary) reading of the Constitution which favours the traditional liberal notions of the common law. This practice seems to enjoin the Constitution itself in the legitimation of an unjust status quo in the law of contract.

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[56] NJ Grové 'Die Kontraktereg, Altruïsme, Keusevryheid en die Grondwet' (2003) *De Jure* 134 140: 'Dit word egter aan die hand gedoen dat die bron van die remedie nie die kritieke punt is nie, maar dat daar inderdaad 'n remedie is.'

[57] 2002 (4) SA 1 (SCA).

[58] 2002 (6) SA 21 (SCA).

[59] 2005(3) SA 323 (SCA).

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## III DECISIONS IN THE LAW OF CONTRACT AFTER 1994

### (a) Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO[60]

The above case provides an example of the utter unfairness in maintaining the pacta servanda sunt rule. The respondent, in her capacity as curatrix bonis of her mother, Mrs Malherbe, obtained an order in a provincial division which ordered the appellant ('FNB') to hand over to her certain share certificates which Mrs Malherbe had ceded to FNB in 1989 to secure certain debts her son was owing to FNB.[61]

The court dismissed FNB's claim in reconvention, based on a suretyship as causa of the above mentioned cession, on the grounds that Mrs Malherbe was of unsound mind and accordingly lacked capacity to contract when she concluded the agreements in question.[62] FNB appealed against this decision and the Supreme Court of Appeal, per Streicher, AJA held that in the light of the expert and factual evidence, Mrs Malherbe was decidedly without capacity to understand what she was doing or what the possible outcomes of her acts could be.[63] Accordingly, the appeal was denied.[64]

In this case Mrs Malherbe was 85 years old, almost deaf and nearly blind when she was asked by her loving son to sign the agreements in question.[65] Most of the time Mrs Malherbe was also confused and delusional.[66] Her loving son had her apparently wrapped around his little finger and

[60] 1997 (4) SA 302 (SCA).

[61] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 307A-C.

[62] Ibid 307A.

[63] Ibid 315A-C.

[64] Ibid 318F.

[65] Ibid 330I.

[66] Ibid 330J.

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had her sign one after the other utterly detrimental document.[67] Mrs Malherbe was under the impression that she was merely making the shares available to her son without prejudice of her rights. She was also under the impression that she merely had to ask for the shares back in order to get them back.[68] She signed these agreements without having their consequences explained to her and without reading them. [69]

Olivier, JA declines to base his decision (like the majority) on a negation of the will theory and based his decision that the appeal had to be denied in a concurring minority judgment on an application of the bona fides principle to our law of contract:

> [e]k hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelike skepper en gebruiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid.[70]
> ([i] believe that the principles of good faith, based on public policy, still play and should continue to play an important role in our law of contract as it does in any legal system which is sensitive to the convictions of the community - who is the ultimate creator and user of the law - relating to the moral and ethical values of justice, fairness and propriety.)

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[67] Ibid 330J-331A.

[68] Ibid 331A.

[69] Ibid 331B.

[70] Ibid 326 F-H.

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In his judgment Olivier, JA affirms that the principle of individual autonomy as embodied by the freedom of contract doctrine should be subject to the standards of the bona fides and external circumstances:

> In gemelde omstandighede meen ek dat die openbare belang nie vereis dat die algemene beginsel, dat 'n handelingsbevoegde kontraktant aan die ooreenkoms gebonde gehou moet word, strak deurgevoer moet word nie....Waar die borg, soos in hierdie geval, opsigtelik liggaamlik swak is en uit 'n gesprek met die skuldeiser laat blyk dat hy of sy verward is of moontlik nie die implikasies van die borgkontrak goed verstaan nie, of waar die borg tot die kennis van die skuldeiser 'n eggenote is wat vir die eggenoot borg staan of 'n bejaarde ouer is wat vir 'n kind borgstaan, verg die openbare belang myns insiens dat die skuldeiser seker maak dat die borg die volle en werklike betekenis en implikasies van die borgkontrak en enige gevolglike sessies goed begryp.[71]
> (In the present circumstances, I am of the opinion that public policy does not require that the general principle, namely that a contractual party of sound mind should be kept to her contracts, should be enforced…Where the surety, as in this case, appears to be clearly physically weak, and, in a conversation with the creditor appears confused or not to comprehend the implications of the suretyship, or where the surety is, to the knowledge of the creditor, a spouse who stands surety for another or an elderly parent who stands surety for a child, public policy requires in my opinion that the creditor makes sure that the surety clearly understands the full and true meaning and implications of the suretyship as well as any subsequent cessions.)

This passage reveals in my opinion a clear sensitivity for the broad legal context of constitutional transformation, because it points out that social values which are separate from the freedom of contract doctrine have a primary role to play in the correction of the tyranny often brought about

[71] Ibid 331 D-G.

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by the strict application of this doctrine. In a legal system where morality and social responsibility have been declared paramount by the operation of the Constitution, this approach should, in my opinion be considered the more favourable one, especially because it allows for an escape from the shackles of the traditional law of contract by making use of the concepts already contained within the common law to bring it in line with the Constitution. Unfortunately, the judgment is only that of a minority and therefore has only persuasive authority.

Although no direct constitutional argument was submitted in the *Eerste Nasionale Bank* case, the decision nevertheless reveals aspects of an approach that would be generally in line with a sensitivity for the values embodied in the Constitution. Here the Court had clearly made its moral judgment (ie that the law was not going to deprive an elderly, ailing woman from her only means of income) and proceeded to apply the law in accordance with that judgment, without attempting to be neutral or insensitive to the outcome of its application of the law. Although the majority elected to base their decision on a negation of will, they could in the light of the evidence easily have decided to hold that the will was not negated, *caveat subscriptor*.

The decision of Olivier, JA specifically, confirms that the Court is at least willing to follow a new approach and does not consider itself bound to pronounce the law only.[72] The impropriety of this is explicitly stated in Olivier, JA's judgment.[73] The decision comes down to the fact that public interest requires from contracting parties good faith in respect of the origination, content, execution, enforcement and termination of contracts – the so-called broad lawfulness criterion.[74]

[72] Also see NJ Grové 'Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid' (1998) 61 *THRHR* 687, 688, 695.

[73] *ENB v Saayman* (note 60 above) 320A.

[74] CFC Van der Walt 'Beheer oor onbillike kontraksbedinge – *quo vadis* vanaf 15 Mei 1999?' (2000) 1 *JSAL* 33 35. Here Van der Walt also shows that where the broad lawfulness criterion is not satisfied, the Court will visit the agreement with invalidity or unenforceability.

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In his discussion of unfair contracts, Christie remarks: 'There is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract.'[75] In accordance with Christie's advice the above dicta was quoted with approval (although obiter) in the judgment of Davis J, in *Mort NO v Henry Shields-Chiat*[76] in which the judge added that, for the bona fides in our law of contract to be taken seriously, the primary importance placed on the concept of individual autonomy of contracting parties, should be reconsidered.[77] The court held that the hegemony of the will theory, which still survives, notwithstanding dicta indicating a move in the opposite direction towards a system of social responsibility should also be re-examined.[78]

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[75] Christie (note 27 above) 19.

[76] 2001 (1) SA 464 (C).

[77] Ibid 474.

[78] Ibid. See also the decisions in *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) and *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2002 (6) SA 202 (C) for examples of a transformative approach. This chapter's focus is on decisions in the Supreme Court of Appeal (SCA) because these decisions provide the authority or guidance to the High Courts. In addition, a decision of a High Court can always be overridden by the SCA and it is thus important to rather focus on SCA decisions in order to interpret the approach a court will follow when faced with re-examining the decision of a High Court. In this regard Matlala remarks: 'It would seem as if far from playing a constructive role, the SCA has unfortunately stalled a number of initiatives emanating from various divisions of the High Court.' See DM Matlala 'The Law of Contract: When the Supreme Court of Appeal Fails to Act'

(available at http://wwwserver.law.wits.ac.za/workshop/workshop03/WWLSMatlala.doc)

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(b) De Beer v Keyser:[79] 'In with the old out with the new'

The way in which the issue of public policy was handled in the above decision however constitutes a rejection of the approach elaborated upon in the previous section. In this case the Supreme Court of Appeal was concerned with the question whether the provisions of a micro-lending franchise agreement were enforceable or not. The respondent was of the opinion that the agreement was unenforceable because the purpose of the agreement (the establishment of a micro-lending business) was contrary to the public interest.[80]

The micro-lending business contemplated in the agreement under consideration would be run in terms of a system where a debtor would conclude a loan at an excessive lending rate. As security for repayment of the loan the debtor would hand her ATM card and secret PIN code to the creditor, who would then on the date that her salary is paid into the account, utilise the card and secret code to claim capital and interest payments due to it in terms of the loan, by a direct withdrawal of funds from the account.[81]

In this case the court elected once again to exercise its public policy choice in favour of the stronger bargaining agent. The court holds that it is not the manner in which a micro-lending scheme is operated which is contrary to public policy, but rather the fact that lenders are forced to make use of this technique.[82] The court finds it shocking that lenders have to take such drastic steps as retention of the ATM card and secret code in order to secure payment of monies due to them in order to enforce borrowers' payment obligations or secure honouring of those

[79] 2002 (1) SA 827 (SCA).

[80] Ibid 837B.

[81] Ibid 837G-J.

[82] Ibid 838B-C.

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obligations.[83] According to the court this points to the unwillingness of borrowers to honour their obligations and, implies the court, these lenders are from the outset not of the intent to honour their payment obligations, partly because their financial position would not be any better when the loan becomes repayable than it was when the loan was entered into.[84]

The implication seems to be that the court accepts that the debtors to these contracts contract in bad faith from the outset and that the creditor is aware of this bad faith but has no choice but to contract with them. He can therefore do nothing else but protect himself as far as possible against the bad faith of the debtor by taking the drastic precautions to insure against the non-payment. Consequently, the court holds that the manner in which the micro lending business is practiced does not amount to a form of *parate executie* and accordingly does not offend public policy.[85]

This bad faith assumption apparently does not hold for the contractual situation of the lenders. Apart from the fact that nothing is said about the excessive rates these lenders often charge in bad faith and contrary to the public interest, Nugent JA, concedes that the posession of a borrowers card and secret code can give rise to fraud, but finds for the benefit of the creditors that the technique is not contrary to public policy just because the possibility of such fraud exists.[86] The same benefit of the doubt is however not afforded the borrowers. These borrowers are rather branded as 'as anxious to avoid repayment of their loans as they were to secure them in the first place'.[87]

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[83] Ibid.

[84] Ibid.

[85] Ibid 838D-J.

[86] Ibid 838I.

[87] Ibid 838B-C.

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This arbitrary award of general moral attributes to the different parties, again reveals a lack of sensitivity for a plethora of very real variables forming part of the equation. Logically, one can ask but what of the borrower who is bona fide of the intention to repay the loan but is socio-economically not capable to provide one of the traditional forms of security? Nothing is said about the unequal bargaining position such a borrower will find herself in when contracting on these terms with a micro lender in circumstances where he is not prepared to hand over his card and secret code. The fact of the matter is that the lender will simply not contract with him. In the same breath one can as readily envisage, especially in the light of recent revelations of corruption in the marketplace, a lender who is from the outset of the intention precisely to commit fraud by exploiting the way in which the micro-lending business is conducted.

Furthermore, the court seems to loose sight of the fact that it is an integral part of a micro-lending scheme's business to charge excessively high interest rates and that lenders are quite aware that these agreements are more often than not entered into as a matter of necessity or economic survival by debtors who simply cannot provide security required by a commercial bank – a knowledge which often leads to an exploitation of the debtor's bargaining position manifest in the form of excessively high interest rates. This is an unequal bargaining position which the court seems simply to ignore and not take notice of. Here one can agree with Tladi where he remarks that:

> The failure or unwillingness of the Supreme Court of Appeal to even consider the values underlying the Constitution and the drive towards substantive equality in determining whether the practice offends against public policy is also, to say the least, disappointing.[88]

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[88] Tladi (note 5 above) 316.

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An application of the constitutional value system could have easily led to the conclusion that the purpose of the agreement in casu was indeed contrary to the spirit, purport and objects of the Bill of Rights. One can think here of the right to equality, human dignity, access to the courts and other rights which clearly outweigh the lender's interest in securing obligations due to it or even its freedom of contract to contract for such a form of security.

(c) Brisley v Drotsky:[89] 'A milestone for the South African law of contract'[90]

In stark contrast with what was said in *Mort NO v Henry Shields-Chiat* and in an endorsement of the, in my view, elitist approach in *De Beer v Keyser* the judgment of the majority in this case shows a regression back into the old trenches of pacta servanda sunt.

(i) The majority decision

At issue was a dispute between Mrs Antoinette Drotsky, a widow from Pretoria and Ms Madeleine Brisley. Brisley rented a townhouse from Drotsky at R3 500 per month which rent was due and payable on the first of every month according to the written contract between them.[91] Brisley and Drotsky however orally agreed after conclusion of the written contract that Brisley would for some months be late with payment of the rent.[92] For a few months Drotsky accepted these late payments, but in January 2000 she put her foot down and evicted Brisley as a result of the late and irregular payments.[93] Brisley's defence centred around the contention that she and Drotsky orally agreed that payments could sometimes be made late, regardless of the

[89] See note 57 above.

[90] Sakebeeld, Monday 20 May 2002 10.

[91] *Brisley v Drotsky* (note 57 above) 9F.

[92] Ibid 10E.

[93] Ibid 9G-H.

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written agreement which provided for payment of the rent on the first day of every month.[94] The High Court however ordered an eviction against which order Brisley brought the appeal.[95]

The majority of the Supreme Court of Appeal held, Harms, JA speaking on its behalf, that a provision in a contract which provided that later oral agreements would have no legal validity unless also reduced to writing, is still as much part of the South African law of contract as when it was adopted by the Appellate Division 38 years before in the case of *SA Sentrale Ko-Op Graanmaatskappy Beperk v Shifren en Andere*.[96] This kind of provision in a contract is known as a non-variation clause and the principle is that such a clause is valid and enforceable and became commonly known as the *Shifren* principle. The Supreme Court of Appeal based its finding primarily on the view that overthrowing the *Shifren* principle would cause large scale legal uncertainty and evidentiary difficulties.[97]

The court viewed the argument on behalf of the appellant that self imposed entrenchment provisions could be rendered inoperative by mere agreement as an argument similar to one it rejected in the *Harris* decision[98] where the parliament of the day attempted to circumvent a statutorily entrenched provision by mere majority vote and the Appellate Division found that it could not be done. The *Harris* decision is seen as the 'historical and jurisprudential context' of the *Shifren* principle.[99] Along these lines the court holds that the non-variation clause is not 'contra bonos mores from the outset; our constitutional dispensation is built upon an analogical principle and it is often recorded in legislation.'[100]

[94] Ibid 10E

[95] Ibid 9I-10B.

[96] Ibid, 1964 (4) SA 760 (A).

[97] *Brisley v Drotsky* (note 57 above) 11F.

[98] *Harris & Others v Minister of the The Interior & Another* 1952 2 SA 428 (A).

[99] *Brisley v Drotsky* (note 57 above) 10H.

[100] Ibid.

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There is something in this part of the decision that simply does not follow. Firstly, it appears as if the court employs the historical context of the *Shifren* principle as a justification to hold that it cannot be overthrown *today*. The court states this explicitly where it holds that in its opinion the *Shifren* principle must be viewed in its historical and jurisprudential context. In addition, the court holds that '[d]ie *Shifren*-beginsel is 'trite' en die vraag ontstaan waarom dit, na bykans veertig jaar, omvergewerp moet word?'[101] It appears that one of the most persuasive factors in the court's decision is the consideration that the *Shifren* principle is trite and almost forty years old, and that it should for this reason alone not be tampered with. The court does not explain why, apart from the alleged certainty its application entails, *Shifren* is still justifiable in an open and democratic society based on freedom, equality and human dignity, considerations which I will return to in this context later.

It is almost as if the normative divide between the Constitution and the South African law before its enactment, is not viewed as an event of sufficient importance in the forty years of the *Shifren* lifetime to warrant an enquiry into or re-evaluation of its propriety in a new dispensation. All of this notwithstanding the fact that legal principles older and more 'trite' than *Shifren*, have been overthrown[102] or developed[103] without much ado, in the light of the new moral order and constitutional standards.

Concerning the analogy with the *Harris* decision the Court's analogy occurs with a sleight of hand that reminds of conjuring. Firstly, it should be clear that the *Harris* decision is just on the facts

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[101] Ibid 11F. (Author's translation from the original Afrikaans.)

[102] For extreme examples see *S v Makwanyane* 1995 (3) SA 391 (CC), where the death sentence was abolished; *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) where sodomy as a crime was abolished.

[103] *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C) in which Van Zyl J expanded the application of the aedillian actions also to goods bartered.

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distinguishable from both *Shifren* and *Brisley v Drotsky*. The fact of the matter is that in *Harris* the court had to deal with a parliamentary attempt to override the voting system by a simple majority vote where the Constitution was calling for a two-thirds majority to amend the voting system. It had absolutely nothing to do with reducing subsequent oral amendments to a written form in order for the oral agreement to be valid. To say that a requirement that Parliament had to pass a two third majority to amend the voting system is analogous to a party who has to reduce an oral agreement to writing for it to validly amend a contract, to my mind, simply does not follow.

The court continues in this curious manner and holds that the *Shifren* principle cannot yield to principles of reasonableness, fairness and good faith in contractual matters.[104] This decision is based on the view that the court in *Miller and Another NNO v Dannecker*[105] (on which the tenant relied) arrived at the (wrong) conclusion on the basis of 'the minority judgment that represents the views of a single judge'[106] that it could deviate from the decision in *Shifren* on the basis of considerations of good faith. The minority judgment to which the court refers is of course that of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.[107] The court in casu holds that the minority judgment of a single judge cannot override a judgment of the Supreme Court of Appeal and that Olivier JA's judgment in the above mentioned case is largely based on 'what we consider as doubtful grounds'.[108]

Concerning the argument that the judgment of Olivier, JA was underwritten by the Supreme Court of Appeal in a later decision,[109] the court holds that its dicta concerning Olivier, JA's

[104] Ibid 12G-19B. Also see Lubbe (note 21 above) 397.

[105] 2001 (1) SA 928 (C).

[106] *Brisley v Drotsky* (note 57 above) 13F

[107] See the discussion of this judgment in the previous section.

[108] Ibid 14A.

[109] *NBS Boland Bank v One Berg River Drive CC and Others*; *Deeb and Another v ABSA Bank Ltd*; *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA).

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judgment in the *Saayman* case, was rendered in passing, did not form part of the ratio decidendi in that case and that the views of Olivier, JA represents 'still only that of a single judge'.[110]

The court holds that the judgment of Olivier, JA cannot be taken to imply (as Davis, J indicated in *Mort NO v Henry Shields-Chiat*) that the enforcement of contractual terms should depend on community convictions because it would warrant a state of unacceptable chaos and uncertainty in our law of contract.[111] The court holds that good faith and freedom of contract are underlying values of the law of contract and that it is the task of the courts to weigh these underlying values against each other when they are at odds and to slowly and gradually make changes when they appear necessary.[112]

In this case such slow and gradual change was clearly not regarded as necessary, even though the underlying values of freedom of contract and good faith were in conflict. For the court it would entail performing a somersault or a cartwheel[113] to overthrow *Shifren* and it was clearly not inclined to such circus-like moves. What is troubling is that it is once again clear that the political decision in favour of liberal ideology was made before a practical reasoning with the evidence, the outcome and the constitutional propriety even crossed the court's mind. From the outset the majority rigorously defended *Shifren,* discredited Olivier, JA's good faith approach and emphasised the interests of certainty and the chaos which would ensue was *Shifren* to be overthrown. To further justify its political decision it claims that a court does not make somersaults and cartwheels but takes one step at a time; (but then fails to even take the one step).

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[110] *Brisley v Drotsky* (note 53 above) 13I.

[111] Ibid 15A-D.

[112] Ibid 15E–16A.

[113] Ibid 16A-B.

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These types of arguments and the contention that the enforceability of contractual clauses cannot depend on community convictions are clearly used as a shield to resist more difficult questions such as, were the enforceability of contracts to depend on community convictions, how is a court to determine those convictions in a heterogeneous society; who constitutes that community in a contractual context and how are these questions influenced by the constitutional rule of law? It is certainly easier to hold that the enforcement of contracts do not depend on community convictions than it is to attempt to provide answers to these pressing questions. The court even affirms its view that the judiciary should shy away from the Constitution (and the development of the common law in terms thereof) where it states: "n Hof kan nie skuiling soek in die skadu van die Grondwet om vandaar beginsels aan te val en omver te werp nie.'[114] (A court cannot hide in the penumbra of the Constitution to attack and overthrow principles from there).

In accordance with this approach the court holds that it would be contrary to the controlled developmental approach to:

> [E]ensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou. Die gevolg sal immers wees dat die beginsel van pacta servanda sunt grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou.[115]
>
> (Suddenly afford judges a discretion to ignore contractual principles when they regard those principles as unreasonable or unfair. The consequence would be that the principle of pacta servanda sunt would largely be ignored because the enforcement of a contractual provision would depend on what a specific judge regards as reasonable and fair in the circumstances.)

[114] Ibid 16D-E.

[115] Ibid 16B-C.

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The above dicta underwrites, by necessary implication, the perpetuation of the decade-long preference afforded to an individualistic rule-bound approach. The necessary question is how the court plans to make these controlled developmental changes[116] if it is primarily still concerned with protection of the pacta servanda sunt rule above considerations of good faith, equity and reasonableness in the contractual context and what would constitute allowable and necessary adaptations of the common law in the light of the Constitution?[117]

In respect of the submission on behalf of the tenant that the non-variation clause is so unfair that the court should in the public interest refuse to enforce it, the court distinguishes the decision in *Magna Alloys*[118] from the case before it by asserting that the consideration that everyone should be allowed as far as possible to freely participate in commercial activity, does not fall to be considered in the circumstances.[119]

The *Sasfin* decision is trumped in a similar manner where the court finds firstly that because the non-variation clause as such is not invalid, the *Sasfin* principle finds no direct application.[120] This conclusion is simply wrong. It will be remembered that the certificate clause in *Sasfin* was also not *as such* invalid (that is why the court upheld a similarly worded clause in *Donely*[121]) and that the court held specifically that it was because the clause had the effect of enslaving the doctor to the

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[116] Ibid 10H.

[117] Also see *De Beer v Keyser* (note 79 above) where the court elected not to have public policy considerations trump the sanctity of contract, quite aware of the harsh reality of the way in which micro-lending businesses conduct their operations.

[118] See the discussion of this case in Chapter 3.

[119] *Brisley v Drotsky* (note 57 above) 17F.

[120] Ibid 18C.

[121] See the discussion of this aspect in Chapter 3.

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bank, that it was unfair and unenforceable.[122] A clause does not have to be as such invalid in order to invoke the *Sasfin* principle.

In addition, the court holds that even if the *Sasfin* principle (namely that contract terms which are unfair to such an extent that they are invalid) found direct application, the tenant's case in the judgment of the court falls far short from the rigid test of extreme inequity required to invoke the *Sasfin* principle.[123] Again one is tempted to ask: Where is the line between extreme inequity and 'normal' inequity? How is a court to determine this? And again the court's moral choice not to invoke the Constitution indirectly, precisely to determine this, shows up in the statements that the tenant's situation is far too equitable to invoke *Sasfin*, but without telling us why it is too equitable.

The direct constitutional argument in this case was based on the contention of the tenant that even if the lease was validly cancelled, the court a quo should not have granted an eviction order because of the provisions of section 26(3) of the Constitution.[124] The section provides as follows:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The tenant alleged that the circumstances under which the contract was cancelled, as well as her and her mother and child's personal socio-economic circumstances, all constituted relevant circumstances which the court a quo should have taken into account.[125] The court does not agree

[122] *Sasfin v Beukes* 1989 (1) SA 1 (A) 13H.

[123] *Brisley v Drotsky* (note 57 above) 18B-G.

[124] Ibid 19C.

[125] Ibid 19E.

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with these contentions and hold that, although section 26(3) has horizontal application, circumstances can only be relevant where they are *legally* relevant (regtens relevant), because section 26(3) does not afford a discretion to the court to refuse to make an eviction order under certain circumstances to an owner which would otherwise have been entitled to such an order.[126] According to the court the landlord as owner is entitled to an eviction order and the circumstances which the tenant alleges are not legally relevant circumstances which would provide a basis for the court to refuse to grant the eviction order.[127]

Formalistically and clinically, the court refuses to take the tenant's personal circumstances into account in order to determine whether the eviction order violated her constitutional rights in terms of section 26(3), because it had no discretion to refuse to grant the order and because the alleged circumstances were not legally relevant circumstances. According to the court the only legally relevant circumstances are the facts that the landlord is owner and the tenant is in unlawful occupation (possession).[128]

In this context, the following question begs an answer: what is the point of the inclusion of section 26(3) in the Constitution if it provides for nothing more than a codification of what is already trite under the common law? In the light of the later decision in the *Ndlovu*-case,[129] the approach to section 26(3) as followed by the court in the present case is currently still wrong. In *Ndlovu* the SCA held that tenants holding over (like Ms Brisley) qualified as 'unlawful occupiers' in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[130] (PIE). This indeed means (contra *Brisley v Drotsky*) that the court does have a discretion to order

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[126] Ibid 21A-B.

[127] Ibid 21C.

[128] Ibid 21D.

[129] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

[130] Act 19 of 1998.

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the eviction on the basis of whether it is just and equitable to do so taking into regard factors similar to those alleged by Ms Brisley and further, that tenants' personal socio-economic circumstances are relevant circumstances *and* that they do fall to be protected by the procedures stated in section 4 of PIE.[131]

A few months before, Davis, J held in the Cape High Court that 'the task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.'[132] For all of the above reasons I cannot but conclude that the task in this dispute was precisely to disguise equity and not to develop contractual principles in the image of the Constitution. It appears as if the Constitution is itself employed to whitewash the extreme view of sanctity of contract and the public interest in such an extreme view. Although I have no doubt that freedom of contract is an important constitutional value it is not the only, sudden-death constitutional value to exclusion of all others, which in the light of this decision, seems to be the view of the Supreme Court of Appeal.

(ii) Olivier, JA in the minority (again)

In contrast with the majority, Olivier, JA in a separate concurring judgment again pleads convincingly that the bona fides, infused by the Constitution, deserves greater recognition in our law of contract. At the same time, the learned judge does not deny the problematic nature of such a recognition,[133] but emphasises the importance of the courts in solving this problematic issue:

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[131] It should be noted that the parliamentary Housing Portfolio Committee will propose to Parliament that PIE be amended to exclude bona fide landlords from the provisions of PIE. See in this regard http://www.fin24.co.za/articles/business/display_article.asp?Nav=ns&lvl2=buss&ArticleID=1518-1786_1814842 (11 October 2005).

[132] *Mort NO v Henry Shields-Chiat* (note 76 above) 475C-D.

[133] *Brisley v Drotsky* (note 57 above) 29B.

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'Die werking van die bona fides in ons kontraktereg is nog lank nie volledig verken en inhoud gegee nie. Dit sal oor jare en aan die hand van baie uitsprake moet geskied. Uiteindelik sal, hopelik, 'n nuwe raamwerk en denkpatroon in ons kontraktereg ontstaan.'[134] (The operation of the bona fides in our law of contract has long not yet been fully explored or given content. This will have to happen over years and through many judgments. Eventually, a new framework and mindset will hopefully evolve in our law of contract).

Olivier, JA points out that our law finds itself in a developmental phase where contractual justice is emerging more than ever before as a moral and juristic norm of superlative importance and that this tendency will be strengthened by constitutional values.[135] The constitutional values are enunciated as the core values of freedom, equality and human dignity and the application thereof in the law of contract by virtue of section 39(2) and section 173.[136]

Olivier regards the *Magna Alloys* decision, in conflict with the majority, as precisely the analogous approach in the determination of the question whether the *Shifren* principle is socio-ethically so unacceptable, that it should not, or not entirely, be enforced. Olivier, JA holds specifically that the test for enforceability of such a clause was stated in *Magna Alloys* as being the public interest and that the public interest is determined, inter alia, by reference to the question of reasonableness.[137] With regard to the majority's view in respect of legal uncertainty Olivier, JA mentions that: '...dit is die prys wat 'n viriele regstelsel, wat billikheid net so belangrik as regsekerheid ag, moet betaal: 'n balans moet gevind word tussen kontinuïteit van die regsisteem en die aktualiteit van die sosiale werklikheid.'[138] (it is the price which a virile legal system, which values fairness just as highly as

[134] Ibid.

[135] Ibid 29E-F.

[136] Ibid 29G.

[137] Ibid 30F.

[138] Ibid 31C.

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certainty, has to pay: a balance has to be struck between continuity of the legal system and the actuality of social reality.)

Olivier, JA continues to point out the unreasonable appearance of Ms Drotsky's sudden reliance on the written contract in circumstances where the oral agreement has to be accepted as having been proved.[139] No notice was given to Brisley of the sudden reliance on the written agreement and she also was not given a reasonable opportunity to comply with the written agreement in the future. Olivier, JA points out that there was no reason to adopt a ruthless approach towards Ms Brisley.[140]

In respect of the majority's decision that the circumstances of the tenant were not legally relevant circumstances and could thus not be pleaded to successfully invoke section 26(3) of the Constitution, Olivier, JA holds in accordance with the new approach that:

> Die waardes van die goeie trou, redelikheid en billikheid en kontraktuele geregtigheid sal verloën word, as dit neergelê word dat summiere uitsettingsbevele sonder enige uitsondering en sonder oorweging van die *menslikheid* daarvan na regmatige kansellasie of afloop van 'n huuroorkontrak moet en sal volg.[141]
> (The values of good faith, reasonableness, fairness and contractual justice will be denied, should it be established that summary eviction orders must follow after lawful cancellation without exception and without consideration of the humanity thereof.)

This formulation should, in my view, be welcomed as a more acceptable post-constitutional approach in these matters, rather than the majority's clear liberal approach in protection of pacta

[139] Ibid 31E.

[140] Ibid 31E-G.

[141] Ibid 33C.

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servanda sunt.[142] In the light of *Ndlovu* it also appears that this formulation is to be preferred as in line with constitutional requirements in the contractual sphere. Generally, Olivier's approach seems to me to be far more conscious of constitutionally relevant considerations, nuanced and indicative of an engagement with the law and its application in the circumstances, than the approach of the majority. Also, Olivier's approach is openly political and does not hide behind claims of certainty or sanctity of contract.

Notwithstanding this, Olivier, JA does conclude that the appeal should be denied.[143] But he does offer non-doctrinal reasons why: because there is evidence of readily available alternative housing and removal companies to facilitate Brisley's move.[144] At the same time he does make it clear that this is a boarderline case – not denying the legitimacy of Ms Brisley's claim, which is something that the majority doubts right from the outset.[145]

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[142] For a similar approach see *Janse van Rensburg v Grieve Trust CC* (note 103 above) where Van Zyl, J held that the application of the aedillian actions should be expanded to transactions of barter, because it is 'consonant with the spirit and values contained in the Bill of Rights'.

[143] *Brisley v Drotsky* (note 57 above) 33D.

[144] Ibid 33E.

[145] Ibid 31G.

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(iii) Cameron, JA's 'constitutional' reading of freedom of contract

Cameron, JA's view of the matter is also commendable: '[t]he Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity'[146] and '[p]ublic policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines.'[147]

However, Cameron, JA, further argues that the Constitutional values in fact requires the controlled developmental approach to contract law reform[148] and that it is 'evident' that 'neither the Constitution nor the value system it embodies gives a court the discretion to strike down a contract on the basis of judicially perceived notions of unjustness or… imprecise notions of good faith'.[149]

I again feel compelled to take issue with these statements: Firstly, if Cameron, JA is going to state that it is 'evident' that neither the Constitution nor its value system allows for a good faith jurisdiction in contract, why not tell us from which provisions in the Constitution this 'evidence' flows? Why it is that the Constitution does not allow for this. Why can the convictions of the community determine whether a delict has taken place, but the convictions of the community cannot determine whether a breach of contract (including a breach of the duty to contract in good faith) has taken place? The majority held that this is the case because parties freely will their

[146] Ibid 36A.

[147] Ibid 34G.

[148] Ibid 35E.

[149] Ibid.

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contractual obligations and not their delictual ones, which is obvious, but why then have a public policy enquiry in contract at all?

Furthermore, Cameron, JA seems to miss the point that it is precisely the constitutional enquiry which is supposed to ensure that the good faith jurisdiction does not become a capricious, arbitrary and discretionary exercise. The court / judge will in each case have to justify its interpretation of good faith in a specific case with reference to the constitutional value system and a specific interpretation of *its* values. If public policy in its modern guise is rooted in the Constitution as Cameron, JA claims, then why can the enquiry not simply be the undisputed common law lawfulness requirement ie whether the contract is unlawful and unenforceable because in the light of the constitutional convictions of the community it is inequitable?

Cameron, JA's view that 'contractual autonomy is part of freedom'[150] and 'shorn of its obscene excesses'[151] it 'informs also the constitutional value of dignity'[152] is subject to the same criticism. Apart from the fact that this reading of freedom and dignity is based on a specific (liberal) reading of the Constitution, I for one simply fail to grasp how human self-respect and dignity is enhanced by allowing a person to conclude a written agreement, allowing her further to orally amend that agreement and accept performance in terms of that agreement, and finally to allow her to fall back, on the written agreement in breach of the later oral agreement – all in the name of freedom.

The actuality of social reality is that the South African law of contract (as a result of enactment of the Constitution) finds herself currently in a dispensation which is politically opposed to and in stark contrast with the dispensation that makes up most of the law's history. This is a

[150] Ibid 35E.

[151] Ibid 35F. (I am also interested in understanding in which circumstances the court will regard freedom of contract as sufficiently 'shorn of its obscene excesses'.)

[152] Ibid.

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dispensation enjoining each and every person to exercise a moral decision in all matters of law he or she may be confronted with. It can no longer be denied that the Constitution has a profound impact on the continuity of certain of the aspects of the legal system which have been (and still are) believed to be untouchable and in fact indispensable. Our past has shown how many things regarded as untouchable and indispensable were in fact invented to keep 'the enemy at the gates'. The interpretation of constitutional values can no longer be marginalised or circumvented in the law of contract by continued application of the strict law masked as constitutionally acceptable. The Constitution requires from each of us a commitment to its values also in contractual dealings. In the light of this it is no longer acceptable or legitimate to mask forms of contractual *dissensus* (which do not fall into one of the crystallised categories nullifying consensus) behind the strict 'underlying' principle of pacta servanda sunt.

(d) Afrox Healthcare Beperk v Strydom[153]

The South African positive law's persistant clinging to traditional values of contract is just further perpetuated in the above mentioned decision, rendered only a few months after *Brisley v Drotsky*. I include it so as to support my claim that there is a sustained political commitment to steer clear of the Constitution and its value system in the South African law of contract.

(i) The facts

The core issue in this matter was whether a contractual provision which exempts a hospital from liability for the negligence of its nursing staff, is valid and enforceable.[154] The appellant owns the Eugene Marais Private Hospital in Pretoria to which the respondent was admitted for an

[153] *Afrox Healthcare Bpk v Strydom* (note 58 above).

[154] Ibid 32C.

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operation and post-operative care. After the operation complications set in after it was discovered that a nurse had dressed a bandage too tightly which resulted in the cut-off of blood supply to a sensitive post-operative area.[155] According to the respondent the complications caused damages of over R2 million to him. The respondent averred that an agreement between him and Afrox Healthcare came into existence at his admission and that it was a tacit term of that agreement that the appellant's nursing staff would treat him in a professional way, exercising a reasonable amount of care.[156] The respondent further contended that the negligence of the particular nurse constituted a breach of contract on the side of the appellant.[157]

The respondent consequently claimed the damages from the appellant in the Transvaal Provincial Division, based on the breach of the alleged agreement. The appellant relied, amongst other defences, on clause 2.2 of the agreement, which indemnified it against claims for damages caused to a patient, with the only exception of damages resulting from the 'wilful default' [158] of the appellant. This is a standard disclaimer in hospital admission contracts and according to the appellant, it blocked the claim, as the claim was based on negligence.[159]

(ii) The respondent's case

The respondent averred that the indemnity clause was not enforceable for the following reasons:

- the clause was contrary to the public interest;
- the clause was contrary to the contractual bona fides; and

[155] Ibid 32D-E.

[156] Ibid 32C-E.

[157] Ibid 32E.

[158] Ibid 32E-F.

[159] Ibid 32F-G.

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- the admissions clerk at the hospital was legally obliged to alert him to the disclaimer when the contract was concluded, which he did not do.[160]

Again we see that the conflict exists between freedom of contract and the concern for contractual justice. The court a quo held in favour of the respondent.[161] It found that the clause was contra bonos mores because, inter alia, it enfringed upon the respondent's (plaintiff in the court a quo) right to access to proper health care in terms of section 27 of the Constitution. The court a quo employed its duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights to found its decision. It appears therefore that the court held that it can employ the constitutional values and provisions to develop the boni mores criterion to escape in this way the hegemony of freedom of contract – a victory for equitable considerations over freedom of contract.[162]

But Tladi appears to be more sceptical of the court a quo*'s* decision and is of the opinion that, if one looks beyond the nuances, it is still freedom of contract which comes out as the winner.[163] Tladi claims that the court only makes it clear that the *bona fide* principle requires the defendant to draw the plaintiff's attention to the clause and to explain to him the nature and scope of its application.[164] So, had the plaintiff done this, the clause would have still been substantively enforceable, without any question to the fairness of inclusion thereof in a contract the nature of

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[160] Ibid 33G.

[161] For a discussion of the High Court judgment see Brand (2002) "Disclaimers in hospital admission contracts and constitutional health rights: *Afrox Healthcare v Strydom*" located at http://communitylawcentre.org.za/ser/esr2002/2002sept_afrox.php (accessed 14 September 2004).

[162] Tladi (note 5 above) 315.

[163] Ibid 315.

[164] Ibid.

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the one under discussion, which appears to be a clear policy choice in favour of freedom of contract.[165]

Against this decision the appellant hereafter approached the Supreme Court of Appeal in which the policy choice was exercised in far clearer terms in favour of freedom of contract and the appeal in accordance herewith, upheld.[166]

(iii) The respondent's public interest argument and the Court's decision

In the Supreme Court of Appeal the respondent relied on three grounds concerning its argument that the exemption clause was contrary to public policy:

- there existed an unequal bargaining position between the parties at conclusion of the agreement;
- the nature and scope of the acts of hospital staff that were indemnified against were too wide; and
- the appellant was a provider of professional health care services and had prevented the respondent from enforcing the constitutional right of access to professional health care and in doing so also promoted negligent conduct of its staff.[167]

As a point of departure the court applies the dictum in *Sasfin v Beukes*,[168] where it is warned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. In addition, the court held that disclaimers or indemnity clauses are in principle enforced in our law, but that the court has the power to limit the interpretation thereof

[165] Ibid.

[166] *Afrox Healthcare Bpk v Strydom* (note 58 above) 33C.

[167] Ibid 35A.

[168] *Sasfin v Beukes* (note 122 above) 9B-F.

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and occasionally acts in terms of this power. This, according to the court, does not mean that a specific indemnity clause may be declared to be contrary to public policy and therefore unenforceable.

The court found that the standard applied to determine the unenforceability of disclaimers, when it is contended that the clause is contrary to public policy, does not differ from the standard that applies generally in respect of other contractual provisions:

> The question in each case is whether the enforcement of the relevant indemnity or other contractual clause will be detrimental to the interests of the community, either because of exceptional unfairness or because of policy considerations.[169]

Concerning the argument in respect of the unequal bargaining position of the parties, the court proceeds to hold that a contractual provision which is to the benefit of the stronger party, is not necessarily contrary to the public interest.[170] Although unequal bargaining power was recognised by the court to be a considering factor, along with other factors, that play a role in the determination of the enforceability of the agreement on the ground of public policy, it nevertheless concludes that there was no evidence of an unequal bargaining position in the present case.[171]

The implication of the respondent's second ground of appeal was that it is contrary to public policy for a provider of professional health care services to indemnify itself against the gross negligence of its nursing staff. Conceding that an indemnity clause excluding liability for gross negligence could be contrary to public policy, the court finds on a technicality that the

[169] *Afrox Healthcare Bpk v Strydom* (note 58 above) 34F. (Author's translation from the original Afrikaans).

[170] Ibid 35B-C.

[171] Ibid 35C.

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respondent did not rely in the pleadings on the gross negligence of the nursing staff and that the question whether the exclusion of liability of a hospital for the gross negligent conduct of its nursing staff is contrary to public policy, cannot be judged in the present case.[172] The court finds, in addition, that the clause would not, without more, be invalid even if it was found that such an indemnity was contrary to public policy, for the court would then use its power to restrict the application of the provision in order to exclude the gross negligence.[173]

Concerning the limited interpretation of exemption clauses and the artificial results of this practice, courts in England have been following a hostile approach for quite some time. This approach has been followed in South Africa and is best expressed by Lord Denning in a passage from *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*:[174]

> None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or time-tables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press… It was a bleak winter for our law of contract… Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the Judges did what they could to put a curb on it. They still had before them the idol, 'freedom of

[172] Ibid 35F: 'Hy [die respondent] steun op nalatigheid sonder meer.' (He [the respondent] relies on negligence per se).

[173] Ibid 35G.

[174] [1983] QB 284 296-7 ([1983] 1 All ER 108 (CA).

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> contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract." They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause… But when the clause was itself reasonable and gave rise to a reasonable result, the Judges upheld, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount.
>
> In 1969 there was a change of climate. Out of winter into spring. It came with the first report of the Law Commission on Exemption Clauses in Contracts, which was implemented in the Supply of Goods (Implied Terms) Act 1973. In 1975 there was a further change. Out of spring into summer. It came with their second report on Exemption Clauses which was implemented by the Unfair Contract Terms Act 1977.[175]

Hoffmann remarks that these legislative interventions had introduced the fairness concept to the English law of contract and courts were given the power to decide the reasonability (or not) of an

[175] Ibid 113.

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exemption clause and it was no longer necessary to follow artificial interpretations to escape the hegemony of a specific exemption clause.[176]

Hoffmann also points out that he is not convinced that our courts' approach to exemption clauses is based on a search for the true meaning of these clauses:

> I think we must accept that we are dealing with what I would call "policy-based interpretation." The cases in England and South Africa and Zimbabwe show, to my mind quite clearly, that the Courts interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the Court claiming that they do not make law but only interpret it.[177]

This point of view is confirmed by the Supreme Court of Appeal's positivistic approach to the exemption clause in the present case.

The third ground of the respondent's appeal on which it was relying for the argument that the disclaimer was contrary to public policy, also constituted the ground on which the court a quo's decision in the respondent's favour was primarily founded; namely that the appellant was the provider of professional health care services and that it was contrary to the provisions of section 27(1)(a) of the Constitution to include a provision such as the one in question into its standard contracts. The respondent argued that everyone in terms of this section has the right to

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[176] J Hoffmann from the firm Dyason in his reaction to the SALC proposed Bill on the Control of Unfair Contract Terms SA Law Commission Report Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998) 22.

[177] Ibid.

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access to health care and that the right of access to health care was unduly restricted by the inclusion of such a clause in a hospital's standard contract.[178]

The court however holds that even if it is accepted (in favour of the respondent), that section 27(1)(a) has horizontal application in terms of section 8(2) and accordingly applies to private hospitals, the disclaimer did not deprive the respondent of his right to access to health care. According to the court, section 27(1)(a) does not prevent the hospital from setting legally enforceable conditions for the provision of professional health care services. The issue remains still whether the disclaimer in the present case constituted such a legally enforceable condition.[179]

The respondent contended that when considering whether a particular agreement is contrary to public policy, due regard should be afforded to the fundamental rights enshrined in the Constitution, in correspondence with the provisions of section 39(2) which stipulates that every court must take into account when developing the common law, the spirit, purport and objects of the Bill of Rights.[180] Along these lines it was contended that the disclaimer is contrary to the spirit, purport and objects of the Bill of Rights and accordingly contrary to public policy.[181]

The court again in principle, accepts that the provisions of section 27(1)(a) should be taken into account, although they did not yet apply when the instant agreement was concluded on the 15th of August 1995, (in other words before enactment of the final Constitution) and there had not been a corresponding provision in the Interim Constitution.[182] The court also accepts (seemingly for the benefit of the respondent) that in applying section 39(2), the determination of what the

[178] *Afrox Healthcare Bpk v Strydom* (note 58 above) 36A-B.

[179] Ibid 36D.

[180] Ibid 36E.

[181] Ibid 36F-G.

[182] Ibid 37B.

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legal convictions of the community encompass, cannot take place without due consideration for the value system enshrined in the Constitution. The *dictum* of Cameron, JA in *Brisley v Drotsky* is quoted with approval in this regard:[183] 'Public policy…nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise 'public policy' is now rooted in our Constitution and the fundamental values it enshrines.'[184]

However, not surprisingly, the court holds that the substructure of the argument that the disclaimer will promote negligent and unprofessional conduct rests upon a '*non sequitur*'. According to the court it does not follow that the inclusion of such type of disclaimers will result in an increase in negligent conduct of hospital staff. In the opinion of the court, the appellant's staff would under such circumstances still be bound to their professional code of conduct and subject to disciplinary action. Furthermore, negligent conduct of the appellant's staff would not be conducive to its reputation and competitiveness as a private hospital.[185]

For all of the above reasons, the court holds that the respondent's argument that the disclaimer is contrary to public policy, cannot be upheld.

(iv) Critique

As Brand has put it: 'the judgment of the court puzzles'.[186] The part of the decision that contains, in my opinion, detrimental implications for post-constitutional adjudication of contractual disputes, is formulated by the court as follows: '[t]he constitutional value of freedom of contract

[183] *Brisley v Drotsky* (note 57 above) 37D-E.

[184] Ibid 35E.

[185] *Afrox Healthcare Bpk v Strydom* (note 58 above) 37H-J.

[186] Brand (note 161 above).

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encompasses, on its part, the principle that is explained by and contained in the maxim pacta servanda sunt.'[187]

The court continues to refer to the principle as stated by Steyn, CJ in *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere*: 'the elementary and fundamental principle that contracts freely and seriously entered into by parties of sound capacity should, in the interest of the public, be enforced.' [188] The court relies heavily on these considerations in arriving at its decision that the respondent's view that the disclaimer is contrary to public policy, cannot be upheld.[189]

As an alternative basis for his case the respondent contended that even if the disclaimer is held not to be contrary to public policy, it is still unenforceable because it is unconscionable, unfair and contrary to the principles related to the contractual bona fides.[190] The court holds however that this good faith approach was put in perspective in the decision of *Brisley v Drotsky* and holds as follows:

> Concerning the place and role of abstract ideas such as good faith, reasonableness, fairness and justice, the majority in the *Brisley* case held that, although these considerations are subjacent to our law of contract, they do not constitute an independant or 'free-floating' basis for the setting aside or the non-enforcement of contractual provisions; put differently, although these abstract considerations represent the foundation and very right of existence of rules of law and can also lead

[187] *Afrox Healthcare Bpk v Strydom* (note 58 above) 38C (Author's translation from the original Afrikaans).

[188] *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* (note 96 above) 767A.

[189] *Afrox Healthcare Bpk v Strydom* (note 58 above) 38E.

[190] This basis finds its origin in the minority judgment of Olivier, JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* (note 60 above) 318.

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> to the shaping and transformation of these rules, they are not self-contained rules of law. When it comes to the enforcement of a contractual provision, the Court has no discretion and does not act on the basis of abstract ideas, but precisely on the basis of crystallised and established rules of law.[191]

This formalistic approach of the post-constitutional Supreme Court of Appeal baffles. Or does it really, in light of other key contract decisions of this court?[192] What is more perplexing is the fact that the court concedes that the values of reasonableness, fairness and justice may shape and transform rules of law, but holds at the same time that it has no discretion to act on the basis of these values and therefore must act on the basis of the established rules. The approach is clearly contrary to the constitutional duty of the courts to precisely act on the basis of abstract values when developing the common law. Who then, if not the courts, must shape and transform the established rules in consideration of abstract values?

Notwithstanding the approving manner in which the seemingly value-sensitive *dicta* of Cameron, JA in the *Brisley*-case is quoted, the court appears to experience no problem in justifying an approach that reveals a clear preference for that which is known – the black lettered, value neutral, individualistic rules of the law of contract. The rules that have been around for centuries and that are justified an existence in a legal system where the Constitution (as the supreme law of the country) is satured with values, just because that's the way things are; because the rules after all, are the rules.

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[191] *Afrox Healthcare Bpk v Strydom* (note 53 above) 40H-41A (Author's translation from the original Afrikaans). This approach appears to ignore (or merely pays lipservice to) the presumption that all common law contracts are deemed to be entered into bona fide. See *Meskin NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) 802A and *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651B-652G.

[192] See Chapter 3.

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In contrast with its following of the *dictum* in *Shifren* which is in accordance with the precedent system, the court holds that if a High Court, with regard to the constitutional dispensation, is of the opinion that an earlier decision no longer reflects the boni mores or public interest accurately, it is compelled to deviate from that decision, because 'considerations of what is in the public interest do not remain static.'[193] But it is nevertheless held that a principle formulated 38 years ago remains in the best interests of the public. According to the court, the position as set out in *Shifren* survived not only 38 years of dynamics in the concept that is the public interest, but also a complete constitutional transformation. Although we may have all thrown out the bellbottoms and the polka dot skirts, the state of the public interest in contractual matters remains, (if one is to believe the Supreme Court of Appeal), the same in 2002 as it was in 1964 and furthermore, the values underlying the decision in *Shifren*, is in accordance with the value system contained in the Constitution.

The provisions of section 39(2) are marshalled to support the decision in favour of freedom of contract above all other. The basic values of freedom, equality and human dignity are clearly interpreted to protect the idol that is freedom of contract. This is illustrated where the court concurs with Cameron, JA's other famous remark in *Brisley v Drotsky* namely that 'contractual autonomy is part of freedom' and 'contractual autonomy informs also the constitutional value of dignity'.[194] In this respect Hopkins asks: 'And what about equality? … If one is going to contend that the Bill of Rights (as a whole) informs the public policy doctrine, then one cannot afford to be selective – all the values must be considered, including human dignity and equality.'[195]

[193] *Afrox Healthcare Bpk v Strydom* (note 58 above) 39D.

[194] *Brisley v Drotsky* (note 57 above) 35E-F.

[195] K Hopkins 'The influence of the Bill of Rights on the enforcement of contract' (2003) 425 *De Rebus* 25.

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It is clear that Cameron JA, allows for a broad interpretation of the constitutional value of freedom to include freedom of contract. By the same token, the constitutional value of equality will presumably also then be broad enough to include equality in bargaining power[196] - but the court elected not to embark upon that treacherous route. As Lubbe remarks: 'When used in such an un-nuanced manner, equality, freedom and dignity work in only one direction, serving to dissipate pressure on traditional doctrines and to stultify a creative tension that might result in the wholesome development of the common law'.[197]

The questions as to exactly how freedom of contract serves the other two constitutional values of dignity and equality are conveniently left open. So too the questions as to how public policy favours freedom of contract where the parties are clearly and contrary to the constitutional value of equality, in an unequal bargaining position. I for one could not see how the court found that no evidence was present that indicated an unequal bargaining position in the instant case. To my mind it should be clear, merely from a superficial reading of the facts, that an ill patient in need of professional health care (access to which happening to be a constitutional right), finds himself in an unequal bargaining position when he is forced to contract with a competitive private hospital who, as a standard clause, contain an indemnity in their contracts with patients. So does all other private and public hospitals.

Nobody seems to have reminded the court that this was not a case of Mr Strydom being able to go just around the next block or across the street to a hospital that does not contain an indemnity in their standard form contracts for all hospitals do. In addition, nobody, and certainly not the court itself, was reminded that Mr Strydom entrusted the hospital with his physical integrity (to which he also has a right in terms of the Constitution[198]) and that an exemption

[196] Ibid.

[197] Lubbe (note 21 above) 420.

[198] See section 12(2) of the Constitution.

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clause of this nature is simply contrary to the relationship that arises when physical integrity is so entrusted.[199]

Rather than to follow an approach that allows for a satisfying interpretation of the influence of constitutional values on contractual morality, the court steers clear from such an interpretation by employing technicalities, for example the decision that there was no evidence of an unequal bargaining position and that the respondent did not in his pleadings rely on gross negligence, but on negligence as such and accordingly could not submit that the hospital was not allowed to indemnify itself against its own gross negligence. To solve its problem the court could merely have interpreted the reference to negligence in the pleadings, as a reference to the broad concept of negligence which includes the specific form of gross negligence. But that was not done.

What makes decisions like this even more anachronistic and the shying away from equality even more reprehensible is the fact that the findings are delivered in a judicial environment where a report and draft Bill on unreasonable, unconscionable and oppressive terms in contracts have been submitted by the Law Commission to the legislature,[200] amongst other reasons, because the report found how far South Africa is behind in the pursuit of contractual justice in relation to other comparative legal systems with less sophisticated constitutions than that of South Africa. These legal systems have had legislation dealing with contractual justice for decades and did not turn into the much-feared litigation paradises as a result.[201]

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[199] I acknowledge and thank Prof LM Du Plessis for this helpful insight.

[200] SA Law Commission Report Project 47: *Unreasonable Stipulations in Contracts and the Rectification of Contracts*. See further Chapter 5.

[201] The South African Law Commission's research team found that courts in Germany, England, the United States of America, Sweden, Israel, the Netherlands and Denmark have the power to declare unfair contractual provisions unenforceable.

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Is it not one of the goals of the constitutional democracy to elevate the values of freedom, equality and human dignity to the status of core determinants of the public interest? Should the question when deciding the enforceability of a contract not be whether its enforcement will serve and further the values of freedom, equality and human dignity, rather than being set on panel beating these values (or at least some of them and ignore the harder ones) until they adhere to a specific understanding of freedom of contract?

Apparently not – and the SCA is not backing down. Having held in May 2004 that '[s]ince the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines'[202] and that 'an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values'[203] the SCA, as recently as September 2004, confirmed the position in *Brisley* and *Afrox* in its decision in *South African Forestry Co Ltd v York Timbers Ltd.*[204] Here it was held that:

> although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly….After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.[205]

[202] *Price Waterhouse Coopers Inc And Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) 73E-H.

[203] Ibid.

[204] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

[205] Ibid 338J-339B. It should however be said that the SCA in this case did employ good faith in a very narrow and restricted manner to hold that had there been any ambiguity (and only when there had been ambiguity) in

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This assertion misses the point that these values cannot be cast into traditional constructs and rules to provide clear answers in any given case. It is the constitutional duty of the courts to determine whether the rules of contract serve the constitutional values adequately in the particular circumstances and, if not, to hold that it does not. Fairness and justice may lie in the eye of the beholder, but that beholder is in South Africa, the Constitution and not the rules of contract law as such.

## IV CONCLUSION

More than ten years past, in the South African law of contract very little has changed. Like Adams and Brownsword remark: 'the world may change, but the traditional rules [of contract] like "Ol' Man River", 'jus' keep rollin along.'"[206] Freedom of contract remains the incontestable idol of the law of contract and the supreme values of the country, namely freedom, equality and human dignity become the pliable servants of the court, with which the false claim is maintained that constitutional legitimacy is actually being achieved in the law of contract.

Van der Vyfer's suggestion in 1994 that the boni mores concept in contractual matters will probably be transformed in light of what would be reasonable and justifiable in an open and democratic society based on equality and freedom,[207] is not realised. Exactly the opposite proves to have come true: the values of equality and freedom are afforded a 'common law' meaning in light of how they are interpreted to adhere to an outdated version of the contractual boni mores. The lip service to the Constitution is perpetuated, the reification continued – or is it just an overly sceptical and cynical perception of reality that leads one to come to this conclusion?

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relation to the parties rights and obligations, the principles of good faith, reasonableness and fairness would decide the matter (341D).

[206] JN Adams and R Brownsword 'The ideologies of contract' (1987) 7 *Legal Studies* 205.

[207] JD Van der Vyfer 'The Private Sphere in Constitutional Litigation' (1994) 57 *THRHR* 378.

In this reality (which may of course be another's illusion) it is with reluctance that one accepts the truth and there is no other choice but to agree with Van der Walt's 2000 contention that:

> …it has to be concluded that our courts will probably never reach the point where they apply relevant values directly to contractual provisions. Insofar as the courts are left to themselves and the precedent system to distinguish between provisions that will be enforced or not, and between provisions that are void or valid, they will not get to it. In the mean time the courts will probably continue to apply the underlying value of good faith indirectly, behind the mask of all kinds of legal constructs, remedies and discretions. The latter method should not, from the point of view of judicial action, be regarded with disparagement. But unless expeditious progress is made in respect of the direct approach, an acceptable equilibrium of rights and duties (that which is to be regarded as just and equitable) will not be achieved by the courts.[208]

It may very well be that our judiciary is still too caught-up in the entanglements of its history to facilitate a proper constitutional infusion of the common law. In my view it finds itself in a position very similar to that of Plato's prisoners in the cave:

> The immediate problem of Plato's prisoners in the cave, it will be recalled, was understanding what was going on in the cave (for they could see only the shadows on the wall). … the situation of those who try to operate consistently within the constraints imposed by the traditional exposition of contract (sometimes referred to as the 'black-letter' approach), is somewhat akin to that of Plato's prisoners. They

[208] CFC Van der Walt 'Beheer oor onbillike kontraksbedinge – *quo vadis* vanaf 15 Mei 1999?' (2000) 1 *JSAL* 33 41.

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may perceive shadows, but they are unable to interpret them from the confines of their position.[209]

It is doubtful that the common law principles such as the boni mores, the public interest and the bona fides will, absent of legislative intervention, be developed by the courts to properly recognise the values enshrined in the Constitution and the values associated with the societal notion of *ubuntu*. These decisions of the Supreme Court of Appeal are already forming a line of precedent indicating the contrary.[210]

Currently, the common law door which provides for a transformative reading of traditional values by way strictly of an indirect horizontal application of the Constitution, is contained in the contractual validity requirement of lawfulness (with reference to the boni mores and public policy) as well as the good faith criterion. It is here where the boni mores as part of the public interest requirement and good faith must operate as the tools of the constitutional infusion of contract. But it is equally doubtful whether our courts will in the future refrain from its individualistic interpretation of these requirements, according to which contractual freedom is and remains the core determinant of the public interest and all contracts are simply deemed to be entered into in good faith.

Although it is trite that these concepts should be informed by the values of the Constitution and that the values of freedom, equality and human dignity are the new 'boni mores of our

[209] Adams and Brownsword (note 206 above) 205.

[210] Also see the decision in *Juglal NO and Another v Shoprite Checkeers (Pty) Lts t/a OK Franchise Division* 2004(5) SA 248 (SCA) 258A-C where the court again declined to re-examine the common law in light of constitutional considerations and held that 'the common law does not limit the right of access to the courts. Nor does it fall short of the spirit, purport or objects of the Constitution'.

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constitutional community',[211] the development has, more than ten years later, still not been set in motion. It is true that: '[t]he transition from the apartheid society of pre-1994 to a new society founded on the values and principles of the Constitution is an ongoing process that is yet to be completed.'[212] In the meantime, the 'have-nots' assemble outside courtrooms, crying: 'How long *do* we have to wait? Who do we have to wait for? How will it happen? When will it happen?' At some or the other point someone will have to answer.

It has been said that the Court in *Afrox* missed an opportunity and again insulated the common law from constitutional infusion; that it failed to convincingly apply the values of the Constitution in the law of contract.[213] One cannot help to ask whether the opportunity was consciously or conscientiously missed.

From what has been shown from Chapter 3 to 5 it is (hopefully) clear that in the South African law of contract the individualism/rules pole is and remains the privileged or favoured pole of the contract law duality, and that the enactment of the Constitution did not bring about the change / shift which could have been expected. The grand narrative of the South African law of contract is indeed one of proliferation of the will theory, the abolishment of equitable doctrines which do not fit the picture and a liberalist reading of the Constitution which purports to legitimise the will theory.

In the remainder of this study I shall investigate the Law Commission's efforts to bring about transformation in the law of contract. Finally, I shall suggest a re-emphasis on good faith as the ethical element of contract.

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[211] *Sayed v Editor, Cape Times, and Another* 2004 (1) SA 58 (C) 61F.

[212] Tladi (note 5 above) 306.

[213] Brand (note 161 above).

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# CHAPTER 5:

# THE SOUTH AFRICAN LAW COMMISSION'S PROJECT ON UNFAIR CONTRACTS

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# CHAPTER 5:

# THE SOUTH AFRICAN LAW COMMISSION'S PROJECT ON UNFAIR CONTRACTS

## I INTRODUCTION: THE CHALLENGE OF REFORM: THE SALC'S PROJECT 47 ON UNFAIR CONTRACTS

Hawthorne has indicated that no clear criteria have up to now developed out of our courts to provide guidance where the weighing of competing interests to determine the public interest in the law of contract, is at stake.[1] In addition, she is of the opinion that there has been no serious examination of, on the one hand, the facts which a court may take judicial notice of in determining the public interest and, on the other, the evidence which will be relevant in such an assessment.[2] Issues relating to the question how conflicting values and customs, inherent in a heterogeneous society in which public policy has to be determined, should be dealt with, has similarly not been properly enquired into or clearly articulated.[3]

These factors, coupled with the perceived inability of the South African courts to apply considerations of fairness *directly* to the South African law of contract, before but particularly since the decision in *Bank of Lisbon*[4] was noted by Kerr as early as 1982 and worded in a request that legislation should be considered dealing with the issue of unfair contracts in South African

[1] L Hawthorne 'Public policy and micro lending – has the unruly horse died?' (2003) 66 *THRHR* 116, 118.

[2] Ibid.

[3] Ibid.

[4] See the discussion of this judgment in Chapter 3.

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law.[5] Eventually, the request and the above concerns resulted in a preliminary research team, under the guidance of Prof CFC van der Walt tasked by the South African Law Commission (SALC) with the responsibility to enquire into the need for law reform in this area.[6] The findings of the preliminary project were reported in a working document tabled before the project committee of the South African Law Commission for consideration. After further consideration and amendment the SALC issued Working Paper 54 in May 1994.[7]

This working paper examined unfair contract terms and the possibility / desirability of legislative control thereof. After some amendments to the Working Paper the Law Commission issued Discussion Paper 65: Project 47 in July 1996 which contained its prima facie findings regarding unfair contracts and their legislative control.[8] The project aims to address the following question: Should the courts be enabled to remedy contracts or contractual terms that are unjust or unconsionable and thus be enabled to modify the application of such contracts or terms to particular situations before the courts so as to avoid injustices which would otherwise ensue?[9]

The discussion paper identified three approaches to the above question, which to my mind embody three different stories we tell about the South African law of contract. I also believe that these approaches again reflect the fundamental contradiction and specific positions within the duality of substance and form as discussed in Chapter 3. The three approaches are as follows:

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[5] AJ Kerr 'Does a claim for rectification depend on a mistake having been made and/or upon the requirements of the *exceptio doli generalis* being met?' (1982) 45 *THRHR* 86. Also see J Jamneck 'Die Konsepwet op die Beheer van Kontraksbedinge, 1994' 1997(4) *JSAL* 637 note 1.

[6] SA Law Commission Discussion Paper 65 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (July 1996) par 1.12.

[7] SA Law Commission Working Paper 54 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1994).

[8] SA Law Commission Discussion Paper 65 (note 6 above).

[9] Ibid 1.

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- The answer to the aforementioned question should be an unqualified 'no';
- The answer should be an unqualified 'yes';
- The answer should be a qualified 'yes'.[10]

## II THE NO ANSWER

The 'no' answer relies on the familiar arguments that a fairness criterion in the law of contract will give rise to large scale legal uncertainty, because parties will not be able to predict the outcome of their dispute and will thus not know whether the contract will be modified to the detriment of one or the other of them.[11] From the legal uncertainty argument flows the argument that a fairness criterion will in any event be counter productive, because no-one would longer want to contract with persons in relatively weaker socio-economic positions.[12] A further argument relates to that ever-present anxiety of the floodgates of litigation in cases where equity jurisdiction becomes part of the playing field.[13] The fourth argument of the 'no' approach holds that it is in any event unnecessary, because other constructions like error, metus and contractual misrepresentation, already assist the prejudiced party in circumstances of contractual inequity.[14]

[10] Ibid par 1.5

[11] Ibid 2.

[12] Ibid par 1.6.

[13] Ibid.

[14] Ibid par 1.7.

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## III RESPONSE TO THE 'NO' ARGUMENTS

Those who feel themselves opposed to this tale of the law of contract point out that the adequacy of this indirect operation of fairness in the law of contract via the constructions affecting consensus, has been questioned.[15] The fact that cases with factual scenarios indicative of contractual positions of extreme inequity, make it to the Supreme Court of Appeal in this day and age of escalating litigation costs, can leave one only to wonder how many cases of substantial contractual inequity are out there which never reach the courts – both where the unfairness is manifest within the delineated structures of the doctrines affecting consensus and where it is not. It is submitted that even if this number is grossly underestimated, it still suggests that the current accommodation of fairness *via* the indirect route of doctrines affecting consensus, is inadequate in that it does not send out a clear signal to the contracting public that unfair contracts will not be enforced.

With regard to the concern for the proliferation of contract law litigation which our courts will simply not be able to handle, the argument in my opinion loses sight of the problem of access to justice in South Africa, a detailed discussion of which falls outside of the scope of this study.[16] Suffice it to say that there exists substantial proof that access to the courts (or other appropriate fora) is still very restricted in South Africa, especially in the context of private law litigation. If the so-called 'have-nots', for whose benefit it is trite the fairness criterion in contract will operate predominantly, are expected to flood the courts with litigation, the expectation is certainly over-estimated.

[15] CFC van der Walt 'Beheer oor onbillike kontraksbedinge – Quo vadis vanaf 15 Mei 1999? (2000) 1 *TSAR* 33,41.

[16] This problem is discussed by A Pillay 'Accessing justice in South Africa' (2004) Paper presented at the Annual South North Exchange on Theory, Culture and Law, San Juan, Puerto Rico, 9-13 December 2004. (Copy on file with author).

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It is a simple fact that those perceived beneficiaries of a fairness criterion in contract are at this point in time still the 'have nots' of adequate access to justice; those for whom there is simply no choice between going to court over an unfair contract or putting food in the mouths of hungry children. Kötz words a related problem as follows: 'the unfair contract term will typically harm people who are too poor to pay for the expenses of litigation but are too "rich" to qualify for legal aid, if legal aid is available at all. Even where legal aid is available the persons affected may belong to population groups who lack the skills and sophistication required to make use of existing procedures'.[17] One can add to this the fact that legal aid in South Africa is primarily concerned with providing aid to accused in criminal cases.[18] It is, in any event, expected (and recent developments certainly indicate) that efforts to improve the adequacy of access to justice will (at least chronologically) parallel the occurrence of cases flowing from the enactment of an equity jurisdiction in contract – therefore the system may be said to at least have the potential to be developed so as not to have cases flowing from the equity jurisdiction in contract law to be stigmatised as resulting from the litigation paradise.

These responses however, feel that a preventative measure of control is necessary in the form of the office of an ombudsperson, in addition to the powers of the courts to control unfair contract terms.[19]

[17] SA Law Commission Discussion Paper 65 (note 6 above) par 1.24.

[18] See the South African Legal Aid Board qualification criteria for legal aid available at http://www.legal-aid.co.za/services/qualifications.htm.

[19] SA Law Commission Discussion Paper 65 (note 6 above) par 1.20

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## IV THE UNQUALIFIED 'YES' ANSWER

The unqualified 'yes' answer is based on the principle that it is in the public interest to exercise social control over private volition in the law of contract. The discussion paper seems to accept it as given that: '[I]n modern contract law a balance has to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other.'[20] The discussion paper point out that public policy in recent times is more sensitive to concepts such as justice, fairness and equity than ever before.

The rise of the movement towards consumer protection, which served as a catalyst for the argument that legislative measures are needed to deal with contractual unfairness on a general level, is but one way in which this realisation has been borne out.[21] The movement towards consumer protection pointed out that the traditional ways of dealing with contractual equity, namely interpretation and specific legislation dealing with certain types of unfair contracts, are insufficient. This has resulted in legislative measures taken in many foreign jurisdictions (most of them comparative) dealing with contractual unconscionability on a more general level. The legislative action in most instances is based on the principle of good faith.[22]

In short, the proponents of the unqualified 'yes' answer hold the view that 'modern social philosophy requires curial control over unconscionable contracts'[23] and that South Africa will be

[20] Ibid par 1.30.

[21] Ibid par 1.44.

[22] Ibid par 1.44 – 1.47.

[23] Ibid par 1.48. See in general JM Feinman 'Critical Approaches to Contract Law' (1983) 30 *UCLA LR* 829, 842-843; D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685 1717; P Selznick 'The Idea of a Communitarian Morality' (1987) 75 *California LR* 445.

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rather the exception and its law of contract deficient in comparison with those foreign countries which recognise and require compliance with a standard of good faith in contract.[24]

In one of a series of articles on the justifiability of a system of preventative control over freedom of contract in the South African law of contract, CFC Van der Walt makes the following claims and illuminates the following factors as socio-economic arguments in support of an approach focusing on contractual justice in South Africa.[25]

Firstly, Van der Walt points out that the general reasons for support of a doctrine of contractual justice globally, also apply in the South African context.[26] These include the fact that classical nineteenth century economic premises and views on the relationship between the individual and the community has lost substantial ground to transformed views of the individual, groups and enterprises, the State and on economic premises themselves. These transformed views sparked research into the effect of contractual terms on the parties thereto and the joint conclusions from these studies generated a renewed realisation of and an emphasis on the ethical element of contract.[27] These transformed views hold 'that the principles of good faith, based on public policy still plays and should play an important part in the South African law of contract as in any legal system which is sensitive to the views of the community who is ultimately the creators and users of the law in regard to the moral and ethical values of justice, fairness and decency.'[28]

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[24] SA Law Commission Report *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Report (April 1998) xiii.

[25] CFC Van der Walt 'Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg' 1993 (56) *THRHR* 65, 68-69.

[26] Ibid 68.

[27] Ibid 68-69, 76. May this be the almost lost memory of Aristotle finally again whispering in the ear of economists, philosophers, politicians and lawyers?

[28] SA Law Commission Report (note 24 above) 56.

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Concerning the South Africa-specific issues in support of contractual justice, Van der Walt pointed out in the same article that the political, economic and social challenges that South Africa faces, makes it 'urgently necessary' that the formulation and pursuit of contractual justice should be revisited.[29] Further factors include the following:

- The transforming configuration of economic thrusts coupled with an increased use of standard term contracts over which control is required;
- The fact that South Africa has reached a phase of 'from status to contract' due to the abolishment of racially based legislation;
- The increased importance of the informal sector in the economy to which a substantial portion of the GDP is attributed;
- From the above two factors flow the realisation that newly gained freedom of contract rests in the hands of people who can barely communicate, least to say contract, in the predominant language of contract[30] and that it is the exploitation of their interests that needs to be guarded against;
- To the above one should add that 68%[31] of the country's population is partially or completely illiterate. (Of course a substantial part of newly gained freedom of contract also lies in the hands of these people who are even more vulnerable to exploitation);
- Increased urbanisation results in commercially inexperienced persons finding themselves in an environment of 'contract or die';

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[29] Van der Walt 'Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontrakteervryheid in die Suid-Afrikaanse Reg' (note 25 above).

[30] Most contracts in South Africa are concluded in Afrikaans or English which is the third or fourth language of a major part of the population.

[31] Currently the statistics indicate that one in three South Africans aged 20 and older had not completed primary school or had no schooling at all. (Information obtained from http://www.projectliteracy.org.za/)

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- The implicated ignorance of the law amongst the above mentioned categories of people. (To this may be added the cultural inheritance of an intense suspicion of the law);

The high poverty level in the country, coupled with the new human rights dispensation which implies affirmative action, creates increased expectations amongst the poor for means to achieve upliftment. It is submitted that a focus on contractual justice and control over freedom of contract is an indirect means of achieving upliftment or at the very least a means of preventing further social and economic decay. Carefully chosen government / judicial intervention have the potential to diminish the negative effects of the free market tradition and can lead to a better outcome for all. The complicated problem, however, is and remains the political one, namely who it is that will be responsible for the careful choosing.[32]

## V THE QUALIFIED 'YES' ANSWER

The qualified 'yes' answer rests on an attempt to achieve a balance between 'the continued application of the existing law and the actuality of social reality,'[33] that is an attempt to balance the interests of fairness and justice in individual cases with those of certainty. The proponents of this approach are in favour of legislation introducing a doctrine of contractual unconscionability, but feel that it is necessary to delineate the scope and extent of such powers so as to provide concrete content to the general good faith and unconscionability criterion.[34] The approach favours the inclusion in legislation of guidelines to the courts with which its power of intervention can be limited and so indicating the ambit of the unconscionability doctrine – which will at the same

[32] J Milnor 'John Nash and "A Beautiful Mind"' (1998) 45(10) *Notices of the AMS* 1329, 1332.

[33] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 31C-D. (Author's translation from the original Afrikaans.)

[34] SA Law Commission Discussion Paper 65 (note 6 above) par 1.49.

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time afford the system a measure of legal certainty in the unconscionability context.[35] The research team of the Working Committee of the SALC held that the inclusion of guidelines in the proposed legislation were 'indispensable for legal certainty'[36] and supported the inclusion of an open-ended list of guidelines, capable of being adapted to changed circumstances. [37]

The Working Committee however did not support and in fact declared itself in the discussion paper 'completely opposed'[38] to the incorporation of guidelines in the proposed legislation, primarily for the reason that it may result in the courts considering themselves bound exclusively by those guidelines even though the guidelines are open-ended.[39] The Working Committee foresees the potential danger that where an unfair situation is not covered or does not fall within the ambit of one of the guidelines, the court may find that the specific term is not unfair.[40] With regard to the question whether the proposed legislation should apply to all types of contract, the Working Committee is again opposed to any restriction of the application of the proposed legislation, primarily because it does not follow, according to the Committee, that provisions in existing legislation aimed at curbing unfairness, will necessarily result in contracts connected with the legislation being fair.[41]

With regard to a waiver of the benefit of the proposed legislation the Working Committee proposed that it should not be possible to waive the benefit of the proposed Act and advocated

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[35] Ibid par 1.52-1.54.

[36] Ibid par 1.55.

[37] Ibid.

[38] Ibid par 1.57.

[39] Ibid.

[40] Ibid.

[41] Ibid par 1.62.

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the inclusion of a provision in the proposed Act to the effect that all clauses purporting to exclude the provisions of the proposed Act, shall be void.[42]

## VI THE 'OFFICIAL' STORY

The Law Commission never supported the 'no' approach and stated its position regarding the objections held by the 'no'-ists as follows:

> The Commission is, however, of the view that this is a price that must be paid if greater contractual justice is to be achieved, that certainty is not the only goal of contract law, or of any other law, and lastly in any event, that the fears provoked by the proposed Bill are exaggerated, in the light of the experience of countries that have already introduced such legislation.

After having received and reviewed comments by a number of respondents,[43] however, it appeared that the Law Commission was no longer opposed to the enactment of guidelines and also changed its view that the proposed Act's application should not be restricted.[44] The arguments tendered by the different respondents, feature within the framework of the different approaches I have indicated above. Some of the respondents welcomed the qualified 'yes' approach, others were completely opposed to it and others still, held the opinion that a qualified 'yes' approach was the correct one to recommend to Parliament. In April 1998 the SALC issued

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[42] Ibid.

[43] See the list of respondents in SA Law Commission Report *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (note 24 above) Annexure C, 226.

[44] Ibid par 1.7.

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its Final Report on Project 47 in which it opted to recommend to Parliament the qualified 'yes' approach.[45]

In a report running over 200 pages the Commission dealt with each of the further objections and recommendations and concluded as follows:

> The Commission is finally of the view that reform is called for and that legislation is the most viable and expedient method to effect legal reform. The Commission is of the view that there is a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced. The Commission consequently recommends the enactment of legislation addressing this issue.[46]

The Bill on the Control of Unreasonableness, Unconscionableness or Opressiveness in Contracts or Terms was proposed by the SALC as the final product of decade long efforts to achieve a more just South African law of contract.[47] The Bill envisages both judicial and preventative control over unfair contracts. But it is into Parliament where the trail becomes cold. The above mentioned Bill was tabled before Parliament on the 18th of September 1998 but the SALC has confirmed that Parliament is currently not dealing with Project 47 and Cabinet has not been approached for leave to promote the legislation.[48]

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[45] Ibid.

[46] Ibid xiii.

[47] See Ibid Annexure A

[48] CFC Van der Walt 'Beheer oor Onbillike Kontraksbedinge – *Quo vadis* vanaf 15 Mei 1999?' (note 15 above) 50.

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Van der Walt has argued that there is an urgent need for liaison within Parliament over the road ahead and that active deliberation will have to take place within the portfolio committees and parliamentary processes to iron out the possible difficulties with implementation of the legislative control of unfair contracts.[49] Van der Walt has also suggested some valuable methods to deal with the interim phase until an office of ombudsperson has been set up through which the control of unfair contracts can become reality.[50] However, very little seems to have followed from this. We remain thus without a facilitator other than the courts to bring us closer to a public deliberation about contractual justice.[51]

In the meantime, as we have seen, the 'no' approach prevails on the pages of the law reports and this is, until further notice (if any) the legal position in respect of unfair contracts in South Africa. This is a position which does not differ in any great parts from the position before enactment of

[49] Ibid.

[50] Ibid 50-51.

[51] A ray of light in this dark labyrinth is the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 and the commencement in 1999 of the Consumer Affairs Act 7 of 1996 which established the Gauteng consumer protector and consumer affairs court. Other provinces have similar legislation but have not yet been able to set up their courts. These courts are said to extend protection to consumers against unfair business practices (which can include unfair contracts). Most of the cases in these courts have been settled out of court up to now. These Acts do not however, change or amend the law of contract applicable to these agreements where the emphasis remains on freedom of contract. While it can indeed be argued that it creates an increased awareness of the ethical element of contract (good faith bargaining), the national act, for instance, provides for elaborate investigations and referral of reports on the alleged unfair business practice by a committee to the Minister who may then make the decision as to the unfairness of the business practice (agreement) in question. It is submitted that these courts will remain inefficient where the law pertaining to the agreements is not also transformed, seeing that the committee as well as the Minister will be influenced in their decisions by the law applicable to the agreement. Furthermore, these Acts do not change the position where unfair contracts are before an ordinary court of law.

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the Constitution, except that it has been constitutionally whitewashed by the Supreme Court of Appeal.

## VII CONCLUSION

Christie deals in the latest edition of his text on the South African law of Contract with unfair contracts under the heading 'Current Problems'.[52] Initially Christie acknowledges that pacta servanda sunt is necessary as a general principle, but adds that the enforcement of an unfair contract (note unfair, not extremely unfair) cannot be justified on any grounds. Furthermore, Christie appears to be of the view that it is an objective fact that the conclusion, terms or enforcement of contracts are often unfair.[53] Christie concludes in this respect by stating that he is of the opinion that legislation would prove to be unnecessary were the office of an ombudsman introduced who would have the capacity to bring test cases through which the courts' existing common law powers may be expanded - but he quickly adds that the Supreme Court of Appeal may of course fail the test.[54]

To my mind the problem with this lies in the courts' perceptions of what an appropriate test case will be. We have already seen how our courts have fallen into a tendency of indirect application of fairness to the law of contract. In the light of the facts in *Brisley* and *Afrox* it is almost beyond imagination to picture a factual scenario which would warrant that the South African positive law, after all these years and a constitutional transformation, suddenly change its approach. It is more probable than not that our courts are, from this predisposition, in any event not in a position to recognise a test case when it is brought. In my view the underlying principle of pacta servanda

[52] RH Christie *The Law of Contract* (4ed) (2001) 14.

[53] Ibid.

[54] Ibid

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sunt is rooted so deeply in the paradigm of the South African judiciary that the office of an ombudsperson with the ability to bring test cases will be inefficient and a waste of time, *unless* the courts are compelled by legislation to apply fairness directly (in the form of a good faith jurisdiction) to the law of contract.

No matter how acceptable, virtuous and admirable minority judgments and bills are, they have only persuasive authority in the South African law. One can only hope that the persuasive authority of these sources will, in time, culminate in a new approach to the law of contract; whether this happens through implementation of legislation or a transformative interpretation of constitutional values as they apply to the law of contract. What is clear is that the existing common law powers of the court are inadequate to bring about transformation. Even where it is accepted that the open-ended values of the common law of contract (eg good faith, public policy, *boni mores,* reasonableness and fairness) exist in theory as common law powers, everything that foregoes this conclusion indicate that the courts will either decline to employ them or employ them in an essentially classical liberalist way which falls far short from what is envisaged by a post-constitutional law of contract.

The sounds of an approaching reform can, nevertheless, be heard above the white noise generated by the liberalist rhetoric. The fact that comparative jurisdictions have already adopted similar legislation, the fact that the Law Commission sticks to its view that legislation is the only way in which fairness will significantly infuse the law of contract, the creation of unfair business practices courts as well as increasingly convincing pleas of academics in this context all places significant pressure on and problematises the legitimate perpetuation of the traditional approach. In spite of the current position, it can thus no longer be denied that the law of contract in South Africa, now more than ever, finds herself on the verge of reform.

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# CHAPTER 6:

# THE ETHICAL ELEMENT OF CONTRACT AND CONTRACTUAL JUSTICE

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# CHAPTER 6:

# THE ETHICAL ELEMENT OF CONTRACT AND CONTRACTUAL JUSTICE

'…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.

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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.

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## 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

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[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.

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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.

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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

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[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.

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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]

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[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 Drotsky* (2002) (4) SA 1 (SCA) can serve as an example of where the *application* of the law was in favour of the landlord.

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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, indue 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]

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[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.

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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.

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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.

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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.

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[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.

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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 embarrasing 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 contracs (all

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[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).

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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.

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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

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[46] Ibid 3.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Ibid.

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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.

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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 obliquelt 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.

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[56] Ibid.

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

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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]

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[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.

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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) *Wisconson Law Review* 465, 477.

[62] Ibid.

[63] Ibid 478.

[64] Ibid.

[65] Ibid.

[66] Ibid 477.

[67] Ibid 479.

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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 sanctitiy of contract and that the enquiry into whether an agreement was entered into in good faith[68] 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.

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[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.

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## 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.

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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.

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[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.

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(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.

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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]

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[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.

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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

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[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.

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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.

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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

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[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.'

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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.

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[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.

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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.

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[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.

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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.

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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

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[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.

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'[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.

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[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.

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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

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[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.

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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.

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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 then

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[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.

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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

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[132] Du Plessis (note 116 above) 812.

[133] Dalton (note 121 above) 1009.

[134] Cornell (note 130above) 101-102.

[135] Ibid 102.

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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

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[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.

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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]

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[142] Ibid.

[143] Ibid.

[144] Ibid.

[145] Ibid.

[146] Ibid 858.

[147] Ibid 860.

[148] Ibid.

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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.

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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.

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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.

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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.

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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

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[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.

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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.

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# ANNEXURE A

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**ANNEXURE A**

## THE WORKING COMMITTEE'S PROPOSED UNFAIR CONTRACTUAL TERMS BILL

### BILL

**To provide that a court may rescind or amend contracts which are contrary to good faith.**

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**To be introduced by the Minister of Justice**

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**BE IT ENACTED by the President and the Parliament of the Republic of South Africa, as follows:**

**Court may rescind or amend unfair contractual terms**

1.(1) If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

(2) In deciding whether the way in which a contract came into existence or the form or content of the contract or any term thereof is contrary to the principles set out above,

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those circumstances shall be taken into account which existed at the time of the conclusion of the contract.

**Application of Act**

2.(1) The provisions of this Act shall apply to all contracts concluded after the commencement of this Act.

(2) Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

(3) This Act shall be binding upon the State.

**Short title**

The Act shall be called the Unfair Contractual Terms Act, 19.. .

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